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2018 IL App (5th) 150248-U

NO. 5-15-0248

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 13-CF-2396
	)	
DAVID HAHS,	)	Honorable
	)	Richard L. Tognarelli,
Defendant-Appellant.	)	Judge, presiding.

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

**ORDER**

¶ 1 *Held*: Sufficient evidence was presented to support defendant's convictions on two counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)).

¶ 2 Defendant, David Haahs, was charged by information with two counts of sexual assault and two counts of sexual abuse for incidents involving L.S., his five-year-old great-niece. Counts I and II charged defendant with predatory criminal sexual assault of a child and alleged acts of sexual penetration whereby defendant penetrated L.S. with his fingers (720 ILCS 5/11-1.40(a)(1) (West 2014)); counts III and IV alleged acts of aggravated criminal sexual abuse (*id.* § 11-1.60(c)(1)(i)). After a jury trial in the circuit

court of Madison County, defendant was found guilty of all four counts. He was sentenced to 15 years each on counts I and II to run consecutively. He was sentenced to five years each on counts III and IV to run concurrently with each other, but consecutively to counts I and II, for a total of 35 years. The trial court denied defendant's motion to reconsider sentences as to counts I and II. The only issue raised in this direct appeal is whether the evidence of sexual penetration was sufficient to prove beyond a reasonable doubt that defendant was guilty of predatory criminal sexual assault. We affirm.

¶ 3

### FACTS

¶ 4 Defendant was charged by information on October 31, 2013. At trial, L.S.'s grandmother, Debra, testified that she was taking L.S. to preschool on October 17, 2013. L.S. was in the back of the car on the passenger side. It was pajama day at L.S.'s school, meaning that L.S. could wear her pajamas to school that day. After school, Debra was going to pick up L.S. and take her to defendant's home. Defendant is married to Debra's sister, Dorothy. Debra and Dorothy were supposed to take their mother for a hearing aid appointment after L.S. got out of school. Debra packed L.S. a change of clothes in case she wanted to change clothes after school.

¶ 5 When Debra told L.S. about the change of clothes, L.S. said she did not need to have pants because she did not need to wear pants at Dorothy and defendant's house. L.S. also said she did not need to wear underwear at Dorothy and defendant's house because defendant plays with her butt. Debra asked L.S. what she meant by that, and L.S. said defendant touches her butt and plays with it. Debra tried not to say too much and just let

L.S. talk. L.S. said that she told defendant if he did not stop touching her, she was going to tell someone. Debra could see L.S. in her rearview mirror. She said L.S. looked "very serious" when she discussed this. Debra dropped L.S. off at school and picked her up and took her to Dorothy's house after school.

¶ 6 Debra testified she was completely shocked by L.S.'s comments about defendant. Defendant is Debra's brother-in-law, and she has known him for 45 years. She was very close to her sister and defendant. After school, Debra tried to get L.S. to go to the hearing aid appointment with her and Dorothy, but L.S. insisted she wanted to stay with defendant. When they got back after the appointment, she left L.S. with defendant and Dorothy. Debra's son was supposed to pick up his children at defendant's house about 5 p.m. after he got off work.

¶ 7 Debra went home and talked to her husband about what L.S. told her. They decided they should go talk to their son and his wife. Debra and her husband went to their son's house at approximately 8:30 p.m. and told him about Debra's conversation with L.S. earlier that day.

¶ 8 L.S.'s mother, Hilary, testified she has three children, and she relies on extended family to help her care for the children while she and her husband are at work. She said L.S. used to be at defendant's home two or three days per week. She said that normally L.S. was able to go to the bathroom on her own, but when she was at Dorothy and defendant's house she had "multiple" accidents and her underwear would need to be washed. Hilary found this to be odd because L.S. did not have accidents other places.

¶ 9 Hilary recounted that her in-laws requested to meet with her and her husband on the evening of October 17, 2013. Hilary said she was shocked when Debra told her what L.S. said about defendant. L.S. was in bed, but not yet asleep, so Hilary decided to go talk to her. Hilary started out by reading L.S. a book about "favorite people." L.S. told Hilary her favorite people were Debra, Grandma, and Brendan. L.S. did not mention defendant. Defendant's absence from L.S.'s list surprised Debra because L.S. and defendant were close and L.S. "always enjoyed being around" defendant.

¶ 10 Hilary specifically asked L.S. whether defendant was one of her favorite people. L.S. shrugged and acted like she did not want to talk about defendant. Hilary asked whether L.S. played games with defendant, and L.S. went on to explain a letter game they played. Hilary asked about other games they played, and L.S. said defendant "tickles me down there." L.S. pointed to her "bottom" as she said that. Hilary became uncomfortable and "gasp[ed]." L.S. became quiet and shy. Hilary could tell L.S. did not want to talk anymore, so Hilary ended the conversation. Hilary testified that it was unusual for L.S. to be embarrassed or shy because she is not that type of child.

¶ 11 The following morning, Hilary told L.S. she wanted to talk a little bit more about what they had discussed the previous night. Hilary asked L.S. if defendant put anything inside of her. L.S. said defendant put his finger inside her. Hilary sat up and gasped. L.S. then immediately said she lied and took it back. However, Hilary said L.S. was very serious when she told her about defendant, and Hilary believed L.S. was telling the truth. Hilary said L.S. could tell Hilary was upset and L.S. tried to cheer her up by smiling and telling Hilary everything was okay.

¶ 12 After her conversation with L.S., Hilary and her husband contacted the Troy Police Department. They spoke to Detective Todd Hays who suggested they have L.S. examined by her pediatrician or at the Sexual Abuse Management (SAM) clinic at Children's Hospital. Prior to an examination, they took L.S. for an interview at the Madison County Child Advocacy Center (CAC). Hilary was not in the room when L.S. was interviewed.

¶ 13 Detective Hays testified that he was working on October 18, 2013, when L.S.'s father, Brad, came to the police department to report that his daughter had been touched inappropriately by his uncle. Brad told Hays he learned about this from his wife and mother-in-law. Detective Hays then interviewed Debra and Hilary. He did not interview L.S. because it is the policy of the police department to try to have a young victim interviewed only once rather than multiple times by doctors and police. Detective Hays referred L.S.'s parents to the CAC where L.S.'s interview was videotaped. He also referred them to the SAM clinic.

¶ 14 L.S. testified at trial that she is six years old. She remembered going to her aunt and uncle's house and was specifically asked whether anything ever happened at their house that made her "feel weird." The following colloquy then ensued:

"A. Uh-huh.

Q. Can you tell me what?

A. I can't say it because my mom and dad don't let me.

Q. Okay. Why did it make you feel weird?

A. Because he—I can't remember that.

Q. Did you like Uncle David?

A. Kinda, because he did the bad stuff and sometimes he did good stuff."

L.S. recalled giving an interview at the CAC and telling the interviewer what her uncle did. L.S. said she told the truth during the CAC interview.

¶ 15 Kim Mangiaracino, a senior forensic interviewer at the CAC, testified that she interviewed L.S. on October 21, 2013. The interview was recorded. Mangiaracino identified People's Exhibit 1 as the videotape of her interview with L.S. It was admitted into evidence and played for the jury. Mangiaracino also identified People's Exhibits 5 through 11 as drawings used in her interview with L.S. They were admitted into evidence and published to the jury. During cross-examination, Mangiaracino admitted that she specifically asked L.S. whether defendant touched her on the inside or the outside and L.S. said outside. During the interview, L.S. never indicated to Mangiaracino that defendant touched her on the inside. On redirect, the prosecutor asked Mangiaracino, "When you asked her inside versus outside, did you use the phrase hand as opposed to fingers, right?" Mangiaracino agreed she used the word hand rather than fingers.

¶ 16 During the 52-minute and 26-second video, Mangiaracino asked L.S. to identify body parts on drawings that were introduced into evidence. L.S. told Mangiaracino that defendant touches her "tushie" and plays with it. L.S. identified her "tushie" as her butt. She said he touches her in the living room when Aunt Dot is not there and in the bathroom. L.S. also said defendant touches her in the place where she goes potty. L.S. described her vagina as the place where she goes potty. She said he touches her skin and puts his hands in her pants and "it hurts." L.S. said it hurts "in there" while specifically

pointing to her butt on the drawing. L.S. said defendant made her touch "his private," which she also identified as "his weiner." She said he grabbed her hand and put it on there. She said it felt "slimy." She said defendant's private has hair around it. L.S. said she decided to tell her mom "because it was gross." L.S. specifically said he touched her tushie more than once, touched her where she goes potty more than once, and made her touch his penis more than once.

¶ 17 Cara Christanell, a certified pediatric nurse practitioner at the SAM clinic, examined L.S. on November 5, 2013. She examined L.S.'s genitalia and found no evidence of injury or trauma. L.S.'s hymen was intact. She explained, however, that the hymen "does not completely cover the opening to the vagina. The hymen goes around the outside of it. \*\*\* [I]t is a myth that something pops or tears, or you can tell if somethings [sic] ever gone inside the vagina. That's simply not true." The prosecutor specifically asked Christanell if a normal examination means that sexual abuse did not happen and Christanell replied, "No. In fact, in my reports I always state that although there was no permanent physical injury, sexual abuse can still occur." Christanell estimated that 90 to 95% of the examinations performed at the SAM clinic result in normal findings. She explained that a big part of the examination process is to help a child understand that he or she is healthy and normal and people will not know something happened to them just by looking at them.

¶ 18 Detective Hays was recalled as a witness by the State. He said he was present during the CAC interview of L.S. After hearing that interview, Hays arranged to meet with defendant. Defendant signed a waiver of his rights under *Miranda v. Arizona*, 384

U.S. 436 (1966), before Hays interviewed defendant at the Troy Police Department. The interview was videotaped and includes audio. Hays talked about how he first tried to build rapport with defendant and then minimized the seriousness of the alleged crimes and the investigation in an attempt to get defendant to open up to him about what had occurred. The videotape of the interview was played for the jury.

¶ 19 During the interview, defendant initially denied any improper contact with L.S. As the interview progressed, defendant admitted he touched L.S. on her vagina with her clothes both on and off. He admitted to touching L.S. inappropriately 20 to 30 times. He said L.S. told him to stop touching her "down there." He admitted L.S. said "ow!" when he touched her. He admitted he took her hand in his hand and put it on his penis. Initially, he said these incidents happened upstairs, but then said they happened downstairs on the couch. He said he was "playing around" and he knew it was not appropriate. At first he said, "As far as I know" it only happened once. He later admitted he had her touch his penis approximately three times. He admitted that he moved her hand back and forth on his penis. He said when he was wiping her butt his finger might have gone inside her.

¶ 20 Defendant opted not to testify in his own defense at trial. After hearing all the evidence, the jury found defendant guilty on all four counts. He was sentenced to 15 years each on counts I and II to run consecutively. He was sentenced to five years each on counts III and IV to run concurrently with each other, but consecutively to counts I and II. Defendant now appeals.

¶ 21

## ANALYSIS

¶ 22 The only issue raised on appeal is whether the evidence of sexual penetration was sufficient to prove beyond a reasonable doubt that defendant was guilty of predatory criminal sexual assault. Defendant does not appeal his two convictions for aggravated criminal sexual abuse. Defendant contends the evidence presented at trial was insufficient to prove beyond a reasonable doubt that he sexually penetrated L.S.'s sex organs with his fingers on two separate occasions and asks us to overturn his convictions on counts I and II. Defendant asserts there is a lack of testimonial, medical, physical, scientific, or forensic evidence to prove that he sexually penetrated L.S. The State replies that the jury's conclusion that defendant committed predatory criminal sexual assault in that he penetrated L.S.'s sexual organs was neither inherently impossible nor unreasonable and, therefore, counts I and II should be affirmed. We agree with the State.

¶ 23 When presented with a challenge to the sufficiency of the evidence, it is not a reviewing court's function to retry a defendant. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). Rather, we must consider " '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 beyond a reasonable doubt.' " (Emphasis in original.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under this standard, a reviewing court must draw all reasonable inferences in favor of the prosecution. *Id.* A reviewing court should not overturn a defendant's conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Givens*, 237 Ill. 2d at 334.

¶ 24 Counts I and II charged defendant with predatory criminal sexual assault of a child under section 11-1.40(a)(1) of the Criminal Code of 2012 (Code), which required the State to prove that defendant:

"commit[ed] an act of sexual penetration, is 17 years of age or older, and:

(1) the victim is under 13 years of age[.]" 720 ILCS 5/11-1.40(a)(1) (West 2014).

The Code defines "sexual penetration" in pertinent part as "any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person \*\*\* into the sex organ or anus of another person \*\*\*. Evidence of emission of semen is not required to prove sexual penetration." *Id.* § 11-0.1.

¶ 25 In the instant case, the only element of the crime in issue is that of sexual penetration given that there was no question defendant was over 17 and the victim was under 13 years of age. We first point out that the lack of semen or trauma to the victim's genitals is not dispositive of the issue of penetration. *People v. Raymond*, 404 Ill. App. 3d 1028, 1040 (2010). Whether sexual penetration occurred is a question of fact to be determined by the trier of fact. *People v. Hillier*, 392 Ill. App. 3d 66, 69 (2009), *aff'd*, 237 Ill. 2d 539 (2010).

¶ 26 In *Hillier*, the court determined that even though the victim did not testify directly or expressly that the defendant committed an act of sexual penetration, she testified that the defendant "rubbed," "felt," or "handled" her vagina. *Id.* The court went on to hold that even though there was not clear testimony of penetration, the fact finder could reasonably

infer that penetration occurred and such an inference would only be unreasonable if the victim expressly denied that penetration occurred. *Id.*

¶ 27 Here, after learning about defendant's sexual abuse of her daughter, Hilary specifically asked L.S. whether defendant put anything inside of her. L.S. responded that defendant put his finger inside of her. The fact that L.S. said she lied and immediately took the statement back after her mother "gasp" does not mean it did not happen. It is understandable that a five-year-old child would not want to upset her mother and would attempt to retract her statement.

¶ 28 When L.S. was interviewed at the CAC, she told Kim Mangiaracino, the forensic interviewer, that defendant touches her "tushie" and plays with it. She also told Mangiaracino that defendant touches her in the place where she goes potty. Mangiaracino asked L.S. point to the areas she was talking about in order to make sure they were talking about the same things. Mangiaracino identified the place where L.S. went potty as her vagina and her "tushie" as her butt. We are aware that when Mangiaracino asked L.S. whether defendant put his hand inside her, L.S. said he did not; however, as the State points out, children are quite literal, and the interviewer never asked L.S. whether defendant put his finger inside her.

¶ 29 L.S. specifically said "it hurts" when defendant put his hands in her pants. L.S. said it hurts "in there" while pointing to her butt on the drawing. L.S. told Mangiaracino that defendant touched both her butt and her vagina on more than one occasion.

¶ 30 In his videotaped interview with Detective Hays, defendant initially denied any improper contact with L.S. However, upon further questioning, defendant ultimately

admitted to touching L.S. inappropriately at least 20 to 30 times, including touching both her vagina and her butt. Defendant described himself as "tickling" the victim and can be seen on the videotape wiggling his fingers to illustrate how he did so. He admitted he put L.S.'s hand on his penis and made her stroke it on more than one occasion. He even admitted one of his fingers penetrated her anus while he was wiping her and he hurt her. He recalled that on one occasion, L.S. cried out in pain, "Ow!"

¶ 31 The record before us shows several reasons why there was a reasonable basis for the jury to find that defendant sexually penetrated L.S. with his finger more than once. L.S. specifically told her mother that defendant hurt her and that defendant put his fingers inside her. Second, L.S. told the forensic interviewer that when defendant touched her it hurts "in there" while pointing to her butt. L.S. also told the interviewer defendant touched both her butt and her vagina more than once. And finally, defendant admitted to causing L.S. pain while he was sexually abusing her. Under these circumstances, we find sufficient evidence was presented to establish that defendant sexually penetrated L.S. to support defendant's convictions on counts I and II.

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 33 Affirmed.