

NOTICE

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2012 IL App (5th) 090525-U
NO. 5-09-0525
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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Christian County.
)	
v.)	No. 08-CF-98
)	
DOUGLAS A. FORD,)	Honorable
)	Ronald D. Spears,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Presiding Justice Donovan and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant was proven guilty beyond a reasonable doubt; the trial court did not err in allowing the State to amend its charges; the trial court erred in ordering the defendant to pay a public defender reimbursement fee without first holding a hearing on his ability to pay; the trial court erred in assessing an inapplicable lab fee; the trial court did not err in assessing a medical costs fee; the defendant was not entitled to credit against his DNA analysis fee; and the trial court erred in imposing a term of mandatory supervised release less than the statutorily required minimum.

¶ 2 The defendant, Douglas A. Ford, raises numerous arguments on appeal from his convictions for aggravated criminal sexual abuse and criminal sexual assault. For the reasons that follow, we affirm in part, vacate in part, and remand for further proceedings.

¶ 3 **BACKGROUND**

¶ 4 In June 2009, the State filed an 11-count amended information charging that the defendant committed acts of sexual penetration with "Jane Doe," *i.e.*, A.B., "who was at least 13 years of age" but was still a minor when the acts were committed. Alleging acts of

vaginal penetration occurring while the defendant "was in a position of trust, supervision[,] or authority with the victim," counts II through XI charged instances of criminal sexual assault. See 720 ILCS 5/12-13(a)(4) (West 2006). Count I, which alleged an act of oral penetration but did not allege that the defendant was in a position of trust, supervision, or authority with the victim when the act occurred, charged that the defendant committed the offense of aggravated criminal sexual abuse. See 720 ILCS 5/12-16(d) (West 2006). The cause subsequently proceeded to a bench trial, where the following evidence was adduced.

¶ 5 A.B. testified that she was born on July 9, 1991, and had known the defendant since she was seven or eight. In the summer of 2006, when A.B. "kept getting in trouble with the law," the defendant, who was a correctional officer at the local prison and a youth sponsor at a local church, approached her mother, Katrina B., and volunteered to be A.B.'s "mentor." Katrina agreed, and thereafter, the defendant took A.B. to Sunday morning church services and Tuesday night youth group meetings. Additionally, the defendant and A.B. would drive around town and talk about her problems.

¶ 6 After a few months, the defendant asked A.B. if he could take some "nude pictures" of her with his cell phone. A.B. told him "no," because "it was weird," and he bought her a cheeseburger and took her home. A few weeks later, while they were driving around, the defendant told A.B. that he would give her money or food if she would give him a "hand job." Indicating that the defendant was nearly 40, A.B. testified that she initially declined the offer because she "thought it wouldn't be right." "Then he kept telling [her] it would be okay, and [she] decided to do it." After A.B. performed the act, the defendant gave her \$5, bought her a cheeseburger, and took her home. He told her not to say anything about what had happened, and she kept quiet because she feared that she would get into trouble if she talked about it.

¶ 7 A.B. testified that after the hand job incident, she started going to the defendant's

house, and "[a]lmost all" of their subsequent contacts involved some type of sexual activity. Early on, A.B. allowed the defendant to take pictures of her naked, and in exchange, he gave her \$10 and allowed her to drive his truck out in the country. A.B. testified that she did not tell anyone about the picture incident, because she had "agreed to it," and thus feared that she would get into trouble over it. Before the defendant and A.B. ever had sexual intercourse, the defendant "just wanted either a hand job, pictures, or a blow job," and he would give A.B. money or food whenever she obliged him. The defendant also showed A.B. pornographic videos. The defendant advised A.B. that if anyone ever asked her if anything was going on between them, she "was supposed to just say that he was [her] mentor." Whenever the defendant bought A.B. food, the food was always obtained via "drive-up" window, and he never took her to "like a sit-down restaurant *** or anything like that." A.B. stated that, other than church, the defendant "didn't want [them] to get seen together out in public," because "he didn't want people to ask questions."

¶ 8 A.B. indicated that she and the defendant first had sexual intercourse in the fall of 2006. A.B. was 15, and the act took place in the defendant's bedroom one Sunday after church. A.B. testified that she and the defendant routinely had sex after that, and his "taking pictures" of her became commonplace as well. A.B. thought that one of the pictures that the defendant took was of his penis lying on her chest. Estimating that after the first time, she and the defendant had engaged in sexual intercourse approximately "three or four times a week" until their relationship ended in the summer of 2008, A.B. explained that the relationship "didn't start getting real sexual till after [she had] lost [her] virginity." A.B. testified that whenever she and the defendant had sex, he would give her money or food. A.B. indicated that she could always get money from the defendant so long as she was willing "to do something in return for him." In December 2007, the defendant bought A.B. a purse and a pair of pajamas for Christmas. When A.B. was on court supervision, there

were times that the defendant threatened to get her into trouble with her probation officer if she did not have sex with him. The defendant often performed oral sex on A.B., and on a few occasions, he penetrated her vagina with a dildo from his collection of sex toys. A.B. testified that the defendant kept the toys in a plastic tub in the upstairs bathroom cabinet. A.B. indicated that the defendant had told her that he had had a vasectomy, but nonetheless, he never ejaculated inside of her. A.B. stated that the defendant "said there could still be a chance that even though he is fixed, [she] could still get pregnant from him."

¶ 9 A.B. testified that sometime around March 2008, while she was still having sexual relations with the defendant, she started seeing 19-year-old Tony Mollot, who she met through her older sister. A.B. testified that one night when she and Tony needed a place to stay, she called the defendant, and he picked them up and took them back to his house. Once there, the defendant asked Tony if he cared whether he and A.B. had sex, and "he asked Tony if Tony wanted to join." After A.B. indicated that it "wouldn't bother" her, the three went upstairs to the defendant's bedroom, and the defendant turned on a pornographic movie. A.B. testified that the defendant performed oral sex on her, while she performed oral sex on Tony. When Tony "got finished," he went back downstairs, and A.B. and the defendant had sexual intercourse. The following morning, the defendant watched A.B. and Tony have sex on his couch. Using his cell phone, Tony later took a nude picture of A.B. getting out of the shower at her mother's house. Tony subsequently sent the picture to the defendant's cell phone, and a few days later, the defendant showed it to A.B. A.B. identified People's Exhibit 40 as the picture the defendant had shown her.

¶ 10 A.B. testified that she once had a picture of a 13-year-old female friend of hers on her cell phone, and when the defendant saw the picture, he said that the friend "looked cute," and he "asked if [A.B.] would ask her to come to youth group or something." A.B. told the defendant that she would, but she never did. A.B. testified that when she started ninth grade,

after school on Tuesdays, the defendant had her walk from her school to the pizza parlor where he worked part-time. They would usually go to his home after that and have sex before Tuesday night youth service at church. A.B. described the defendant's home, provided details regarding his place and his person, and drew a sketch of his bedroom during the course of the State's investigation into her allegations.

¶ 11 A.B. testified that toward the end of her relationship with the defendant, she started seeing Jason Banchi, who she later married, and she would bring him to the youth activities at the church. Seemingly jealous, the defendant did not approve of A.B.'s relationship with Jason, and the defendant and Jason "didn't like each other." Jason ultimately convinced A.B. that she should "stay away from the church activities for [her] own good."

¶ 12 When cross-examined, A.B. acknowledged that Myra Brady, a close family friend, had taken her to the Taylorville police department when she initially reported her allegations against the defendant. She further acknowledged that a month earlier, Myra had taken her to the Taylorville police department, where A.B. "made some allegations against two other individuals for a sexual assault." A.B. was aware that Myra and the defendant once "had a relationship" and that the defendant later "wanted nothing to do with Myra." A.B. denied having access to the defendant's house while he was not there, and she testified that he had never asked her to let his dogs out while he was away. A.B. acknowledged dropping out of school after the ninth grade, and she admitted that she had prior "issues with alcohol." A.B. was impeached with discrepancies between her trial testimony and a videotaped statement that she gave to an interviewer at the Child Advocacy Center in Springfield. The trial court later viewed the interview in its entirety.

¶ 13 Tony testified that he was 20 years old, was an active-duty Marine, and had been in a dating relationship with A.B. for several months in 2008. Tony met the defendant while attending Tuesday night youth group with A.B., and he and the defendant became friends.

¶ 14 Tony testified that one night when he "was going through some family problems" and "really didn't want to go home," he and A.B. had spent the night at the defendant's house. While they were hanging out in the defendant's living room, the defendant asked Tony and A.B. if they wanted to "have a three-way with him." They agreed and proceeded upstairs to the defendant's bedroom. Tony testified that he subsequently had sexual intercourse with A.B. and that after he had ejaculated, the defendant had sexual intercourse with her. Tony indicated that there was pornography "playing on the TV" in the bedroom at the time. Afterwards, the defendant told Tony and A.B. not to say anything about what had occurred, because the defendant and Tony "could get into some bad trouble if the word got out." Tony testified that he and A.B. had once had sex on the defendant's couch in the defendant's presence. Tony further testified that using his cell phone, he had once sent a nude picture that he had taken of A.B. to his father and the defendant. Tony stated that the picture had been taken at A.B.'s house with his cell phone and with A.B.'s permission. Tony identified People's Exhibit 40 as the picture he had taken.

¶ 15 Tony testified that a few days before he had been contacted by investigators looking into A.B.'s claims against the defendant, the defendant had called him asking him "to lie if [he] ever got questioned about what happened." The defendant indicated that there was a "good possibility" that the police would question him, and the defendant asked him to deny that their sexual encounter with A.B. had ever occurred. Although he told the defendant that he would lie for him, when later interviewed by the police, Tony changed his mind and "decided to be honest."

¶ 16 When cross-examined, Tony acknowledged that around the time that he had dated A.B., he had been dealing with "personal issues" such as those that had prompted him to seek refuge at the defendant's home. Tony acknowledged that his personal issues ultimately led to his being "put into a psychiatric ward for four days." Tony further acknowledged that

"being a Marine" meant a lot to him and that being criminally charged with having sex with an underage girl could "screw" his military career. Tony testified that he had been "told there wouldn't be any charges filed against [him], but there were no deals made."

¶ 17 A.B.'s mother, Katrina B., testified that she knew the defendant because they had been neighbors in Taylorville for approximately three years. After getting to know him, she "thought he was a real good person." After Katrina and her two daughters moved to another part of town in October 2004, the defendant occasionally stopped by to visit. During one such visit, when the discussion turned to A.B.'s "discipline problems" and troubles at school, the defendant offered to "be like a mentor or big brother" to her. Indicating that she and A.B.'s sister were both surprised by the defendant's offer, Katrina testified that she had agreed to the proposed arrangement because the defendant had been taking A.B. to church and youth group, and she had noticed that A.B. had been "more respectful" and less "hateful and mouthy." Katrina testified that at some point, A.B. began walking from school to a pizza parlor, where she would meet up with the defendant before "the youth thing on Tuesdays."

¶ 18 When cross-examined, Katrina testified that she and Myra had been close friends since 2002. Katrina was aware that at some point, the defendant and Myra had been in a "personal relationship" that the defendant had ultimately ended. When Katrina acknowledged that A.B. had had some "legal problems," the court noted that in January 2008, upon pleading guilty to a charge of retail theft of "some baseball cards," A.B. had been sentenced to a four-month term of court supervision, which she "satisfactorily completed."

¶ 19 Catrice Martin testified that she worked with the defendant at a pizza parlor in Taylorville from August 2006 to May 2008, when she was 16 and 17. Catrice indicated that she and the defendant had been friends, and they sometimes talked about their personal relationships. After working together for a few months, the defendant started asking Catrice to "flash him," *i.e.*, to expose her bare breasts to him, and he also "started asking [her] to

come over to his house." Catrice testified that on a few occasions, she had "flashed him," and he had taken pictures of her when she had. The defendant also "started grabbing [her] butt after awhile." Catrice testified that she and her boyfriend had gone to the defendant's house to ride the defendant's motorcycle, and she had been there by herself when she let the defendant's dogs out while he was away.

¶ 20 Investigator Richard Bryan testified that after briefly interviewing A.B. when Myra brought her to the Taylorville police department to report her allegations against the defendant, he had obtained a warrant to search the defendant's home. During a subsequent search of the home, sex toys and "various elements of pornography" were found. The sex toys were in a plastic tub in the top cabinet of the upstairs bathroom, where A.B. stated they would be. Forensic scientist Rhonda Carter testified that a mixture of A.B.'s and the defendant's DNA was extracted from one of the toys, *i.e.*, a "tan vibrator/dildo with nubs."

¶ 21 When called as the defendant's first witness, Myra testified that she and the defendant had once been "sort of boyfriend/girlfriend," but "it was kind of a strange relationship as far as that went." Referring to the relationship, Myra denied being upset about "how it ended." Myra stated that when A.B. first started telling her about what she and the defendant had been doing, A.B. would "just give [her] bits and pieces of things that happened," and it took A.B. some time to fully open up about it. Myra indicated that before hearing A.B.'s accusations, she had no reason to suspect that the defendant could have done what he had been accused of doing. Myra acknowledged that after her relationship with the defendant had ended, she had continued to "write and text" him "as a friend." She further stated that following the defendant's arrest, she had "offered him [her] friendship and help if he needed it." Myra testified that upon hearing that the defendant had an "inappropriate" picture of a "young girl" on his cell phone, she had confronted him about it, and "he admitted that it had been there[,] but it was no longer there." Myra admitted that before taking A.B. to the police,

she had spoken to Pastor Steve Robinson, questioning whether the defendant "should still be in charge of the youth group." When cross-examined, Myra denied telling A.B. to "lie or make up stories" about the defendant. She also testified that the defendant had once told her that he "had some type of sexual addiction."

¶ 22 Cody Hott testified that in late 2006 and early 2007, he had attended Tuesday night youth group at the defendant's church, but A.B. had not. Hott stated that following the defendant's arrest, he had spoken with A.B. at Jason's house. Referring to her accusations against the defendant, Hott had asked A.B. why she would "say something like that." Hott testified that A.B.'s response was "Myra Brady told her to say it."

¶ 23 Kyle Simmons testified that he had regularly attended the Tuesday night youth group and that A.B. had not start attending until spring 2008. After the defendant was arrested, Kyle had also gone to Jason's house to speak with A.B. about her allegations. After telling him "her side of the story," A.B. told Kyle that Myra had reported that God had told her that the defendant had molested Kyle and his older brother when they were children. Kyle testified that the defendant had not, in fact, molested either him or his older brother.

¶ 24 Wesley Simmons testified that he had regularly attended the Tuesday night youth group from 2005 to 2007, and he never saw A.B. there. Roger Everett testified that he had been the youth group leader until 2007, and he had never seen A.B. at Tuesday night youth group.

¶ 25 Robinson testified that he was the pastor at the church that the defendant and A.B. used to attend. Robinson stated that the defendant had been involved with the youth group since 2006, that Everett had been the youth group leader until spring 2007, and that A.B. had first attended Sunday service and Tuesday night youth group in April 2008. In May 2008, A.B. had also helped with the youth group's summer fund-raiser. Robinson testified that a week or two before the authorities began investigating A.B.'s allegations against the

defendant, Myra had come to his office and advised him that the defendant had been sexually abusing children. Myra had further advised him that God had told her that such was the case.

¶ 26 When cross-examined, Robinson explained that as a "youth sponsor," the defendant had helped oversee the Tuesday night youth group, which was essentially an activity and game night "designed as an outreach program." Robinson indicated that there were generally two youth sponsors and a youth leader present on Tuesday nights. Robinson further indicated that approximately a month before Myra had come to see him, he had heard "complaints from some of the parishioners about inappropriate behavior" on the defendant's part. In response, Robinson counseled the defendant on "appropriate behavior" and emphasized that an individual youth leader should never be alone with any of the youths. Robinson testified that he had also spoken with the defendant about "having naked photos on his phone that some of the youth claimed to have seen." Robinson testified that the defendant had admitted owning such photos and had apologized to him.

¶ 27 Randy Emerson testified that he worked with the defendant at the Taylorville Correctional Center for over eight years, and he and the defendant were close friends who spent a lot of time together. Emerson testified that the defendant had an exemplary reputation for morality and decency.

¶ 28 Paula Borger testified that she was a friend of Myra's and in July 2008, while she was smoking a cigarette outside her place of work, Myra drove up crying and talking on her cell phone. When Myra exited her car and Borger asked her what was wrong, Myra stated that she and another friend had been praying on the phone, and the friend had described a "vision she had of a sexual molester." Myra indicated that the friend's description of the molester led Myra to believe that it was "her ex-boyfriend," the defendant. Borger testified that Myra was crying and upset and "couldn't hardly believe it." Surmising that the defendant was only "interested in little boys" and children, Myra had also stated that the vision explained why,

"when they were together[,] *** [the defendant] didn't want to be with her like a man wanted to be with a woman." Myra further stated that the defendant did not want to get too close to her, "because he was afraid that she might find out his secret." Borger testified that Myra had subsequently talked to her "about it" on two other occasions, one of which was after the defendant's arrest.

¶ 29 The defendant testified that before being charged in the present case, he had worked as a correctional officer and a pizza delivery driver and had lived alone at his home in Taylorville. The defendant testified that he had invited A.B. to Tuesday night youth group in March or April 2008. Explaining that he had heard through mutual friends that A.B. had been exhibiting behavioral problems, the defendant testified he had thought that "youth group would help keep her busy and out of trouble." The defendant explained that although attendance numbers varied, there were always at least two supervisors present every Tuesday night. The defendant testified that A.B. had attended Tuesday night youth group with Tony and later with Jason, and she had only attended for a few months.

¶ 30 The defendant testified that in April 2008, he had allowed A.B. to access his house so she could take care of his dogs while he was away visiting friends. The defendant testified that to his knowledge, Tony had never been to his house. Referring to his relationship with Myra, who he had met through A.B. and Katrina, the defendant stated that they were "intimate" one time and then "saw each other frequently for about five weeks." The defendant testified that he and Myra had talked about his past, and she knew that he had had a vasectomy. After the defendant terminated their relationship, Myra "kept wanting to come over all the time" and continued to text and call him. The defendant stated that the situation became "increasingly irritating to her." Before he was arrested, Myra had called him and accused him of molesting two named and four unnamed girls at his church. Myra told the defendant that "God told her." A.B.'s "name was never mentioned." The defendant denied

having ever purchased anything for A.B., and he stated that he had never offered her money in exchange for sexual favors. The defendant further denied all of A.B.'s allegations regarding their various sexual encounters.

¶ 31 When cross-examined, the defendant testified that he had not shown Catrice a cell phone photo of "a young girl with bare breasts" or a photo of "another young girl with bare breasts and with a man's penis on her bare breasts." He also denied telling Catrice that he had been "dating an underage girl" and was afraid that he would lose his job and go to prison as a result. When asked about his claim that A.B. had taken care of his dogs while he was away, the defendant stated that A.B. had spent the night at his home, like a house-sitter.

¶ 32 Keith Watrous testified that he lived next door to the defendant in Taylorville for approximately three years. Watrous stated that in April 2008, the defendant had called him asking if he would take care of his dogs while he was out of town. Watrous agreed to care for the dogs, but the defendant later called him back advising that he had found someone else to do it. Watrous testified that he later saw a "young, blonde female" letting the dogs out. The female was at the defendant's house 15 to 20 minutes and then left. When Watrous was subsequently outside smoking a cigarette that evening, he saw that someone was letting the dogs out again, and he "assumed it was the same person."

¶ 33 Domanique Hariford of East Peoria and Phil McGuire of Morton testified that the defendant had visited them at their respective homes on the same weekend in April 2008. McGuire further testified that the defendant had stayed one night at his home.

¶ 34 In rebuttal, A.B. testified that the defendant had never asked her to take care of his dogs while he was out of town in April 2008 or at any other time. In rebuttal, Catrice testified that in the summer of 2007, the defendant had told her that he had been seeing a girl, "and he really liked her, [and] he had been seeing her for a while, but he knew that she was underage." Catrice testified that the defendant had also stated that he "didn't know if he

should continue seeing [the girl] because he might lose his job over it." The defendant then showed Catrice two pictures from his cell phone that he stated were of the girl. Catrice described the first picture as "a topless girl laying on [the defendant's] bed." In the second picture, the girl "was bare[-]breasted laying on his bed with his penis touching her breasts." Catrice testified that the defendant had also shown her some photographs of "other women that were older."

¶ 35 The trial court ultimately found the defendant guilty of 2 of the 11 counts against him, count I (aggravated criminal sexual abuse) and count X (criminal sexual assault). As previously noted, count I alleged an act of sexual penetration, but unlike counts II through XI, it did not allege that the defendant was in a position of trust, supervision, or authority with the victim when the act occurred. As amended, count X alleged that the defendant committed criminal sexual assault in March 2008.

¶ 36 When announcing its verdict, the trial court found that although A.B. had "exaggerated certain portions of her testimony" and "lacked specificity on other portions," her claims that she had been in a sexual relationship with the defendant were corroborated by the DNA evidence, the items found in the defendant's home, and Tony's and Catrice's testimony. The court indicated that it had "absolutely no reason to disbelieve" Catrice, and it characterized Tony's testimony as "credible," adding that in its view, Tony had not been "impeached in any way." The court also found that Tony's "testimony about the defendant's efforts to conceal the crime after it took place by asking him to deny [it] to the authorities [was] persuasive." Noting that the defendant had "basically denied everything, even things that he could have admitted," the court specifically stated that it "did not find the defendant's testimony credible."

¶ 37 Stating that it was "convinced that the defendant had sexual relations with [A.B.] on more than one occasion," the court indicated that at what point the defendant was in an actual

position of trust, authority, or supervision with A.B. was less apparent. Observing that A.B. had described "a general concept of mentorship over a longer period of time," the court noted that she had also described a narrower period of time during which she was on court supervision and was an active participant in the youth group. Further noting that the incident that Tony had corroborated had occurred during the narrower time frame, the trial court found the defendant guilty on count X. When finding the defendant guilty on count I, the trial court noted that the State had proved its allegation of "oral sex between the period of August 1, 2006 and August 1, 2008." The trial court subsequently sentenced the defendant to serve a seven-year sentence on count I and a consecutive four-year sentence on count X. The court further ordered that each count be followed by a two-year term of mandatory supervised release (MSR). The court also assessed several fines and fees, including a public defender reimbursement fee, a medical costs fee, a "lab fee," and a DNA analysis fee. The present appeal followed.

¶ 38

DISCUSSION

¶ 39 On appeal, the defendant argues that the State failed to prove his guilt beyond a reasonable doubt; the trial court erred in permitting the State to amend its charges; the trial court erred in imposing a two-year term of MSR on his criminal sexual assault conviction; the trial court erred in imposing a public defender reimbursement fee without a requisite hearing; the trial court erred in imposing a medical costs fee in the absence of medical costs; the trial court erred in imposing an inapplicable lab fee; and, lastly, he is entitled to monetary credit against his DNA analysis fee.

¶ 40

Reasonable Doubt

¶ 41 To prove the defendant guilty as charged on count I, the State was required to prove that he "placed his penis in [A.B.'s] mouth" when she was "at least 13 years of age but under 17 years of age *** and [he] was at least 5 years older." See 720 ILCS 5/12-16(d) (West

2006). To prove the defendant guilty as charged on count X, the State was required to prove that he "placed his penis in [A.B.'s] vagina" when she was "at least 13 years of age but under 18 years of age *** and [he] was 17 years of age or over and *** was in a position of trust, supervision[,] or authority with [A.B.]" See 720 ILCS 5/12-13(a)(4) (West 2006).

¶ 42 On appeal, suggesting that Myra and A.B. went to great lengths to ensure that he would be falsely convicted, the defendant argues that the State failed to prove his guilt beyond a reasonable doubt. The defendant maintains, *inter alia*, that none of the State's primary witnesses were credible and that A.B. could have experimented with the sex toys found in his home while he was away.

¶ 43 When reviewing the sufficiency of the evidence supporting a criminal conviction, it is not the function of the reviewing court to retry the defendant. *People v. Ward*, 215 Ill. 2d 317, 322 (2005). Rather, "[t]he relevant inquiry is whether, 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." *Id.* Under this standard, a reviewing court "will not reverse a conviction unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of [the] defendant's guilt." *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 44 Here, viewing the evidence adduced at trial in the light most favorable to the prosecution, we conclude that the State overwhelmingly proved the defendant's guilt beyond a reasonable doubt. Despite the problems that the trial court identified in A.B.'s testimony, her allegations regarding her sexual relationship with the defendant were extensively corroborated by other evidence such as Tony's testimony describing the "three-way" and the DNA found in the defendant's house. In his defense, the defendant testified and denied the claims against him, but his argument on appeal ignores that "[a] reviewing court will not reverse a conviction simply because the evidence is contradictory [citation] or because the

defendant claims that a witness was not credible." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Moreover, "in a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence" (*id.*), and here, the court specifically stated that the State's witnesses were credible and the defendant was not. Because a trial judge hears and sees the witnesses whose testimony a reviewing court merely reads, the trial court has the "superior ability" to assess the witnesses' credibility, and a reviewing court must necessarily rely on those assessments. *People v. Adkins*, 239 Ill. 2d 1, 21 (2010). In any event, contrary to the defendant's intimations, the evidence here is not so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt as to his guilt, and we accordingly affirm his convictions.

¶ 45 Amendment of the Charges

¶ 46 At the close of all the evidence, the trial court allowed the State to amend the dates of the criminal sexual assault counts to conform to the proof at trial. Count X, in particular, which initially alleged an act of criminal sexual assault occurring in February 2007, was amended to allege an act occurring in March 2008. The court also suggested that some of the charges be amended to reflect the time frame during which the 2008 incident that Tony testified to had occurred. On appeal, intimating that he would have been acquitted on count X had the State not been allowed to amend the charge, the defendant argues that the "trial court erred, because there was a fatal variance between the original charges and the proof at trial, and [he] was misled in preparing his defense."

¶ 47 "It is well-recognized that the date of the offense is not an essential ingredient in child sex offenses." *People v. Barlow*, 188 Ill. App. 3d 393, 402 (1989). "[B]ecause the date of the offense is not an essential element in child sex offenses [citation], any change in the dates does not alter the nature of the crime charged. Moreover, *** a charge is sufficient if it is

in writing and states 'the date and county of the offense as definitely as can be done.' " *Id.* at 402-03. "The date alleged in a charging instrument need not ordinarily be proved precisely," and if "upon trial[,] the proof establishes that the offense was committed on a date other than the precise date alleged, that irregularity will not constitute a fatal variance." *People v. Alexander*, 93 Ill. 2d 73, 77 (1982). "A variance between allegations in an indictment and proof at trial is fatal to a conviction if the variance is material and could mislead the accused in making his defense." *People v. Winford*, 383 Ill. App. 3d 1, 4 (2008).

¶ 48 "It is a well-established rule in Illinois that all counts of a multiple-count indictment should be read as a whole ***." *People v. Morris*, 135 Ill. 2d 540, 544 (1990). "The idea that a multiple-count information should be read as a whole is equally relevant whether the focus of inquiry is actual prejudice to the defendant or potential for prejudice." *People v. Hall*, 96 Ill. 2d 315, 324 (1982).

¶ 49 "The trial court's decision to allow an amendment to the charging instrument will not be disturbed unless the court abused its discretion." *People v. Alston*, 302 Ill. App. 3d 207, 211 (1999). "An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable [citation] or where no reasonable person would agree with the position adopted by the trial court [citations]." *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 50 Here, the trial court did not abuse its discretion by allowing the State to amend its criminal sexual assault charges, particularly count X, to conform to the proof at trial. First of all, the variance in the dates alleged in count X was not material, because the date of the offense was not something that the State was required to prove. *Barlow*, 188 Ill. App. 3d at 402-03. As previously indicated, to prove the defendant guilty as charged on count X, the State was required to prove that he "placed his penis in [A.B.'s] vagina" when she was "at least 13 years of age but under 18 years of age *** and [he] was 17 years of age or over and *** was in a position of trust, supervision[,] or authority with [A.B.]" See 720 ILCS 5/12-

13(a)(4) (West 2006). Secondly, it cannot be said that the variance could have misled the defendant in making his defense. When read as a whole, the State's information alleged that from August 1, 2006, to August 1, 2008, the defendant committed numerous acts of sexual penetration with A.B., most of which occurred while he was in a position of trust, supervision, or authority over her. Furthermore, as the trial court noted when allowing the State to amend the charges, the discovery materials the defendant received covered the same range of dates and also revealed the time frame of the incident that Tony described at trial. Lastly, as the trial court observed, the variance had no bearing on the defendant's defense because, as to each count, the defense was "it didn't happen."

¶ 51 Through occurrence witnesses such as Robinson, defense counsel was able to establish that, contrary to A.B.'s and Katrina's testimony, the defendant had been one of A.B.'s youth sponsors at church for only a few months. This was strategically sound. The record indicates that counsel's efforts resulted in acquittals on most of the charges against the defendant, and at sentencing, the trial court candidly stated that the defendant was "probably *** acquitted on more charges than he should have been." The trial court found the defendant guilty on count X on the testimony describing the incident that occurred during the time that Tony and A.B. had attended Tuesday night youth group together, and the record indicates that amending count X's date was intended to eliminate what the State referred to as an "awkwardness in the record." The record suggests that the incident involving Tony likely occurred in April or May of 2008, but in any event, whether the incident occurred in February 2007, March 2008, April 2008, or May 2008, the date was not an essential element of the offense and the variance could not have misled the defendant's preparation of his defense under the circumstances. We therefore reject the defendant's contention that the trial court erred in allowing the State to amend its criminal sexual assault counts.

¶ 52

Public Defender Fee

¶ 53 The trial court ordered the defendant to pay a \$500 public defender reimbursement fee without first conducting a hearing on his ability to pay the fee. The State concedes that such a hearing is mandatory and that the defendant's cause must be therefore be remanded. *People v. Love*, 177 Ill. 2d 550, 563 (1997). Accordingly, we vacate the trial court's public defender reimbursement order and remand for a hearing on the defendant's ability to pay. See 725 ILCS 5/113-3.1(a) (West 2006). "The hearing must focus on the foreseeable ability of the defendant to pay reimbursement as well as the costs of the representation provided." *Love*, 177 Ill. 2d at 563.

¶ 54

Medical Fee

¶ 55 The trial court ordered the defendant to pay a \$10 medical costs fee pursuant to section 17 of the County Jail Act (730 ILCS 125/17 (West 2006)). The defendant argues that the trial court erred in assessing this fee because there were no medical costs resulting from his arrest (see *People v. Cleveland*, 393 Ill. App. 3d 700, 714 (2009)) and because the current, amended version of section 17 (see Pub. Act 95-842 (eff. Aug. 15, 2008) (amending 730 ILCS 125/17 (West 2006))), which requires the imposition of the fee regardless of whether a defendant incurs any medical costs, cannot be applied retroactively to apply to him.

¶ 56 In *People v. Jackson*, 2011 IL 110615, specifically overruling *Cleveland* "on this point," the supreme court recently held that under the preamended version of the statute, the trial court could properly assess section 17's medical fee even where the defendant incurred no medical expenses resulting from his arrest. *Id.* at ¶¶ 10-16. The court further held that "the legislature intended Public Act 95-842 to clarify section 17 of the County Jail Act rather than to substantively change its meaning" (*id.* at ¶ 20), and because "the same result obtains pursuant to either version of section 17," retroactive application of the amended version was not an issue (*id.* at ¶ 23). Accordingly, we reject the defendant's argument that the trial court

erred in ordering him to pay a \$10 medical costs fee pursuant to section 17.

¶ 57

MSR

¶ 58 The trial court ordered that each of the defendant's terms of imprisonment be followed by a two-year term of mandatory supervised release (MSR). The defendant correctly notes, however, that on a conviction for criminal sexual assault, the term of MSR must "range from a minimum of 3 years to a maximum of the natural life of the defendant" (730 ILCS 5/5-8-1(d)(4) (West 2006)).

¶ 59 "[A] trial court must impose the criminal penalties that the legislature has mandated and has no authority to impose punishment other than that provided by statute." *People v. Caban*, 318 Ill. App. 3d 1082, 1090 (2001). "A sentence which does not conform to a statutory requirement is void" (*People v. Arna*, 168 Ill. 2d 107, 113 (1995)), and "a sentence is void for lack of inherent power where the court orders a lesser sentence than is mandated by statute" (*People v. Allen*, 386 Ill. App. 3d 30, 35 (2008)).

¶ 60 Here, because the trial court imposed a term of MSR one year less than the statutorily required minimum for the defendant's criminal sexual assault conviction, that portion of the defendant's sentence is void. We therefore vacate it and remand the defendant's cause so that the trial court can sentence the defendant to a fixed term of MSR within the applicable range.

¶ 61

Lab Fee

¶ 62 The trial court imposed a \$100 lab fee that the defendant maintains "applies to drug cases only." See 730 ILCS 5/5-9-1.4(b) (West 2006). The State concedes that the fee should not have been imposed, and we hereby vacate that portion of the trial court's sentencing order.

¶ 63

DNA Fee

¶ 64 The trial court ordered the defendant to pay a \$200 DNA analysis fee, as required by statute. See 730 ILCS 5/5-4-3(j) (West 2006). Noting that he was in pretrial custody for

nearly 400 days, the defendant argues that he "must be credited the entire \$200 fine."

¶ 65 Pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963, "[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110-14(a) (West 2006). As the defendant correctly notes, the credit mandated by section 110-14(a) is not limited to those who apply for it at the trial level, and section 110-14(a) is viewed "as conferring a clear statutory right which is not waived despite any failure to raise the 'issue' at the trial level." *People v. Woodard*, 175 Ill. 2d 435, 444-45, 456-57 (1997). However, section 110-14(b) provides, "Subsection (a) does not apply to a person incarcerated for sexual assault as defined in paragraph (1) of subsection (a) of Section 5-9-1.7 of the Unified Code of Corrections." 725 ILCS 5/110-14(b) (West 2006).

¶ 66 Here, the defendant was incarcerated on charges of aggravated criminal sexual abuse and criminal sexual assault, both of which fall under section 5-9-1.7's definition of "sexual assault." 730 ILCS 5/5-9-1.7 (West 2006). Accordingly, the defendant is not entitled to credit towards his DNA analysis fee. *People v. Schneider*, 403 Ill. App. 3d 301, 304 (2010).

¶ 67 **CONCLUSION**

¶ 68 For the foregoing reasons, we affirm the defendant's convictions, vacate the portions of the trial court's order assessing the public defender reimbursement and lab fees, and vacate the two-year term of MSR imposed on count X. We remand the defendant's cause for a hearing on his ability to pay the public defender reimbursement fee, and we order that on count X, the trial court resentence the defendant to a fixed term of MSR within the applicable statutory range.

¶ 69 Affirmed in part and vacated in part; cause remanded.