2015 IL App (1st) 140037-U

Sixth Division
Order filed: October 9, 2015

No. 1-14-0037

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 5206
	)	
EDDIE RIVERS,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Because the State failed to prove that the defendant committed an act of sexual penetration with his tongue and fingers, there was insufficient evidence to convict him of predatory criminal sexual assault of a child under counts III and VII, warranting the reversal of his convictions and remand for sentencing on the lesser offense of aggravated criminal sexual abuse.

¶ 2 Following a bench trial, the defendant, Eddie Rivers, was found guilty of eight counts of predatory criminal sexual assault of a child (720 ILCS 12-14.1(a)(1) (West 2006) (amended by Pub. Act 95-640, § 10 (eff. June 1, 2008)) based upon acts of sexual misconduct that he carried out on his ten-year-old daughter. The circuit court merged the eight counts into four counts and

sentenced the defendant to four consecutive terms of 20 years' imprisonment. The defendant now appeals, contending that the State failed to prove beyond a reasonable doubt that he: (1) inserted his fingers into the victim's vagina (count VII); and (2) placed his mouth on the victim's vagina (count III). He asks this court to reverse his conviction as to count VII and to reduce his conviction to the lesser-included offense of aggravated criminal sexual abuse and remand for resentencing. He also asks this court to reverse his conviction as to count III. For the reasons that follow, we reverse the defendant's conviction for predatory criminal sexual assault based upon sexual penetration involving his fingers and remand to the circuit court for sentencing on aggravated criminal sexual abuse. Additionally, we reverse the defendant's conviction for predatory criminal sexual assault based upon sexual penetration involving his tongue.

¶ 3 In February 2010, the defendant was charged in a multi-count indictment with, *inter alia*, eight counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)) for various acts of sexual misconduct involving his ten-year-old daughter, J.R. Counts I and II brought charges for sexual penetration involving contact between the defendant's penis and J.R.'s vagina. Counts III and IV charged him with sexual penetration for contacting J.R.'s vagina with his mouth. Counts V and VI brought charges for the same involving contact between his penis and J.R.'s anus. Lastly, under counts VII and VIII, the defendant was charged with predatory criminal sexual assault for inserting his finger into J.R.'s vagina. The pertinent part of counts VII and VIII states that the defendant " *** COMMITTED AN ACT OF SEXUAL PENETRATION UPON [J.R.], TO WIT: AN INTRUSION IN THAT [THE DEFENDANT] INSERTED HIS FINGER INTO [J.R.'s] VAGINA ***."

¶ 4 Prior to trial, the State filed a motion requesting a hearing to determine the admissibility of J.R.'s out-of-court statements pursuant to the hearsay exception delineated in section 115-10

of the Criminal Code of 1963 (Code) (725 ILCS 5/115-10 (West 2010)). The circuit court granted the motion and conducted a hearing on July 28 and August 25, 2011. Pamela Thomas, Officer Monica Gonzalez, Detective Moreen Hanrahan, and Lynn Aladeen were called as witnesses, and gave their accounts of their interactions with J.R. involving the defendant's alleged criminal sexual acts. Regarding what J.R. told Thomas while they were in the bathroom at the Shining Light Baptist Church, located at 1950 West 63rd Street in Chicago, Thomas testified as follows:

"Q Did you ask [J.R.] anything about what her normal routine was?

A Yes. I asked her what's gonna happen when you go home. And she said that he – she insinuated that he may kiss her, like kiss on her vagina and put the skin in there."

The court found that the hearsay statements were admissible at trial if J.R. testified in court, satisfying the defendant's sixth amendment right to confront witnesses against him, based upon its finding that all of J.R.'s statements to the four witnesses had sufficient safeguards of reliability.

¶ 5 The defendant waived his right to trial by jury and he was tried in a bench trial on February 13, 2013, and April 15 and 25, 2013. The following evidence was adduced at trial.

¶ 6 Thomas, an office manager at PLS Loan Store, testified that she knew J.R. through church. On one or two Sundays each month, Thomas would see J.R. at church. Thomas acknowledged that J.R. mostly had a relationship with Thomas' mother, and that J.R. would occasionally spend weekends with her mother. According to Thomas, she had known J.R. for approximately one year in February 2010, and J.R. was ten years old at that time. Thomas stated that she was living with her mother on Essex Avenue in Chicago during February 2010. Thomas stated that, prior to February 2010, her mother and other members of the church expressed

concern about J.R. urinating on herself. Because of this, Thomas testified that she asked J.R. why that was occurring and J.R. responded that she did not feel herself doing it.

¶ 7 On the weekend of February 21, 2010, J.R. stayed over at the Thomas' house with Thomas, Thomas' mother and nine-year-old stepdaughter, Imani. Thomas testified that, at approximately 10 a.m. on February 21, 2010, she took J.R. into her bedroom to talk about why J.R. was urinating on herself. J.R. again told Thomas that she could not feel herself urinating. Thomas then asked J.R. if she had any friends and how her friends greeted each other. J.R. told Thomas that she had friends and that they would shake hands, give high-fives, and sometimes hug. Thomas also asked what J.R. wears when she gives and receives hugs and J.R. answered that she wears her uniform. Thomas then asked J.R. whether she receives hugs from anyone while she is naked. According to Thomas, J.R. stated that her father, the defendant, hugs her without clothes on. Thomas testified that she asked J.R. additional questions which clarified that both J.R. and the defendant were not wearing any clothes during these hugs.

¶ 8 Thomas testified that she asked J.R. if the defendant ever touched her and J.R. responded that he did. When Thomas asked where the defendant touched her, J.R. said, "my vagina," and pointed her finger up her skirt. Thomas stated that J.R. further explained that the defendant touches her vagina with "the skin." To clarify what "the skin" was, Thomas asked J.R. to point to an area on her own body where the defendant's skin was located. J.R. responded by again pointing to her vaginal area. Thomas then asked J.R. to point to something in the room that was the same shape as "the skin," and J.R. responded by pointing to a small can of air freshener that was located on Thomas' dresser. Thomas testified that the can was short and cylindrical in shape. Thomas next walked over to her dresser, picked up the can, and asked J.R. if the can was

the item that she was pointing to. J.R. said, "yes," and confirmed that the defendant put "the skin" into her vagina.

¶ 9 When Thomas asked J.R. what happened during these incidents, J.R. said that the defendant would take off their clothes, lie down, and put her on top of him. Thomas testified that she asked J.R. how her body felt when the defendant did this and J.R. replied that she could not feel it or that it did not hurt anymore. Thomas next inquired what the defendant did after his skin was inside of her and J.R. stated that he would fall asleep. Additionally, Thomas stated that she asked J.R. if J.R.'s mother knew about this before she passed away. J.R. answered affirmatively and told Thomas that her mother told her not to tell anyone. Thomas stated that, while she was answering these questions, J.R. had her head down and was teary-eyed and her demeanor was shy, confused, and embarrassed. According to Thomas, each time that she asked J.R. how she felt about what was going on, J.R. said, "not good" and "sad."

¶ 10 J.R., Thomas, Thomas's mother, and Imani then left the house to attend church. Thomas stated that, after they arrived, she saw the defendant there and that J.R. went to greet him. Thomas observed J.R. sitting on the defendant's lap and the defendant whispering to her. Thomas testified that, towards the end of the service, at approximately 1 to 2 p.m., Thomas and J.R. went to the bathroom where Thomas told J.R. that she was going to find her some help because what she was going through was not normal. Also in the bathroom, Thomas asked J.R. how often these acts occur. J.R. initially told Thomas that it happens every day, but then said every week and "a lot." Thomas further testified that J.R. told her what might happen after she left church with the defendant; however, that testimony was stricken, as shown in the following dialogue:

"Q. When you were speaking to her again in the bathroom did she confirm at that point what the defendant had done to her?

A. Yes.

Q. What did she say?

MR. SANDOVAL: Objection, your Honor.

THE COURT: Overruled.

BY MS. ESSIG:

Q. What did she say?

A. She just confirmed that everything we discussed in the bedroom [*sic*] and then she confirmed that when she got home that he may have kissed on her vagina [*sic*], that he may –

MR. SANDOVAL: Objection, your Honor.

THE COURT: Sustained. The first part will remain."

Thomas stated that, during this conversation, J.R. was shaking, breathing heavily and appeared "distant" and "hurt." After Thomas observed J.R. leave church with the defendant, she informed the pastor and other male members of the church about what she had learned. Shortly thereafter, Thomas contacted the police.

¶ 11 Officer Sergio Valdez testified that, on February 22, 2010, at approximately 9:17 p.m., he and his partner, Officer Urlich, received a call from Thomas reporting that she had information regarding a crime. Officer Valdez stated that he met with Thomas on a street corner across from the defendant's apartment, located at 1943 West 63rd Street in Chicago. Based upon the information that Thomas provided during their meeting, Officers Valdez and Urlich as well as a sergeant went to the defendant's apartment to investigate the allegations. According to Officer Valdez, they knocked approximately 5 to 10 times and waited for 5 minutes before the defendant

answered the door in his underwear. Officer Valdez stated that, upon entering the apartment, he saw J.R. and noticed that she was wearing her underwear and a T-shirt. He also observed that there was a mattress in front of a television in the living room. Officer Valdez proceeded to J.R.'s bedroom and noticed that her bed was neatly made. The officers then took the defendant into custody.

¶ 12 Officer Gonzalez testified that she was assigned to assist with a call relating to criminal sexual assault involving a female victim. She stated that, on February 22, 2010, at approximately 9:45 p.m., she interviewed J.R. at the police station and that Thomas was also present. Officer Gonzalez started the interview by asking J.R. to identify female and male body parts. According to Officer Gonzalez, when identifying female parts, J.R. pointed at her chest and said that those were "boobs;" then, she pointed to her vaginal area, and said that this was a vagina. J.R. said that males have "skins," and when Officer Gonzalez asked where they were located on a male's body, J.R. pointed to her vaginal area. Officer Gonzalez testified that J.R. also told her that "the skin" was "black" in color.

¶ 13 When Officer Gonzalez asked J.R. if the defendant had ever "touched" her vagina, J.R. replied, "yes," and explained that the defendant "touched *** her vagina with *** [his] hands" and "his skin." The following dialogue took place regarding whether the defendant touched the inside or outside of J.R.'s vagina:

"Q. Did you clarify how [the defendant] touched her vagina with his skin?

A. I don't –

Q. Did she indicate whether [the defendant] touched her vagina on the outside or the inside with his skin?

A. No, I didn't ask that question.

Q. Did you ask [J.R.] if the [d]efendant put anything into her vagina?

A. Yes.

Q. And what was her response to that question?

A. She said the skin."

According to Officer Gonzalez, she next asked J.R. if anything came out of the defendant's skin and J.R. responded, "yes," and explained that "skin" came out of the skin. Officer Gonzalez asked what color the skin that came out of the skin was and how it felt, and J.R. stated that it was white and wet. She also testified that J.R. informed her that the white, wet substance went into her vagina. When Officer Gonzalez asked J.R. how often this happens, J.R. told her that it happens every day. Officer Gonzalez stated that J.R. also told her that she slept with the defendant and that they would fall asleep after the defendant did this to her. She described J.R. as being quiet and timid during the interview.

¶ 14 Detective Hanrahan, who works for the special investigations unit at Chicago's Children's Advocacy Center (CAC), testified that she and her partner, Detective Franchini, also interviewed J.R. at the police station on February 22, 2010. Detective Hanrahan asked J.R. if anyone had done anything to her that she did not like, and J.R. responded that the defendant had touched her. She next asked J.R. to identify her body parts while pointing to them. Detective Hanrahan explained that J.R. identified her chest as breasts, her vaginal area as vagina, and her anus or buttocks as "boo boo." After identifying her body parts, J.R. informed Detective Hanrahan that the defendant "had touched her breasts with his hands. That he touched her vagina with his hands – or with his fingers and that he touched her vagina with his thing." When Detective Hanrahan asked J.R. to explain what "the thing" was, J.R. demonstrated two fingers standing up and stated that it was "black" in color. J.R. further stated that the defendant "would lay on top of

her and put his thing on her vagina and that he would put his thing in her boo boo." According to Detective Hanrahan, J.R. was crying, shy, and "really broken down" throughout the course of the interview. She stated that, after they had concluded the interview and as they were leaving the room to go to the hospital, she noticed that J.R. had urinated on herself.

¶ 15 Aladeen, a forensic interviewer at Lake County's CAC and a forensic interview supervisor at the Niagara County's CAC, testified that, while she was working as a forensic interviewer for Chicago's CAC, she interviewed J.R. at CAC on February 23, 2010. Aladeen stated that J.R. indicated that she understood the difference between a truth and a lie, and promised to tell the truth during their interview. When Aladeen asked J.R. if the defendant had done something to her that she did not like, J.R. answered, "that he did drugs and hit her and touched her breast and her vagina and her boo boo" or her buttocks.[*] J.R. again identified her vagina and buttocks by pointing to them.

¶ 16 According to Aladeen, J.R. told her that the defendant had touched her breasts with a pen, "touched her vagina with a Q-Tip and with his private part," and that he had put a Q-Tip "in her boom boom." J.R. told Aladeen that the defendant began doing these things to her when she was seven-years-old. Aladeen testified that J.R. told her that the last time that the defendant placed his private part in her vagina was two to three weeks prior to February 23, 2010, and that it took place in her bedroom. Based upon what J.R. told her, Aladeen stated that, during that specific incident, "[the defendant] hit her leg and that he put medicine on a Q-Tip and touched her vagina with it. She said that he put medicine on his body and on her body and that he touched her vagina with his private part."

¶ 17 Aladeen testified that J.R. lifted up her shirt and pointed to her stomach when she asked

[*] Aladeen later corrected herself and stated that J.R. used the term "boom boom" for buttocks.

J.R. to describe what the defendant's private part looked like. J.R. also said that the defendant's private part was "standing up." Aladeen stated that J.R. informed her that it "didn't feel good" when the defendant put his private part in her vagina. J.R. also told Aladeen that these acts had occurred more than once and that the defendant told J.R. not to tell anyone about them. According to Aladeen, J.R. appeared upset and distressed throughout the interview, and told her that she did not like talking about these incidents because it made her feel sad.

¶ 18 Dr. Emily Siffermann, a pediatrician at John Stroger Hospital and Chicago's CAC's Medical Clinic, testified as an expert in the fields of pediatric medicine and child sexual abuse pediatrics. Dr. Siffermann stated that, before meeting with J.R. on February 24, 2010, she reviewed J.R.'s emergency room medical records from Comer Children's Hospital and noted that J.R.'s genital exam was abnormal in that her hymen was not intact. Based upon these findings, Dr. Siffermann stated that she thought it appropriate to conduct another physical exam.

¶ 19 Before the exam, Dr. Siffermann interviewed J.R. J.R. again identified her vagina and buttocks. Dr. Siffermann testified that she asked J.R. whether anyone had touched her private parts and J.R. said, "no." J.R. also denied that she told anyone that the defendant had touched her.

¶ 20 Dr. Siffermann then proceeded to J.R.'s genital and anal exam with a nurse present. According to Dr. Siffermann, J.R.'s hymen appeared prepubertal; however, the tissue appeared "abnormal in its shape and contour." Both of the abnormalities that Dr. Siffermann found were present in the posterior half of the area surrounding J.R.'s vagina. Dr. Siffermann explained that J.R. had a clef or "U-shaped deformity," *i.e.*, she was missing a portion of her hymenal tissue, in one location that extended into the vaginal wall. She also found an enfacement in another location of the area surrounding J.R.'s vagina, which she described as a "gradual disappearance

of the tissue to the level of the vaginal wall and then it reappeared again." Dr. Siffermann testified that the location of these variances indicated previous penetrating trauma because "there is always hymenal tissue in the posterior half" as opposed to the anterior half of the area. Based upon these findings, Dr. Siffermann opined that J.R. had been sexually abused. She explained that the trauma could have been caused by contact with a penis and fingers.

¶ 21 On cross-examination, Dr. Siffermann stated that, theoretically, missing hymenal tissue could be self-created, but explained that it would be "unusual" because "people would stop if they felt discomfort." She also admitted that she could not determine whether the penetrating trauma was caused by a finger or penis.

¶ 22 Katherine Lee-Rogers, J.R.'s aunt and the defendant's sister-in-law, testified that Brenda Rivers, her late sister and J.R.'s mother, lived with the defendant and J.R. before passing away in November 2009. She stated that, prior to November 2009, she stopped by the apartment to visit her family on several occasions; however, either no one was home or they were home but did not answer the door or respond to her. Lee-Rogers also testified that she visited J.R. at the apartment more than one time after Brenda passed away and before the defendant's arrest in February 2010. According to Lee-Rogers, she felt uncomfortable and had the sense that "something wasn't right" during those visits. She explained that it was very warm in the apartment and the defendant was not wearing a shirt or would only have "a sheet or some kind of covering over him." She also stated that she told J.R. to put on some clothes on more than one occasion because J.R. was only wearing underwear with a T-shirt or a gown. Lee-Rogers further testified that, after the defendant was arrested and while J.R. was in the custody of the Department of Children and Family Services (DCFS), J.R. told her that the defendant had touched her inappropriately.

¶ 23 J.R., who was 13 years old at the time of trial, testified that she currently lived with her

aunt, but had previously lived with the defendant. She stated that, while she lived with the defendant, she slept in her own bedroom as well as on a bed in the living room with the defendant. According to J.R., she would wear a T-shirt and underwear to bed and the defendant would just wear a T-shirt. When she was asked to identify the private parts belonging to a female, J.R. listed "vagina, chest and butt," and identified each of these parts on her own body. J.R. testified that males also have chests and butts and again identified where each of these parts are located. She clarified that the word "boo boo" means buttocks or anus. J.R. stated that the "other parts" that males have are "vaginas." She pointed to her vaginal area when asked where the defendant's "private parts" were located.

¶ 24 J.R. testified that she saw the defendant's private parts more than once while she was living with him and that he did not have any clothing on during those occurrences. She described the defendant's private parts as a "circle." J.R. further testified that the defendant put his private parts into her vagina and "near the outside of [her] vagina" more than three times and that it hurt her when he did this. She stated that the defendant told her not to tell anyone about what was occurring. J.R. denied that the defendant touched other parts of her body with his penis. She also denied that the defendant touched any part of her body "with his body;" specifically, his hands.

¶ 25 The State presented certified copies of the defendant and J.R.'s birth certificates, showing that the defendant was born on April 9, 1966, and J.R. was born on December 16, 1999. Thereafter, the State rested and the defendant moved for a directed finding which was denied.

¶ 26 The defendant called Dr. Stacy Glabach, an expert in child therapy, who testified that, from August 2011 to June 2012, she provided individual therapy to J.R. every other week for one-hour sessions. According to Dr. Glabach, the purpose of their meetings was to facilitate

conversations about J.R.'s past sexual abuse. She stated that J.R. acknowledged that the defendant had inappropriately touched her private parts. Dr. Glabach also testified that, before meeting with J.R., she reviewed J.R.'s previous records and noted a diagnosis of moderate mental retardation and an I.Q. of 49. Based upon her review of J.R.'s records and her own experience with J.R., on June 28, 2012, Dr. Glabach wrote a letter to DCFS stating that J.R.'s stories and answers surrounding the alleged sexual abuse were vague and inconsistent and that she would be unable to accurately and correctly answer questions in court.

¶ 27 Following the testimony of Dr. Glabach, the defendant rested without testifying.

¶ 28 The circuit court found the defendant guilty beyond a reasonable doubt of eight counts of predatory criminal sexual assault. The defendant filed a motion for a new trial which was denied. At the sentencing hearing, the court merged counts I and II; III and IV; V and VI; and VII and VIII. The court sentenced the defendant to four consecutive terms of 20 years' imprisonment. The court explained, "[t]hese are consecutive counts because of the four acts of the penetration that we have, mouth to vagina, penis to vagina, penis to anus, finger to vagina, for a total of 80 years." The defendant then filed a motion to reconsider which was denied. This appeal followed.

¶ 29 The defendant first argues that the State failed to prove him guilty beyond a reasonable doubt as to counts III and VII of the indictment, which alleged that he contacted J.R.'s vagina with his mouth and inserted his fingers into J.R.'s vagina. We agree.

¶ 30 The due process clause of the United States Constitution’s fourteenth amendment ensures that an accused defendant is not convicted of a crime "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *People v. Carpenter*, 228 Ill. 2d 250, 264 (2008); *People v. Brown*,

2013 IL 114196, ¶ 52 ("the State bears the burden of proving beyond a reasonable doubt each element of a charged offense and the defendant's guilt."). When a defendant presents a challenge to the sufficiency of the evidence, it is not the function of a reviewing court to retry the defendant or to substitute its judgment for that of the trier of fact. *Brown,* 2013 IL 114196 at ¶ 48; *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, a reviewing court must determine 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. *Id.* at 330. This standard applies to both circumstantial and direct evidence (*People v. Ehlert,* 211 Ill. 2d 192, 202 (2004)) as well as to both jury and bench trials (*Brown,* 2013 IL 114196 at ¶ 48).

¶ 31 "[A] reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *People v. Givens*, 237 Ill. 2d 311, 334 (2010). Also, because the trier of fact saw and heard the witnesses, its credibility determinations are entitled to great weight. *People v. Wheeler,* 226 Ill. 2d 92, 114–15 (2007). However, the trier of fact's acceptance of testimony is neither binding nor conclusive. *Wheeler,* 226 Ill. 2d at 115. A reviewing court will not accept unreasonable inferences from the record. *People v. Cunningham,* 212 Ill. 2d 274, 280 (2004). If a reviewing court concludes that there was insufficient evidence of a defendant's guilt beyond a reasonable doubt, his conviction must be reversed. *People v. Smith,* 185 Ill. 2d 532, 541 (1999). "[A] conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *Wheeler,* 226 Ill. 2d at 115.

¶ 32 Section 12-14.1(a)(1) of the Code reads, "[a] person commits predatory criminal sexual assault of a child if that person commits an act of sexual penetration, is 17 years of age or older, and *** the victim is under 13 years of age." 720 ILCS 5/12-14.1(a)(1) (West 2006). The Code

defines "sexual penetration" as follows:

> "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 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 2006).

¶ 33 Our supreme court has interpreted this definition to include two types of conduct. *People v. Maggette,* 195 Ill. 2d 336, 346–47 (2001). The first conduct category is contact; the second is intrusion. *Id.* at 347. The "contact" clause refers to "any *contact* between the sex organ or anus of one person by an object, the sex organ, mouth, or anus of another person;" whereas, the "intrusion" clause refers to "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." (Emphasis in original.) *Id.* "[T]he word 'object' in the 'contact' clause of the statutory definition of sexual penetration was not intended to include parts of the body." *Id.* at 350. Rather, the intrusion clause should be used to interpret sexual penetration involving parts of the body. *People v. McNeal*, 405 Ill. App. 3d 647, 674 (2010).

¶ 34 In *Maggette,* 195 Ill. 2d at 352, our supreme court addressed the intrusion clause as defined in section 12–12(f) of the Code in relation to a defendant's conviction for criminal sexual assault. In that case, the victim testified as follows:

> " 'I remember [defendant] caressing me through my—to my knowledge it was—my panties was still up but he was just rubbing and caressing me through—he got underneath

my panties—and I felt underneath my panties and *in* my vagina area and through it just right through it and his fingers going underneath it.' " (Emphasis in original.) *Id.* at 352.

In vacating the defendant's conviction for criminal sexual assault, our supreme court first agreed with the appellate court's holding that " '[m]ere touching or rubbing of a victim's sex organ or anus with a hand or finger does not prove sexual penetration and cannot, therefore, constitute criminal sexual assault.' " *Id.* (quoting *People v. Maggette,* 311 Ill. App. 3d 388, 397 (2000)). Regarding the victim's above-quoted testimony, our supreme court held that "[t]he victim's brief and vague reference to her vaginal area is not sufficient to prove an 'intrusion' and cannot support a conviction of criminal sexual assault." *Maggette,* 195 Ill. 2d at 352.

¶ 35 Here, it is undisputed that the defendant sexually penetrated J.R.'s vagina and anus with his penis, which served as the basis for two of his other convictions for predatory criminal sexual assault. The issue here, however, is whether the State proved beyond a reasonable doubt that the defendant committed an act of sexual penetration upon J.R. based on the intrusion of his fingers into her vagina. While the evidence adduced at the defendant's trial overwhelmingly indicated that he, on multiple occasions, *touched* J.R.'s vagina with his hands and fingers, it is insufficient to support a finding that he committed an act of sexual penetration upon J.R. with those body parts.

¶ 36 We believe that it is significant that J.R. described other acts by the defendant as resulting in an intrusion into her vagina and "boo boo." J.R., herself, testified and told other testifying witnesses that the defendant placed his penis "in" or "into" her vagina and boo boo. However, she never testified or told anyone else that he placed his fingers in or into her vagina. Additionally, although Dr. Siffermann testified that J.R. had suffered from penetrating trauma based upon the location of J.R.'s missing hymenal tissue, she stated that she could not determine

whether penis *or* a finger caused that damage. At the very least, the testimony regarding the missing hymenal tissue raises a reasonable doubt as what caused the damage: the defendant's fingers or penis. After reviewing the above evidence, we hold that the State did not prove beyond a reasonable doubt that the defendant's fingers caused the missing portion of J.R.'s hymen.

¶ 37 The State relies on *People v. Ikpoh*, 242 Ill. App. 3d 365 (1993) to support its argument that the defendant intruded into J.R.'s labia majora "in order for his hand to touch her vagina." In *Ikpoh*, the defendant argued that the evidence was insufficient to prove that he committed the "sexual conduct" necessary for a conviction of aggravated criminal sexual abuse because "the testimony was too imprecise to prove that" he had touched the victim's "sex organs." *Ikpoh*, 242 Ill. App. 3d at 381. According to the *Ikpoh* defendant, female sex organs were limited to the vagina and labia minora and did not include the labia majora, the external skin covering of the vagina. *Id*. The defendant contended "that the closest part of the body to which the [victim] might have been referring when she stated that [the] defendant rubbed her 'vagina' and that her vagina was 'in between my legs * * * [i]n the front' was the labia majora," and thus he did not engage in sexual conduct with her sex organs. *Id.* The reviewing court in *Ikpoh*, relying on *People v. Hebel*, 174 Ill. App. 3d 1, 31-32 (1988) *abrogated by People v. Lawson*, 163 Ill. 2d 187 (1994), rejected the defendant's argument and held that labia majora are part of the "sex organs" referred to in section 12–12(e) of the Code. *Ikpoh*, 242 Ill. App. 3d at 381-82.

¶ 38 We note that *Ikpoh*, unlike this case, related to a defendant's conviction for aggravated criminal sexual abuse. Instead, we find *Maggette* persuasive and reverse the defendant's conviction under count VII for predatory criminal sexual assault of a child.

¶ 39 The defendant also contends that the State did not offer any evidence that he contacted

J.R.'s vagina with his mouth and, as such, count III should be reversed. The State concedes and we accept its concession. After reviewing the record, we found only a brief statement from Thomas at the section 115-10 hearing and her stricken trial testimony. Because there is no trial evidence establishing that the defendant contacted J.R.'s vagina with his mouth, we also reverse this conviction.

¶ 40 Lastly, the defendant urges us to reduce his conviction under count VII to the lesser-included offense of aggravated criminal sexual abuse because the evidence presented at trial established that he merely touched J.R.'s vagina, *i.e.*, there was no sexual penetration. Supreme Court Rule 615(b) permits a reviewing court to "[r]educe the degree of the offense of which the appellant was convicted." Ill. S.Ct. R. 615(b)(3) (eff. Feb. 26, 2010).

¶ 41 Our supreme court has held that a criminal defendant has a fundamental due process right to notice of the charges being brought against him, and may not be convicted of an offense for which he has not been charged. *People v. Baldwin,* 199 Ill. 2d 1, 6 (2002). "A defendant may, however, be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument [citation], and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense." *People v. Kolton,* 219 Ill. 2d 353, 360 (2006).

¶ 42 A defendant commits the crime of aggravated criminal sexual abuse if he is 17-years-old or older and he "intentional[ly] or knowing[ly] touch[es] or fondl[es] * * * any part of the body of a child under 13 years of age * * * for the purpose of sexual gratification or arousal of the victim or [himself]." 720 ILCS 5/12–16(c)(1)(i); 720 ILCS 5/12-12(e) (West 2006).

¶ 43 In *Kolton,* 219 Ill. 2d at 368–69, our supreme court held that aggravated criminal sexual abuse was a lesser-included offense of predatory criminal sexual assault because both crimes

describe intentional acts of a sexual nature. The court held that "an intrusion of [defendant's] finger into" the victim's vagina fell within the definition of "sexual conduct" in relation to the aggravated criminal sexual abuse statute. *Id.* at 369. Additionally, the court also addressed the statute's requirement that the conduct was done "for the purpose of sexual gratification or arousal." The court explained:

> "it [is] reasonable to infer the statutory element 'for the purpose of sexual gratification or arousal' primarily because 'sexual penetration' was alleged in [the] defendant's indictment and the type of conduct described in the definition of 'sexual penetration' is inherently sexual in nature." *Id.* at 369.

¶ 44 In the instant case, the record reflects that the defendant was over 17 years old and that J.R. was under 13 when the acts in question took place. While the State presented no evidence of digital penetration, the testimony of the witnesses indicated that the defendant touched J.R.'s vagina on multiple occasions. As our supreme court held in *Kolton*, it is permissible to infer that these acts were done with the purpose of sexual gratification or arousal. *Kolton*, 219 Ill. 2d at 369-70. Based upon this evidence, we find a sufficient basis for a conviction on the offense of aggravated criminal sexual abuse. Accordingly, pursuant to our authority under Supreme Court Rule 615(b)(3) (eff. Feb. 26, 2010), we modify the defendant's conviction under count VII to the lesser-included offense of aggravated criminal sexual abuse (720 ILCS 5/12–16(c)(1)(i) (West 2006)) and remand for sentencing on that offense.

¶ 45 In conclusion, we find that the State failed to prove the defendant guilty beyond a reasonable doubt as to counts III and VII. Pursuant to Illinois Supreme Court Rule 615(b)(3), we find that the evidence supporting count VII—that the defendant's fingers touched J.R.'s vagina—is sufficient to sustain a conviction on the lesser-included offense of aggravated criminal sexual

abuse. Accordingly, we reverse the defendant's convictions as to counts III and VII, alleging predatory criminal sexual assault of a child, enter a conviction on the lesser-included offense of aggravated criminal sexual abuse under count VII, and remand the cause for sentencing on the single, lesser-included offense. We otherwise affirm the defendant's convictions as to counts I and V.

¶ 46 Affirmed in part; reversed in part. Cause remanded with directions.