2015 IL App (2d) 131203-U
No. 2-13-1203
Order filed October 15, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MAURICIO LOSADA-SANCHEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 10-CF-314 Honorable Mark L. Levitt, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in admitting statements pursuant to section 115-10, as despite some weaknesses the statements bore sufficient indicia of reliability; (2) we vacated fines imposed by the circuit clerk and other assessments that were unauthorized or miscalculated, and we remanded for the trial court's imposition of the proper assessments.

¶ 2 Following a jury trial in the circuit court of Lake County, defendant, Mauricio Losada-Sanchez, was convicted of six counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)) and one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2006)). The trial court imposed consecutive sentences of seven years'

imprisonment for each count of predatory criminal sexual assault of a child and five years' imprisonment for aggravated criminal sexual abuse. On appeal, defendant argues that the trial court erred in admitting hearsay statements by the alleged victim, E.F. The statements were admitted pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2012)). Defendant argues that the statements were not sufficiently reliable to qualify for admission under that provision and were therefore inadmissible under the hearsay rule. Defendant alternatively argues that the clerk of the circuit court improperly imposed and/or miscalculated various fines and fees. We affirm defendant's conviction, but vacate certain fines and fees and remand for further proceedings.

¶ 3 Prior to trial, the State requested a hearing to determine the admissibility of various out-of-court statements made by E.F. Evidence presented at the hearing established that E.F. was born on November 25, 1999. Defendant was a former boyfriend of E.F.'s mother, Sara F. In March 2007, defendant lived with Sara in her apartment in Waukegan. E.F. also lived in the apartment, as did her younger brother, J.F., and Sara's mother, Sanguma F. Sanguma testified that defendant lived in the apartment for seven months. About a year after defendant moved out of the apartment, E.F. told Sanguma that defendant "was grabbing her parts, would pass her through his parts, would kiss her, [and] would get on top of her." At first, Sanguma did not believe E.F. E.F. told Sanguma that defendant "would put his penis down there and would pass it on her and would be mounted or on top of her." E.F. told Sanguma that defendant did not penetrate her. She also told Sanguma that defendant would kiss her on the mouth. Asked if she relayed E.F.'s allegations to Sara, Sanguma responded, "No, they told me, they told me." Sanguma explained that "they" referred to E.F. and Sara. Sanguma testified that she did not contact the police.

¶ 4 Like Sanguma, Sara testified that defendant was living in her apartment in Waukegan in March 2007. Defendant lived at the apartment for about eight months and then suddenly moved out. At the time, Sara was taking a college course that met in the evening. After defendant moved out, E.F. spoke with Sara about things that defendant had done to her. The conversation took place after Sara returned from class. Sara testified that E.F. had already talked with Sanguma about what had happened. E.F. indicated that, when she was going to take a bath or shower, defendant would "get in and touch her." Sara added, "Also in *the room* he would touch her and [*sic*] with his penis, he wouldn't put it in very much, just a little, would play and would put it in her mouth." (Emphasis added.) Sara explained that "the room" was the bedroom that Sara and defendant shared, and the incidents that E.F. described took place while Sanguma was sleeping and Sara was in class. Sara testified that E.F. said that defendant touched her whole body. Although she believed that E.F. was telling the truth, Sara did not contact the police.

¶ 5 Sara further testified that, a few days after her conversation with E.F., E.F. retracted her accusations. Sara initially testified that the conversation occurred a few days after defendant moved out of the apartment. On cross-examination she testified that she believed the conversation took place in March 2008 (which, per Sara's own testimony, would have been at least three to four months after defendant moved out of her apartment[1]).

¶ 6 In November 2009, E.F. spoke with teachers, Department of Children and Family Services (DCFS) personnel, and the police about defendant's alleged sexual misconduct. At that

[1] As noted, Sara testified that defendant lived in her apartment for about eight months and was living there in March 2007. Thus, he would have moved out of the apartment no later than November 2007.

point, Sara learned that E.F. retracted her initial accusation because defendant had threatened to harm E.F. or her family if E.F. told anyone what he had done to her.

¶ 7 Flor Rios testified that she was an elementary school teacher. On November 5, 2009, three female students told her that E.F. was claiming to be pregnant. Rios asked E.F. if she was saying that she was pregnant. E.F. responded that she was not pregnant. She told Rios that her mother's boyfriend had raped her. E.F. told Rios that Mauricio was the name of the person who had raped her. Rios reported E.F.'s accusation to DCFS. Analia Cobrda, an investigator with DCFS, testified that she spoke with E.F. for about 10 to 15 minutes on November 9, 2009. E.F. indicated that she had been raped by her mother's former boyfriend, Mauricio.

¶ 8 Timothy Ives, a detective with the Waukegan police department, testified that he interviewed E.F. on November 13, 2009. A video camera recorded the interview, and the recording was played at the hearing. During the interview, E.F. stated that when she was seven or eight years old defendant touched her private parts. According to E.F., defendant placed his "dick" both inside and on the outside of her vagina. He did not touch her anywhere else with his "dick." This occurred almost every day while defendant was living with E.F. and her family. E.F. indicated that it was painful and that she still felt pain when she went to the bathroom. E.F. resisted, kicking defendant's "balls." Defendant hit her. Defendant also grabbed her, leaving a mark on her arm. She stated that the mark was still there. Ives testified that he did not observe any injuries to E.F. E.F. also told Ives that defendant would touch her "vagina" with his hand over her clothing.

¶ 9 E.F. told Ives that defendant threatened to kill her if she told her mother what he had done to her. E.F. stated that she told her grandmother, but that her grandmother did not believe her. Neither her mother nor her grandmother contacted the police. E.F. indicated, however, that

on one occasion she called the police herself. A police officer responded, but E.F. did not tell the officer why she had called. Ives testified that he had been unable to find a police report to corroborate that such a call had been made.

¶ 10 At trial, E.F. testified that defendant would have her come to the bedroom he shared with her mother. He would lock the door and start kissing her and touching her breasts. He would then take her pants and underwear off and put his penis on her vagina. E.F. testified that this occurred more than five times. On two occasions, defendant put his penis in E.F.'s mouth. He also touched her vagina with his hand. E.F. told Sara and Sanguma what defendant was doing to her, but they did nothing about it. E.F. also told her fourth-grade teacher. E.F. recalled speaking with Ives. She testified that she did not tell Ives about everything that defendant had done to her. She also testified that her statement to Ives that on one occasion she had called the police was not true. Sara and Sanguma testified at trial about what E.F. had told them, and the recording of Ives's interview with E.F. was played for the jury. Rios and Cobrda did not testify at trial.

¶ 11 Andy Ulloa, a detective with the Waukegan police department, testified that he interviewed defendant. Before doing so, Ulloa advised defendant of his *Miranda* rights and defendant signed a form written in Spanish, acknowledging that he understood those rights. Defendant told Ulloa that he had put E.F.'s hand on his penis. He also told Ulloa that he had put his penis in E.F.'s mouth and between her legs. Defendant prepared a written statement in Spanish describing these events. Ulloa translated defendant's written statement into English and read it to the jury.

¶ 12 Defendant testified on his own behalf. He denied putting his penis in E.F.'s vagina or her mouth. He also denied telling Ulloa that he had done so. Defendant claimed that Ulloa had not

advised him of his *Miranda* rights. He also denied writing the statement that Ulloa translated and read to the jury.

¶ 13 We first consider defendant's argument that the trial court erred in admitting E.F.'s hearsay statements to Sara, Sanguma, and Ives. The admissibility of these statements is governed by section 115-10 of the Code (725 ILCS 5/115-10 (West 2012)). Section 115-10 provides, in pertinent part, as follows:

> "(a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13 ***, the following evidence shall be admitted as an exception to the hearsay rule:
>
> (1) testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another; and
>
> (2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.
>
> (b) Such testimony shall only be admitted if:
>
> (1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and
>
> (2) The child *** either:
>
> (A) testifies at the proceeding; or
>
> (B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement; and

> (3) In a case involving an offense perpetrated against a child under the age of 13, the out of court statement was made before the victim attained 13 years of age or within 3 months after the commission of the offense, whichever occurs later, but the statement may be admitted regardless of the age of the victim at the time of the proceeding.
>
> (c) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, *** the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.
>
> (d) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement." 725 ILCS 5/115/10(a) (West 2014).

¶ 14 Defendant argues that the trial court erred in finding that E.F.'s out-of-court statements were sufficiently reliable to be admissible under section 110-15. Defendant contends that E.F.'s out-of-court statements were not consistent. Defendant notes that, according to Sanguma, E.F. initially stated that defendant had not penetrated her. According to Sara, however, E.F. reported that defendant had penetrated her "just a little." Later statements indicated repeated penetration. E.F. recanted her initial accusations but subsequently indicated that the recantation was false. Defendant contends that E.F. lied when she told classmates that she was pregnant and when she told Ives about having called the police on one occasion.

¶ 15 The State bears the burden of establishing that the statements it seeks to admit pursuant to section 115-10 were reliable and not the result of adult prompting or manipulation. *People v.*

Sharp, 391 Ill. App. 3d 947, 955 (2009). The trial court's reliability determination will not be reversed unless the record shows that the trial court abused its discretion. *Id.* " 'An abuse of discretion occurs when the [court's] ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view.' " *Id.* (quoting *People v. Robertson*, 312 Ill. App. 3d 467, 469 (2000)).

¶ 16 When reviewing the trial court's decision to admit out-of-court statements under section 115-10, we consider the totality of the circumstances. *People v. Stull*, 2014 IL App (4th) 120704, ¶ 85. Relevant factors include "(1) the child's spontaneity and consistent repetition of the incident; (2) the child's mental state; (3) use of terminology unexpected of a child of similar age; and (4) the lack of motive to fabricate." *People v. Simpkins*, 297 Ill. App. 3d 668, 676 (1998). Our supreme court has observed:

> "[V]ictims of sexual abuse are often threatened not to tell anyone about the abuse, and that such threats may explain a child's delay in reporting abuse. [Citation.] In addition, our courts have recognized that child victims of sexual abuse are often reluctant to discuss the abuse with anyone other than their mothers. [Citation.] Thus, as a general rule, delay in reporting abuse or initial denials of abuse will not automatically render a victim's statements inadmissible under section 115-10." *People v. Zwart*, 151 Ill. 2d 37, 45-46 (1992).

¶ 17 Just as threats can lead a child to initially deny abuse, threats can also lead a child to retract a truthful accusation. Moreover, like an initial denial, a recantation does not necessarily preclude a finding of reliability. *Stull*, 2014 IL App (4th) 120704, ¶ 87 (even if certain statements by the alleged victim represented a recantation, the reviewing court would still

conclude that the trial court's ruling that the alleged victim's initial incriminating statements were reliable was not an abuse of discretion).

¶ 18 We note that, in ruling that E.F.'s out-of-court statements were admissible under section 115-10, the trial court recognized that there were discrepancies in those statements, but did not find the discrepancies serious enough to compel the conclusion that the statements were unreliable. Considering the totality of the circumstances, and not merely how consistent E.F.'s out-of-court statements were, we cannot say that the trial court's ruling was an abuse of discretion. It is not surprising that E.F.'s level of comfort discussing certain details of defendant's conduct would vary over time. Similarly, it might have been easier (or perhaps in some instances more difficult) for E.F. to discuss certain details with family members than with teachers, social workers, or law-enforcement officials. Overall, however, although certain details varied, E.F.'s statements were fairly consistent with respect to the general nature of the abuse she suffered.[2]

¶ 19 Circumstances that tend to establish reliability include the spontaneity of E.F.'s initial statements to Sanguma and Sara. In addition, the trial court expressly found that the timing of the statements supported their reliability. We realize that there was conflicting evidence about when E.F. first came forward to accuse defendant of abusing her. Sanguma testified that E.F.

[2] The trial court indicated that it would not expect a child to use precisely the same words each time he or she discussed an incident of abuse. The court added that, were a child to do so, his or her statements would be more questionable. Defendant contends that the trial court's reasoning "turns the concept of reliability on its head." In our view, however, the trial court's observation merely reflects the possibility that a child who repeats the same account with no variation has been coached.

spoke with her about a year after defendant moved away. In contrast, Sara testified that E.F. revealed the abuse only days after defendant moved out. We note that Sara's testimony supports the trial court's finding and that defendant does not argue that the timing of E.F.'s initial statements diminishes their reliability.

¶ 20 Moreover, the record shows that E.F.'s statements to Ives were not the product of suggestive interviewing techniques. Nor does it appear that E.F. had any motive to falsely accuse defendant. In addition, E.F. used age-appropriate language when describing defendant's conduct.

¶ 21 We next consider defendant's argument that the clerk of the circuit court improperly imposed fines that were not part of defendant's sentence and imposed fees or fines that were either miscalculated or not authorized by law. It is well established that the clerk of the court lacks the authority to impose a fine. See *People v. Evangelista*, 393 Ill. App. 3d 395, 401 (2009). Here the record shows amounts assessed by the clerk designated "Arrestee Medical," "Child Advocacy Center," "Drug Court Fee," "Sex Offender [Investigation]," "Sexual Assault Service," "Specialty Court," "Victims, Crim Assist," and "County." The State acknowledges that each of these items has been held to be a fine. See *People v. Graves*, 235 Ill. 2d 244, 254-55 (2009) (specialty court assessment); *People v. Jernigan*, 2014 IL App (4th) 130524, ¶¶ 37-38 (medical assessment); *People v. Smith*, 2014 IL App (4th) 121118, ¶¶ 75-81 (sexual-assault assessment and sex-offender assessment); *People v. Wynn*, 2013 IL App (2d) 120575, ¶¶ 10, 17 (Children's Advocacy Center assessment and "County" assessment); *Evangelista*, 393 Ill. App. 3d at 401 (Violent Crime Victims Assistance Fund assessment and drug-court assessment). The State and defendant agree that, although the clerk lacked authority to impose these fines, they are mandatory and we may impose the fines or we may remand to the trial court to impose them.

¶ 22 Defendant also argues that the clerk had no statutory authority to assess amounts designated "Clerk Operation Fund" and "DNA Test Clerk's Fee" and that the clerk miscalculated the amount of the State's Attorney fee assessed pursuant to section 4-2002 of the Counties Code (55 ILCS 5/4-2002(a) (West 2012)). The State concedes that there was no statutory authority for the "Clerk Operation Fund" and "DNA Test Clerk's Fee" assessments—which must therefore be vacated—and that the State's Attorney fee was not calculated correctly. Defendant and the State are also in agreement that the clerk miscalculated the arrestee medical fine, the Children's Advocacy Center fine, the "County" fine, the drug-court fine, the sex-offender fine, the sexual-assault fine, the specialty court fine, and the Violent Crime Victims Assistance Fund fine.

¶ 23 The State further notes that the clerk improperly imposed a fine created to defray the expense of expunging juvenile records (see 730 ILCS 5/5-9-1.17 (West 2012)). The State notes that no such fine was provided for by law when defendant committed the offenses against E.F. Thus, as the State correctly observes, the imposition of this fine not only exceeded the authority of the clerk of the court, but also violated the constitutional prohibition against *ex post facto* laws. See *Smith*, 2014 IL App (4th) 121118, ¶ 61.

¶ 24 As noted, when the clerk of the court improperly imposes a fine that is mandatory, the fine must be vacated, but may be reimposed by this court or, on remand, by the trial court. Both the State and defendant agree, as do we, that a remand would be preferable in this case. The State also notes that the trial court erred in failing to impose the mandatory "surcharge" required pursuant to section 5-9-1(c) of the Unified Code of Corrections (730 ILCS 5/5-9-1(c) (West 2012)). On remand, trial court must impose this surcharge. Finally, the parties agree, as do we, that delinquency penalties assessed by the clerk were based on improperly calculated fees and fines. The delinquency penalties must be recalculated.

¶ 25 To summarize, we affirm defendant's convictions but vacate those fines identified above that were improperly imposed by the clerk of the circuit court. We remand to the circuit court with directions to impose those fines (and all mandatory assessments) in the proper amounts. We also vacate the State's Attorney fee and direct the trial court to impose that fee in the proper amount. We vacate the Clerk Operation Fund assessment, the DNA Test Clerk's Fee; and the juvenile-expungement fine; those items shall not be reimposed on remand. Finally, we vacate the delinquency penalties imposed by the clerk. Those penalties shall be recalculated on remand.

¶ 26 As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 27 Affirmed in part and vacated in part; cause remanded with directions.