2018 IL App (1st) 151886-U

THIRD DIVISION
February 28, 2018

No. 1-15-1886

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11 CR 13530-01
	)	
JOSE HERNANDEZ,	)	
	)	
Defendant-Appellant.	)	The Honorable
	)	Gregory R. Ginex,
	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's trial counsel was not ineffective for failing to file a motion to suppress that would not have succeeded, and defendant's constitutional challenges to the Sex Offender Registration Act and related statutes also failed. However, the order requiring testing for sexually transmitted diseases was improperly issued, and this court granted defendant's request to vacate the order. Likewise, the State correctly noted that defendant's sentence for criminal sexual abuse improperly merged into that for attempted criminal sexual assault. This court granted the State's request to remand for imposition of a sentence, rendering defendant's argument about the mittimus moot. The judgment was affirmed in all other regards.

¶ 2 Following a bench trial, defendant Jose Herenandez was found guilty of the attempted criminal sexual assault of his mentally disabled nephew and sentenced to six years in prison plus a mandatory lifetime registration as a sexual predator. Defendant appeals arguing that police provided incorrect *Miranda* warnings and his trial counsel was therefore ineffective for failing to file a motion to suppress his inculpatory statement. He also contends the mandatory registration as a sex offender violates his constitutional right to due process, the trial court erred in ordering that he be tested for sexually transmitted diseases (STDs), and that the mittimus must be corrected to reflect only the conviction for which he was sentenced. For the reasons to follow, the judgment is affirmed in part, vacated in part, and remanded with directions.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested for the above-stated offense after he attempted to have anal sex with his 27-year-old nephew, R.E. The parties stipulated that R.E. suffered from a severe form infantile autism and mental retardation that left him essentially immobile absent assistance, as he had the developmental age of a two-year-old. He could not dress himself, speak, or use the bathroom by himself. Dora, R.E.'s mother, testified at trial through a Spanish interpreter that she went to the basement area under her apartment in search of R.E., and found him in defendant's room, where defendant was dropping his pants as he leaned over with his bare buttocks pointed towards R.E. Defendant reached back for R.E., who stood behind him, and R.E.'s penis was hanging out of his unzipped pants. Dora then confronted defendant, who apologized while also pulling up his trousers. Dora threatened to call the police, and defendant then apologized a third time, requesting that she not do so. The State had Dora identify various photographic exhibits of the scene.

¶ 5 As stated, defendant was subsequently arrested for the offense. Sergeant Eduardo Zamora, a fluent native Spanish speaker, read defendant his *Miranda* rights in Spanish from a preprinted form containing both English and Spanish, and defendant initialed and signed the form. Defendant then made an oral statement to Sergeant Zamora that on the day in question R.E. followed defendant into the basement, and defendant noticed R.E. was "playing *** with himself." Defendant believed R.E. needed to use the bathroom and took him there even though Dora testified defendant had never done so during the time he was with their family. Defendant stated that he unzipped R.E.'s pants and pulled out R.E.'s penis, holding it for about 20 or 30 seconds. Defendant stated that during that time, he wondered what it would be like to have R.E.'s penis inside of him, so he pulled down his pants, backed towards R.E., and bent over, wondering again what it would be like to have R.E.'s penis inside of him. R.E.'s penis remained limp, and it was then that Dora walked in on them, becoming hysterical. Defendant stated he was sorry because he knew what he was doing and the thoughts that he was having were wrong.

¶ 6 The parties stipulated that a sexual assault kit was performed on R.E. at the hospital, and semen matching R.E.'s DNA profile was recovered from his underwear.

¶ 7 Defendant testified on his own behalf through an interpreter that he stopped by the basement, where he lived, to pick up some clothes and accordion parts. R.E. entered the basement and pulled on defendant while touching his pants and directing defendant to a toilet in the basement. Although defendant had never assisted R.E. in using the bathroom before, defendant took R.E. to the bathroom, and pulled R.E.'s penis out of his pants and held R.E.'s penis for a few seconds, but R.E. did not urinate, so defendant left R.E. to change his clothes in his room. As defendant was about to change, R.E. entered the room, and R.E. was beside him, although on cross, defendant testified R.E. was behind him. Defendant pulled down his own

pants and underwear in an effort to change when Dora walked in. Defendant denied he ever reached back or grabbed R.E. by the legs or thighs. He did not grab R.E.'s penis and try to put it in his anus, and there was no contact between the two. Defendant apologized not because of any sexual assault but because Dora had seen him naked. While defendant admitted speaking to police, he denied telling them anything incriminating.

¶ 8 In issuing its detailed determination of guilt, the trial court found Dora "very credible", especially as compared to defendant. The court specifically found it incredible that defendant would help his nephew use the bathroom but then decline to clothe R.E. afterwards and also choose to change his own clothing knowing R.E. was by his side. The court found defendant instead "took advantage of the situation" when he discovered R.E. alone. The court additionally pointed to the semen found in R.E.'s pants as evidence of the crime, which was corroborated by Sergeant Zamora's testimony that defendant held R.E. for some 30 seconds. The court finally found Sergeant Zamora's testimony credible that defendant knew what he was doing was wrong. The court found defendant guilty of both criminal sexual abuse (counts five and six) (720 ILCS 5/11-1.50(a)(2) (West 2010)), in that defendant touched R.E.'s penis for his own sexual arousal or gratification without R.E. able to understand the nature of the act, and attempted criminal sexual assault (counts seven and eight) (720 ILCS 5/8-4(a) (West 2010); 720 ILCS 5/11-1.20(a)(2) (West 2010)), in that defendant attempted to pull R.E.'s penis towards his anus.

¶ 9 The court sentenced defendant on count seven to six years in prison and merged the remaining counts, citing as a basis the one-act, one-crime rule. Defendant was ordered to register as a sexual predator for life under the Sex Offender Registration Act (730 ILCS 150/1 *et seq*. (West 2014)) (SORA) and undergo STD testing, particularly for HIV. Defendant now appeals.

¶ 10 ANALYSIS

¶ 11 Defendant first argues police provided deficient *Miranda* warnings by informing defendant that he had the right to appointed counsel "before an interrogation" when it exists both before and during an interrogation. Defendant therefore argues his trial counsel was ineffective in failing to file a motion to suppress defendant's inculpatory statement and asks that we remand the case for a new trial.

¶ 12 Initially, the State responds that the record on direct appeal is insufficient to support defendant's ineffective assistance of counsel claim.[1] See *People v. Bew*, 228 Ill. 2d 122, 134 (2008) (ineffective assistance of counsel claims are preferably brought on collateral review rather than on direct appeal). Prior to trial, defendant was assigned a public defender who filed a motion to suppress statements. At a status hearing, the public defender withdrew the motion to suppress and was granted leave to withdraw from the case because private counsel, who was also present at that status hearing, filed an appearance on defendant's behalf. The public defender handed over discovery and medical records, and private counsel never filed a subsequent motion to suppress. The State notes that the original motion is not part of the present record. However, the *Miranda* form from which the police read defendant his rights appears in the record as the State's exhibit 9, and Officer Zamora identified this form in open court and also testified that defendant had placed his initials next to each right, acknowledging his understanding. It is this form, not the actual motion to suppress, which forms the basis of defendant's ineffective assistance claim of improper *Miranda* warnings. The record is therefore adequately developed to address the matter.

[1] The State relies on *People v. Hughes*, 2015 IL 117242, ¶ 44-46, to assert that defendant affirmatively waived his *Miranda* argument. Defendant, however, raises the *Miranda* argument in the context of an ineffective assistance of counsel claim. *Hughes* addressed waiver of an involuntary confession claim, and ineffective assistance of counsel was not at issue, so we therefore find it inapposite.

¶ 13 Nonetheless, in considering the form, we agree with the State that defendant's ineffective assistance of counsel claim must fail. To prevail on such a claim, a defendant must show both that his counsel was deficient and that this deficiency prejudiced the defendant. *Bew*, 228 Ill. 2d at 127. In order to establish prejudice resulting from failure to file a motion to suppress, a defendant must show the unargued suppression motion is meritorious, and that a reasonable probability exists showing the trial outcome would have been different had the evidence been suppressed. *People v. Henderson*, 2013 IL 114040, ¶ 15; *Bew*, 228 Ill. 2d at 128-29.

¶ 14 Defendant submits the *Miranda* form notified him in English and Spanish of his right to remain silent, that anything he said could be used against him in court, and "You have the right to talk to a lawyer before we ask you any questions and have him with you during questioning" ("Usted tiene el derecho de hablar con un abogado antes de que se le haga pregunta alguna, y de tener un abogado presente durante la interrogacion"), and "If you cannot afford a lawyer, one will be appointed for you before any questioning" (Si usted no puede pagar a un abogado, uno se le asignara, antes de una interrogacion).[2] Defendant faults Officer Zamora for failing to inform defendant that he had a right to appointed counsel *during* the interrogation, as well. As defendant acknowledges, there is no precise formula for conveying *Miranda* warnings. *Florida v. Powell*, 559 U.S. 50, 60, 64 (2010); *People v. Macias*, 2015 IL App (1st) 132039, ¶¶ 44, 50. What matters is that the words, read in their totality, reasonably conveyed to defendant his rights required by *Miranda*. *Id*. Here, the warnings considered together conveyed to defendant his right to have an attorney – whether appointed or private – not only prior to any questioning but also during questioning. See *Powell*, 559 U.S. at 62-63. Nothing indicated defendant's right to

[2] Defendant also asks that we review a certified translation, attached to his brief, of the *Miranda* warnings. As this is not part of the record, and was not presented in the trial court, we decline to consider it. See *Cottrill v. Russell*, 253 Ill. App. 3d 934, 939 (1993) (attachments to briefs not otherwise of record are not properly before a reviewing court and cannot be used to supplement the record).

appointed counsel would be restricted after questioning commenced. *Id*. Rather, altogether with a commonsense reading, the words demonstrated defendant's right to appointed counsel carried forward through the interrogation. We agree with the State that the *Miranda* warnings allegedly provided were not flawed and thus defense counsel was not ineffective in declining to file a motion that would not have succeeded. See *Henderson*, 2013 IL 114040, ¶ 15.

¶ 15 We also agree with the State that regardless, defendant cannot establish prejudice because even absent defendant's admission to police, the trial court still would have reached the same result. See *Bew*, 228 Ill. 2d at 135 (*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice). Defendant does not challenge the sufficiency of the evidence but contends Dora was unreliable, pointing to minor discrepancies that were addressed at trial, and argues that the outcome of the trial would have been different absent his statement. We disagree, noting first that it is the job of the trial court to evaluate witness credibility, weigh evidence, and resolve evidentiary conflicts. See *People v. Domagala*, 2013 IL 113688, ¶ 34. Dora testified competently and consistently that she saw a pant-less defendant bend back towards and reach for her mentally disabled son, who was himself exposed, and the trial court believed her. That, together with the physical evidence of semen in R.E.'s underpants and defendant's own testimony, plus reasonable inferences flowing from the evidence, supported the guilty findings.

¶ 16 Moreover, as set forth above, in finding defendant guilty, the trial court largely focused on the internal inconsistencies in defendant's own testimony rather than his admission to police. The court only mentioned his statement in passing as corroborating the physical evidence showing R.E. had semen in his underpants, thus suggesting defendant's statement that he had held R.E.'s penis for some 30 seconds was accurate. And, the court made no mention whatsoever of defendant's statement to police when denying his motion for a new trial, instead

again pointing out that defendant's testimony at trial was wholly incredible. As the trial court did not rely on defendant's statement in finding him guilty, we conclude the outcome of trial would not have been different if the statement had been suppressed.

¶ 17 Finally, we note that defense counsel zealously advocated on defendant's behalf. See *People v. Ingram*, 382 Ill. App. 3d 997, 1006 (2008) (we look to the totality of counsel's conduct). Defense counsel requested mental health records on the victim, and provided a detailed opening and closing statement. He cross-examined the witnesses, revealing inconsistencies, and argued in detail for a directed finding at the close of the State's case. In addition, counsel filed a motion for a new trial and motion to reconsider defendant's sentence. It is noteworthy, too, that counsel knew defendant's appointed counsel previously had filed a motion to suppress, which she withdrew, yet private counsel declined to refile such a motion, perhaps recognizing there was no basis for it. See *Bew*, 228 Ill. 2d at 127 (whether to file a motion to suppress is generally a matter of trial strategy, which is entitled to great deference). Instead, knowing Sergeant Zamora did not record defendant's oral statement, counsel made a strategic decision to highlight defendant's testimony that he did not reveal incriminating information when willingly talking to police. Counsel argued the Seargent Zamora's testimony was not reliable, and defendant's willingness to talk to the police lent credence to defendant's own claim that Dora misunderstood what she saw. In short, defendant's ineffective assistance of counsel claim fails.

¶ 18 Defendant next raises a number of constitutional challenges to SORA (see 730 ILCS 150/1 *et seq*. (West 2014)) and the concomitant Sex Offender Community Notification Law (Notification Law) (730 ILCS 152/101 *et seq*. (West 2014)).[3] We first note that statutory

[3] Defendant refers to SORA as a "statutory scheme" since regulations of sex offenders arise in various statutory contexts. See, e.g., 720 ILCS 5/11-9.4-1(b), (c) (West 2014) (making it unlawful for a sexual predator or child sex

enactments are presumed constitutional, and it is the duty of the court to construe a statute so as to affirm its constitutionality if such a construction is reasonably possible. *People v. Cornelius*, 213 Ill. 2d 178, 189 (2004). If a statute's construction is doubtful, a court should resolve that doubt in favor of the statute's validity. *Id*. at 189-90. Defendant, as the party challenging the validity of the statute, bears the burden of clearly establishing its unconstitutionality. *Id*. at 191.

¶ 19 Defendant specifically contends his mandatory registration as a sex offender and life-time registration as a sexual predator violates his constitutional right to substantive and procedural due process and is also unconstitutional as a disproportionate penalty. See 730 ILCS 150/2(A)(1)(a) and (B)(1) ("sex offender" includes one convicted of attempted criminal sexual assault and criminal sexual abuse); 730 ILCS 150/2 (E)(1) (West 2014) ("sexual predator" includes one convicted of attempted criminal sexual assault); 730 ILCS 150/7 (West 2014). Defendant argues the onerous regulations under SORA – such as requiring DNA submission and also registration with law enforcement authorities in the relevant jurisdiction of his address, phone, employer, school, email, internet identities, and travel itinerary, etc. – all lack a rational basis in violation of his right to substantive due process. See 730 ILCS 150/3 (West 2014); 730 ILCS 150/8 (West 2014). He also argues that the lack of an individualized assessment as to the risk of reoffending violates procedural due process. Defendant adds that procedural due process "demands some mechanism for sex offenders to petition for relief from a lifetime of restrictions." Finally, defendant contends the lifelong restrictions imposed absent individual assessment are disproportionate penalties to the crime. While the State initially challenges defendant's standing, we need not address that argument because, as the State notes, defendant's contentions conclusively fail on the merits. See *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶¶ 38,

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offender to knowingly be present in public parks or loiter nearby); 730 ILCS 5/5-5-3(o) (West 2014) (requiring sex offenders to annually renew their driver's licenses); see also 735 ILCS 5/21-101 (West 2014) (prohibiting sex offenders from name changes).

43 (finding the defendant had standing to raise eighth amendment and due process challenges to SORA and the Notification Law); *but see In re A.C.*, 2016 Il App (1st) 153047, ¶ 24 (no standing to challenge SORA penalty provision).

¶ 20 That is, defendant's arguments have already been raised and disposed of in a number of cases. We rely principally on the more recently-decided *Avila-Briones*, 2015 IL App (1st) 132221, and the cases cited therein. See also *People v. Parker*, 2016 IL App (1 st) 141597 and *People v. Pollard*, 2016 IL App (5th) 130514 (both following *Avila-Briones* and relevant precedent). In *Avila-Briones*, this court held that SORA's regulatory scheme did not implicate fundamental rights and, while perhaps over-inclusive as it failed to assess each registrant's likelihood of reoffending, was rationally related to a legitimate state interest of protecting the public from sex offenders such that it did not violate substantive due process. 2015 IL App (1st) 132221, ¶¶ 81, 86; see also *In re J.W.*, 204 Ill. 2d 50, 72 (2003) (rejecting juvenile's substantive due process claim after finding SORA did not implicate a fundamental right and had a rational basis to protect the public from sex offenders); *People v. Malchow*, 193 Ill. 2d 413, 420 (2000) (upholding SORA and Notification Law). The *Avila-Briones* court held that whether the statute is finely-tuned to the threat of sex-offender recidivism was not an appropriate question for rational-basis review, especially given the limited record before it, but rather a question for the legislature. *Id*. ¶ 84; see also *In re J.W.*, 204 Ill. 2d at 72. The *Avila-Briones* court similarly held that SORA did not violate the defendant's right to procedural due process, as the sex offender registration was triggered by the offender's conviction alone, and the offenders' likelihood to reoffend was irrelevant. *Id*. ¶¶ 91-92; see also *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 7 (2003) (holding, the sex offender registration turns on offender's conviction alone, "a fact that a convicted offender has already had a procedurally safeguarded opportunity to

contest"). Finally, the *Avila-Briones* court held that even assuming SORA's statutory scheme constituted punishment, it did not violate the eighth amendment or the proportionate penalties clause. *Id*. ¶ 51; *but see People v. Tetter*, 2018 IL App (3d) 150243, ¶ 80 (finding otherwise). Moreover, the supreme court has repeatedly held that SORA's requirements do not constitute punishment. *People v. Cardona*, 2013 IL 114076, ¶ 24; *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 203 (2009) (and cases cited therein); see also *Smith v. Doe*, 538 U.S. 84, 103 (2003) (a State may make "reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences" and legislating with respect to certain sex offenders as a class did not make the statute punitive); *but see Tetter*, 2018 IL App (3d) 150243, ¶¶ 56, 69 (finding the sex offender statutes constitute punishment)..

¶ 21 We thus reject defendant's reliance on *State v. Pepitone*, 2017 IL App 3d 140627 (appeal allowed by *People v. Pepitone*, Ill., May 24, 2017). There, the third district held section 11-9.4-1(b) of the Criminal Code of 2012 (720 ILCS 5/11-9.4-1(b) (West 2012)), banning convicted sex offenders from public parks, was not a reasonable method of protecting the public and was therefore facially unconstitutional. *Id*. at ¶ 24. The court reasoned that provision was overly broad and punished innocent conduct. *Id*. at ¶¶ 23-24. Defendant urges this court to adopt this reasoning with respect to the various SORA provisions he is now challenging. However, for the reasons stated above, we find the *Avila-Briones* to be the more well-reasoned and legally sound approach and therefore decline defendant's invitation. Defendant's constitutional claims must fail.

¶ 22 Defendant next complains that the trial court erroneously ordered STD testing in violation of section 5-5-3(g) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3(g) (West 2014)). He notes section 5-5-3(g) mandates STD testing "whenever a defendant is

convicted" of certain enumerated offenses, including criminal sexual abuse or criminal sexual assault, but not including attempt. *Id*. The State does not dispute that attempt is not one of the enumerated offenses listed in the statute. Rather, the State responds that the test was authorized because defendant *should have been* sentenced on the criminal sexual abuse counts, but the court improperly merged those counts into defendant's sentenced-on count 7 for attempted criminal sexual assault. See *People v. Franklin*, 135 Ill. 2d 78, 106 (1990) (a defendant must be convicted of an offense *before* he can be sentenced, and a judgment is not final without a sentence). The State elaborates that the criminal sexual abuse as charged and proven occurred when defendant touched R.E.'s penis for the purpose of sexual arousal or gratification while in the bathroom, and this was a separate act from the attempted criminal sexual assault, which occurred when defendant attempted anal intercourse with R.E. in his bedroom. Citing *People v. Traufler*, 152 Ill. App. 3d 987, 991-92 (1987), the State argues criminal sexual abuse was not a lesser-included offense, thus precluding the merger. The State asks that we remand the matter so that the trial court can sentence defendant on the criminal sexual abuse count for which he was found guilty. The State then circles back, arguing defendant's claim that STD testing was not statutorily authorized is therefore moot because section 5-5-3(g) conclusively permits STD testing where one is convicted of criminal sexual abuse.

¶ 23 Defendant initially responds that the State forfeited its argument about improper merger by failing to raise the issue below. We disagree, as the supreme court has carved out an exception for remand where counts are improperly merged, apparently notwithstanding the State's forfeiture of the issue in the trial court. In *People v. Dixon*, 91 Ill. 2d 346 (1982), the appellate court reversed the defendant's armed violence conviction, but affirmed his aggravated battery conviction. The State argued that the appellate court should have remanded the case on

defendant's unsentenced conviction of mob action.[4] The supreme court noted the general rule that a sentence is the final step in a criminal judgment without which an appeal ordinarily cannot be entertained as the judgment is not final. As such, under normal circumstances, the appellate court would have no authority to substantively review an unsentenced conviction. However, the supreme court found the situation in *Dixon* to be distinguishable because the trial judge had improperly merged the mob action conviction into the armed violence and aggravated battery convictions for which defendant was sentenced. The court stated that the charges all arose from separate but closely related acts. *Dixon* then cited Rule 615(b)(2) (73 Ill. 2d R. 615(b)(2))[5], permitting a reviewing court as part of its powers on appeal to "set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken." Seizing on the latter clause in Rule 615, the *Dixon* court held that the unsentenced conviction for mob action was "intimately related to and 'dependent upon' the appealed convictions" (for which the defendant had been sentenced), and as such, the appellate court was authorized to remand for imposition of a sentence on the mob action conviction. This was the case even though the defendant had not raised any issue concerning the propriety of his unsentenced mob action conviction on appeal. *Dixon* held that any other interpretation would lead to mischievous results because if a defendant's sentenced convictions were thrown out on appeal, he could potentially go unpunished even though technically found guilty and convicted of other crimes.[6]

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[4] The State also argued for remand of the disorderly conduct conviction, but then conceded before the supreme court that it was a lesser-included offense of mob action, and the defendant could not be concurrently sentenced for both crimes. For the sake of simplicity, we refer only to the mob action conviction.

[5] The current version of Rule 615(b) remains the same.

[6] *Dixon* implicitly rejected the notion that remand in such a case expanded the State's right to appeal. Supreme Court Rule 604(1) (eff. Dec. 11, 2014) identifies when the State can appeal in a criminal case: an order or judgment dismissing a charge (see 725 ILCS 5/114-1 (West 2014)); arresting judgment based on a defective indictment, information or complaint; quashing an arrest or search warrant; or suppressing evidence.

¶ 24 The supreme court very recently revisited *Dixon*'s reach in *People v. Relerford*, 2017 121094, ¶¶ 70-76, noting that *Dixon* applies only in limited factual circumstances, such as where there's improper merger in the trial court. *Relerford* additionally found that *Dixon* makes clear that an appellate court's "jurisdiction to address nonfinal convictions" is limited "to ordering a remand for imposition of sentences on the lesser convictions." *Id*. ¶ 75.

¶ 25 We believe the present case fits within the narrow constraints of *Dixon*, as described by *Relerford*. Here, the trial court improperly merged the unsentenced criminal sexual abuse conviction into defendant's attempted criminal sexual assault conviction, for which he filed the present appeal. Although the State did not raise improper merger before the trial court, forfeiture is a limitation on the parties and not on this court. See *People v. Yaworski*, 2011 IL App (2d) 090785, (overlooking the State's forfeiture of improper merger); *cf. People v. Betance-Lopez*, 2015 IL App (2d) 130521, (declining to overlook such forfeiture where on remand the defendant's conviction would require mandatory consecutive sentencing). In keeping with *Dixon*, we order the sentence for criminal sexual abuse to run concurrently with that for attempted criminal sexual assault.[7] See *Dixon*, 91 Ill. 2d at 356; see also 730 ILCS 5/5-8-4(a), (c) (West 2014); see also *People v. Castleberry*, 2015 IL 116916, ¶ 2 (Rule 615(b) "cannot be read as granting a plenary power to the appellate court to increase criminal sentences"). Moreover, defendant has not specifically identified any prejudice that results from remanding to complete his sentence.

[7] We note that criminal sexual abuse is a Class 4 felony, carrying 1 to 3 years' imprisonment. 720 ILCS 5/11-1.50(d) (West 2014); 730 ILCS 5/5-4.5-45(a) (West 2014). Attempted Criminal sexual assault is a class 1 felony carrying a sentence for a Class 2 felony (since it's attempt) of 3 to 7 years' imprisonment. 720 ILCS 5/11-1.20(b) (West 2014)). Attempt for a class 1 felony is a sentence for a class 2 felony. 720 ILCS 5/8-4(c)(3) (West 2014); 730 ILCS 5/5-4.5-35(a) (West 2014).

¶ 26 In reaching this conclusion, we are compelled to distinguish *People v. Ramos*, 339 Ill. App. 3d 891, 905 (2003). In *Ramos*, the trial court improperly merged two counts of aggravated discharge of a firearm into one count of aggravated battery with a firearm, and the State requested remand on the unsentenced, merged convictions. The second district held *Dixon* inapplicable because the State had forfeited the issue and had not filed a cross-appeal. The *Ramos* court asserted both the defendant and the trial court had been taken by surprise with the State's merger argument. *Ramos* reasoned that *Dixon* would only apply if the appellate court were to reverse the sentenced-on conviction of aggravated battery with a firearm, as occurred in *Dixon*. This was to avoid any crimes going unpunished.

¶ 27 We disagree with *Ramos*' interpretation of *Dixon*. *Dixon*'s principal holding was that Rule 615's plain language permitted a reviewing court to remand where there was improper merger. The avoidance of the "mischievous consequences" language relating to unpunished crimes served as additional reasoning underlying the opinion but also was *dicta*. This conclusion is supported by the other supreme court authority that *Dixon* relied on to reach its decision, *People v. Lilly*, 56 Ill. 2d 493 (1974), and *People v. Scott*, 69 Ill. 2d 85 (1977). *Lilly* addressed a trial court's error with respect to the one-act, one-crime rule, and *Scott* addressed the trial court's improper merger. Neither case involved vacation of a sentenced-on conviction. We find *Scott* particularly apt. There, the trial court improperly merged the defendant's conviction for aggravated kidnapping into a sentenced-on rape conviction. The appellate court affirmed all of defendant's sentenced-on convictions, including for rape, but remanded the case ordering the trial court to impose a sentence on the aggravated kidnapping count, too. The supreme court upheld the appellate court's actions, citing Rule 615, and noting the State's position that the defendant had raised the propriety of the aggravated kidnapping conviction on appeal, giving the State

reason to request remand for correction of the sentence. Relying on 615 and the power to modify the order from which an appeal is taken, *Scott* held the defendant was not punished for exercising his right to appeal because "in ordering the imposition of a sentence on the conviction on which no sentence had previously been imposed the appellate court did not increase defendant's punishment." *Scott*, 69 Ill. 2d at 88. *Scott* stated the effect of remand in such a case was to complete the trial court's order and render the judgment final. Thus, the concerns raised by *Ramos* with respect to surprise or unfairness seem to have been implicitly if not expressly brushed aside.

¶ 28 For the reasons set forth above, we grant the State's request for remand for the limited purpose of imposing a sentence on one of the criminal sexual abuse charges, and we also grant defendant's request to vacate the STD testing order because "attempt" is not a qualifying offense under section 5-5-3(g). See 730 ILCS 5/5-5-3(g) (West 2014)). Notably, we observe that section 5-5-3(g) does mandate STD testing for criminal sexual abuse convictions and requires that the court notify the defendant of the test results. 730 ILCS 5/5-5-3(g) (West 2014).[8] Defendant's contention as to the mittimus is moot since a new mittimus will issue on remand.

¶ 29 CONCLUSION

¶ 30 The judgment of the trial court is affirmed. As stated, the STD testing order is vacated, and the case remanded for sentencing on the criminal sexual abuse conviction with a new mittimus to issue and any relevant orders.

¶ 31 Affirmed in part, vacated in part, and remanded with directions.

[8] The cost incurred is clearly to cover the testing analysis and thus is a fee, not a fine, and is not punishment. See, *e.g.*, *People v. Guadarrama*, 2011 IL App (2d) 100072, ¶¶ 9, 13 (a fee is a compensatory charge in that it is imposed to recoup some of the costs incurred in prosecuting a defendant; a fine, in contrast, is a pecuniary punishment that is assessed against a defendant convicted of a crime and is part of the defendant's sentence).