2017 IL App (1st) 142743-U

No. 1-14-2743

Order filed September 29, 2017

Fifth Division

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. 12 CR 3646
	)	
BENJAMIN BUCKHALTER,	)	Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge, presiding.
	)	
	)	

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Reyes concurred in the judgment. Justice Lampkin dissented.

ORDER

¶ 1 *Held*: The evidence was sufficient to establish the element of force or threat of force necessary to support defendant's conviction for aggravated criminal sexual assault. The trial court did not err by giving the jury certain general criminal Illinois pattern jury instructions (IPI). The trial court did not abuse its discretion in sentencing defendant to 20 years' imprisonment for aggravated criminal sexual assault. The trial court erred in sentencing defendant beyond the statutory mandatory sentence of 15 years' imprisonment for criminal sexual assault.

¶ 2 Defendant Benjamin Buckhalter was charged with various counts of criminal sexual assault, criminal sexual abuse, and unlawful restraint of his stepdaughter, J.B., beginning when she was 16 years old. J.B. was impregnated by defendant and subsequently gave birth to their son. Following a jury trial, defendant was found guilty of one count of aggravated criminal sexual assault in violation of section 12-14(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/12-14(a)(2) (West 2010)), for committing an act of sexual penetration with J.B. by placing his penis in her vagina through the use of force or the threat of force, causing her bodily harm, *i.e.*, pregnancy. Defendant was also found guilty of one count of criminal sexual assault in violation of section 12-13(a)(3) of the Code (720 ILCS 5/12-13(a)(3) (West 2010)), for committing an act of sexual penetration with J.B., who was his family member and under 18 years of age, by placing his penis in her vagina.

¶ 3 The trial court denied defendant's motion for a new trial and sentenced him to 20 years' imprisonment on each count, to be served concurrently. Defendant was also sentenced to three-years-to-life mandatory supervised release. Defendant's motion to reconsider sentence was denied, and this appeal followed. For the reasons discussed below, we affirm as modified.

¶ 4 The State presented evidence that the defendant used the threat of physical force, backed up by prior instances of physical punishment he had inflicted on his stepdaughter, to make her perform sexual acts against her will. J.B. described defendant as the disciplinarian of the household, who used a belt to physically discipline her on prior occasions.

¶ 5 The State also presented evidence that defendant isolated J.B. and used a combination of the threat of physical force and psychological manipulation through the use of religion to control and coerce her. J.B. testified that during her sophomore year of high school, the defendant

removed her from school to be home schooled. Defendant would then sexually abuse J.B. when her younger siblings were at school and her mother was at work. Defendant told J.B. "how a husband and wife become as one, and they have intercourse." Defendant testified that he considered J.B. to be his second wife and "[a]ccording to the Bible *** it actually states that if a man lies with a woman, that's considered the marriage, in God's eyes. That's what I believe." Defendant testified that a wife has a duty to obey her husband.

¶ 6 Further evidence presented at trial detailed sexual activity between defendant and J.B., which progressed from defendant ordering J.B. to hug and lay on top of him, to vaginal intercourse. We need not recite all the details of this sexual activity; however, we will refer to certain of these details as they are relevant to our analysis.

¶ 7 ANALYSIS

¶ 8 Defendant first contends the evidence was insufficient to establish the element of force or threat of force necessary to support his conviction for aggravated criminal sexual assault arising from his sexual encounters with J.B. We disagree.

¶ 9 A criminal conviction will not be set aside on grounds of insufficient evidence unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). When reviewing the sufficiency of the evidence in a criminal case, we 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." *People v. Cooper*, 194 Ill.2d 419, 430-31 (2000). In reviewing a challenge to the sufficiency of the evidence, it is not our role to retry the defendant; rather, it is for the trier of fact to determine the credibility of the witnesses, the weight to be

given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Enis*, 163 Ill. 2d 367, 393 (1994).

¶ 10 Defendant was charged and convicted of aggravated criminal sexual assault under section 12-14(a)(2) of the Code (renumbered as section 11-1.30 by Pub. Act 96-1551, art. 2, § 5 (eff. July 1, 2011)), which required the State to prove, among other things, that the defendant committed an act of sexual penetration with J.B. by the use or threat of force. See, *e.g.*, *People v. Herring*, 324 Ill. App. 3d 458, 463 (2001) ("In order to find a defendant guilty of the offense of aggravated criminal sexual assault, the trier of fact must find that the accused committed an act of sexual penetration by the use of force or threat of force ***"). The Code defines "force or threat of force" as follows:

> " 'Force or threat of force' means the use of force or violence, or the threat of force or violence, including but not limited to the following situations:
>
> (1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat; or
>
> (2) when the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement." 720 ILCS 5/12-12(d)(1), (2) (West 2010).

¶ 11 "There is no definite standard setting forth the amount of force necessary to establish criminal sexual assault by the 'use of force,' and each case must be considered on its own facts." *People v. Mpulamasaka*, 2016 IL App (2d) 130703, ¶ 74. "Every act of sexual intercourse

involves force in the sense of energy or motion, but it cannot be said that every act of sexual intercourse involves force that will unlawfully 'overcome' the other participant or 'victim.' " *People v. Kinney*, 294 Ill. App. 3d 903, 908 (1998). Therefore, the "force" necessary to establish criminal sexual assault by the use of force requires something more than the force inherent in the sexual penetration itself. *People v. Alexander*, 2014 IL App (1st) 112207, ¶ 54. The requisite force necessary to sustain a conviction for aggravated criminal sexual assault can be established by evidence that the defendant used physical compulsion, or a threat of physical compulsion, which caused the victim to submit to the sexual penetration against his or her will. *People v. Denbo*, 372 Ill. App. 3d 994, 1005 (2007).

¶ 12 Defendant argues that the evidence was insufficient to sustain his conviction for aggravated criminal sexual assault arising from his sexual encounters with J.B. because the prosecution failed to present evidence demonstrating that he used force or the threat of force against J.B. at the precise time of the sexual encounter which resulted in her pregnancy. This argument is meritless.

¶ 13 The prosecution produced evidence establishing that the ongoing sexual abuse which ultimately resulted in J.B.'s pregnancy occurred approximately every two weeks starting in June 2008 when the victim was a 16-year old minor, and ended about a year later in June 2009, when the victim, who was still a minor, informed her mother that she was pregnant. The defendant's suggestion that the record fails to support a conclusion that the initial force or threat of force continued in every sexual encounter, implies that the force or threat of force initially imposed upon a sexually inexperienced minor by a father figure and disciplinarian somehow evaporated

over time and was somehow not necessarily in effect at the time the victim was sexually abused and impregnated by the defendant.

¶ 14 The thinking implicit in such an argument is one which supposes that in cases where a minor is subjected to ongoing and continual sexual abuse over time, at some point the victim feels less threatened by the continual exposure to the physical and psychological domination imposed upon her or him. The jury obviously disagreed with this implicit assumption, and so do we. By assuming the role of a father-figure and physical disciplinarian of a minor child, defendant had the power and authority over the victim inherent in a parent-child relationship. See, *e.g.*, *State v. Eskridge*, 38 Ohio St. 3d 56, 59, 526 N. E. 2d 304 (1988) ("The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose").

¶ 15 In this case, the use and threat of force had been firmly established by the defendant's practice of physical discipline. Defendant then abused his authority by requiring that his sexual instructions also be obeyed. It is likely that the victim J.B. would not initially differentiate one parental command from another.

¶ 16 The fact that this live-in predatory authority figure had constant and ongoing access to this minor child he raised as his daughter, before violating her trust by continually raping her, does not mean that at any point the threat of force implied by his authority had ever lessened. If anything, the passage of time would have afforded defendant countless opportunities to reinforce his authority and discipline over the minor victim. Our courts have determined that no bright line should be drawn between the ending of a sexual assault and the resulting bodily harm since

this would defeat the statutory purpose of protecting individuals from sexual predators. *People v. Colley*, 188 Ill. App. 3d 817, 820 (1989).

¶ 17 The issue of force in the context of criminal sexual assault is generally considered a factual issue to be decided by the trier of fact. *People v. Fosdick*, 166 Ill. App. 3d 491, 499 (1988). In this case, the trier of fact evidently concluded that the defendant did in fact use force or the threat of force against J.B. at the time of the sexual encounter that resulted in her pregnancy.

¶ 18 "It has repeatedly been held that a reviewing court in Illinois should not disturb a verdict on appeal where the jury, as the trier of fact, has determined the weight and credibility to be afforded a witness' testimony unless the determination is so unreasonable, improbable, or unsatisfactory as to raise a reasonable doubt of the defendant's guilt." *People v. Reed*, 84 Ill. App. 3d 1030, 1036 (1980). Here, the State's evidence was not so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt for aggravated criminal sexual assault. Viewing the evidence in a light most favorable to the State, as we must upon a challenge to the sufficiency of the evidence (*People v. Cunningham*, 212 Ill. 2d 274, 278 (2004)), we find there was more than sufficient evidence to establish the force element of aggravated criminal sexual assault arising from the defendant's sexual encounters with the victim. In sum, we find there was sufficient evidence for a rational trier of fact to find defendant guilty beyond a reasonable doubt of aggravated criminal sexual assault by the use or the threat of force under section 12-14(a)(2) of the Code.

¶ 19 Defendant next contends the trial court erred by giving the jury certain general criminal Illinois pattern jury instructions (IPI). Defendant argues he was denied a fair trial where the jury

was given an IPI issues instruction for aggravated criminal sexual assault which failed to specify whether the alleged use or threat of force was employed during the commission of the charged sexual assault. Defendant maintains that "the jury was never informed that the sexual act that occurred by force or threat of force had to be the same one that caused J.B.'s pregnancy."

¶ 20 Defendant contends that the defective jury instruction created a serious risk that the jury convicted him of aggravated criminal sexual assault because they did not understand the applicable law. Defendant concedes he forfeited the issue by failing to object at trial or raise it in his motion for a new trial. Defendant urges us to review the issue under the plain error doctrine and, in lieu of that, as an ineffective assistance of trial-counsel claim. However, trial counsel is not ineffective where a defendant is not prejudiced, nor is there plain error where we find no error. See *People v. Wilson*, 404 Ill. App. 3d 244, 247 (2010) ("There can be no plain error if there was no error at all; counsel cannot be ineffective for failing to challenge a correct instruction"). Because we find no error regarding the challenged jury instruction, defendant's claims of plain error and ineffective assistance of trial counsel based on the alleged errors necessarily fail, since without error, there was no prejudice.

¶ 21 "The purpose of jury instructions is to provide the jury with correct legal principles that apply to the evidence, thus enabling the jury to reach a proper conclusion based on the applicable law and the evidence presented in a case." *People v. Jackson*, 331 Ill. App. 3d 279, 290 (2002). "Jury instructions should not be misleading or confusing." *People v. Bannister*, 232 Ill. 2d 52, 81 (2008).

¶ 22 In criminal cases, "the IPI Criminal instruction shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 451(a) (eff. April 8, 2013); see also

Bannister, 232 Ill. 2d at 81 ("If IPI instructions contain an applicable instruction on a subject about which the trial court determines the jury should be instructed, the trial court must use that instruction, unless the court determines that the instruction does not accurately state the law"). "Illinois pattern instructions have been painstakingly drafted * * * so as to clearly and concisely state the law." (Internal quotation marks omitted.) *People v. Durr*, 215 Ill. 2d 283, 301 (2005). Therefore, "[t]rial judges should not take it upon themselves to second-guess the drafting committee where the instruction in question clearly applies." *Id*. The trial court is "allowed to deviate from the suggested instruction and format only where necessary to conform to unusual facts or new law." *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 40.

¶ 23 "It is within the sound discretion of the trial court to determine whether a non-IPI instruction should be given, and the trial court's determination will not be disturbed absent an abuse of that discretion." *People v. Jackson*, 331 Ill. App. 3d 279, 290 (2002). "In reviewing the adequacy of instructions, this court must consider the jury instructions as a whole to determine whether they fully and fairly cover the law." *People v. Nutall*, 312 Ill. App. 3d 620, 633 (2000). The trial court has the burden of seeing that the jury is instructed on all elements of the crime charged, the burden of proof, and the presumption of innocence. *People v. Roberts*, 182 Ill. App. 3d 313, 317 (1989). The failure to do so results in the denial of due process. *Id*. Here, the challenged jury instruction, considered with the other instructions bearing on same subject, fairly and accurately informed the jury of the applicable law.

¶ 24 The jury was given, without objection, the following definitional instruction for aggravated criminal sexual assault: "A person commits the offense of aggravated criminal sexual assault when he commits criminal sexual assault; and causes bodily harm to the victim." The

issues instruction provided that in order to sustain this charge, the State was required to prove the following propositions:

> "That the defendant committed an act of sexual penetration upon [J.B.];
>
> That the act was committed by the use of force or threat of force; and
>
> That the defendant caused bodily harm to [J.B.]"

¶ 28 Contrary to defendant's assertions, we do not believe that the issues instruction for this offense was rendered erroneous, misleading, or confusing by excluding the proposition that the requisite bodily harm (the pregnancy) occur "during the commission of the offense." The issues instruction clearly and distinctly listed each proposition the jury was required to find in convicting defendant of the charged aggravated criminal sexual assault. Defendant cites no case law or authority holding that a trial court either abused its discretion or erred by failing to add the phrase "during the commission of the offense," to the challenged issues instruction.

¶ 29 Defendant further contends that the issues and definitional instructions for the aggravated criminal sexual assault charge in question were in conflict because the definitional instruction did not include the element of the use or threat of force. Defendant claims it was important for the definitional instruction to include the force element in order to avoid confusion between the charge of aggravated criminal sexual assault and the charge of criminal sexual assault. Defendant argues the jury received incomplete and conflicting instructions on the key element of the State's burden of proof concerning the use or threat of force. We disagree.

¶ 30 Defendant appears to maintain that setting forth the element of the use or threat of force in the issues instruction for the aggravated criminal sexual assault charge in question, but not in

the definitional instruction for this offense, was somehow confusing to the jury. Defendant however overlooks the fact that the jury must consider the jury instructions as a whole.

¶ 31 "It is not necessary that a single instruction should state either all the law of the case or all the law on a given subject. * * * It is sufficient if the instructions, when considered as a whole, fully and fairly announce the law applicable to the theories of the prosecution and the defendant, respectively." (Internal quotation marks omitted.) *People v. Kelly*, 8 Ill. 2d 604, 616 (1956); see also *People v. Mills*, 40 Ill. 2d 4, 15 (1968) ("no single instruction is required to state all of the relevant law on a given subject").

¶ 32 Reviewing the jury instructions as a whole, and considering the instructions along with the parties' closing arguments and the trial court's oral instructions, which included instructions on the burden of proof and the presumption innocence, we find that the jury instructions clearly informed the jury that it could find defendant guilty of aggravated criminal sexual assault only if it concluded, beyond a reasonable doubt, that he engaged in an act of sexual penetration with the victim by the use or threat of force. Moreover, we also observe that during jury deliberations, the jury sent a note to the trial court requesting clarification on the issue of the "threat of force." In the note, the jury asked, "Does the threat of force include all of the below: Verbal threat, physical threat, implied threat. And in parentheses, not verbal, not physical but victim believes from prior events that a threat exists." The parties agreed that the trial court should instruct the jury to continue deliberating and review the jury instructions, and the court instructed the jury accordingly.

¶ 33 The jury ultimately found defendant guilty of criminal sexual assault and aggravated criminal sexual assault. There is no indication or suggestion in the record that the jury was

confused by the jury instructions or that they disagreed about the factual basis of defendant's guilt as to these separately-charged offenses. Defendant has failed to carry his burden of establishing either plain error or ineffective assistance of trial counsel.

¶ 34 Defendant finally challenges the concurrent 20-year sentences imposed for aggravated criminal sexual assault and criminal sexual assault. Defendant first contends the trial court abused its discretion in sentencing him to 20-years' imprisonment for aggravated criminal sexual assault, arguing the court failed to give adequate consideration to certain mitigating factors such as his limited criminal history, age (52 years old at the time of sentencing), and rehabilitative potential. Defendant also contends that his 20-year sentence for criminal sexual assault exceeds the statutory maximum for this offense and requests that we reduce his sentence to a term less than the maximum. We reject the former argument, but find merit in the latter.

¶ 35 Imposition of a sentence is a matter of judicial discretion. *People v. Perruquet*, 68 Ill. 2d 149, 153 (1977). Where a defendant's sentence is within statutory limits, a reviewing court will not alter the sentence absent an abuse of that discretion. *People v. Cabrera*, 116 Ill. 2d 474, 494 (1987). In this case defendant acknowledges that his 20-year sentence for aggravated criminal sexual assault falls within the statutory bounds of 6 to 30 years' imprisonment for this offense. See aggravated criminal sexual assault is a Class X felony (720 ILCS 5/12-14(d)(1) (West 2010)), with a sentencing range of 6 to 30 years in prison (730 ILCS 5/5-4.5-25(a) (West 2012)).

¶ 36 Where an imposed sentence is within the statutory range, it will not be found excessive unless there is an affirmative showing that the sentence varies greatly from the spirit and purpose of the law or manifestly violates constitutional guidelines; the spirit and purpose of the law are

promoted when a sentence reflects the seriousness of the crime and gives adequate consideration to defendant's rehabilitative potential. *People v. BoClair*, 225 Ill. App. 3d 331, 335 (1992).

¶ 37 In the instant case, there is nothing in the record which indicates the trial court ignored defendant's rehabilitative potential or any mitigating factors before he imposed sentence. The record indicates that at defendant's sentencing, the trial court acknowledged the presentence investigation report, which raises the presumption that the court took into account defendant's potential for rehabilitation. See *People v. Wilburn*, 263 Ill. App. 3d 170, 185 (1994). Our review of the record shows the trial court considered both mitigating and aggravating factors and arrived at a balance between society's need for protection and defendant's rehabilitative potential.

¶ 38 In regard to the 20-year sentence imposed for criminal sexual assault, we find the trial court abused its discretion in imposing this sentence because criminal sexual assault is a Class 1 felony (720 ILCS 5/12-13(b)(1) (West 2010)), with a sentencing range of 4 to 15 years' imprisonment (730 ILCS 5/5-4.5-30(a) (West 2012)). The 20-year sentence the trial court imposed was beyond the statutory maximum for this offense.

¶ 39 A sentence in excess of the applicable statutory maximum is void to the extent it exceeds that maximum. *People v. Rankin*, 297 Ill. App. 3d 818, 822 (1998). "The legally authorized portion of the sentence remains valid." *People v. Brown*, 225 Ill. 2d 188, 205 (2007). Since the trial court obviously intended to sentence defendant to the maximum term allowable for criminal sexual assault, we reduce defendant's sentence to the statutory maximum of 15 years' imprisonment. Pursuant to our authority under Illinois Supreme Court Rule 615(b)(4) (eff .Jan.1, 1967), we reduce defendant's sentence for criminal sexual assault to the applicable statutory

maximum of 15 years' imprisonment and order the clerk of the circuit court to issue a corrected mittimus reflecting that sentence.

¶ 40 Accordingly, for the foregoing reasons, we reduce defendant's sentence on his conviction for criminal sexual assault to 15 years' imprisonment and otherwise affirm the judgment of the circuit court of Cook County.

¶ 41 Affirmed as modified; mittmus corrected.

¶ 42 JUSTICE LAMPKIN, dissenting.

¶ 43 I respectfully dissent. Because I do not find there were sufficient facts to establish the element of force or threat of force necessary to support defendant’s conviction for aggravated criminal sexual assault as charged, I would reverse that conviction.

¶ 44 The majority fails to provide essential facts presented to the trial court.

¶ 45 At trial, J.B. identified defendant as her stepfather, whom she had lived with for as long as she could remember along with her mother, younger half sister, and two younger half brothers. According to J.B., defendant was the only father figure in her life and she referred to him as “Dad” until she was 15 years old, at which time he instructed her to address him as “Ben.”

¶ 46 J.B. recalled that, in June 2008, an incident occurred wherein defendant was lying on his back on the couch and he told J.B. to lie on top of him and give him a hug. J.B. “asked him why,” but defendant did not respond so she “just did it.” J.B. stated that she lay on top of defendant for about 20 seconds during which time he had his arms around her and his torso and lower half of his body were in contact with hers. J.B. stated that she complied with defendant’s request “because he was the disciplinarian in the household, and if [she] don’t [*sic*] do what [she]

was told, [she] would be punished." No one else was home at the time. J.B. elaborated that defendant was the disciplinarian for all of the children in the home and he would hit them across their hands with a belt if they disobeyed.

¶ 47 Approximately one week later, defendant called J.B. into his bedroom. They were alone in the home at the time. J.B. testified that defendant sometimes asked her to retrieve a snack or something to drink, so the request to enter his bedroom was not unusual. However, on this occasion, defendant told her to lie back on his bed with her legs hanging off the end of the bed. J.B. complied. Defendant then told her that he "wanted to make [her] his wife." According to J.B., she understood what defendant intended "from previous conversations, [wherein] he told [her] that, *** from the Bible, a man is able to have more than one wife, and he wanted to make [her] his wife." J.B. understood that a husband and wife become one by having intercourse. Defendant then instructed J.B. to pull down her pants and underwear. She "did as [she] was told." At the time, defendant was only wearing his boxer shorts. Once she removed her pants and underwear, defendant removed his boxer shorts. He was standing at the edge of the bed when he did so. According to J.B., she did not believe she could leave the room at that point "because if [she] left, then [she would have been] disciplined," possibly "using a belt." J.B. testified that defendant had disciplined her in the past with a belt. J.B. stated that defendant approached her while rubbing his penis with his hand and then rubbing her vagina with his hand. Without saying anything, defendant put his penis inside her vagina. J.B. told defendant that "it hurt" and told him to "stop," but he continued. Defendant then pulled his penis out and ejaculated on top of her vagina. Defendant was not wearing a condom. Defendant instructed J.B. to "go wash up." J.B. complied and entered the bathroom. She had not had sexual intercourse before the incident.

According to J.B., defendant told her that "no one else needs to know our business," which she understood to mean, "not to tell anyone." J.B. testified that, if she told someone, she believed defendant would find out and she would be disciplined as a result.

¶ 48 J.B. admitted that she did not try to leave the room during the incident nor did she yell or tell defendant to get off of her. J.B. additionally admitted that defendant did not threaten her or physically force her. Defendant did not have a weapon or anything in his hands at the time. J.B., however, testified that she did not believe she could run away or disobey defendant. J.B. noted that defendant was stronger and larger than her. She testified that defendant mentally forced her.

¶ 49 J.B. testified that, about two weeks later, in July 2008, a similar incident occurred. This time J.B's siblings were home, "in the back of the house, watching tv." Defendant instructed the children to remain in the back of the house watching television or reading a book. J.B. described the family apartment such that it could be divided into two parts by a door in the kitchen. Once the door was closed, leaving defendant and J.B. alone, defendant asked J.B. into his bedroom. When J.B. entered the bedroom, defendant pointed to the bed. Defendant did not say anything. J.B. testified that she lay back on the bed and "knew what he wanted to do." Defendant then put his penis in J.B.'s vagina and ejaculated inside her. Defendant told J.B. "he read in the Bible that a man isn't supposed to spill his seed." Defendant was not wearing a condom. He again instructed J.B. to "wash up."

¶ 50 Approximately every two weeks thereafter, defendant would instruct the younger siblings to stay in the back of the house and call J.B. into his bedroom. Defendant consistently pointed to the bed, J.B. would lie down, and defendant would insert his penis into her vagina. During that time period, defendant advised J.B. "a man can have more than one wife, and the wives are

supposed to obey the husbands." J.B. testified that she did not tell anyone about the incidents because she was ashamed. J.B. stated that she thought her mother would be mad if she informed her because J.B. did not report the first incident after it occurred.

¶ 51 J.B. testified that, in June 2009, she discovered she was pregnant. She was 17 years old at the time. J.B. informed her mother that she was pregnant, but identified the father as a boyfriend in the Navy. When defendant learned J.B. was pregnant, he said "this is our first child, and this is us becoming one." J.B. gave birth to a boy on February 23, 2010. J.B.'s mother named the child Daniel Buckhalter. No father was listed on Daniel's birth certificate. After Daniel's birth, J.B. returned to the home she shared with her mother, defendant, and her half siblings. She remained in the house until just after Daniel's first birthday. As she experienced "more conflict" with defendant in terms of him instructing her that she was his wife according to the Bible and she was required to obey him, J.B. spoke to a local pastor. Following that conversation, J.B. decided to leave the house, which she did in March 2011. J.B. moved into her older brother's house, but defendant refused to allow her to take Daniel.

¶ 52 In April 2011, J.B. reported the offenses to the police. Subsequent paternity testing revealed defendant was 99.9999% Daniel's father.

¶ 53 Detective Arnold Weddington testified that he interviewed J.B. on April 9, 2011. Based on that interview, Detective Weddington scheduled an interview with defendant on April 18, 2011. When confronted with the allegations against him, defendant denied that anything ever happened. Detective Weddington next interviewed defendant in January 2012. When Detective Weddington revealed the results of the paternity test to defendant, defendant said he had a feeling Daniel was his child. Defendant further stated that, based on his religion, he could have

two wives and J.B. was like his second wife. Defendant admitted he knew that J.B. had not had sexual intercourse prior to having intercourse with him. Defendant acknowledged having raised J.B. since she was one year old. According to defendant, J.B.'s mother was aware of his relationship with J.B. Detective Weddington testified he did not recall J.B. reporting that she told defendant to stop during the incident. Detective Weddington also could not recall whether J.B. said anything about defendant disciplining her with a belt. The State agreed to stipulate that there was nothing in the police reports regarding discipline with a belt.

¶ 54 Defendant testified that J.B. was not his stepdaughter. Defendant admitted he was married to Susie Mae Buckhalter, but denied knowing whether J.B. was her daughter. Defendant stated that he lived in a home with J.B. since 1999, but that he knew J.B. since 1991 or 1992 when J.B. was about 1 year old. Defendant denied pulling J.B. out of high school, but admitted being "a male figure" in her life. Defendant denied being her father figure and further denied that J.B. called him dad. Defendant, however, admitted J.B. did refer to him as dad around "Christmastime." According to defendant, he and J.B. were not home alone together often because his autistic child generally was at home. Defendant stated that he had sexual intercourse with J.B. when she was 18 or 19 years old. In June or July of 2009, defendant learned J.B. was pregnant. He believed the child was his until 2011 when J.B. stated that the child might belong to someone else. Defendant considered J.B. to be his second wife. According to defendant, the Bible "states that if a man lies with a woman, that's considered marriage, in God's eyes" and it is a wife's duty to obey her husband. Defendant denied being the disciplinarian in the house, but admitted he had control over setting household rules. Defendant additionally denied using a belt

to discipline the children, but admitted using a little piece of rubber on the children when they did not obey, including J.B. "when she was really young."

¶ 55 Turning now to the sufficiency of the evidence claim, I support the majority's recitation of the applicable law, adding that "[p]hysical resistance or demonstrative protestations are not necessary to demonstrate that a victim was forced to have sexual intercourse, and the absence thereof does not establish consent if the victim was threatened or in fear of being harmed." *People v. Mpulamasaka*, 2016 IL App (2d) 130703, ¶ 74. Our supreme court, however, has instructed that "a threat, by its very nature, must be communicated to the object of the threat." *People v. Giraud*, 2012 IL 113116, ¶¶ 14-15. "Thus, to act in a manner that threatens a victim, the offender must communicate the threat to the victim by word or deed. A risk of future harm is not a threat of harm." *Id*.

¶ 56 As stated by the majority, the State was required to prove defendant committed an act of sexual penetration by the "use of force or threat of force" *and* caused bodily harm[1] *during the offense*. 720 ILCS 5/12-14(a)(2) (West 2008); 720 ILCS 5/12-13(a)(1) (West 2008). Whether J.B.'s pregnancy occurred during the commission of the offense, in this case sexual penetration by use of force or threat of force, requires the application of the well-known maxims of statutory interpretation, which is subject to *de novo* review. *Giraurd*, 2012 IL 113116, ¶6. A reviewing court's primary objective is to ascertain and give effect to the legislative intent by applying the plain and ordinary meaning of the language itself. *Id*.

¶ 57 Considering the plain language of the statute under which defendant was charged, I respectfully disagree with the majority that there was sufficient evidence establishing defendant

[1] It is undisputed that "bodily harm" includes pregnancy. 720 ILCS 5/12-12(b) (West 2008).

used force or threat of force during the sexual incident resulting in J.B.'s pregnancy. Recently, in *Giraud*, 2012 IL 113116, the Illinois Supreme Court considered the timing element in the context of whether the defendant, who was HIV positive, committed aggravated criminal sexual assault insofar as, during the commission of the undisputed sexual assault, he threatened or endangered the life of the victim by exposing her to the risk of contracting HIV. More specifically, the question before the supreme court was whether the defendant's knowingly exposing the victim of a sexual assault to HIV constituted a threat or endangerment of her life during the commission of the offense. *Id*. ¶ 6. The supreme court concluded that threatening the victim's life would have required the defendant to communicate that he was HIV positive to the victim *at the time of the assault* and endangerment would have required that the victim actually become infected with the HIV virus *during the assault*. ¶¶ 14-16, 33-35. In so doing, the supreme court highlighted the fact that the aggravating circumstance must exist "while the offender is engaging in the conduct that constitutes the offense." *Id*. ¶ 13.

¶ 58 Based on the record on appeal, I would find the evidence was insufficient to sustain defendant's conviction of aggravated criminal sexual assault as charged. I recognize that the determination of the issue of force is a question of fact within the province of the fact finder. *People v. Fosdick*, 166 Ill. App. 3d 491, 498-99 (1988). I, however, would find that, where there was no evidence submitted regarding the circumstances of the encounter that actually resulted in J.B.'s pregnancy, there could be no finding of force or threat of force. Unlike cases wherein courts have found that acts of bodily harm which did not occur simultaneously with a sexual assault were still close enough in time to be considered to have occurred during the commission of the assault (see, *e.g.*, *People v. Colley*, 188 Ill. App. 3d 817 (1989)), there was no evidence

presented that the bodily harm here, namely, J.B.'s pregnancy, happened close enough in time to sexual penetration by force or threat of force. In fact, the only evidence presented relative to force or threat of force was during the first incident in June 2008. It is undisputed that defendant caused J.B. to become pregnant and the resulting child, Daniel, was born on February 23, 2010. The incident resulting in J.B.'s pregnancy, therefore, occurred approximately in June 2009. The only testimony related to any sexual encounters in 2009 was that every two weeks beginning in July 2008 defendant would call J.B. into his bedroom, point to the bed, J.B. would lie down, and defendant would insert his penis into her vagina. Even assuming the evidence from the first incident in June 2008 was sufficient to establish force or threat of force, the record fails to support a finding that the force or threat of force continued in every sexual encounter thereafter and specifically in the encounter causing J.B.'s pregnancy. As a result, I believe the lack of evidence compels reversal of defendant's aggravated criminal sexual assault conviction.