2012 IL App (2d) 090754-U
No. 2-09-0754
Order filed February 8, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-3355
REGINALD KENNEBREW,	)	Honorable Joseph G. McGraw,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

ORDER

Held: The trial court properly admitted hearsay statements pursuant to section 115-10 of the Criminal Code of Procedure of 1963 (725 ILCS 5/115-10 (West 2008)) because the victim testified in court, satisfying defendant's right to confront the witness and therefore defeating defendant's constitutional attack.

The State failed to prove defendant's guilt of anal penetration (predatory criminal sexual assault of a child) beyond a reasonable doubt, and defendant's conviction and sentence as to count I of the indictment were vacated.

In light of supreme court's supervisory order, the evidence was sufficient to find defendant guilty of the uncharged, lesser-included offense of aggravated criminal sexual abuse.

¶ 1 Defendant, Reginald Kennebrew, was convicted of three sexual acts against his stepdaughter, D.C.: predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2008) for placing his penis in D.C.'s anus as alleged in count I; predatory criminal sexual assault by placing his finger in D.C.'s vagina as alleged in count II; and, aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008) for touching D.C.'s buttocks with his hand for the purpose of sexual gratification. Defendant appealed his conviction for predatory criminal sexual assault of a child as charged in count I of the indictment. On appeal, defendant argued: (1) that section 115-10 of the Criminal Code of Procedure of 1963 (Code), which was the basis for the admission of the hearsay statements made by the child-victim, was unconstitutional in light of *Crawford v. Washington*, 541 U.S. 36 (2004), because it conflicted with the confrontation clause; and (2) the State failed to prove beyond a reasonable doubt that his penis penetrated the child-victim's anus. We affirmed the trial court's decision to admit the hearsay statements pursuant to section 115-10, but we reversed defendant's conviction as to count one of the indictment, that defendant anally penetrated the victim. *People v. Kennebrew*, No. 2-09-0754 (2011) (unpublished order under Supreme Court Rule 23).

¶ 2 In a supervisory order dated November 2, 2011, the supreme court directed us to vacate our order and directed us to consider whether the conduct which we found to be insufficient for a finding of a guilt on the charged crime of predatory criminal sexual assault was sufficient for a finding of guilt on the uncharged crime of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)). Since this issue was never briefed to this court, we allowed supplemental briefs to be filed by the parties. After reconsideration, we agree with the State's position that the evidence was sufficient to sustain a conviction to be entered on the uncharged crime pursuant to our powers under Illinois Supreme Court Rule 615(b) (Ill. Sup. Ct. R. 615(b) (eff. Jan. 1, 1967)). Accordingly, we

reverse and remand the cause to the trial court for further sentencing proceedings on the aggravated criminal sexual abuse count.

¶ 3 I. BACKGROUND

¶ 4 A three-count indictment against defendant was issued on August 27, 2008, for various acts of sexual misconduct against his seven-year-old stepdaughter, D.C., which took place between April 1, 2007, and January 1, 2008. Count I alleged that defendant committed the offense of predatory criminal sexual assault of a child, in that defendant, who was 17 years of age or older, knowingly committed an act of sexual penetration with D.C., who was under 13 years of age, when he placed his penis in D.C.'s anus. Count two alleged the same offense but for the act of defendant placing his finger in D.C.'s vagina. Count three alleged that defendant committed aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)) when he knowingly touched the buttocks of D.C. with his hand for the purpose of sexual gratification or arousal.

¶ 5 Prior to trial, the court heard testimony and arguments regarding the defense's motion to bar prior statements made by D.C. to her stepmother, Cierra C., and Cierra's niece, Aaliyah Joyce, and a videotaped interview of D.C. by the Carrie Lynn Children's Center. The trial court determined that if D.C. testified in court to the substance of those conversations and the interview, the testimony of Cierra and Aaliyah and the videotape would be admissible under section 115-10.

¶ 6 On January 27, 2009, the matter proceeded to trial. The State first called D.C. D.C. answered Assistant State's Attorney (ASA) Kate Kurtz's initial questions. D.C. provided her name, date of birth, her age, the name of her school, her favorite and least favorite classes in school, her teacher's name, and her family members. She testified that she lived with her mother, LaToya Brown, her older sister, P.S., her older brother, M.C., and her younger sister, H.K. D.C. stated her

father's name was Marlowe C., and that he was also the father of M.C. She identified defendant as H.K.'s father, and she identified him in the courtroom. When she lived on Elm Street, defendant also lived with her family. D.C. testified that she also had a stepmother, Cierra, who was married to Marlowe, and they had a baby boy, J.C. They lived in a town that was far away from Rockford.

¶ 7 D.C. testified that there were parts of her body that no one should touch, and that she referred to those parts as "private." She stated that those parts are used to go to the bathroom. One part was in the front of her body. The part of the body that she sits on, she called her "bottom." Both her "private" and "bottom" were never to be touched. On a boy, D.C. described the parts in the same manner–"private" and "bottom." When asked whether anybody had ever touched her in those parts, she testified "no." When asked whether she ever told someone that someone had touched those parts of her body, she testified "no." When asked whether she remembered going to the Carrie Lynn Children's Center, D.C. testified "yes." She recalled going there approximately one year earlier. She remembered speaking to a woman at the center. D.C. testified that she never told that woman that someone had touched her body where no one should touch. D.C. recalled that while at Carrie Lynn, she was taken into a room and that she was in that room with a woman. She did not recall what the room looked like but recalled that no one else was in the room. D.C. could not remember what they discussed. However, when asked if the woman asked D.C. what parts of her body should not be touched, D.C. remembered that question being asked of her. She remembered being shown a picture of a boy and girl.

¶ 8 ASA Kurtz next showed D.C. a picture of a girl, described in the record as a "gingerbread girl." D.C. identified her name at the top of the picture, and the date "1-16-08." She remembered using this picture when she talked to the woman at Carrie Lynn. D.C. remembered the woman asked

her what parts of the body a person should not touch on a girl. D.C. recalled that she circled those body parts on the picture using an orange crayon, and she recalled telling the woman the names of the body parts. D.C. recalled that she identified and labeled the picture of the front part of the girl as the "loosey," and the back part as the "butt." D.C. testified that she used the term "loosey" to identify the "private" area of a girl.

¶ 9 ASA Kurtz showed D.C. a picture of a gingerbread boy that she used when talking to the woman at Carrie Lynn. She identified her name and date at the top of the picture. She identified the circles that she made of areas of a boy's body that should not be touched. D.C. recalled that she identified and labeled the diagram of the back part of the boy not to be touched as the "butt," and the front part as the "thing." She testified that the "thing" was the boy's "private" part. D.C. recalled that the woman at Carrie Lynn asked her if anyone had touched her on those parts, but D.C. did not remember what she told the woman.

¶ 10 Next, ASA Kurtz showed D.C. a picture that she used when talking with the woman at Carrie Lynn, and she recalled that she drew the picture. She testified that it was a picture of herself lying on a towel on the bed at her mother's home. The picture showed her sister H.K. in the room, playing nearby, and a television that is in her mother's bedroom. She testified that the picture also showed defendant putting lotion on her, which he would do after she took a shower with H.K. After taking a shower, D.C. would go into her mother's bedroom with H.K. and defendant. D.C. testified that defendant would put lotion on H.K. first, and then on her body. She stated that he would put the lotion on her while she laid on her mother's bed on a towel. She testified that he would put the lotion on "everywhere," using his hand. D.C. testified that "everywhere" included her stomach, back, legs, "private," and "butt." D.C. testified that while she was lying on her back, defendant used

his hand to put lotion on her "private." She further testified that defendant did not touch her "private" or her "butt" with any other part of his body. D.C. could not remember if she told the woman at Carrie Lynn that defendant did use another part of his body to touch her "butt." When asked whether defendant touched the inside or the outside of her "private," D.C. testified that he touched the outside.

¶ 11 D.C. identified Aaliyah as Cierra's niece, and admitted that she told Aaliyah that someone touched her on a part of her body that no one should touch. When asked what she told Aaliyah, D.C. testified "I don't really remember." She did not know when she told Aaliyah this information but recalled that she was at Aaliyah's house when she did. They were in the bottom bunk bed talking when they should have been sleeping. D.C. testified that P.S. and two cousins were also in the room but that they were asleep. D.C. did not remember who she told Aaliyah was the person who had touched her but testified that she told Aaliyah the truth.

¶ 12 D.C. remembered speaking to Cierra at Pizza Hut in Rockford. However, D.C. did not remember what she said to Cierra and denied telling Cierra that someone touched her. Later, D.C. testified that she did tell Cierra that someone had touched her. D.C. testified that she was sitting alone with Cierra when she told Cierra this information and that she told Cierra the truth. When asked whether she told Cierra that defendant had touched her, D.C. answered "I don't know."

¶ 13 At this point, ASA Kurtz asked the court to deem D.C. an uncooperative witness. ASA Robert Fuenty argued that the State had been denied access to the child by the mother, that the mother continued to have contact with defendant, and that the State believed the child had been coached to give inconsistent answers. The trial court agreed with the State. It stated based on its observations, D.C. could remember specific details but when asked material questions, she was

reluctant to answer, put her head down, looked up at the trial court before answering, paused for long periods of time, and then answered that she could not remember. Essentially, the court stated that D.C. could remember everything about her prior conversations but the details pertaining to the actual abuse.

¶ 14 The State proceeded to cross-examine D.C. D.C. denied asking Aaliyah if her father ever touched her and that she told Aaliyah she asked because her stepfather touches her. She denied telling Aaliyah that defendant touched her between her legs and touched her butt and that defendant touched her with his "private." D.C. denied telling Aaliyah that defendant would do this in his bedroom, that he would lock the door, and that he would lay her on the bed. D.C. denied that when Aaliyah asked if it hurt, she told her "sometimes."

¶ 15 D.C. then denied that when Cierra first asked her whether anyone was touching her inappropriately, she told her "no." She denied that Cierra then asked whether she had told Aaliyah that defendant had touched her, and that she answered "I did say that." She denied telling Cierra that defendant would take her and H.K. into the bedroom and rub lotion on D.C. She denied that she told Cierra that he touched/rubbed her "private" and that one time, defendant got in the shower with her and she could see his "thing." D.C. denied telling Cierra that defendant asked her what she looking at, that she told defendant "nothing," and defendant told her to stop looking.

¶ 16 ASA Kurtz then questioned D.C. on her Carrie Lynn interview. ASA Kurtz asked D.C. if she remembered that she told the woman at Carrie Lynn that defendant touched her on her "loosey" and her "butt." D.C. answered "yes." However, she did not remember that she told the woman that defendant used his hand to touch her cheek. D.C. did not remember telling the woman that she was lying on her stomach on a towel in her mother's bedroom when defendant put lotion on her butt and

butt cheek. She did not recall telling the woman that defendant told her not to tell anyone. She also did not recall telling the woman that she was lying on her back when defendant touched her "loosey" with his thumbs, that he touched the inside of her "loosey," and that it tickled. D.C. also did not recall telling the woman that defendant would use his "thing" to touch the inside of her butt. She denied that she told the interviewer that it felt "not good." D.C. further denied telling the woman that defendant's "thing" felt "wet and squishy." However, D.C. remembered speaking to the woman at Carrie Lynn and admitted that she told that woman the truth.

¶ 17 Defense counsel stated it had no questions for D.C., and therefore there was no cross-examination of D.C. Defense counsel then moved for a directed verdict, arguing that D.C. did not substantively testify, as meant under *Crawford*, and therefore the State had no evidence against defendant. The trial court denied the motion, finding that a gap in D.C.'s recollection did not preclude the opportunity for effective cross-examination. Further, the State had not yet rested its case, and it would be allowed to seek admission of certain hearsay statements pursuant to section 115-10. Therefore, the trial court deemed defense counsel's motion premature.

¶ 18 The State proceeded to call Aaliyah Joyce. Aaliyah stated that she was 13 years old, resided in Chicago, and knew D.C. through her aunt, Cierra. Around Christmas 2007, D.C. spent the night at Aaliyah's house. They were in bed together in the evening and supposed to be asleep. Aaliyah testified that D.C. asked her if her father ever touched her. Aaliyah stated she told D.C. "no," and asked D.C. why she asked that. D.C. told Aaliyah that defendant did, and Aaliyah asked her how he touched her. D.C. told Aaliyah that defendant used his "private" and touched her "privacy." Aaliyah asked D.C. where her siblings were when this happened, and D.C. told her sometimes downstairs or in their bedrooms. Aaliyah asked D.C. whether it hurt, and D.C. answered

"sometimes." D.C. told Aaliyah that it would happen in D.C.'s mother's bedroom, when her mother was at work.

¶ 19 Cierra C. testified next about the conversation she had with D.C. at Pizza Hut near Christmas 2007. When Cierra picked up D.C. from her sister's home around Christmas 2007, Aaliyah told Cierra what D.C. had told her the night before. The next day, she and Marlowe took the kids to Pizza Hut to see if D.C. would tell Cierra this information. At the Pizza Hut, Cierra sat with D.C. at a table alone and asked D.C. if anyone was touching her inappropriately. Initially, D.C. said "no." Cierra asked her if she was sure because Aaliyah stated that D.C. said defendant had touched her. D.C. then admitted that she told that to Aaliyah. Cierra asked her how defendant was touching her. D.C. demonstrated where by touching her vaginal area. D.C. told Cierra that defendant usually touched her after she and H.K. would take baths. Defendant would take them into a room and rub lotion on D.C., and while doing so, he would touch her inappropriately and rub his penis up and down her bottom. D.C. stated that when his penis touched her bottom, it "tickled." D.C. told Cierra that she was upset because defendant did not do this to H.K. but only to her. Cierra described D.C.'s demeanor during this conversation as "shy." D.C. at one point stated that she did not want to say anymore because it was "too nasty." Cierra told her that it was okay and that she could tell Cierra what happened. D.C. had a nervous grin, as "if she was embarrassed."

¶ 20 Lori Thompson, a nurse practitioner, testified that she volunteered with the Carrie Lynn center to examine children in suspected child abuse cases. On January 25, 2008, Thompson examined D.C. D.C. did not want to discuss anything. LaToya provided Thompson with D.C.'s medical history. Thompson then performed a comprehensive physical exam. She noted redness at the 8 o'clock position of D.C.'s hymenal tissue, which Thompson called a hymenal cleft. A hymenal

cleft is a v-shaped injury to the hymenal tissue. Such an injury was consistent with sexual abuse, typically the result of an insertion of an object.

¶ 21 On cross-examination, Thompson agreed that the injury could be the result of vigorous masturbation using an object and that the redness could be caused by vigorous masturbation. The redness could also be caused by poor hygiene or skin irritation. Thompson explained that she indicated that the findings were suggestive of sexual abuse but that she did not check off the box that stated the physical findings "definitely" indicated sexual abuse. Thompson explained that the only definitive factors that would result in that box being checked were the presence of semen, pregnancy, or the presence of a sexually transmitted disease. Thompson admitted that D.C.'s mother indicated that D.C. did not complain of any pain or genital abnormalities, such as pain, itching, or discharge. D.C.'s mother also reported no rectal itching, pain, discomfort, or bleeding. Upon examination of D.C.'s anus, Thompson found no abnormalities.

¶ 22 Marisol Tischman, a counselor at the Carrie Lynn Children's Center, testified regarding her interview with D.C. She testified that the interview was recorded by a video camera. The DVD of the interview was played for the jury. Tischman was then shown the gingerbread diagrams and D.C.'s drawing. Regarding the gingerbread girl, Tischman testified that she wrote "loosey" to identify the part of the body that D.C. circled and described as "loosey." She did the same on the back region, labeled "butt." Tischman did the same on the gingerbread boy diagram. D.C. described the back region of the boy as the "butt," and the front region as the "thing" and the "part used to wash up." She also labeled the "thumbs," which D.C. had identified as the part that defendant used to touch her "private." The State then rested, and the pictures and DVD were admitted into evidence.

¶ 23 We summarize the contents of the videotaped interview of D.C. at the Carrie Lynn center. D.C. told Tischman that she learned about the parts of the body that no one should touch from school. Using gingerbread boy and girl diagrams, D.C. circled the parts of the bodies that no one should touch. She told Tischman the names that she used for those parts, and Tischman labeled the diagrams accordingly. The vaginal region was labeled "loosey," and the backside was labeled "butt" on the girl diagram. The area of the penis was labeled "thing" and the backside was labeled "butt" on the boy diagram. When Tischman asked D.C. if someone had ever touched her "loosey" or "butt," D.C. answered yes and identified defendant.

¶ 24 Tischman asked D.C. where defendant touched her on her butt. D.C. stated he touched her butt with his hand, on her cheek area. This happened when she was 7 years old.[1] He also touched her "loosey." Tischman asked how many times this happened, and D.C. said more than once for her butt and one time for her "loosey." Later, D.C. stated that this happened many times and each time was the same–defendant rubbed lotion on her after her showers. Regarding the first time this occurred, D.C. was laying on her stomach on a towel in her mother's bedroom, on her mother's bed, and defendant was putting lotion on her. D.C. stated her brother and sister were downstairs watching television. Defendant told her not to tell anyone. Defendant was wearing clothes, and D.C. recalled that it occurred at night, after she showered. H.K. was in the room but playing on the floor to the side of the bed. Tischman asked D.C. whether defendant touched the inside or outside of her butt. D.C. stated the outside. When Tischman questioned D.C. regarding the touching of her "loosey," D.C. stated that defendant was applying lotion, and touched her "loosey" with his thumbs.

[1] D.C. turned eight years old approximately one month prior to the date of the interview.

¶ 25 Tischman then had D.C. draw a picture of the bedroom. D.C. stated that H.K., who was approximately four years old at the time, saw defendant touch her "loosey." D.C. knew because she was looking at H.K. when this happened, and H.K. asked her "what is that?". D.C. replied with "what" because she did not know what H.K. was referring to. H.K. did not say anything. Tischman asked D.C. whether defendant touched the inside or outside of her "loosey." D.C. said the inside. When asked how it felt, D.C. stated it "tickled." D.C. said after defendant touched her "loosey," he had her lay on her back so that he could put lotion on her back. Defendant then applied the lotion and touched her butt. After defendant was done, he told D.C. to get dressed and to go to bed.

¶ 26 Tischman asked again whether defendant touched the inside of her butt, and D.C. first said "no," but then said "yeah." When asked what he touched the inside of her butt with, D.C. said his "thing." Tischman asked where defendant touched her with his "thing," and D.C. said the inside of her butt. When asked how it felt, D.C. answered "not good." Tischman never asked D.C. whether she knew the word "anus" or what she meant by "inside of her butt." She also did not ask D.C. to elaborate on what she meant by "not good," such as whether that meant physical pain or emotional sadness or embarrassment. D.C. denied ever seeing defendant's "thing," but described that it felt "wet and squishy." D.C. said nothing ever came out of defendant's "thing." Tischman asked D.C. to describe where defendant was in relation to her on the bed, and D.C. said he was sitting on his knees. When Tischman asked D.C. where defendant was sitting on his knees, she pointed to the area on the floor at the foot of the bed. D.C. stated that defendant would be wearing a shirt and shorts. When Tischman asked how defendant used his "thing" to touch her "there", D.C. stated that he would pull it out of his underwear and "just stick it in there." Tischman did not ask D.C. further questions as to where defendant "stuck it" or where D.C. meant by "there." D.C. denied that

defendant used his "thing" to touch any other part of her body and that he ever asked her to touch his thing.

¶ 27 Defense counsel renewed its motion for directed verdicts, and the court denied that motion. Defendant then testified in his defense. Defendant was in a relationship with LaToya, and he eventually moved in with LaToya and her other children, P.S., M.C., and D.C. The children were fairly young when defendant moved in, and he became close to the children, taking them to the YMCA, parks, and helping them with household chores. Defendant and LaToya had H.K. together during the time they lived together. Defendant testified that P.S. often bathed and helped care for D.C. when D.C. was younger. However, when P.S. started high school and had more homework and activities, defendant took over some of her duties and helped feed and bathe D.C. and H.K. Because D.C. and H.K. were only a year apart in age, defendant would put them in the tub together, starting around ages two and three, with bath tub toys. Defendant continued this practice as they got older. He would help them out of the tub, making sure they did not slip and wrap them in towels. He would walk or carry the girls into the bedroom because the bathroom was small. P.S. would help pick out the girls' clothes and lay them on the bed. Defendant sometimes would lock the door because there was time when the gas was shut off and the home did not have heat. During that time, he would have a hot plate to heat up water in the room, and it helped to keep the temperature in the rooms warmer. However, defendant testified that he did not always close the door. He would lock the door at times because the door to the bedroom was really old and would only stay shut when locked. When it was not locked, it would open back up. He locked it to help with privacy because the bathroom was part of the master bedroom, and the bathroom door did not properly close at all. Defendant explained that locking the bedroom door prevented access to the bathroom. He admitted

the children could not reach the locks because they were moved to the top of the door. Defendant moved the locks so that the kids could not lock themselves inside the master bedroom.

¶ 28 Defendant would help the girls put their clothes on and sometimes he would apply lotion to their bodies. He would not apply lotion to the girls every time they bathed. He would apply the lotion to D.C. when she would complain about being itchy or her skin appeared bumpy from skin irritation. He would apply lotion to H.K. more frequently because she was younger. Defendant explained that he tried to show D.C. how to apply the lotion herself but she was not doing it quickly so defendant would apply it with his hands. He put the lotion on his hand and rubbed his hands together. He then would rub it on her legs, back, arms, and face. Defendant would do this either in the bathroom or in the bedroom, usually when D.C. was standing up. Sometimes D.C. would be laying down on the bed or on the floor. Defendant testified that he would just stand over her and put the lotion on her. He denied that he ever kneeled over D.C.'s body or got onto the bed. Defendant testified that he was always wearing clothes when he did this, typically pants and a shirt and underwear underneath his clothing.

¶ 29 Defendant denied that he ever placed his penis in D.C.'s anus. He denied ever placing his finger in D.C.'s vagina. He denied when he rubbed lotion on D.C.'s buttocks that he did so for personal sexual gratification or to arouse D.C. He denied that there was ever a time when his thumbs slid across or went into D.C.'s vagina when he was rubbing lotion on her. The defense then rested.

¶ 30 On January 28, 2009, after closing arguments, the jury returned guilty verdicts on all three counts. After a series of posttrial motions, the trial court denied defendant's *pro se* motion for a new trial. The trial court appointed counsel to represent defendant for sentencing proceedings. After arguments, the trial court sentenced defendant to 15 years' imprisonment for count one; 15 years'

imprisonment for count two; and five years' imprisonment for count three. The sentences were consecutive as mandated by statute. Through counsel, defendant moved for reconsideration of his sentence. The trial court denied that motion on July 10, 2009. Defendant timely appealed.

¶ 31 II. ANALYSIS

¶ 32 A. Constitutionality of Section 115-10

¶ 33 In his brief, defendant argued that section 115-10 was unconstitutional in light of the Supreme Court's decision in *Crawford.* Because section 115-10 was facially unconstitutional, defendant argued, it could not form the basis for the admission of the hearsay evidence that the State introduced, including the testimony of Aaliyah Joyce, Cierra C., Marisol Tischman, and the DVD interview. Defendant argued that the hearsay evidence was the bulk of the substantive evidence against him and should not have been admitted. At oral argument, defense counsel conceded that our supreme court's recent decision in *People v. Kitch*, 239 Ill. 2d 452 (2011), defeated his arguments on this point. We agree.

¶ 34 The defendant in *Kitch* made the same arguments regarding the constitutionality of section 115-10 as defendant did in his brief. The *Kitch* court explained that there was a strong presumption that a statute was constitutional and that the party challenging the statute bears the burden of clearly establishing its invalidity. *Kitch*, 239 Ill. 2d at 466. A statute is unconstitutional on its face only if no set of circumstances exists under which it would be valid. *Id.* If there exists a situation in which a statute could be validly applied, a facial challenge must fail. *Id.* Whether a statute is constitutional is a question of law, which we review *de novo*. *Id.*

¶ 35 In *Kitch*, the supreme court held that because the child-witnesses testified at trial and were present to defend or explain their testimony on cross-examination, the admission of their hearsay

statements under section 115-10 did not violate the confrontation clause. *Id.* at 467. The supreme court explained that section 115-10 provides that a child-victim's hearsay statement may be admitted under two scenarios: (1) the court deems the statement reliable and the child testifies at trial (725 ILCS 5/115-10(b)(2)(a) (West 2008)); or (2) the child does not testify, the statement is deemed reliable, and the allegations of abuse are independently corroborated (725 ILCS 5/115-10(b)(2)(B) (West 2008)). *Id.* at 468. In *Kitch*, like in this case, the trial court admitted the hearsay statements under the first scenario. *Id.* Under *Crawford*, the confrontation clause poses no restrictions on the admission of hearsay testimony if the declarant testifies at trial and is present to " 'defend or explain' " that testimony. *Id.* at 467, quoting *Crawford*, 541 U.S. at 59, n.9. Here, D.C. also testified at trial and was present to defend or explain her testimony upon cross-examination. Therefore, the admission of her prior statements to Marisol Tischman, Aaliyah Joyce, and Cierra C. did not violate the confrontation clause. We further reject defendant's argument that the videotape evidence was admitted without the benefit of cross-examination. Again, the admission of this out-of-court statement does not violate the confrontation clause where the declarant testifies at trial and is present to defend or explain her statements. Here, as discussed, D.C. testified at trial and was present for cross-examination.

¶ 36 B. Sufficiency of the Evidence as to Count I

¶ 37 Defendant next argues that the State failed to prove him guilty beyond a reasonable doubt as to count I of the indictment, which alleged that defendant anally penetrated D.C. We agree. When considering the sufficiency of the evidence, our inquiry is 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. Jackson*, 232 Ill. 2d 246, 280 (2009).

This standard of review does not allow us to substitute our judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of witnesses. *Id.* Further, reviewing courts must apply this standard regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *Id.* This standard of review gives deference to the fact finder who bears the responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. *Id.* It is sufficient if all of the evidence taken together satisfied the trier of fact beyond a reasonable doubt of the defendant's guilt. *Id.* In weighing evidence, the trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *Id.* With that being said, the fact finder's decision is "neither conclusive nor binding," and we will reverse a conviction where the evidence is so unreasonable, improbable, or so unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *People v. Ostrowski*, 394 Ill. App. 3d 82, 92 (2009). "Appellate review of the sufficiency of the evidence must include consideration of *all* of the evidence, not just the evidence convenient to the State's theory of the case." (Emphasis in original.) *Id.*

¶ 38 Section 14.1(a)(1) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12-14.1(a)(1) (West 2008)) provides that an accused commits predatory criminal sexual assault of a child if the accused was over 17 years of age and commits an act of sexual penetration with a victim who was under 13 years of age. The Criminal Code defines "sexual penetration" as follows:

> " 'Sexual penetration' means any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio, or anal penetration. Evidence of emission of semen is not required to prove sexual penetration." 720 ILCS 5/12-12(f) (West 2008).

¶ 39 At trial, the State proceeded on the theory that defendant's penis intruded D.C.'s anus, and the jury was instructed that "sexual penetration" meant "any intrusion, however slight, of any part of the body of one person into the sex organ or anus of another person." Defendant argues that D.C.'s statements were too vague to sustain his conviction on count I. D.C. spoke of defendant's "thing" touching across her butt and touching the "inside" of her butt. At one time in her interview with Tischman, D.C. identified the area touched as her cheek area. She stated that when defendant used his "thing" to touch the inside of her butt, it felt "not good." D.C. did not at any time identify what the "inside" of her butt meant. Defendant argues that the gingerbread pictures showed a very nondescript picture of the backside region with two half circles representing the bottom butt cheek region. The questioning of D.C. did not demonstrate that she had knowledge of what an anus is, where it is, or whether she could distinguish among the words "butt," "cheek," and "anus." The State counterargues that D.C.'s statements that defendant used his "thing" to touch the "inside of her butt" and that he just would "stick it in there" were sufficient to sustain the conviction given the circumstances of the case and D.C.'s young age.

¶ 40 We agree with defendant that *People v. Oliver*, 38 Ill. App. 3d 166, 170 (1976), applies to this case. In *Oliver*, the defendant argued that the State failed to prove his guilt of a charge of

deviate sexual assault by failing to prove that his penis touched the anus of the victim. The court agreed that the witness showed that she was unknowledgeable as to the meaning of the terms used in the direct examination questions that were based upon the deviate sexual assault statute. *Oliver*, 38 Ill. App. 3d at 170. The witness did not "precisely testify to the penis-anus touching but characterized defendant's conduct by a reference to 'in my butt.' " *Id.* The witness also stated to her husband in an out-of-court statement that the defendant's "penis went along her 'cheeks.' " *Id.* Penetration was not a required element of deviate sexual assault but it required proof of an act of deviate sexual conduct, which under the facts of its case required proof of an act involving the sex organs of the defendant and the anus of the victim. *Id.* Therefore, the court held that the evidence was insufficient to support the conviction. *Id.*; see also *People v. Kelly*, 185 Ill. App. 3d 43, 52 (1989) (evidence was insufficient to support penetration count where the victim only testified in vague terms, including that the defendant had "poked" her and had "touched" her "naughty place").

¶ 41 Like in *Oliver*, D.C. did not precisely testify to defendant's penis touching her anus, but rather vaguely referred to her "butt," "butt cheeks," "inside her butt," and that defendant "stuck it in." At no time was D.C. questioned in court or by Tischman as to her knowledge of the term or concept of "anus." Instead, we know only that D.C. described the area she used to sit on as the "butt" and "butt cheek." Like in *Oliver*, we agree that this is insufficient to sustain a conviction under the sexual assault statute. The State argues that *Oliver* is distinguishable in that the victim in *Oliver* was obviously more mature as the case referenced the victim's husband, and therefore it was reasonable for the court to hold that victim's testimony to a higher degree of detail. We disagree with the State's argument. The sexual assault statute does not provide a lesser standard of proof necessary for the State to convict a defendant based on the victim's age. While the State admitted

at oral arguments on this matter that additional questions "would have been helpful" but were unnecessary, we disagree. The State carries the burden to prove each element of the crime charged, and in this case, the State had the burden to establish that defendant's penis contacted or intruded upon D.C.'s anus. Under the facts of this case, additional questions would not have just been "helpful," they were necessary to prove that the alleged contact occurred because the State had no other evidence that such contact occurred, such as the physical evidence that was presented regarding the vaginal penetration count.

¶ 42 The State argues that *People v. Atherton*, 406 Ill. App. 3d 598 (2010), is more comparable to the facts of this case than the facts of *Oliver*. We do not agree and find *Atherton* distinguishable. In *Atherton*, the defendant was charged with his sex organ having made contact with the child-victim's anus. *Atherton*, 406 Ill. App. 3d at 608. The child-victim testified that the defendant's "private" was "kind of in [her] butt" and when asked what that felt like, the child-victim responded that she "didn't really feel anything." *Id.* at 603. The child-victim testified that she "poops" with her butt but that the defendant "didn't put it inside there. It went in there as it was like going into my private. He didn't put it exactly in where I poop." *Id.* Upon further questioning, the child-victim was asked "You said [Frank's private] didn't go inside that part but did it touch that part at all?". *Id.* The child-victim answered, "Yeah." *Id.* The appellate court stated that while the child-victim's testimony was at times contradictory, it was the jury's duty to resolve conflicts or inconsistencies in testimony. *Id.* at 609. Under its facts, the child-victim testified that the defendant put his penis where she "pooped" like it was going into her "private" and answered affirmatively when questioned whether the defendant's "private" touched the area where she "pooped."

¶ 43 We find the facts of *Atherton* much different from the facts of this case. In this case, D.C. never demonstrated an understanding of the anus, even in the child-like terms that the victim in *Atherton* did (the area where she "pooped"). D.C. only spoke of the "butt" or "inside of her butt" or "butt cheeks" but gave no indication that the inside of her butt referred to her anus. D.C.'s testimony was not as specific as the victim's testimony in *Atherton*, where that victim testified that the defendant's "private" touched the place where she pooped. Here, D.C. only spoke in vague terms in response to vague questions. Tischman asked D.C. how defendant used his "thing" to "touch her there," and D.C. responded that he would pull it out and "just stick it in there." At no time did the State or Tischman clarify where "there" meant or what D.C. meant by "in there." D.C. was never asked to explain what the "inside of her butt" meant to her, for instance whether that meant her anus or just the fleshy area between her butt cheeks. Because the level of specificity in the victim's testimony was greater in *Atherton*, even with the use of child-like terminology, we disagree with the State that the outcome in *Atherton* controls the outcome in this case.

¶ 44 We further find the cases relied on by the State to be distinguishable from the facts of this case. First, in *People v. Hillier*, 392 Ill. App. 3d 66, 67 (2009), the child-victim was asked if the defendant ever touched her in any way or placed his finger anywhere, and the child-victim answered "yes." When asked where the defendant placed his finger, the child victim responded "my vagina." *Id.* The defendant argued that he was not proven guilty beyond a reasonable doubt of predatory criminal sexual assault because the child-victim never testified that he placed his finger *inside* her vagina. *Id.* at 69-70. The court held that the evidence was sufficient because the jury could reasonably infer that the defendant penetrated the child-victim's vagina with his finger, and that a jury may reasonably infer that an act of penetration occurred based on testimony that the defendant

"rubbed," "felt," or "handled" the victim's vagina. *Id.*, quoting *People v. Bell*, 234 Ill. App. 3d 631, 636-37 (1992). Unlike the victims in *Hillier* and in *Bell*, D.C. did not use anatomically specific language in her testimony, prior interview, or prior statements. The victims in *Hillier* and *Bell* specified that the defendants used their fingers to "place," "rub," "feel," and "handle" their vaginas. In *Bell*, the court determined that there was sufficient evidence that the defendant had "pulled [the victim's] privates apart," and "ran his finger up inside her privates," which was sufficient to constitute penetration of the sex organ under the statute. *Bell*, 234 Ill. App. 3d at 636. In the case at bar, we do not have any testimony or statements by D.C. that specify that her anus was touched, rubbed, handled, or otherwise by defendant; reference to her "butt" and "cheek" area is insufficient under the statute to sustain a conviction of anal penetration.

¶ 45 The State correctly points out that the issue of whether sexual penetration occurred is a question of fact for the jury to determine. *People v. Harris*, 187 Ill. App. 3d 832, 838 (1989). However, a reviewing court may set aside a guilty verdict if the evidence is so palpably contrary to the finding or so unreasonable, improbable, or unsatisfactory as to leave a reasonable doubt about the accused's guilt. *Id.* For the reasons discussed in this order, we agree with defendant that the State failed to prove his guilt beyond a reasonable doubt as to the anal penetration conviction.

¶ 46 C. Aggravated Criminal Sexual Abuse

¶ 47 Pursuant to our supreme court's supervisory order, we next consider whether the evidence was sufficient to sustain the uncharged crime of aggravated criminal sexual abuse. Defendant first argues that the State forfeited this argument because the State did not charge him with the lesser offense, no jury instruction was given on the lesser offense, and the State never argued on appeal to this court that the conviction in count I should be reduced rather than vacated. Defendant points out

that the State first raised this issue in its petition for leave to appeal to the supreme court, which denied the petition but remanded the cause to this court for consideration. Defendant argues policy reasons favor a holding that the State forfeited the argument because the court should not rescue the State from its unsuccessful strategy in pursuing only the more serious offense. Otherwise, defendant argues, the State could, in every case, charge the more serious offense without acknowledging the possibility of lesser culpability until it receives an adverse ruling on appeal. Notably, defendant argues, the State never informed the supreme court in its petition that the lesser-included offense issue was not raised earlier. Despite forfeiture, defendant argues that aggravated criminal sexual abuse is not a lesser-included offense of predatory criminal sexual assault under the abstract elements approach. Thus, defendant argues that entering a conviction on that uncharged offense violates due process.

¶ 48 The State counterargues that forfeiture is a limitation on the parties, not the courts, and we should review the issue despite forfeiture. On the merits, the State argues that under *People v. Miller*, 238 Ill. 2d 161 (2010), we should use the charging-instrument approach to determine whether an uncharged offense is a lesser-included offense of a charged offense. The State further argues that *People v. Kolton*, 219 Ill. 2d 353 (2006), held that under the charging-instrument approach, aggravated criminal sexual abuse is a lesser-included offense of predatory criminal sexual assault. Therefore, the State argues that we should find that the evidence was sufficient to enter a conviction on the lesser offense pursuant to our powers under Rule 615(b)(3).

¶ 49 It is well-settled that forfeiture represents a limitation upon the parties and not the courts of review. *People v. Yaworski*, 2011 IL App. (2d) 090785, ¶ 10. We acknowledge defendant's argument that the State's course of action in this case is undesirable as it failed to raise this issue in

the trial court, this court, and failed to mention these facts in its petition to the supreme court. We admonish the State that it should not rely on reviewing courts relaxing the application of forfeiture in future cases. Despite the State's failure to mention its forfeiture in its petition to the supreme court, we presume the supreme court knew the issue was not presented to us given the fact our earlier Rule 23 order did not address or mention the issue. In light of the supreme court's advisory order, judicial economy, and the fact that society has an interest in seeing convictions entered for offenders whose guilt has been proven (*id.)*, we will consider the merits of the State's argument.

¶ 50 Moving on, we find that under *Miller*, 238 Ill. 2d at 172-74, the appropriate method in determining whether aggravated criminal sexual abuse, an uncharged crime, is a lesser-included offense of the charged offense, predatory criminal sexual assault, is the charging-instrument approach. Under the charging-instrument approach, the court looks to the charging instrument to see whether the description of the greater offense contains a " 'broad foundation' or 'main outline' of the lesser offense." *Id.* at 166. "The indictment need not explicitly state all of the elements of the lesser offense as long as any missing element can be reasonably inferred from the indictment allegations." *Id.* at 167. The court must then examine the evidence adduced at trial to decide whether the evidence rationally supports a conviction on the lesser offense. *Kolton*, 219 Ill. 2d at 361.

¶ 51 The *Kolton* court considered whether aggravated criminal sexual abuse was a lesser-included offense of predatory criminal sexual assault of a child, using the charging-instrument approach, and concluded that it was indeed a lesser-included offense where the indictment alleged an act of sexual penetration but did not explicitly allege that the acts were done for the purpose of sexual gratification. *Kolton*, 219 Ill. 2d at 370. The court explained that when sexual penetration is alleged,

it is possible to infer the acts were done with the purpose of sexual gratification or arousal, an element of aggravated criminal sexual abuse. *Id.* The court also stated that the overriding constitutional concern when determining whether an offense is lesser-included is the sufficiency of the notice to the defendant and that where a defendant is charged with predatory criminal sexual assault of a child based on acts of sexual penetration, the defendant has reasonable notice that such a charge might encompass the lesser offense of criminal sexual abuse. *Id.* at 371. Likewise, in this case, aggravated criminal sexual abuse is a lesser-included offense of predatory criminal sexual assault where the indictment charged defendant with penetrating D.C.'s anus with his penis.

¶ 52 On this issue, we reject defendant's contention that the abstract elements approach applies for federal due process claims and that *Miller* and *People v. Bouchee*, 2011 IL App. (2nd) 090452, do not limit the use of the abstract elements approach to only one-act, one-crime cases involving charged offenses. *Bouchee* involved whether one of the charged crimes was a lesser-included offense of another charged crime and which *Miller* dictated the abstract elements approach applied. The facts of this case are different in that the issue is whether a defendant may be convicted of a lesser-included uncharged offense of the greater, charged, offense. Defendant also argues that *Kolton* is inapplicable because the trier of fact made the determination that a conviction on the lesser offense was warranted. *Kolton* is still applicable in the analysis of whether aggravated criminal sexual abuse is lesser included to predatory criminal sexual assault under the charging-instrument approach. Further, we remind defendant that the jury found him guilty of the greater offense.

¶ 53 Our review requires that we next consider whether the facts adduced at trial supports a conviction of the lesser-included offense, given that we have concluded that penetration was not proven beyond a reasonable doubt. See *id.* at 371-72 (evaluating whether the evidence at trial

supported the conviction on the lesser-included offense). Section 12-16(c)(1) of the Code provides that an accused commits aggravated criminal sexual abuse if the accused was 17 years of age or over and commits an act of sexual conduct with a victim who was under 13 years of age when the act was committed. 720 ILCS 5/12-16(c)(1) (West 2008). The Code defines "sexual conduct" in relevant part as any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age for the purpose of sexual gratification or arousal of the victim or the accused. 720 ILCS 5/12(e) (West 2008).

¶ 54 The intent to arouse or satisfy sexual desires can be established by circumstantial evidence, and the trier of fact may infer a defendant's intent from his conduct. *People v. Burton*, 399 Ill. App. 3d 809, 813 (2010). A defendant's intent to arouse or gratify himself sexually can be inferred solely from the nature of the act. *Id.* Regarding defendant's penis touching D.C.'s anus, D.C. testified that she could not recall what she told the Carrie Lynn interviewer, Aaliyah, or Cierra, but she did testify that she told the truth to those witnesses. Cierra testified that D.C. told her that defendant used his penis to touch her butt and that his penis touched her bottom and that it "tickled." Tischman testified regarding her interview of D.C. and the videotape was played. In the video, D.C. stated that defendant's "thing" touched the inside of her butt and that it felt "not good." She described defendant's "thing" as feeling "wet and squishy." We further look to the remaining evidence, which puts defendant's conduct in context. D.C. made statements that defendant touched her butt with his penis while they were alone or in the presence of a very young child while D.C. was unclothed. D.C. also made statements that defendant used his hands to touch her vagina, and physical evidence showed that D.C.'s hymen was not intact. Further, he told D.C. not to tell anyone else about the

conduct. The nature of the conduct (penis touching butt of victim) alone was sufficient to establish that defendant's intent in the touching was for the purpose of sexual gratification. The additional evidence adduced at trial provides further support for the inference. The ages of the victim and defendant were not at issue. Accordingly, the evidence adduced at trial, which did not establish penetration of D.C.'s anus beyond a reasonable doubt, was sufficient to support a conviction of the lesser-included offense of aggravated criminal sexual abuse.

¶ 55 Rule 615(b)(3) provides that we may reduce the degree of the offense of which the appellant was convicted. This power is only available where a lesser-included offense is involved and is used oftentimes where the evidence fails to prove the defendant guilty beyond a reasonable doubt of an element of the greater offense. *People v. Kick*, 216 Ill. App. 3d 787, 792 (1991). The power should be exercised with caution and circumspection and used in the interest of fair and uniform administration of justice. *People v. Mata*, 243 Ill. App. 3d 365, 372 (1993). In light of the supreme court's supervisory order and society's interest in seeing a conviction entered against a defendant whose guilt has been proven beyond a reasonable doubt, we exercise our powers under Rule 615(b)(3) and remand the cause for further sentencing proceedings consistent with this order.

¶ 56 III. CONCLUSION

¶ 57 In conclusion, we find that under *Kitch*, section 115-10 as applied in this case withstands defendant's facial challenge, and the hearsay statements of D.C. were properly admitted. However, as to count I, the anal penetration charge, we find that the State failed to prove defendant guilty beyond a reasonable doubt.. Pursuant to a supervisory order issued by our supreme court and using our powers under Rule 615(b)(3), we find the evidence sufficient to sustain a conviction on the lesser-included offense of aggravated criminal sexual abuse. Accordingly, we reverse defendant's

conviction as to count I, alleging predatory criminal sexual assault of a child, and remand the cause for sentencing on the lesser-included offense.

Affirmed in part and vacated in part; cause remanded.