2011 IL App (2d) 100429-U
No. 2-10-0429
Order filed September 7, 2011



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>BILLY G. HUNT,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Winnebago County.<br><br><br><br>No. 08-CF-4372<br><br>Honorable Joseph G. McGraw, Judge, Presiding. |

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Birkett concurred in the judgment.

**ORDER**

*Held:* (1) The State failed to prove beyond a reasonable doubt count of predatory criminal sexual assault of a child alleging that defendant placed his finger in the victim's vagina where the victim consistently stated in her pretrial statements and trial testimony that defendant only touched the outside of her vagina with his finger or hand; and (2) trial court's failure to set a specific term of mandatory supervised release on conviction of predatory criminal sexual assault of a child did not render that portion of the court's sentencing order void.

¶ 1 Following a jury trial in the circuit court of Winnebago County, defendant, Billy G. Hunt, was convicted of two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)) and two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1)

(West 2008)). The trial court sentenced defendant to a term of 20 years' imprisonment on each count of predatory criminal sexual assault of a child and a term of 7 years' imprisonment on each count of aggravated criminal sexual abuse. The sentences for predatory criminal sexual assault of a child were consecutive to each other. The sentences for aggravated criminal sexual abuse were concurrent to each other, but consecutive to the terms for predatory criminal sexual assault of a child. The trial court also imposed a term of mandatory supervised release (MSR) on each conviction, including a range of three years to life on each count of predatory criminal sexual assault of a child. Defendant now appeals, raising two distinct issues. First, he argues that he was not proved guilty beyond a reasonable doubt of the count of predatory criminal sexual assault of a child which alleged that he placed his finger in the vagina of the victim, J.B. Second, he contends that the cause must be remanded for the trial court to set a determinate term of MSR. We agree with defendant's first contention, but otherwise affirm.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged by superseding indictment with two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)) and two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)). Count I alleged that defendant committed the offense of aggravated criminal sexual abuse in that defendant "committed an act of sexual conduct with J.B." by "knowingly plac[ing] his hand on the vagina of J.B." Count II alleged that defendant committed the offense of predatory criminal sexual assault of a child in that defendant "knowingly committed an act of sexual penetration with J.B." by "plac[ing] his penis in the vagina of J.B." Count III alleged that defendant committed the offense of predatory criminal sexual assault of a child in that defendant "knowingly committed an act of sexual penetration with J.B." by

"plac[ing] his finger in the vagina of J.B." Count IV alleged that defendant committed the offense of aggravated criminal sexual abuse in that he "committed an act of sexual conduct with J.B." by "knowingly transmitt[ing] his semen on the stomach of J.B."

¶ 4 Prior to trial, the State moved pursuant to section 115–10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2008)) to admit out-of-court statements by J.B., the seven-year-old victim, to her grandmother and a child advocate. At the hearing on the motion, J.B.'s grandmother, Judy K., testified that she received a telephone call at about 1:30 a.m. on October 25, 2008, requesting that she pick up J.B. at the Carrie Lynn Children's Center. Judy was informed that defendant's neighbor observed J.B. getting dressed as she exited defendant's bedroom, but that J.B. had not made any relevant disclosures. Judy asked a police officer whether she should talk with J.B. The officer told Judy that she could if she felt that she could get J.B. to open up, but he instructed Judy not to "push" J.B.

¶ 5 At approximately 7:30 p.m. on October 27, 2008, Judy spoke to J.B. in the basement of their home with no one else present. J.B. looked distraught and Judy offered to help her. J.B. asked whether she could write something on a piece of paper, and Judy responded in the affirmative. J.B. then handed Judy a note. The note said "We had sex. Love, [J.B.]" Judy asked J.B. what she meant, and J.B. responded that defendant touched her with his hand on her "tutu," the word J.B. uses for vagina, and "was moving it around on her." J.B. elaborated that she told defendant to stop, but he refused, adding that it would not do J.B. any good to talk because no one would believe what she was saying. Judy told J.B. that she would have to talk to someone else because of the serious nature of what occurred. J.B. indicated that she was okay with that and asked to write another note. The second note said, "We had sex. [J.B.] You're wekum [*sic*]." Judy later handed over the notes to the

Roscoe police department. Thereafter, J.B. was interviewed a second time at the Carrie Lynn Children's Center.

¶ 6 Marisol Tischman testified that she is the lead forensic interviewer at the Carrie Lynn Children's Center. Tischman explained that the facility is a child advocacy center that assists in the investigation of child abuse and neglect cases. Tischman interviewed J.B. at 12:35 a.m. on October 25, 2008, regarding a sexual abuse allegation. J.B. made no disclosure of significance at that time. Tischman conducted a second interview of J.B. at the facility on October 28, 2008, at 3:38 p.m. J.B.'s grandmother, Judy K., was present in the interview room. Judy was instructed neither to speak on J.B.'s behalf nor encourage her to answer questions. Tischman stated that Judy complied with these instructions. Tischman acknowledged that it was not the ususal practice for a family member to be present in the interview room, but it was allowed in this case because J.B. "was a little hesitant to come back" and it made the child more comfortable. Both interviews were recorded.

¶ 7 The trial court reviewed the recordings of the interviews of J.B. at the Carrie Lynn Children's Center prior to ruling on the admissibility of J.B.'s out-of-court statements. The court ruled that there were sufficient safeguards of reliability and therefore J.B.'s statements would be admissible at trial subject to her testimony and availability for cross-examination.

¶ 8 Also prior to trial, the State submitted a motion *in limine* to allow evidence of other crimes and uncharged acts by defendant based on additional disclosures by J.B. The trial court ruled that J.B. would be allowed to testify that defendant placed his tongue on J.B.'s vagina and that defendant had J.B. touch his penis with her hand. The court allowed this evidence for the limited purpose of showing defendant's intent and lack of mistake.

¶ 9 At trial, the State's first witness was Larry Nye. Nye testified that in October 2008, he lived in the same apartment complex as defendant and occasionally socialized with him. On October 24, 2008, at about 8 p.m., Nye went to defendant's apartment and noticed a set of keys and three pairs of shoes, including children's footwear, on the ground outside the apartment door. Nye knocked on the door, heard someone say something, and then entered the apartment. Nye observed a boy in defendant's daughter's bedroom. Nye took a few more steps and noticed a girl standing just inside the doorway to defendant's bedroom. Nye testified that the girl appeared to have just finished putting on her underwear. The girl then grabbed a shirt and put that on. Nye saw defendant "passed out" on his bed. Defendant was not wearing a shirt and was covered with a sheet and blanket from the waist down. Nye left the apartment, and law enforcement was contacted.

¶ 10 Officer Samuel Hawley of the Roscoe police department testified that he responded to a sexual assault call at defendant's apartment building at about 10:10 p.m. on October 24, 2008. Officer Hawley met with the complainants, Nye and Nye's son. Thereafter, Officer Hawley and another officer went to defendant's apartment. A boy answered the door. The officers spoke briefly with the boy before proceeding to defendant's bedroom. The officers observed defendant sleeping on his bed covered by a comforter. The boy attempted to wake up defendant but could not. Officer Hawley shouted defendant's name, and he eventually woke up. Defendant told the officers that he was naked under the comforter. Officer Hawley observed lotion laying next to the bed, as well as clothes scattered around the bedroom, including a small pair of jeans with flowers at the bottom.

¶ 11 D.B., the boy Officer Hawley encountered in defendant's apartment, testified that he and J.B. are twins. D.B. stated that he, J.B., and two other siblings live with their grandma, Judy K., and her boyfriend. D.B. identified defendant, who he said used to be his grandma's friend. D.B. stated that

defendant has a daughter with whom he and J.B. would play and that he and J.B. have spent the night at defendant's home on more than one occasion. D.B. testified that one time, J.B. and defendant were in defendant's bedroom with the door closed and locked. D.B. stated that he knew the door was locked because he tried to enter the bedroom but the door would not open. D.B. said that this happened one time.

¶ 12 J.B. testified that she was born in October 2001 and that D.B. is her twin brother. J.B. stated that she lives with her grandma and that defendant, who she identified in court as "Billy," was a friend of her grandma. J.B. testified that defendant has a daughter and that she and D.B. would go to defendant's home to play with her and watch television. J.B. stated that she and D.B. have spent the night at defendant's on more than one occasion.

¶ 13 J.B. testified that the last time she spent the night at defendant's was when Nye came and the police were called. Before Nye came over, D.B. was in defendant's daughter's bedroom watching television and J.B. was in defendant's bedroom. Defendant closed his bedroom door and locked it. He then told J.B. to take off her clothes. J.B. testified that defendant touched her "tutu" with his hand. J.B. stated that she uses her "tutu" to "pee." The State asked J.B. if defendant touched her with his hand on the "inside or outside of [her] tutu." J.B. responded that defendant touched her on the "[o]utside" of her tutu. J.B. also testified that defendant "put his tongue in [her] tutu." J.B. further testified that defendant's "private" touched her tutu. The State asked J.B. if defendant touched her with his private "on the inside or the outside." J.B. responded "in" and that it hurt when defendant did that. J.B. explained that a boy uses his "private" to "pee." J.B. stated that defendant also made her touch his "private" with her hand, that "white stuff" came out of defendant's "private," and that the "white stuff" went on the bed and J.B.'s stomach. J.B. testified that defendant told her

to keep it a secret. J.B. stated that she did not talk about the incident the evening that it happened because she was scared.

¶ 14 J.B. identified various State exhibits as writings she made when being interviewed at the Carrie Lynn Children's Center, including pictures depicting female anatomy with circled parts labeled "boobie," "tutu," and "butt" and pictures showing male anatomy with circled parts labeled "butt," "ding-a-ling," and "boobies." J.B. testified that a "ding-a-ling" is the same as a boy's "private." J.B. also identified other documents that contained her writing, which she read out loud in court, including: (1) People's exhibit 13, which stated "Billy made me touch him on his front private part. He made white stuff come out. He touched me on the private–privates;" (2) People's exhibit 14, which stated "Billy made me touch him on his private part. White stuff came out. He touched–he touched me on my private part. He touched me with his tongue on the inside part of my privates. He let [D.B.] out of the bedroom. He made me open the door before [D.B.] He made me stay all night;" (3) People's exhibit 15, which stated "Billy put his tongue in my private and he told me not to tell anyone. I also remember he told me to lock [D.B.] out of the room. He told me to lock [D.B.] out of the room so he wouldn't get in trouble. I didn't want to lock the door but Billy yelled at me. He said *** to lock the door right now or he will . . . spank me. So I locked the door and *** [D.B.] started banging on the door. He told me to open the door and I did. I asked [D.B.] what he wanted. He said he wanted Billy;" and (4) People's exhibit 17, which stated "Billy put his tongue in my tutu. I told him to stop but–but he would not. He put his private into my tutu the same way he did with his tongue."

¶ 15 Judy K. testified that since March 2008, she has been raising four of her grandchildren, including J.B. and D.B., twins born in October 2001. Judy met defendant at the gas station where

she worked and defendant was a customer. Judy and defendant became friends because she was from Georgia and defendant was "a good old boy from Alabama." Judy stated that defendant had a daughter who became friends with D.B. and J.B. and that sometimes D.B. and J.B. would spend the night at defendant's house.

¶ 16 Judy further testified that on October 24, 2008, D.B. and J.B. spent the night at defendant's apartment. At approximately 1:30 a.m. on October 25, 2008, Judy received a call asking her to pick up the twins from the Carrie Lynn Children's Center. When Judy arrived, Officer Robare told her that J.B. did not say anything. Judy asked the officer if she should talk with J.B. Officer Robare told Judy to talk with J.B. only if Judy felt comfortable doing so. Officer Robare added that Judy should not "push" J.B.

¶ 17 On the evening of October 27, 2008, Judy and J.B. were in the basement of their home. Judy stated that J.B. looked "incredibly sad," so Judy asked if she could help. J.B. asked if she could write something down. Judy then gave J.B. some paper. J.B. wrote, "[w]e had sex. Love [J.B.]" Judy asked J.B. what the note meant, and J.B. stated that defendant had placed his hand on her "tutu" and that he was moving his hand around. J.B. asked defendant to stop, but he would not do so and he told J.B. that it would not do any good to talk. When Judy went upstairs to put the other children to bed, J.B. wrote another note. The second note said "We had sex. [J.B.] Here you go you're wekum [*sic*]."

¶ 18 Marisol Tischman, the lead forensic interviewer at the Carrie Lynn Children's Center, testified that she interviewed J.B. on October 25, 2008. Tischman identified exhibits produced during the interview, including a female anatomical drawing, a male anatomical drawing, and a diagram of defendant's apartment. Tischman testified that she interviewed J.B. a second time on

October 28, 2008. Tischman identified exhibits from the second interview, including a handwritten note by J.B., a female anatomical drawing, and a male anatomical drawing.

¶ 19 Dr. Raymond Davis testified that he is a pediatrician and that he examined J.B. on October 29, 2008, at the Carrie Lynn Children's Center. Dr. Davis related that J.B.'s general examination was normal. However, a genital examination revealed "an almost complete transection of the inferior hymenal ring." Dr. Davis explained that the face of a clock is used to describe a disruption of the hymen. In J.B.'s case, the posterior rim of the hymen was torn from the 4:30 position to the 6:00 position, which equates to an opening of between seven and eight millimeters. Dr. Davis described this disruption as "abnormal large." Dr. Davis opined, beyond a reasonable degree of medical certainty, that J.B. suffered a penetrating injury or traumatic injury to her hymenal tissue. He also stated that the examination was "highly suspicious for sexual abuse, and in particular [he] was concerned about penile penetration or vaginal penetration." On cross-examination, Dr. Davis acknowledged that he was unable to determine who or what actually penetrated J.B.'s vagina. In addition, Dr. Davis stated that the examination did not reveal any bleeding or bruising, and a culture of a discharge was negative for chlamydia and gonorrhea. Following the testimony of Dr. Davis, the State rested. The defense then moved for a directed verdict, which the trial court denied.

¶ 20 Defendant then testified that he was born on January 11, 1971, in Birmingham, Alabama. Defendant moved from Alabama to Winnebago County in March 2007 and subsequently met Judy K. at the convenience store where she worked. Defendant stated that he had custody of his daughter on weekends and she would play with Judy's grandchildren. Defendant estimated that between the time Judy gained custody of her grandchildren and the night of the alleged incident in this case, J.B. and D.B. had stayed overnight at his home about 10 times.

¶ 21 Defendant testified that on October 24, 2008, he awoke at 4 a.m. and worked from 6:30 a.m. until a little after 3 p.m. After work, defendant stopped by the convenience store where Judy worked, but she was not there. Defendant proceeded to Judy's home, arriving between 4:30 and 4:45 p.m., and he was invited to stay for dinner. Defendant had purchased a six-pack of beer at the convenience store, and he, Judy, and Judy's boyfriend each drank two cans. As it got closer to bedtime, J.B. and D.B. said they wanted to spend the night at defendant's home. Judy had a headache and said, "just go, just go." According to defendant, he "really didn't have any input on the decision at all" and he went along with the plan because he did not want to ruin what was supposed to be a good time for the children.

¶ 22 Defendant testified that he left Judy's home between 7:30 and 8 p.m. and drove straight to his apartment. Defendant stated that he does not usually leave his keys outside his apartment door, but he was exhausted from working, so he may have done so that evening. Upon entering the house, defendant turned on the television in his daughter's room for D.B. and J.B. He then laid down on the couch and started to doze off. Shortly later, defendant got up and laid down on his bed with his clothes on while D.B. and J.B. watched television in the other room. Defendant dozed off again, but was awoken by the children asking him to play a movie on the VCR in his daughter's bedroom. Defendant started the movie and then went into his room with the intention of taking a shower. To that end, defendant undressed, but laid down for a second to rest his eyes. Defendant ended up falling asleep. Defendant was unable to remember if he was under the bed covers. Defendant did not recall D.B. knocking on the door. He also could not recall if he locked his bedroom door, although he believed he did. Defendant did not recall J.B. coming into his room. Defendant denied having any kind of sexual conduct with J.B., including penetration or molestation.

¶ 23 After defendant's testimony, the defense rested. The State then called Judy K. in rebuttal. Judy testified that it was defendant's idea for D.B. and J.B. to spend the night at his apartment on October 24, 2008.

¶ 24 Thereafter, the parties presented closing arguments, and the court instructed the jury. Among the instructions the jury received was the following:

> "Evidence has been received that the defendant has been involved in conduct other than that charged in the indictment. This evidence has been received on the issues of the defendant's intent and lack of mistake and may be considered by you only for those limited purposes. It is for you to determine whether the defendant was involved in that conduct and, if so, what weight should be given to this evidence on the issues of intent and lack of mistake."

The jury deliberated and found defendant guilty on all four counts.

¶ 25 On March 29, 2010, the trial court heard and denied defendant's motion for a new trial. At the sentencing hearing, which was held on April 7, 2010, the court sentenced defendant to a term of seven years' imprisonment on each count of aggravated criminal sexual abuse. The court sentenced defendant to a term of 20 years' imprisonment on each count of predatory criminal sexual assault of a child. The court ordered the sentences for predatory criminal sexual assault of a child to run consecutive to each other. The sentences for aggravated criminal sexual abuse were ordered to run concurrent to each other but consecutive to the sentences for predatory criminal sexual assault of a child. Thus, defendant's sentence totaled 47 years. In addition, the trial court imposed a term of MSR on each conviction, including a range of three years up to natural life on each of the predatory

criminal sexual assault of a child convictions. On April 29, 2010, the trial court heard and denied defendant's motion to reconsider sentence. This appeal ensued.

¶ 26 II. ANALYSIS

¶ 27 A. Reasonable Doubt

¶ 28 On appeal, defendant first argues that he was not proved guilty beyond a reasonable doubt of predatory criminal sexual assault of a child as alleged in count III of the superceding indictment. Count III alleged that defendant committed the offense of predatory criminal sexual assault of a child in that he "knowingly committed an act of sexual penetration with J.B." by "plac[ing] his finger in the vagina of J.B." See 720 ILCS 5/12-14.1(a)(1) (West 2008). According to defendant, however, J.B. consistently said in her pretrial statements and trial testimony that he only touched the *outside* of her vagina with his hand. As such, defendant asserts that the evidence was legally insufficient to show "sexual penetration" of the victim by the intrusion of his finger or hand into J.B.'s vagina.

¶ 29 When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, the relevant 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. Phillips*, 127 Ill. 2d 499, 510 (1989). When the determination of guilt or innocence depends upon the credibility of the witnesses and the weight to be given their testimony, it is for the trier of fact to resolve any conflicts in the evidence. *People v. Larson*, 379 Ill. App. 3d 642, 654 (2008). A reviewing court is not to substitute its judgment for that of the jury. *Larson*, 379 Ill. App. 3d at 654. We will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Billups,* 384 Ill. App. 3d 844, 846 (2008).

¶ 30 A person commits the offense of predatory criminal sexual assault of a child if the accused was 17 years of age or older and commits an act of "sexual penetration" with a victim who was under 13 years of age when the act was committed. 720 ILCS 5/12-14.1(a)(1) (West 2008); *People v. Hillier*, 392 Ill. App. 3d 66, 69 (2009), *affirmed on other grounds*, 237 Ill. 2d 539 (2010). For purposes of the predatory-criminal-sexual-assault-of-a-child statute, the term "sexual penetration" is defined as "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." 720 ILCS 5/12-12(f) (West 2008). Our supreme court has interpreted this statutory definition to encompass two broad categories of conduct. *People v. Maggette*, 195 Ill. 2d 336, 346-47 (2001). The first category includes any *contact* between the sex organ or anus of one person and an object, the sex organ, mouth, or anus of another person (the contact clause). *Maggette*, 195 Ill. 2d at 347. The second category includes any *intrusion* of any part of the body of one person or of any animal or object into the sex organ or anus of another person (the intrusion clause). *Maggette*, 195 Ill. 2d at 347. Further, the supreme court has determined that the word "object" in the contact clause was not intended to include parts of the body. *Maggette*, 195 Ill. 2d at 348-50. Thus, in this case, with respect to count III, defendant's finger or hand cannot constitute an "object" which came into contact with J.B.'s vagina for purposes of the contact clause. See *Maggette*, 195 Ill. 2d at 350.

¶ 31 In addition, the record does not support a finding that defendant's conduct as alleged in count III constituted "sexual penetration" under the intrusion clause. J.B. testified at trial that defendant touched her "tutu," or vagina, with his hand. The State then asked J.B. if defendant touched her with

his hand on the "inside or outside of [her] tutu." J.B. responded that defendant touched her on the outside of her vagina. The State also introduced two written accounts from J.B. describing defendant's conduct. Neither of these documents established that defendant's finger "intruded" into J.B.'s vagina. In People's exhibit 13, J.B. wrote that defendant "touched [her] *on* the privates." (Emphasis added.) Similarly, in People's exhibit 14, J.B. wrote that defendant "touched [her] *on* [her] private part." (Emphasis added.) In addition, J.B.'s out-of-court statements to her grandmother said only that defendant touched J.B.'s vagina with his hand and moved it around. J.B. did not include a statement that defendant's finger intruded into her vagina.

¶ 32 We find it significant that J.B. described other conduct by defendant as resulting in an intrusion into her vagina. J.B. testified that defendant placed his tongue "in" her tutu and that he placed his penis "in" her tutu. Further, in her written statements, J.B. wrote that defendant placed his tongue or penis "in," "into," or "inside" her vagina. This use of language by J.B. shows that she consistently distinguished between the defendant's conduct of touching the *outside* of her vagina with his hand and his conduct involving an *intrusion* into her vagina with defendant's penis and tongue.

¶ 33 Based on the foregoing evidence, we conclude that where, as here, the victim consistently stated that defendant touched the *outside* of her vagina with his finger or hand and made no statements that could support a finding that defendant's hand or finger intruded, however slightly, into her vagina, the evidence was insufficient to support a finding of "sexual penetration" as that term is defined in section 12-12(f) (720 ILCS 5/12-12(f) (West 2008)). As a result, defendant was not proved guilty beyond a reasonable doubt of predatory criminal sexual assault of a child as charged in count III of the superceding indictment, which requires proof of sexual penetration.

¶ 34 Our finding is consistent with other cases that have interpreted the term "sexual penetration" as defined in section 12–12(f) (720 ILCS 5/12-12(f) (West 2008)). In *Maggette*, for instance, the victim testified on direct examination that the defendant rubbed her vagina over her panties. On cross-examination, the victim said that the defendant placed his hand underneath her panties and she felt his hand "in [her] vagina area." The supreme court held that the victim's vague reference to her vaginal area was not sufficient to prove an "intrusion" of the victim's vagina and could not support a conviction of an offense requiring proof of sexual penetration as an essential element. *Maggette*, 195 Ill. 2d at 352. Similarly, in *People v. Garrett*, 281 Ill. App. 3d 535, 545 (1996), the court reversed a conviction for criminal sexual assault based upon an allegation of anal penetration. The court found that the only evidence presented by the State was that the defendant placed his finger *on* the victim's anus. The evidence was inconclusive as to whether the defendant's conduct actually resulted in an intrusion of the victim's anus, even slightly. In *People v. Lofton*, 303 Ill. App. 3d 501 (1999), *affirmed*, 194 Ill. 2d 40 (2000), the defendant was charged with predatory criminal sexual assault of a child for placing "his finger on the vagina" of the victim. Citing *Garrett*, this court said that placing a finger *on* the victim's vagina is not an act of sexual penetration as defined in section 12–12(f). *Lofton*, 303 Ill. App. 3d at 508. More recently, in *People v. Lara*, 408 Ill. App. 3d 732, 741 (2011), the reviewing court reduced the defendant's conviction of predatory criminal sexual assault of a child to aggravated criminal sexual abuse. In doing so, the *Lara* court noted that while the defendant signed a written statement that he inserted his finger into the victim's vagina, the evidence presented at the defendant's trial established only that the defendant touched the victim's vagina. *Lara*, 408 Ill. App. 3d at 741.

¶ 35 Our finding is also in accordance with *People v. Bell*, 234 Ill. App. 3d 631 (1992). There, the victim testified that the defendant "rubbed" her privates with his finger. The prosecutor then asked whether the defendant placed his finger in or just rubbed the victim's private area. The victim responded that he "[r]ubbed it." The reviewing court ruled that the jury could not reasonably infer from this evidence that the defendant committed an act of sexual penetration. *Bell*, 234 Ill. App. 3d at 637. In other circumstances, the court said, the jury could infer penetration from testimony that the defendant rubbed the victim's private parts. *Bell*, 234 Ill. App. 3d at 637. However, where the victim was expressly asked whether any penetration occurred and the victim's response was implicitly negative, evidence has been held to be insufficient to establish penetration. *Bell*, 234 Ill. App. 3d at 637; see also *Hillier*, 392 Ill. App. 3d at 69 (noting that jury's inference that an act of penetration occurred based on testimony that the defendant "rubbed," "felt," or "handled" the victim's vagina is unreasonable only if the victim denies that penetration occurred). In the present case, similar to *Bell*, the State asked J.B. at trial whether defendant touched her with his hand "inside or outside [her] tutu." J.B. responded that defendant touched the "[o]utside" of her vagina. Thus, as in *Bell*, where the victim responded to a specific question that the defendant touched her only on the outside of her vagina, the evidence in this case was insufficient to support the jury's finding of sexual penetration by defendant with his finger or hand.

¶ 36 The courts in *Bell* and *Lara* reduced the defendant's convictions of predatory criminal sexual assault to the lesser-included offense of aggravated criminal sexual abuse. See *Lara*, 408 Ill. App. 3d at 743 (reducing the defendant's convictions of predatory criminal sexual assault of a child to aggravated criminal sexual abuse where there was no corroboration for the element of sexual penetration); *Bell*, 234 Ill. App. 3d at 637 (entering conviction for aggravated criminal sexual abuse

where penetration element was not proved in prosecution for predatory criminal sexual assault of a child). However, we decline to do the same in this case. Here, defendant has already been convicted of aggravated criminal sexual abuse (see 720 ILCS 5/12-16(c)(1)(i) (West 2008)) as charged in count I of the superceding indictment for placing his hand on the vagina of J.B. Moreover, the evidence at trial showed only one act by defendant of touching J.B.'s vagina with his hand. Thus, reducing the predatory criminal sexual assault of a child conviction as alleged in count III to aggravated criminal sexual abuse would result in multiple convictions arising from a single act and therefore violate the one-act, one-crime rule. See *People v. Johnson*, 237 Ill. 2d 81, 97 (2010) (prohibiting multiple convictions when the convictions are carved out of the same physical act). Therefore, we reverse defendant's conviction of and sentence for predatory criminal sexual assault of a child as alleged in count III.

¶ 37 The State urges that, even if we hold that it did not sufficiently prove defendant's finger penetrated J.B.'s vagina, we should nevertheless affirm defendant's conviction on count III. The State reasons that because J.B. testified that, in addition to defendant placing his penis in her vagina (which was charged in count II), defendant put his tongue in her vagina, the variance between the act named in the indictment and the act proven at trial is not fatal. We find that the State has forfeited this argument. First, by not charging defendant with predatory criminal sexual assault of a child on the basis that defendant placed his tongue in J.B.'s vagina, the State affirmatively indicated that it was not seeking to prosecute defendant for this conduct. Indeed, the State did not argue this theory of penetration to the jury during closing argument. Moreover, while the instructions tendered to the jury defined the offense of predatory criminal sexual assault of a child in general terms, the verdict forms tracked the conduct alleged in the indictment. Thus, one set of forms allowed the jury to find

defendant guilty or not guilty of "Predatory Criminal Sexual Assault of a Child (placed his finger in the vagina of J.B.)," while the other set of verdict forms allowed the jury to find defendant guilty or not guilty of "Predatory Criminal Sexual Assault of a Child (placed his penis in the vagina of J.B.)" Finally, we note that the evidence that defendant penetrated J.B.'s vagina with his tongue was admitted, at the State's request, as evidence of uncharged conduct expressly for the limited purpose of showing intent and lack of mistake. Further, the jury was instructed that the evidence was admitted for this limited purpose. For all of these reasons, we are compelled to deny the State's request to affirm defendant's conviction on count III.

¶ 38 B. The MSR Term

¶ 39 Next, defendant challenges the term of MSR imposed on his remaining conviction of predatory criminal sexual assault of a child. The trial court ordered defendant to serve a term of MSR ranging between three years and natural life for his conviction on count II. Defendant acknowledges that, with respect to an individual convicted of certain sexual assault crimes, section 5-8-1(d)(4) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1(d)(4) (West 2008)) provides that the MSR term "shall range from a minimum of 3 years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4) (West 2008). Defendant interprets the statute to require the trial court to fix a *specific* term of MSR within the range of three years to natural life. Defendant asserts that the court's failure to do so in this case rendered that portion of its sentencing order void. See *People v. Thompson*, 209 Ill. 2d 19, 24-25 (2004) (noting that a sentence which does not conform to a statutory requirement is void). Although defendant did not raise this issue in his motion to reconsider sentence, a void order may be challenged at any time. See *Thompson*, 209 Ill. 2d at 25-27. Accordingly, defendant may challenge the MSR term on appeal.

¶ 40 We recently addressed the precise issue raised by defendant in *People v. Schneider*, 403 Ill. App. 3d 301, 305-09 (2010). In that case, we found that the language of section 5-8-1(d)(4) of the Code was ambiguous. *Schneider*, 403 Ill. App. 3d at 307. Specifically, we determined that the statute could be interpreted to require either that the trial court impose (1) an MSR term of a range between three years to natural life or (2) a set term of MSR as long as the term falls within the range of three years to natural life. *Schneider*, 403 Ill. App. 3d at 307. To ascertain the intent of the legislature, we invoked the rule of statutory construction known as the doctrine of *in pari materia*. *Schneider*, 403 Ill. App. 3d at 307-08. This doctrine provides that separate statutes dealing with the same subject or different sections of the same statute should be given harmonious effect. *People v. Rodriguez*, 398 Ill. App. 3d 436, 441 (2009).

¶ 41 In *Schneider*, we concluded that the intent of the legislature in promulgating section 5-8-1(d)(4) was to require the court to set a minimum of three years' MSR with a possible maximum of natural life and then grant the Department of Corrections (DOC) the authority to determine how long the defendant remains on MSR after three years. *Schneider*, 403 Ill. App. 3d at 308. In so holding, we pointed out that Illinois had long ago replaced its system of indeterminate sentences with a system of determinate sentences. *Schneider*, 403 Ill. App. 3d at 308. We also noted that while the other subsections of section 5-8-1(d) of the Code set specific MSR terms, only subsection (4) sets forth a range. *Schneider*, 403 Ill. App. 3d at 307. Thus, we reasoned, the legislature, in using indeterminate language with regard to the MSR term mandated in section 5-8-1(d)(4) long after it generally abolished indeterminate sentences, must have specifically intended indeterminate MSR terms in sexual assault cases. *Schneider*, 403 Ill. App. 3d at 308. We noted further that the Code as a whole gives the DOC broad authority to oversee the entire MSR process. See, *e.g.*, 730 ILCS

5/3-3-7 (West 2008) (allowing DOC to set conditions of MSR); 730 ILCS 5/3-3-8(b) (West 2008) (allowing the DOC to release a defendant from MSR early).

¶ 42 Defendant asks that we reconsider our decision in *Schneider* in light of *People v. Rinehart*, 406 Ill. App. 3d 272 (2010), *appeal allowed*, 949 N.E. 2d 1102 (Ill. 2011). In *Rinehart*, the Fourth District held that a trial court has an obligation, at the time it imposes sentences on a defendant convicted of a sex offense falling within section 5-8-1(d)(4) of the Code, to set a specific term of MSR to accompany the term of imprisonment. *Rinehart*, 406 Ill. App. 3d at 281. The *Rinehart* court reasoned that the legislature, in setting forth an MSR term of a range of three years to natural life, implicitly authorized the trial court to impose a term within that range (*Rinehart*, 406 Ill. App. 3d at 280) and that the trial court is in a better position than the DOC to assess and weigh the factors relevant to determine the term of MSR (*Rinehart*, 406 Ill. App. 3d at 281). However, in light of our holding and rationale in *Schneider*, we decline to follow *Rinehart.* Accordingly, we affirm the MSR term of a range of three years to natural life imposed on defendant's remaining conviction of predatory criminal sexual assault of a child.

¶ 43 III. CONCLUSION

¶ 44 For the reasons set forth above, we reverse defendant's conviction of and sentence for predatory criminal sexual assault of a child as charged in count III of the superceding indictment. We otherwise affirm the judgment of the circuit court of Winnebago County.

¶ 45 Affirmed in part and reversed in part.