2012 IL App (4th) 110624-U

NO. 4-11-0624

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 30, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
WILLIE J. CHERRY,	)	No. 10CF42
Defendant-Appellant.	)	
	)	Honorable
	)	James E. Souk,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in either admonishing the jury pursuant to Illinois Supreme Court Rule 431(b) or instructing the jury the dates of the alleged offense were immaterial. The State presented sufficient evidence for a rational trier of fact to find defendant guilty of predatory criminal sexual assault.

¶ 2 In March 2011, a jury found defendant, Willie J. Cherry, guilty of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 1998)), involving penis to anus contact with a minor, K.M.W. (born October 11, 1994). In June 2011, the circuit court sentenced defendant to 20 years in prison with 3 years' mandatory supervised release (MSR). Defendant appeals, arguing the following: (1) the trial court improperly admonished the jury pursuant to Illinois Supreme Court Rule 431(b) (eff. May 1, 2007); (2) the trial court erred by instructing the jury the dates of the alleged offenses were immaterial; and (3) the State did not prove his guilt beyond a reasonable doubt. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In January 2010, a grand jury indicted defendant, who was approximately age 41 or 42 at the time of the offense, with three counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 1998)) against two minors under the age of 13 occurring on or about January 1, 2000, through December 31, 2000. Count I alleged defendant committed an act of sexual penetration on K.W. (born August 15, 1995), involving defendant's penis and the anus of K.W. Count II alleged defendant committed an act of sexual penetration on K.W., involving defendant's penis and K.W.'s mouth. Count III alleged defendant committed an act of sexual penetration on K.M.W., involving defendant's penis and K.M.W.'s anus.

¶ 5 In March 2010, Defendant filed a motion for bill of particulars, requesting the date of each act, the street address and description of the location where the act allegedly occurred, and the defendant's particular acts constituting each offense. In the State's answer to the motion for a bill of particulars, the State noted the following:

> "1. The exact dates of each act are unknown to the victims, Minors K.W. and K.M.W. The acts occurred during the period of time that defendant lived with the grandmother of the two minors. The dates alleged are as stated in the indictments.
>
> 2. The particular acts which constitute each offense are as stated in each indictment. The initials of 'K.W.' refer to the minor male victim, and the initials of 'K.M.W.' refer to the minor female victim.

3. The location of the incidents has been described as at the residence which the defendant shared with the grandmother of the victims, Ms. Julia West, in Normal, IL. The location of these incidents has been listed as 108 College Park Court, in Normal, IL, in the bedroom shared by defendant and Ms. West."

¶ 6 Defendant's jury trial began on March 15, 2011. The morning jury venire consisted of 21 potential jurors. The trial court told the 21 potential jurors:

"We have some basic principles in our criminal justice system that I need to go over with you.

The Defendant is presumed to be innocent of these charges as he sits there now. The presumption of innocence remains with him throughout the trial, and it's not overcome unless, after you have heard all of the evidence, listened to the arguments of the attorneys, been instructed on the law by the Judge and deliberated with your fellow jurors, you then become convinced that the State has proven one or more of the charges beyond a reasonable doubt.

The Defendant is not required to prove his innocence. He does not have to present any evidence. He does not have to testify himself. If he chooses not to do so, that's not held against him in any way.

The State has the burden of proof, and that burden of proof

remains with him throughout the case, and of course in a criminal case, it's a higher burden than it is in a civil case. Beyond a reasonable doubt is the standard that we use which I'm sure you're all familiar with.

Now is there anyone who has any disagreement with those basic principles of our criminal justice system?"

It appears the jurors responded "No" as a group. Later during *voir dire*, defense counsel asked the court to ask each individual juror about the Rule 431(b) admonitions. The court then stated to the prospective jurors:

"All right, just to make sure we cover an important issue, those principles that we've talked about before, the presumption of innocence, the State's burden to prove the case beyond a reasonable doubt, the Defendant's right to not testify or present any evidence, the fact that the Defendant does not have to prove his own innocence, which I referred to, I believe, as the basic principles of our criminal justice system.

I just want to go through and make sure that everybody understood those and agrees with them and can follow them."

The court then asked each juror, individually, and each juror responded affirmatively.

¶ 7 The next venire consisted of 20 prospective jurors. Again, the trial court told these prospective jurors what it had told the earlier panel. The court then asked each juror individually whether he or she understood, agreed with, and agreed to follow the law. Each of

the prospective jurors responded affirmatively.

¶ 8 K.M.W. testified she was 16 at the time of the March 2011 trial. In 2000, when she moved into her grandmother's house, defendant was there. Defendant stayed at the house several days a week for a period of four or five months. According to K.M.W., defendant watched her and her two brothers at her grandmother's house more than 20 times. She testified defendant took her into a bedroom with him one morning when he was babysitting. She was wearing pajamas, but she ended up naked on the bed on her stomach. Defendant was on top of her and put "his penis in [her] butt." She said this happened more than once in the bedroom.

¶ 9 According to her testimony, this stopped happening when she, her brothers, and her grandmother moved. Defendant did not move with them. She testified she did not tell anyone what defendant was doing because defendant said he would hurt her family if she told. She testified she knew defendant did the same thing to her little brother because defendant would also take him into the bedroom alone. She disclosed the abuse in 2009 when she thought her grandmother was going to Bloomington to see defendant.

¶ 10 K.W. testified he was 15 years old at the time of the trial. He testified he met defendant, whom he identified in court, when he was four years old through his grandmother while living in an apartment in Bloomington. He shared a room in the apartment with his sister, K.M.W., and his older brother, Kh.W. (born October 18, 1991). K.W. testified defendant sometimes babysat for him, K.M.W., and his brother when the children's grandmother went to play bingo or work. K.W. testified defendant sexually assaulted him in his grandmother's room. Defendant awakened K.W. and told him to go to his grandmother's bedroom. K.W. was wearing pajamas when he went into his grandmother's room but ended up naked. Defendant told him,

"Turn around and lay across the bed." K.W. testified he did not know what was going on. He laid on his stomach on the bed and defendant put his penis in K.W.'s anus.

¶ 11 According to K.W.'s testimony, this happened four or five times. K.W. testified defendant put his penis in K.W.'s mouth on one occasion. Defendant told K.W. he would kill K.W.'s grandmother if K.W. told anyone about the assaults. K.W. never told anyone about the assaults until he learned his sister told about defendant assaulting her. According to K.W., he wanted to leave the situation alone. K.W. testified he did not have any direct knowledge of his sister being molested.

¶ 12 Julia Howard testified she is the grandmother of K.W., K.M.W, and Kh.W. She met defendant through a friend while attending Illinois State University (ISU) and living in Normal, Illinois, in the late 1990s. She and defendant were friends for six months to a year before starting a dating relationship. After they started dating, defendant sometimes stayed at her residence on weekends and sometimes for an extended period of time, including at night.

¶ 13 Howard testified she was going to school and working evening hours at McDonalds, between 20 and 40 hours per week. She was living in ISU off-campus housing on Shelbourne Drive when defendant began staying with her overnight. Then, also in the late 1990s, she moved to 108 College Park Courts, where she lived with her grandchildren, K.W., K.M.W., and Kh.W. The children's mother was in prison at the time. She testified she was still living at the College Park Courts address in 2000 and defendant stayed there overnight at times.

¶ 14 Howard testified defendant babysat for Kh.W., K.W., and K.M.W. three to five times a week, usually from about 2:30 in the afternoon until 9:30 or 10 at night. Her relationship with defendant, from their first meeting, lasted about 18 months. Howard did not know

defendant was married when she first began dating him. When she found this out, she ended the relationship. Howard testified she did not know anything about the sexual abuse until November 2009 when K.M.W. disclosed the abuse.

¶ 15 Detective Nicholas Thacker of the Normal police department, testified he became aware of this case after K.W. and K.M.W. were interviewed. After being briefed on what the children said during their interviews and watching videotapes of the interviews, he and Sharnet Griffin, who worked for the Department of Children and Family Services, went to defendant's residence and requested an interview. Defendant agreed to come to the Normal police department to talk to Detective Thacker.

¶ 16 Detective Thacker testified he told defendant he was not under arrest and was free to leave at any time. Thacker told defendant he was a suspect in a case and advised him of his rights pursuant to *Miranda*. See *Miranda v. Arizona*, 384 U.S. 436 (1966). Defendant admitted knowing Julia Howard and said they dated approximately 10 years earlier. Defendant said he was married to his current wife, Dottie, when he and Howard had a relationship. Defendant told Thacker he and his wife were having marital problems at the time. According to Thacker, defendant told the detective he lived with Howard for a little over two months.

¶ 17 According to Detective Thacker, defendant admitted babysitting for K.W., K.M.W., and Kh.W. However, later in the interview when confronted with K.W. and K.M.W.'s allegations, defendant said he had never been alone with the kids. Early in the interview, Thacker told defendant he probably knew what K.W. and K.M.W. had said happened 10 years earlier. Defendant said he was not certain, but he guessed it was something to do with molestation because of the "vibe" the detective was giving defendant.

¶ 18 Defendant told Thacker during the interview the children were out of control so he did not watch them for very long. However, defendant also said he had a good rapport with the minors and did not know why they would make up these allegations unless Howard put them up to it. Defendant consistently denied molesting any of the children.

¶ 19 Kh.W. testified he began living with his grandmother when he was eight. He testified his brother, K.W., and his sister, K.M.W., also lived with his grandmother. Shortly after he began living with his grandmother, defendant lived with them. The family was living at the Shelbourne Apartment when defendant "came into the picture." Defendant watched the children both at the Shelbourne Apartments and at College Park Court after the family moved there.

¶ 20 Kh.W. testified he saw defendant having sex with his sister, K.W., on his grandmother's bed at the College Park Court apartment. Defendant was behind his sister. Kh.W. saw this from the hall outside the bedroom when he had gotten up in the night to use the restroom. The bedroom door was open. Kh.W. told his grandmother about what he saw but she did not believe him. Kh.W. said this was the only time he saw defendant having sex with his sister, but he testified defendant would be in the bedroom with his sister with the door closed on other occasions.

¶ 21 Kh.W. also testified defendant was alone in the bedroom with his brother K.W. on occasion. Kh.W. stated:

> "Most of the time when [K.W.] was in there, I never seen nothing with [K.W.] in there with the door open, but I used to hear him scream all the time and like I could hear him screaming and hollering, like he was beating him up or something. Like I would

hear punches like, like you can hear him being punched, and he'd be in there crying and screaming."

Kh.W. testified this happened more than 10 times.

¶ 22 Dottie Cherry, defendant's wife, testified on defendant's behalf. She testified she married defendant in September 1998. In 1999, they separated but reconciled in December 1999. She knew they reconciled in December 1999 because their son, who was born on November 2, 1999, was hospitalized because of an illness when he was 6 1/2 weeks old. She recalled this happened near Christmas. She testified she knew of a Julia Howard during that time.

¶ 23 On cross-examination, Dottie Cherry testified she did not recall the month she and defendant separated in 1999, but she stated the separation was more than two months and less than four. They were not living completely apart during the separation. She knew defendant was seeing other women during the separation, one of whom was Julia Howard. She met Julia Howard's grandchildren a couple of times when she and defendant were separated. However, she did not know defendant watched the children.

¶ 24 Defendant testified he met Julia Howard in 1999. He stayed at her home on occasion but did not live with her. According to defendant, Howard left her grandchildren with him no more than four times while she went to gamble at the riverboat in Peoria. Defendant reconciled with his wife around November 2, 1999, when his son was born because he realized he needed to be home with his wife and son. He testified he was completely done with Howard around November 1999 and denied sexually abusing K.W. and K.M.W.

¶ 25 On cross-examination, defendant said he also watched the children "a time or two" while Howard went to school. He then admitted it was possible he could have watched the

children as many as seven times. He also admitted staying overnight at Howard's residence.

¶ 26 During the jury instruction conference, defendant objected to Illinois Pattern Jury Instructions, Criminal, No. 3.01 being given to the jury. The instruction in question states:

> "The indictment states that the offense charged was committed on or about the 1st day of January 2000 thru the 31st day of December 2000. If you find the offense charged was committed, the State is not required to prove that it was committed on the particular dates charged." Illinois Pattern Jury Instructions, Criminal, No. 3.01 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.01).

Defense counsel pointed out the State had filed a bill of particulars adopting the dates of the alleged offenses found in the indictment. Defendant submitted an alternative jury instruction that included a fourth proposition that the act was committed on or after January 1, 2000. Defense counsel argued the addition would be consistent with the State's bill of particulars but would not nail the State down to a particular date on or after January 1, 2000. The State argued its answer to the request for a bill of particulars indicated the exact dates were unknown but the incidents occurred at a time when defendant was living with Howard.

¶ 27 Defendant also raised another complication dealing with the dates on which the offenses allegedly occurred because the predatory criminal sexual assault statute was amended effective January 1, 2000, to provide for enhanced Class X sentencing.

¶ 28 The trial court, relying on this court's decision in *People v. Suter*, 292 Ill. App. 3d 358, 685 N.E.2d 1023 (1997), stated:

"This situation falls into the category of the case mentioned by the court there where it's not inappropriate to give [No.] 3.01 even when there's a bill of particulars, because in this case, the Court cannot discern any real prejudice to the Defendant or that he was misled in any way.

The variance in the evidence here, all of the Defendant's evidence points to '99. The prosecution evidence is kind of '99-2000 without much precision really, as I recall, even from the grandmother, but everybody is talking about the same time frame.

Even if the dates of that time frame are somewhat off, the children are alleging during a time that he and his wife were separated and having marital problems, and he was having a relationship with the grandmother and staying over some and babysitting these children. The kids say that's when this happened. Mr. Cherry admitted to the police and has testified here in court that, in fact, happened, that he stayed over there and babysat.

He has consistently denied any improper conduct, but this is not a situation such as where there's perhaps an alibi defense and the Defendant is misled in the preparation of his defense."

The court then addressed the change in the statute, stating it did not believe the State had to prove the date of the occurrence as an element of the offense. The court recognized the State "has a serious issue to address if [it] would be requesting the Court to sentence under the new

statute," assuming defendant was convicted. In the end, the court gave IPI Criminal 4th No. 3.01 over defendant's objections.

¶ 29 After deliberations, the jury acquitted defendant on counts I and II and convicted defendant of predatory criminal sexual assault of a child (K.M.W.) as alleged in count III.

¶ 30 On April 11, 2011, defendant filed a motion for judgment of acquittal notwithstanding the verdict, or in the alternative, motion in arrest of judgment, or in the alternative, motion for new trial. On April 21, 2011, the trial court denied defendant's motion. On June 2, 2011, the court sentenced defendant to 20 years in prison and 3 years' MSR. The court noted the following on the sentencing order: "There were dates[, January 1, 2000, through December 31, 2000,] in the indictment. Evidence revealed the offense may have occurred in 1999 so he was sentenced pursuant to law in 1999, at which time the offense was a regular Class X [with] 6–30 range [and] 3 [years] MSR."

¶ 31 On June 16, 2011, defendant filed a motion to reconsider sentence, which the trial court denied.

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 A. Rule 431(b) Admonishments

¶ 35 On appeal, defendant argues the trial court undermined defendant's "presumption of innocence and relieved the State of its burden of proof beyond a reasonable doubt" by telling the jury defendant's presumption of innocence is not overcome unless the State proves one or more of the charges beyond a reasonable doubt. According to defendant, pursuant to this admonition, reasonable jurors trying to conscientiously follow the court's instructions could

conclude that proof beyond a reasonable doubt on one charge would be sufficient to overcome defendant's presumption of innocence on the other two charges. Defendant argues the court's admonition violated Illinois Supreme Court Rule 431(b). Rule 431(b) states:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

Defendant does not argue the court's procedure in providing the Rule 431(b) admonitions amounts to error, only that the substance of the admonition regarding the State's burden of proof misled the jurors.

¶ 36 Defendant's trial counsel did not object to the trial court's admonition. As a result, defendant forfeited this issue. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124,

1130 (1988). However, defendant argues we should review the court's error as either a structural error or plain error.

¶ 37 We must first determine whether the trial court violated Rule 431(b) in the manner argued by defendant. *People v. Thompson*, 238 Ill. 2d 598, 606, 939 N.E.2d 403, 409 (2010). The court plainly instructed the prospective jurors defendant (1) was presumed innocent of all charges throughout the trial, (2) the State had the burden of proving defendant guilty beyond a reasonable doubt, (3) defendant did not have to present any evidence, and (4) defendant did not have to testify and, if defendant decided not to testify, the decision was not to be held against him. Granted, the trial court did not use the precise language provided by Rule 431(b). However, this does not constitute error. *People v. Zirko*, 2012 IL App (1st) 092158, ¶ 62, 976 N.E.2d 361, 383. Each prospective juror stated he or she agreed with the principles described in Rule 431(b).

¶ 38 However, defendant argues the trial court undermined defendant's presumption of innocence and relieved the State of its burden of proving defendant's guilt beyond a reasonable doubt on all three charges. At issue is the following statement made by the court while admonishing the prospective jurors:

> "The Defendant, as he sits there right now, is presumed innocent of these charges against him. That presumption of innocence remains with him throughout the trial, and it's not overcome unless at the end of the case after you have heard all the evidence, you've heard the Judge instruct you on the law, and you've had a chance to talk with each other in deliberations that you then conclude that the

> State has proven one or more of the charges beyond a reasonable doubt."

Defendant argues "[t]his admonition was highly misleading, because reasonable jurors conscientiously trying to follow their instructions could conclude from this admonition that proof beyond a reasonable doubt concerning only one of the three charges would overcome [defendant's] presumption of innocence and satisfy the State's burden as to all three charges."

¶ 39 The trial court did not err by providing this admonition in the way it did. The court did not tell the jury it should convict on all counts if the State proved one count beyond a reasonable doubt. Further, the record clearly reflects the prospective jurors were in no way confused or misled by the court's statement. The jurors convicted defendant on one count and acquitted defendant on the other two counts. Had the jurors been misled or confused by the court's admonishments, the jury would have convicted him on all three counts once they found the State proved defendant's guilt beyond a reasonable doubt on count III. This did not happen.

¶ 40 Assuming, *arguendo*, the trial court erred in some manner with regard to this admonition, the error would not rise to the level of a structural error as defendant argues. In *Thompson*, our supreme court stated an error is "typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Thompson*, 238 Ill. 2d at 609, 939 N.E.2d at 410. Referring to the United States Supreme Court, our supreme court stated:

> "The Supreme Court has recognized an error as structural only in a very limited class of cases. [Citations.] Those cases include a complete denial of counsel, trial before a biased judge,

> racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *Thompson*, 238 Ill. 2d at 609, 939 N.E.2d 411.

Our supreme court also stated a trial before a biased jury would also constitute structural error. *Thompson*, 238 Ill. 2d at 610, 939 N.E.2d at 411 (quoting *People v. Glasper*, 234 Ill. 2d 173, 200-01, 917 N.E.2d 401, 418 (2009)). However, according to our supreme court, "[w]e cannot presume [a] jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning." *Thompson*, 238 Ill. 2d at 614, 939 N.E.2d at 414. The jury's verdict in this case shows the trial court's admonishment in this case in no way amounted to structural error.

¶ 41 Further, without considering whether plain error review would be appropriate, this case presents the rare situation where the jury's verdict shows defendant was not harmed in any manner by the admonishment at issue. The jury's verdict shows it completely understood what the trial court meant by the admonishment given. The jury only found defendant guilty on one of three counts.

¶ 42 B. Challenge Regarding I.P.I. Criminal 4th No. 3.01

¶ 43 Defendant next argues the trial court erred in accepting People's Instruction No. 8, which followed IPI Criminal 4th No. 3.01 and stated:

> "The indictment states that the offense charged was committed on or about the 1st day of January 2000 thru the 31st day of December 2000. If you find the offense charged was committed, the State is not required to prove that it was committed on the particular dates

charged."

Defendant argues this instruction was improper in light of the State's response to defendant's request for a bill of particulars.

¶ 44 The parties agree the State ordinarily does not have to prove beyond a reasonable doubt the charged offense occurred on a particular date, "unless the allegation of a particular time is an essential ingredient of the offense or a statute of limitations question is involved." *People v. Suter*, 292 Ill. App. 3d 358, 363, 685 N.E.2d 1023, 1027 (1997). The dates of the alleged offenses in this case were not an essential element of the charged offenses. Defendant admitted he had access to the children on multiple occasions. Further, the State did not attempt to pin the alleged assaults down to a particular date.

¶ 45 This court has stated:

> "Where the proof at trial suggests the offense occurred on a date other than the one charged, IPI Criminal 3d No. 3.01 serves to inform the jury that the difference in dates is not material. [Citation.] The instruction prevents a defendant from arguing that he should be acquitted simply because of a technical, nonfatal variance between the proof and charging instrument. Where there is no variance, however, there is no need for the instruction."
> *Suter*, 292 Ill. App. 3d at 363, 685 N.E.2d at 1027.

As the trial court pointed out when ruling on this issue, the evidence in this case varied as to when defendant had unsupervised contact with the children. Defendant argued he had unsupervised contact with the children in 1999, not 2000. However, the State's evidence pointed

to defendant having unsupervised contact with the children in 1999 and 2000. Regardless, the evidence from both sides shows without a doubt defendant had the children in his sole care for periods of time when he stayed with Howard.

¶ 46 Defendant points to the Committee Note to IPI Criminal 4th No. 3.01 and the fact the State filed a bill of particulars in this case as a reason why this instruction should not have been given. The Committee Note in question states:

> "This instruction should be given only when there is a variance between the date alleged and the evidence, and all dates are within the period of limitations. It should not be given if the State has filed a bill of particulars stating the date of the crime.
>
> The filing of a bill of particulars does not necessarily preclude the use of this instruction. Give this instruction whenever the time variance is immaterial. *See People v. Suter*, 292 Ill.App.3d 358, 685 N.E.2d 1023 *** (1997)." IPI Criminal 4th No. 3.01, Committee Note.

While the Committee Note cited *Suter* as authority for allowing this instruction even if the State filed a bill of particulars, defendant argues *Suter* supports his argument this instruction should not have been given. Defendant points to the following passage from that case:

> "Although IPI Criminal 3d No. 3.01 should only be given where a variance arises, the instruction is not necessarily proper in every case where there is a variance. Giving IPI Criminal 3d No. 3.01 may result in reversible error, (1) where inconsistencies between

> the date charged in the indictment and the evidence presented at trial are so great that the defendant is misled in presenting his defense or (2) when he presents an alibi for the time alleged in the indictment and is thereby prejudiced because he failed to gather evidence and witnesses for the time actually proved by the State." *Suter*, 292 Ill. App. 3d at 364, 685 N.E.2d at 1028.

Defendant does not argue he was misled by the time frame in this case.

¶ 47 However, according to defendant, because his and his wife's testimony established an alibi defense for the time alleged in the indictment, the instruction should not have been given. Defendant argues his alibi under the bill of particulars showed he could not have committed the crimes because he was no longer staying with Julia Howard in 2000. Defendant pointed to the testimony he had moved back in with his wife by December 1999.

¶ 48 However, the State never alleged specific dates the offense occurred. In response to the request for a bill of particulars, the State disclosed it did not know the exact date but the offense occurred when defendant was living with Howard.

¶ 49 Basically, the State, in responding to the request for a bill of particulars, stated the offense occurred while defendant was living with Howard whenever that was, with its best guess being sometime during the year 2000. More important, although defendant argues on appeal the giving of IPI Criminal 4th No. 3.01 interfered with his alibi defense, defendant did not argue alibi at trial. Defendant gave no notice of an alibi defense as required by Illinois Supreme Court Rule 413(d) (eff. July 1, 1982), nor did he argue alibi during his closing argument. In fact, he argued the time frame of the charges was 1999-2000. He also argued the offense did not occur, not that

it was impossible for him to have been the perpetrator. In fact, defense counsel was trying to limit the State to technical proof of dates of the offense by use of a bill of particulars and was not using the bill of particulars for the purpose of developing an alibi defense. The trial court recognized this and so stated on the record. Defense counsel did not attempt to disabuse the court of its view. This is the type of situation where the court can appropriately give IPI Criminal 4th No. 3.01 where the State has responded to a bill of particulars. In addition, defendant's response to the State's request for discovery specified he did not intend to raise an affirmative defense.

¶ 50 Based on the record in this case, the trial court did not abuse its discretion in giving this jury instruction.

¶ 51 C. Sufficiency of Evidence To Convict

¶ 52 When reviewing a challenge to the sufficiency of the evidence, a court of review will not disturb a verdict if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999). Defendant argues the State failed to prove his guilt beyond a reasonable doubt.

¶ 53 Defendant points to his trial testimony denying any sexual assault or abuse against K.W. or K.M.W. as well as his consistent denials to the police prior to trial. Defendant also points to his testimony that he had ended his relationship and moved away from Julia Howard's home by November or December 1999 and his wife's testimony she and defendant reconciled in December 1999. According to defendant, he and his wife could reasonably pinpoint these dates because they coincided with the birth of their son in November 1999 and their son's illness in

December 1999.

¶ 54 Defendant cites *People v. Seibech*, 141 Ill. App. 3d 45, 49, 489 N.E.2d 1138, 1141 (1986), for the proposition "where the testimony of a witness is neither contradicted, either by positive testimony or by circumstances, nor inherently improbable, and the witness has not been impeached, that testimony cannot be disregarded by a jury." According to defendant:

> "In [defendant's] case, the State presented no evidence rebutting the defense testimony that Mr. and Mrs. Cherry's son was born in November 1999 and fell ill in December 1999. The couple had already reconciled by that time; therefore he could not have committed any offense as alleged in the indictments and in the testimony of the State's witnesses. The State did not prove its case beyond a reasonable doubt. Therefore, this Court should reverse Willie Cherry's conviction for predatory criminal sexual assault."

We disagree.

¶ 55 The State did not need to rebut defense testimony defendant and his wife reconciled in November or December 1999 or that his son was born in November 1999 or became ill in December 1999. Even if all of these points are true, it does not mean defendant could not have committed the acts in question. As previously noted, the testimony of defendant and his wife regarding the reconciliation of their marriage in either November or December 1999 did not constitute an alibi defense regardless of when the alleged offenses occurred. Defendant's reconciliation with his wife did not make it impossible for him to have committed the alleged offenses in this case. Further, all witnesses agreed there was a period of time where defendant

lived with Howard. It was during this period, whether in 1999 or 2000, that the offense occurred.

¶ 56 The State presented sufficient evidence for a rational trier of fact to find defendant guilty beyond a reasonable doubt. K.M.W. testified defendant put his penis inside her anus. Kh.W. testified he witnessed defendant having sex with his sister, K.M.W. The jury apparently chose to believe the testimony of K.M.W. and Kh.W. over that of defendant. We will not disturb the jury's decision.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, we affirm the circuit court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2010).

¶ 59 Affirmed.