

NOTICE

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2023 IL App (5th) 220177-U

NO. 5-22-0177

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Williamson County.
	)	
v.	)	No. 20-CF-109
	)	
DAVID I. BLUE,	)	Honorable
	)	Michelle M. Schafer,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of conviction is reversed where the State failed to present sufficient evidence to establish the defendant's guilt beyond a reasonable doubt.

¶ 2 Following a bench trial, the defendant, David I. Blue, was convicted of predatory criminal sexual assault of a child and aggravated criminal sexual abuse, and he was sentenced to six years in prison. On appeal, the defendant claims there was insufficient evidence to prove his guilt beyond a reasonable doubt. The defendant also claims he was denied a fair trial where the trial court considered and based its findings on inadmissible hearsay contained in records that were not admitted into evidence at trial, and where trial

counsel provided ineffective assistance in that counsel admitted and/or failed to object inadmissible hearsay that prejudiced the defense. For the reasons that follow, we reverse.

¶ 3

I. BACKGROUND

¶ 4 In February 2020, the State charged the defendant, by information, with two counts of predatory sexual assault of a child, a Class X felony (720 ILCS 5/11-1.40(a)(1) (West 2018)), and one count of aggravated criminal sexual abuse, a Class 2 felony (720 ILCS 5/11-1.60(b) (West 2018)). In May 2021, the State filed an amended information. Count I of the amended information alleged that the defendant, a person over 17 years of age, committed “an act of contact” between the defendant’s penis and the mouth of N.B., a person under 13 years of age at the time of the offense, for the purpose of sexual gratification of the victim or the accused, in violation of section 11-1.40(a)(1) of the Criminal Code of 2012 (Code) (720 ILCS 5/11-1.40(a)(1) (West 2018)). Count II alleged that the defendant, a person over 17 years of age, committed “an act of penetration,” in that the defendant placed his penis in the mouth of N.B., a person under 13 years of age at the time of the offense, in violation of section 11-1.40(a)(1) of the Code (720 ILCS 5/11-1.40(a)(1) (West 2018)). Count III alleged that the defendant knowingly placed his penis on the mouth of N.B., a family member under 18 years of age at the time of the offense, for the sexual gratification of the defendant, in violation of section 11-1.60(b) of the Code (720 ILCS 5/11-1.60(b) (West 2018)). The State alleged that the defendant committed these offenses against N.B., his adopted daughter, during the period from March 2018 until October 26, 2019.

¶ 5 A bench trial commenced on September 9, 2021. A summary of the evidence that was presented during the trial follows.

¶ 6 In 2013, the defendant and his wife, Lisa Blue, began providing foster care for N.B., then 6 years old, and N.B.'s 16-year-old brother. Prior to being placed with the Blues, N.B. and her brother had been in and out of foster care due to neglect by their biological mother, who struggled with mental illness. After the parental rights of the biological mother were terminated, the defendant and Lisa adopted N.B.¹ At that time, the couple also had another child, G.B., who was also adopted. Sometime after N.B.'s adoption, the defendant and Lisa experienced marital difficulties. The couple separated in February 2017, and they began formal divorce proceedings in February 2018. By all accounts, the divorce was contentious. All issues, including child custody, were contested. In February 2019, the trial court issued an order regarding child custody. Under the terms of the order, N.B. and G.B. stayed with the defendant two days a week (Tuesday and Wednesday) and every other weekend. At all other times, the children stayed with Lisa. The final judgment of dissolution, addressing all other contested issues, was issued in August 2019. Lisa and the defendant continued to have problems getting along even after the conclusion of the divorce proceedings.

¶ 7 On the morning of October 28, 2019, Lisa Blue went to the Marion County police station and reported that the defendant had sexually abused her 12-year-old daughter. Detective Thomas Warren, a 25-year veteran officer, was assigned to investigate the allegations. Detective Warren contacted Lisa and asked her to bring N.B. to the police

¹The defendant and his wife did not adopt N.B.'s older brother.

department for an interview. Later that same afternoon, Lisa brought N.B. to the police department. Detective Warren and Rose Grundy, an investigator with the Illinois Department of Children and Family Services (DCFS), conducted an initial interview with the child. Following this interview, Grundy scheduled N.B. for a forensic interview. The forensic interview was conducted later that week at the Franklin and Williamson County Child Advocacy Center (CAC). Subsequently, Lisa obtained an order of protection so that N.B. would not have to attend visitation with the defendant.

¶ 8 After the forensic interview was completed, Detective Warren contacted the defendant and requested an interview. The defendant agreed. Detective Warren testified that the defendant, accompanied by his attorney, appeared for the interview. During the interview, the defendant granted Detective Warren's request to come to the defendant's home and take photographs.

¶ 9 On November 6, 2019, Detective Warren went to the defendant's home. He asked to see the defendant's bedroom because the offenses reportedly occurred there. Upon entering the defendant's bedroom, Detective Warren noted that a bathroom and an office adjoined the bedroom. He also noted a hand weight on the floor near the bedroom door and damage to the door frame. Detective Warren testified that the victim referred to the weight during the interview. He photographed the hand weight and the damaged door frame, and those photographs were admitted into evidence. Detective Warren did not collect the bed sheets from the defendant's bedroom because the defendant had done laundry since his last visit with his children.

¶ 10 During cross-examination, Detective Warren testified that the defendant was fully cooperative. The defendant provided access to all areas of his home. He allowed Detective Warren to take a pillowcase and a stuffed animal from the bedroom where N.B. and her younger brother slept. Detective Warren submitted those items to the Illinois State Police Laboratory. The items tested negative for the presence of semen. Detective Warren testified that the defendant voluntarily provided saliva samples for DNA analysis. Detective Warren questioned the defendant about the damage to the door frame, and the defendant gave a plausible explanation. Detective Warren concluded that no further investigation was necessary. At the time Detective Warren interviewed the defendant, he was aware that Lisa had obtained an order of protection against the defendant. He was also aware that the couple had divorced.

¶ 11 Lisa Blue testified that she and the defendant began fostering N.B. when N.B. was six years old. Lisa recalled that N.B. had been removed from the custody of her biological mother because of severe environmental neglect. Lisa and the defendant discovered that N.B. had developmental disabilities shortly after N.B. entered their care. When N.B. struggled with schoolwork during first grade, Lisa had N.B. evaluated. The test results revealed that N.B. had an I.Q. in the high fifties, moderate intellectual disabilities, and impairments to cognitive functioning. N.B., then eight years old, was provided with an individualized educational program, counseling, and other resources to address her specific needs. Lisa stated that N.B. was not able to process concepts. She noted that N.B. did not understand the time surrounding an event, and struggled with calendar time and the sequencing of events. Lisa testified that N.B. also had some behavioral issues, but nothing

Lisa deemed significant. Lisa testified that, overall, N.B. had progressed well since joining their family.

¶ 12 Lisa testified that the child custody order was entered in February of 2019. In accordance with the order, N.B. and G.B. stayed with the defendant every Tuesday and Wednesday, and every other weekend, during a period from February 2019 through October 28, 2019. N.B. and G.B. stayed with the defendant during the weekend of October 25, 2019, because it was his parenting weekend. On Sunday, October 27, 2019, Lisa received a phone call or a text message from N.B., asking to come home early. Lisa stated that nothing seemed out of the ordinary when the defendant dropped off the children. Later that day, Lisa took N.B. and G.B. to a Halloween event, and then to Steak ‘n Shake for dinner. After everyone placed their orders, N.B. told Lisa that her dad “annoyed” her. Lisa stated that this was not unusual because N.B. often complained that her dad made her fold laundry or do other chores. She told N.B. that there was nothing wrong with her dad asking her to help with those tasks. Then, N.B. grabbed Lisa’s hand, became tearful, and disclosed something “horrendous.” Lisa and the children left the restaurant immediately. N.B. broke down on the drive home. Lisa testified that N.B. provided more details when they got home. The following morning, October 28, 2019, Lisa took N.B. to school. Lisa then went to the Marion County Police Department and reported that the defendant had sexually assaulted their daughter.

¶ 13 Lisa testified that N.B. disclosed the abuse shortly before her thirteenth birthday. Lisa stated that N.B. had not disclosed anything like that before, and she did not have a history of making up stories. Lisa did not think that N.B.’s developmental disabilities

impacted her ability to tell the truth. Lisa admitted that the divorce was contentious. She stated she would never do anything to hurt the defendant and would not ask N.B. to do anything to hurt the defendant.

¶ 14 During cross-examination, Lisa acknowledged that she emailed N.B.'s caseworker in January 2015, because she was concerned about N.B.'s behavior. In the email, Lisa noted that N.B. had stolen candy at school and lied about it, that N.B. had engaged in self-harm by biting her own arm, that N.B. had urinated and defecated in plastic containers, that N.B. had been found peeking into her brother's diaper, and that N.B. had been caught with her pants down and butt exposed while playing with her younger brother. Lisa admitted that she informed the caseworker that she did not trust N.B.'s motives or explanations for her behavior. Lisa discounted the significance of N.B.'s behaviors. She stated that those behaviors occurred when N.B. was fairly new to their home, that they were isolated incidents, and that almost all of the concerning behaviors had resolved within a year of N.B.'s placement in their home. Lisa was questioned about N.B.'s intellectual challenges. Lisa reiterated that N.B. was unable to process concepts. She explained that N.B. could remember things, but she could not put a time stamp on memories. Lisa testified that, in her experience, N.B. did not have the mental capacity to fabricate things.

¶ 15 The State called N.B. as its final witness. At the time of the trial, N.B. was 14 years old and in eighth grade. She testified in the company of a support dog named Zoie. During her testimony, N.B. was generally able to reply to "yes-or-no" and "this-or-that" types of questions and simple leading questions. N.B. seemed to have trouble following more

complex or open-ended questions. At times, N.B.'s responses did not correlate with the questions posed to her.

¶ 16 During direct examination, N.B. testified that she lived with her mother and her younger brother. The defendant did not live with them anymore because of the divorce. N.B. stated that she and her younger brother, G.B., stayed with the defendant on Tuesdays and Wednesdays, and sometimes on weekends. She and G.B. shared a room. It was across the hall from the defendant's bedroom.

¶ 17 N.B. testified that sometimes the defendant would come into their room and wake her up. If N.B. did not want to get up, the defendant would put his hands on her neck or throat. That made it hard to breathe. The defendant led her into his bedroom and closed the door. He put a weight in front of the door so that no one could get in. N.B. stated that the defendant was wearing underwear. She was wearing pajamas. The defendant got on the bed. As she stood next to the bed, the defendant asked her "to put his private part in [her] mouth." Using drawings of the human bodies of a male and a female, N.B. circled the penis of the male figure and the mouth of the female figure. N.B. stated that the defendant's private parts were hard, and that the defendant moved his hand on "his private." When asked whether anything ever came out of the defendant's private part, she replied, "Yeah." N.B. said it was like "batter." It went in her mouth, but it did not taste like anything, and she swallowed it. Then, the defendant sent her back to bed. The prosecutor asked how often this happened. N.B. replied that it happened more than once. N.B. was asked whether it happened more than twice, and then more than three times, and as to each question, she replied in the affirmative. When asked whether it happened more than four times, N.B.

stated, “I don’t know.” N.B. indicated that the defendant never talked about it or explained why he did it. If she told the defendant she did not want to do it, he put his hands around her throat. She made an in-court identification of the defendant.

¶ 18 During cross-examination, N.B. testified that the first person she ever told about the abuse was her mom. One day when N.B., her mom, and her younger brother were at Steak ‘n Shake, N.B. told her mom that she was frustrated with the defendant. N.B. testified that when she said she was frustrated, her mom knew what was going on, and they had to leave the restaurant. N.B. did not tell her mom about what the defendant had done until they got home from the restaurant. She did not tell her mom at the restaurant because she did not want her younger brother to hear. Defense counsel asked whether something had happened right before N.B. told her mom, and N.B. replied, “No.” When asked if she knew how long it had been since the incident, N.B. answered, “No.” N.B. stated that she did not often talk about what happened, but her mom brought it up sometimes. N.B. stated that she talked with a counselor about what happened “a lot,” but she was unable to state how many times she talked with the counselor. N.B. indicated that after the disclosure, she became afraid that she would see her dad in a store or somewhere in public.

¶ 19 As cross-examination continued, N.B. testified that the defendant only choked her one time. It happened when she said “no” to him. She thought she was 12 years old. She could not remember if the choking incident happened a long time or a short time before she disclosed the sexual abuse. When asked whether the defendant ever told her to do things while she was in his bedroom, she initially replied, “Uh-huh,” but then stated that he did not tell her what to do. N.B. testified that the defendant called what he did “training.” N.B.

also testified that the defendant used the word “batter.” Defense counsel also asked whether N.B. was standing by the bed when the defendant placed his penis in her mouth. N.B. stated that she was on her knees. When asked whether she knew how long the abuse had been going on, N.B. replied, “No.” Defense counsel asked N.B. whether she sometimes had a hard time remembering these events. N.B. replied, “Sometimes. But, like, I have a good memory.” Defense counsel asked a series of questions regarding N.B.’s memory of the events she had testified about.

“Q. Is there—could you remember this—these things you’re talking about today, could you maybe not remember all the details?

A. No.

Q. You remember?

A. No.

Q. You don’t really remember all the stuff?”

At that point, the prosecutor objected because he did not think N.B. understood the question, and he asked that it be rephrased. The trial court did not rule on the objection, but asked defense counsel not to ask questions with double negatives. Defense counsel resumed questioning.

“Q. Are you sure you remember this, how it happened?

A. The first time it happened, yeah.

Q. Any of the times?

A. I don’t think so.

Q. You don’t think you remember?

A. (No response.)

Q. That's okay. It's okay if you don't remember. Is that what you are saying?

A. Yeah."

During redirect, the prosecutor asked N.B., "The stuff that you told me that your dad did, did those things happen?" N.B. replied, "Yes." The prosecutor then asked, "Okay. And you remember those happening?" N.B. replied, "Yes."

¶ 20 At the conclusion of N.B.'s testimony, the State rested. The trial court denied the defendant's motion for a directed verdict, and the defendant proceeded with its defense.

¶ 21 Anthony Stearns and Rick Bethel were the first two witnesses for the defense. Anthony Stearns was N.B.'s softball coach during the summer of 2018. Rick Bethel was N.B.'s martial arts instructor. N.B. attended his academy for about three years, beginning in late 2015 or early 2016. Stearns and Bethel described the defendant as a committed parent who brought N.B. to practice and often stayed for practice. Both testified that N.B. was an affectionate child. Neither observed any conflict or trouble between N.B. and the defendant.

¶ 22 The defendant's older brother, Michael Blue, also testified for the defense. Michael acknowledged that while he was a board-certified forensic psychiatrist, he was not testifying in that capacity. Michael testified that the defendant and Lisa began dating in 2002, and that he spent a lot of time with them. He recalled that the couple had an ordinary romantic relationship while dating and during the early years of their marriage. Subsequently, the couple's relationship deteriorated, and their divorce was acrimonious. As a result, Michael distanced himself from Lisa, but he continued to spend time with N.B.

and the defendant. Michael described N.B. as a physically affectionate child. Michael testified that N.B. displayed behavioral issues shortly after she was placed with Lisa and the defendant. N.B. would bite herself or slap herself. In 2014 or 2015, Lisa and the defendant sought Michael's advice about N.B.'s behavioral issues, and he advised them to seek professional guidance. Michael observed that over time, some of N.B.'s behavioral issues improved, while others remained. During the period between March 2018 and July 2019, Michael attended family gatherings with N.B. and the defendant. He stated that the defendant was an engaged parent and that the defendant and N.B. had a good relationship.

¶ 23 Dr. John Fabian, a licensed physician trained in clinical and forensic psychiatry, testified as an expert witness for the defense. Dr. Fabian was retained to offer "a forensic psychological analysis as to this forensic child abuse/sexual abuse investigation." He stated that he had "a consulting role in the case."

¶ 24 Dr. Fabian testified that he reviewed all of the records available on N.B., including DCFS, social services and educational records, the police reports, and the CAC interviews. Dr. Fabian also interviewed the defendant. He did not have the opportunity to interview N.B. or her mother. Based upon his review of the records and reports, he found that N.B. was intellectually disabled, that she had difficulties communicating effectively, and that she displayed evidence of attention deficit hyperactivity disorder (ADHD), reactive attachment disorder—disinhibited type, and disinhibited social engagement disorder. N.B. also displayed evidence of autism and learning disorders. Dr. Fabian testified that N.B. made inconsistent statements about the abuse. For example, during the initial interview on October 28, 2019, N.B. reported only the choking incident, but during the forensic

interview on October 31, 2019, she reported both choking and oral sex. Dr. Fabian opined inconsistent statements would not bolster the claim of assault, but could impair one.

¶ 25 Dr. Fabian testified that there are risks factors that tend to support the truth or the falsity of an allegation of sexual abuse. After analyzing those factors in N.B.'s case, he concluded that they weighed more heavily on the side of a false allegation. He stated that those factors included the timing of allegations—that they were made after a contentious divorce; that N.B. was subjected to neglect and possible sexual abuse very early in her childhood; and that N.B.'s emotional and social immaturity along with the cognitive deficits and intellectual disabilities make her gullible and more susceptible to manipulation, coaching, or persuasion by an authority figure. He noted that additional risk factors for a false allegation included confabulation or errors in memory in which a person confuses and incorporates memories of past events, such as prior abuse, with more recent events. He opined that N.B.'s vulnerabilities related to her memory and social communication disorders made it more likely that she filled in gaps in her memory and inaccurately reported events because of compromised memories. N.B. also evidenced little understanding of time and space, inability to engage in meaningful conversation, superficial or unrelated responses to questions, and inconsistencies with time, sequences, and details of events. He testified that those difficulties rendered her disclosure less credible, though through no fault of her own. The lack of physical evidence or other corroborating witnesses also diminished the probability of a true allegation.

¶ 26 Dr. Fabian testified that there were factors that could support a finding that the allegations were true. These included the fact that N.B.'s allegations were not improbable

or absurd in nature, that N.B. provided some specific details, that the CAC interviewer was not overly leading, and that there was no evidence that N.B. made the allegations to protect someone else who was being abused by the defendant. Dr. Fabian also noted that N.B. had a constricted and dysphoric affect during the CAC interview, which was consistent with abuse.

¶ 27 During cross-examination, Dr. Fabian testified that it was possible the N.B. did not disclose the sexual abuse to Detective Warren during the initial interview because she did not feel comfortable describing the incident to the detective. Given N.B.'s intellectual and emotional capacity, it was also possible that she did not initially recognize that she was being abused, and that, in turn, could have made it difficult for her to recall specific instances of abuse. During redirect, Dr. Fabian testified that N.B.'s affect, hesitation in answering certain questions, and inconsistent statements could have resulted from the stress of not wanting to say something that was not true.

¶ 28 At the conclusion of Dr. Fabian's testimony, the defense sought to admit into evidence Dr. Fabian's report along with many of the documents that Dr. Fabian relied upon in forming his opinions. The court admitted those documents over the State's objection as to foundation. Notably, Detective Warren's report and the CAC interview were not among those documents offered by the defense.

¶ 29 The defendant testified in his own defense. The defendant stated that he had been employed as a nurse anesthetist prior to his arrest. He lost his position because of the allegations. The defendant testified that he and Lisa separated in March 2017, and that they had a contentious divorce that was finalized in August 2019. The defendant noted that Lisa

was not pleased with the court's judgment. She petitioned for full custody of the children, but the court ordered a joint custody arrangement. She was also displeased with the court's decision regarding the distribution of marital property. The defendant strongly denied N.B.'s allegations.

¶ 30 During cross-examination, the defendant testified that he thought the animosity between he and Lisa led to the allegations. The defendant acknowledged that he was a strict parent. He encouraged his children to commit to practice when they engaged in extracurricular activities. He also admitted that he had workout equipment in his home, including a weight bench and assorted weights in his office. He stated that he used a weight to prop open his bedroom door so that his cat could use a litter box in the office adjacent to his bedroom. The defendant testified that he damaged the bedroom door frame when Lisa locked him out of the bedroom after an argument during the marriage. The defendant stated that the lock on the door remained functional despite the damage to the frame.

¶ 31 The State presented no rebuttal witnesses. At the close of the evidence, the trial court took a recess to review the testimony and exhibits. The court then issued a decision from the bench. The court found the defendant guilty on both counts of predatory criminal sexual assault of a child and aggravated criminal sexual abuse of a child. The court provided its findings and reasoning. The court noted that it had previously examined the DCFS records and all of the related records to determine whether they were relevant and whether they could be released to the parties for use during trial. The court also noted that it had considered the testimony of the witnesses and all of the exhibits during its deliberations. The court specifically commented on N.B.'s testimony:

“And I find her testimony to be extremely credible given the nature and extent of how difficult it was for her, given that she testified in court on Wednesday, and that she had given that same story almost two years ago to Detective Warren and CAC investigators, not once, but twice.^[2] And that’s contained in Dr. Fabian’s report both in October of 2019 and February 2020.”

The court ordered a presentence investigation and set the matter for sentencing on October 18, 2021.

¶ 32 On October 7, 2021, the defendant filed a motion to reconsider the finding of guilt. While that motion was pending, and at defendant’s request, the trial court proceeded with the sentencing hearing on October 18, 2021. During the hearing, the court found that only a few sentencing factors were applicable in the defendant’s case. The court noted that the defendant had an advanced degree, a supportive family, and no prior criminal history, and that those were all mitigating factors. The court sentenced the defendant to six years on each count of predatory criminal sexual assault of a child, and the sentences were to run concurrently. The court found that count III was a lesser included offense and did not sentence the defendant on that count.

¶ 33 Subsequently, the defendant obtained new counsel. In November 2021, the defendant filed a motion for a new trial, a supplemental motion to reconsider the defendant’s guilt, and a motion to reconsider the sentence. All pending motions were called for hearing on January 14, 2022, and the trial court issued written orders on those motions

²Although Dr. Fabian referred to two CAC interviews in his report, the State indicated that N.B. participated in one CAC interview.

on February 18, 2022. In an order addressing the defendant's motion to reconsider the sentence, the court concluded that the defendant should be sentenced only on count I of the amended information, and it amended the judgment accordingly. The court also issued an order specifically addressing the defendant's contention that the court found him guilty based upon inadmissible hearsay statements contained in records that were not admitted into evidence. In its order, the court noted that Dr. Fabian had relied upon several documents, including the CAC interview and Detective Warren's report, in forming his opinions regarding the truth or falsity of N.B.'s sexual abuse allegations. The court explained that this material was received by the court, not as substantive evidence, but as information that could be considered in assessing the perceived risk factors regarding the truth or falsity of the allegations, N.B.'s credibility, and the defendant's guilt. The court further stated that it was permitted to consider the information upon which the defendant's expert relied in forming his opinions, not as substantive evidence, "but to evaluate the expert's credibility and the weight to be given to his testimony." The court stated that it only considered admissible evidence that was received during the trial, and denied the motion to reconsider guilt and the motion for new trial. The court also denied the defendant's motion for new trial based upon claims of ineffective assistance of trial counsel. Subsequently, the defendant filed a motion to reconsider the aforementioned orders, and that motion was also denied. This appeal followed.

¶ 34

II. ANALYSIS

¶ 35 On appeal, the defendant initially claims that the evidence was insufficient to prove beyond a reasonable doubt that he was guilty of predatory criminal sexual assault and

aggravated criminal sexual abuse. He argues that N.B. was an adolescent with intellectual, cognitive, and behavioral disorders; that N.B. gave inconsistent testimony regarding whether the abuse ever occurred; and that the State offered no other evidence to corroborate N.B.'s testimony. The defendant also claims he was denied a fair trial where the trial court based its findings on inadmissible hearsay contained in records that were not admitted into evidence.

¶ 36 When presented with a challenge to the sufficiency of the evidence, the reviewing court must determine whether, after viewing the evidence in a 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. Collins*, 106 Ill. 2d 237, 261 (1985). The trier of fact is responsible for weighing the evidence, assessing the credibility of witnesses, resolving conflicts in the evidence, and drawing reasonable inferences from the evidence, and a reviewing court will not substitute its judgment for the trier of fact on those matters. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). That said, the ultimate duty of a reviewing court is to independently evaluate the reasonableness of a guilty verdict, and therefore, the reviewing court is not absolutely bound by the trier of fact's verdict. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004); *People v. Schott*, 145 Ill. 2d 188, 206-07 (1991). A defendant's conviction will not be reversed on review unless the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 37 A trial judge presiding over a bench trial is presumed to consider only admissible evidence and disregard inadmissible evidence. *People v. Naylor*, 229 Ill. 2d 584, 603

(2008). This presumption may be rebutted where the record affirmatively shows that the judge considered improper evidence in making his or her findings and conclusions. *Naylor*, 229 Ill. 2d at 603-04. The deliberations of the trial judge are limited to the record made before that judge during the course of the trial. See *People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962). The determination of a trial judge based upon personal investigation or private knowledge of the court, and untested by cross-examination or any of the rules of evidence, constitutes a denial of due process. *Wallenberg*, 24 Ill. 2d at 354.

¶ 38 In issuing its verdict from the bench, the trial court stated that it considered statements of N.B. that were contained in Detective Warren's report and in the CAC interview in assessing N.B.'s credibility. The trial court ultimately found that N.B.'s testimony was credible because she testified in court under difficult circumstances and because she had "given that same story almost two years ago to Detective Warren and CAC investigators," as noted in Dr. Fabian's report. In posttrial motions, the defendant argued that the information upon which the trial court relied in assessing N.B.'s credibility was not subject to a reliability hearing under section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2018)), and was not admitted into evidence during the trial; and, as such, the defendant's rights to due process and to confrontation were violated. In a written order, the trial court stated that it had only reviewed and considered evidence that was offered and admitted during the trial. For clarification, the court explained that it had considered the testimony from the defendant's expert, Dr. Fabian, along with Dr. Fabian's report, including his discussion of statements made by N.B. in the initial interview and in the CAC interview. The court stated that it had considered this information, not as

substantive evidence, but rather to assess the perceived risk factors regarding the truth or falsity of the allegations, N.B.'s credibility, and the defendant's guilt, and to "evaluate" the credibility and the weight to be given to the expert's opinions. The trial court's explanation of its ruling is not clear. Based upon our review of the record, it appears the trial court considered out-of-court statements contained in documents that were not admitted into evidence, at least in part, as evidence corroborating N.B.'s trial testimony and evidence of the defendant's guilt. To the extent that the court did so, that was error. In reviewing the defendant's challenge to the sufficiency of the evidence, we consider only evidence that was admitted during the trial.

¶ 39 The State called N.B. as its only witness to testify about the alleged sexual offenses. N.B. was 14 years old and in eighth grade at the time of the trial. N.B. had cognitive impairments and intellectual and emotional disabilities. N.B. testified in the company of a support dog. During her testimony, N.B. was generally able to reply to "yes-or-no" and "this-or-that" types of questions. She answered simple leading questions, but she seemed confused by more open-ended questions. At times, it did not appear that N.B. was able to comprehend the questions posed. At other times, her answers did not correlate with the questions posed to her.

¶ 40 During direct examination, N.B. testified that the defendant sexually assaulted her when she and her younger brother stayed with him. She described an incident in which the defendant woke her up, took her into his bedroom, and placed his penis in her mouth. She was able to provide some details of the incident, but there were also inconsistencies in her testimony. During direct examination, N.B. testified that she stood by the bed when the

defendant placed his penis in her mouth. During cross-examination, N.B. testified she was on her knees. During direct examination, N.B. stated that the defendant told her what to do. During cross-examination, the defendant did not tell her what to do. Significantly, during direct examination, N.B. stated that it happened more than once, and during cross-examination, N.B. stated that she did not know if it happened at all. The record indicates that she seemed to follow the lead of the person questioning her. N.B. did not associate the sexual abuse with any particular dates, times of year, or life events. She did not differentiate between instances of abuse. To be sure, N.B. appeared to answer the questions to the best of her ability, but her testimony was not consistent or reliable. Dr. Fabian, the defendant's expert, opined that N.B.'s intellectual and emotional disabilities and her history of severe neglect during childhood affected her memory and made her prone to suggestibility. He also testified that N.B., through no fault of her own, and without malice, may have incorporated old memories of abuse that she suffered while residing with her biological mother.

¶ 41 The State did not offer any other witnesses to corroborate N.B.'s testimony. The State did not ask the trial court for a ruling on the reliability of the CAC interview pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2018)), and it did not offer statements made by N.B. during that interview into evidence. It is well-settled that the testimony of a single witness is sufficient to support a conviction if the testimony is positive and credible. *Smith*, 185 Ill. 2d at 545. Here, N.B.'s conflicting and unreliable statements from the witness stand, together with the lack of corroborating evidence, cast reasonable doubt about the defendant's guilt. After reviewing this record,

we find that the State failed to establish that the defendant committed the offenses charged beyond a reasonable doubt.

¶ 42

III. CONCLUSION

¶ 43 A bedrock principle in all criminal cases is that a defendant must be proved guilty beyond a reasonable doubt. *Smith*, 185 Ill. 2d at 545. The burden of meeting this standard of proof falls solely on the prosecution, and if it fails, a defendant is entitled to a finding of not guilty. *Smith*, 185 Ill. 2d at 545. In *Smith*, our supreme court cautioned that although a not guilty finding is sometimes equated with innocence, that is an erroneous conclusion.

“Courts do not find people guilty or innocent. They find them guilty or not guilty.

A not guilty verdict expresses no view as to a defendant’s innocence. Rather it indicates simply that the prosecution has failed to meet its burden of proof.” *Smith*, 185 Ill. 2d at 545.

Courts have “a duty to ensure that all citizens receive those rights which are applicable equally to every citizen who may find himself charged with a crime,” and when the State cannot meet its burden of proof, the defendant must go free. *Smith*, 185 Ill. 2d at 545-46.

¶ 44 In this case, the State did not satisfy its burden to offer evidence to prove beyond a reasonable doubt that the defendant was guilty of the offenses charged in the amended information. Because the State failed to present sufficient evidence to support a conviction, a retrial would violate double jeopardy principles. Therefore, the defendant’s convictions must be reversed without remand. Because our resolution of the initial issue is dispositive of the appeal, we will not address the defendant’s other claims of error.

¶ 45 Accordingly, the defendant’s convictions and sentence are hereby reversed.

¶ 46 Reversed.