No. 127757

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 2-19-0329, 2-19-0452.
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of the Twenty-Second
-vs-	)	Judicial Circuit, McHenry County, Illinois, No. 15 CF 467.
ROBERT LIBRICZ,	)	Honorable James Cowlin,
Defendant-Appellant.	)	Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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NATURE OF THE CASE

Robert Libricz, defendant-appellant, appeals from judgments of conviction following a bench trial for, *inter alia*, two counts of predatory criminal sexual assault. The appellate court affirmed the judgment, and this Court allowed leave to appeal. An issue is raised concerning the sufficiency of the indictment.

ISSUE PRESENTED FOR REVIEW

Whether two counts of the indictment fail to sufficiently charge the offense of predatory criminal sexual assault where the counts allegedly occurred during a two-year period, 14 months of which encompass the time before the effective date of the statute creating the offense.

STATEMENT OF FACTS

Robert Libricz was charged in June 2015 in an 11-count indictment with sex offenses against two of his daughters, D.H. and K.L., between 1987 and 2006 at times when the complainants were minors. (SC 52-57; 337-42)

The two counts of the indictment at issue in this appeal, Counts 6 and 8, charge Libricz with separate offenses of predatory criminal sexual assault against K.L. occurring between "March 27, 1995, and March 27, 1997, inclusive." (SC 54, 55; 339, 340) The offense of predatory criminal sexual assault was created by Public Act 89-462, which took effect on May 29, 1996.

Additionally, Counts 7 and 9 of the indictment charged Libricz with aggravated criminal sexual assault and were based on the same physical acts as Counts 6 and 8. (SC 55, 56; 340, 341; 1274) Counts 7 and 9 also alleged the acts occurred between "March 27, 1995, and March 27, 1997, inclusive." (SC 55, 56; 340, 341) The State dismissed Counts 7 and 9 on the day of commencement of the trial. (SC 1313)

Prior to trial, the court denied Libricz' motion for a bill of particulars asking the State to more narrowly define the alleged dates of offenses. (SC 245-46; 1175-78) The State argued the dates in the indictment were sufficiently specific to permit the defendant to prepare a defense and to show the charges fall within the statutes of limitation. (SC 1157-60) The court found the State had provided the defendant with the best information available as to when the offenses occurred. (SC 1175-78)

Libricz waived his right to a jury trial, (SC 308, 1232), and the case proceeded to a bench trial on November 1, 2018, on the counts alleging offenses against K.L.

K.L. testified her date of birth is March 27, 1984. (SC 1331) She graduated

high school in 2002 and has five children. (SC 1333) K.L. identified the defendant as her father and said his birth date is August 8, 1960. (SC 1334) K.L. grew up at a house in Algonquin with her parents and four siblings. (SC 1335-36)

Regarding the allegations in Count 6, K.L. testified that when she was about age 11, she was sleeping on a couch in the living room and woke up with defendant undressed and on top of her. (SC 1350) The defendant was attempting to place his penis into K.L.'s vagina, and his penis touched both her vagina and anus. (SC 1351) K.L. looked up and saw her sister J.L. looking down through a stair railing. K.L. told the defendant J.L. was watching, and the defendant quickly moved away and the incident ended. (SC 133-54)

Regarding the allegations in Count 8, K.L. testified she asked for permission to attend a sixth grade dance at Algonquin Middle School. Her father told K.L. she could attend the dance but that she had to shower first. (SC 1355) While K.L. showered in the upstairs bathroom, the defendant came into the bathroom, removed his clothes, and got into the shower with her. (SC 1356) The defendant stood behind K.L. and placed his penis in her vagina. (SC 1357-58)

In March 2015, D.H. and K.L. went to the McHenry County Sheriff's Office to report their allegations of abuse by defendant. On April 1, 2015, Detective Michelle Asplund recorded a telephone call in which K.L. called the defendant on his cell phone and asked the defendant to apologize for abusing her. (SC 1376-77, 1397-98) On April 13, K.L. wore a recording device provided by Detective Asplund and visited her father at Boulder Ridge Country Club, where he worked in the maintenance department. (SC 1378-79) K.L. again asked defendant to apologize for what he did. (SC 1380-81) The recordings of the phone call and face-to-face

meeting were admitted into evidence and played for the court. (Pl.Ex.1, SC 1382-85)

Beverly Bass testified that in 1989, her daughter was a friend of K.L. and J.L. (SC 1455) Bass was driving the two girls to their house when K.L. said, "[W]e take a shower with daddy, and he makes us touch his penis." (SC 1459) Bass made an anonymous report to DCFS. (SC 1462) Bass had no further contact with K.L. until 2015, and she later made a statement to sheriff's police. (SC 1464)

K.L.'s sister, D.H., testified regarding other acts of sexual conduct by the defendant. (SC 951-54) D.H. said that in February 1999, when she was six or seven years old, she and the defendant went to a daddy-daughter dance. (SC 1477-78) After the dance, D.H. and defendant were in his bedroom and he placed his finger in D.H.'s vagina. (SC 1480) About 2004 to 2006, when D.H. was about 13 years old, she was sleeping in her parents' bed and woke up with the defendant's hand inside her underwear, rubbing the outside of her vagina and inserting his fingers inside her vagina. (SC 1481)

For the defense, J.L. identified Libricz as her father. (SC 1552-53) J.L. is about 19 months younger than K.L. and they were close growing up. (SC 1553, 1558-59) J.L. did not recall being in a car with Beverly Bass when K.L. told about touching defendant's penis. (SC 1559) J.L. never saw defendant inappropriately touch or attempt to have sex with K.L.. The defendant never made J.L. shower with him and never abused her. (SC 1563)

K.L.'s sister, R.L., testified for the defendant and said she was the youngest of the siblings. (SC 1579) R.L. shared a bedroom and was close to D.H. until they drifted apart in high school. (SC 1582) R.L. never saw anything inappropriate happen between any of her sisters and the defendant. (SC 1584)

Kimberlee Kelly Libricz, the defendant's wife, testified that she and the defendant have been married for 35 years and have five children. (SC 1588-89) Kimberlee and K.L. had a falling out in 2014 over how K.L. was raising her children. (SC 1590-91) Kim said she never saw defendant abuse K.L.. (SC 1595-96)

Robert J. Libricz II testified in his defense. Libricz denied, *inter alia*, that when K.L. was about 13 years old he attempted to penetrate her from behind as she slept on the couch. (SC 1653-54) Libricz denied having sex with K.L. in the shower before a school dance. (SC 1654-55) Libricz denied having inappropriate sexual contact with D.H. or K.L.. (SC 1660)

Following closing arguments, the court on November 28, 2018, found Libricz not guilty of aggravated criminal sexual assault of K.L. (count 3) because it could not rely on the memory of K.L. at age 3. The court found Libricz guilty of aggravated criminal sexual abuse (Count 4); aggravated criminal sexual assault (Count 5); predatory criminal sexual assault (Count 6); predatory criminal sexual assault (Count 8); criminal sexual assault (Count 10); and criminal sexual assault (Count 11). (SC 1811-22)

Counsel filed a motion for new trial, which the trial court denied on February 5, 2019. (SC 390-91, 1885) The motion argued, *inter alia*, that the trial court erred by denying Libricz' motion for a bill of particulars. (SC 390)

Libricz elected to be sentenced under statutory provisions in effect at the time of the offenses. (SC 1898) The court sentenced Libricz to prison terms of five years for aggravated criminal sexual abuse (count 4); 12 years for aggravated criminal sexual assault (count 5); 12 years for predatory criminal sexual assault (count 6); 18 years for predatory criminal sexual assault (count 8); five years for

criminal sexual assault (count 10); and eight years for criminal sexual assault (count 11). The court determined that consecutive sentences were not required to protect the public from further criminal conduct and ordered all sentences to be served concurrently. (SC 1950, 1952-54)

The trial court denied a motion to reconsider sentence on March 28, 2019. (SC 1998)

On April 11, 2019, Libricz entered a negotiated guilty plea to predatory criminal sexual assault against D.L. (count 1) and was sentenced to six years in prison to be served at 85 percent and concurrent to the previous sentences. Count 2, which charged Libricz with predatory criminal sexual assault against D.L., was dismissed pursuant to the plea. (SC 2036-58)

Libricz, on April 22, 2019, filed a motion pursuant to Supreme Court Rule 472 to correct errors in sentencing regarding fines and fees imposed by the court. (SC 666-68) The trial court denied the motion on May 13, 2019. (SC 673, 2081)

ARGUMENT

The counts of the indictment charging Robert Libricz with predatory criminal sexual assault against K.L. contained fatal substantive defects that rendered them invalid by charging an offense that was not in effect during the time when the offense was alleged to occur.

Robert Libricz was convicted and sentenced after a bench trial on two counts of a criminal indictment (count 6 and count 8) charging predatory criminal sexual assault of his daughter K.L.. Each count alleged a single and separate act by Libricz that occurred during a two-year period between "March 27, 1995, and March 27, 1997, inclusive." (SC 54, 55; 339, 340) However, the statute creating the offense of predatory criminal sexual assault did not take effect until May 29, 1996. Public Act 89-462. Thus, the relevant counts of the indictment include a 14-month period when the charged offense did not exist.

Because the offense was not in effect during the entire two-year period charged in these counts of the indictment, the counts are fatally defective and provided an insufficient basis to prosecute Libricz as charged. *People v. Wasson*, 175 Ill.App.3d 851, 855, 860 (4th Dist. 1988); *People v. Mescall*, 379 Ill.App.3d 670, 671 (2d Dist. 2008). The Second District acknowledged the indictment here was defective, but went on to find reversal was not warranted because the defense did not move to dismiss the charges in the trial court and the charging instrument was sufficient to allow Libricz to prepare his defense and to bar further prosecution for the same acts under the standard of *People v. DiLorenzo*, 169 Ill.2d 318, 323 (1996). *People v. Libricz*, 2021 IL App (2d) 190329-U, ¶ 40.

The Second District erred by applying the *DiLorenzo* standard, which should not be applied to review of indictments that suffer from the substantive defect

of charging an offense that was not in effect at the time alleged in the charging instrument, even if the defendant did not move to dismiss the indictment in the trial court. Alternatively, if this Court finds the indictment here should be reviewed under the *DiLorenzo* standard, this Court should find the substantive defects in count 6 and count 8, in conjunction with related counts that alleged that the same acts and charged aggravated criminal sexual assault and were dismissed on the day of trial, prejudiced Libricz in his ability to prepare a defense and to protect against future prosecutions, and consequently reverse his convictions.

Standard of Review

The sufficiency of this charging instrument presents a question of law to be reviewed *de novo*. *People v. Swanson*, 308 Ill.App.3d 708, 711 (2d Dist. 1999).

Enactment of Predatory Criminal Sexual Assault

The offense of predatory criminal sexual assault, 720 ILCS 5/12-14.1, initially was created by Public Act 89-428 and became effective on December 3, 1995. However, the statute was declared to be unconstitutional in *Johnson v. Edgar*, 176 Ill.2d 499, 523 (1997), for violating the single subject rule of the Illinois Constitution. Ill. Const., art. IV, § 8(d). The legislature reenacted the statute in Public Act 89-462, effective May 29, 1996. See *Mescall*, 379 Ill.App.3d at 671.

When Public Act 89-428 was held unconstitutional in *Johnson*, the offense of predatory criminal sexual assault was rendered void *ab initio*; that is, it was as if the law never existed. When the legislature reenacted the offense, the reenactment had the effect of creating an entirely new criminal statute. *People v. Tellez-Valencia*, 188 Ill.2d 523, 526 (1999). The new statute, by its language, did not apply to acts occurring before the effective date of May 29, 1996. *Tellez-*

Valencia, 188 Ill.2d at 525; *Mescall*, 379 Ill.App.3d at 676.

Effect of Charging Void Offense of Predatory Criminal Sexual Assault

In *Tellez-Valencia*, the consolidated defendants were charged with and convicted of predatory criminal sexual assault for acts committed in the spring of 1996, prior to reenactment of §12-14.1 in Public Act 89-462. *Tellez-Valencia*, 188 Ill.2d at 525. This Court found the defect caused by charging an offense based on a statute not in effect "is fatal, rendering the entire instrument invalid, and warranting reversal of defendants' convictions." *Tellez-Valencia*, 188 Ill.2d at 527.

Tellez-Valencia favorably cited the case of *Wasson*, in which the Fourth District considered a charging instrument that alleged the defendant committed aggravated criminal sexual assault, Ill.Rev.Stat. 1984, ch. 38, par. 12-14(b), between January 1, 1983, and April 24, 1985. The offense was enacted by Public Act 83-1067, which took effect on July 1, 1984. *Wasson*, 175 Ill.App.3d at 853-54. The court found the single-count information was defective to the extent it charged the act occurred prior to July 1, 1984, and provided an insufficient basis for the State to prosecute the defendant as charged. *Wasson*, 175 Ill.App.3d at 853-54. The court concluded that because the information charged the defendant for an offense that could have occurred before the statute was legally operative, the entire charging instrument and resulting conviction must be invalidated. *Wasson*, 175 Ill.App.3d at 860.

Notably, as in this case, the defendant in *Wasson* did not move to dismiss the charging instrument in the trial court. The reviewing court noted it was compelled to consider the claim that the complaint was defective because of the "serious nature of the State's error." *Wasson*, 175 Ill.App.3d at 854.

In *Mescall*, the Second District considered the rulings of *Tellez-Valencia* and *Wasson* in a case in which the defendant was charged by amended information with four counts of predatory criminal sexual assault, each occurring between June 1995 and September 1996. *Mescall*, 379 Ill.App.3d at 672. The defendant argued on appeal from dismissal of a petition for relief from judgment under 735 ILCS 5/2-1401(c) (2006) that his convictions were void based on a defective charging instrument that alleged some conduct occurred before the effective date of the statute creating § 12-14.1. *Mescall*, 379 Ill.App.3d at 671-72. The Second District acknowledged that the charging instruments were defective, as in *Wasson*, because they charged conduct under statutes that were not in effect "at all the times alleged." *Mescall*, 379 Ill.App.3d at 677.

Ultimately, however, the Second District affirmed the dismissal of Mescall's § 2-1401 petition because the judgment was merely "voidable" rather than "void." Even though the charging instrument was defective, the defects did not deprive the trial court of jurisdiction and thus the judgments of conviction were not "void." And, because the § 2-1401petition was filed outside the two-year limitations period and the defendant failed to show he should be excused for not timely filing the petition, the Second District found the trial court properly dismissed the petition as untimely. *Mescall*, 379 Ill.App.3d at 677.

The argument raised in this appeal does not suffer from the procedural default that led the Second District to deny relief in *Mescall*. The Second District recognized that "a voidable judgment is one entered erroneously by a court acting within its jurisdiction and is correctable on review [only] if a timely appeal is taken." *Mescall*, 379 Ill.App.3d at 673, 675, 677, citing *People v. Speed*, 318 Ill.App.3d

910, 914 (3d Dist. 2001); *People v. Raczkowski*, 359 Ill.App.3d 494, 497 (1st Dist. 2005). See also *People v. Davis*, 156 Ill.2d 149, 155-57 (1993) (a voidable judgment is one entered erroneously by a court acting within its jurisdiction and is correctable on review if a timely appeal is taken). Notably, the Second District considered the convictions in *Mescall* to be "entered erroneously" by the trial court because of the defective charging instrument. Only because the defect was raised in a late-filed § 2-1401 petition did the Second District deny relief. *Mescall*, 379 Ill.App.3d at 673, 675, 677. Here, *Mescall* is distinguishable to the extent that Libricz argues on direct appeal that his convictions for predatory criminal sexual assault are voidable because of a defective indictment.

Substantive Defects to Indictment Require Dismissal

Tellez-Valencia, Wasson, and *Mescall* should control the disposition of this appeal and result in the dismissal of Libricz' two convictions for predatory criminal sexual assault. The court in *Wasson*, a decision which this Court favorably cited in *Tellez-Valencia*, clearly held the defects in the charging instrument, similar to the defects in the indictment here, were fatal.

> If an indictment or information contains sufficient information to apprise defendant of the charge with sufficient particularity to prepare his defense and to bar future prosecutions arising out of the same offense, it will be upheld when attacked for the first time on appeal. (citations omitted) In this case we consider the flaws in the charging instrument are fatal defects which invalidate the entire instrument and warrant the reversal of defendant's conviction.

Wasson, 175 Ill.App.3d at 855.

It is notable in this passage that the *Wasson* court considered and rejected the standard applied by the Second District in this case. Generally, where a

defendant challenges the sufficiency of an indictment or information for the first time on appeal, a reviewing court need determine only whether the charging instrument apprised the defendant of the precise offense charged with enough specificity to prepare his or her defense and allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct. *DiLorenzo*, 169 Ill.2d at 323; *People v. Maggette*, 195 Ill.2d 336, 347-48 (2001); *People v. Burke*, 362 Ill.App.3d 99, 103 (2d Dist. 2005). But here, because the defect in the indictment was substantive rather than merely formal, the *DiLorenzo* test should not be applied.

This Court recognized this point in *Tellez-Valencia* 11 years after *Wasson*. This Court's analysis in *Tellez-Valencia* illustrates that the defect in the indictment here was a substantive defect that rendered the indictment invalid, rather than a formal defect that may be cured by amendment. This Court noted in *Tellez-Valencia* that failure of an indictment to state an offense is a substantive defect that is not subject to amendment under 725 ILCS 5/111-5 (1999). "The committee comments to section 111-5 of the Code of Criminal Procedure of 1963 specifically exclude failure to charge a crime from those defects in a charge considered merely formal and which may be cured by amendment at any time, instead labeling this a substantive defect." *Tellez-Valencia*, 188 Ill.2d at 526-277. This Court went on to cite *Wasson* for the principle that such substantive defects are fatal. "[T]he defect caused by charging an offense based upon a statute not in effect when the alleged offense occurred is fatal, rendering the entire instrument invalid, and warranting reversal of defendant's convictions." *Tellez-Valencia*, 188 Ill.2d at 527, citing *Wasson*, 175 Ill.App.3d at 854.

Thus, the Second District's acknowledgment that the indictment was defective

under *Wasson* should have resulted, according to this Court's prior decision in *Tellez-Valencia*, in that court's finding the indictment to be invalid and vacating Libricz' convictions. The Second District erred, then, by not simply vacating the convictions as prescribed by this Court and by continuing its analysis and finding the indictment to be sufficient under the standard of *DiLorenzo*. When an indictment contains a substantive defect as in this case, the only available remedy is reversal of the resulting conviction, and application of the *DiLorenzo* standard is not appropriate. *Tellez-Valencia*, 188 Ill.2d at 526-27.

In addition to being consistent with established Illinois law, there are compelling policy reasons to reverse Libricz' convictions resulting from an indictment containing these substantive defects. In effect, affirming the judgment below would effectively constitute permitting convictions for offenses for which Libricz was not properly charged. This Court has recognized, "A defendant in a criminal prosecution has a fundamental due process right to notice of the charges against him; thus, a defendant may not be convicted of an offense he has not been charged with committing." *People v. Clark*, 2016 IL 118845, ¶ 30. This principle is rooted in a defendant's Fifth Amendment right to be informed of the nature and cause of the accusation against him and his Sixth Amendment right to indictment by a grand jury. *U.S. v. Ratliff-White*, 493 F.3d 812, 819-20 (7th Cir. 2007); U.S. Const. Amend. V; U.S. Const. Amend. VI. To safeguard those constitutional guarantees, the United States Supreme Court has long held that "a court cannot permit a defendant to be tried on charges that are not made in the indictment," *Stirone v. United States*, 361 U.S. 212, 215-16, 217 (1960). Allowing the convictions to stand in this case would violate foundational principles of criminal jurisprudence

dating to enactment of the Bill of Rights in the Untied States Constitution.

Defendant was Prejudiced by Defective Indictment

Even if this Court determines it should review the defective indictment according to the *DiLorenzo* standard for assessing instruments challenged for the first time on appeal, this Court should go on to find the defects prejudiced Libricz in preparing his defense.

The defects in the indictment in this case are similar to the defects in *Wasson*, in which the reviewing court found not only that the charging instrument was fatally defective for charging an offense that was not in effect, but also that the defendant was prejudiced by the defective charging instrument:

> While the information adequately apprised defendant of the nature, cause, and elements of the charge against him, it also charged him for conduct which occurred before the statute came into effect. Defendant was hindered in the preparation of his defense because he was forced to answer to crimes for which he could not have been lawfully convicted.

Wasson, 175 Ill.App.3d at 855. Accordingly, the Court in *Wasson* reversed the defendant's conviction based on the defective indictment. *Wasson*, 175 Ill.App.3d at 860. In *Mescall*, the Second District favorably cited this finding of *Wasson* before declining to grant relief on other grounds. *Mescall*, 379 Ill.App.3d at 676. Therefore, the Second District erred by finding in this case that Libricz was not prejudiced in preparing his defense even though the indictment charged him with offenses that did not exist during significant portions of the alleged times when the offenses occurred. This Court may reverse the convictions at issue in this case on the basis of this holding in *Wasson*.

Additionally, this Court should consider the impact of count 7 and count

9 of the indictment when assessing the prejudice to Libricz in preparing his defense. Prior to the effective date of Public Act 89-462 on May 29, 1996, the identical nature and elements of the new offense of predatory criminal sexual assault existed as the offense of aggravated criminal sexual assault. 720 ILCS 5/12-14(b)(1) (1995). Counts 7 and 9 of the indictment charged Libricz with aggravated criminal sexual assault and were based on the same physical acts as Count 6 and 8. (SC 55, 56; 340, 341; SC 1274) Count 7 and count 9 also alleged the acts occurred between "March 27, 1995, and March 27, 1997, inclusive." (SC 55, 56; 340, 341) The State dismissed Counts 7 and 9 on the day of commencement of bench trial. (SC 1313)

The significance of count 7 and count 9, and their relationship to contested count 6 and count 8, is that at all times prior to trial Libricz was charged with two different offenses, each with the same essential elements, for the same alleged conduct. The State acknowledged count 6 charging predatory criminal sexual assault was based on the same alleged acts as count 7 charging aggravated criminal sexual assault. (SC 55, 56; 340, 341; 1274) Similarly, count 8 charging predatory criminal sexual assault was based on the same alleged acts as count 9 charging aggravated criminal sexual assault. (SC 55, 56; 340, 341; 1274)

Notably, count 7 and count 9 suffered from the same defect as their counterparts by charging offenses that were not in effect at all times alleged in the indictments. Thus, Libricz was forced to prepare a defense for trial against counts of the indictment that directly contradicted each other. Libricz was placed in the prejudicial position of being charged with alternative offenses alleging the same conduct, yet neither of the offenses was in effect for substantial periods of the two-year time-frame alleged in the counts of the indictment. Where the defendant

in *Wasson* was found to be prejudiced by a single charge that was not in effect at all times alleged in the charging instrument, Libricz faced substantially greater prejudice where he was forced to prepare a defense against multiple similarly defective indictments for each alleged act. Then, only on the day of trial did the State dismiss count 7 and count 9 and elect to proceed on the defective count 6 and count 8. (SC 1313)

Libricz moved for a bill of particulars in an attempt to clarify the time of the alleged offenses and the precise charges against him. Libricz argued, *inter alia*, that the law had changed during the times alleged in the indictment, making it impossible to adequately prepare a defense. (SC 1153-57) But the trial court denied Libricz' motion for a bill of particulars after the State represented to the court that it had provided the defendant with the best available information that was consistent with discovery. (SC 1157-59, 1175-78) By maintaining that it could not refine the possible dates of the offenses within the two-year period charged in the indictment, the State tacitly admitted the offenses charged in count 6 and count 8 could have occurred during the 14-month period before the statute creating the offense of predatory criminal sexual assault took effect.

It is notable that the Second District attempted to distinguish *Wasson*'s finding that the defendant there was prejudiced by being forced to answer for crimes for which he could not have been lawfully convicted. *Libricz*, 2021 IL App (2d) 190329-U, ¶ 47.

> [*W*asson] is distinguishable because, in that case, there was no indication that counsel was aware, *before trial*, that the law had changed during the alleged periods. In addition, counsel in *Wasson* proposed a jury instruction that would have informed the jury of the effective date of the offense. Counsel thereby attempted

to remedy the defect in the indictment.

Libricz, 2021 IL App (2d) 190329-U, ¶ 47 (emphasis in original). But the Second District's reasoning presents a distinction without a difference. It is clear, as the Second District notes, that counsel in *Wasson* unsuccessfully attempted to remedy the defective instrument in the trial court by proposing a jury instruction that would have included as an essential element that the aggravated criminal sexual assault occurred on or after July 1, 1984, which is the effective date of the statute creating the offense. *Wasson*, 175 Ill.App.3d at 859. In the instant case, the defendant moved for a bill of particulars in an attempt to learn the dates of the alleged acts so it would be clear whether the acts were charged as predatory criminal sexual assault as alleged in count 6 and count 8, or charged as aggravated criminal sexual assault as alleged in count 7 and count 9. Thus, as in *Wasson*, the trial court rejected Libricz' attempt to remedy the defect in the indictment by clarifying the time of the offense and the precise charge against him. There is no practical difference between Libricz and the defendant in *Wasson* where both asked the trial court to remedy the defective charging instruments and both attempts were rejected. The Second District's attempt to distinguish *Wasson*'s finding of prejudice should be rejected and Libricz' convictions under the defective indictments should be reversed.

Furthermore, it is significant to note that the trial evidence in this case cannot be found to show the charged offenses occurred during the time period after the newly created offense of predatory criminal sexual assault took effect on May 29, 1996. Count 6 charged Libricz with predatory criminal sexual assault by committing an act of sexual penetration with K.L. by causing his penis to make

contact with the vagina and/or anus of K.L., who was under age 13 when the act was committed. (SC 54, 339) K.L. testified her date of birth was March 27, 1984. (SC 1331) K.L. testified at trial that when she was "about [age] 11," she was sleeping on a couch in the living room and woke up with defendant touching both her vagina and anus with his penis. (SC 1350-511) This testimony shows that K.L. would have turned age 12 on March 27, 1996, which was well before the offense of predatory criminal sexual assault took effect on May 29, 1996. Thus, according to K.L.'s testimony, the charged act occurred before the effective date of the statute creating § 12-14.1.

Count 8 charged Libricz with predatory criminal sexual assault by committing an act of sexual penetration with K.L. by inserting his penis inside her vagina while she was under age 13. Regarding this count, K.L. testified that she got permission from the defendant to attend a dance while she was in the sixth grade. (SC 1355) While K.L. showered before the dance, Libricz got into the shower and inserted his penis in K.L.'s vagina. (SC 1357-58) The State elicited no testimony regarding K.L.'s age at the time of the alleged act other than she was in the sixth grade. On cross-examination, K.L. said that when she was in the sixth grade, she would have been 11 years old and would have turned 12 during the school year. (SC 1432) Again, this testimony shows that the offense occurred when K.L. was 11 or shortly after she turned 12 years old on March 27, 1996. K.L.'s testimony shows the alleged offense occurred before the offense of predatory criminal sexual assault took effect on May 29, 1996.

The Second District rejected Libricz' argument below that the evidence did not show the offenses charged in count 6 and count 8 occurred after the offense

of predatory criminal sexual assault went into effect. *Libricz*, 2021 IL App (2d) 190329-U, ¶ 47. The Court said that because the case was tried at a bench trial, the presiding judge was presumed to know and follow the law, including the effective date of the statute. Thus, by finding Libricz guilty of predatory criminal sexual assault, the Second District said, the trial court found the acts occurred after the effective date of the statute. *Libricz*, 2021 IL App (2d) 190329-U, ¶ 47.

However, the Second District's finding does not withstand scrutiny. The Second District noted the established rule that in a bench trial, a trial judge is presumed to know the law and to follow it, *and this presumption is rebutted only when the record affirmatively shows otherwise. Libricz*, 2021 IL App (2d) 190329-U, ¶ 47, citing *People v. Ressa*, 2019 IL App (2d) 170439, ¶ 31. (emphasis added) Here, the trial court's comments in delivering the guilty verdicts show it did not know and properly apply the law regarding the effective date of the relevant statute, § 12-14.1. The trial court said in announcing the verdicts, "Each offense is charged pursuant to the law in effect at the time of the alleged offense." (SR 1812) The Second District cites the trial court's comment as showing the court understood the relevant statutory effective dates. *Libricz*, 2021 IL App (2d) 190329-U, ¶ 47. But the plain language of the court's comment indicates the opposite. The clear and plain meaning of the trial court's comment is that it believed that the charged offenses were in effect at all times during the times alleged in each count of the indictment. As has been shown in this brief and as the Second District recognized, the offense of predatory criminal sexual assault became effective about 14 months into the alleged two-year time period. *Libricz*, 2021 IL App (2d) 190329-U, ¶ 40 ("The above cases, particularly *Wasson*, lead us to conclude that counts VI and

VIII of the indictment were defective.") This Court should reject the Second District's finding that the trial court implicitly found the offenses in count 6 and count 8 to have occurred after the effective date of the offense of predatory criminal sexual assault on May 29, 1996.

Finally, *Tellez-Valencia* makes clear that the indictment may not be amended on appeal to remedy any defects by amending the charges or imposing convictions on other charges. In *Tellez-Valencia*, in which the defendants were charged with predatory criminal sexual assaults that occurred before the effective date of the new statute, this Court rejected an argument by the State that the charging instruments could be amended on appeal to show the defendants committed the prior offense of aggravated criminal sexual assault under § 12-14(b)(1). This Court held the amendments proposed by the State sought to cure a substantive, rather than a formal defect, and the Court held such amendments could not be made on appeal. *Tellez-Valencia*, 188 Ill.2d at 528. Similarly here, the counts of the indictment charging Libricz with predatory criminal sexual assault suffer from substantive defects that cannot be amended on appeal. This finding in *Tellez-Valencia* precludes any resolution that permits entry of convictions for aggravated criminal sexual assault under § 12-14(b)(1) as it existed before enactment of the new offense of predatory criminal sexual assault.

Challenge to Defective Indictment Not Forfeited

This Court should not find this argument to be forfeited for consideration on this direct appeal. First, it must be noted that Libricz filed a motion for a bill of particulars asking the State to more narrowly define the alleged dates of offenses. (SC 245-46; 1175-78) Libricz argued that changes in the law during the time-frame

made it impossible to adequately prepare a defense. (SC 1153-57) The State argued the dates in the indictment were sufficiently specific to permit the defendant to prepare a defense and to show the charges fall within the statutes of limitation. (SC 1157-60) The trial court denied the motion, finding the State had provided the defendant with the best information available as to when the offenses occurred. (SC 1175-78) Libricz argued in his motion for new trial that the court erred by denying the motion for a bill of particulars. (SC 390) This Court should find this issue to be sufficiently preserved in the trial court to preclude forfeiture on review in this appeal.

If this Court finds Libricz did not specifically argue below that the counts of the indictment charging predatory criminal sexual assault are fatally defective because that offense was not in effect at all alleged times, this Court should review this matter as an issue of plain error. In *Wasson*, the defendant did not challenge the sufficiency of the complaint in the trial court. The reviewing court noted that in *People v. Spain*, 24 Ill.App.3d 377, 381 (1st Dist. 1974), the court found it was plain error for a complaint to charge a defendant with an offense not yet covered by the charging statute. *Wasson*, 175 Ill.App.3d at 854. The court in *Wasson* then said, "The defendant here did not argue to the trial court that the State had filed a defective complaint. The serious nature of the State's error compels us to consider this issue nonetheless." *Wasson*, 175 Ill.App.3d at 854, citing *People v. Terry*, 170 Ill.App.3d 484 (4th Dist. 1988). Similarly here, this Court may find that prosecution of Libricz under the fatally defective indictment constitutes plain error. See Ill. S. Ct. Rule 615(a) (plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court).

In sum, *Wasson*, *Tellez-Valencia*, and *Mescall* all demonstrate that counts 6 and 8 of the indictment in this case are fatally defective where they encompass a 14-month time period before the offense of predatory criminal sexual assault was enacted into law. The Second District erred where it applied the standard of *DiLorenzo* and concluded that Libricz suffered no prejudice from the defective indictment. This Court should reverse Libricz' two convictions and sentences for predatory criminal sexual assault resulting from the defective indictment. If this Court determines the defective indictment should be reviewed by the standard of *DiLorenzo*, this Court should find Libricz was prejudiced in preparation of his defense for trial and reverse his convictions and sentences for predatory criminal sexual assault.

CONCLUSION

For the foregoing reasons, Robert Libricz, respectfully requests that this Court reverse his convictions and sentences for predatory criminal sexual assault as charged in counts 6 and 8 of the indictment.

Respectfully submitted,

THOMAS A. LILIEN
Deputy Defender

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Assistant Appellate Defender
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2nddistrict.eserve@osad.state.il.us

COUNSEL FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 23 pages.

/s/Jeffrey Bruce Kirkham
JEFFREY BRUCE KIRKHAM
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Robert Libricz No. 127757

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff/Petitioner

Reviewing Court No: 2-19-0329
Circuit Court No: 2015CF000467
Trial Judge: JAMES S COWLIN

v.

ROBERT LIBRICZ
Defendant/Respondent

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APPEAL TO THE APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

FROM THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT

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Plaintiff/Petitioner

Reviewing Court No: 2-19-0329
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Trial Judge: JAMES S COWLIN

v.

ROBERT LIBRICZ

Defendant/Respondent

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff/Petitioner

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Report of Proceedings ("R")

ONE EXHIBIT ENV. CONTAINING ONE DISK

IN THE CIRCUIT COURT OF McHENRY COUNTY, ILLINOIS
22 nd JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS

vs.

Robert J. Libricz
Defendant

Case No. 15CF467

Date of Sentence 2-8-19

Date of Birth 8-8-60 (Defendant)

Year of Birth 1984 (Victim)

FILED
McHenry County, Illinois
FEB - 8 2019
KATHERINE M. KEEFE
Clerk of the Circuit Court

JUDGEMENT - SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant has been adjudged guilty of the offenses enumerated below.

IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	DATE OF OFFENSE	STATUTORY OFFENSE	CITATION	CLASS	SENTENCE	MSR
IV	3/27/89-3/27/90	Agg. Crim. Sexual Abuse	Ch. 38, Sec. 12-14(b)(1)	2	5 Yrs. ___ Mos.	2 Yr.
and said sentence shall run	(☒ concurrent with) (☐ consecutive to) the sentence imposed on: ___.					
V	3/27/92-3/27/94	Agg. Crim. Sexual Assault	720 ILCS 5/12-14(b)(1)	X	12 Yrs. ___ Mos.	3 Yr.
and said sentence shall run	(☒ concurrent with) (☐ consecutive to) the sentence imposed on: ___.					
VI	3/27/95-3/27/97	Pred. Crim. Sexual Assault of a Child	720 ILCS 5/12-14(a)(1)	X	12 Yrs. ___ Mos.	3 Yr.
and said sentence shall run	(☒ concurrent with) (☐ consecutive to) the sentence imposed on: ___.					
VIII	3/27/95-3/27/97	Pred. Crim. Sexual Assault of a Child	720 ILCS 5/12-14(b)(1)	X	18 Yrs. ___ Mos.	3 Yr.
and said sentence shall run	(☒ concurrent with) (☐ consecutive to) the sentence imposed on: ___.					

The Court finds that the defendant is:

☐ Eligible for and is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2.

☐ Convicted of a class ___ offense but sentenced as a Class X offender pursuant to 730 ILCS 5/5-5-3(c)(8).

☒ The Court finds that the defendant is entitled to receive credit for time actually served in custody from 6/5/15 to 7/24/15 [specify date(s)] from 11/28/18 to 2/8/19 from ___ to ___

☐ The Court further finds that the conduct leading to conviction for the offence enumerated in counts ___ resulted in great bodily harm to the victim. (730 ILCS 5/3-6-3(a)(2)(iii)).

☐ The Court further finds that the defendant meets the eligibility requirements and is approved for placement in the impact incarceration program. If the Department accepts the defendant and determines that the defendant has successfully completed the program, the sentence shall be reduced to time considered served upon certification to the Court by the Department that the defendant has successfully completed the program. Written consent is attached.

☐ The Court further finds that the offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance.

☐ IT IS FURTHER ORDERED that the sentence(s) imposed on count(s) ___ be (☐ concurrent with) (☐ consecutive to) the sentense imposed in case number ___ in the Circuit Court of ___ County.

☐ IT IS FURTHER ORDERED that the defendant serve ☐ 75% ☐ 85% ☐ 100% of said sentence.
IT IS FURTHER ORDERED that the Clerk of the Court deliver a certified copy of this order to the Sheriff.

☐ IT IS FURTHER ORDERED that the Sheriff take the defendant into custody and deliver him to the Department of Corrections which shall confine said defendant until expiration of his sentence or until he is otherwise released by operation of law.

☒ IT IS FURTHER ORDERED that Defendant shall make restitution for all therapy costs incurred as a consequence of his criminal conduct with a $3,000.00 cap imposed on the criminal case for K.L. Defendant shall pay $2,000 fine (count VIII), plus court costs and statutory fees.

This order is (☐ effective immediately), (☒ stayed until further order of the Court.

DATE: 2-8-19

ENTER: James S Cowlin
JAMES S COWLIN
(PLEASE PRINT JUDGE'S NAME HERE)

Approved 4-18-08 by Conference of Chief Judges

SEC C 615

IN THE CIRCUIT COURT OF McHENRY COUNTY, ILLINOIS
22 nd JUDICIAL CIRCUIT

2 of 2

PEOPLE OF THE STATE OF ILLINOIS

vs. Robert J. Libricz
Defendant

Case No. 15CF467

Date of Sentence 2-8-19

Date of Birth 8-8-60 (Defendant)

Year of Birth 1984 (Victim)

FILED
McHenry County, Illinois
FEB - 8 2019
KATHERINE M. KEEFE
Clerk of the Circuit Court

JUDGEMENT - SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant has been adjudged guilty of the offenses enumerated below.

IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	DATE OF OFFENSE	STATUTORY OFFENSE	CITATION	CLASS	SENTENCE	MSR
V	3/27/96-3/27/98	Crim. Sexual Assault	720 ILCS 5/12-13(a)(3)	1	5 Yrs. ___ Mos.	2 Yr.
and said sentence shall run	☒ concurrent with) (☐ consecutive to) the sentence imposed on: ____.					
XI	3/27/96-3/27/98	Crim. Sexual Assault	720 ILCS 5/12-13(a)(3)	1	8 Yrs. ___ Mos.	2 Yr.
and said sentence shall run	☒ concurrent with) (☐ consecutive to) the sentence imposed on: ____.					
___	___	___	___	___	___ Yrs. ___ Mos.	___ Yr.
and said sentence shall run	☐ concurrent with) (☐ consecutive to) the sentence imposed on: ____.					
___	___	___	___	___	___ Yrs. ___ Mos.	___ Yr.
and said sentence shall run	☐ concurrent with) (☐ consecutive to) the sentence imposed on: ____.					

The Court finds that the defendant is:

☐ Eligible for and is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2.

☐ Convicted of a class ____ offense but sentenced as a Class X offender pursuant to 730 ILCS 5/5-5-3(c)(8).

☒ The Court finds that the defendant is entitled to receive credit for time actually served in custody from 6/5/15 [specify date(s)] to 7/24/15 from 11/28/18 to 2/8/19 from ____ to ____

☐ The Court further finds that the conduct leading to conviction for the offence enumerated in counts ____ resulted in great bodily harm to the victim. (730 ILCS 5/3-6-3(a)(2)(iii)).

☐ The Court further finds that the defendant meets the eligibility requirements and is approved for placement in the Impact Incarceration program. If the Department accepts the defendant and determines that the defendant has successfully completed the program, the sentence shall be reduced to time considered served upon certification to the Court by the Department that the defendant has successfully completed the program. Written consent is attached.

☐ The Court further finds that the offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance.

☐ IT IS FURTHER ORDERED that the sentence(s) imposed on count(s) ____ be (☐ concurrent with) (☐ consecutive to) the sentense imposed in case number ____ in the Circuit Court of ____ County.

☐ IT IS FURTHER ORDERED that the defendant serve ☐ 75% ☐ 85% ☐ 100% of said sentence.
IT IS FURTHER ORDERED that the Clerk of the Court deliver a certified copy of this order to the Sheriff.

☐ IT IS FURTHER ORDERED that the Sheriff take the defendant into custody and deliver him to the Department of Corrections which shall confine said defendant until expiration of his sentence or until he is otherwise released by operation of law.

☒ IT IS FURTHER ORDERED that DEFENDANT ALS. ENTITLED TO Credit from 2/8/19 until His Arrival AT IDOC. SENTENCES SERVED AT 50% All counts to be served concurrently.

This order is (☐ effective immediately) (☒ stayed until Further order of the court

DATE: 2-8-19

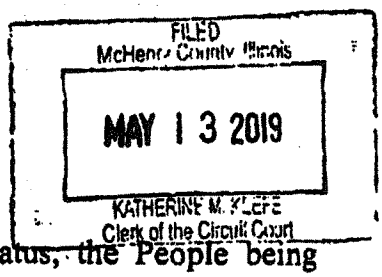
ENTER: James S Cowlin
JAMES S COWLIN
(PLEASE PRINT JUDGE'S NAME HERE)

Approved 4-18-08 by Conference of Chief Judges

SEC C 616

IN THE CIRCUIT COURT OF THE 22ND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
)
vs.) 15CF467
)
Robert Libricz)



ORDER

THIS MATTER COMING BEFORE THE COURT for status, the People being present, Defendant (~~not~~) present, with(~~out~~) counsel, and the Court having jurisdiction and being fully advised in the premises, it is hereby ordered that:

In custody

____ This case is set for _____ hearing on _____ at 9:00 a.m./ 1:30 p.m., on motion of the Defendant/ People/Court/by agreement of the parties.

★★★

____ This case is set for jury/bench trial on _____ at 10:00 a.m./1:30 p.m. on motion of the Defendant/ People/Court/by agreement of the parties.

★★★

____ This case is continued for status/negotiated plea on _____ at 9:00 a.m./ 1:30 p.m. on motion of the Defendant/People/Court/by agreement of the parties.

It is further ordered that:

Defendant's motion to correct certain errors in sentencing is denied for reasons stated on the record. Appellate Defenders Office appointed to represent Defendant on appeal. Stay to transport Defendant to IDOC is lifted.

Defendant must appear; bond continued.

5-13-19
Date

Judge:

CR-Sht Ord

ORIGINAL

No. 2-19-0329

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ROBERT LIBRICZ, Defendant-Appellant.	)	Appeal from the Circuit Court of the Twenty-Second Judicial Circuit, McHenry County, Illinois No. 15 CF 467 Honorable James Cowlin, Judge Presiding.

AMENDED NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Second District, from the judgment described below:

Appellant's Name:	Robert Libricz
Appellant's Address:	McHenry County Jail 2200 N. Seminary Ave. Woodstock, IL 60098
Appellant's Attorney:	Office of the State Appellate Defender
Appellant's Attorney's Address:	One Douglas Avenue, Second Floor Elgin, IL 60120
Offenses of which convicted:	Two counts of predatory criminal sexual assault, two counts of criminal sexual assault, one count of aggravated criminal sexual assault and one count of aggravated criminal sexual abuse
Date of Order:	March 28, 2018
Sentences:	12 years, 18 years, 5 years, 8 years, 12 years and 5 years, respectively

Respectfully Submitted:

By: /s/ Thomas A. Lilien
Deputy Defender

SEC C 681

No. 2-19-_____

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ROBERT LIBRICZ, Defendant-Appellant.	)	Appeal from the Circuit Court of the Twenty-Second Judicial Circuit, McHenry County, Illinois No. 15 CF 467 Honorable James Cowlin, Judge Presiding.

NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Second District, from the judgment described below:

Appellant's Name: Register No.	Robert Libricz 126510
Appellant's Address:	McHenry County Jail 2200 N. Seminary Ave. Woodstock, IL 60098
Appellant's Attorney:	Office of the State Appellate Defender
Appellant's Attorney's Address:	One Douglas Avenue, Second Floor Elgin, IL 60120
Offenses of which convicted:	Two counts of predatory criminal sexual assault, two counts of criminal sexual assault, one count of aggravated criminal sexual assault and one count of aggravated criminal sexual abuse
Date of Order:	May 13, 2019
Sentences:	18, 12, 8, 5, 12 and 5 years, respectively
Order appealed:	Denial of motion to correct sentence errors (Rule 472 motion)

Respectfully submitted,

By: Thomas A. Lilien

Thomas A. Lilien, Deputy Defender

2021 IL App (2d) 190329-U
Nos. 2-19-0329 & 2-19-0452 cons.
Order filed September 9, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 15-CF-467
ROBERT J. LIBRICZ,	)	Honorable James S. Cowlin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hudson and Brennan concurred in the judgment.

ORDER

¶ 1 *Held*: Though the indictment alleged a date range for sex offenses that included time before the effective date of the statute creating the offense, this defect was not fatal to the indictment. Defense counsel was aware that the law had changed during the specified time frames and could have prepared an appropriate defense. Also, the allegations were sufficient to allow defendant to assert a double jeopardy bar to subsequent charges based on the same conduct.

¶ 2 Following a bench trial, defendant, Robert J. Libricz, was convicted of, *inter alia*, two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 1996)). On appeal, defendant argues that the indictment was fatally defective, and his convictions must be

reversed because the alleged period in which the acts took place included time before the effective date of the statute creating the offense. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 25, 2015, defendant was charged in an 11-count indictment with various sex offenses against two of his daughters, D.H. and K.L., alleged to have been committed between 1987 and 2006, when the victims were minors. Counts I and II charged defendant with predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 1998)) and criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2004)), respectively, against D.H., who was born on May 4, 1992.[1] Counts III through XI charged defendant with various sex offenses against K.L., who was born on March 27, 1984.

¶ 5 At issue here are counts VI and VIII, charging predatory criminal sexual assault of a child. The offense of predatory criminal sexual assault of a child was created by Public Act 89-428, with an effective date of December 13, 1995. Before then, the offense existed in section 12-14(b)(1) of the Criminal Code of 1961 (720 ILCS 5/12-14(b)(1) (West 1994)) as one of the several different ways in which a person could commit aggravated sexual assault. See *People v. Tellez-Valencia*, 188 Ill. 2d 523, 529 (1999) (Rathje, J., dissenting). "Public Act 89-428 moved the offense from the aggravated criminal sexual assault statute and designated it the separate offense of predatory criminal sexual assault of a child." *Id.* Public Act 89-428 was later declared unconstitutional for violating the single-subject clause of the United States Constitution. *Johnson v. Edgar*, 176 Ill. 2d

[1] Defendant brought a motion to sever counts I and II, which the trial court granted. The State first proceeded to a bench trial on the allegations involving K.L.

499 (1997). This rendered the offense of predatory criminal sexual assault of a child "void *ab initio*; that is, it was as if the law never existed." *Tellez-Valencia*, 188 Ill. 2d at 526. The General Assembly reenacted the offense in Public Act 89-462, with an effective date of May 29, 1996. "[T]his reenactment had the effect of creating an entirely new criminal statute." *Tellez-Valencia*, 188 Ill. 2d at 526.

¶ 6 Count VI charged that, "on or between March 27, 1995 and March 27, 1997, inclusive," defendant committed predatory criminal sexual assault of a child, "in violation of Chapter 720, Section 5/12-14.1(a)(1) of the Illinois Compiled Statutes," in that he "committed an act of sexual penetration with K.L., who was under 13 years of age," when he "caused his penis to make contact with the vagina and/or anus of K.L."

¶ 7 Count VIII charged that, "on or between March 27, 1995 and March 27, 1997, inclusive," defendant committed predatory criminal sexual assault of a child, "in violation of Chapter 720, Section 5/12-14.1(a)(1) of the Illinois Compiled Statutes," in that he "committed an act of sexual penetration with K.L., who was under 13 years of age," when he "inserted his penis inside the vagina of K.L."

¶ 8 Counts VII and IX charged defendant based on the same alleged acts and period in counts VI and VIII, respectively. However, those counts alleged the offense of aggravated criminal sexual assault "in violation of 720 ILCS 5/12-14(b)(1) of the Illinois Compiled Statutes."

¶ 9 On April 26, 2017, defendant filed a motion for a bill of particulars, arguing that he was unable to prepare his defense. Defendant argued, *inter alia*, that "[t]here have been substantive law changes both within the date ranges as well as in the time period between the specified date ranges and the charging date."

¶ 10 On May 4, 2017, defendant filed a motion to dismiss the indictment, arguing that counts I and III-XI were barred by the statute of limitations. On June 22, 2017, defense counsel advised the trial court that he had withdrawn the motion.

¶ 11 The hearing on the motion for a bill of particulars took place on August 3, 2017. Defense counsel argued at the hearing that the State "pled a range" and that "the law changes over these ranges." Counsel argued that he could not prepare a defense, because he "[did not] know what law we are talking about *** and this isn't supposed to be a guessing game." Further: "It seems there is a due process violation to say I have to generally prepare for some unspecified law and we are going to sort it out at trial. I don't think that's the way the system was set up, so it impacts our defense and it impacts our ability to negotiate and it impacts everything."

¶ 12 The trial court denied the motion, stating that it was permissible to allege a range of dates in which the offenses allegedly occurred. The court stated: "As long as the crime occurred within the statute of limitations and prior to the return of the charging instrument, the State need only provide the Defendant with the best information it has as to when the offenses occurred."

¶ 13 On November 1, 2018, the matter proceeded to a bench trial. The court granted the State's motion to dismiss counts VII and IX (each charging aggravated criminal sexual assault), and the State proceeded on counts III, IV, V, VI, VIII, X, and XI. Four witnesses testified for the State, including K.L. Four witnesses testified for the defense, including defendant. The State presented three rebuttal witnesses.

¶ 14 K.L. testified that she had three sisters, D.H., J.L. (born 10/27/85), R.L. (born 6/27/94), and one brother, R.J.L. (born 5/23/90). K.L. testified as follows about the allegations in count VI. When she was "about 11," she was sleeping on the couch in the living room of the family home when she woke up with defendant on top of her. Defendant was attempting to penetrate her vagina

with his penis. Defendant's penis touched her vagina and her anus. On cross-examination, defense counsel asked: "At that time, I believe you said it was somewhere between the ages of 11 and 13?" K.L. responded: "In there."

¶ 15 K.L. testified as follows about the allegations in count VIII. When K.L. was "in the sixth grade," she had asked defendant for permission to attend a sixth-grade dance. Defendant told her that she could go but that she would have to first shower. K.L. went to the upstairs bathroom to shower. While she was showering, defendant entered the bathroom, took off his clothes, and entered the shower. Defendant bent K.L. over and penetrated her vagina with his penis from behind. On cross-examination, K.L. testified that, in sixth grade, she would have been 11 when the school year started and turned 12 during the school year.

¶ 16 K.L. testified that, in March 2015, she and D.H. went to the McHenry County Sheriff's Office to report allegations of abuse against defendant and met with McHenry County Sheriff's detective Michelle Asplund. On April 1, 2015, K.L. had a telephone conversation with defendant in Asplund's presence, which was recorded. On April 13, 2015, K.L. met with defendant in person, while wearing a recording device provided to her by Asplund. The recordings were admitted into evidence as People's exhibit No. 1 and were played for the trial court.

¶ 17 During the April 1, 2015, telephone conversation, K.L. told defendant that she missed spending time with the family. K.L. told defendant that she knew that they had sex and that she wanted him to apologize for what he did. Defendant commented about D.H. and about things being posted on the Internet to ruin their lives. Defendant denied that he had sex with K.L. and stated, "You know, you guys didn't have to go down this fucking route." K.L. commented that she kept having flashbacks about when they had sex and defendant said, "I don't know what to say to you." Throughout the conversation, defendant denied K.L.'s allegations. Defendant told K.L. that if she

wanted to talk to him, she needed to do so in person. When she asked defendant if he would apologize, he told her that he was not going to apologize for anything. When K.L. stated that she could not believe that defendant would not apologize to her, he said that he did not trust anyone anymore and that everyone was trying to ruin their lives.

¶ 18 During the April 13, 2015, conversation, which took place at defendant's place of employment, K.L. told defendant that she wanted the apology that he told her he would give her in person. She said that she wanted to come back to her family but that she was not going to unless he apologized. Defendant asked K.L. what she needed an apology for. K.L. replied, "You know for what dad. You know for what." Defendant replied, "I know. What am I going to do about you and the other fucking asshole sister of yours." Defendant went on to talk about posts that D.H. made on Facebook. K.L. again stated that she wanted her apology and that it was all that she expected from him. Defendant commented that he thought that K.L. was in counseling. Defendant then stated: "You know Ruby apologized to somebody he did something to and he's going to jail. I don't want to go to fucking jail for anything." Defendant asked K.L. if she was wearing a recording device and she told him that she was not. Defendant asked K.L., "So what am I supposed to tell your mother [unintelligible] all this? How do I explain that to her?" K.L. told defendant that her mother was "fucking blind." Defendant stated: "Well, it seems like all you guys want to do is ruin our entire life, which you guys have halfway succeeded in doing." He stated: I don't know why this has become such a fricking issue all of a sudden." Defendant again commented on things being posted on Facebook, stating that he did not know who started it or why. K.L. said: "Because [D.H.] said you molested her when she was little." K.L. stated: "And I know what you did to me, dad." K.L. then commented that she was not sure if "it ever happened to [R.L.]" but that J.L. said that "it happened to her too" but "she recanted" because "she needed somewhere to live."

Defendant then stated that nothing ever happened with R.L., J.L., or D.H. Defendant stated: "I don't even know where to begin with this. I mean once you squirt the toothpaste out of the tube it, you can't put it back in so I don't know what's going to go on." K.L. then asked defendant if he was going to apologize to her on his death bed, and he responded: "I thought about that." Defendant later stated: "I guarantee we didn't have a perfect normal family, but I don't think anybody's got a perfect normal family. I never meant to hurt you or anybody, [K.L.]" Defendant told K.L. that her mom did not want to have anything to do with D.H. Defendant then stated, "You on the other hand, I don't know, your mom told me she thinks something was going on, blah, blah, whatever. You know, I gotta live with everything I've done, I—I'm not happy with a lot of things I did. Would I do things different? Yeh." At that point, someone entered the room. After the individual left, as K.L. was saying goodbye to defendant, he stated: "Your mom thinks something went on. I don't know why it went on. I loved you the most out of all the kids [K.L.], you were my first born, you were my pride and joy. I wasn't drunk. I wasn't high. Nothing like that. I loved you. I don't know."

¶ 19 D.H. testified regarding other acts of sexual conduct committed by defendant. In 1999, when DH was between five and seven years old, she attended a daddy-daughter dance with defendant. After the dance, she was alone with defendant in his bedroom and he put his pinky finger in her vagina. In approximately 2004 to 2006, when D.H. was about 13 years old, she fell asleep with her parents in their bed. When she woke up, defendant had his hand in her underwear, penetrating her vagina with his fingers.

¶ 20 Asplund testified that she met with K.L. and D.H. on March 11, 2015. She spoke with them separately. She subsequently obtained an "overhear" order and, on April 1, 2015, recorded the telephone conversation between K.L. and defendant. Asplund listened to the call while in progress.

K.L. was "extremely emotional" and "upset" during the call. On April 13, 2015, she set up a "person-to-person overhear" with K.L. She provided K.L. with a recording device to wear on her person. K.L. then drove to defendant's place of employment and had a conversation with him. Afterward, K.L. returned the recording device to Asplund. On April 17, 2015, Asplund interviewed defendant at his place of employment. When she told him that she was investigating an allegation of sexual abuse, he responded that he knew what she was talking about. When she told him that K.L. reached out to him for an apology and that he apologized to K.L, defendant told her that "he did not apologize for any sexual abuse." Rather, "[h]e apologized for how bad her life was."

¶ 21 Beverly B. testified that, in the summer of 1989, her daughter, M.B., was friends with K.L. and J.L., who was K.L.'s younger sister. Beverly was in her vehicle, with M.B., K.L., and J.L., when M.B., who was about five years old, stated that "boys have penises and girls have vaginas." According to Beverly, K.L. then stated, "[W]e take a shower with daddy, and he makes us touch his penis." J.L. "scoochied back in the seat," and Beverly said, "I'll take care of it." Beverly made an anonymous report to "DCFS." K.L.'s mother confronted Beverly, and Beverly denied making the report. Beverly had no further contact with the family until November 2015 when she had contact with K.L. In January 2016, Beverly gave a statement to the police.

¶ 22 For the defense, J.L., testified that she was K.L.'s sister and was about 19 months younger that K.L. She testified that, while growing up, she always shared a bedroom with K.L. and they were very close. J.L. never saw defendant inappropriately touch K.L. Defendant never touched J.L. inappropriately and never made her shower with him. J.L. had no recollection of being in a car with K.L. when K.L. told an adult about touching defendant's penis.

¶ 23 R.L. testified that she was born in 1994 and was the youngest of defendant's five children. While growing up, she shared a bedroom with D.H., who was two years older than her. She never saw defendant do anything inappropriate to K.L. or D.H.

¶ 24 Kimberlee Kelly Libricz, defendant's wife, testified that she had been married to defendant for 35 years and they had five children. Kimberlee was not "on speaking terms" with K.L. because she did not agree with how K.L. was raising her children. Kimberlee never saw defendant abuse K.L.

¶ 25 Defendant testified that the sexual acts testified to by D.H. and K.L. never happened and that he never did anything sexually inappropriate with either of them.

¶ 26 In rebuttal, D.H. testified regarding a photograph taken during the daddy-daughter dance. Beverly testified regarding three photographs taken of herself, her daughter, and K.L. in defendant's home over Thanksgiving in 1989. Shelly Pier, a licensed clinical social worker specializing in sexual violence trauma, provided expert testimony on post-traumatic stress disorder, rape trauma syndrome, and child abuse accommodation syndrome.

¶ 27 The trial court found defendant not guilty of count III but guilty of all remaining counts. The court found that D.H. was a credible witness and that her testimony as to other-crimes evidence corroborated the State's case against defendant. The court also found that, although defendant denied all allegations, "he made incriminating statements when confronted by [K.L.] on April 13, 2015." The court stated:

> "The Defendant stated to [K.L.] in response to her plea for an apology, quote, how do I explain it to your mother; quote, I never meant to hurt you; quote, I have to live with everything I have done, closed quote. Other incriminating statements are included in the recording, admitted as State's Exhibit Number 1.

> Defendant attempted to explain away the statements when testifying, but the Court gives no weight to those explanations. The recorded statements made to [K.L.] are clear and unequivocal.
>
> It is not logical for the Defendant to address his daughter in the manner he did on April 13, 2015, if he had not committed acts against her."

¶ 28 The court specifically noted that "[e]ach offense is charged pursuant to the law in effect at the time of the alleged offense." Concerning count VI, the court cited the relevant statutory provision and noted that the act was alleged to have occurred between March 27, 1995, and March 27, 1997. Pointing to K.L.'s testimony, D.H.'s testimony as to other crimes, and defendant's incriminating statements, the court found that "the State has met its burden of proof on all elements of the charged offense." The court also stated:

> "Although the Court is convinced beyond a reasonable doubt the incident occurred when [K.L.] was under age 13, the Court does not find [K.L.] was under age 12 when the act occurred. Doubt exists as to the age of 11, as testified to by [K.L.], as [K.L.] could only say she was around 11."

Concerning count VIII, the court again cited the relevant statutory provision and noted that the act was alleged to have occurred between March 27, 1995, and March 27, 1997. The court stated that it found "[K.L.'s] testimony credible." The court further stated that "[d]efendant's recorded statements made in person to [K.L.] on April 13, 2015, corroborate[d] [K.L.'s] testimony, as does the testimony of [D.H.]" The court found that "the State has proved all elements of Count VIII beyond a reasonable doubt."

¶ 29 On December 19, 2018, defendant filed a motion for a new trial, which was denied. Following a sentencing hearing, the trial court sentenced defendant on counts IV, V, VI, VIII, X,

and XI, to concurrent prison sentences of 5, 12, 12, 18, 5, and 8 years, respectively. On March 25, 2019, defendant filed an amended motion for reconsideration of his sentences. The trial court denied the motion on March 28, 2019.

¶ 30 On April 11, 2019, defendant pleaded guilty to count I and was sentenced to six years in prison, to be served concurrently with the above sentences. Count II was dismissed per the plea.

¶ 31 On April 22, 2019, defendant filed both a motion to correct certain errors in sentencing and a notice of appeal (appeal No. 2-19-0329). The motion was denied on May 13, 2019. On May 24, 2019, defendant filed a notice of appeal from the order entered on May 13, 2019 (appeal No. 2-19-0452). On July 5, 2019, we consolidated defendant's appeals.

¶ 32 II. ANALYSIS

¶ 33 Defendant contends, for the first time on appeal, that counts VI and VIII in the indictment, alleging predatory criminal sexual assault of a child, were fatally defective, because the offense did not exist before May 29, 1996, and each count alleged that the act occurred on or between March 27, 1995, and March 27, 1997. Defendant argues that, because he was charged with offenses that did not exist during portions of the alleged periods, he was prejudiced in the preparation of his defense. Thus, according to defendant, his convictions for predatory criminal sexual assault of a child as charged in counts VI and VIII of the indictment must be vacated.

¶ 34 The State responds that counts VI and VIII were not defective, because the State charged defendant with a continuing course of conduct that straddled the effective date of the offense. In addition, the State argues that defendant was not prejudiced by the alleged defect, because he "possessed specific knowledge about the alleged time frames within the indictment, along with the applicable predatory criminal sexual assault statute in effect" Alternatively, the State argues that, if we find the convictions void, we should enter judgment on the lesser included offenses of

aggravated criminal sexual abuse or hold that the State may charge defendant with any other applicable offenses in effect on the dates of the alleged acts, such as aggravated criminal sexual assault.

¶ 35 We first make clear our standard of review. "When the sufficiency of the charging instrument is attacked in a pretrial motion, the standard of review is to determine whether the instrument *strictly* complies with the requirements of section 111-3[(a)] of the Code of Criminal Procedure of 1963 [725 ILCS 5/111-3(a) (West 2018)]." (Emphasis in original.) *People v. DiLorenzo*, 169 Ill. 2d 318, 321-22 (1996). However, when an indictment is challenged for the first time on appeal, as in the present case, "the standard of review is more liberal." *Id.* at 322. "In such a case, it is sufficient that the indictment apprised the accused of the precise offense charged with enough specificity to (1) allow preparation of his defense and (2) allow pleading a resulting conviction as a bar to future prosecutions arising out of the same conduct." *Id.* (citing *People v. Thingvold*, 145 Ill. 2d 441, 448 (1991)). In other words, this court should consider whether the defect in the indictment prejudiced defendant in preparing his defense. *Id.*

¶ 36 Defendant relies on *Tellez-Valencia*, *People v. Mescall*, 379 Ill. App. 3d 670 (2008), and *People v. Wasson*, 175 Ill. App. 3d 851 (1988), in support of his argument that his convictions on count VI and VIII must be vacated.

¶ 37 In *Wasson*, the defendant was charged in a one-count information with aggravated criminal sexual assault, based on acts that he committed between January 1, 1983, and April 24, 1985. *Wasson*, 175 Ill. App. 3d at 853. The aggravated criminal sexual assault statute became effective on July 1, 1984. *Id.* At trial, the jury heard evidence that the defendant sexually assaulted the victim on numerous occasions during the period charged. *Id.*at 854. The trial court refused a jury instruction that would have included as an essential element of the offense that the act occurred on

or after the effective date of the statute. *Id.* at 859. The defendant was found guilty. The defendant did not challenge the information in the trial court, but he argued for the first time on appeal that it was defective. *Id.* at 854. The Fourth District agreed. The court held that the information "was defective to the extent it charged [that] the act occurred prior to July 1, 1984." *Id.* The court stated that "the flaws in the charging instrument are fatal defects which invalidate the entire instrument and warrant reversal of [the] defendant's conviction." *Id.* at 855. The court further stated:

> "While the information adequately apprised defendant of the nature, cause, and elements of the charge against him, it also charged him for conduct which occurred before the statute came into effect. Defendant was hindered in the preparation of his defense because he was forced to answer to crimes for which he could not have been lawfully convicted." *Id.* at 855.

The court found that the defective indictment was the source of any prejudice the defendant may have suffered at trial. The court noted that other-crimes evidence is admissible if it is "independently relevant to show motive, intent, identity, or some other issue connected with the crime charged." *Id.* In contrast, "the jury heard evidence of other crimes of defendant of which he was improperly accused." *Id.* Additionally, the court found that "in the limited circumstances of this case the trial court erred in refusing to instruct the jury that defendant could not be convicted as charged if the sexual misconduct occurred prior to July 1, 1984." *Id.* at 859. Although the reviewing court was "convinced" that the victim's testimony established that an act occurred after July 1, 1984, it held that, without a limiting instruction, it was impossible to know whether the jury's verdict was based on an act that predated the effective date of the charged offense. *Id.* The court concluded:

> "For the reason the information charged defendant for an offense which could have occurred before the corresponding statute was legally operative, we find it necessary to invalidate the entire charging instrument and the resulting conviction. The defective nature of the instrument, coupled with the conflicting testimony as to when the offense was committed, and the trial court's refusal to instruct on the effective date of the statute, requires a reversal of the conviction and remand for a new trial." *Id.* at 860.

The court noted that "it would have been better practice for the State to charge [the] defendant under the old statute with one or more counts alleging the offense of aggravated indecent liberties with a child between January 1, 1983, and June 30, 1984, [citation] and, under the current statute, to enter additional counts for the act or acts committed between July 1, 1984, and April 24, 1985." *Id.* at 854-55. (On remand, the State filed an amended information charging the defendant with aggravated indecent liberties with a child for the conduct before July 1, 1984, and aggravated criminal sexual assault for the conduct thereafter. *People v. Wasson*, 211 Ill. App. 3d 264, 266 (1991).

¶ 38 In *Tellez-Valencia*, the indictments charged the offense of predatory criminal sexual assault of a child, and the defendants were found guilty. *Tellez-Valencia*, 188 Ill. 2d at 525. While their appeals were pending, the supreme court invalidated the law that created the offense. *Id.* This had the effect of rendering the statute void *ab initio*. *Id.* at 526. The offense was reenacted but the statute did not apply to offenses committed before its new effective date. *Id.* The supreme court held that "[e]ach defendant's charging instrument thus failed to state an offense because the statute under which each was charged and prosecuted was not in effect when the alleged offenses occurred." *Id.* at 526. The court further held that the State could not amend the charging instruments on appeal to allege aggravated criminal sexual assault. *Id.* at 527-28. Pointing to

Wasson, the court stated: "[T]he defect caused by charging an offense based upon a statute not in effect when the alleged offense occurred is fatal, rendering the entire instrument invalid, and warranting reversal of defendants' convictions." *Id.* at 527.

¶ 39 In *Mescall*, this court considered both *Tellez-Valencia* and *Wasson*. At issue was whether the defendant's conviction, which the defendant alleged was based on a defective information, was void, or merely voidable, for purposes of a postjudgment challenge in a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)) filed beyond that section's two-year limitations period. *Mescall*, 379 Ill. App. 3d at 675-77. There, as in the present case, the defendant was charged in an amended information with predatory criminal sexual assault of a child based on conduct that was alleged to have occurred over a period that included time before the effective date of the statute. *Id.* at 672. We held that the trial court properly dismissed the section 2-1401 petition as untimely, because "any problem with the amended information" did not deprive the trial court of jurisdiction and, thus, the judgment was voidable, rather than void. *Id.* at 675. We distinguished *Tellez-Valencia* based on the fact that, unlike in *Tellez-Valencia*, the offense existed when the defendant committed at least some of the acts in the information. *Id.* 675-76. We noted, moreover, that the holding in *Tellez-Valencia* was not based on the trial court's lack of jurisdiction and whether the judgments were void or voidable. *Id.* at 676. We also distinguished *Wasson*, emphasizing that the trial court erred in that case by refusing to give the tendered jury instruction and that the defendant raised the issue in a timely direct appeal rather than in an untimely section 2-1401 petition. *Id.* at 676-77. We agreed that "the information was defective because a portion of the conduct complained of was alleged to have occurred before the effective date of the statute," but we held that the trial court nevertheless had jurisdiction to enter the judgment and thus the defendant could not challenge it as void in an untimely section 2-1401 petition. *Id.* at 678.

¶ 40 The above cases, particularly *Wasson*, lead us to conclude that counts VI and VIII of the indictment were defective. As in *Wasson*, defendant was charged in counts VI and VIII with offenses that did not exist during a significant portion of the alleged periods. *Wasson* makes clear that those counts were defective to the extent they charged defendant for acts occurring prior May 27, 1996, the effective date of the offense. Although the present case is distinguishable from *Tellez-Valencia* because the offense here did exist during a portion of the alleged periods, we nevertheless note that *Tellez-Valencia* cited *Wasson* with approval. Further, in *Mescall*, the same kind of charging irregularity as we have in this case was found to have rendered the charging instrument in that case defective, albeit not void.

¶ 41 We reject the State's argument that, because the dates alleged straddled the effective date of the offense, counts VI and VIII were not defective. The State claims that it proceeded on a theory that defendant engaged in a continuous course of predatory criminal sexual assault against K.L. where the final act was not complete until March 1997, well after the effective date of the offense. The State cites *People v. McDade*, 345 Ill. App. 3d 912, 915 (2004), for the proposition that a continuous course of conduct is "not complete until the last act [is] accomplished." *McDade* does not apply here. In *McDade*, the defendant was convicted on one count of predatory criminal sexual assault based on numerous assaults that occurred between December 1997 and June 1999. *Id.* at 913. The issue on appeal was whether the defendant was eligible for the harsher restrictions on sentencing credit that became effective in June 1998. *Id.* at 914. The First District found that the defendant was eligible, reasoning that he was charged under a theory that he engaged in a continuous course of conduct that did not end until 1999, after the effective date of the relevant statute. *Id.* at 915-16. Unlike in *McDade*, counts VI and VIII here were not charged as continuous courses of conduct, but rather as discrete instances of sexual misconduct.

¶ 42 Our conclusion that counts VI and VIII were legally defective is not the end of our analysis. As noted above, because defendant is challenging counts VI and VIII for the first time on appeal, the question is whether "the indictment apprised the accused of the precise offense charged with enough specificity to (1) allow preparation of his defense and (2) allow pleading a resulting conviction as a bar to future prosecutions arising out of the same conduct." *DiLorenzo*, 169 Ill. 2d at 322.

¶ 43 Citing *Wasson* in support, defendant argues that he could not adequately prepare his defense, "because the indictment charged him with offenses that did not exist during significant portions of the alleged times when the offenses occurred." The State argues that defendant was not prejudiced in preparing his defense, because he (1) "possessed specific knowledge about the alleged time frames within the indictment, along with the applicable predatory criminal sexual assault statute in effect" and (2) his trial strategy was not complex, consisting of only attacking K.L.'s testimony. We find that the indictment was sufficient to allow defendant to prepare a defense.

¶ 44 Defendant's argument that he could not adequately prepare his defense overlooks what transpired during the hearing on defendant's motion for a bill of particulars. During the hearing, defense counsel stated:

> "[B]efore I filed this, I went to the law library and started a spreadsheet and tried to chart all this and I can tell you, it's very complicated and it's very problematic because some of the law—some of these laws on some of these dates, there is not a book in the law library that even has those laws and it's not included in the subscription—it's not archived on the electronic research stuff. So we're here in a situation where they've alleged such a wide date range that you don't know what the law is going to be, I don't know what the law is

going to be, the [S]tate hasn't told us what law applies and we can't look at a jury and tell them what law applies."

Later, the following colloquy took place:

"THE COURT: Let me ask you this: When you say no one knows what law we are talking about, each particular count gives an on-or-between date. For example, Count 1 on or between February 1, '99 and February 28, 1999. Why can't you determine what the law is in 1999 if that's the problem?

[DEFENSE COUNSEL]: You can, Judge. You can, Judge.

THE COURT: All right.

[DEFENSE COUNSEL]: But let's talk more about—let's talk about the 1987 case—

THE COURT: Well, my point is, they set these kinds of dates out, it looks like, in each and every count.

[DEFENSE COUNSEL]: And, Judge, my point is, over those ranges, some of those ranges, the law changes.

THE COURT: Well, I understand that, that the law—the law may be different in Count 3 between '87 and '89, December 1, '87 and December 1, '89, as to that particular allegation. So you can look to see what law is going to apply to Count 3. There may be—you may be right, if you're going this way, that different laws, because they changed, apply to different counts. You may be right about that.

[DEFENSE COUNSEL]: No, no, no. What I'm saying is from '87 to '89, the statute, there were three different versions of the statute.

THE COURT: In that two-year time period.

[DEFENSE COUNSEL]: Yes.

THE COURT: Okay.

[DEFENSE COUNSEL]: And if I recall—and, Judge, to be completely up front, I tried to look at this for each count and I can't because those books don't even exist in the law library and some of that stuff is not archived on Lexis.

THE COURT: Well, you'll find it."

¶ 45 In denying the motion, the trial court stated:

"I understand the difficulty that is before the defense when we were looking back to the 1980s and the 1990s and trying to determine exactly which version of the statute was in effect at that time. And if the defense were to go back and look and say, well, between '87 and '89—this pertains to Count III—a particular statute was in effect and that statute of limitations as pertains to that offense ran out in whatever year, you're certainly free to bring that motion, and the Court would rule on it."

The court further commented, "[T]hat would be for the defense to examine."

¶ 46 This colloquy establishes that defendant was well aware, before trial, that there had been changes in the law during the periods alleged in the indictment. Defendant does not dispute that counts VI and VIII alleged the proper elements of the offense of predatory criminal sexual assault of a child, along with the proper statutory citation. His only argument concerns the effective date, which he would have discovered had he researched the statute. Counsel argued that he could not prepare a defense, because he "[did not] know what law we are talking about *** and this isn't supposed to be a guessing game." However, counts VI and VIII of the indictment charged defendant with a violation of "Chapter 720, Section 12-14.1(a)(1) of the Illinois Compiled Statutes" and it provided him the alleged dates of the offense. We note, too, that when defendant

filed his motion for a bill of particulars, counts VII and IX of the indictment charged defendant with aggravated criminal sexual assault based on the same physical acts as counts VI and VIII. It was not until the first day of trial that the State *nol-prossed* those counts. Thus, the record shows that counsel had enough information to adequately prepare a defense. See *People v. Cuadrado*, 214 Ill. 2d 79 (2005) (where the record showed that the defendant was aware that the State needed to prove procurement to prove her guilty of solicitation of murder for hire, the defendant was not prejudiced by the State's replacement of the word "procurement" with the word "solicited" in the indictment, even though the terms were not interchangeable); *People v. Rowell*, 229 Ill. 2d 82 (2008) (distinguishing *Cuadrado* on the basis that the *Cuadrado* defendant "could simply look to the statute to determine that the State needed to prove procurement").

¶ 47 To be sure, in *Wasson*, the reviewing court stated that the "[d]efendant was hindered in the preparation of his defense because he was forced to answer to crimes for which he could not have been lawfully convicted." 175 Ill. App. 3d at 855. Defendant claims that he was hindered in the same way. However, *Wasson*, is distinguishable because, in that case, there was no indication that counsel was aware, *before trial*, that the law had changed during the alleged periods. In addition, counsel in *Wasson* proposed a jury instruction that would have informed the jury of the effective date of the offense. Counsel thereby attempted to remedy the defect in the indictment. The present case was a bench trial. "In a bench trial, *** a trial judge is presumed to know the law and to follow it, and this presumption is rebutted only when the record affirmatively shows otherwise." *People v. Ressa*, 2019 IL App (2d) 170439, ¶ 31. Thus, we presume that the trial court, unlike the jury in *Wasson*, was well aware of the effective date of the offense. Here, in issuing its ruling, the court specifically noted that "[e]ach offense is charged pursuant to the law in effect at the time of the alleged offense" and found that the State met its burden of proof as to all the elements of the

offenses charged in counts VI and VIII. The court specifically cited the testimony from K.L. and D.H. as well as defendant's recorded statements. Although defendant asserts that, based on K.L.'s testimony, it is "likely" that the acts occurred before the effective date of the offense, we presume that the trial court found otherwise as it would not have convicted defendant based on acts that occurred before the effective date of the statute. There is nothing in the record to affirmatively indicate otherwise.

¶ 48 *Tellez-Valencia* is also readily distinguishable because, in that case, the offense of predatory criminal sexual assault of a child was invalidated after the defendants had been convicted and while their appeals were pending. The supreme court held that the defendants were prejudiced because the offense was rendered nonexistent during the periods alleged in the indictments and, thus, the defendants were charged and convicted of a nonexistent offense. *Tellez-Valencia*, 188 Ill. 2d at 526-28. Here, the offense existed as of May 29, 1996, within the period during which defendant was alleged to have committed it. Given (1) the allegations in counts VI and VIII, which included the date ranges within which the acts were alleged to have occurred and (2) defense counsel's knowledge that, "over those ranges, some of those ranges, the law changes," we cannot say that defendant was hindered in the preparation of his defense.

¶ 49 We also find that those allegations, along with the record of the proceedings, are sufficient to allow defendant to plead the judgment to bar any subsequent prosecution for the same conduct. See *DiLorenzo*, 169 Ill. 2d at 325.

¶ 50 III. CONCLUSION

¶ 51 For the reasons stated, we affirm the judgment of the circuit court of McHenry County.

¶ 52 Affirmed.

No. 127757

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 2-19-0329, 2-19-0452.
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of the Twenty-Second
-vs-	)	Judicial Circuit, McHenry County, Illinois, No. 15 CF 467.
ROBERT LIBRICZ,	)	Honorable James Cowlin,
Defendant-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 24, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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