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SECOND DIVISION
FEBRUARY 8, 2011

1-09-1794

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 19168
)	
CORTEZ LEWIS,)	Honorable
)	Kay M. Hanlon,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

Held: Where the evidence failed to show defendant's conduct actually detained the victim, his conviction for unlawful restraint was reversed.

After a bench trial, defendant Cortez Lewis was convicted of unlawful restraint and sentenced to three years in prison. On appeal, defendant asserts that: (1) the State failed to prove he knowingly detained the victim; (2) the trial court erred in admitting prejudicial and irrelevant evidence found in defendant's backpack; and (3) the fines and fees order must be modified.

At trial, the evidence established that on July 17, 2008, 10-year-old Marc E. had three encounters with defendant while at a friend's birthday party at Gameworks, a two-story facility in Schaumburg that houses a restaurant, a bar, and several games. The first encounter, which occurred on the second floor, was the basis of the unlawful restraint conviction.

Marc testified that during the birthday party, he was on the second floor waiting for his turn

1-09-1794

to play a game, which his friend Max was playing. As he was waiting, defendant approached Marc, wearing a backpack, and asked if he could take Marc's picture. Marc asked why and defendant explained that he liked to take pictures, then asked if Marc would walk to a different area. Marc complied because he "was kind of nervous that [defendant] had like a gun or a knife." No adults were around. Defendant led Marc around the corner to an area that was "kind of like a doorway," with games lined up against the wall nearby. Defendant asked Marc to pose in a catcher's stance, squatting with his legs spread apart, and took a picture. Defendant remained about seven feet away from Marc while taking pictures and asked Marc to pose in two other ways. Marc did not feel like he could leave, because he felt that if he "tried to, [defendant] would pull out a gun or a knife." Defendant never raised his voice, showed or told Marc he had a weapon, touched Marc, told Marc he was not free to leave, and never threatened or forced Marc to do anything. He spoke to Marc in a "kind of quiet" voice and pointed to where he wanted Marc to stand. When defendant was finished taking pictures, Marc went back to Max, then went downstairs and told his mother what had happened.

Later, Marc used the bathroom and, as he was walking out, spotted defendant by the door of the bathroom looking inside. Marc then went to play more games with his two older, teenaged brothers on the first floor and saw defendant for the third time. Defendant asked to take Marc's picture again, and Marc agreed because he was still afraid defendant would pull out a knife. Defendant asked Marc to go upstairs, but Marc said he had to stay downstairs. Defendant said he could take the pictures right where they were, but then Marc's brothers came over and defendant said "never mind."

Christine E., Marc's mother, testified that on the day in question, she saw Marc around 5 p.m., looking very "scared, anxious" and he told her someone had taken his picture. Christine immediately found a manager. While she was talking to the manager, her three boys came up to her and she heard her oldest son say, "Mom, he's still here, and he tried to take Marc again." They

pointed at defendant. Christine and the manager then called the police. Christine testified that defendant was "very disheveled, dirty" and "had a giant hole in the crotch of his pants." Christine saw defendant leave wearing a backpack.

Officer Scott Tillema of the Schaumburg police department testified that he responded to a call at Gameworks at around 6:30 p.m. on July 17, 2008. When he arrived he spoke with Christine, who described defendant to him. Tillema then canvassed the area and spotted defendant, who matched Christine's description, about two blocks away from Gameworks. Defendant stated that he had been at Gameworks, but when Tillema asked whether he had been taking pictures of anyone, defendant became uncooperative and no longer wanted to talk.

The parties then stipulated that if Christine were recalled as a witness, she would testify that at no time did she give consent or authority to anyone to remove her child to any place in the Gameworks facility and take his photograph.

Detective Joe Kaminski, who was in charge of the follow-up investigation of the incident, testified to the contents of defendant's backpack. Inside, there were two disposable cameras, papers, lotions, and a rubber dildo, all of which were admitted as evidence. The film from the cameras was developed and revealed photos of a bowling game and a bathroom at Gameworks. The papers recovered included a hand-sketched index card which read, "I love to f**k boys' little skinny asses." When Kaminski interviewed Marc at his home, Marc stated that other than by mere presence, defendant did not prevent him from leaving.

After defendant rested without presenting evidence, the trial court found defendant guilty of unlawful restraint. In making its decision, the trial court gave the exhibits "very little weight, if any," and specifically found that Marc's testimony was credible. The court accepted that defendant took Marc to another area in Gameworks where there were no adults and "no games" and had Marc pose for pictures. The court also believed Marc was afraid of defendant and felt he could not leave.

The trial court later sentenced defendant to a three-year prison term, followed by one year

of mandatory supervisory release.

On appeal, defendant first contends that the evidence was insufficient to prove him guilty of unlawful restraint. Specifically, the defendant claims the State failed to prove both that he detained Marc and that he did so knowingly.

The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). When considering a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant; it is for the trier of fact to determine the credibility of witnesses, weigh the evidence, draw reasonable inferences and resolve any conflicts in the evidence. *Siguenza-Brito*, 235 Ill. 2d at 228.

To sustain a conviction for unlawful restraint, the State must prove that defendant knowingly and without legal authority detained another. 720 ILCS 5/10-3(a) (West 2008); *People v. Dominguez*, 382 Ill. App. 3d 757, 772 (2008). The essence of unlawful restraint is detention of a person by some conduct on the part of defendant, which prevents that person from moving from one place to another. *People v. Brians*, 315 Ill. App. 3d 162, 174 (2000).

Generally, physical constraint is the key element to support an unlawful restraint conviction. See *People v. Lissade*, 403 Ill. App. 3d 609 (2010); *People v. Hermosillo*, 256 Ill. App. 3d 1020 (1993); *People v. Jones*, 93 Ill. App. 3d 475 (1981); *People v. Satterthwaite*, 72 Ill. App. 3d 483 (1979). In *Lissade*, the defendant held the victim by the throat while pushing her back against a couch. *Lissade*, 403 Ill. App. 3d at 613. In *Hermosillo*, the defendants grabbed the victim's arms and held her facedown on a couch. *Hermosillo*, 256 Ill. App. 3d at 1028. In *Jones*, the defendant grabbed his victim and held a knife to her for only a few seconds. *Jones*, 93 Ill. App. 3d at 479. In *Satterthwaite*, the defendant held the victim by her arm and leg, thereby impairing her freedom of movement. *Satterthwaite*, 72 Ill. App. 3d at 485.

The State does not dispute that defendant never touched Marc but instead argues that the totality of the circumstances surrounding defendant's conduct was sufficient to establish a detention for the purpose of unlawful restraint. The State focuses on Marc's fear that defendant had a weapon, that defendant was older and larger than Marc, that defendant was a stranger to Marc, and that defendant's appearance was disheveled.

It is true that actual or physical force is not necessary to sustain a conviction of unlawful restraint as long as the victim's freedom of movement is impaired. *People v. Lee*, 376 Ill. App. 3d 951, 958 (2007). In support of this principle, the State cites to *People v. Warner*, 98 Ill. App. 3d 433 (1981). In *Warner*, the defendant confined two children living in his household to their bedrooms for extended periods of time; Jesse was confined for approximately 30 days, and Sarah for one week. *Warner*, 98 Ill. App. 3d at 435. Jesse was allowed to leave once each day to use the bathroom, was let out a few times to go to the cemetery or go shopping, but was not allowed to see or talk to anyone other than the defendant. *Warner*, 98 Ill. App. 3d at 435. The court found that because the children "were not free to leave the custody and control of the defendant," a jury could reasonably find that the children were detained within the meaning of the unlawful restraint statute. *Warner*, 98 Ill. App. 3d at 436.

Similarly, in *Lee*, the defendant's aggravated unlawful restraint conviction was not based on any physical constraint. *Lee*, 376 Ill. App. 3d at 958. The defendant held up the 11-year-old victim's parents at gun point, threatened to shoot them and demanded their money. *Lee*, 376 Ill. App. 3d at 953. The court upheld the defendant's conviction of aggravated unlawful restraint of the 11-year-old boy even though the boy was able to run across the street, explaining that the defendant detained the victim by virtue of holding up his parents at gunpoint and threatening them with a gun. *Lee*, 376 Ill. App. 3d at 958.

In both of the above cases, an adult was found guilty of the unlawful restraint of a child. However, in *Warner*, the defendant confined the children in an enclosed space and exercised

complete control over when they could leave, where they went, and with whom they could speak. *Warner*, 98 Ill. App. 3d at 435. In *Lee*, the defendant was threatening to shoot the victim's parents with a gun. *Lee*, 376 Ill. App. 3d at 953. The defendants' conduct in these cases detained the victims and prevented their movement in a very direct manner.

Here, however, there was no conduct from defendant that rose to the level of directly preventing the victim's movement in contrast to the conduct in the cited cases. Defendant neither commanded nor forced Marc around the corner to take pictures. Marc testified that defendant never said he had a weapon, never showed Marc a weapon, never threatened Marc and never told Marc he was not free to leave. Defendant remained seven feet away from Marc while taking pictures and there was no testimony that defendant was physically blocking Marc from leaving. Marc only told Kaminski that defendant's "mere presence" kept him from leaving and testified that he felt he could not leave because he was afraid that defendant had a gun or a knife. We do not condone defendant's behavior and can understand the fear experienced by Marc because of defendant's appearance and the fact that he was a stranger. Nevertheless, the State has not established any conduct by which defendant actually detained Marc and prevented him from moving.

The only other two cases the State cites to are easily distinguishable from the current case. *People v. Doll*, 371 Ill. App. 3d 1131 (2007); *People v. Leonhardt*, 173 Ill. App. 3d 314 (1988). In *Doll*, the defendant held the seven-year-old victim upside down by her ankles, and grabbed her pants so they "came down" to her feet. *Doll*, 371 Ill. App. 3d at 1133. Even though there was contradictory testimony as to whether the victim voluntarily followed defendant into a stairwell, or whether he dragged her there, the court found that the evidence was sufficient to prove defendant guilty of unlawful restraint. *Doll*, 371 Ill. App. 3d at 1137-38. In *Leonhardt*, the defendant grabbed the victim by the arm when they were on a gravel path next to a forest preserve. *Leonhardt*, 173 Ill. App. 3d at 317. Despite the victim pleading that she simply wanted to go to work, the defendant pulled her to the side of the path, pushed her onto the gravel, grabbed the back of her head, then

sexually assaulted her. *Leonhardt*, 173 Ill. App. 3d at 318. When the defendant dozed off later, the victim attempted to escape, just to be chased down by the defendant who then sexually assaulted her again. *Leonhardt*, 173 Ill. App. 3d at 318. The court found the defendant was proven guilty of unlawful restraint because the detention was willful and without the victim's consent. *Leonhardt*, 173 Ill. App. 3d at 322. Unlike these cases, the evidence here revealed that defendant never touched or threatened Marc or commanded that Marc stay in one place at any time.

We are mindful that this case involves a young child and while Illinois law does not set a different standard for this crime simply because it involves a child, there are special factors worth mentioning. A child is likely to be intimidated and acquiesce against his will to an adult, simply because it is an adult who is demanding that the child act in a certain way. From the facts of this case, it is not clear to us that simply because this particular child acquiesced, that he did so willingly. Secondly, it is also unclear whether a child of only 10 years of age is capable of consenting in such a situation. Frankly, the facts of this case give rise to questions which should be addressed by the legislature in drawing a line of demarcation between children of tender age and adults regarding the elements of the crime charged in this case. That being said, the law as it currently stands requires some objective factor which would indicate lack of consent or at least an unwillingness on the part of the child. There are no such facts in the record before us.

The State failed to meet its burden of proving, beyond a reasonable doubt, the element of detention for the offense of unlawful restraint. Moreover, the State has failed to provide any legal authority to support defendant's conviction on appeal. Absent a detention, it is axiomatic that there can be no restraint and this conviction cannot stand. Accordingly, we reverse defendant's conviction and do not need to consider defendant's remaining issues.

Reversed.