

2011 IL App (1st) 091452-U
No. 1-09-1452

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SECOND DIVISION
June 28, 2011

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. 05 CR 13245
)	
ANTOINE MOSELEY,)	Honorable
)	Angela M. Petrone,
Defendant-Appellant.)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

O R D E R

HELD: State's evidence deemed sufficient to sustain defendant's conviction of aggravated criminal sexual assault; defendant precluded from raising inconsistent verdicts; claim of ineffective assistance of counsel based on alleged failure to adequately cross-examine a physician rejected for lack of prejudice.

¶ 1 Following a bench trial, defendant Antoine Moseley was found guilty of aggravated criminal sexual assault and aggravated battery, then sentenced to consecutive, respective terms of 14 and 4 years' imprisonment. On appeal, defendant contends that his aggravated criminal sexual assault conviction must be reversed because the evidence was insufficient to prove him guilty beyond a reasonable doubt. He also contends that this conviction was legally inconsistent with his acquittal on the counts charging vaginal penetration, and that he was denied effective assistance by trial counsel.

¶ 2 In 2005, defendant was charged by indictment with multiple counts of aggravated criminal sexual assault based on anal and vaginal penetration, attempted murder, aggravated battery, and the unlawful restraint of R.P. The testimony at trial presented conflicting accounts of what happened between defendant and R.P. in the early morning hours of May 19, 2005. However, it is undisputed that they met for the first time the previous afternoon, played pool that night, and struggled in defendant's car.

¶ 3 Under the State's theory of the case, defendant made unwanted advances toward R.P. at the end of the evening, sexually assaulted her in the back seat of his car, and punched her in the face when she tried to escape. Defendant's theory, as indicated in his opening statement, was that there was consensual kissing,

but he could not achieve an erection; he did not vaginally or anally penetrate R.P.; she refused to perform oral sex and they fought when she put her finger in his face.

¶ 4 R.P. testified that she asked defendant to drive her home at the end of the evening, but he insisted on talking in his car and tried to touch her breasts and legs. When she answered a call on her cell phone and said that she was trying to get home, defendant "snapped" and pushed her into the back seat. He got on top of her and punched her in the face repeatedly. He then turned her around and pulled her pants down. Because she was pinned down and could not move, she told defendant that he would "catch something." She then heard a condom wrapper open and felt his penis enter her anus and then vagina. She managed to escape, leaving her pants behind, but defendant caught her, knocked her to the ground and left. As defendant drove away, she memorized his license plate number and called 911.

¶ 5 The physician, who examined and spoke to R.P. in the emergency room, found that her injuries were consistent with her report of the incident. Those injuries included facial trauma (nasal tenderness, soft tissue swelling, and dried blood), and a small, linear abrasion near her anus.

¶ 6 Defendant testified that he and R.P. were kissing and fondling "for about an hour, hour and a half," when he asked her for oral sex and she refused. She asked to be driven home and he

offered to drop her off at the train station, but then said to "get the fuck out my car" because she had urinated on the back seat. She refused because it was raining and poked him in the face. When he slapped her, the palm of his hand caught her nose. She began screaming, her nose was bleeding, and blood was "flying out of her mouth." He grabbed her by the back of her neck and "threw her out of the car," "face first" into a pole.

¶ 7 The trial court found defendant not guilty of the counts of aggravated criminal sexual assault based on vaginal penetration, but guilty of aggravated criminal sexual assault based on anal penetration. In so finding, the court observed that "penetration has a different meaning medically and legally," and the law requires "only contact however slight between the penis and the anus." The court stated that an intrusion was also proven based on medical evidence showing "an abrasion arising from the rectum of [R.P.] between her anus and vagina that corroborates her testimony."

¶ 8 The court noted that R.P. told a detective that defendant penetrated her anus with either his penis or finger, and that she could not specify which because he was holding her face down. The court added that R.P. testified that she heard a condom wrapper open after she told defendant that he would get a disease if he raped her, which verified defendant's penetration of R.P.'s anus with his penis. The court further found that the testimony

of the examining physician that R.P. said that defendant "attempted" to penetrate her anus was not impeaching.

¶ 9 The court agreed with defendant that there was a period of time unaccounted for by R.P., and credited his testimony that they were kissing and that R.P. refused to perform oral sex. The court, however, rejected defendant's testimony that he was not upset by her refusal, or that she poked him in the face and uttered vulgarities. Rather, the court stated, "[t]he evidence to me shows the defendant felt like he was entitled to the oral sex."

¶ 10 The court also noted that physical evidence corroborated R.P.'s testimony that she fought to prevent defendant from sexually assaulting her. The court observed that R.P. sustained injuries, including bruises to her hands and legs, cuts and bruises to her face, a swollen nose, and a crooked tooth. The court, however, rejected defendant's contention that she sustained those injuries during "a mutual combat situation," noting that defendant suffered no injuries. The court also rejected defendant's testimony that R.P. consumed an entire pint of vodka and then beer. The court reasoned that R.P. accurately recalled details such as defendant's physical appearance, and the make, model and license plate number of defendant's car.

¶ 11 Defendant was also found guilty of aggravated battery based on bodily harm for punching R.P. in the face, and attempted

murder. The court subsequently vacated the attempted murder conviction, but denied defendant's motion for a new trial. This appeal follows.

¶ 12 Defendant first contends that the evidence was insufficient to prove beyond a reasonable doubt that anal penetration occurred because R.P.'s testimony was impeached and not credible, and medical evidence including the "abrasion arising from the rectum of [R.P.] between her anus and vagina that corroborates her testimony," was not an "intrusion" under the alternative definition of sexual penetration.

¶ 13 When a defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant question on review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). This standard of review gives "'full play to the responsibility of the trier of fact fairly to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *People v. Jackson*, 232 Ill. 2d 246, 281 (2009), quoting *Jackson*, 443 U.S. at 319. Under this standard, we will resolve all reasonable inferences in favor of the State. *People v. Stewart*, 406 Ill. App. 3d 518, 525 (2010). Our role is not to

retry defendant, and we will not reverse a conviction because of contradictory evidence or defendant's claim that a witness is not credible. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 14 By statute, sexual penetration may occur in two ways: by "contact" or by "intrusion." 720 ILCS 5/12-12(f) (West 2004). Specifically, sexual penetration means any *contact*, however slight, between the sex organ or anus of one person and the sex organ or anus of another person, or any *intrusion*, however slight, of *any body part* of one person into the sex organ or anus of another. (Emphasis added.) 720 ILCS 5/12-12(f) (West 2004). Whether penetration occurred is a question for the trier of fact to determine, and a lack of detail in a witness's testimony only affects the weight of the evidence. *People v. Herring*, 324 Ill. App. 3d 458, 464 (2001).

¶ 15 The testimony of a single witness, if positive and credible, is sufficient to convict although contradicted by defendant (*Siguenza-Brito*, 235 Ill. 2d at 228), and the trier of fact is entitled to draw all reasonable inferences from the evidence, including an inference of penetration (*Herring*, 324 Ill. App. 3d at 465). This inference is unreasonable only if the victim denies that penetration occurred. *People v. Hillier*, 392 Ill. App. 3d 66, 69 (2009), *aff'd on other grounds*, 237 Ill. 2d 539 (2010).

¶ 16 Here, the trial transcript shows that when R.P. was specifically asked, "Did he put [his penis] inside your anus," she answered, "I did feel it inside, yes." R.P. never denied that defendant penetrated her, and she testified that she was pinned down with her back toward him when she told him that he would "catch something" and heard a condom wrapper open. Based on her testimony, the trial court could reasonably infer that defendant penetrated R.P. within the meaning of the statute.

¶ 17 We reach this conclusion notwithstanding the various inconsistencies, cited by defendant, between R.P.'s statements and her trial testimony, such as how much alcohol she consumed, what statements she made to which officers, whether she was anally and-or vaginally penetrated, and whether it was with a finger or a penis. *Hillier*, 392 Ill. App. 3d at 69. The State need only prove that a type of sexual penetration occurred beyond a reasonable doubt (*People v. Olivieri*, 334 Ill. App. 3d 311, 317 (2002)), and based on R.P.'s testimony, as discussed above, we find that a rational trier of fact could have reasonably inferred that defendant anally penetrated her, and was therefore proved guilty of aggravated criminal sexual assault (*Hillier*, 392 Ill. App. 3d at 69).

¶ 18 Defendant maintains that R.P.'s failure to account for the significant period when they were kissing inside his car undermined her credibility since she denied that any consensual

kissing or sexual contact occurred, and "the attack as testified to by [her] certainly did not take more than a few minutes." The trial court acknowledged those matters, but obviously did not find them dispositive on the major issue. Minor discrepancies by the State's witnesses in relating a crime do not, alone, render their testimony as a whole so improbable that it must be disregarded on review. *People v. Marshall*, 256 Ill. App. 3d 310, 323 (1993). Here, the fact that there was a period of time unaccounted for by R.P. did not disturb the State's proof on the elements of the charged offense. *Marshall*, 256 Ill. App. 3d at 323.

¶ 19 We are likewise unpersuaded by defendant's argument that the examining physician did not identify the presence of any injuries often associated with a forceful sexual assault such as bleeding or swelling, and that the "abrasion arising from the rectum of [R.P.] between her anus and vagina that corroborates her testimony," was not an "intrusion" under the alternative definition of sexual penetration. There is no requirement that a victim's testimony be corroborated by medical evidence. *People v. Willer*, 281 Ill. App. 3d 939, 948-49 (1996). As discussed, R.P. did not waver on the material allegations of the assault at trial, and the court was entitled to draw a reasonable inference of penetration by intrusion from her testimony.

¶ 20 Defendant also argues that he was not proved guilty beyond a reasonable doubt because the State failed to prove the material allegation of "bodily harm in the form of rectal tearing" as charged in the indictment. We disagree.

¶ 21 Although "'every material allegation in the indictment must be proved beyond a reasonable doubt'" to sustain a conviction, "'an immaterial allegation need not be so proved.'" *People v. Braddock*, 348 Ill. App. 3d 115, 125 (2004). An allegation is "material" only if it is essential to the crime and cannot be stricken from the indictment without rendering it insufficient. *Braddock*, 348 Ill. App. 3d at 125.

¶ 22 Here, defendant was charged with committing an act of sexual penetration in that he inserted his penis into R.P.'s anus by the use or threat of force and caused bodily harm to R.P. in the form of rectal tearing. From this, it is clear that "bodily harm" is the material allegation, and if the phrase "rectal tearing" were stricken from the indictment, the remaining language would still clearly state the necessary statutory elements. *Braddock*, 348 Ill. App. 3d at 125. Because the type of bodily harm is immaterial to the sufficiency of the charge, the phrase "rectal tearing" is surplusage and need not be proven so long as bodily harm of some sort is proven beyond a reasonable doubt. *Braddock*, 348 Ill. App. 3d at 125; accord *People v. Wyatt*, 23 Ill. App. 3d 587, 590 (1974). "Bodily harm" includes physical pain or damage

to the body, such as lacerations, bruises, or abrasions, whether temporary or permanent. *People v. Bishop*, 218 Ill. 2d 232, 249-50 (2006).

¶ 23 Here, the trial court was entitled to draw the reasonable inference that defendant's actions caused bodily harm to R.P. based on the medical evidence showing an "abrasion arising from the rectum of [R.P.] between her anus and vagina." Considering the evidence in the light most favorable to the State, we conclude that the "bodily harm" to R.P.'s anus was proven to have been caused by defendant's acts, as charged. *Bishop*, 218 Ill. 2d at 250.

¶ 24 We are also not persuaded that the trial court's "ruling," *i.e.*, that he committed the sexual assault because he felt entitled to oral sex, is problematic because it imputed a motive that was not based on a reasoned evaluation of the evidence. According to defendant, it was wholly inconsistent for the trial court to discredit R.P.'s testimony regarding what occurred prior to the sexual assault and then accept her testimony that he penetrated her anus with his penis.

¶ 25 It is well established that the trier of fact may accept parts of defendant's case and parts of the State's case in reaching a conclusion of guilt or innocence. *People v. Reed*, 80 Ill. App. 3d 771, 781 (1980). It is also the responsibility of the trier of fact to determine how flaws in part of a witness's

testimony affect credibility as a whole. *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004).

¶ 26 Here, the trial court was free to accept defendant's statement that he and R.P. were kissing and that she refused to perform oral sex, but reject his claim that he was okay with her refusal. *People v. Bowen*, 289 Ill. App. 3d 378, 384-85 (1997). We see nothing in the record showing that the only reasonable inference is that the questionable parts of R.P.'s testimony make the whole unworthy of belief, that R.P. had a motive to falsely accuse defendant, or that her description of the actual crime was incredible on its face. *Cunningham*, 212 Ill. 2d at 284.

¶ 27 The trial court's statement about defendant's "motive" was made in the context of rejecting defendant's testimony that he was not upset by R.P.'s refusal to perform oral sex and reflects a credibility determination, rather than an error in imputing motive. Aside, we note that aggravated criminal sexual assault is a general intent crime (*People v. Wilder*, 219 Ill. App. 3d 437, 440 (1991)), and that the State is not required to prove motive (*People v. Agnew-Downs*, 404 Ill. App. 3d 218, 228 (2010)).

¶ 28 Defendant next contends that the trial court's guilty finding on the anal penetration count is legally inconsistent with its conclusion that the counts alleging vaginal penetration were not proven beyond a reasonable doubt. He acknowledges that in *People v. Jones*, 207 Ill. 2d 122, 133-34 (2003), the supreme

court held that defendants can no longer challenge convictions on the sole basis that they are legally inconsistent with acquittals on other charges. He maintains, however, that *Jones* and the cases upon which it relied are inapplicable because they involved a discussion of inconsistency stemming from lesser-included offenses and the exercise of lenity, whereas in this case, "conviction on one offense is not predicated upon a conviction on the other." In his reply brief, defendant clarifies his argument to be that "the same witnesses testified with the same demeanor and offered the same physical evidence. Yet somehow, the trial court found that [R.P.'s] impeachment formed reasonable doubt for one of the crimes, but not for the other."

¶ 29 We initially observe that in *People v. McCoy*, 207 Ill. 2d 352, 356 (2003), our supreme court applied its holding in *Jones*, 207 Ill. 2d at 133-34 (inconsistent verdicts cannot provide the sole basis to challenge convictions), to bench trials, as here. In *McCoy*, 207 Ill. 2d at 357-58, the supreme court observed that we must presume that the trial court knows the law and that we do not reject an inconsistent bench conviction as unreliable and suggestive of confusion. Therefore, "it is no longer necessary for reviewing courts to examine the record as a whole to rule out confusion on the part of the trial judge." *McCoy*, 207 Ill. 2d at 358.

¶ 30 In light of this authority, we need not determine whether defendant's conviction on the anal penetration count is inconsistent with the findings of not guilty on the vaginal penetration counts, for even if it were, the trial court's findings of guilt would still stand. *McCoy*, 207 Ill. 2d at 358. Nonetheless, we find no apparent legal or logical inconsistency stemming from the trial court's finding that the testimony of R.P. showed that defendant anally, but not vaginally, penetrated her. See *People v. Wesley*, 250 Ill. App. 3d 245, 258 (1993) (verdicts were not legally inconsistent because the findings were not mutually exclusive); *People v. D.R.R.*, 258 Ill. App. 3d 282, 289-90 (1994) (verdicts were not logically inconsistent).

¶ 31 Lastly, defendant contends that defense counsel was ineffective for failing to prepare for, and adequately cross-examine the examining physician regarding a crucial discrepancy between a report containing a diagram of an abrasion near R.P.'s anus and a computer-generated report with no check mark for a laceration. He argues that defense counsel was ultimately ineffective for failing to interject crucial objections and questions regarding the physician's opinion of R.P.'s injuries. The State responds that a cursory review of defense counsel's cross-examination refutes these allegations of ineffectiveness, and that defendant cannot demonstrate that he suffered any resulting prejudice from it.

¶ 32 Defendant is entitled to competent, not perfect representation, and where, as here, defendant fails to show any resulting prejudice, we need not determine whether counsel's performance was defective. *People v. Johnson*, 372 Ill. App. 3d 772, 777-78 (2007). We also observe that cross-examination is a matter of trial strategy, which is entitled to substantial deference (*People v. Pecoraro*, 175 Ill. 2d 294, 326-27 (1997)).

¶ 33 In his reply brief, defendant asserts that defense counsel should not be afforded that deference because he failed to elicit whether the abrasion near R.P.'s anus could have been caused by a finger as opposed to a penis. We disagree because, as discussed, there is no requirement that a victim's testimony, which the trial court credited, be corroborated by medical evidence. *People v. Willer*, 281 Ill. App. 3d 939, 948-49 (1996). Moreover, based on R.P.'s testimony that she heard a condom wrapper open after she told defendant that he would catch a disease and that she felt defendant penetrate her anus with his penis, a rational trier of fact could have reasonably inferred that defendant anally penetrated R.P. and was proved guilty of that offense. *Hillier*, 392 Ill. App. 3d at 69. On these facts, the absence of resulting prejudice defeats defendant's claim that defense counsel was ineffective in his cross-examination of the physician. *People v. Klepper*, 234 Ill. 2d 337, 358 (2009).

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¶ 34 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.