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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07—CF—2544
)	
SANTIAGO DIAZ,)	Honorable
)	Blanche Hill Fawell,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

Held: The State proved defendant guilty beyond a reasonable doubt of two counts of aggravated criminal sexual abuse; on one, the trial court was entitled to credit the victim's recanted out-of-court statement over her trial testimony; on the other, defendant submitted no evidence that the touching was a permitted medical examination, and the court could conclude from the pertinent factors that defendant acted with the intent to sexually arouse or gratify.

Following a bench trial, defendant, Santiago Diaz, was found guilty of two counts of aggravated criminal sexual abuse (720 ILCS 5/12—16(c)(1)(I) (West 2006)). He was sentenced to five years' imprisonment on each count, the sentences to run concurrently. Defendant appeals,

arguing that the State failed to prove him guilty beyond a reasonable doubt. For the reasons that follow, we affirm.

Defendant was initially charged with two counts of predatory criminal sexual assault of a child (720 ILCS 5/12—14.1(a)(1) (West 2006)) (counts 1 and 2) and two counts of aggravated criminal sexual abuse (counts 3 and 4). The State dismissed counts 1 and 2 prior to trial, and defendant was tried on only counts 3 and 4. Count 3 alleged that defendant, being over the age of 17 at the time of the offense, knowingly committed an act of sexual conduct with J.D., who was under the age of 13 at the time of the offense, in that defendant touched J.D.'s breast for the purpose of sexual gratification or arousal of defendant or J.D. Count 4 alleged that defendant, being over the age of 17 at the time of the offense, knowingly committed an act of sexual conduct with J.D., who was under the age of 13 at the time of the offense, in that defendant touched J.D.'s sex organ for the purpose of sexual gratification or arousal of defendant or J.D.

At trial, J.D. testified that defendant was her father. When initially asked if defendant ever did anything to make her uncomfortable, J.D. responded yes. When questioned further about it, however, she stated that nothing happened between her and defendant and that she said something had happened only because she was angry that defendant had grounded her. She acknowledged that for the past year she had been telling her family, doctors, the State, and the investigators that defendant had touched her breasts four or five times and had put his fingers in her vagina numerous times, and she acknowledged that she told the State and the investigators that what she had previously told them was the truth. She admitted that she told everyone that defendant would walk into her bedroom, shut the door, insert his fingers into her vagina, and tell her not to tell anyone what he was doing.

According to J.D., she came home around 2 a.m. one day after staying out with her friends. Later that morning, defendant examined her back, front, and arms for bruises. She had a bra on, but did not have any other clothes on. Defendant told her that he was examining her because he was worried that somebody had injured her. J.D. testified, “I know that what he did was wrong, that he wouldn’t—that he need[ed] to take me instead to a doctor instead of my own family checking me.” She denied that defendant examined her vagina or touched her breasts during this examination.

J.D. testified that, shortly after she told her grandmother and mother that defendant had touched her inappropriately, her mother confronted defendant about the issue, and defendant moved out of the house for a little while. J.D. was glad when he left the house. Sometime around August defendant returned, at which point, in an effort to keep defendant out of the house, J.D. informed the police that defendant had been touching her inappropriately.

Robert Holguin, an investigator with the Du Page County State’s Attorney’s office, testified that on September 11, 2007, he met with J.D. at her school to discuss the allegations she had made against defendant. An audio recording and transcript of the interview were admitted into evidence. During the interview, J.D. told Holguin that defendant touched her breasts under her bra on four or five occasions. She also told Holguin that defendant put his fingers in her “front bottom”—the part of her body that she used to urinate. The first time that defendant did this was on May 5, 2007, which she specifically remembered because it was near her grandmother’s birthday. At the time, her mother was at work and her grandmother had gone somewhere with her aunt. Her siblings were watching television. She was watching television alone in her bedroom when defendant came into the room and shut the door. He proceeded to touch her breasts and insert his fingers into her vagina. Defendant did not say anything to her while he did this. Although J.D. could not remember exactly

how many more times this happened, she told Holguin that it happened more than two more times. Defendant told her not to tell anyone what happened.

Holguin also testified that on September 13, 2007, he interviewed defendant about the allegations J.D. had made. A video recording and transcript of the interview were admitted into evidence. During the interview, defendant told Holguin that he and J.D.'s mother had been experiencing some behavioral problems with J.D. Defendant told Holguin that J.D. would stay out too late, would lie about where she was going, was suspected of having a boyfriend, and neglected her personal hygiene. One morning after J.D. had stayed out especially late, she was running late to leave for school. When defendant went to look for her, he found her lying on her bed, naked but for a towel wrapped around her head. Defendant asked J.D. why she did not cover herself, and J.D. did not respond. Defendant became angry and told J.D. to open her legs so he could check where she had been. Using his hands, he then spread J.D.'s labia so that he could examine the interior of her vagina. Nobody else was in the room at the time; all of the other children were in the living room waiting to go to school. Defendant denied telling J.D. not to tell anyone what happened. Defendant told Holguin that this was the only time that he touched J.D. At several points during the interview, defendant acknowledged that what he had done was inappropriate, stating, "[Y]es, now I regret it. I should have taken her to a clinical person or whoever and not (Unintelligible). Because this caused a problem for me," and "This was my mistake to have done this, but believe me, that never for one moment did it enter my mind to—it makes me ashamed to say this, but I came here ready to accept it and to recognize what I did."

At trial, defendant testified that he and J.D.'s mother experienced problems with J.D.'s behavior in that J.D. would lie about where she was going, stay out late, and skip school. One

morning after J.D. had stayed out especially late, she was slow in getting ready for school. When defendant went looking for her, he found her lying on her bed with the towel wrapped around her head. He told J.D. to hurry up because he needed to get to work. Defendant denied conducting any examination of J.D. He also denied ever touching J.D.'s breasts or putting his fingers in her vagina. According to defendant, he told Holguin that he had examined and touched J.D. because Holguin began to talk to him "very strongly" and because Holguin wanted him to repeat what Holguin had said.

The trial court found defendant guilty, stating that it based its decision on J.D.'s statements made to authorities prior to trial, defendant's lack of credibility in testifying, and the fear J.D. exhibited on the stand when asked about the possibility of defendant returning to the home. The trial court sentenced defendant to five years' imprisonment on both counts, and defendant brought this timely appeal.

Defendant contends that the State failed to prove him guilty beyond a reasonable doubt in two respects: (1) on count 3, the State failed to prove that defendant touched J.D.'s breast, and (2) on count 4, the State failed to prove that defendant's examination of J.D.'s genitals was for the purpose of sexual gratification or arousal.

A person commits aggravated criminal sexual abuse when he or she is at least 17 years old and commits an act of sexual conduct with a victim who was under the age of 13 when the act was committed. 720 ILCS 5/12—16(c)(1)(I) (West 2006). Sexual conduct is defined as

"any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the

accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused.” 720 ILCS 5/12—12(e) (West 2006).

The standard for reviewing the sufficiency of the evidence in a bench trial is the same as it is in a jury trial. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009), citing *People v. Cooper*, 194 Ill. 2d 419, 431 (2000). We review claims of insufficient evidence to determine “ ‘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.’ ” (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985), quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant’s guilt. *Collins*, 106 Ill. 2d at 261. It is not the function of this court to retry the defendant. *Collins*, 106 Ill. 2d at 261. The trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence, and this court will not substitute its judgment for that of the trier of fact on these matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

Defendant’s first contention is that the State failed to prove that he touched J.D.’s breast, because the only evidence that defendant touched J.D.’s breast was J.D.’s out-of-court statement to Holguin. According to defendant, the reliability of that statement was undermined when J.D. testified at trial that she had fabricated the allegations against defendant because she was angry with him for grounding her. This contention is without merit. J.D.’s statement to Holguin was admitted pursuant to section 115—10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115—10.1 (West 2008)), which provides for the substantive admission of prior inconsistent statements under

certain conditions. Despite defendant's contention that J.D.'s statement to Holguin was inconsistent with her trial testimony and rendered the statement to Holguin unreliable and incredible, courts have previously held that a recanted prior inconsistent statement admitted pursuant to section 115—10.1 may serve as the basis for a conviction, even without other corroborative evidence. See *People v. Island*, 385 Ill. App. 3d 316, 347 (2008); *People v. Logan*, 352 Ill. App. 3d 73, 79-80 (2004). Moreover, J.D.'s trial testimony diminished the credibility of her prior statement to Holguin only if the trial court found her trial testimony to be more credible than her statement to Holguin. Clearly, the trial court determined that J.D.'s statement to Holguin was more credible than her trial testimony, and we may not substitute our judgment for that of the trial court on this issue. See *Logan*, 352 Ill. App. 3d at 80 (appellate court could not substitute its judgment for that of the jury where it found the witness's pretrial statement and grand jury testimony more credible than her trial testimony).

Defendant also contends that the State failed to prove him guilty because it failed to demonstrate that defendant's touching of J.D.'s vagina was for the purpose of sexual gratification or arousal. First, according to defendant, his examination of J.D.'s vagina could be considered a medical examination under section 12—18(b) of the Criminal Code of 1961 (720 ILCS 5/12—18(b) (West 2006)). Section 12—18(b) provides:

“Any medical examination or procedure which is conducted by a physician, nurse, medical or hospital personnel, parent, or caretaker for purposes and in a manner consistent with reasonable medical standards is not an offense under Sections 12—13, 12—14, 12—14.1, 12—15 and 12—16 of this Code.” 720 ILCS 5/12—18(b) (West 2006).

The burden is on the defendant to prove by a preponderance of the evidence that his conduct did not constitute a sexual offense and that he is exempt from prosecution under section 12—18(b). *People*

v. Ikpoh, 242 Ill. App. 3d 365, 384 (1993). Here, defendant did not offer any evidence that his examination of J.D. was conducted for a purpose or in a manner consistent with reasonable medical standards. There was no evidence as to why defendant conducted the examination, except that he was upset with J.D. for having come home late the previous night, and there was no evidence of how the examination met reasonable medical standards. Accordingly, defendant failed to carry his burden of showing that he was exempt from prosecution under section 12—18(b).

Defendant also argues that, even if he was not exempt from prosecution under section 12—18(b), the State nevertheless failed to prove that his touching of J.D. was for the purpose of sexual gratification or arousal. “Intent to arouse or satisfy sexual desires may be established by circumstantial evidence, which the trier of fact may consider by inferring defendant’s intent from his conduct.” *People v. Ostrowski*, 394 Ill. App. 3d 82, 92 (2009). Many factors may be considered in determining whether a defendant intended to arouse or satisfy sexual desires, including, but not limited to, the relationship between the defendant and the victim; whether anyone else was present; the length of the contact; the purposefulness of the contact; whether there was a legitimate, nonsexual purpose for the contact; when and where the contact took place; the conduct of the defendant and the victim before and after the contact (*Ostrowski*, 394 Ill. App. 3d at 92); whether there had been previous sexual contact between the defendant and the victim (*People v. Foster*, 195 Ill. App. 3d 926, 951 (1990)); and whether the defendant made any statements demonstrating a consciousness of guilt (*In re D.H.*, 381 Ill. App. 3d 737, 741 (2008)). In addition, the defendant’s intent may be inferred from the nature of the act itself. *People v. Burton*, 399 Ill. App. 3d 809, 813 (2010).

The trial court could have inferred that defendant intended to sexually arouse or gratify himself when he touched J.D.'s vagina. Evidence indicated that when defendant touched J.D., they were alone in J.D.'s bedroom while she was lying on the bed. Defendant's conduct was deliberate and purposeful, not accidental. In J.D.'s statement to Holguin, she indicated that defendant touched her breasts four or five times and inserted his fingers into her vagina on at least three occasions. When speaking with Holguin, defendant made statements indicating a consciousness of guilt, including, "[Y]es, now I regret it. I should have taken her to a clinical person or whoever and not (Unintelligible). Because this caused a problem for me," and "This was my mistake to have done this, but believe me, that never for one moment did it enter my mind to—it makes me ashamed to say this, but I came here ready to accept it and to recognize what I did." Moreover, the nature of defendant's contact with J.D. is statutorily premised as sexual: he touched her vagina, a sex organ. See 720 ILCS 5/12—12(e) (West 2006); see also *People v. Ikpoh*, 242 Ill. App. 3d 365, 381-83 (1993). Finally, although defendant offered to Holguin a nonsexual explanation for his contact with J.D., the trial court was free to reject that explanation and to accept the evidence, including J.D.'s statement to Holguin, from which it could infer that defendant touched J.D. with the intent to sexually arouse or gratify. See *People v. C.H.*, 237 Ill. App. 3d 462, 473 (1992).

For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

Affirmed.