

2011 IL App (2d) 100140-U
No. 2-10-0140
Order filed September 27, 2011

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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 Kane County. |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 08-CF-2055 |
| |) | |
| JUAN J. LOPEZ, |) | Honorable |
| |) | Allen M. Anderson, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

Held: The State proved defendant guilty beyond a reasonable doubt of various sex offenses: although the victims' testimony was weak in certain tangential respects, it was not so fundamentally deficient that the trial court could not credit it.

¶ 1 Defendant, Juan J. Lopez, appeals his convictions of three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(b), (d) (West 2008)) and one count of indecent solicitation of a child (720 ILCS 5/11-6(a) (West 2008)). He contends that the evidence was insufficient to convict him because of discrepancies in the evidence. We affirm.

¶ 2 I. BACKGROUND

¶ 3 In July 2008, Lopez was indicted on 3 counts of aggravated criminal sexual abuse, 2 counts of indecent solicitation of a child, and 10 other counts, in connection with sexual behavior directed at his nieces, M.L. and S.L. Lopez was ultimately convicted after a bench trial of four offenses: (1) count 7, aggravated criminal abuse under section 12-16(b), which alleged that, between January 1, 2000, and December 31, 2003, he engaged in sexual conduct with M.L., who was under 18 years of age, by putting his hand on her sex organ; (2) count 10, aggravated criminal sexual abuse under section 12-16(d), which alleged that, between October 26, 2001, and August 31, 2003, he engaged in sexual conduct with M.L., who was between 13 and 17 years of age, by putting his hand on her sex organ when Lopez was at least 5 years older than M.L.; (3) count 12, indecent solicitation of a child, which alleged that Lopez, who was 17 years of age or older, knowingly solicited M.L., who was under 17 years of age, to engage in sexual conduct; and (4) count 13, aggravated criminal sexual abuse under section 12-16(b), which alleged that, between August 1, 2002, and June 30, 2003, Lopez engaged in sexual conduct with S.L., who was under 18 years of age, by placing his hand on her breast.

¶ 4 At trial, S.L. testified that Lopez was her uncle, and that his family lived in her home when she was in middle school. She testified that, around March or April 2003, she went to Lopez's room to use his computer for a school science project. She said that Lopez began touching her and that he put his hand down her shirt, under her bra, and groped her. She testified that, a few weeks later, she and M.L. missed their school bus, and M.L. asked Lopez to drive them, but S.L. was not actually present when M.L. did so. She said that Lopez did not drive them to school and that they stayed home and watched TV with Lopez being present there all day. S.L. also provided evidence that her mother was rarely home and that she did not tell anyone other than her best friend about the incident when she used the computer. S.L. stated that her mother did not take it well when M.L. reported

sexual abuse to her and that S.L. did not want to go through that. The record indicates that S.L. might have been referring to a previous incident where M.L. reported abuse from a different relative.

¶ 5 A teacher testified and confirmed that S.L. was in her science class during the 2002-2003 school year. S.L.'s mother testified that Lopez lived in the home during 2003 and that he had a computer in his room.

¶ 6 M.L., who was approximately two years older than S.L., testified that her mother was rarely home and that Lopez's wife, Erika, was often responsible for the children. M.L. said that she slept in her mother's room with two young siblings. M.L. testified that, on numerous occasions, Lopez would rub up against her. She said that he would also walk in on her while she was in the shower and would touch her when he was driving her somewhere in his vehicle. She testified that, on many other occasions, she would wake to find Lopez touching her under her clothing and touching her vagina and breasts and that, on two to six occasions, he also penetrated her with either his fingers or his penis. She testified that her siblings were also there during two of those incidents and that she sometimes fought back. According to M.L., the sexual activity in the bed occurred around 8 a.m., when her mother was not there and after her brother had left for school. She testified that Erika left for work before M.L. went to school and that Lopez left for work after all of the children went to school. She did not know where Lopez worked and she said that he was not always employed and that he had days off from work. She also indicated that there may have been a period of time when she went to a different school and left earlier and that Lopez perhaps also left earlier during that time.

¶ 7 M.L. testified that, on the day that they missed the school bus, she asked Lopez to drive them, and he replied that he would do so if she performed oral sex on him. She did not tell anyone

about the incidents until a school counselor asked her about them after the counselor talked to S.L. She said that she did not tell anyone because Lopez threatened her.

¶ 8 An investigator testified that Lopez denied any inappropriate behavior. However, Lopez also told the investigator that he once slapped M.L. on her butt when he was joking around, and he said that he may have given S.L. back massages and may have accidentally touched her breast.

¶ 9 The defense sought to ask M.L. about previous abuse allegations against another uncle, which the defense alleged were false. Some of the material was not allowed by the court. In regard to those accusations, M.L. stated that she alleged that an uncle sexually abused her when she was in fifth grade. There was no showing by the defense that the allegation was false. The defense also asked M.L. questions to show that she had inconsistent memories about details such as whether she walked to school or missed school on the day they missed the bus, that she did not report all incidents to investigators, and that she did not recall what she told investigators about the frequency of Lopez's sexual advances. M.L. said that, once a court case was set, her mother told her to stick with what she first told the investigators, because her mother did not want Lopez to get sentenced for more than what he was already facing.

¶ 10 The defense presented testimony that conflicted with evidence that Lopez was home with the girls before they went to school. Erika, who had previously been in the courtroom in violation of an exclusion order, testified that Lopez left for work between 5:45 and 6:30 a.m. and that she did not go to work at an A&W restaurant until after 10:30 a.m. Lopez denied the allegations against him and testified that he generally left for work at around 5:30 a.m.

¶ 11 Erika's previous employer at A&W testified that, during the time at issue, Erika worked there from 11 a.m. to 2 p.m. Lopez's brother testified that, from 2002 to 2003, Lopez worked with

him, and they had to meet a company vehicle at around 6 a.m. A sister-in-law of the girls' mother testified that M.L. had a reputation for being a liar.

¶ 12 The court convicted Lopez on four counts and found that counts 7 and 10 were based on the same act. The court stated that, while it was clear that much more sexual activity went on between Lopez and M.L., it was unable to conclude beyond a reasonable doubt that the remaining counts occurred as the State had alleged. Lopez's motion for a new trial was denied, he was sentenced to concurrent three-year terms of incarceration, and he appeals.

¶ 13

II. ANALYSIS

¶ 14 Relying on the recent First District case of *People v. Herman*, 407 Ill. App. 3d 688 (2011), Lopez contends that there was insufficient evidence to convict him because of inconsistencies in the testimony. For example, he notes inconsistencies in the testimony about when Lopez went to work, inconsistencies between the testimony of S.L. and M.L. about details of events, and inconsistencies about when and to whom the girls reported the abuse. Lopez concludes that the girls' testimony was not credible.

¶ 15 “A criminal 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.” *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In considering a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. *Id.* Rather, “ ‘the relevant question 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.’ ” (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). 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).

¶ 16 “Discrepancies, omissions and bias go to the weight of the testimony to be evaluated by the trier of fact.” *People v. Rodriguez*, 408 Ill. App. 3d 782, 794 (2011). Further, when the statute of limitations is not at issue and the defendant has not asserted an alibi defense, a witness’s failure to recall the specific date of the offense does not in itself raise reasonable doubt. See *People v. Letcher*, 386 Ill. App. 3d 327, 332 (2008).

¶ 17 In *Herman*, a woman who admitted to being under the influence of crack cocaine at the time of the events at issue alleged that she was violently sexually assaulted by a police officer, but she gave numerous inconsistent statements about the details and events surrounding the alleged crime. The allegations were inconsistent with physical evidence in the case, there was evidence that the woman had motive to lie in order to try to obtain money from the police, and the entire case relied on the woman’s credibility. Noting that the defendant’s testimony was consistent, unimpeached, and unrebutted, the court found that the woman’s testimony was so flawed that it was impossible for any fact finder to reasonably accept any part of it. Thus, the court found insufficient evidence to sustain a conviction. *Herman*, 407 Ill. App. 3d at 709.

¶ 18 Lopez’s case does not include the level of inconsistencies or issues of credibility seen in *Herman*. Unlike in *Herman*, there was no evidence that the girls had any motive to lie about the abuse. To the contrary, they sought to hide it for some time. There also were multiple occasions when the testimony of M.L and S.L. was corroborated by other testimony in the case. While there were a number of inconsistencies in the testimony, including about when Lopez was home in the morning, the witnesses who testified for Lopez, other than Erika’s former employer, were family members whom the court reasonably could have determined were biased and lacked credibility.

Indeed, Lopez's wife testified after she had been in the courtroom in violation of an exclusion order. Lopez himself also gave mildly incriminating statements to investigators. It was not clear that Lopez was gone each and every morning during the time frame at issue, and the witnesses were not required to remember the specific dates of the offenses. Further, trial occurred several years after the events at issue, making inconsistencies in the girls' recollections more likely. A reading of the record as a whole supports the conclusion that the girls had difficulties remembering specific details because of the lapse in time rather than because of dishonesty.

¶ 19 The trial court, which heard and observed the witnesses, was the best positioned to determine their credibility, and it was reasonable for the court to accept the testimony of the State's witnesses over those of the defense. In sum, the inconsistencies and credibility issues in this case do not rise to the level of seriousness where it can be said that the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of Lopez's guilt. In weighing the evidence, the court found guilt on 4 counts and acquitted Lopez on 10 more where it could not find sufficient evidence.

¶ 20

III. CONCLUSION

¶ 21 The evidence was sufficient to convict Lopez. Accordingly, the judgment of the circuit court of Kane County is affirmed.

¶ 22 Affirmed.