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No. 3--10--0552

Order filed June 22, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois
Plaintiff-Appellee,	)	
v.	)	No. 08--CM-692
KEVIN CARDWELL,	)	Honorable Rick Mason,
Defendant-Appellant.	)	Judge, Presiding

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Holdridge and Wright concurred in the judgment.

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**ORDER**

¶ 1 Held: The defendant's conviction for sexual exploitation of a child was upheld on appeal because the trial court did not rely on inadmissible hearsay and the defendant was proven guilty beyond a reasonable doubt. The trial court did not abuse its discretion in denying the defendant's motion for a new trial because the newly discovered evidence was cumulative and could have been discovered prior to trial. The defendant's 180-day stayed jail sentence, and related conditions, was not excessive.

¶ 2 Following a bench trial, defendant Kevin Cardwell was convicted of sexual exploitation of a child, his own 13-year-old daughter, J.C. 720 ILCS 5/11--9.1(a)(2) (West 2006)). The trial court sentenced the defendant to \$300 in fines and costs, 24 months conditional discharge, and 180 days in jail, stayed pending noncompliance with the conditions ordered by the trial court, The defendant appeals, contending that: (1) the trial court impermissibly considered hearsay statements of J.C.; (2) the evidence failed to prove him guilty beyond a reasonable doubt; (3) the trial court erred in denying his motion for a new trial; and (4) his sentence was excessive. We affirm.

¶ 3 **FACTS**

¶ 4 During Columbus Day weekend in 2007, J.C., the defendant's middle daughter, came to stay with him for the weekend. At that time, the defendant and his wife, Valerie Cardwell, had been separated for several years, and their three daughters lived with Valerie. They had an informal visitation schedule; typically all three girls visited at one time, but occasionally, they visited alone for time with their father. On the weekend in question, the defendant picked up J.C. on Friday evening.

¶ 5 At the bench trial, J.C. testified that, on Friday night, she and the defendant slept on couches in the living room of the home of the defendant's friend, Kelly. On Saturday night, before they went to bed, the defendant questioned J.C. about her dating life; J.C. was dating a girl. J.C. testified that the defendant was supportive, and he offered to buy marijuana or sex toys for her if she wanted them. The defendant then pulled out a magazine with naked girls from under the couch cushion and showed some of the pictures to J.C. The defendant also showed J.C. a pornographic video. Near the end of the video, the defendant asked J.C. if she had ever seen a penis. J.C. said she had not, and the defendant unzipped his pants and took out his penis.

J.C. testified that the defendant told her to look at it, and then he began rubbing it with his hand in an up and down motion. After the video ended, the defendant got up and went into the pantry, and J.C. fell asleep.

¶ 6 J.C. testified that her older sister, N.C., joined them on Sunday. J.C. attempted to tell N.C. what had happened, but N.C. did not believe her. J.C. testified that the defendant had to work on Sunday. A couple of weeks later, J.C. told her friends what had happened, and then she talked to the school counselor and to her mother, Valerie.

¶ 7 Valerie testified that J.C. told her what had happened after the school counselor had called and left a message. Valerie called the defendant and accused him of playing a porno and masturbating in front of J.C. The defendant's response was "No, it didn't happen that way." After the State rested, the defense moved for a directed verdict on the basis that there was no proof of sexual gratification. The trial court denied the motion.

¶ 8 The defendant testified that he worked all day on Saturday, not Sunday, and that he did not get home from work until approximately 4:30 a.m. on Sunday morning. He acknowledged that he and J.C. had a conversation about her girlfriend, but that conversation occurred on Friday night, and he denied showing J.C. the magazine, the video, or his penis.

¶ 9 The trial court convicted the defendant of sexual exploitation of a child (720 ILCS 5/11--9.1(a)(2) (West 2006)). The trial court found J.C. and Valerie to be much more credible than the defendant.

¶ 10 The defendant also pled guilty to an unrelated charge of driving on a suspended license, and his sentencing hearing included both convictions. The State asked for 30 days of straight jail time on the license offense and 180 day-for-day jail time on the sexual exploitation offense. It recommended that the defendant serve 30 days in jail and then the remainder be stayed for

compliance with the recommendations of Dr. Patricia Grosskoff, who performed a sex offender evaluation on the defendant. The defendant had no objection to complying with the recommendations of Dr. Grosskoff, but he wanted 300 hours of community service instead of jail time for the license offense. Defense counsel indicated that the defendant had no problem with the 180-day stayed jail term.

¶ 11 The trial court sentenced the defendant to 24 months of conditional discharge in both cases, with \$300 in fines and costs on each count. The trial court also imposed the conditions recommended by Dr. Grosskoff, which included, among other things, a substance abuse evaluation and sex offender treatment. The trial court sentenced the defendant to 180 days in jail on the sexual exploitation charge, but stayed the jail sentence pending compliance with the other conditions. It sentenced the defendant to 300 hours of community service on the license offense.

¶ 12 The defendant filed a motion for a new trial, based on the testimony of N.C. At an evidentiary hearing on the motion, N.C. testified that she joined J.C. and the defendant on Saturday of the subject weekend. J.C. told N.C. that she had a sex talk with the defendant the night before. N.C. testified that she spent the night on Saturday night and J.C. never said anything about pornography or the defendant exposing himself. Later, N.C. told Valerie that she did not believe that the incident occurred, and Valerie told N.C. to stick by her sister. By the time the motion for a new trial was filed, N.C. was no longer living with Valerie. The trial court denied the motion, finding that N.C.'s opinion about whether the event happened would not be admissible at trial. It also found that the evidence was not of such a conclusive nature as to change the result of the trial. The evidence was merely cumulative, and it could have been discovered prior to trial. Even if there were veiled threats by Valerie, N.C.'s testimony would still not be conclusive enough that it would probably or likely have changed the result of the

trial.

¶ 13 The trial court also denied the defendant's motion to reconsider his sentence on the basis that 180 days was excessive because it found that it had appropriately considered all the factors in aggravation and mitigation. The defendant appealed.

¶ 14 ANALYSIS

¶ 15 The defendant contends that: (1) the trial court impermissibly considered hearsay statements of J.C.; (2) the evidence failed to prove him guilty beyond a reasonable doubt; (3) the trial court erred in denying his motion for a new trial; and (4) his sentence was excessive. We will discuss each issue in turn.

¶ 16 I. Hearsay Evidence

¶ 17 The defendant contends that when the trial court found that the story of J.C. and Valerie was more credible, it was necessarily relying on an inadmissible prior consistent hearsay statement made by J.C. to Valerie. The State argues that the defendant forfeited this issue because the defense did not object at trial, raise the issue in a posttrial motion, nor argue plain error on appeal.

¶ 18 Out-of-court statements offered to prove the truth of the matter asserted are inadmissible hearsay and considered to lack reliability unless an exception applies. *People v. Tenney*, 205 Ill. 2d 411 (2002). However, out-of-court statements offered to prove their effect on the listener or to explain a course of events are not hearsay. *People v. Carroll*, 322 Ill. App. 3d 221 (2001).

¶ 19 To preserve an error for review, the defendant must make a timely objection at trial and raise the error in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d. 176 (1988).

¶ 20 In this case, when the trial court rendered its decision, it stated that it found J.C. and Valerie much more credible than the defendant. It went on to state that it believed J.C.'s

testimony and it believed Valerie's testimony regarding the defendant's verbal reaction to the allegations when she called him. There is no indication that the trial court relied on any prior consistent statements of J.C.

¶ 21 To the extent that the trial court considered the out-of-court statement of the defendant to Valerie, the issue of whether it was inadmissible hearsay has been forfeited. It was not objected to at trial, it was not raised in a posttrial motion, and it was not argued on appeal.

¶ 22 II. Reasonable Doubt

¶ 23 The defendant contends that the State failed to prove that he exposed himself to J.C. for the purpose of sexual gratification. The State contends that the defendant was proven guilty beyond a reasonable doubt.

¶ 24 In a bench trial, the trial judge, as the trier of fact, has to responsibility to determine the credibility of witnesses, to determine the weight to be given their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213 (2009). A reviewing court will not set aside a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to cause a reasonable doubt as to the guilt of the accused. *People v. Rowell*, 229 Ill. 2d 82 (2008). In a challenge to the sufficiency of the evidence, the standard of review to be applied is whether, 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. Collins*, 106 Ill. 2d 237 (1985).

¶ 25 Sexual exploitation of a child occurs when a person, in the presence of a child and with the intent or knowledge that the child would view his acts, exposes his sex organs for the purpose of sexual arousal or gratification of such person or the child. 720 ILCS 5/11--9.1(a)(2)

(West 2006).

¶ 26 In this case, J.C. was 13 years old during the Columbus Day weekend in 2007. She testified that the defendant exposed his penis to her after showing her a pornographic video and magazine. J.C. testified that he was rubbing it in an up and down motion. Although the defendant denied doing so, the trial court found that J.C. was the more credible witness. A rational trier of fact could easily conclude that the defendant was seeking sexual gratification through his actions, and the trial court clearly did not abuse its discretion in so finding.

¶ 27 III. Newly Discovered Evidence

¶ 28 The defendant contends that the trial court erred in denying his motion for a new trial on the basis of newly discovered evidence because the testimony of his older daughter, N.C., challenging the credibility of J.C., was substantial and noncumulative. The State argues that the trial court did not abuse its discretion in denying the defendant's motion for a new trial.

¶ 29 To warrant a new trial on the basis of newly discovered evidence, the evidence: (1) must be of such conclusive character that it will probably change the result on retrial; (2) must be material to the issue, not merely cumulative; and (3) must have been discovered since trial and be of such character that the defendant in the exercise of due diligence could not have discovered it earlier. *Smith*, 177 Ill. 2d 53. Whether to grant a motion for a new trial on the basis of newly discovered evidence is within the sound discretion of the trial court, and the denial of such motion will not be reversed absent an abuse of discretion. *People v. Smith*, 177 Ill. 2d 53 (1997).

¶ 30 The motion for a new trial was based upon statements made by N.C. to the defendant's newly retained counsel after the defendant was found guilty at trial. The trial court denied the defendant's motion for a new trial, concluding that N.C.'s opinion that the event did not happen would not be admissible at trial. The evidence was not of such a conclusive nature as to change

the result of the trial, and the evidence was merely cumulative. Even accepting that there were veiled threats by Valerie, N.C.'s testimony was still insufficient.

¶ 31 There is no basis to find that the trial court abused its discretion in denying the motion for a new trial. N.C. was not present during the incident in question, so she could not testify as to whether or not she believed that it occurred. The evidence was cumulative, and it could have been discovered sooner.

¶ 32 IV. Sentence

¶ 33 The defendant contends that the alcohol-based conditions of his sentence and the 180-day stayed jail sentence were excessive. The State argues that the trial court acted well within its discretion in imposing sentence.

¶ 34 A trial court had broad discretion in imposing a sentence, and its decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203 (2000). A sentence that falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense. *People v. Jackson*, 375 Ill. App. 3d 796 (2007).

¶ 35 The defendant was convicted of sexual exploitation of a child and driving while his license was suspended. The license offense was a Class A misdemeanor and, due to the defendant's history, it carried a mandatory minimum sentence of 30 days imprisonment or 300 hours of community service. 625 ILCS 5/6--303(d--1)(West 2006). The sexual exploitation offense was also a Class A misdemeanor, carrying a maximum possible term of imprisonment of one year, with an available two year period of conditional discharge. 730 ILCS 5/5--4.5--55 (West 2006). At sentencing, the State and the defendant agreed to the recommendations of Dr. Grosskoff, which included a substance abuse evaluation. The parties disagreed on the jail sentence for the license offense. Defense counsel sought community service instead of jail time

on the license offense, but stated that the defendant had no problem with the 180-day jail sentence for the sexual exploitation offense as long as it was stayed.

¶ 36 The defendant received the sentence that he requested. In addition, the sentence was within the statutory maximum and the trial court considered all the factors in aggravation and mitigation. There is no showing of an abuse of discretion.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 39 Affirmed.