NOTICE
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2011 IL App (5th) 090143-U

NO. 5-09-0143

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Fayette County.
	)	
v.	)	No. 08-CF-41
	)	
DEREK KLINCAR,	)	Honorable
	)	S. Gene Schwarm,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE DONOVAN delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

O R D E R

¶ 1 *Held*: Victim's prior inconsistent statements made on MySpace account were substantively admissible and sufficient to support defendant's convictions.

¶ 2 Derek Klincar, defendant, was convicted after a jury trial in the circuit court of Fayette County of two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)) and one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)) and was sentenced to a total of 15 years' imprisonment. Defendant argues on appeal that he is entitled to a new trial because he was deprived of equal protection and/or due process by the substantive introduction of the victim's prior inconsistent statements. He also contends that his convictions should be reversed because the State's case depended solely upon the prior inconsistent statements of the victim which she disavowed at trial and because there was no corroborating evidence that a crime had occurred. He further contends the court committed reversible error in admitting portions of the victim's

MySpace pages as substantive evidence when the victim did not testify that she made the majority of the entries in question. We affirm.

¶ 3 The evidence revealed that on the afternoon of February 22, 2008, the 12-year-old victim was partying with her friends and her 14-year-old sister. At one point in the day, she and one of her friends were out walking around and spotted defendant who gave them a ride in his car. The victim's stepsister soon joined the group and asked defendant to purchase vodka for them at a package liquor store. Defendant was 21 years old at the time. After getting the vodka, everyone went to defendant's house. The group, which now included others already at the house, started drinking and playing games while listening to defendant's band. Around 8 p.m. defendant left the house. The victim decided to go with him. The two of them got into defendant's car and started driving around. They stopped at the river in a secluded area and began kissing. According to the victim, they moved to the back seat of the vehicle because it was too crowded in the front seat. They started kissing again while defendant removed the victim's clothing. He then digitally penetrated the victim's vagina and subsequently had intercourse with her. Afterwards, the victim performed oral sex on him. Defendant noticed that it was nearing 10 p.m., the time when the victim needed to return home. On the ride back to his house, defendant allegedly commented: "I can't believe I did that, you're ten years younger than I am." Although the record does not reflect why, shortly after they returned to defendant's house, the police arrived. The victim was taken to the police station where she was charged with illegal consumption of alcohol.

¶ 4 Over the next few days, the victim made entries on her MySpace page about spending the evening with defendant. In one entry she admitted that they had had sex. In others she wrote about how she gets seductive when she is drunk and that defendant finally just gave in after she made him so "horny." She also commented that he may not have used a condom and discussed what she would do if she were pregnant. The victim later denied making many

of the statements. She further explained that those statements she did admit to writing were made just to get attention. At trial she denied that she and defendant had sex. According to her trial testimony, she only gave him a kiss on the cheek when it was time to go home. The victim's friends and sister corroborated various parts of the story such as the victim getting into defendant's car or seeing her get out of his car later in the evening but denied that the victim had told them that she and defendant had had sex.

¶ 5 Further testimony revealed that the St. Elmo police chief regularly monitored MySpace content to "see what was going on in town." He read a page with the victim's name and picture attached to it and printed it out. After reading the content and realizing that something was wrong, he contacted the Illinois State Police. Illinois State Police Special Agent Krutsinger contacted the victim on March 3 and asked her whether the statements made on her MySpace pages were boasting or the truth. The victim admitted that they were the truth. The victim then related the entire incident to him. Agent Krutsinger prepared a report about his conversation with the victim. On March 12, he asked the victim and her sister to sign the report. After looking at it, the victim signed the report. The report was later used at trial to impeach the victim and was entered into evidence along with certain entries from the victim's MySpace pages. The jury found defendant guilty on all three counts.

¶ 6 Defendant first argues on appeal that he was denied a fair trial by the substantive admission of the victim's prior inconsistent statements. Defendant contends he was deprived of his due process rights as a defendant in a criminal case and of his right to equal treatment under the law given that the victim's inconsistent statements could not be used to make a plaintiff's case in a civil suit.

¶ 7 We initially note that statutes are presumed to be constitutional, and in challenging a statute's constitutionality, defendant, as the challenging party, carries the burden of establishing its unconstitutionality. *People v. Donoho*, 204 Ill. 2d 159, 177, 788 N.E.2d 707,

718 (2003). We further note that the rational basis test applies in this instance because defendant identifies no fundamental right or suspect class affected by the challenged statute. See *People v. Botruff*, 212 Ill. 2d 166, 176, 817 N.E.2d 463, 469 (2004). Under the rational basis test, judicial review of a legislative classification is limited and generally deferential. *In re Detention of Samuelson*, 189 Ill. 2d 548, 562, 727 N.E.2d 228, 236 (2000). We are to inquire whether the method or means employed in the statute to achieve the stated goal or purpose of the legislation is rationally related to that goal. *Botruff*, 212 Ill. 2d at 177, 817 N.E.2d at 469. If any set of facts can reasonably be conceived to justify the classification, the constitutionality of the statute must be upheld. *Botruff*, 212 Ill. 2d at 177, 817 N.E.2d at 469.

¶ 8 The equal protection clauses of both the United States and Illinois Constitutions require that persons who are similarly situated be treated equally. *People v. Shepard*, 193 Ill. App. 3d 910, 917, 550 N.E.2d 599, 603 (1990). Neither, however, prohibits the General Assembly from enacting legislation which affects different classes of persons differently. *People v. Esposito*, 121 Ill. 2d 491, 500-01, 521 N.E.2d 873, 877 (1988). Defendant's argument here fails because he requires that all parties to a legal proceeding be treated equally with respect to a statutory rule of evidence. Section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2008)) applies only in a criminal proceeding, and specifically applies only to the class of parties in a criminal proceeding and does not apply to parties in civil proceedings. "[I]t is by no means irrational for the General Assembly to treat civil litigants different from criminal ones." *In re Detention of Samuelson*, 189 Ill. 2d at 563, 727 N.E.2d at 236-37. Unlike classes do not have to be treated the same, and the legislature has the power to prescribe methods of proof in criminal cases. See *People v. Orange*, 121 Ill. 2d 364, 381, 521 N.E.2d 69, 77 (1988). The legislature was not irrational to treat the class of parties to a criminal proceeding differently than those in civil

proceedings. The pertinent inquiry is whether the method or means employed in the statute to achieve the stated goal or purpose of the legislation is rationally related to that goal.

¶ 9 The goal of section 115-10.1 is to protect parties from turncoat witnesses who deny former statements that were made under circumstances indicating such statements were likely to be true. *People v. Fauber*, 266 Ill. App. 3d 381, 390-91, 640 N.E.2d 689, 695 (1994). In enacting section 115-10.1, the legislature determined that prior inconsistent statements should be admitted substantively because the prior statements were made closer in time to the event in question than statements made at trial, the witness is available for cross-examination thereby eliminating hearsay concerns of unavailability, and the admission of such statements furthers the search for truth in a criminal proceeding. *People v. Morales*, 281 Ill. App. 3d 695, 702, 666 N.E.2d 839, 844 (1996). Section 115-10.1 applies to all parties to a criminal proceeding including the prosecutor and the defendant thereby defeating any equal protection concerns. See *People v. Broadnax*, 177 Ill. App. 3d 818, 834, 532 N.E.2d 936, 946 (1988). Moreover, evidence which is relevant, *i.e.*, it has any tendency to make the existence of a material fact more or less probable than it would be without the evidence, will not be excluded merely because it may prejudice the accused. *People v. Pursley*, 284 Ill. App. 3d 597, 603, 672 N.E.2d 1249, 1253-54 (1996). All admissible evidence against a defendant is prejudicial in the eyes of a defendant. Merely because a statute may strengthen evidence that is otherwise relevant, reliable, and admissible against a defendant does not make it violative of due process or equal protection. See *Donoho*, 204 Ill. 2d at 178, 788 N.E.2d at 719.

¶ 10 Defendant argues there was insufficient evidence to prove him guilty beyond a reasonable doubt because the only evidence against him was the prior inconsistent statements of the victim admitted substantively into evidence without corroboration. We disagree.

¶ 11 When reviewing a challenge to the sufficiency of the evidence, we consider, after

viewing the evidence in the light most favorable to the prosecution, whether 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, 261, 478 N.E.2d 267, 277 (1985); *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004). It is the trier of fact's responsibility, not ours, to resolve any conflicts in the testimony, to weigh the evidence, and to draw all reasonable inferences from it. *People v. Howery*, 178 Ill. 2d 1, 38, 687 N.E.2d 836, 854 (1997). The testimony of a single witness is sufficient to convict if such testimony is positive and credible. *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999). And, contrary to defendant's assertions, recanted prior inconsistent statements can be sufficient to support a conviction even without corroborating evidence. See *People v. Morrow*, 303 Ill. App. 3d 671, 677, 708 N.E.2d 430, 436 (1999); *People v. Curtis*, 296 Ill. App. 3d 991, 999-1000, 696 N.E.2d 372, 378-79 (1998). Here, there was corroborating evidence in addition to the victim's prior inconsistent statements. Several witnesses confirmed that the victim was drunk that evening, that she got into defendant's vehicle and drove away with him by herself, that they did not return until almost two hours later, and that she was the only other person exiting the vehicle upon their return to defendant's house. The surrounding circumstances of the evening as well as the opportunity for the commission of crimes in question were corroborated. Even at trial, the victim did not deny drinking vodka that day, nor did she deny going to a secluded area with defendant in his car and kissing him at least once. The victim admitted to the police that she made the entries to her MySpace page about her and defendant having had sex that night and that the entries were true. She also told her stepsister and some of her friends about the evening as well. A rational trier of fact could have found that the essential elements of the crimes were proved beyond a reasonable doubt. We see no reason to overturn defendant's convictions in this instance.

¶ 12 For his final point on appeal, defendant argues certain portions of the printout of the

victim's MySpace entries should not have been admitted into evidence because the victim had no memory of making the entries. He further contends that the State failed to prove that the victim herself, in fact, even made the entries. Again, prior inconsistent statements are substantively admissible under section 115-10.1. It is within the sound discretion of the trial court to determine whether a prior inconsistent statement of a witness is admissible under the statute, and that determination will not be overturned on appeal absent a clear abuse of discretion. *People v. Watkins*, 368 Ill. App. 3d 927, 931, 859 N.E.2d 265, 268 (2006). It is also within the trial court's discretion whether to admit documentary evidence as long as the document is identified and authenticated. *People v. Chromik*, 408 Ill. App. 3d 1028, 1046, 946 N.E.2d 1039, 1055 (2011). "A finding of authentication is merely a finding that there is sufficient evidence to justify presentation of the offered evidence to the trier of fact and does not preclude the opponent from contesting the genuineness of the writing after the basic authentication requirements are satisfied." *People v. Downin*, 357 Ill. App. 3d 193, 202-03, 828 N.E.2d 341, 350 (2005). Both direct and circumstantial evidence may be used to authenticate a document. Circumstantial evidence of authenticity includes such factors as appearance, contents, and substance. *Downin*, 357 Ill. App. 3d at 203, 828 N.E.2d at 350. Additionally, *prima facie* authorship of a document may include a showing that the writing contains knowledge of a matter sufficiently obscure so as to be known to only a small group of individuals. *Downin*, 357 Ill. App. 3d at 203, 828 N.E.2d at 350. Factors that courts use in authenticating writings similarly apply to e-mail messages (see *Downin*, 357 Ill. App. 3d at 203, 828 N.E.2d at 350) and text messages (see *Chromik*, 408 Ill. App. 3d at 1046-47, 946 N.E.2d at 1056). It is no different with respect to the victim's MySpace pages. It was for the trier of fact to make the ultimate determination of authorship. Here, the police chief identified the photocopy of the printout of the victim's MySpace account and testified that it was a true and accurate copy of the original and was in substantially the same condition.

The victim acknowledged that she made several entries on her MySpace page stating that she and defendant had had sex. At trial she stated that she wrote the entries for attention. When initially asked by the police if she was boasting to impress her friends or whether her entries were the truth, she responded that they were true. This was sufficient to prove by the preponderance of the evidence that the statements on her MySpace page were written by the victim. Her lack of memory with respect to certain statements included in the entire printout does not bar their admission. When a witness claims to be unable to recollect the matter at issue, a former affirmation of it is admissible as a contradiction under section 115-10.1. *People v. Flores*, 128 Ill. 2d 66, 87, 538 N.E.2d 481, 488-89 (1989). We therefore conclude that the court committed no abuse of discretion in admitting all of the statements when all of the foundational requirements had been met.

¶ 13 For the foregoing reasons, we affirm the judgment of the circuit court of Fayette County.

¶ 14 Affirmed.