

2012 IL App (1st) 103164-U

FIRST DIVISION  
DATE 6-4-12

No. 1-10-3164

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the  |
|                                      | ) | Circuit Court of |
| Plaintiff-Appellee,                  | ) | Cook County.     |
|                                      | ) |                  |
| v.                                   | ) | 08 CR 3061       |
|                                      | ) |                  |
| ERICK JOHNSON,                       | ) | The Honorable    |
|                                      | ) | James B. Linn,   |
| Defendant-Appellant.                 | ) | Judge Presiding. |

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice HOFFMAN and Justice KARNEZIS concurred in the judgment.

**ORDER**

¶ 1 *HELD:* Defendant was proven guilty beyond a reasonable doubt of predatory criminal sexual assault of a child. Three of defendant's four convictions must be vacated pursuant to the one-act, one-crime rule because they are all based on the same act. Defendant failed to establish that the trial court did not consider the mitigating evidence presented at sentencing. Pursuant to *People v. Rinehart*, 2012 IL 111719, defendant is subject to an indeterminate term of mandatory supervised release.

¶ 2 After a bench trial, defendant Erick Johnson was found guilty of predatory criminal sexual assault of a child and sentenced to seven years in prison. On appeal, he contends that he was not proven guilty beyond a reasonable doubt because the victim's outcry statements were unreliable and the victim was not credible. Defendant also contends that three of his convictions must be vacated pursuant to the one-act, one-crime rule because they are all based upon the same act. He finally contends that the trial court failed to consider certain mitigating evidence at sentencing and to impose a definite term of mandatory supervised release (MSR). We vacate three of defendant's convictions, while affirming the judgment of the trial court in all other aspects.

¶ 3 Defendant was arrested and charged by indictment with predatory criminal sexual assault of a child and criminal sexual assault after a November 2009, incident during which he inserted his penis into the mouth of the victim, his seven-year-old niece L.C.

¶ 4 Prior to trial, the court held a hearing pursuant to section 115-10(b)(1) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10(b)(1) (West 2008)), after the State indicated that the victim would testify at trial, to ascertain the admissibility of certain out-of-court statements the victim made to adults, including her mother and nurses Wendy Brogan and Elaine Novak.<sup>1</sup>

¶ 5 Defendant's sister, Tawanda J.C., testified that she and her husband Andrew C., were the parents of six children; five sons and the victim. At the time of the incident, defendant was

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<sup>1</sup> Although forensic interviewer Maria Ramirez also testified at the hearing, her testimony was ultimately deemed inadmissible.

living with the family. On the morning of November 4, 2009, Tawanda was awakened by the victim shoving her and stating that defendant "put his stuff" in the victim's mouth. She woke Andrew up and had the victim tell him what happened. Tawanda then took the victim into the living room where she woke defendant up and spoke to him. Later that morning at the hospital, Tawanda initiated a second conversation with the victim. Tawanda denied suggesting to the victim that the victim make these accusations against defendant.

¶ 6 Nurse Wendy Brogan testified that she treated the victim in the emergency room while the victim's mother was present. When Brogan asked the victim what brought her to the ER, the victim indicated that defendant put his "stuff" in her mouth.

¶ 7 Nurse Elaine Novak testified that the victim stated that she had been awakened and taken into the bathroom by defendant who indicated that they would play a game. There, defendant put his "junk" in the victim's mouth. Tawanda was present for this conversation, but did not speak.

¶ 8 At the close of the hearing, the trial court determined that the first conversation between the victim and Tawanda was admissible as it was initiated by the victim. However, the second conversation, which was initiated by Tawanda, was not. The court also determined that the testimony of the two nurses would be allowed at trial. The matter then proceeded to a bench trial.

¶ 9 Initially, the court incorporated by reference the testimony that had been determined admissible at the conclusion of the section 115-10 hearing. The State adopted the prior testimony of Tawanda, Brogan, and Novak.

¶ 10 The State then recalled Wendy Brogan, who testified that an examination of the victim did not reveal any physical signs of sexual abuse. As there was no indication of ejaculation, no

oral swab of the victim's mouth was taken.

¶ 11 Tawanda testified that when she went into the living room to confront defendant, defendant said that the victim must have been dreaming and suggested that Tawanda "slap the blank" out of the victim. After she declined to slap the victim, Tawanda dressed and stated that she was going out to buy cigarettes. She said this in order to keep defendant in the apartment while she called the police.

¶ 12 During cross-examination, Tawanda testified that there was no furniture in the living room. At the time of this incident, defendant contributed to household expenses and was permitted to babysit the children. Tawanda admitted that Andrew had lost his job and that she fought with defendant about money, but she denied threatening to have defendant locked up. After this incident, DCFS became involved with her family and she received funds to pay the rent and to buy furniture. Tawanda had previous experience with DCFS and had been a ward of the State. Although she admitted she was sexually abused as a child, she denied that was the reason she was a ward of the State.

¶ 13 Tawanda immediately believed the victim. Although she thought that the victim might not be telling the truth had entered her mind, she knew her children and could tell a white lie from a "big" lie. Tawanda admitted that she asked the victim if Andrew had done it, as she knew that her husband had a previous conviction for sexual assault. She explained that Andrew, who was 30 years old at the time of trial, was convicted when he was 15 years old.

¶ 14 During redirect, Tawanda clarified that on the occasion defendant babysat, he was not under the influence of alcohol or drugs. However, the night of the incident he had drunk beer and used marijuana. She asked the victim whether the victim was sure that it was defendant

because there were other adult men in the house. After the victim confirmed that it was defendant, the victim stated when she exited her room to watch X-Men defendant told her he would reward her if she started going to the bathroom. Defendant asked the victim to come to the bathroom and said he would give her junk food. After defendant instructed the victim to open her mouth and close her eyes, he inserted his penis into her mouth. Tawanda believed the victim because she did not think that the victim could have made up such a detailed story.

¶ 15 The victim testified that she woke up and went to the bathroom. When she came out of the bathroom, she watched X-Men on the living room television. Defendant was also in the living room and told her to go into the bathroom. Once they were in the bathroom, defendant closed the bathroom door "a little" and told her to say "a-a-h." Defendant pulled out his "stuff," *i.e.*, his penis, and put it in her mouth. He then wiggled it. Defendant told her to keep it secret and promised her junk food. At one point, defendant thought that someone was coming and jumped "on the wall." Afterward, the victim went to Tawanda, woke her up, and told her what had happened. Although the victim remembered her mother and defendant fighting once, she denied that Tawanda told her to make up a story to get defendant into trouble.

¶ 16 During cross-examination, the victim admitted that she had practiced her story many times and was told not to add anything or take anything away from it. She initially testified that she fell asleep in a white chair while watching television, however, she then testified that she did not fall asleep. The victim indicated that defendant told her to go to the bathroom and to wake up her brothers and have them go to the bathroom as well. However, after she went to the bathroom, she did not go back to her room and wake up her brothers.

¶ 17 Defendant testified that he did not place his penis in the victim's mouth. On the night in

question, he rolled over around 3 a.m. and noticed the victim sleeping on the floor. After calling out and waking her up, defendant told her to go to the bathroom and then to take her brothers to the bathroom. He heard the toilet flush and went back to sleep. At around 3:41 a.m., he was awakened by Tawanda. When Tawanda said to tell her what had happened, he asked what she meant. Tawanda then leaned over the victim and told her to say what had happened. The victim did not say anything. The victim, Tawanda and Andrew then left the room. When they came back Tawanda leaned over the victim and told her, in a "hostile" voice, to say what had happened. Again, the victim did not say anything.

¶ 18 Defendant and Tawanda fought "a lot" about household matters, including finances. When he told Tawanda that the children were rambunctious, she responded that they lived in the house and he was a visitor. Tawanda also told defendant she was going to get him locked up.

¶ 19 During cross-examination, defendant denied that he was "tipsy" that night, although he had a few beers. He also admitted that he told police officers that kids lie and that he believed the victim's story was fabricated by Tawanda because she was jealous of his success.

¶ 20 In rebuttal, the State presented the testimony of Detective Jarrod Smith who spoke with defendant in January 2010. Smith testified that defendant admitted that he had returned home tipsy. When he saw the victim on the floor, he instructed her to go to the bathroom. However, he then used the bathroom before she did.

¶ 21 Ultimately, the trial court found defendant guilty of predatory criminal sexual assault of a child. The court determined that the issue in this case was credibility and that the victim had been consistent throughout the proceedings.

¶ 22 At sentencing, the State acknowledged that defendant did not have a criminal

background, but argued that the nature of the crime was egregious. The defense replied that although defendant's mother was a drug addict, he had finished high school and volunteered with youth. The court then indicated that defendant's lack of a criminal record and the fact that the offense was nonviolent were mitigating; however, the facts of the case themselves were aggravating, which was why this offense was classified as a Class X felony. The court sentenced defendant to seven years in prison. The defense filed a motion to modify the sentence. In denying the motion, the court stated that it had considered all factors in mitigation.

¶ 23 Although the court stated that all counts merged, defendant's mittimus indicates that he was convicted of two counts of predatory criminal sexual assault of a child and two counts of criminal sexual assault and sentenced to four concurrent terms of seven years in prison.

¶ 24 On appeal, defendant contends that the victim's outcry statements were unreliable. He further contends that he was not proven guilty beyond a reasonable doubt because the State's case rested solely upon the victim's testimony and the victim was not credible. He also argues that the evidence against him was inadequate because Tawanda had motivation to lie and Andrew was silent during the proceedings.

¶ 25 Initially, defendant contends that the victim's outcry statements cannot be considered credible and were improperly admitted because Tawanda coached the victim.

¶ 26 When conducting a section 115-10 hearing, a trial court must evaluate the totality of the circumstances surrounding the making of the hearsay statements. *People v. Sharp*, 391 Ill. App. 3d 947, 955 (2009). Factors for the trial court to consider when making a reliability determination include the child's spontaneity and consistent repetition of the incident, the child's mental state, whether the child used terminology unexpected of a child of similar age, and the

child's lack of a motive to fabricate. *Sharp*, 391 Ill. App. 3d at 955. The State has the burden to establish that the statements are reliable and not the result of prompting. *Sharp*, 391 Ill. App. 3d at 955. This court reviews the admission of evidence pursuant to section 115-10 under an abuse of discretion standard. *People v. Bowen*, 183 Ill. 2d 103, 120 (1998).

¶ 27 Here, the victim went to her mother's room immediately after the incident and told Tawanda what had happened. The victim also spoke to Brogan and Novak later the same day and used the words "stuff" and "junk" to describe defendant's penis. In addition, the version of events that the victim described to her mother was substantially consistent with the account of the incident that she gave to Brogan and Novak. In each case, she stated that defendant put his stuff or junk in her mouth when they were alone in the bathroom. Although defendant contends that the victim was coached to lie, Tawanda denied suggesting to the victim that she make such accusations and the victim later denied at trial that Tawanda told her to say things to get defendant in trouble. The victim spontaneously reported the attack, was consistent in the repetition of the details and had no clearly established motive to fabricate. Therefore, we find that the trial court did not abuse its discretion by admitting the victim's statements to Tawanda, Brogan and Novak pursuant to section 115-10 (725 ILCS 5/115-10 (West 2008)).

¶ 28 Defendant next contends that he was not proven guilty beyond a reasonable doubt because the victim was not credible and her testimony was uncorroborated. He also argues Tawanda had a motive to lie and that Andrew's silence casts doubt on the victim's story.

¶ 29 In assessing the sufficiency of the evidence, the relevant inquiry is whether, 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. *People v. Ross*, 229 Ill. 2d 255,

272 (2008). This court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's testimony, and the reasonable inferences to be drawn from the evidence. *Ross*, 229 Ill. 2d at 272. A conviction will be reversed only when the evidence was so unreasonable or unsatisfactory that reasonable doubt remains as to whether the defendant was guilty. *Ross*, 229 Ill. 2d at 272.

¶ 30 To sustain a conviction for predatory criminal sexual assault of a child, the State must establish beyond a reasonable doubt that defendant, who was 17 years of age or older, committed an act of sexual penetration upon the victim, who was less than 13 years old at the time the act was committed. 720 ILCS 5/12-14.1(a)(1) (West 2008).

¶ 31 Here, the seven-year-old victim testified that while in the bathroom with defendant, he told her to open her mouth, and then inserted his "stuff," *i.e.*, his penis, into her mouth and wiggled it. Although defendant told her to keep this incident secret, the victim immediately told her mother. Tawanda testified that the victim woke her up to tell her that defendant put his stuff in the victim's mouth. The victim also told both Brogan and Novak that defendant put his penis in her mouth.

¶ 32 Here, the victim's testimony, if credible, provided sufficient evidence of a sexual assault to convict defendant. *People v. Tatum*, 389 Ill. App. 3d 656, 661 (2009) (identification by a single witness is sufficient for the trier of fact to find a defendant guilty beyond a reasonable doubt); *People v. Robinson*, 199 Ill. App. 3d 24, 32 (1989) ("the testimony of the victim alone, if clear and convincing, is sufficient to support a conviction for rape, \* \* \* even where the testimony is contradicted by the accused"). Defendant contends, however, that the victim's testimony was not credible, because the victim testified inconsistently, Tawanda coached the

victim, and Andrew did not testify. Defendant argues that Tawanda lied in order to punish defendant for a prior argument and obtain assistance from DCFS.

¶ 33 Although the victim testified inconsistently regarding whether she fell asleep in the living room and about the existence of a white chair, these inconsistencies did not destroy her credibility; rather they went to the weight the trier of fact afforded her testimony. *People v. Loya*, 90 Ill. App. 3d 1078, 1085 (1980). While Tawanda admitted that she was sexually abused as a child and had been a ward of the State, she denied suggesting that the victim make up a story to punish defendant. Tawanda also testified that she had permitted defendant to babysit her children in the past. Although defendant denied inserting his penis into the victim's mouth and asserted Tawanda created these allegations because she was jealous of him, the trial court found the victim and Tawanda to be credible witnesses and defendant's testimony to be incredible, as evidenced by the verdict. This court will not substitute our judgment for that of the trial court on this issue. *Ross*, 229 Ill 2d at 272.

¶ 34 Defendant next contends that the "silence" of the victim's father Andrew throughout these proceedings casts doubt upon the victim's credibility. However, the State is not required to produce every witness to a crime, and the failure to do so does not ordinarily create a presumption that the testimony of that witness would be unfavorable to the State. *People v. Zenner*, 84 Ill. App. 3d 566, 571 (1980). While a negative inference may arise in certain instances, such as when the State does not call a witness with "unique knowledge of a crucial, disputed issue of fact," or when the State has caused the absence of a material witness, no negative inference is created when the witness at issue is also known and available to the defense, yet the defense does not call the witness to testify. *People v. Doll*, 371 Ill. App. 3d

1131, 1137 (2007). Here, the record reveals that immediately after hearing the victim's description of the incident, Tawanda woke Andrew up and told the victim to repeat what the victim had just told her. There does not appear to be any reason why the defense could not have called the victim's father to testify at the section 115-10 hearing or at trial, thus, no negative inference was created.

¶ 35 Ultimately, this court reverses a conviction only when the evidence at trial was so unsatisfactory that reasonable doubt remains as to a defendant's guilt (*Ross*, 229 Ill. 2d at 272); this is not one of those cases. The trial court, which observed the victim testify, found the victim to be a credible witness; this court will not substitute its judgement for that of the trial court on this issue. *Ross*, 229 Ill. 2d at 272; see also *People v. Parker*, 234 Ill. App. 3d 273, 274 (1992) (a reviewing court gives due consideration to the fact that the trier of fact observed and heard the witnesses as they testified). Accordingly, we affirm defendant's conviction for predatory criminal sexual assault of a child.

¶ 36 Defendant next contends, and the State concedes, that three of his convictions must be vacated as violations of the one-act, one-crime rule when all four convictions were carved out of the same act of inserting his penis in the victim's mouth. We agree.

¶ 37 A careful review of the indictment in this case reveals that all of defendant's convictions are based upon a single "act," *i.e.*, the insertion of his penis into the victim's mouth. See *People v. Miller*, 238 Ill. 2d 161, 165 (2010) (one physical act cannot be the basis for multiple convictions). Accordingly, one of defendant's predatory criminal sexual assault of a child convictions and both of his criminal sexual assault convictions were violations of the one-act, one-crime rule (*People v. King*, 66 Ill. 2d 551, 566 (1977)), and must be vacated.

¶ 38 Defendant next contends that the trial court failed to adequately consider certain mitigating factors, including his difficult childhood, lack of a criminal record, and potential for rehabilitation at sentencing. He argues before this court, as he did before the trial court, that the appropriate sentence in this case is the statutory minimum of six years.

¶ 39 A trial court has broad discretion to determine the appropriate sentence for a particular defendant and its determination will not be disturbed absent an abuse of that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including, but not limited to, a defendant's age, habits, credibility, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010). It is presumed that the trial court properly considered all mitigating factors before it; it is the defendant's burden to affirmatively show the opposite. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010).

¶ 40 Here, as defendant was convicted of predatory criminal sexual assault of a child he was subject to a prison term of between 6 and 60 years. 720 ILCS 5/12–14.1(b)(1) (West 2008).

¶ 41 At sentencing, the trial court stated that defendant's lack of criminal record and the absence of violence in the commission of the offense were mitigating factors. In denying defendant's motion to reduce sentence, the court again stated that it had considered all factors in mitigation. Defendant points to nothing in the record to indicate that the trial court did not actually consider his childhood and lack of a criminal background when imposing a sentence that was only one year above the statutory minimum. See *Brazziel*, 406 Ill. App. 3d at 434. Thus,

his claim must fail.

¶ 42 Defendant finally contends that the trial court erred when it did not specify the length of the term of MSR defendant must serve upon his release from prison.

¶ 43 In *People v. Rinehart*, 2012 IL 111719, our supreme court considered the issue of whether section 5-8-1(d)(4) of the Unified Code of Corrections (the Code) (730 ILCS 5/5-8-1(d)(4) (West 2006)) requires the trial court to set a determinate MSR term within a statutory range. The court ultimately determined that section 5-8-1(d)(4) of the Code "contemplate[d] indeterminate MSR terms, not determinate terms." *Rinehart*, 2012 IL 111719, ¶ 30; see also 730 ILCS 5/5-8-1(d)(4) (West 2008) (providing that the MSR term for certain sex offenses, including predatory criminal sexual assault of a child, "shall range from a minimum of 3 years to a maximum of the natural life of the defendant"). Thus, defendant is properly subject to an indeterminate term of MSR.

¶ 44 Accordingly, this court affirms defendant's conviction for predatory criminal sexual assault of a child (Count 1), while vacating his conviction for predatory criminal sexual assault of a child (Count 2) and his convictions for criminal sexual assault (Counts 3 and 4).

¶ 45 Affirmed in part; vacated in part.