

Third Division  
September 12, 2012

No. 1-10-3471

**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(3)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	09 CR 14072
	)	
JOHNNY PAGAN,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE NEVILLE delivered the judgment of the court.  
Presiding Justice Salone and Justice Murphy concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The appellate court will not reverse a conviction because of minor inconsistencies between a complainant's testimony and the testimony of other witnesses for the prosecution. The trier of fact's lenity in choosing not to convict the defendant on some counts of a multi-count indictment does not prove that the trier of fact found the complainant incredible, when the trier of fact found the defendant guilty on other counts. The defendant here did not show ineffective assistance of counsel because the defendant did not establish a reasonable probability that any different acts and arguments by his attorney would have produced a better result.
- ¶ 2 Following a bench trial, the trial court found the defendant, Johnny Pagan, guilty on three

counts of the aggravated criminal sexual abuse of X.A. On appeal, Johnny argues that his counsel provided ineffective assistance, and the evidence cannot sustain the convictions because X.A. lacked credibility. We find that the record does not permit this court to disturb the trial court's assessment of X.A.'s credibility, and Johnny has not shown that any of his counsel's errors had prejudicial effect. However, we find that the State presented insufficient evidence to support one of the convictions. Accordingly, we affirm the judgment on two counts of aggravated criminal sexual abuse, and we vacate the third conviction.

¶ 3

### BACKGROUND

¶ 4

On July 23, 2008, X.A. told her mother, Carmen Pagan, that Carmen's brother, Johnny, had raped her. Carmen's aunt, Elba Lugo, came over to Carmen's home with Johnny. After a private discussion with X.A., Carmen asked Johnny if he had molested X.A. Eventually, Johnny said that he had.

¶ 5

Police arrested Johnny a year later, in July 2009. A grand jury returned an indictment with 26 counts against Johnny. In the first four counts, the State charged Johnny with predatory sexual assault, listing four separate kinds of acts of penetration Johnny allegedly performed on X.A. when she was not yet 13 years old and Johnny was over 17, with the acts occurring repeatedly over the course of two years, from 2006 until July 23, 2008. In the next six counts, the State alleged acts of sexual penetration amounting to criminal sexual assault, again occurring over the same period of time. In counts 11, 12 and 13, the State charged Johnny with aggravated criminal sexual abuse in that he touched his penis to X.A.'s buttocks (count 11), he touched her breast with his hand (count 12), and he touched her buttocks with

his hand (count 13), repeatedly over the course of the two year period. The State largely repeated the charges of counts 11, 12 and 13 as criminal sexual abuse, and added further counts alleging that Johnny used force to achieve the crimes charged in earlier counts.

¶ 6 At a bond hearing, the court asked if any physical evidence supported the charges. Johnny's attorney told the court that X.A. said the last assault took place on July 23, 2008, the day she told her mother about the misconduct, and Carmen took X.A. to the hospital that day. Johnny's attorney said, without objection:

"What we received today are the examinations of the rape kit and there is no semen or saliva present.

\*\*\* No showering, no changing of clothes, no biological material was collected from the girl. An in depth physical analysis showed no tearing, no abrasions. Her virginity was intact. No bruising. Nothing."

The court set bond.

¶ 7 At trial, Dr. Marjorie Fujara testified that she examined X.A. on August 5, 2008, about two weeks after X.A. accused Johnny of rape. X.A. told Dr. Fujara that Johnny "tried to touch her everywhere." When Dr. Fujara asked her for specifics, X.A. pointed to her waist and her crotch. X.A. said it happened many times. X.A. had a normal exam that showed no evidence of sexual trauma. Dr. Fujara explained that a normal exam could occur after some penetration because the hymen of a girl X.A.'s age "can be stretched or distended without \*\*\* injury." Dr. Fujara added that if Johnny placed his penis between X.A.'s labia, "her

perception is that somebody put something inside their private, but there's no injury caused."

¶ 8 X.A. testified that from 2006 through 2008, her family, which included her two brothers, I.A. and A.A., and her mother, moved twice. She referred to the first home as the home on Albany. Johnny sometimes slept over at each address, using the futon in the living room. According to X.A., Johnny lived with X.A.'s family at Albany for about four months.

¶ 9 In February 2006, when X.A. was 10, she woke up one morning and found Johnny on the bed next to her. He touched her pajamas over her breasts and vagina. On several later occasions, Johnny put his hands on X.A. under her clothes. X.A. testified, "He would touch my breasts, my hands, my feet, my legs, and my vagina." He touched her in those places "[t]oo many times to count." Sometimes Johnny's penis touched X.A. on her vagina and her buttocks. X.A. said Johnny sometimes put his penis about an inch inside her vagina. He tried to put it in her mouth and her butt, but she prevented it. When he touched X.A. with one hand, "he would be jacking off with the other." Once in a while, part of Johnny's finger entered X.A.'s vagina. She did not tell anyone about the touching because she feared Johnny would hurt her, and she thought "everybody would judge" her. X.A. added that in 2007, Johnny also said that if X.A. told anyone about the touchings, Johnny would "die by getting electrified."

¶ 10 According to X.A., Johnny mostly touched X.A. at night in her bedroom with the door open, though some incidents occurred during the day, while Johnny babysat X.A. She admitted that the misconduct did not affect her relationship with Johnny, and she still hugged him and sat on his lap at times. She explained, "if I would have acted distant, they would have thought something."

- ¶ 11 Johnny's attorney asked X.A., on cross-examination, "Who did you tell that your uncle tried to put his penis in your mouth?" X.A. answered, "My mom." She said she first told Carmen, her mother, in July 2008, the day after the last time Johnny molested her. She admitted that Johnny often took her to school, but he rarely molested her in the morning before school. On one occasion, her brothers were in the apartment in the morning at the time of an assault. Other times Johnny touched her after her brothers left for school.
- ¶ 12 X.A. testified that when he touched her, she saw Johnny with only a shirt on. She noticed that he had a deep scar in his groin area. She did not notice any other scar or anything unusual about the appearance of his penis. She never met or heard about Johnny's girlfriend.
- ¶ 13 Carmen testified that Johnny lived with her family at Albany "on and off," but he did "not really" live with Carmen's family on Albany for any long stretch of time. He stayed overnight once in a while at the other homes. Carmen did not notice anything amiss about X.A.'s interactions with Johnny before the accusation. On July 23, 2008, when she spoke to X.A. privately, Carmen first asked X.A. whether she knew what "rape" meant. X.A. told her Johnny had pulled his pants down, gotten on top of her and put his penis in her vagina. X.A. told Carmen that Johnny started doing this when they lived on Albany.
- ¶ 14 On cross-examination, Carmen testified that X.A. did not describe any other kind of sexual contact with Johnny. X.A. did not tell Carmen that Johnny tried to put his penis in X.A.'s butt or mouth. On July 22, 2008, the day before the accusation, Johnny came to Carmen's home and brought food for X.A. Johnny's girlfriend did not come into the home, but Carmen knew the girlfriend waited for Johnny outside.

¶ 15 Johnny testified that on July 22, 2008, his girlfriend came to Carmen's home with him, and he introduced the girlfriend to Carmen, X.A., and the rest of the family. X.A. asked Johnny not to leave, but he said he had an appointment. Johnny has a scar on his abdomen, a scar on his groin, and prominent foreskin on his uncircumcised penis. Johnny testified that the incidents X.A. described did not occur. He never touched X.A. inappropriately.

¶ 16 All of the persons who saw the confrontation between Carmen and Johnny on July 23, 2008, described the scene to the court. Carmen testified that when she asked Johnny whether he molested X.A., he said nothing. But when Lugo asked, Johnny lowered his head and said, "yes." A.A. said that when Carmen asked whether Johnny molested X.A., Johnny just nodded his head. He never said a word, even when Lugo questioned him. Johnny said that when Carmen first asked the question, he denied any misconduct. He continued denying the accusation as Lugo and Carmen badgered him for 20 minutes. Finally, out of anger, he said, "oh, yeah, I did it." He said it, although it was not true, to get back at his sister for treating him like a child molester.

¶ 17 Lugo testified that when Carmen asked Johnny whether he molested X.A., at first Johnny said no. When she asked again, Johnny stood silent, and when Lugo rephrased the question, Johnny admitted his misconduct and hung his head. Lugo said that she never learned the details about the molestation.

¶ 18 When Johnny's attorney finished cross-examining Lugo, the judge asked the parties if he could question Lugo further. Neither party objected. The judge asked Lugo whether she ever talked to Johnny about the molestation charge after the July 2008 confrontation. Lugo said

that twice she asked Johnny why he would do something like that, and both times he said he did not know. Johnny testified that both times Lugo asked him why he would do something like that, and he said he would never do anything like that.

¶ 19 In closing argument, Johnny's attorney said that the court should not believe X.A. because her testimony contradicted the testimony of Carmen and A.A. in several particulars. Counsel focused mainly on inconsistencies about who babysat X.A. at home after school at each home, and how long Johnny stayed with the family. He argued that X.A. had not actually seen Johnny naked, because she did not mention his abdominal scar, and she did not notice the singular appearance of his uncircumcised penis.

¶ 20 The court found X.A.'s testimony compelling and corroborated by Johnny's confession to his family on July 23, 2008. The court especially noted the absence of any medical findings of trauma. Accordingly, for counts 1 through 10 of the indictment, which all included allegations of penetration, the court found Johnny not guilty. The court also acquitted Johnny on the counts in which the State alleged Johnny used force to get X.A. to submit to his touch. The court found Johnny guilty on three counts: count 11, for touching X.A.'s buttocks with his penis, count 12, for touching X.A.'s breast with his hand, and count 13, for touching X.A.'s buttocks with his hands. The court found Johnny guilty on several remaining lesser counts, but found that the convictions merged into the three primary convictions.

¶ 21 In a terse motion for a new trial, Johnny's attorney argued that because the court found X.A.'s testimony insufficient to sustain the convictions on most counts, her testimony could not sufficiently support the three convictions. The court denied the motion for a new trial.

Because of Johnny's prior felonies, the Unified Code of Corrections required a minimum sentence of six years for each count. See 730 ILCS 5/5-5-3(c)(8), 5/5-8-1(a)(3) (West 2008).

The court sentenced Johnny to three concurrent terms of six years in prison.

¶ 22

## ANALYSIS

¶ 23

### Sufficiency of the Evidence

¶ 24

Johnny argues on appeal that the evidence cannot sustain the conviction on any count. When we review the sufficiency of the evidence, we must decide “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.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), quoted in *People v. Davison*, 233 Ill. 2d 30, 43 (2009).

¶ 25

Like his attorney at trial, Johnny relies on a number of discrepancies between X.A.'s testimony and the testimony of other witnesses. X.A. said she told Carmen Johnny tried to put his penis in her mouth, but Carmen testified that X.A. did not tell her that. X.A. said Johnny never mentioned a girlfriend, but Johnny testified that he introduced his girlfriend to his family, including X.A., the night before she accused him of molestation. Carmen testified that Johnny brought his girlfriend over that night, but the girlfriend did not come into the home. X.A. said Johnny sometimes babysat for her after school in the Kimball home, but A.A. said Johnny never babysat after school.

¶ 26

Johnny also points out that X.A.'s testimony in court included far more detail than her

statements to Carmen. X.A. told the court that Johnny assaulted her too many times to count, but she did not tell her mother anything about the frequency of the assaults. X.A. told the court Johnny touched her under her clothes, but she did not tell her mother that. X.A. told the court Johnny tried to put his penis in her butt, but she never told her mother that.

¶ 27 Johnny claims that the court could not lend any credence to X.A.'s testimony because the testimony conflicted with human experience. X.A. said Johnny molested her mostly in her bedroom at night, with the bedroom door open, when Carmen and X.A.'s brothers could walk past at any time. Johnny rarely molested her in the morning, even though he often had his best opportunity to molest her then, when only he and X.A. were at home. Johnny argues that in the homes where X.A. lived with her family, someone would have seen Johnny molesting X.A. if it had happened as frequently as X.A. said it did. X.A. continued to show affection for Johnny, and no one noticed any change in her behavior toward Johnny.

¶ 28 We apply the following rules when reviewing credibility claims:

"Courts of review have a special duty of carefully examining the evidence in rape cases. [Citation.] But in doing so the court may not encroach upon the function of the trier of fact to weigh credibility and otherwise assess the evidence which was presented. [Citation.] That evidence has been conflicting will not justify a reversal of a finding by the trier of fact. [Citation.] A court of review will not set aside a finding of guilty unless the evidence is so palpably contrary

to the finding or so unreasonable, improbable or unsatisfactory as to cause reasonable doubt as to the guilt of the accused." *People v. Reese*, 54 Ill. 2d 51, 57-58 (1973).

Moreover, "[m]inor discrepancies in a child's testimony do not necessarily render the testimony incompetent, unbelievable, or impeached. [Citation.] In reviewing a claim by the defendant that a sexual assault victim's testimony is implausible, a reviewing court must remember that the trier of fact believed the witness and that the factfinder's finding of guilt will not lightly be disturbed." *People v. Miller*, 222 Ill. App. 3d 1081, 1086 (1991).

¶ 29 We find only minor discrepancies between X.A.'s testimony and the testimony of other witnesses, and we see nothing implausible about X.A.'s testimony. On this record, we will not disturb the trial court's credibility assessments. See *Reese*, 54 Ill. 2d 51; *Miller*, 222 Ill. App. 3d at 1088-89.

¶ 30 Johnny also argues that the testimony cannot support the convictions because the trial court actually found X.A. not credible. The trial court acquitted Johnny on all counts in which the State alleged penetration, even though X.A. testified that Johnny penetrated her vagina with his finger and his penis, and even though Carmen testified that X.A. told her only about the penetration and not about the other acts of sexual abuse. In effect, Johnny argues that the convictions conflict with the acquittals on the charges involving penetration and force.

¶ 31 In *People v. Buford*, 110 Ill. App. 3d 46 (1982), prosecutors charged the defendant with both forced oral intercourse and forced vaginal intercourse. The defendant and the complainant

both testified to both oral and vaginal intercourse, with the defendant claiming that the complainant accepted payment for sex with him on many occasions, including on the morning when the complainant accused him of rape. The complainant testified that she never saw the defendant before the morning when he grabbed her at gunpoint and forced her to have both oral and vaginal intercourse with him. A medical examination on the morning of the complaint confirmed that the complainant had semen in both her throat and her vagina. The trier of fact found the defendant guilty of forced vaginal intercourse but acquitted him on the charge of forced oral intercourse.

¶ 32 On appeal, the defendant argued that the acquittal proved that the trier of fact did not believe the complainant's testimony. The *Buford* court said:

"verdicts are so logically inconsistent as to contribute to a finding that the prosecution has not met its burden of proof when they cannot be construed as anything but an acceptance and a rejection of the same theory of the case. [Citation.] In the instant case, the offenses with which defendant was charged have dissimilar elements, and the verdicts can be construed as a finding by the jury that the state has proven that defendant forced the complainant to have vaginal intercourse at gunpoint, but that the state failed to prove that \*\*\* oral sex occurred. We also note that the verdict may have reflected the jury's belief that the convictions for rape and armed violence would

provide sufficient punishment to the defendant, and that “[t]he jury’s historic power of lenity must prevail... over the traditional doctrine concerning legally and logically inconsistent verdicts.” [Citation.] We hold that the verdicts in the instant case are not so logically inconsistent as to create an inference that there was a reasonable doubt as to defendant’s guilt.” *Buford*, 110 Ill. App. 3d at 55-56 (quoting *People v. Murray*, 34 Ill. App. 3d 521, 536 (1975)).

¶ 33 Here, too, the acquittal on the charges of penetration shows that the court exercised lenity, not that it disbelieved X.A. Johnny’s confession to molestation provides important corroboration for X.A.’s testimony. We find the evidence sufficient to sustain the convictions on counts 11 and 12 for Johnny touching his penis to X.A.’s buttocks and his hand to her breast.

¶ 34 We agree, however, with Johnny’s argument that the evidence does not support the conviction for touching her buttocks with his hand. X.A. testified that Johnny’s hands touched her “all over,” but then she specified that he touched her breasts, hands, feet, legs, and vagina. X.A.’s doctor testified that X.A. said Johnny touched her “everywhere,” but she pointed to only her waist and her crotch as the parts Johnny touched. Johnny confessed that he molested X.A., but he never said that his hand touched her buttocks. Accordingly, we vacate the conviction and sentence on count 13. See *People v. Coulson*, 13 Ill. Wd 290, 296 (1958).

¶ 35

### Ineffective Assistance of Counsel

¶ 36 Next, Johnny argues that his attorney deprived him of his constitutional right to effective assistance of counsel. To establish that ineffective assistance of counsel provides grounds for a new trial, Johnny must overcome the "strong presumption that counsel's performance falls within the wide range of reasonable professional assistance," (*People v. Enis*, 194 Ill. 2d 361, 377 (2000)), to show that "counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Enis*, 194 Ill. 2d at 376. Johnny claims that four separate objectively unreasonable acts led to the convictions: (1) counsel did not introduce into evidence the rape kit; (2) counsel did not object to the questions the court asked Lugo; (3) counsel's closing argument did not highlight all of the discrepancies between X.A.'s testimony and the testimony of other witnesses; and (4) counsel presented an inadequate motion for a new trial.

¶ 37

### Rape Kit

¶ 38 At the bond hearing, Johnny's attorney told the court, without objection, that the rape kit taken on the day X.A. accused Johnny of rape showed that X.A. had a normal examination, with no evidence of a stretched hymen or other sexual trauma. At trial, the doctor who examined X.A. two weeks later said the examination showed no evidence of sexual trauma or penetration, but the doctor added that X.A.'s elastic hymen may have recovered in the weeks before the examination. Thus, the rape kit would have supported the inference that

Johnny did not penetrate X.A. on the day of the accusation.

¶ 39 The court acquitted Johnny on all charges of penetration. Dr. Fujara testified that an assault victim with an intact hymen may feel as though the assailant has penetrated her even though his penis has only touched the folds of her labia. We find that the rape kit has little effect on the credibility of X.A.'s testimony about the charges on which the court found Johnny guilty. Johnny has not shown a reasonable likelihood that he would have obtained a better result if his attorney had introduced the rape kit into evidence. Accordingly, we find that the failure to introduce the kit does not prove ineffective assistance of counsel.

¶ 40 Judge's Questions to Lugo

¶ 41 When the parties finished questioning Lugo, the judge asked if they objected to the judge asking his own questions. They did not object. The court asked Lugo if she ever asked Johnny about the alleged misconduct after the day of the accusation. She said that later she twice asked Johnny why he had molested X.A. Both times he said he did not know. Lugo's testimony substantially corroborated Johnny's confession, and it undercut his trial testimony that he told Lugo and Carmen he did it only because they badgered him until he answered dishonestly in anger. Johnny now argues that his attorney acted incompetently when he failed to object to the questions the judge asked Lugo.

¶ 42 The trial judge has "the right to question witnesses in order to elicit the truth or to bring enlightenment on material issues which seem obscure." *People v. Palmer*, 27 Ill. 2d 311, 314

(1963). The judge has discretion to question the witness, and we will not disturb the trial judge's judgment based on questions the judge asked witnesses unless the judge abused his discretion. *People v. Falaster*, 173 Ill. 2d 220, 232 (1996). "In a bench trial, the danger of prejudice due to the trial judge's questions to a witness is lessened. [Citations.] To show prejudice in a bench trial, the defendant must show that 'the tenor of the court's questioning indicates the court has prejudged the outcome before hearing all of the evidence.'" *People v. Jackson*, 409 Ill. App. 3d 631, 647 (2011) (quoting *People v. Smith*, 299 Ill. App. 3d 1056, 1063, (1998)).

¶ 43 Here, the judge's questions do not indicate bias or hostility, and therefore we cannot say that the judge abused his discretion in questioning Lugo. If defense counsel had objected to the judge's questions, the judge probably would have overruled the objection. Trial counsel does not act incompetently when he chooses not to make a futile motion. See *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). Therefore, we find that Johnny has not shown that his attorney acted incompetently when he failed to object to the questions the judge asked Lugo.

¶ 44 Closing Argument

¶ 45 Defense counsel's closing argument focused on reasons the court should not believe X.A.'s testimony. Counsel pointed to some discrepancies in the testimony of the prosecution's witnesses, concerning such issues as how long Johnny lived with Carmen's family and how often he stayed overnight at each address. Counsel argued that X.A. should have noticed that Johnny had an uncircumcised penis, if she had actually seen the penis, and she should have

seen both of Johnny's scars, and not just the scar near his groin. However, counsel did not raise most of the issues with X.A.'s testimony discussed in the first section of this analysis, the issues that appellate counsel relied on as grounds for doubting X.A.'s testimony. As we found above that those issues do not substantially affect X.A.'s credibility, we cannot say that the failure to raise those issues in closing argument prejudiced Johnny. Johnny has not shown that defense counsel gave an objectively unreasonable closing argument that substantially prejudiced Johnny. This issue, too, does not provide grounds for reversal.

¶ 46 Motion for New Trial

¶ 47 Defense counsel presented a very brief motion for a new trial in which he preserved for review only the issue of whether the acquittal on most counts showed that X.A.'s testimony could not suffice to sustain the convictions. We agree with Johnny that defense counsel failed to find any issues that might warrant a new trial, but Johnny has not shown a reasonable probability that he would have achieved a better result if he had raised more or different issues in the motion for a new trial. Considering all of counsel's conduct cumulatively, we cannot say that Johnny has shown that he received ineffective assistance of counsel.

¶ 48 CONCLUSION

¶ 49 We reverse Johnny's conviction on the charge that his hand touched X.A.'s buttocks because X.A. never said that it did, and no other evidence shows that Johnny's hand touched X.A.'s buttock. The acquittal on 17 counts of the indictment does not provide grounds to reverse

1-10-3471

the convictions on counts 11 and 12, for touching X.A.'s buttocks with his penis and X.A.'s breast with his hand. The minor discrepancies in the testimonies of State witnesses, and alleged implausibilities in X.A.'s testimony, do not permit this court to reject the trial court's assessment of X.A.'s credibility. Johnny has not shown that he received ineffective assistance of counsel. Accordingly, we vacate the conviction the trial court entered on count 13 and the convictions on counts 22 and 23 which the court merged into count 13, and we affirm the judgment entered on the other counts.

¶ 50 Affirmed in part and vacated in part.