

2012 IL App (2d) 101204-U
No. 2-10-1204
Order filed April 2, 2012

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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. 07-CF-2750
)	
MICHAEL L. ROBINSON,)	Honorable
)	Timothy Q. Sheldon,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

ORDER

Held: (1) Any error in the trial court's admission of nonverbal hearsay was harmless: the evidence was cumulative of other evidence, and the evidence of defendant's guilt was strong; (2) defendant was entitled to full credit against his \$45 fines, to reflect the 127 days he spent in presentencing custody.

¶ 1 Following a bench trial, defendant, Michael L. Robinson, was convicted of heinous battery (720 ILCS 5/12-4.1(a) (West 2006)) and sentenced to seven years' imprisonment. He appeals, contending that (1) the trial court erred by admitting "nonverbal hearsay" that was part of a statement

the court had previously barred; and (2) he is entitled to credit against the various fines and fees the court imposed. We affirm as modified.

¶ 2 Before trial, the State sought to introduce an out-of-court statement that the victim, O.T., made to Department of Children and Family Services (DCFS) investigators Kathy Byrne and Dave Berg. See 725 ILCS 5/115-10 (West 2010). The trial court denied the motion, finding that the statement, made about one year after the incident, was too far removed in time to be reliable.

¶ 3 The evidence at trial showed that in 2006 defendant was living in Elgin with Delicia T., her son, O.T., and defendant's daughter, Shauna. On May 25, 2006, a Thursday, defendant dropped Delicia off at work. Defendant was to care for O.T. and Shauna during the day. When defendant picked up Delicia after work, O.T. had bandages wrapped around his hands. Delicia testified that defendant told her that he had to discipline O.T. with a belt and then told O.T. to put his hands under some water.

¶ 4 The following Saturday, they took O.T. to the home of Angela Reed, who was going to care for him while defendant and Delicia went out. Reed noticed that O.T. was limping and his hands were bandaged. He complained that his foot hurt. When she removed his shoe, a paper towel fell off and she saw that his foot was badly burned. She saw through a gap in the bandages on his hands that his knuckles were burned. When she tried to remove the bandages, he screamed. When she asked him what had happened, he told her, "Mike did it, water, water, hot, hot." She eventually called the paramedics. At the hospital, O.T. was diagnosed with scald burns on his hands and left foot. On cross-examination, Reed admitted that she had initially told Byrne that O.T. said, " 'water, hot, and Mike and Mommy *** Mommy and Mike, water, water, hot, hot.' "

¶ 5 O.T. testified that the burns happened when defendant turned on the hot water in the kitchen sink and held his hands under the water. On cross-examination, defense counsel asked him to demonstrate how the injury occurred and O.T. did so.

¶ 6 Byrne testified that she discussed the incident with defendant. He said that O.T. had been having behavior problems. On May 25, 2006, he struck O.T. with a belt because he refused to eat and refused to stand in a corner. Defendant said that, when he saw welts coming up, he put O.T.'s hands in water. The water was cool initially, and defendant left the room. When he returned, O.T.'s hands were still under the water, which was then very hot, and O.T.'s skin was "loose." When defendant attempted to dry O.T.'s hands with a towel, the skin peeled off.

¶ 7 The trial court permitted Byrne to testify, over defense objection, that, to demonstrate how his hands got burned, O.T. grabbed Berg's hand and placed it under running tap water.

¶ 8 The State's medical expert, Dr. Rich Kaplan, opined that these injuries were "consistent with child abuse." Deputy Jesus Gonzalez of the United States Marshal Service testified that on July 28, 2010, defendant was located in Chicago and taken into custody.

¶ 9 The trial court found defendant guilty, noting that O.T. was a very convincing witness. The court sentenced defendant to seven years' imprisonment. Defendant timely appeals.

¶ 10 Defendant first contends that the trial court erred by allowing Byrne to testify about O.T.'s demonstration of how he was injured. He contends that Byrne was not merely testifying about her personal observations. Rather, O.T.'s demonstration was in effect an answer to a question, a type of "nonverbal" hearsay. See *People v. Barger*, 251 Ill. App. 3d 448, 464 (1993). Defendant contends that the trial court's ruling was inconsistent with its earlier ruling that the circumstances of O.T.'s statement to Byrne did not render it sufficiently reliable. The State responds that the trial

court was free to effectively reconsider its ruling with regard to this particular testimony and that, in any event, any error was harmless.

¶ 11 Defendant appears to be correct that O.T.'s demonstration was "nonverbal hearsay." However, we need not decide whether the trial court properly permitted testimony about it, because any arguable error was harmless beyond a reasonable doubt.

¶ 12 Most importantly, O.T. testified on direct examination that defendant held his hands under hot water. On cross-examination, he demonstrated for defense counsel how defendant did so. Thus, Byrne's testimony about O.T.'s demonstration was merely cumulative of his trial testimony.

¶ 13 Further, the other evidence against defendant was strong. Delicia testified that defendant admitted holding O.T.'s hands under water. Reed testified that O.T. told her that "Mike did it, water, water, hot, hot." Defendant's preposterous story to Byrne that O.T. voluntarily left his hands in the scalding water, and defendant's subsequent flight, are evidence of his consciousness of guilt.

¶ 14 Defendant insists that the error was not harmless. He asserts that the evidence against him was "not overwhelming," essentially because O.T. and Delicia were not credible. Defendant's primary contention is that O.T.'s account "had previously been found unreliable on the basis that a year had lapsed between the event and O.T.'s statements," and his trial testimony occurred more than three years after that.

¶ 15 Defendant cites no authority for the startling assertion that, where a court excludes an out-of-court statement under section 115-10, the factfinder must disregard the declarant's *in-court* testimony as well. While under the circumstances here defendant's argument has some superficial appeal, he is comparing apples and oranges.

¶ 16 Section 115-10 provides a mechanism to admit certain out-of-court statements by a victim of physical or sexual abuse. It provides, *inter alia*, that such statements shall not be admitted unless the court finds “that the time, content, and circumstances of the statement provide sufficient safeguards of reliability.” 725 ILCS 5/115-10(b)(1) (West 2010). Thus, the focus is on the circumstances surrounding the making of the statement, not only on its substantive content.

¶ 17 Out-of-court statements are subjected to this type of scrutiny precisely because they are considered presumptively unreliable, primarily because they are not subject to cross-examination. See *People v. Holman*, 103 Ill. 2d 133, 148 (1984). No such restrictions apply to in-court testimony. A witness at trial is subject to cross-examination. The trier of fact can observe the witness as he or she testifies and draw its own conclusions about the witness’s credibility. Here, the trial court expressly found O.T. credible.

¶ 18 Defendant suggests that, in the four years between the incident and O.T.’s testimony at trial, numerous “people could have influenced O.T. in his account of what supposedly occurred.” This is pure speculation. The same could be said of any witness at any trial. Defendant points to no evidence that anyone actually did influence O.T.’s trial testimony, which was quite similar to what he told Reed just two days after the offense.

¶ 19 Notably, defendant does not argue that O.T. was not credible. He does not suggest that O.T. was substantially impeached, that he gave inconsistent accounts of what happened, or that he had a motive to falsely accuse defendant. In short, he suggests no reason that we should not defer to the trial court’s credibility finding. See *People v. Bradford*, 106 Ill. 2d 492, 502 (1985) (it is the factfinder’s function to assess witness credibility and to decide the weight to give their testimony).

¶ 20 Defendant suggests that Delicia's testimony was not credible because she was motivated to shift the blame for the incident by fear of having O.T. removed from her home. First, it is virtually undisputed that Delicia was at work when O.T. was injured and that defendant was caring for him at the time. Thus, she had no need to deflect the blame. Moreover, if she feared having O.T. removed from her home, it would have been exceedingly foolish to falsely blame defendant, with whom she was living when the incident occurred. DCFS would still have likely removed the child from that environment. Delicia's fear of losing O.T. might explain her initial failure to take him to the hospital and her lying to Reed about how he was injured, but it does not explain her testimony nearly four years later.

¶ 21 Defendant points out that Reed initially told Byrne that O.T. had said, "[W]ater, hot, and Mike and Mommy *** Mommy and Mike, water, water, hot, hot." As noted, all the evidence showed that Delicia was at work at the time of the incident. However, even if we accept the double hearsay as evidence that Delicia somehow participated in the offense, defendant does not explain how this absolves him of guilt.

¶ 22 Finally, defendant argues that the trial court may have been influenced by "other improperly admitted testimony" by Byrne. While testifying about her conversation with defendant, she noted that an allegation had been made about defendant's daughter who was living in Texas. She testified that, after a telephone number defendant gave her did not work, she gave Texas authorities "what information [she] had," and they "were going to look into it to check on the safety of that child."

¶ 23 Evidence of other bad acts by a defendant is generally inadmissible merely to prove the defendant's propensity to commit crimes. *People v. Grengler*, 247 Ill. App. 3d 1006, 1013 (1993). Here, however, Byrne's testimony was simply too vague to support an inference that defendant was

guilty of a crime involving his daughter in Texas. A reasonable interpretation of Byrne's testimony is that defendant merely gave Byrne an outdated phone number. There is no evidence that, after "check[ing] on the safety" of the daughter, the Texas authorities found anything amiss. In light of the significant evidence of defendant's guilt detailed above, a vague innuendo that there may have been some problem with defendant's daughter—who did not live with him—could not have influenced the trial court's decision.

¶ 24 Defendant's final argument is that he is entitled to credit toward his fines. A defendant who is assessed a fine is entitled to a \$5 credit for each day spent in custody prior to sentencing. 725 ILCS 5/110-14(a) (West 2010). A defendant does not forfeit his right to the credit even if he fails to request it in the trial court. *People v. Woodward*, 175 Ill. 2d 435, 448 (1997). Here, defendant was in custody for 127 days before sentencing. He was assessed fines totaling \$45. Thus, the credit is more than sufficient to satisfy these fines. The State agrees that defendant is entitled to the credit. Thus, we affirm defendant's conviction, but modify the judgment to reflect full credit toward these fines.

¶ 25 Affirmed as modified.