

2012 IL App (2d) 110117-U
No. 2-11-0117
Order filed July 16, 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 McHenry County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-495
)	
JOSHUA R. ORNBERG,)	Honorable
)	Joseph P. Condon,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: (1) The State proved defendant guilty beyond a reasonable doubt of aggravated criminal sexual abuse, as the trial court was entitled to credit the victim's testimony despite the weaknesses that defendant asserted; (2) defense counsel was not ineffective for not objecting to the admission of the victim's prior statements that the trial court had previously barred, as such admission was part of a reasonable strategy of reliance on inconsistencies between the prior statements and the victim's trial testimony.

¶ 1 Following a bench trial, defendant, Joshua R. Ornberg, was found guilty of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)) and sentenced to seven years' imprisonment. He appeals, contending that (1) he was not proved guilty beyond a reasonable doubt

and (2) his counsel was ineffective for stipulating to the admission of the victim's prior consistent statements. We affirm.

¶ 2 Defendant was charged with committing an offense against his stepdaughter, H.B. Before trial, the State moved to admit the victim's hearsay statements. See 725 ILCS 5/115-10 (West 2010). At a hearing on the motion, H.B.'s sister, H.M., testified that H.B. told her that "when Josh tucks her in, he puts her hand down his pants." H.B.'s mother, Cariann M., testified that she questioned H.B. about her allegation. H.B. told her that defendant "had touched her private and made her touch his private." In a statement to the Johnsburg police, H.B. wrote that defendant "put my hand in his pants" and that the incident occurred at "the old house." Johnsburg police officer Todd Collander interviewed H.B. at the Child Advocacy Center. The interviews were videotaped, and the tape was played for the court.

¶ 3 On the tape, H.B. first denied that defendant had ever touched her. She said that she liked defendant and had no problems with him tucking her in. After being informed that her sister had said that some touching occurred, H.B. agreed that it had. She said that it happened one or two years before, when defendant put his hand in her pants. She denied that defendant had ever asked her to touch him. Using dolls to demonstrate what happened, H.B. placed the hand of a male doll under the skirt of a female doll. The court denied the motion to admit the statements, finding that "[c]onsistent repetition is absent."

¶ 4 At trial, when H.B., now 10 years old, was asked if something had happened between her and defendant that she did not like, she responded, "Yes *** He touched my tinkler." She explained that her "tinkler" was used to go to the bathroom. Defendant touched it with his hand inside her pajamas and underwear. She could not remember in which house it happened, but it happened while she was

on her mother's bed. She denied that she ever saw defendant's penis or touched it, but stated that she would tuck her hand away when defendant tried to take her hand and move it toward the "part that he goes potty with." H.B. told her mother and older sister about the incident. She told her mother that defendant was snoring or breathing heavily when he touched her.

¶ 5 Cariann testified that in 2008 she lived with defendant and her three children in a home in the Dutch Creek subdivision in Johnsburg. They moved into the home in September 2007. Previously, they lived in another house in Johnsburg. On May 8, 2008, she repeated to defendant H.B.'s statement that he "had made her touch him in his private area." She asked him to pack some things and leave. Defendant had the demeanor of being "ashamed" or "guilty." Cariann delayed calling the police, afraid that she would get into trouble. Further, she wanted to "get the story straight" before doing anything. She testified that a similar situation had occurred with her older daughter, H.M.

¶ 6 On cross-examination, she said that H.B. told her that the incident occurred in the "old house," that defendant was sleeping at the time, and that his eyes were closed. Later that night, she asked H.B. about some of these inconsistencies in an effort to get to "the truth of the whole matter."

¶ 7 H.M. testified about an incident that occurred in 2002, when she was eight years old. At that time, defendant touched her crotch area under her clothes.

¶ 8 The State introduced the tape of Collander's interview with H.B. Despite the court's earlier ruling barring this evidence, defense counsel did not object and in fact stipulated to its admission.

¶ 9 Stating that the case came down to a credibility finding, the court found H.B.'s testimony credible. Accordingly, it found defendant guilty. Subsequently, the court sentenced defendant to seven years' imprisonment, and defendant timely appeals.

¶ 10 Defendant first contends that he was not proved guilty beyond a reasonable doubt, because H.B.'s testimony was not credible. Defendant makes three primary challenges to H.B.'s credibility: her description of the act itself was inconsistent, as she first said that defendant forced her to touch him and later said that defendant touched her; she never clearly stated when the alleged touching occurred; and her description of the ancillary facts concerning the incident was inconsistent.

¶ 11 When a defendant challenges on appeal the sufficiency of the evidence, our role is not to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, while viewing the record in the light most favorable to the State, we must determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *People v. Evans*, 209 Ill. 2d 194, 209 (2004). A conviction will not be set aside unless the evidence is so improbable, unreasonable, or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *Hall*, 194 Ill. 2d at 330. Moreover, it is primarily the role of the finder of fact to assess the credibility of witnesses, resolve conflicts in the testimony, and assign weight to the evidence. *People v. Bull*, 185 Ill. 2d 179, 204 (1998). We may not simply substitute our judgment for the factfinder's on such matters. *People v. Slinkard*, 362 Ill. App. 3d 855, 857 (2005). A conviction will not be reversed merely because the evidence is contradictory or because the defendant claims that a particular witness was not credible. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 12 Here, defendant contends that the victim's description of his conduct was inconsistent where she testified at trial that defendant touched her but told her mother and sister that defendant made her touch him. She also wrote in her statement that defendant “put my hand in his pants.” Defendant concedes that H.B.'s trial testimony was internally consistent, but contends that it was inconsistent with these earlier statements. However, it is axiomatic that the credible, positive

testimony of a single witness is sufficient to sustain a conviction. *People v. Swart*, 369 Ill. App. 3d 614, 634 (2006). Moreover, although a witness may be impeached by a prior inconsistent statement (*People v. Wilson*, 2012 IL App (1st) 101038, ¶ 38), assessing witness credibility remains primarily the responsibility of the trier of fact (*People v. Ortiz*, 196 Ill. 2d 236, 259 (2001)). Here, the trial court was aware of the victim's earlier, inconsistent statements, but expressly found her credible. Such a finding was reasonable.

¶ 13 We note that H.B.'s testimony was not necessarily inconsistent with her earlier statements. It is not clear, for example, whether she was inconsistently describing the same incident or was referring to a separate (uncharged) incident. Although H.B. testified at trial that she had never seen defendant's penis and had never touched it, it was obviously possible for defendant to have placed her hand inside his pants without her seeing his penis. It was also possible that she did not touch it or at least did not realize that she had done so. In any event, even if we concluded that H.B.'s prior statements were irreconcilably inconsistent with her trial testimony, a prior inconsistent statement does not automatically destroy a witness's credibility and the factfinder remains free to accept the witness's in-court testimony. *Id.*

¶ 14 Defendant further contends that H.B. was inconsistent about when the incident occurred. H.B. first testified that she did not remember when the incident occurred or in which of the two houses it happened. She later acknowledged that she had told her mother that it took place in the "old house," where they had lived before. When she spoke with her mother about the incident, they had been out of that house for more than a year. In her interview with Collander, she said that the incident happened one to two years before.

¶ 15 We fail to see the inconsistency. A present inability to remember is not inconsistent with a previous or subsequent recall of the event. See *Grabner v. American Airlines*, 81 Ill. App. 3d 894, 899 (1980) (“inability to remember a fact prior to trial is not inconsistent with later recall at trial”). It is certainly not inconceivable that, under the stress of testifying in a courtroom, the young victim might have forgotten a fact that she had previously remembered, at least vaguely. Moreover, her previous statements were relatively consistent that the incident occurred at the old house more than a year before she first reported the incident.

¶ 16 Although defendant complains that “nothing in the record *** suggests why H.B. would wait over a year to make these kinds of allegations,” it is not at all unusual for a young victim of sexual abuse to be reluctant to come forward. See *People v. Kerns*, 229 Ill. App. 3d 938, 942 (1992). It appears that H.B. spoke up after being prompted by her sister, which explains the timing of her disclosure.

¶ 17 In any event, the exact date of the offense was not an element of the crime charged, and thus proof of an exact date was not necessary. *People v. Miller*, 222 Ill. App. 3d 1081, 1086 (1991). Additionally, a witness’s inability to remember the exact date of an offense merely affects the weight to be given her testimony and does not create a reasonable doubt of the defendant’s guilt. *Id.* at 1086-87.

¶ 18 Defendant further contends that H.B.’s description of “ancillary facts” surrounding the incident was inconsistent. She testified at trial that the act occurred in the bed that defendant shared with Cariann. However, she had previously stated that the act occurred when defendant was tucking her into her own bed.

¶ 19 As defendant implicitly concedes, these matters are ancillary to the central question of his guilt or innocence. Such minor inconsistencies do not, of themselves, create a reasonable doubt of a defendant's guilt. *People v. Brisbon*, 106 Ill. 2d 342, 360 (1985). Thus, the trial court was not required to reject H.B.'s testimony merely because she could not consistently recall or describe certain ancillary details surrounding the incident.

¶ 20 Defendant's second primary contention is that he was denied the effective assistance of counsel when his attorney stipulated to the admission of H.B.'s prior statements, which the court had previously barred under section 115-10. A claim of ineffective assistance of counsel requires a defendant to establish that (1) his attorney's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). We indulge a strong presumption that counsel's conduct was the result of strategic choices rather than incompetence. *People v. Evans*, 186 Ill. 2d 83, 93 (1999).

¶ 21 Defendant concedes that whether to object to or seek to admit particular items of evidence is generally a strategic decision and acknowledges that counsel's decision was "likely made as part of some sort of trial strategy." However, he insists that counsel's strategy in acquiescing in the admission of the previously barred statements was so unsound that it fell below an objective standard of reasonableness.

¶ 22 Defendant's dismissive reference to "some sort of trial strategy" is particularly disingenuous given that virtually his entire reasonable-doubt argument is based on comparing H.B.'s trial testimony to her previous statements. As noted, defendant concedes that H.B.'s trial testimony was relatively clear and consistent. Given this, it was not unreasonable for counsel to conclude that his

only reasonable chance of obtaining an acquittal was to allow admission of H.B.'s prior statements and focus on the inconsistencies.

¶ 23 Defendant primarily objects to H.B.'s taped interview with Collander. Positing that the evidence against him was “extraordinarily weak” (in large part because H.B.'s trial testimony was inconsistent in many respects with her earlier out-of-court statements), defendant contends that the Collander interview was “the sole prior statement of H.B.'s that was in any way consistent with her trial testimony.”

¶ 24 Although defendant highlights (in this part of his argument) some aspects of the statement that were consistent with H.B.'s trial testimony, the State points to other aspects of the statement that were inconsistent. For example, in the interview, H.B. initially denied that anything improper occurred. She said that she liked defendant and had “no problem” with him tucking her in at night. Thus, counsel could reasonably have concluded that the inconsistencies between H.B.'s recorded statement and her trial testimony outweighed the consistencies. In any event, the decision to allow admission of the statement was clearly part of a larger trial strategy to focus on H.B.'s various inconsistent accounts of the incident and argue that they destroyed her overall credibility (much as appellate counsel did in the reasonable-doubt portion of his argument). In reviewing ineffective-assistance claims, we consider counsel's conduct as a whole rather than viewing particular decisions in isolation. *People v. Flores*, 128 Ill. 2d 66, 107 (1989). As noted, counsel's overall strategy of focusing on H.B.'s prior inconsistent statements was reasonable if ultimately unsuccessful.

¶ 25 Clearly, allowing the Collander interview to be admitted was part of a reasonable trial strategy that allowed counsel to argue—much as defendant does on appeal—that H.B.'s accounts of the incident varied widely and that she had never settled on a single version of the incident. That

defendant can now find certain aspects of those earlier statements that were consistent with her trial testimony does not make counsel's strategy unsound.

¶ 26 Moreover, it is not clear that counsel could have pursued such a strategy while objecting to the admission of the Collander interview, which was H.B.'s most complete account of the incident prior to her trial testimony. In practical terms, the court had heard the interview during the section 115-10 hearing and, while a trial court is presumed to consider only properly admitted evidence, the court might reasonably have questioned a defense case based on pointing out inconsistencies with H.B.'s earlier statements to family members but ignoring the detailed interview.

¶ 27 The judgment of the circuit court of McHenry County is affirmed.

¶ 28 Affirmed.