2012 IL App (3d) 110048-U

Order filed February 15, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court) of the 14th Judicial Circuit,) Whiteside County, Illinois,
Plaintiff-Appellee,	)
	) Appeal No. 3-11-0048
v.	) Circuit No. 08-CF-440
	)
LUISA C. MORELL-ENGELKES,	) Honorable) John L. Hauptman,
Defendant-Appellant.	) Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Wright and Carter concurred in the judgment.

ORDER

¶ 1 *Held:* The evidence was sufficient to establish defendant's guilt beyond a reasonable doubt. The trial court did not err in barring a defense expert's testimony or in failing to admit defendant's cellular telephone records.

¶ 2 On October 15, 2008, the State issued a complaint charging defendant, Luisa C. Morell-Engelkes, with one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)). Defendant was found guilty of the charge following a bench trial. Defendant appeals her conviction, arguing that: (1) the evidence did not establish that defendant was guilty beyond a

reasonable doubt; (2) the trial court erred in barring a defense expert's testimony; and (3) the trial court erred in failing to admit defendant's cellular telephone records into evidence. We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant with one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)). Defendant waived her right to a jury trial, and the cause proceeded to a bench trial.

¶ 5 At trial, Sergeant Michael Bauer of the Whiteside County sheriff's department testified that the victim showed him his cellular telephone, which contained several saved text messages from defendant's cellular telephone number. The messages, sent after the alleged abuse occurred, included the following language: "can [I] see [you] and talk [I] promise to keep my hands to myself text me"; "I did not plan to lose my phone it just happened [I] did not want to go alone so [I] used that excuse to spend time with [you]"; "[I'm] really attracted to [you] but [I] tried to ignore it and [I] couldn[']t"; "im sorry if [I] upset [you] that[']s not my intention"; and "It means you are delicious baby."

¶ 6 The victim's brother also testified for the State. He stated that defendant was an aide at his school. After a soccer game on October 7, 2008, his mother told him he had to go back to the park with his brother to help look for defendant's cellular telephone. Defendant picked the brothers up at their house. The victim sat in the front passenger seat with his brother sitting directly behind him. On the way to the park, the victim's brother witnessed defendant whisper into the victim's ear and reach over and rub his leg. He could not make out what defendant was saying. When they reached the park, defendant had the victim call her cellular telephone. The phone was quickly recovered.

¶ 7 After they located the phone, defendant took the brothers to a Walmart store located in Sterling. Thereafter, the three went to an Applebee's restaurant for ice cream. It was defendant's idea to go to the restaurant. At the restaurant, defendant told the victim to sit next to her in the booth. The victim's brother believed that defendant and the victim were sitting closer together than normal. He also witnessed defendant whisper into the victim's ear. He did not see defendant place the victim's hand on her pants; however, he did state that defendant's hands were under the table. After they finished, defendant drove the brothers back to their house. Once they arrived, defendant called the victim back into her car. The victim's brother did not return to the car, but instead went into the house. He was unsure how long the victim was alone with defendant in her car.

¶ 8 The victim testified that he was born on January 6, 1992, and that he was 16 years old on October 7, 2008. On that date, defendant called the victim's sister and asked to speak with him. She asked him if he would go to the soccer field to help her look for her cellular telephone. His mother gave him permission to go but made sure that his brother accompanied him. On the way to the field, he sat in the front passenger seat. During the trip, defendant whispered in his ear, stating that if his brother was not there then the car would be pulled over. She also whispered that she was 41 years old, and asked "is 41 okay for you[?]" While she was whispering, defendant kept putting her hand on his lap.

¶ 9 When they reached the soccer field, defendant asked him to call her cellular telephone. The victim did, and the cellular telephone was quickly recovered. They then drove to Walmart. Again, defendant placed her hand on his lap. After Walmart, the three went to an Applebee's restaurant. Defendant had him sit on the same side of the booth as her, saying, "If you want to be

my man you have to sit next to me." He sat close to the edge, and defendant sat uncomfortably close to him. At some point, defendant grabbed his hand under the table and placed it over her clothing, but "right on her vagina." Almost immediately, he brought his hand back. Thereafter, defendant went to the restroom, and he told his brother that he did not like that defendant was hitting on him and that he wanted to go home.

¶ 10 On the way home, defendant touched the victim a little more, but did not whisper anything else. Upon their arrival at the victim's house, defendant called him back into the car, saying that she needed to speak to him. This time he was alone with defendant because his brother returned to the house. Once in the car, defendant rubbed his face and began to kiss him. He left the car without speaking. Following the incident, defendant began to text him. He identified the text messages previously introduced by the State as messages sent to him from defendant's cellular telephone number.

¶ 11 Following the State's evidence, defendant called three character witnesses, who testified that they were aware of defendant's reputation for morality and chastity in the community and that they were of the opinion that it was good or positive. Then defendant testified. She stated that she volunteered at the school that the victim attended. After a soccer game on October 7, 2008, defendant realized that she had lost her cellular telephone. She called a number of students to find out if any of them had picked up her cellular telephone from the soccer field. One of the students she called was the victim's sister, who volunteered the victim to help defendant find her phone. Defendant denied whispering to the victim or touching his leg in the car or at the restaurant. Further, she denied placing the victim's hand on her vaginal area.

¶ 12 On the ride back to the victim's house, defendant stated that she received a text from the

victim that said if his brother was not in the car he would have sex with her in the field right then. Defendant was threatened by the message. Upon arrival at the house, the victim got out of the car and then returned uninvited. Defendant informed him that she was going to tell the school principal the next day about the text message and that he should treat women with respect. Thereafter, defendant had a panic attack on her way back to her house and decided that she would teach the victim a lesson. To do so, she pretended to be a predator and sent him the text messages which were previously introduced by the State. The next day, defendant apologized to the victim for sending the messages.

¶ 13 During her testimony, defendant was asked to identify Defendant's exhibit 1A. She stated that the exhibit was a copy of the call records from her Sprint cellular telephone, and she identified her cellular telephone number and a bottom header that stated it was from the Sprint Nextel Corporation. The trial court determined that defendant's testimony did not lay a proper foundation for the admission of the exhibit, and thus it was not admitted into evidence.

¶ 14 Finally, the defense called Dr. Donna Ripley. She testified that she was a clinical psychologist who had been contacted by defendant following her arrest. The State objected to the relevance of Dr. Ripley's testimony. Defense counsel stated that her testimony was relevant to show whether defendant had any tendencies or could possibly have the characteristics of someone who would be abusive. The trial court barred Dr. Ripley's testimony, stating that defendant's mental condition was not relevant to the question of whether she committed the crime, especially since the defense was not attempting to argue lack of capacity or insanity.

¶ 15 In rebuttal, the State called the victim's sister. She testified that defendant had called her on October 7 and asked if the victim could help her find her cellular telephone because her son

was doing homework and could not go. She stated that she never offered the help of her brother.

¶ 16 The trial court ultimately found defendant guilty of aggravated criminal sexual abuse. Defendant appeals.

¶ 17 ANALYSIS

¶ 18 Defendant first argues that the evidence did not establish her guilt beyond a reasonable doubt. When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry defendant; rather, the relevant question is 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. *People v. Collins*, 106 Ill. 2d 237 (1985). A conviction will only be overturned where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Smith*, 185 Ill. 2d 532 (1999).

¶ 19 In this case, sufficient evidence was presented that would allow a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Pursuant to section 12-16(d) of the Criminal Code of 1961, a person commits aggravated criminal sexual abuse if she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was at least 5 years older than the victim. 720 ILCS 5/12-16(d) (West 2008). "Sexual conduct" is defined in part as "any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused[.]" 720 ILCS 5/12-12(e) (West 2008).

¶ 20 Evidence presented at trial established that the victim was 16 years old and defendant was 41 years old on October 7, 2008. Further, the State presented evidence, through the testimony of

the victim, that defendant placed the victim's hand directly on her vagina while they sat on the same side of a booth at a restaurant. The testimony of the victim's siblings and the text messages from defendant corroborated the victim's testimony. Therefore, we find that the evidence presented could establish the elements of aggravated criminal sexual abuse beyond a reasonable doubt.

¶ 21 Defendant next argues that the trial court erred in barring a defense expert's testimony. It is well established that an individual will be permitted to testify as an expert if her experience and qualifications afford her knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusions. *People v. Mertz,* 218 Ill. 2d 1 (2005). However, the admission of evidence is within the sound discretion of the trial court, and we will not reverse the trial court's decision absent an abuse of that discretion. *People v. Becker,* 239 Ill. 2d 215 (2010).

¶ 22 Here, defendant attempted to offer the testimony of a psychologist, Dr. Ripley. According to defense counsel, the testimony was relevant to show whether defendant had any tendencies or had the possibility of being abusive. It is important to note that defendant's only defense to the crime was actual innocence, not lack of capacity or insanity. Therefore, the testimony of Dr. Ripley would only be relevant to bolster defendant's credibility. In this case, the determination of whether defendant was credible was not beyond the knowledge of the common lay person. See *Becker,* 239 Ill. 2d 215. Therefore, we cannot say that the trial court abused its discretion when it barred Dr. Ripley's testimony.

¶ 23 Finally, defendant argues that the trial court erred in failing to admit defendant's cellular telephone records into evidence. In Illinois, business records are admissible as an exception to

the hearsay rule. See *Troyan v. Reyes*, 367 Ill. App. 3d 729 (2006). Pursuant to the foundation requirements in place at the time of defendant's trial,[1] a record may have been admitted under the business records exception if: (1) the record was made as a record of the event; (2) the record was made in the regular course of business; and (3) it was the regular course of the business to make such a record at the time of the event or within a reasonable time thereafter. *People v. Virgin*, 302 Ill. App. 3d 438 (1998). A custodian or any person familiar with the business and its mode of operation may provide testimony establishing the foundation requirements of a business record. *Reyes*, 367 Ill. App. 3d 729.

¶ 24 Here, the only testimony defendant offered to establish a foundation for her cellular telephone records was her own. Defendant stated that she had a Sprint cellular telephone and that the exhibit represented a call record from that phone. This evidence failed to establish the foundation for a business record under the business record exception to the hearsay rule. Therefore, we do not find that the trial court abused its discretion in denying admission of the cellular telephone records into evidence.

¶ 25 CONCLUSION

¶ 26 The judgment of the circuit court of Whiteside County is affirmed.

¶ 27 Affirmed.

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[1]Defendant's trial took place on September 16, 2010, prior to the enactment of the Illinois Rules of Evidence, which took effect on January 1, 2011, and do not apply retroactively. See *People v. Villa*, 2011 IL 110777.