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(e)(1).

2012 IL App (4th) 110050-U

Filed 4/5/12

NO. 4-11-0050

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ALAN HUGHEY,	)	No. 10CF1376
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in giving the jury a circumstantial-evidence instruction.

¶ 2 Defendant, Alan Hughey, was convicted of three counts of aggravated battery after a jury trial in October 2010. He was sentenced to concurrent five-year terms of imprisonment on each count. Defendant raises only one issue on appeal, *i.e.*, whether the trial court erred when it instructed the jury, over his objection, on circumstantial evidence. Defendant contends there was no circumstantial evidence in the case. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant, age 56, was charged by information on August 13, 2010, with three counts of aggravated battery. Although the name of the victim is redacted in each count, the jury instructions indicate defendant was charged with aggravated battery (720 ILCS 5/12-4(b)(8)

(West 2008)) to three separate male victims after he grabbed one of them by the swim trunks and attempted to pull the trunks down and touched the other two on the outside of their bathing suits near their buttocks at the Spalding pool, a public place of amusement, in Champaign, Illinois. The boys were ages 8, 9, and 10 at the time of the offense.

¶ 5 A two-day jury trial commenced on October 21, 2010. Margaret Stoddard (called Ms. Maggie by the campers), assistant director of Douglass Day Camp, testified about 100 youths age 8 to 11 attended the camp. Every other day, accompanied by 12 counselors, the children swam at Spalding pool. On August 12, 2010, while at the pool with about 75 of the campers, a camp leader approached Stoddard with the three boys and informed her there was a problem. The boys appeared somber and she could tell something was bothering them. Stoddard informed pool management and they called the police.

¶ 6 D.N., who prior to trial had turned nine years old, testified he was playing with his friends at the Spalding pool when an old white man with grey hair in his beard and red eyeballs, tugged on his swim trunks. The man was a stranger to him. He saw this same man touch his two friends on their bottoms. D.N. did not identify defendant at trial.

¶ 7 After the man touched D.N. and one of his friends a second time, they went to tell their camp counselors. The second time, the man put his hand inside the top of D.N.'s swim trunks and the tips of his fingers into the top of the back of his friend's swim trunks. D.N. told Ms. Maggie what happened and pointed out the man to the police after telling the police what happened.

¶ 8 Defense counsel did not cross-examine D.N.

¶ 9 K.B. testified he was nine years old, and during summer camp, had gone

swimming at Spalding pool. On August 12, 2010, he was playing with D.N. and another friend when a man "scooted up and just touched me." He identified defendant as that man and said defendant touched him "like a slap" on his bottom. Defendant was a stranger to him. K.B. also saw defendant touch D.N. K.B. said defendant touched his bottom a second time. Both D.N. and K.B. testified they felt uncomfortable and scared because the man was a stranger to them. After the police came, K.B. pointed out the man who touched him to the police.

¶ 10 T.B., age 10, testified next. T.B. testified he was friends with K.B. and D.N. and attended summer camp with them at Spalding pool. T.B. said he was playing a game with his friends when someone smacked him on his "butt." He identified the defendant. He said he saw defendant tug at D.N.'s swim trunks, saw defendant smack K.B. on the butt, and also stated defendant was a stranger to him. D.N. did not see defendant smack K.B. the second time, but heard a sound like a slap. The State rested.

¶ 11 Defendant called Coreyawn Donald as a witness. Donald had known defendant for about two years and chatted with him at the Spalding pool on August 12 between 1:30-2 p.m. When he left, defendant was still at the pool. Donald did not see defendant touch any boys while he was at the pool.

¶ 12 Defendant testified he arrived at Spalding pool about 1:30 p.m. on August 12. Of the three boys who testified, he only recognized the oldest one. He was not feeling well on August 12. Defendant denied touching any of the three boys. Following defendant's testimony, the defense rested.

¶ 13 At the jury instruction conference, the State offered a circumstantial-evidence instruction, IPI 3.02 (Illinois Pattern Jury Instructions, Criminal, No. 3.02 (4th ed. 2000)

(hereinafter, IPI Criminal 4th No. 3.02)). Defense counsel objected on the basis all of the evidence was direct evidence and to instruct the jury on circumstantial evidence would confuse the jury.

¶ 14 In ruling on defense counsel's objection, the court stated:

> "Defendant's admissions are direct evidence. The witnesses' testimony as to what occurred are direct evidence. His proximity and location during the time would be circumstantial evidence. [The instruction] will be given."

Defendant preserved this objection by raising it in a posttrial motion, which the court denied.

¶ 15 Following the return of the jury's verdicts of guilty on all counts and a sentencing hearing in November, the defendant was sentenced as stated above.

¶ 16 This timely appeal followed.

¶ 17 II. ANALYSIS

¶ 18 The only issue raised on appeal is the purported error made by the court in giving a circumstantial-evidence instruction. We review a trial court's decision to give a particular instruction under an abuse of discretion standard. *People v. Couch*, 387 Ill. App. 3d 437, 444, 899 N.E.2d 618, 624 (2008). Under this standard, the question is whether the trial court acted arbitrarily or whether, considering all the circumstances, the trial court acted unreasonably, ignoring recognized principles of law which resulted in substantial prejudice. *Couch*, 387 Ill. App. 3d at 444, 899 N.E.2d at 624.

¶ 19 The trial court, over defendant's objection, gave the jury an instruction on circumstantial evidence as follows:

> "Circumstantial evidence is the proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of the defendant. Circumstantial evidence should be considered by you together with all the other evidence in the case in arriving at your verdict." IPI Criminal 4th No. 3.02.

¶ 20 In overruling defendant's objection the trial court stated:

> "Defendant's admissions are direct evidence. The witnesses' testimony as to what occurred are direct evidence. His proximity and location during the time would be circumstantial evidence. So I will overrule the objection and it will be given."

We note we can affirm the trial court on any basis supported by the record. See *People v. Dinelli*, 217 Ill. 2d 387, 403, 841 N.E.2d 968, 978 (2005) (reviewing court can affirm on any basis appearing in the record, regardless of whether the trial court relied on that basis).

¶ 21 Defendant cites *People v. Gardner*, 4 Ill. 2d 232, 240-41, 122 N.E.2d 578, 582 (1954) for the proposition a jury instruction on circumstantial evidence should not be given if there is nothing but direct evidence in the case. Further, defendant contends the evidence was close and conflicting and the circumstantial-evidence instruction could have confused the jury, since all of the evidence was direct evidence. We disagree with defendant's analysis.

¶ 22 We reject the defendant's assertion the evidence was close in this case. The three young boys testified clearly, and apparently convincingly, about the events of August 12. The jury reached its verdicts of guilty 70 minutes after deliberations began and without submitting a

single question. There is no evidence the jury was confused by a circumstantial-evidence instruction.

¶ 23 Moreover, the court did not err in giving the instruction. Here, D.N. could not identify defendant in the courtroom. However, his out-of-court identification, testified to by officer Chambers, was circumstantial evidence the defendant sitting in the courtroom was the same person who tugged at D.N.'s swim trunks. Additionally, Stoddard testified the boys appeared uncharacteristically somber when reporting the incident to her, as if something was bothering them. Her testimony was circumstantial evidence something upsetting happened to the boys. Lastly, T.B. testified he did not see defendant smack K.B. a second time, but heard a slapping sound. This evidence circumstantially supported D.N. and K.B.'s testimony defendant smacked K.B. twice.

¶ 24 Because circumstantial evidence was before the jury, the trial court correctly instructed the jury on the law. Further, neither side mentioned circumstantial evidence in their closing, the evidence was not close, no evidence suggests the jury was confused, and the defendant cannot show he was prejudiced in any way by the giving of this instruction.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 27 Affirmed.