

No. 1-09-1740

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).

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.)	No. 04 CR 29878
)	
EDGAR WHERRY,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's jury waiver was voluntarily and knowingly made, where he signed jury waiver form and court told him that he was giving up his right to a jury trial and choosing to be tried by the court before he so chose. Defendant's waiver was not the result of ineffective assistance of counsel: he has failed to show that counsel is required to advise a defendant of the unanimity requirement for guilty verdicts, and his alleged prejudice from counsel's failure to do so is based on a fanciful and delusional allegation. There was sufficient evidence to convict defendant of two counts of predatory criminal sexual assault where the victim described time and nature of two assaults with sufficient specificity and defendant confessed to two other assaults against the victim within the period charged.

¶ 2 Following a 2008 bench trial, defendant Edgar Wherry was convicted of two counts of predatory criminal sexual assault and sentenced to two consecutive prison terms of nine years. On appeal, defendant contends that his jury waiver was the result of ineffective assistance of trial counsel and was not voluntarily and knowingly made. Defendant also contends there was insufficient evidence to convict him beyond a reasonable doubt.

¶ 3 Defendant was charged with predatory criminal sexual assault for two separate sexual acts against Aviona W. between January 26, 1999, and February 14, 2002, when he was at least 17 years old and she was under 13 years old.

¶ 4 Before trial, defense counsel told the court that defendant was tendering a jury waiver. The court told defendant that "your attorney has indicated that you wish to give up your right to trial by jury and have me hear this case." Defendant signed a jury waiver form, stating that he did "hereby waive jury trial and submit [this] cause to the Court for hearing," and he acknowledged to the court that he signed it. The court asked defendant if he knew what a jury trial is, and then if he wanted to "waive or give up [his] right to a trial by jury," and defendant answered both questions affirmatively. The court ascertained from defendant that his jury waiver did not result from threats or promises and that he "made that decision after speaking with [his] attorney of [his] own free will." The court accepted the jury waiver and proceeded to trial.

¶ 5 At trial, Aviona W. testified that she was 16 years old as of the 2008 trial, having been born in January 1992, and lived with her mother Marie and three younger siblings including brother Rayshon in an apartment on Artesian Avenue in Chicago. Defendant was Marie's boyfriend and then her husband and Aviona's stepfather. When Aviona was seven years old, defendant began to rape or molest her, which (she clarified upon objection) entailed keeping her home from school to "watch nasty movies" and then put his penis in her vagina. They would be alone in the home, and specifically in defendant's bedroom, when he did this.

¶ 6 The first time defendant assaulted her was about a month after her seventh birthday – thus near the end of February 1999 – on a morning when he was supposed to take her to school. She awoke at 7:30 a.m. and was supposed to be at school at 8 a.m., but defendant told her that she could stay home as she was already late for school, then told her that they would each watch a movie of their choosing in his bedroom. After watching Aviona's selection, defendant played a "nasty movie" of "people having sex." When Aviona told him that she did not want to watch it, he insisted that they watch it. After the movie, Aviona went to her bedroom, but defendant went there, wearing a bathrobe, and told her to take off her clothes for a bath. She demurred, but he insisted, so she complied. When she tried to cover herself, he pulled her close and then put his penis in her vagina. She was crying and telling him to stop, but he did not and instead told her to "shut up." Defendant told her that she was bleeding, and when she saw blood on the bedsheets, she went to take a bath.

¶ 7 Defendant next assaulted Aviona by putting his penis in her vagina on another morning about two or three weeks later, in her bedroom while they were home alone. Aviona admitted that she did not tell Marie what defendant was doing to her. On cross-examination, Aviona maintained that the assaults occurred while she and defendant lived in the Artesian apartment, denying that they occurred when she lived earlier on 59th Street in Chicago. She also denied that defendant did not reside in the Artesian apartment until July 1999 but could not recall when he moved in with Marie and herself.

¶ 8 Police detective Emily Bellomy testified that, in November 2004, she interviewed defendant at a police station after advising him of his *Miranda* rights. Detective Joseph Agosta¹ apprised Detective Bellomy of Aviona's allegations beforehand and was present for the interview but asked no questions. Detective Bellomy told defendant that Aviona had made allegations

¹Erroneously referred to in the trial transcript as Augusta.

against him without describing the allegations. Detective Bellomy denied that she promised defendant that he could go home, could be released on bond, or would receive only probation if he admitted to Aviona's allegations. She also denied that he asked to make a telephone call. After the interview, Detective Bellomy called an Assistant State's Attorney (ASA) to the police station, saw that defendant was fed, and attended the ASA's interview of defendant along with Detective Agosta. After the latter interview, defendant signed in Detective Bellomy's presence a written statement that the ASA prepared.

¶ 9 That statement was read into the record. In it, defendant stated that he married Marie in August 1999, moved into the Artesian apartment in September 1999, and lived there until February 2002. He admitted to sexual intercourse with Aviona on two different evenings or nights about a month apart in the summer of 2001. In describing the occurrences in detail, he asserted that she initiated contact on the first occasion and was receptive on the second.

¶ 10 Defendant testified that he lived in 1999 on 59th Street until he moved to the Artesian apartment in June 1999. In February 1999, he was not with Aviona on any morning from 7:30 a.m. onwards because he would have been on his way to work at a Jiffy Lube oil-change shop where he was the assistant manager and his duties included opening the store at 8 a.m. Only he and the manager, Jim Brooks, had the keys to open the shop. His work schedule in January through March of 1999 was "majority" weekdays 8 a.m. to 7 p.m., and he was never absent from work during that time nor did he leave the shop during work hours except to buy a meal at a neighboring restaurant. By the summer of 2001, defendant had married Aviona's mother, Marie, and by the time he arrived home the children would be asleep and only Marie would be awake. He worked until the 7 p.m. closing but would not get home until 11 p.m. or midnight as he would repair and service cars for friends after work hours and would socialize with co-workers.

Defendant denied having sexual relations with Aviona in February or March of 1999 or in the summer of 2001.

¶ 11 In November 2004, defendant was arrested. He was not informed of the charges against him until he was being interviewed by Detectives Bellomy and Agosta. Detective Agosta then described the allegations against defendant, which he denied. During questioning, Detective Bellomy told defendant that he would be released on bond and ultimately receive probation if he confessed. When defendant asked to make a telephone call, Detective Agosta told him that he would not be allowed to make a call until he gave a statement. Defendant was given food only after he agreed to give a statement for which the detectives "coached" him. Defendant admitted that, when he gave his statement to the ASA outside of the detectives' presence, he did not tell her of the promise that he would be released on bond.

¶ 12 Marie W., Aviona's mother, testified that she resided on 59th Street in January 1999 and in the Artesian apartment in February 1999. While defendant lived with her on 59th Street, he did not move with her into the Artesian apartment and was not residing there in late February of 1999. However, he would visit the Artesian apartment several times a week, including frequent overnight visits. Because both Marie and defendant worked in the daytime as of February 1999, his weekday visits would be in the evenings. By the summer of 2001, Marie had married defendant and he was residing in the Artesian apartment. During the summer of 2001, Marie attended school or a drug rehabilitation program from 8 a.m. until about 2 p.m., and then worked at night from 11 p.m. to 7 a.m. Marie denied seeing defendant have sexual intercourse with Aviona.

¶ 13 On further examination, Marie testified that defendant did reside in the Artesian apartment in February 1999 and that either defendant or a neighbor would take Aviona and Rayshon to school as Marie had to be at work by 7 a.m. In February and March 1999, Marie

would pick up Aviona and Rayshon from daycare after work, at about 4 p.m., and take them home, while defendant would come home from work at about 8 p.m. In the summer of 2002, Marie was not employed.

¶ 14 Arlene Batorek testified that she was the manager of a nursing home where Marie worked from November 2002 onwards. Marie also worked there until giving birth in 1999 "and she came back shortly after the baby. After that, she left us for a short while, and she came back to us in 2002."

¶ 15 Rayshon W., Aviona's brother, testified that he was born in October 1993 and was 14 years old as of the 2008 trial. In the summer of 2001, he and Aviona attended daycare near the Artesian apartment; a neighbor (not defendant) took him there. Rayshon had also attended daycare in January and February of 1999 but could not recall who took him there.

¶ 16 James Brooks, manager of the oil-change shop where defendant worked as the assistant manager, testified that defendant's duties included opening and closing the shop when Brooks was absent, as no other employee had the keys to open the shop. From January through March of 1999, the shop opened at 8 a.m. daily and the employees were expected to be there by 7:45 a.m., and defendant either opened or closed the shop "at least five or six days" per week. During that period, defendant was never absent from work when scheduled. In the summer of 2001, defendant's work shift would have ended at either 2 p.m. or 7 p.m. Brooks could not recall defendant being absent from work during the summer of 2001. Defendant was not allowed to leave the shop while on duty except to buy lunch at a restaurant next door to be eaten in the shop. On cross-examination, Brooks testified that he and defendant were friends and visited each other's homes. In January 1999, defendant lived near North and Western Avenues in Chicago.²

²The Artesian apartment is less than a block south of North Avenue and a block west of Western Avenue.

¶ 17 Jackie Rivera testified that she was both a customer of the shop in question and a friend of defendant. She would take her car to the shop for repairs after normal work hours. In the summer of 2001, defendant was always at the shop at the 7 p.m. closing time. Rivera would visit defendant at his home, which in early 1999 was on 59th Street. Anthony Jackson, an employee at the shop from 1993 onwards, also testified that in early 1999 defendant lived on 59th Street.

¶ 18 Franklin Lee testified that he was an employee at the shop from 1998 until 2000 and worked "mostly" weekday mornings from 8 a.m. onwards. Nicholas Thornton testified that he was an employee of the shop in the summer of 2001 and worked Wednesdays to Saturdays. Brooks was the manager, defendant was the assistant manager, and only they opened the shop. Lee testified that defendant never left the shop during work hours as it was not permitted. Thornton testified that defendant stayed in the shop until all other employees left and that he and defendant were friends, often socializing after work for several hours and sometimes until midnight.

¶ 19 Detective Joseph Agosta testified that he attended Aviona's November 2004 interview and defendant's interview later the same month. He participated in the questioning of defendant by Detective Bellomy. In particular, he described Aviona's allegations, which defendant initially denied. Detective Agosta denied that he promised defendant that he could go home or could be released on bond if he admitted to Aviona's allegations.

¶ 20 Diane Sobel testified regarding Aviona's school attendance in 1999. She was tardy on February 17 and March 11 and 24 and absent on February 1, 11, and 18 and on March 1, 2, and 10. She was neither absent nor tardy on March 17 through 19.

¶ 21 Following closing arguments, the court found defendant guilty of predatory criminal sexual assault.

¶ 22 Defendant's post-trial motion argued in relevant part ineffective assistance of trial counsel, involuntary or unknowing waiver of the right to a jury trial, and insufficiency of the evidence. Defendant supported his motion with his affidavit averring that counsel³ "never advised me that a jury must be unanimous in its verdict" and that he believed "that if one juror voted for guilty, I would be found guilty." He argued in the motion that his "affidavit alone requires" a hearing to determine whether he waived a jury trial. Following arguments of the parties, the court denied the post-trial motion.

¶ 23 The court sentenced defendant to two consecutive nine-year prison terms, his post-sentencing motion was denied, and this appeal followed.

¶ 24 On appeal, defendant first contends that his jury waiver was the result of ineffective assistance of trial counsel and was not voluntarily and knowingly made.

¶ 25 Waiver of a constitutional right, including the right to trial by jury in criminal cases, must be voluntary and knowing; that is, an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. *People v. Bannister*, 232 Ill. 2d 52, 65, 67-68 (2008). The validity of a waiver depends on the right being waived, and for waiver of a jury trial, "the pivotal knowledge that the defendant must understand – with its attendant consequences – is that the facts of the case will be determined by a judge and not a jury." *Id.* at 69. While the trial court has the duty of ensuring that a defendant waived a jury trial expressly and understandingly, the court need not give any specific admonition or advice for a jury waiver to be effective. *Id.* at 66. Indeed, our supreme court has held in the context of capital sentencing that a sentencing-jury waiver is not rendered unknowing or involuntary because the court did not inform the defendant of the unanimity requirement. *People v. Williams*, 173 Ill. 2d 48, 88 (1996), citing *People v. Thompkins*, 161 Ill. 2d 148, 178–79 (1994). The determination of whether a jury waiver is valid

³Post-trial counsel was a different attorney than counsel through most of the trial.

does not rest on a specific formula but depends on the facts and circumstances of each particular case, and a written jury waiver is not decisive but a starting point in ascertaining whether a jury waiver was made understandingly. *Bannister*, at 66.

¶ 26 For a defendant to successfully challenge his jury waiver based on a claim of ineffective assistance of counsel, the court must determine that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable likelihood that the defendant would not have waived his jury right absent the alleged error. *People v. Hobson*, 386 Ill. App. 3d 221, 242 (2008), citing *People v. Maxwell*, 148 Ill. 2d 116 (1992).

¶ 27 Here, in addition to defendant's signed jury waiver form, the court admonished defendant that he was giving up his right to a jury trial and would instead be tried by the court. Only after defendant expressed understanding of the admonishments, and replied that he understood what a jury trial is, did the court accept the jury waiver. As the crux of a jury waiver is expression of the defendant's knowledge and understanding that he will be tried by the court rather than a jury, the court did what the law requires it to do.

¶ 28 Turning to the contention of ineffective assistance, defendant cites no case for the proposition that counsel must – that is, is positively required to – inform a defendant of the unanimity requirement for a guilty verdict before he makes his election of a jury or bench trial. Moreover, the prejudice from counsel's alleged unreasonable representation in not informing defendant of the unanimity requirement arises from and rests upon defendant's other substantive allegation: that he believed that he would be convicted if any one of the twelve jurors found him guilty. We consider this assertion a fanciful allegation that is fantastic or incredible. See *People v. Coleman*, 2012 IL App (4th) 110463, ¶ 48, citing *People v. Hodges*, 234 Ill. 2d 1, 16-17 (2009) (post-conviction cases). In popular culture both fictional and journalistic, as well as in jurisprudence, the jury has been described as "a bulwark between the defendant and the State"

and "a safeguard against a corrupt or overzealous prosecution and against a compliant, biased, or eccentric judge." *Bannister*, at 75. Defendant's averred belief turns that legal and popular wisdom upside-down, and neither this circuit court nor the circuit court is required to accept that averment at face value.

¶ 29 Defendant also contends that the State presented insufficient evidence to convict him beyond a reasonable doubt.

¶ 30 A person commits predatory criminal sexual assault when, being 17 years old or older, he "commits an act of sexual penetration" upon a person "under 13 years of age." 720 ILCS 5/12-14.1(a)(1) (West 2010). "Sexual penetration" includes "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth, or anus of another person." 720 ILCS 5/12-12(f) (West 2010). The date of the offense is not an element of predatory criminal sexual assault unless the statute of limitations is at issue. *People v. Letcher*, 386 Ill. App. 3d 327, 331 (2008). Instead, it is sufficient for the victim to describe the (1) act or acts committed with sufficient specificity to ensure that unlawful conduct has indeed occurred and, where necessary, to differentiate between various types of proscribed conduct, (2) number of acts committed with sufficient certainty to support each of the counts, and (3) general time period in which those acts occurred to assure the acts were committed within the applicable limitation period. *Id.* at 334. Additional information regarding the time, place and circumstances of the various assaults may assist in assessing the credibility of the victim's testimony but are not essential to sustain a conviction. *Id.* The State is not required to show that the victim's testimony was clear and convincing or substantially corroborated in order to prove guilt beyond a reasonable doubt. *Id.* at 331.

¶ 31 When presented with a challenge to the sufficiency of the evidence, this court must determine whether, after taking 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. Beauchamp*, 241 Ill. 2d 1, 8 (2011). On review, we do not retry the defendant and we accept all reasonable inferences from the record in favor of the State. *Id.* The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Similarly, the trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Beauchamp*, at 8.

¶ 32 Here, taking the evidence in the light most favorable to the State as we must, we find sufficient evidence to convict defendant of two counts of predatory criminal sexual assault. Aviona testified clearly to two separate acts of sexual penetration – that defendant put his penis into her vagina – when she was seven years old and he was well over 17 years old. She described both assaults with sufficient specificity – the first about a month after her January 1999 seventh birthday, and the second a few weeks later – to place them firmly within the charged period of January 26, 1999, to February 14, 2002. Moreover, though corroboration is not required, defendant admitted in his statement to two acts of sexual penetration of Aviona within the charged period and while Aviona was still under 13 years old. The fact that they were at a different time than those described by Aviona does not diminish their corroborative effect.

¶ 33 Accordingly, the judgment of the circuit court is affirmed.

¶ 34 Affirmed.