

No. 1-11-2383

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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. 10 CR 12879
)	
NELSON FRED,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

- ¶ 1 **Held:** Where the trial court found defendant guilty of unlawful restraint based on a misapprehension of defendant's testimony, his conviction is reversed.
- ¶ 2 Following a bench trial, defendant Nelson Fred was convicted of unlawful restraint and sentenced to 18 months' imprisonment. On appeal, defendant contends that his conviction should be reversed because there was no credible evidence demonstrating he had detained the complainant, and the trial court's finding to the contrary was based on a misunderstanding of defendant's testimony. We agree and reverse defendant's conviction.
- ¶ 3 Defendant was charged with 12 counts of aggravated criminal sexual assault, 3 counts of

aggravated kidnaping, 1 count of aggravated battery, and 2 counts of aggravated unlawful restraint. At trial, the complainant, M.M., testified that on August 11, 2009, she walked to the area of 2300 North Spaulding Avenue to meet a friend. M.M. told another friend, Graciela "Denise" Gonzalez, to pick her up from that location in an hour. As she was walking, M.M. saw defendant standing outside the gate of a gangway. Defendant asked her if she was looking for somebody. M.M. testified that she had never seen defendant before, nor had any type of contact with him over the telephone or computer, but she trusted him because he did not look like someone who would harm her. M.M. responded that she was looking for somebody, but she did not tell him who. Defendant then told her to follow him, and she followed him down the gangway to the back of a building and up the stairs. M.M. believed defendant was taking her to meet her friend, but she could not explain why she believed that.

¶ 4 M.M. and defendant entered an apartment, and defendant went to the kitchen. M.M. sat on a bed that was a few feet from the apartment door. Defendant returned from the kitchen, and M.M. told him "it wasn't right." Defendant then went behind M.M., held a small pocket knife against her throat and told her to listen to him. Defendant said another man was coming to the apartment with a gun and if M.M. screamed, defendant would hurt her. Moments later, an unknown man entered the apartment and pointed a gun at M.M. Defendant told M.M. to remove her pants. She initially said no and told him she was nine months pregnant, hoping he would release her. M.M. was seven months pregnant at the time and visibly showing. M.M. begged defendant to release her, but defendant grabbed her, forced her onto the bed and pulled down her pants and underwear. Defendant pulled down his own pants, put on a condom, held M.M. down on the bed and forced his penis inside her vagina. Defendant held his hand over M.M.'s mouth to prevent her from screaming. A few minutes later, defendant removed the condom, placed his penis in M.M.'s mouth and forced her to swallow his semen. Defendant asked the gunman if he wanted to have sex with M.M., but the gunman declined.

¶ 5 M.M. further testified that defendant handed a bandana to the gunman and told him to tie it around M.M.'s mouth to prevent her from screaming. Defendant then went to the bathroom. The gunman told M.M. that if she cooperated, defendant would not hurt her. As they left the apartment together, defendant grabbed M.M.'s cell phone from between her breasts and told her she did not need it. Defendant walked down the stairs first, followed by M.M., with the gunman behind her. As they walked down the stairs, defendant threw M.M.'s cell phone on the roof of a building. When they reached the gangway, the gunman told M.M. that he was going to remove the bandana and she had five seconds to run or he would shoot her from behind. Defendant and the gunman then ran north through an alley. M.M. removed the bandana from her mouth, dropped it to the ground in the alley and ran south.

¶ 6 M.M. ran to the corner of Spaulding and Fullerton Avenues where she sat on the curb and cried. About 25 minutes later, M.M. saw her friend Gonzalez turn onto the street. M.M. entered the car and told Gonzalez to take her home. Gonzalez asked M.M. why she did not answer her phone, and M.M. told her something bad had happened. Gonzalez picked up M.M.'s "baby daddy," and M.M. told him a man had attacked her. M.M. told Gonzalez to stop the car in a parking lot of a convenience store where she exited the car and vomited. Gonzalez found a police officer inside the store, and M.M. told him what had happened. Nearly a year later, M.M. identified defendant in a photo array, and a month thereafter, she identified defendant in a lineup.

¶ 7 M.M. acknowledged that after the court proceedings began in this case, she was convicted of prostitution in an unrelated 2010 case. She further acknowledged that at the time of trial, she had a second prostitution case pending against her from 2011. M.M. denied that she was a prostitute, denied advertising on Craig's List and denied that her interaction with defendant was a prostitution agreement. She further denied that defendant offered or gave her money and denied that she agreed to have sex with him.

¶ 8 The parties stipulated that Gonzalez would testify that on the afternoon of August 11,

2009, she dropped off M.M. near Fullerton and Kimball Avenues. M.M. told Gonzalez she would call her later if she needed a ride. A couple hours later, Gonzalez became concerned when M.M. did not answer her cell phone. Gonzalez returned to the area where she dropped off M.M. and saw M.M. walking and crying. M.M. asked Gonzalez to take her to a police station. Gonzalez flagged down a police car and heard M.M. tell the officer that she had been raped at gunpoint. M.M. also called her boyfriend and told him over the phone that she was raped at gunpoint. Gonzalez then drove to a convenience store where M.M. exited the car and vomited in the parking lot.

¶ 9 The parties further stipulated that Chicago police officer Angel Mosqueda, an evidence technician, would testify that he collected two buccal swabs of suspected semen he observed in vomit in the parking lot of the convenience store. Forensic biologists found that the substance was semen, and that the male DNA profile therein matched defendant's DNA profile in the "Combined DNA Index System" database, as well as a DNA sample taken from defendant in August 2010.

¶ 10 Chicago police officer Rick Wilder testified for the defense that he spoke with M.M. in the parking lot of the convenience store. Wilder's partner and another woman were present, but there were no other men there. M.M. did not tell the officers that her attacker had a knife, and Wilder did not observe any bruises on her. The parties stipulated that Chicago police detective Cathy Burke would testify that she took a statement from M.M. at a hospital. The substance of the summarized statement was substantially similar to M.M.'s testimony, except that M.M. told the detective that her friend's "guy" had called her and given her directions to the apartment, and M.M. never mentioned a knife to Detective Burke.

¶ 11 Ileana and Miguel Ruiz, friends of defendant, both testified that on the day in question, defendant was at their house using their computer, which he did regularly. Miguel further testified that defendant used their computer to access Craig's List to search for prostitutes.

¶ 12 Defendant testified that about 3 p.m. on the day in question, he used the Ruiz's computer to search for prostitutes on Craig's List. There he found M.M.'s telephone number, and later that day he called her. A car dropped off M.M. in front of defendant's house, at which time defendant saw M.M. was pregnant. M.M. asked defendant if he was a police officer, and defendant replied "no." They agreed to have sex for an hour in exchange for \$300 and went upstairs to defendant's apartment. Defendant walked to the kitchen and turned on a light, and when he returned to the other room, M.M. was already undressing herself. Defendant denied having a knife and gun or that any other person was present in the apartment.

¶ 13 Defendant further testified that while they were engaged in sexual intercourse, he was displeased with the fact that M.M. was pregnant and told her he wanted to stop. M.M. told defendant to relax, removed his condom and performed oral sex on him, swallowing the semen. Defendant offered M.M. \$100 because their interaction lasted only 20 to 30 minutes. Defendant acknowledged in court that he had only \$100 and never intended to pay M.M. \$300. M.M. told defendant that if he did not pay her \$300, she was going to call the police and tell them he raped her. Defendant and M.M. began arguing, and when she picked up her phone, defendant grabbed it from her hand. Defendant walked out of his apartment and M.M. followed directly behind him. Defendant locked his apartment door and went downstairs. M.M. followed defendant and continued arguing with him, telling him to return her phone and pay her the money. When defendant turned to walk towards the street, M.M. tried to grab the phone from his hand, but instead, she grabbed a "do rag" he was holding in the same hand as the phone. Defendant then threw M.M.'s phone on the roof of a building to prevent her from calling the police. Defendant saw that the car that dropped off M.M. was still parked near his apartment. Defendant then walked away from M.M. to the right while M.M. walked to the left.

¶ 14 Defendant maintained that the sex was consensual, that he never forced or threatened M.M. in any way, he never grabbed her and he did not harm her. Defendant said he never

forcibly took M.M. from one place to another and expressly stated that she followed him. Defendant denied kidnaping M.M., and when asked if he forced her to remain at his apartment, defendant replied "[n]o, sir." When asked if he detained M.M. while using a gun or a knife, defendant replied that he never had a gun or a knife.

¶ 15 The trial court noted the "dramatically different versions" of what occurred according to the testimony from M.M. and defendant. The court reviewed the evidence and found that M.M. testified that defendant "just miraculously appeared" and that "another mysterious person" came to the apartment with a gun. The court stated that it was not certain what had occurred beyond a reasonable doubt, and therefore, acquitted defendant of all charges except for the two counts of aggravated unlawful restraint. As to those counts, the court stated:

"there is this business that he admits to with her cell phone and keeping her there and arguing with her and hassling her and not letting her leave, so I will find him guilty of the lesser included offense of unlawful restraint. I am not sure about the weapons that were alleged. I have some doubt about that, but he will be found guilty of unlawful restraint, Class 4 felony."

The trial court subsequently sentenced defendant to a term of 18 months' imprisonment.

¶ 16 On appeal, defendant first contends that his conviction should be reversed because there was no credible evidence demonstrating he had detained M.M., and the trial court's finding to the contrary was based on a misunderstanding of defendant's testimony. Defendant argues that he never admitted to detaining M.M., or that he would not let her leave. He further argues that the trial court's ruling acquitting defendant of all the other counts shows the court did not find M.M.'s testimony credible.

¶ 17 The State argues that defendant detained M.M. when he took her phone, thereby leaving a visibly pregnant woman stranded by herself with no phone in an area of town where she did not live. It argues that by taking her phone, defendant impaired M.M.'s ability to leave. The State

asserts that the court could find that defendant unlawfully restrained M.M. "even if *** the trial court did not admittedly have a completely accurate record of the events involved."

¶ 18 When a defendant argues the evidence is insufficient to sustain his conviction, this court must determine whether any rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found the elements of the offense proved beyond a reasonable doubt. *People v. Williams*, 239 Ill. 2d 119, 126 (2010). A criminal conviction will not be reversed based upon insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to the defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). In a bench trial, the trial court, sitting as the trier of fact, is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence and drawing reasonable inferences therefrom. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). This court is prohibited from substituting its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009).

¶ 19 "A person commits the offense of unlawful restraint when he knowingly without legal authority detains another." 720 ILCS 5/10-3(a) (West 2008). A defendant acts knowingly when he is consciously aware that his conduct is practically certain to cause such result. 720 ILCS 5/4-5(b) (West 2008); *People v. Lissade*, 403 Ill. App. 3d 609, 613 (2010). Although the defendant's knowledge is generally inferred from the surrounding circumstances, the State must still prove that mental state beyond a reasonable doubt. *Lissade*, 403 Ill. App. 3d at 613. The offense of unlawful restraint was formerly known as false imprisonment. *People v. Jones*, 93 Ill. App. 3d 475, 479 (1981).

¶ 20 Unlawful restraint occurs when a defendant detains another person by some conduct that prevents the other person from moving from one location to another. *People v. Bowen*, 241 Ill. App. 3d 608, 628 (1993). "The detention must be wilful, against the victim's consent, and

prevent movement from one place to another." *People v. Leonhardt*, 173 Ill. App. 3d 314, 322 (1988). It is not necessary that the defendant use actual or physical force to detain the other person, as long as that person's freedom of movement is impaired. *Bowen*, 241 Ill. App. 3d at 628.

¶ 21 Here, our review of the record reveals that defendant was not proven guilty of the offense of unlawful restraint. In an 18-count indictment, defendant was charged with 2 counts of aggravated unlawful restraint – one for detaining M.M. while armed with a firearm, and the second for detaining her while armed with a knife. While reviewing the "dramatically different versions" of what occurred, the court found that, according to M.M.'s testimony, defendant "just miraculously appeared" and that "another mysterious person" came to the apartment with a gun. The court stated that it was not certain beyond a reasonable doubt what had occurred and acquitted defendant of all charges except for the two counts of aggravated unlawful restraint. As to those two charges, the court expressly stated that it had "some doubt" that weapons were used during this incident. The trial court's findings thereby show that it did not find M.M.'s testimony credible, and that after weighing the evidence, the State had not proved defendant guilty beyond a reasonable doubt of 16 of the charges.

¶ 22 However, when the trial court reviewed the remaining two counts of aggravated unlawful restraint, the court erroneously found that defendant admitted to "keeping" M.M. at his apartment and "not letting her leave." That was not defendant's testimony. The record shows that defendant testified that when he refused to give M.M. \$300, she threatened to call the police and tell them defendant had raped her. Defendant and M.M. then began arguing, and when M.M. picked up her phone, defendant grabbed it from her hand and walked out of his apartment. Both defendant and M.M. testified that M.M. followed defendant out of his apartment and down the stairs. There is no evidence that defendant detained M.M. or prevented her from leaving. Defendant did not wilfully hold M.M. against her consent, nor did he impair her freedom of

movement. In fact, defendant testified that he saw that the car that had dropped off M.M. was still parked near his apartment. The evidence shows that defendant did not take M.M.'s phone to knowingly detain her but, instead, to prevent her from calling the police to falsely report that he had raped her. Accordingly, we find that the State failed to prove defendant guilty of unlawful restraint, and his conviction must be reversed.

¶ 23 When a conviction is reversed based upon insufficient evidence, the double jeopardy clause prohibits the State from retrying the defendant, and the only remedy that is appropriate is a judgment of acquittal. *Williams*, 239 Ill. 2d at 133. Given our disposition on this issue, it is not necessary for this court to address the parties' argument to correct the mittimus.

¶ 24 For these reasons, we reverse the judgment of the circuit court of Cook County and enter a judgment of acquittal.

¶ 25 Reversed.