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2013 IL App (3d) 120687-U

Order filed November 18, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-12-0687
)	Circuit No. 09-CF-1362
)	
DOUGLAS CANAS,)	Honorable
)	Sarah F. Jones,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Wright and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* Following our review, we find that: (1) the evidence was sufficient to prove defendant guilty of the offense; (2) trial counsel was not ineffective; and (3) the trial court did not err in denying defendant's motion for a new trial.

¶ 2 Defendant, Douglas Canas, was convicted of two counts of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2008)), and sentenced to concurrent terms of six years in prison.

Defendant appeals, arguing that: (1) the evidence was not sufficient to prove him guilty beyond a reasonable doubt; (2) he received ineffective assistance of counsel when his attorney did not

inform the trial court of a statement made by a juror; and (3) the trial court abused its discretion when it denied his motion for a new trial based on the juror's statement. We affirm.

¶ 3

FACTS

¶ 4 Defendant was charged with two counts of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2008)). At trial, evidence established that defendant and the victim, G.S., worked together at Dedicated Logistics Incorporated. On September 20, 2008, defendant, G.S., and other employees left work at approximately 3 a.m. and gathered at a nearby park for a party for a coworker who was leaving. While there, G.S. became intoxicated.

¶ 5 Defendant testified that while he was using a portable restroom, G.S. entered and began to kiss him. She then started to masturbate his penis. Defendant asked G.S. for oral sex; however, she continued to only stroke his penis. Eventually, defendant ejaculated, and G.S. pulled down her pants and urinated in the toilet. Later that evening, G.S. informed her coworkers that she planned on leaving. By this time she was too intoxicated to drive, and a coworker grabbed her keys as she passed out in the backseat of her vehicle. Defendant stated that he and another coworker decided to play pranks on their coworkers that had passed out. After drawing on one coworker's face, the two approached G.S., and defendant drew a goatee on her face. While he was doing this, G.S. awoke momentarily but then went back to sleep. Defendant stated that he did not engage in vaginal intercourse with G.S. at any point in the evening.

¶ 6 G.S. testified she heard people talking about her vagina while she was passed out in the backseat of her vehicle. Eventually, she felt someone touch her vagina and awoke to the pain of penetration in her vaginal area. When she turned, she saw defendant, whom she identified in open court. Immediately, the penetration stopped, and she did not feel anyone ejaculate. G.S.

then went back to sleep. When she awoke in the morning, she was fully clothed and had a goatee drawn on her face. G.S.'s friend testified that she received a call from her that morning. G.S. told her that "a Mexican was fucking me."

¶ 7 After her friend gave her directions, G.S. began to drive home. However, she was still tired and ended up pulling over and taking an eight-hour nap. After she awoke, she drove home, changed clothes, and eventually went to the hospital with her friend. G.S. informed the nurse that she believed she had been raped. The nurse contacted the police and conducted an examination using a rape kit. The results showed that semen was found within the vagina and on G.S.'s boxer shorts. The forensic scientist that examined the results determined that defendant could not be excluded as the source of the DNA found on the boxer shorts.

¶ 8 At the conclusion of the trial, the jury found defendant guilty of the charges. Defendant then filed a motion for a new trial. The motion alleged that defendant was entitled to a new trial based on insufficient evidence, jury misconduct, and ineffective assistance of counsel for failing to present a juror's comment to the court. Attached to the motion was an affidavit from defendant's attorney concerning the comment. According to defendant's attorney, defendant informed him that he had overheard a juror say "he (Mr. Canas) lied, yes you did it." However, the attorney chose not to bring the comment to the attention of the court.

¶ 9 A hearing was held on defendant's motion. At the hearing, defendant testified in accordance with his attorney's affidavit. A prosecutor also testified that she heard a statement made by a juror. However, she believed the juror said, "yes, he did," in response to defendant stating that he had not testified on direct examination that G.S. performed oral sex on him in the portable bathroom.

¶ 10 At the conclusion of the hearing, the trial court stated that it did not find defendant's testimony in regard to the juror's remark to be credible. The court also believed that the claim of juror misconduct was waived because it had not been brought to the court's attention during trial. As such, the court denied defendant's motion for a new trial. Defendant was sentenced to six years in prison on each count. The sentences were to be served concurrently. Defendant appeals.

¶ 11 ANALYSIS

¶ 12 I

¶ 13 Defendant first argues that the evidence was not sufficient to prove, beyond a reasonable doubt, that he committed the criminal sexual assaults. 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). Under this standard, an appellate court cannot substitute its judgment for that of the trier of fact on issues regarding the weight of evidence or the credibility of the witnesses. *People v. Kotlarz*, 193 Ill. 2d 272 (2000). 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).

¶ 14 Here, G.S. testified that she woke up to someone penetrating her vagina from behind. When she looked back, she saw defendant. G.S. positively identified defendant in court. Other evidence established that G.S. called a friend after the sexual assault and stated that "a Mexican was fucking me." Analysis of semen found inside G.S.'s vagina could not exclude defendant as

the source. We note that there was other evidence that tended to refute some of the claims made by G.S., and her intoxication made her testimony suspect. However, because we are bound by the strict standard of review found in cases such as *Collins* and *Kotlarz*, we find that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of criminal sexual assault.

¶ 15

II

¶ 16 Defendant next argues that trial counsel was ineffective when he failed to present to the court a statement made by a juror during trial. To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's representation 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. *People v. Albanese*, 104 Ill. 2d 504 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Haynes*, 192 Ill. 2d 437 (2000). Defendant must satisfy both prongs in order to prevail on a claim of ineffective assistance of counsel; however, if the claim can be disposed of on the ground that defendant did not suffer prejudice, a court need not determine whether counsel's performance was deficient. *Id.*

¶ 17 Here, we find that defendant has not established prejudice. After trial, the court held a hearing where it discussed the juror's statement. At the hearing, defendant testified that a juror said "[defendant] lied, yes you did it." The prosecutor stated that the juror said, "yes, he did," but in reference to defendant claiming that he did not testify on direct examination about engaging in oral sex with the victim.

¶ 18 At the conclusion of the hearing, the trial court determined that it did not find defendant credible on the issue. The only remaining evidence—the prosecutor's statement—concerned

whether defendant previously stated that he had engaged in oral sex with the victim. Because the oral sex in question was not part of the charged offense, the juror's comment did not relate to the sexual assault. Thus, while it is true that a juror who has formed an opinion relating to the charged offense cannot be impartial (see *People v. Taylor*, 405 Ill. App. 3d 421 (2010)), courts have not held that the same logic applies when the opinion formed does not relate to the charged offense. Therefore, we find that even if defendant's attorney raised the issue during trial, defendant would not have prevailed. Because of this, defendant cannot establish prejudice, and we do not find that counsel was ineffective.

¶ 19

III

¶ 20 Finally, defendant contends that the trial court abused its discretion when it denied his motion for a new trial. Specifically, defendant claims that he did not receive a fair trial based on the comment he overheard a juror make. A trial court's ruling on a motion for a new trial will not be reversed on appeal absent an abuse of discretion. *People v. Willmer*, 396 Ill. App. 3d 175 (2009).

¶ 21 In this case, we find that the trial court did not abuse its discretion when it denied defendant's motion for a new trial. Initially, we note that claims of juror misconduct must be brought to the trial court's attention during the trial or they are forfeited. *Taylor*, 405 Ill. App. 3d 421. Here, neither defendant nor his attorney informed the trial court of the statement during trial; therefore, the issue has been forfeited.

¶ 22 Further, even if the issue was not forfeited, we believe the trial court acted properly within its discretion to dismiss the motion on its merits. As noted above, the trial court held a hearing where it heard evidence regarding the juror's comment. The court concluded that

defendant was not credible on the issue and that, therefore, the juror did not make an improper comment. Based on the evidence presented, we find no fault with this conclusion. Therefore, we find that the trial court did not abuse its discretion when it denied defendant's motion for a new trial.

¶ 23

CONCLUSION

¶ 24 The judgment of the circuit court of Will County is affirmed.

¶ 25 Affirmed.