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2014 IL App (3d) 120160-U

Order filed May 22, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 14th Judicial Circuit,
)	Whiteside County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-12-0160
v.)	Circuit No. 11-CF-272
)	
MICHAEL L. FISHER,)	Honorable
)	John L. Hauptman,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice Carter concurred in the judgement.
Justice McDade specially concurred in part and dissented in part.

ORDER

¶ 1 *Held:* (1) The State proved beyond a reasonable doubt that defendant touched the victim for the purpose of sexual gratification or arousal; and (2) the court was authorized in ordering restitution to pay for counseling for the victim's mother.

¶ 2 Defendant was charged with aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)) for committing an act of sexual conduct with a nine-year-old girl. Defendant was found guilty after a bench trial. The trial court sentenced defendant to a 48-month term of probation and ordered defendant to pay restitution for any counseling of the

victim and the victim's mother. Defendant appeals, arguing (1) the State failed to prove him guilty beyond a reasonable doubt, and (2) the trial court exceeded its authority when it ordered defendant to pay for the mother's counseling. We affirm.

¶ 3

FACTS

¶ 4

Defendant, Michael L. Fisher, was charged with aggravated criminal sexual assault (720 ILCS 5/12-16(c)(1)(i) (West 2010)) resulting from events that occurred on February 21, 2011. A person commits aggravated criminal sexual assault under section 12-16(c)(1)(i) if "the accused was 17 years of age or over and *** commits an act of sexual conduct with a victim who was under 13 years of age." 720 ILCS 5/12-16(c)(1)(i) (West 2010). On February 21, 2011, defendant was 54 years old. The victim, A.S., was 9. The cause proceeded to a bench trial.

¶ 5

A.S. testified that defendant was a close friend of A.S.'s mother, S.S. A.S. would see him between two and four times a week. He had babysat A.S. a few times, and A.S. considered him a friend. On the night of February 21, 2011, defendant was visiting A.S. and S.S. at their home. The three of them were socializing downstairs when A.S. invited defendant upstairs to see her bedroom and her new Wii video game. Defendant and A.S. went upstairs into A.S.'s bedroom. S.S. stayed downstairs.

¶ 6

Defendant and A.S. sat down next to each other on A.S.'s bed. Defendant watched as A.S. played her video game. A.S. was wearing a white tank top and baggy pajama pants. Defendant began rubbing A.S.'s back, using the arm closest to her. This did not seem unusual to A.S. and did not make her uncomfortable. Defendant moved his hand inside A.S.'s pants and underwear. He touched her buttocks and anus. The touching inside her pants lasted less than one minute. A.S. felt uncomfortable so she got up from the bed and went downstairs.

¶ 7

A.S. told S.S. that there was something she needed to tell her about defendant but could not say it until defendant was gone. S.S. and A.S. got in S.S.'s car and took defendant home.

Afterward, A.S. told S.S. that she "felt uncomfortable because *** he was touching me in some wrong places." A few days later, S.S. asked A.S. if she wanted to talk to the police. A.S. said yes. A.S. told the police what had happened. A.S. never thought that the touching was an accident.

¶ 8 S.S. testified that she had been good friends with defendant for four or five years and completely trusted him. She was not worried when A.S. and defendant went into A.S.'s room. When A.S. came back downstairs, she told S.S. that she had something to say but could not say it until defendant was gone. After S.S. took defendant home, A.S. told her that defendant had made A.S. feel uncomfortable.

¶ 9 A few days later, S.S. went to defendant's apartment to talk to him about what had happened. At that point, S.S. was unaware of the details of the touching. S.S. asked defendant what he had done to make A.S. feel uncomfortable. Defendant's first response was, "[W]hat, do you want to kill me now?" He then apologized and asked S.S. to apologize for him to A.S. S.S. left his apartment.

¶ 10 The interaction with defendant made S.S. more concerned with what may have occurred. She again talked to A.S., hoping to get more details about what actually happened. A.S. continued to be unforthcoming. A few days later, S.S. asked A.S. if she would like to tell the police what happened. A.S. said yes. S.S. took A.S. to the police station to make a statement.

¶ 11 A video recording of A.S.'s forensic interview with a counselor from April House Child Advocacy was admitted into evidence under section 115-10 of the Code of Criminal Procedure of 1963. 725 ILCS 5/115-10 (West 2010). A.S.'s statements on the video for the most part mirrored her testimony at trial. In addition, on the video, A.S. testified to an occurrence at defendant's apartment a few months prior to the incident in her bedroom. Defendant was babysitting A.S. and set up a mattress for her to sleep on in his living room. A.S. was jumping

on the mattress when defendant looked at her and stuck out his tongue and moved it in a "perverted" way. Defendant then went to his bedroom to go to sleep. A.S. also stated on the video that after she and defendant came downstairs from her bedroom, defendant asked her, "Did you like that?" During trial, defendant was not asked about the occurrence at defendant's apartment or whether defendant said anything to her after the events of February 21.

¶ 12 Defendant testified that the touching of A.S. inside her underwear was accidental. Defendant was sitting with A.S. and rubbing her back, as he would sometimes do. His hand accidentally slipped into A.S.'s pants because A.S. was jumping around while playing her video game. Defendant then immediately pulled his hand out of her pants. He did not find the touching sexually arousing but, rather, upsetting and uncomfortable. Afterward, he felt sick. As soon as defendant pulled his hand out of A.S.'s pants, he told her that they should go downstairs, which they did right away. Defendant did not ask A.S. whether she liked the touching. When he stuck his tongue out at her at his apartment, he was "just being goofy." She was making weird faces at him, so he made a weird face back at her. On cross-examination, when asked if his hand touched A.S.'s anus, defendant responded, "I don't believe it did," but, "It could have, yes."

¶ 13 Defendant further testified that after the incident, he did not tell S.S. what had happened. He tried to call her in the days following, but she did not answer her phone. When S.S. came to defendant's apartment a few days later, defendant told her that he had an accident with A.S. He did not explain to S.S. that he had touched A.S.'s bare buttocks or anus.

¶ 14 The trial court found defendant guilty. The parties recommended a sentence of probation. The court sentenced defendant to 48 month's probation. As a condition of probation, the court ordered restitution to pay for past and future counseling for A.S. and S.S. necessary as a result of the offense. Defendant appeals.

¶ 15

ANALYSIS

A. Sufficiency of the Evidence

¶ 16
¶ 17 Defendant argues that the State provided insufficient evidence to prove him guilty beyond a reasonable doubt.

¶ 18 A person over 17 years of age commits aggravated criminal sexual abuse when he or she "commits an act of sexual conduct with a victim who was under 13 years of age." 720 ILCS 5/12-16(c)(1)(i) (West 2010). "Sexual conduct" is defined as "any intentional or knowing touching or fondling *** for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/12-12(e) (West 2010). Defendant argues that the State failed to prove beyond a reasonable doubt that his touching of the victim was done "for the purpose of sexual gratification or arousal." *Id.* Specifically, defendant argues that the State provided no evidence, other than the fact of the touching itself, to prove that defendant acted for the purpose of sexual gratification or arousal.

¶ 19 When reviewing a challenge to the sufficiency of the evidence, the question to ask is whether, after viewing the evidence in a 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). We answer that question in the affirmative.

¶ 20 A rational trier of fact could have found that defendant touched A.S.'s anus and that the touching was intentional. A.S. testified that defendant touched her anus, and defendant testified that it might have happened. A rational trier of fact could have found A.S.'s testimony credible and concluded that defendant touched A.S.'s anus. As to intentionality, A.S. testified that she did not believe the touching was accidental and that defendant moved his hand around inside her pants rather than immediately withdrawing it. In addition, the act of moving one's hand inside another person's underwear is not easily accomplished accidentally. A rational trier of fact could have found incredible defendant's testimony that the touching was accidental, concluding that

defendant intentionally put his hand down A.S.'s pants and intentionally touched her buttocks and anus.

¶ 21 A defendant's intent to arouse or gratify himself sexually may be established by circumstantial evidence. *People v. Balle*, 234 Ill. App. 3d 804 (1992). A trier of fact may infer defendant's intent from the nature of the act itself. *People v. Burton*, 399 Ill. App. 3d 809 (2010). Certain kinds of touching are inherently sexual. See, e.g., *Id.* (grabbing a female breast is inherently sexual when not done for a medical purpose); *People v. Calusinski*, 314 Ill. App. 3d 955 (2000) ("french kiss" is inherently sexual). We hold that the touching of a nine-year-old's anus by an older man is inherently sexual when not done for a medical or hygiene purpose. In the present case, defendant has offered no innocent explanation for his conduct, other than arguing that it was accidental. Under such circumstances, a rational trier of fact could infer that the touching was done for the purpose of sexual arousal or gratification.

¶ 22 The State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)).

¶ 23 B. Restitution

¶ 24 The trial court ordered restitution under section 5-5-6(g) of the Unified Code of Corrections (Code) to pay for past and future counseling for both A.S. and S.S. resulting from defendant's conduct. 730 ILCS 5/5-5-6(g) (West 2010). Defendant challenges the trial court's order, arguing that section 5-5-6(g) did not authorize restitution for S.S.'s counseling because she was not a "victim" of the offense. As an issue of statutory interpretation, we address defendant's claim *de novo*. *People v. Jones*, 214 Ill. 2d 187 (2005).

¶ 25 The primary objective of statutory interpretation is to determine and give effect to the legislature's intent. *People v. Hanna*, 207 Ill. 2d 486 (2003). The best evidence of legislative intent is the statutory language. *People v. Donoho*, 204 Ill. 2d 159 (2003). When possible, the

court should interpret the statute according to the plain and ordinary meaning of the language.

Id.

¶ 26 Section 5-5-6(g) of the Code provided:

"In addition to the sentences provided for in Sections *** 12-16 *** of the Criminal Code of 1961, the court may order any person who is convicted of violating any of those Sections *** to meet all or any portion of the financial obligations of treatment, including but not limited to medical, psychiatric, or rehabilitative treatment or psychological counseling, prescribed for the victim or victims of the offense." 730 ILCS 5/5-5-6(g) (West 2010).

The Code assigns "[v]ictim" the meaning ascribed to it by section 3(a) of the Bill of Rights for Victims and Witnesses of Violent Crime Act (Act). 730 ILCS 5/3-1-2(n) (West 2010); 725 ILCS 120/3(a) (West 2010). To decide whether S.S. is entitled to restitution under section 5-5-6(g) of the Code (730 ILCS 5/5-5-6(g) (West 2010)), we must determine whether she meets the definition of "victim" under section 3(a) of the Act (725 ILCS 120/3(a) (West 2010)).

¶ 27 Section 3(a) of the Act provides several definitions for the term "victim." 725 ILCS 120/3(a)(1)-(6) (West 2010). In particular, section 3(a)(4) defines "victim" as "any person against whom a violent crime has been committed." 725 ILCS 120/3(a)(4) (West 2010). A "[v]iolent crime" includes "any offense involving *** sexual conduct." 725 ILCS 120/3(c) (West 2010). Aggravated criminal sexual abuse as charged in the present case explicitly requires an act of "sexual conduct," (720 ILCS 5/12-16(c)(1)(i) (West 2010)) and there is no question that the present offense was committed by defendant "against" A.S. 725 ILCS 120/3(a)(4) (West 2010). Therefore, A.S. is a "victim" under the Act because she is a "person against whom a violent crime has been committed[.]" *Id.*

¶ 28 Section 3(a)(3) of the Act provides an alternative definition of "victim" as "the spouse, parent, child or sibling of any person granted rights under this Act who is physically or mentally incapable of exercising such rights[.]" (Emphasis added.) 725 ILCS 120/3(a)(3) (West 2010). Section 4 of the Act grants rights to anyone defined as a "crime victim[]" by Section 3(a), which provides identical definitions for "crime victim" and "victim." Therefore, A.S., as a "victim" under section 3(a)(4) of the Act, is a "person granted rights under this Act." 725 ILCS 120/3(a)(3) (West 2010), and S.S. is a "parent" of a person granted rights under the Act. 725 ILCS 120/3(a)(3) (West 2010).

¶ 29 Furthermore, in order for S.S. to qualify as a "victim" under section 3(a)(3) of the Act, A.S. must be "physically or mentally incapable of exercising" the rights granted her under the Act. 725 ILCS 120/3(a)(3) (West 2010). The rights granted under the Act include the right to notification of court proceedings; the right to communicate with the prosecution; the right to make a statement to the court at sentencing; the right to information about the conviction, sentence, imprisonment, and release of the accused; and the right to the timely disposition of the case following the arrest of the accused. 725 ILCS 120/4(a)(2)-(6) (West 2010). We find that these rights are the kind that a nine-year-old victim, such as A.S., is mentally incapable of exercising on her own. Therefore, S.S. is a "victim" under section 3(a) of the Act, as a "parent *** of any person granted rights under this Act who is physically or mentally incapable of exercising such rights[.]" 725 ILCS 120/3(a)(3) (West 2010).

¶ 30 As a "victim" under section 3(a) of the Act, S.S. is also a victim for purposes of section 5-5-6(g) of the Code. See 730 ILCS 5/3-1-2(n) (West 2010). Under section 5-5-6(g), the court may order restitution to pay for counseling for victims of the offense. 730 ILCS 5/5-5-6(g) (West 2010). Therefore, the court did not err in ordering restitution to pay for past and future counseling for S.S.

CONCLUSION

¶ 31

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

¶ 33 Affirmed.

¶ 34 JUSTICE McDADE, specially concurring in part, dissenting in part.

¶ 35 The majority has affirmed the conviction of defendant, Michael Fisher, for aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(I) (West 2010)) of a nine-year-old girl and has also held that the child's mother was a "victim" and affirmed the trial court's allowance of counseling for her as part of the required restitution.

¶ 36 Sufficiency of the Evidence

¶ 37 I believe that affirmance of the conviction is compelled by our standard of review and so I concur in that decision. I write separately, however, to make a couple of what I believe to be fair observations.

¶ 38 The defendant testified that he has been friends with S.S. for approximately 15-20 years. She testified they had been friends for 10-15 years and "good friends" for the last 4-5 years. Theirs had never been a romantic relationship but they talked nearly every day and had dinner together a couple of times a week, sometimes with A.S. and sometimes without her. There is no indication in the record that defendant had ever acted inappropriately with the mother.

¶ 39 As for A.S., defendant had known her since birth and she was three years old when the friendship between her mother and the defendant became closer. Over the years, defendant has spent significant amounts of time with mother and daughter and has been entrusted alone with A.S.'s care on multiple occasions, apparently without incident. The child exhibited no fear of him and seemed comfortable asking him to come to her bedroom and to sit with her on the top bunk. Nor did S.S. have any qualms about letting them go to the bedroom alone. It is worth

noting, *solely with regard to the question of her fear or apprehension*, that it is undisputed both the trip to the bedroom and the climb to the top bunk were initiated by A.S. and not defendant. This is not to say that he did not show incredibly bad judgment in joining her on the upper bunk, but that she did not fear him. There is nothing in this history to suggest that the defendant is a pedophile or that he was preying on A.S.

¶ 40 There is similarly no accusation, charge or conviction of sexual misconduct in the then-54-year-old defendant's criminal history. I acknowledge that this is certainly not dispositive of his guilt or innocence in the current instance, but we consider prior bad acts in many cases to assess a defendant's propensity to have committed the charged sex crime. *See People v. Dabbs*, 239 Ill.2d 277, 295 (2010) (holding that the trial court can admit evidence of other crimes to show defendants propensity to commit a crime of domestic violence); *see People v. Donoho*, 204 Ill.2d 159, 176 (2003) (“enable[s] courts to admit evidence of other crimes to show [a] defendant's propensity to commit sex offenses.”); *see People v. Williams*, 2013 IL App (1st) 112583 (noting the exception to the common law bar against the use of other-crimes evidence to show propensity). Should not the absence of any such prior acts in such a long life equally support the absence of such a propensity?

¶ 41 I am not asserting that the defendant is innocent of the charge. I am not suggesting that A.S. lied about what happened in her bedroom. As the majority has pointed out, a rational finder of fact could (and did) reach a conclusion that the defendant was guilty. However, the issue presented to us on appeal does require consideration of whether A.S. might have misapprehended the defendant's intent and whether the trial court erred in finding that the final element of the crime -- that it was done "for the purpose of sexual gratification or arousal," (720 ILCS 5/12-12(e) (West 2010) -- had been proven. It would seem to me that the combination of the defendant's presumption of innocence, the dearth of any actual evidence that defendant's

purpose was "sexual gratification or arousal", and the absence of any record of prior sexual misconduct evidencing propensity would have created a reasonable doubt and equally have supported an acquittal on the charge.

¶ 42 Restitution

¶ 43 Turning to the restitution issue, I dissent from the majority's conclusion that the defendant should be responsible for the mother's counseling for the reason that she, too, can be defined as a victim of the crime. There is, I believe, a persuasive counseling-based argument for charging the defendant with counseling for the mother. A.S. is a child and for counseling to be effective, the mother must have a meaningful understanding of the emotional and psychic fallout of what the child has to deal with as a result of a traumatic sexual encounter and learn the most appropriate initiatives and responses for driving healthy messages home.

¶ 44 I cannot, however, agree with the complex of procedural technicalities in which the majority's decision is actually grounded. I am in complete agreement with the majority's analysis to the point of its finding that A.S. is a victim with rights under the Act (725 ILCS 120/3(a)(3) (West 2010)) and that S.S. is a "parent" of a person granted rights under the Act. *Id.* A.S. is not, however, "physically or mentally incapable of exercising" rights granted to her under the Act. *Id.* The majority asserts that she is incapable of exercising: the right to notification of court proceedings; the right to communicate with the prosecution; the right to make a statement to the court at sentencing; the right to information about the conviction, sentence, imprisonment, and release of the accused; and the right to the timely disposition of the case following the arrest of the accused. 725 ILCS 120/4(a)(2)-(6) (West 2010)

¶ 45 I reject, as completely untenable, any argument that this nine-year-old is physically or mentally incapable of exercising the enumerated rights. In reality, she has already "exercised" some of them. She has spoken with an advocate, prepared her testimony with a state's attorney,

been advised when the trial was taking place and testified against the accused, at that time and place, seen a timely disposition of the case, and is presumably aware of the outcome of the criminal prosecution. There is nothing in the record suggesting any inability on her part to make a statement to the court at sentencing or to comprehend that defendant has been punished by conviction and a sentence of four years' probation.

¶ 46 I would, therefore, disagree that S.S. -- the child's mother -- is a victim personally entitled to restitution for the reasons found by the majority and dissent from that finding.