

THIRD DIVISION
December 2, 2015

No. 1-14-0135

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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 17603
)	
PABLO ORTIZ,)	Honorable
)	Timothy Joseph Joyce,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held:* The evidence was sufficient to prove defendant guilty of aggravated criminal sexual abuse and sexual exploitation of a child beyond a reasonable doubt where the victim's testimony was not incredible and the trial court could reasonably infer defendant's intent for sexual gratification.

¶ 2 Defendant Pablo Ortiz was found guilty of aggravated criminal sexual abuse and sexual exploitation of a child and sentenced to two years of sex offender probation. On appeal, Ortiz contends that the State failed to present sufficient evidence to prove him guilty of both crimes beyond a reasonable doubt because the testimony of the minor victim, L.M., and her younger

sister, C.M., was inconsistent and "implausible." He also contends that the State failed to present any evidence that he acted for the purposes of sexual gratification. We affirm.

¶ 3 One July 31, 2010, five-year-old L.M. attended a family birthday party with her parents, Phil M. and Amber M., and her four-year-old sister, C.M. During the party, most of the guests gathered on the back deck to watch the guest of honor open presents. At that time, L.M. was in the house's living room which was connected to the deck by a glass sliding door. According to L.M., Ortiz was also in the living room at the time and she asked him to tickle her legs. He began to tickle her legs, but then "he went up and tickled [her] private" over her underwear. L.M. twice told him "to stop tickling [her] vagina," but he kept tickling her again. He tickled her three or four times. When he would not stop, L.M. got up off the couch and again told him to stop.

¶ 4 One minute later, C.M. came into the room and asked Ortiz to tickle her legs and he "tickled her vagina, too." C.M. got up and left the room. According to C.M., Ortiz lifted up her dress and tickled her "private," but she did not see him touch her sister.

¶ 5 After C.M. left, Ortiz went to the bathroom and left the door open. L.M. moved to the hallway. When Ortiz came back out into the hall, L.M. told him, "[Y]ou left the door open, and that's kind of gross because I am still in here and I am glad I didn't see your penis." Ortiz replied, "What you mean this?" and pulled his pants down to the ground, holding out his penis through the buttons of his underwear.

¶ 6 Around that time, Phil M., entered the house to look for his daughters and saw L.M. sitting on the dining room floor. Ortiz was in front of her with his pants around his knees. His right hand was "over his front, and he was kind of moving around a little." When Phil asked, "What's going on here?" Ortiz "grabbed his pants and ran right into the washroom there." Phil

took L.M. to her aunt and then asked his wife, Amber M., to take L.M. and ask her what had happened.

¶ 7 Phil went back into the house and found Ortiz sitting on the toilet. He told him to leave immediately, calling him a "dirty Mexican" and a "pedophile." Phil punched Ortiz once and took his glasses before leaving the house and calling the police. While Phil confronted Ortiz, Amber spoke with each of her daughters separately. L.M. told her that Ortiz had "tickled her butt and her vagina and that he showed her his penis." C.M. said that Ortiz had "tickled her underwear."

¶ 8 Three weeks later, Lauren Glazier, a child-sensitive interviewer, separately interviewed L.M. and C.M. L.M. told Glazier that she had asked Ortiz to tickle her legs, but he tickled her vagina and butt over her clothing instead. L.M. also told Glazier that Ortiz had come out of the bathroom and shown her his penis. She stated that he took his penis out through the hole in his underwear and that it was "dark beige and that it hung down," and it "curved down." He told her, "Do you mean this?" She also stated, "I think he asked me to touch [his penis], but I didn't." L.M. did not see Ortiz tickle her sister. C.M. told Glazier that "a boy Pablo had tickled her sister's vagina and butt." She also said that he had lifted her dress up and tried "to do something to her, too, but she ran away." C.M. also first stated that she had not seen Ortiz touch her sister, but then stated that she had.

¶ 9 Ortiz and several of his family members gave a different account of events at the birthday party. Ortiz attended the party and was listening to music on an mp3 player. When L.M. and C.M. repeatedly asked him for the mp3 player, he lent it to them. After he later retrieved the device from the girls, they followed him, clinging to his leg and asking for it back. Ortiz and his family all witnessed an individual named "Jeff" tickling the girls during the party.

¶ 10 Later that night, Ortiz stood on the deck and watched as presents were opened. Shortly thereafter, he went inside to use the bathroom. His family members could see into the living room through the glass door, and none of them witnessed Ortiz tickle L.M. or C.M. Entering the bathroom, he closed the bathroom door, pulled down his pants, and sat down on the toilet. L.M. then opened the door and asked to use the mp3 player. When he told her no, she left without closing the door. Ortiz waited until he heard nothing and then pulled his pants up, stood, and moved towards the door. He noticed Phil standing in the doorway, "just moving back and forth." Ortiz told him that L.M. had opened the bathroom door, but he did not respond. Ortiz could tell Phil was drunk and closed the door. He returned to the toilet. After 5 to 10 minutes, Phil came back into the bathroom and called him "a dirty Mexican pedophile." He punched Ortiz and took his glasses. Phil started arguing with people outside the bathroom and later left the house. Ortiz testified that he never touched L.M. or C.M. and did not show L.M. his penis.

¶ 11 The trial court found Ortiz guilty of aggravated criminal sexual abuse and sexual exploitation of a child. It explained that it found L.M.'s testimony "to be very credible," and noted that it was corroborated by Phil's testimony and L.M.'s statements to her mother. But the court found C.M.'s testimony to be "unclear" and "unfocused" due to her young age. Consequently, the court found Ortiz not guilty of the attempted aggravated criminal sexual abuse of C.M. Ortiz appeals.

¶ 12 The issue before us is whether the State proved Ortiz guilty beyond a reasonable doubt of aggravated criminal sexual abuse and sexual exploitation of a child. Due process requires the State to prove each element of a criminal offense beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004), citing *In re Winship*, 397 U.S. 358, 364 (1970). In

considering whether evidence is sufficient, a reviewing court must decide "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." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); See also *Cunningham*, 212 Ill. 2d at 278. A reviewing court will not overturn a guilty verdict unless the evidence is "so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005). On appeal, the reviewing court must resolve all reasonable inferences in favor of the prosecution. *Cunningham*, 212 Ill. 2d at 280. It is the duty of the trier of fact to resolve any minor discrepancies and inconsistencies presented by the evidence. See *id.* at 283. This court may not retry a defendant on appeal. *People v. Milka*, 211 Ill. 2d 150, 178 (2004).

¶ 13 The positive and credible testimony of a single witness is sufficient to support a criminal conviction. *People v. Smith*, 185 Ill. 2d 532, 541 (1999); see also *People v. Calusinski*, 314 Ill. App. 3d 955, 960 (2000) (finding six-year-old victim's testimony sufficient to convict the defendant, particularly where it was corroborated by her later statements to her mother). A reviewing court must give due consideration to the fact that a trial court is able to see and hear the witnesses. *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001). A fact finder's determination of a witness's credibility "is entitled to great deference but is not conclusive." *Cunningham*, 212 Ill. 2d at 279. Where a conviction depends on eyewitness testimony, the reviewing court may find testimony insufficient "only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Id.*; see also *People v. Sutherland*, 317 Ill. App. 3d 1117, 1125-26 (2000) (finding a minor victim's corroborated testimony

sufficient to support conviction for attempted murder). A reviewing court will reverse a conviction based on incredible eyewitness testimony only where that testimony is "improbable, unconvincing or contrary to human experience." *Ortiz*, 196 Ill. 2d at 267.

¶ 14 We consider first whether the evidence was sufficient to support Ortiz's aggravated criminal sexual abuse conviction. The offense of aggravated criminal sexual abuse requires the State to prove beyond a reasonable doubt that a defendant: (1) is over the age of 17 and (2) committed an act of sexual conduct with a victim (3) who is under 13 years of age. 720 ILCS 5/11-1.60 (c)(1)(i) (West 2010). Sexual conduct is statutorily defined, in relevant part, as:

"any knowing touching or fondling by the victim or the accused either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age *** for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1 (West 2010).

The parties do not dispute the ages of Ortiz or L.M. Thus, in regards to his aggravated criminal sexual abuse conviction, the only issue is whether the State introduced sufficient evidence to prove beyond a reasonable doubt that (1) Ortiz touched L.M. in a way encompassed by the statutory definition of "sexual conduct" and (2) he did so for the purposes of sexual gratification or arousal. We address each element in turn.

¶ 15 L.M. testified that Ortiz tickled her vagina through her underwear three or four times despite her repeated protestations. Her statements to her mother and Glazier corroborated her testimony. This evidence supports a finding that Ortiz knowingly touched L.M.'s sex organs through her clothing, or more generally, "any part of the body of a child under 13 years of age." See 720 ILCS 5/11-0.1 (West 2010). Ortiz argues that we must reject L.M.'s testimony because

of inconsistencies between her testimony and earlier statements and between her testimony and that of C.M. He also asserts that L.M.'s account is implausible because she alleged that he touched both her and her sister while the rest of the partygoers were just a short distance away. Yet, the trial court explicitly found L.M.'s testimony to be "very credible." The determination of what weight to give a witness's testimony and the resolution of any discrepancies between witness accounts is a question best suited for the fact-finder. See *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 67; see also *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 51. L.M.'s testimony was not so inconsistent or implausible that the trial court acted unreasonably in accepting it. We must therefore defer to the court's credibility determinations. See *Cunningham*, 212 Ill. 2d at 279-80.

¶ 16 We next determine whether the State presented sufficient evidence to prove beyond a reasonable doubt that Ortiz touched L.M. for the purposes of sexual gratification. Intent to arouse or seek sexual gratification may be proven by circumstantial evidence. See *People v. Balle*, 234 Ill. App. 3d 804, 813 (1992). The intent may also be "inferred solely from the nature of the act." *People v. Burton*, 399 Ill. App. 3d 809, 813 (2010).

¶ 17 L.M. testified that Ortiz repeatedly touched her vagina. By the nature of this act, the trial court could reasonably infer that Ortiz intended sexual arousal or gratification. See *People v. Bailey*, 311 Ill. App. 3d 265, 267-69 (2000) (court reasonably inferred intent for sexual gratification where victim awoke and discovered defendant rubbing her vagina through her jeans); see also *Burton*, 399 Ill. App. 3d at 814-15 (defendant's touching of female's breast "generally carries a sexual purpose"). This inference is bolstered by the fact that Ortiz continued touching after L.M. told him to stop, making any suggestion that his actions were accidental

improbable. See *People v. Ostrowski*, 394 Ill. App. 3d 82, 93-94 (2009)(finding insufficient evidence of sexual intent where evidence did not show that victim was upset or rejected actions). Moreover, according to L.M., he exposed his penis to her shortly after touching her. The juxtaposition of these two inherently sexual actions in close proximity further evidences that Ortiz's intent was also sexual in nature. See *id.* at 92 (Illinois courts consider the conduct of defendant after the act in question when determining intent.) Taking the record in the light most favorable to the prosecution, a rational fact-finder could find beyond a reasonable doubt that Ortiz acted for the purposes of sexual gratification when he touched L.M.

¶ 18 Ortiz analogizes his case to *Ostrowski*, arguing that his conviction should be similarly overturned. In *Ostrowski*, the defendant was convicted of aggravated criminal sexual abuse after he was seen kissing his four-year-old granddaughter on the lips at a festival and the appellate court reversed his conviction. *Id.* at 99. The court noted that the act of kissing another person on the lips is not inherently sexual. *Id.* at 93-94. Moreover, it found that consideration of the defendant's history of familial kisses, the public area where the kisses occurred and other factors supported a finding that the defendant's intent was not sexual. *Id.* The court distinguished the defendant's kissing from actions like "French kisses" which are inherently sexual. *Id.* at 93, citing *People v. Calusinski*, 314 Ill. App. 3d 955, 962 (2000).

¶ 19 Here, L.M. did not accuse Ortiz of kissing her in a public area, but rather the inherently sexual act of touching her genitals while she was alone with him and separated from the rest of the party. There was no history of innocent contact which suggests an innocent motive. Thus, we find *Ostrowski* to be readily distinguishable.

¶ 20 We likewise find misplaced Ortiz' reliance on *In re Matthew K.*, 355 Ill. App. 3d 652 (2005), *In re E.R.E.*, 245 Ill. App. 3d 669 (1993), and *In re A.J.H.*, 210 Ill. App. 3d 65 (1991). All three cases involved minors who were adjudged delinquent of aggravated criminal sexual abuse. The adjudications in each case were reversed based on the finding that the State had adduced insufficient evidence of the minor's intent. *In re Matthew K.*, 355 Ill. App. 3d at 653; *In re E.R.E.*, 245 Ill. App. 3d at 670; *In re A.J.H.*, 210 Ill. App. 3d at 65-66. In each case, the appellate court based its reasoning on the proposition that "it is not justified to impute the same intent into a child's action that one could reasonably impute into the actions of an adult." *In re Matthew K.*, 355 Ill. App. 3d at 655; *In re E.R.E.*, 245 Ill. App. 3d at 673; *In re A.J.H.*, 210 Ill. App. 3d at 72. But 19-year-old Ortiz was not a minor at the time of his offense and thus these cases are inapposite. See *In re Matthew K.*, 355 Ill. App. 3d at 655 ("When the accused is an adult, a fact finder can infer that an accused intended sexual gratification.").

¶ 21 Viewing the record in the light most favorable to the State, we conclude that a fact-finder could rationally determine beyond a reasonable doubt that Ortiz touched L.M.'s vagina for the purpose of his own sexual gratification and therefore committed an act of sexual conduct. We therefore find that the evidence presented at trial sufficiently supported Ortiz's conviction for aggravated criminal sexual abuse.

¶ 22 We next determine whether the evidence supports the conviction for sexual exploitation of a child. Sexual exploitation of a child, as charged, occurs when a person "exposes his or her sex organs, anus or breast for the purpose of sexual arousal or gratification of such person or the child" while "in the presence *** of a child and with knowledge that a child *** would view his or her acts." 720 ILCS 5/11-9.1(a)(2) (West 2010).

¶ 23 L.M. credibly testified that Ortiz showed her his penis. She was corroborated by her father's testimony and her statements to her mother and Glazier. The evidence regarding Ortiz' interactions with L.M. supports the finding that Ortiz exposed his penis knowing that L.M. would view his acts. Additionally, we note that our previous discussion of Ortiz's intent is equally applicable to the conviction for sexual exploitation of a child. The trial court may reasonably infer that a defendant intended sexual gratification based upon the sexual nature of the act. See *Burton*, 399 Ill. App. 3d at 813. Ortiz exposed his penis after L.M. had explicitly indicated she did not want to see it. He did so a short time after repeatedly touching her vagina. Viewing all the evidence in the light most favorable to the State, we find that a rational factfinder could find beyond a reasonable doubt that Ortiz exposed himself to L.M. for the purpose of sexual gratification. As such, the evidence presented at trial was sufficient to support his conviction for sexual exploitation of a child.

¶ 24 We find that the State proved Ortiz guilty of aggravated criminal sexual abuse and sexual exploitation of a child beyond a reasonable doubt. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 25 Affirmed.