2015 IL App (2d) 131342-U
No. 2-13-1342
Order filed October 15, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CF-577
ALBERTO CUEVAS-MENDEZ,	)	Honorable John A. Barsanti,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The State failed to prove defendant guilty beyond a reasonable doubt of criminal sexual abuse, as no evidence indicated that defendant committed his act of sexual conduct by the use of force.

¶ 2 Defendant, Alberto Cuevas-Mendez, appeals his conviction of criminal sexual abuse (720 ILCS 5/11-1.50(a)(1) (West 2012)), arguing that his conviction must be reversed where the State failed to prove that defendant committed an act of sexual conduct by the use of force. For the reasons that follow, we reverse that conviction.

¶ 3 I. BACKGROUND

¶ 4 On August 7, 2013, defendant was charged by indictment with one count of criminal sexual abuse (720 ILCS 5/11-1.50(a)(1) (West 2012)), one count of public indecency (720 ILCS 5/11-30(a)(2) (West 2012)), and three counts of battery (720 ILCS 5/12-3(a)(2) (West 2012)).[1] With respect to the charge of criminal sexual abuse (which is the only offense at issue here), the indictment alleged that defendant "committed an act of sexual conduct with Maria [A.] in that by the use of force said defendant pressed his sex organ into the back of Maria [A.], for the purpose of the sexual gratification or arousal of the defendant or the victim."

¶ 5 The following relevant testimony was presented at defendant's jury trial. Maria testified that, on April 2, 2013, at approximately 5:30 p.m., she was shopping in Village Discount when she noticed that defendant seemed to be following her. Maria walked down a narrow aisle and, as defendant passed her, he touched her buttocks with his hand. Maria did not say anything to him, because she thought that it might have been an accident. Defendant walked away, as if he were going to go outside. Maria continued shopping; she was in an aisle looking at bikinis when she saw defendant standing about 1½ feet away. She was embarrassed to be seen looking at bikinis, so she turned around to the other side of the aisle to look at shorts. As she was looking at shorts, defendant walked behind her. Defendant "touched [her] with his hand" on her arm, and "his penis touched [her] on [her] back." When asked, "[w]hat in particular did you feel," she responded, "[h]is hand and his penis behind me." She turned around and saw defendant's exposed penis. She then "got scared and [she] left." When asked what defendant was doing with his arms, Maria testified: "Just like he wanted to grab me but at that moment, I turned around, and I saw his penis was really standing up, and I was really scared." Defendant's arms

[1] Prior to defendant's jury trial, the State nol-prossed the battery charges.

never went around her, because "[h]e didn't have time." Maria walked over to a store employee, Alma Carrillo, and told her what happened.

¶ 6 Alma testified that Maria approached her and said: " 'Help me, help me, please. There is a guy over there who wants to grab me.' " Alma took Maria to a back room where Amparo Silva, the store manager, was working, and she told her what Maria had said. Alma followed Amparo as she went outside to the parking lot. Alma saw a red car driving quickly out of the parking lot, and she saw Amparo writing something down.

¶ 7 Amparo testified that she was working in the back room when she heard Alma call her name. She saw Alma walking toward her with Maria following behind. Maria was "real red and then she was crying." Alma told her what happened and described the individual and what he was wearing. Amparo exited the back room and saw a man fitting the description leaving the store. Amparo ran outside and said, " 'Excuse me, sir.' " The man turned, looked at her, and ran. Amparo ran behind the man's car and wrote down his license-plate number. Amparo went inside the store and called the police. After the police arrived, Amparo was taken to a location and identified defendant and his vehicle. Amparo also testified concerning the layout of the store. Specifically, she testified that the aisles were made up of clothes racks that were seven feet tall, each with a set of clothing on top and a set of clothing on the bottom; a person could not see over them.

¶ 8 The jury found defendant guilty of criminal sexual abuse and public indecency. Following the denial of defendant's posttrial motion, the trial court sentenced defendant to 30 months' sex-offender probation and 180 days in jail on his conviction of criminal sexual abuse and to concurrent terms of 24 months' probation and 180 days in jail on his conviction of public indecency. Defendant timely appealed.

¶ 9 II. ANALYSIS

¶ 10 Defendant argues that his conviction of criminal sexual abuse (720 ILCS 5/11-1.50(a)(1) (West 2012)) must be reversed where the State failed to prove that defendant committed an act of sexual conduct by the use of force. We agree.

¶ 11 When presented with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). 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.' " (Emphasis in original.) *Id*. (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The reviewing court should not substitute its judgment for that of the trier of fact, who is responsible for weighing the evidence, assessing the credibility of witnesses, resolving conflicts in the evidence, and drawing reasonable inferences and conclusions from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). However, a reviewing court must set aside a defendant's conviction if a careful review of the evidence reveals that it was so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 12 Defendant was charged under section 11-1.50(a)(1) of the Criminal Code of 2012 (720 ILCS 5/11-1.50(a)(1) (West 2012)), which states that a person commits criminal sexual abuse if he "commits an act of sexual conduct by the use of force or threat of force." "Sexual conduct" is defined 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, *** for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1 (West 2012). "Force or threat of force" is defined as "the use of force or violence or the threat of

force or violence, including, but not limited to, the following situations: (1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believes that the accused has the ability to execute that threat; or (2) when the accused overcomes the victim by use of superior strength or size, physical restraint, or physical confinement." 720 ILCS 5/11.01 (West 2012). "There is no definite standard establishing the amount of force which the State is required to prove in order to prove criminal sexual assault, and each case must be considered on its own facts." *People v. Vasquez*, 233 Ill. App. 3d 517, 527 (1992). Here, the State charged that defendant used force (not the threat of force) to "press[] his sex organ" into Maria's back.

¶ 13 We agree with defendant that there was no evidence that defendant used force to commit an act of sexual conduct on Maria, other than the force inherent in the act of sexual conduct, *i.e.*, the touching of Maria's back with his penis. We find *People v. Alexander*, 2014 IL App (1st) 112207, to be instructive on the issue of the use of force. There, the defendant was found guilty of criminal sexual assault. *Id.* ¶ 1. At trial, the victim testified that she fell asleep, fully dressed, lying face down on a bed. *Id.* ¶ 10. She later woke up and found the defendant, her first cousin, on top of her. *Id.* ¶¶ 8, 11. She attempted to push him off of her but was slow to do so. *Id.* ¶ 11. As she finally pushed him off, she felt his penis slide out of her vagina. *Id.* Her pants and underwear were down to her knees. *Id.* She next saw the defendant leaning against the wall, covering his genitals. *Id.* At issue on appeal was whether the evidence was sufficient to prove that the defendant used force to commit an act of sexual penetration on the victim. *Id.* ¶ 52. The First District found that it was. The court stated: "[The] defendant used his position and body weight as inertia to prevent [the victim] from disengaging after she woke up. *** [The victim's] testimony reveals that she struggled to free herself while defendant was lying on her back. As a

result, [the] defendant used force beyond the initial sex act to continue penetrating [the victim] even as she attempted to push him away." *Id.* ¶ 56.

¶ 14 Here, there was no evidence that defendant used any force, beyond the act of touching, to press himself against Maria or prevent her from moving. Maria testified only that defendant "touched [her] with his hand" on her arm and that "his penis touched [her] on [her] back." When asked, "[w]hat in particular did you feel," she responded, "[h]is hand and his penis behind me." She then "got scared and [she] left." None of Maria's testimony established that defendant used the weight or position of his body against her. She testified only that he "touched" her and that, when she turned around and saw his penis, she walked away. This act of touching is inherent in an act of sexual conduct. Although the State contends that defendant exerted the force necessary to sustain the conviction when defendant "used his physical contact with the victim's shoulder to achieve greater leverage to pressure his penis into her lower back," Maria's testimony does not support this claim. Again, she testified only that he "touched" her.

¶ 15 We also disagree with the State's contention that the evidence was sufficient to establish force based on confinement. We find *People v. Satterfield*, 195 Ill. App. 3d 1087, 1097 (1990), instructive on the issue of confinement. There, the defendant was found guilty of criminal sexual abuse. *Id.* at 1090. At trial, the victim testified that the defendant approached her as she sat in her car. *Id.* at 1091. He opened the car door, reached in the car, put his arm around the victim's shoulder, and poked her breast. *Id.* She testified: " 'I couldn't do anything. He was in the door and I had a dog on my lap and my mom was sitting next to me.' " *Id.* at 1092. On appeal, we found that the State proved beyond a reasonable doubt the element of force, based on physical confinement. We stated: "[T]he [victim] testified there was nowhere she could move in order to avoid the defendant's advances. She virtually was pinned in the car and, thus, was physically

confined within the meaning of the statute." *Id*. at 1097. Here, although Maria was standing in an aisle between seven-foot-high clothing racks, there was no evidence that defendant physically confined Maria. To the contrary, Maria testified that, after she saw defendant's penis, she quickly and immediately walked away from defendant and approached an employee without struggle or other means of restraint.

¶ 16 Accordingly, based on the foregoing, we find that the State failed to prove defendant guilty beyond a reasonable doubt of criminal sexual abuse.

¶ 17 III. CONCLUSION

¶ 18 For the reasons stated, we reverse defendant's conviction of criminal sexual abuse. We otherwise affirm the trial court's judgment.

¶ 19 Affirmed in part and reversed in part.