2015 IL App (2d) 140524-U
No. 2-14-0524
Order filed June 16, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CM-3452
ERIK C. McGUIRE,	)	Honorable Robert A. Miller,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice Spence concurred in the judgment.
Justice Hutchinson dissented.

ORDER

¶ 1 *Held:* The State proved beyond a reasonable doubt that defendant exceeded the bounds of reasonable corporal punishment and thus was guilty of domestic battery: the trial court was entitled to find that defendant's repeatedly striking his 15 year-old daughter's bare buttocks, leaving lasting bruising and pain, was unreasonable under the circumstances.

¶ 2 After a bench trial, defendant, Erik C. McGuire, was convicted of domestic battery (720 ILCS 5/12-3(a) (West 2012)) and was sentenced to two years' probation and 60 days of work release. On appeal, defendant argues that he was not proved guilty beyond a reasonable doubt. We affirm.

¶ 3 As pertinent here, defendant was charged with two counts of domestic battery.[1] They alleged that, on May 28, 2013, he knowingly and without legal justification struck K.M., his daughter, on the buttocks with his hand, thereby (1) causing her bodily harm (720 ILCS 5/12-3(a)(1) (West 2012)); and (2) making physical contact of an insulting or provoking nature (720 ILCS 5/12-3(a)(2) (West 2012)). At trial, defendant raised an affirmative defense: that his alleged offense was reasonable parental discipline. He was found guilty of both domestic battery counts.[2]

¶ 4 We summarize the evidence that is pertinent to this appeal. The State first called K.M. On direct examination, she testified as follows. She was born May 24, 1998. In 2013, she resided with defendant and her younger brother, Z.M., in a townhome. Her mother, defendant's former wife, resided elsewhere. On August 18, 2013, while defendant was away on business, K.M. and Z.M. were staying with Patty Ludwig. That day, after speaking to Patty, K.M. went to the Children's Advocacy Center and spoke with Investigator Bruce Malkin.

¶ 5 K.M. testified that, on May 28, 2013, defendant left and dropped off Z.M. at a friend's house. When defendant returned, K.M. came downstairs after eating in her room. Defendant pointed to the basement. K.M. went downstairs. She saw three pillows on the floor from defendant's bed. Next to the pillows was a belt. K.M. knew then that defendant was going to spank her. She sat down. Defendant arrived and ordered her to lie down. He told her to put her face into the pillows so that no one would hear her if she screamed. K.M. complied. At that

[1] Defendant was also charged with three other offenses, which are not at issue here.

[2] The trial court merged the domestic battery-insulting physical contact count into the domestic battery-bodily harm count for purposes of sentencing.

point, K.M. had removed her jacket, but she was still wearing her shirt, bra, underwear, and leggings.

¶ 6 K.M. testified that defendant took her leggings off and also took her underwear "all the way off." After that, he spread her legs apart about 12 to 18 inches. This made K.M. "scared"; she felt that he was invading her privacy. Defendant then spanked K.M. four or five times with his hand. It hurt "a lot." Defendant then gave K.M. her leggings and underwear, and she put them on. He then put her jacket on, zipped it up, and told her, "Children obey your parents."

¶ 7 K.M. testified that, after she dressed, she went upstairs and sat on her bed. Her buttocks hurt. In the bathroom, she looked in the mirror and saw purple and blue bruises on her rear end. At school the next day, her butt still hurt and it was difficult for her to sit through classes.

¶ 8 K.M. testified on cross-examination as follows. At a previous hearing, she had testified about the incident, but she could not remember testifying about any bruises. She could not recall whether she told Malkin about any bruising. Sometime before May 28, 2013, defendant had talked to her about her attitude, which he saw as an ongoing problem. On redirect examination, K.M. testified that the last time that defendant had spanked her was when she was in third grade, or near that time. Before then, the last time was when she was in preschool or kindergarten.

¶ 9 Malkin testified as follows. He was a criminal investigator for the Du Page County State's Attorney's office and had been assigned to the Children's Advocacy Center for several years. On August 21, 2013, he spoke to K.M. there for about 40 minutes. Her demeanor varied; when she talked about the incident of May 28, 2013, she was upset. On August 26, 2013, Malkin and another investigator spoke to defendant at his home about the incident. Defendant said that he spanked K.M. because of her "defiant attitude." Just before he spanked K.M., they "negotiated" her punishment and he agreed to spank her five times. Defendant added that he

pulled down K.M.'s pants to "around her ankles" before he spanked her. Malkin told defendant that it was highly unusual for him to spank his daughter with her pants pulled down. Defendant responded, "[D]on't all parents discipline their children that way[?]" Malkin replied, "[N]o."

¶ 10 The State rested. Defendant testified on direct examination as follows. Usually, he punished K.M. by grounding her or taking away her phone for a time. Before May 28, 2013, he had not spanked her since she was in third grade. He decided to spank K.M. on May 28, 2013, because, eight days earlier, she had been rude and disrespectful to him about doing chores. Z.M. was away at his friend's house when defendant spanked K.M. Just before he did, he sat on the couch, "brainstorming ideas how to punish her." He considered, but rejected, denying her the use of certain articles of clothing for a time. Eventually, they went to the basement.

¶ 11 Defendant testified that, in the basement, he first told K.M. that she was being spanked because of her "attitude." He "proposed ten spanks," but she "negotiated" down to five "spanks" with his hand and not the belt. He had her lie down on her stomach, but he never told her to put her face into the pillows. Defendant initially testified that, throughout the punishment, K.M. kept her pants on and thus could not have spread her legs apart. He spanked her five times with his open hand. He did not intend to hurt her. Defendant then testified that, after the first "spank," K.M. "pulled her pants up and rolled over and sat on her butt." He clarified that he had pulled her pants down "[j]ust past her butt so [his] hand wouldn't get caught up on [*sic*]" when he was spanking her. Her pants were down an inch or two "past the bottom of her butt"; they were never removed.

¶ 12 Defendant testified on cross-examination as follows. On May 28, 2013, he decided to spank K.M. because of the attitude that she had displayed about a week earlier. He waited a week "intentionally," because he had promised himself that he would not spank her while he was

angry. On May 28, 2013, he was "brainstorming" how he should punish K.M., because grounding her had not helped with her attitude problem. Only after he had "brainstormed" for about 30 minutes did he decide to spank K.M. In the basement, before the spanking, defendant told K.M. that, if she insisted on making the loud, high-pitched noises that she was making, she would make them into the pillows. Defendant pulled both K.M.'s pants and her underwear down past her butt, but he did not take them off.

¶ 13 After argument, the trial judge stated as follows. K.M. had testified credibly. Defendant had been "lying through [his] teeth." He had testified inconsistently about whether and how far K.M.'s pants and underwear had been down during the spanking, but he had admitted to Malkin that he pulled her pants down to around her ankles. Yet he had testified that, because K.M.'s pants had been most of the way up, she could not spread her legs, which did not follow at all.

¶ 14 The judge also disbelieved defendant's testimony that he had not been trying to hurt K.M. He noted that defendant had not needed to pull down her pants or underwear at all, but had pulled down both. The only reason was to make the spanking "flesh on flesh" so that it would hurt more. The judge explained, "It would have been a millimeter of fabric between your palm and her buttocks. You just don't need to pull it down except to cause it [*sic*] additional pain." The judge rejected defendant's affirmative defense of reasonable discipline and found him guilty of domestic battery based on both bodily harm and insulting or provoking conduct.

¶ 15 In sentencing defendant, the trial judge stated that he agreed with Malkin that defendant's mode of spanking K.M. was not "normal behavior. Parents don't pull down their daughters's [*sic*] pants and panties to spank them." After defendant was sentenced and his motion to reconsider the sentence was denied, he timely appealed.

¶ 16 On appeal, defendant contends that the State did not prove him guilty beyond a reasonable doubt of domestic battery. Defendant argues specifically that the State failed to prove that his act of spanking his daughter five times with his open hand exceeded the bounds of reasonable parental discipline. For the reasons that follow, we affirm.

¶ 17 In considering a challenge to the sufficiency of the evidence, we ask only whether, after viewing all of the evidence in the light most favorable to the State, any rational fact finder could have found the elements of the offense proved beyond a reasonable doubt. *People v. Ward*, 154 Ill. 2d 272, 326 (1992). The trier of fact is responsible for determining the witnesses' credibility, weighing their testimony, and deciding on the reasonable inferences to draw from the evidence. *People v. Hill*, 272 Ill. App. 3d 597, 603-04 (1995). It is not our function to retry the defendant. *People v. Lamon*, 346 Ill. App. 3d 1082, 1089 (2004).

¶ 18 We note that defendant does not contend that the State failed to prove the elements of the charged offense, including both bodily harm and insulting or provoking contact. Viewed most favorably to the State, the evidence proves both of these elements. First, to prove bodily harm, the State needed only to show that K.M. suffered "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent." *People v. Mays*, 91 Ill. 2d 251, 256 (1982). The State did so. K.M. testified that the spanking caused her pain and produced blue and purple bruises on her behind, making it difficult for her to sit even a day later. Second, the State proved that the spanking was insulting or provoking. K.M. testified that the spanking of her bare posterior made her feel "scared" and that her privacy was being invaded. See *People v. DeRosario*, 397 Ill. App. 3d 332, 333 (2009) (victim testified that unwanted touching made her feel scared, uncomfortable, trapped, and mad).

¶ 19 Thus, to obtain a reversal, defendant must rely on his affirmative defense: that as a parent he had a right to administer reasonable corporal punishment to his minor child. See *People v. Green*, 2011 IL App (2d) 091123, ¶ 14; *In re F.W.*, 261 Ill. App. 3d 894, 898 (1994). Once defendant raised this defense, the State had the burden to disprove it beyond a reasonable doubt by establishing that the discipline defendant used exceeded the standards of reasonableness. *Green*, 2011 IL App (2d) 091123, ¶ 16. On appeal, we ask only whether, viewing all of the evidence in the light most favorable to the State, a reasonable fact finder could have found beyond a reasonable doubt that the State disproved the affirmative defense. *Id.* ¶¶ 18, 19. We conclude that the State met its burden here.

¶ 20 Defendant testified that he sought to punish K.M. for her "attitude" by spanking her. He also testified that he did not do it in anger or intend to hurt her in the process. Yet the evidence, viewed most favorably to the State, established that he pulled down both her pants and her underwear, with the result that the repeated spankings—"flesh on flesh," as the trial judge noted—caused K.M. to suffer bruising, pain, and discomfort that lasted into the next day. The judge reasonably agreed with Malkin that this was not conventional punishment for a teenager. Moreover, the judge reasonably found that defendant could have accomplished his purported end without causing K.M. lasting bruising and pain. The judge properly found that defendant's mode of spanking 15 year-old K.M. was not reasonable discipline. Thus, we hold that the State proved beyond a reasonable doubt that defendant exceeded the bounds of reason in how he punished K.M.

¶ 21 Defendant cites several opinions in which the reasonableness of corporal punishment was at issue. We do not deny that the punishment in these cases was more extreme than that here. See, *e.g.*, *People v. Tomlianovich*, 161 Ill. App. 3d 241, 242-43 (defendant administered 20

blows, with a wooden paddle, to buttocks of 11-year-old child, causing severe and long-lasting bruising). However, "[r]easonableness is the proper standard for the [fact finder] to apply in determining whether parental discipline is justified." *People v. Roberts*, 351 Ill. App. 3d 684, 690 (2004). By that standard, the facts here supported the trial court's finding that defendant exceeded the bounds of reasonable parental discipline. Even if defendant's conduct could be viewed as not particularly extreme, the trial court was entitled to find it unreasonable.

¶ 22 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 23 Affirmed.

¶ 24 JUSTICE HUTCHINSON, dissenting:

¶ 25 With respect, I must dissent. In *Green*, we acknowledged the common-law affirmative defense of reasonable parental discipline when a parent is charged with battery to his or her child. *Green*, 2011 IL App (2d) 091123, ¶ 16. Here, defendant plainly asserted that defense and once it was raised, the State was required, in addition to proving the elements of the offense, to *disprove* the defendant's defense beyond a reasonable doubt. See *id*. (stating that "the State must also prove beyond a reasonable doubt that the discipline used exceeded the standards of reasonableness"). I do not believe the State's evidence met this burden.

¶ 26 At most, the State's evidence showed that defendant administered five open-handed spanks to his 15-year-old daughter's bare buttocks. In its ruling, the trial court did not mention defendant's affirmative defense and it did not evaluate the reasonableness of defendant's use of discipline. The majority treats the trial court's silence on this issue as the court's tacit consideration and rejection of the defense (*supra*, at ¶ 20), but I believe that the court failed to give defendant's defense the consideration it deserved. In short, it appears that the trial court

found defendant guilty for engaging in discipline that was, in the trial court's opinion, unconventional, both because of the victim's age and because her spanking was "flesh on flesh." While I concede that defendant's use of discipline was idiosyncratic—and perhaps indicative of a need for parental counseling—I do not believe that it was so unreasonable as to warrant a criminal conviction. For these reasons, I respectfully dissent.