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2015 IL App (3d) 140002-U

Order filed December 8, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Mercer County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0002
	)	Circuit Nos. 13-CF-20 and 13-CF-36
CHARLES A. COOPER,	)	
Defendant-Appellant.	)	Honorable Walter D. Braud, Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Holdridge and Lytton concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Defendant is not entitled to a new trial as the statement at issue, when viewed in the context of the entire colloquy, was not an invocation of his right to remain silent.

¶ 2 Defendant, Charles A. Cooper, appeals from his conviction of several sexual offenses.

On appeal, defendant argues that a new trial is required because it cannot be determined beyond a reasonable doubt that the purported violation of his right not to testify did not contribute to the guilty verdicts. We affirm.

FACTS

¶ 3

¶ 4

In case No. 13-CF-20, defendant was charged with one count each of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)), indecent solicitation of a child (720 ILCS 5/11-6(a) (West 2012)), and criminal sexual abuse (720 ILCS 5/11-1.50(a)(2) (West 2012)). In case No. 13-CF-36, defendant was charged with one count of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1) (West 2012)) and two counts of sexual exploitation of a child (720 ILCS 5/11-9.1(a)(2), (a-5) (West 2012)). The cases were consolidated and proceeded to a bench trial.

¶ 5

The State's evidence established that the victims, A.J.H. and A.H. were sisters, and Stephanie B. was their mother. Defendant lived in a neighboring house, and A.J.H. and A.H. were friends with defendant's daughter, S.P.-C. In January and February, 2013, A.J.H. and A.H. visited S.P.-C. at defendant's house and stayed overnight once or twice. At the time, A.J.H. was eight years old, and A.H. was seven years old.

¶ 6

In February 2013, defendant was visiting Stephanie at her house when A.H. came home, and became upset when she saw defendant. A.H. said that when she was at defendant's house, defendant pulled down his pants and exposed his penis to A.H. and A.J.H.

¶ 7

Initially, A.J.H. told Stephanie that defendant had not exposed himself to the girls, but A.J.H. later said that this incident had occurred. A.J.H. also told Stephanie that defendant wanted the girls to pull down their pants and A.J.H. complied. Stephanie called the police.

¶ 8

On February 11, 2013, A.J.H. and A.H. were interviewed by the Department of Children and Family Services investigator Patrick Perion. The video-recorded interviews were played for the court.

¶ 9 On the recording, A.J.H. said defendant pulled down his pants and she pulled down her pants out of fear. On another night, A.J.H. was in defendant's bed when defendant licked her vaginal area. Defendant told A.J.H. not to tell anyone about the incident. A.J.H. once saw defendant lick S.P.-C.'s vaginal area, but S.P.-C. did not mind. A.J.H. also said that defendant put his penis in A.J.H.'s mouth.

¶ 10 A.H. said in her interview that she and A.J.H. slept in a bed with defendant. Once when A.H. and defendant were in bed, defendant pulled A.H.'s backside toward his penis. A.H. felt defendant's penis touch her back. One night, in February 2013, defendant pulled down his pants and showed his penis to A.H. and A.J.H. A.J.H. also pulled down her pants.

¶ 11 Child pediatric abuse expert Dr. Barbara Hauri interviewed and examined A.J.H. and A.H. Hauri opined that the details that A.J.H. and A.H. provided during the interviews were consistent with inappropriate contact. The physical exams showed no evidence of contact, but Hauri noted that 95% of children with sexual abuse have no physical findings. Hauri opined that the physical findings were consistent with the children's stories.

¶ 12 After Hauri's testimony the State rested, and the case was continued to the following day. When the case resumed, the following exchange occurred.

"BY THE COURT: People versus Charles A. Cooper, reconvening from yesterday, No. 2013 CF 36 and 2013 CF 20. The defendant in both cases is Charles Cooper, he is here with counsel. State is here by the State's Attorney and First Assistant State's Attorney. We have completed the State's case yesterday and we are on time today to start the defendant's case. It's your show.

BY MR. DALTON: Your Honor, at the outset my client is asking me to ask the Court to find him in (inaudible)—he didn't get to see the entirety of the video—

BY THE COURT; What's that—

BY MR. DALTON; He didn't get to see the entirety of the video, the entirety of the second child—like I said before—I did inform Mr. Cooper of everything that the child has said, he is also indicating that he did not get a complete Doctor's report, I did indicate to Mr. Cooper the Doctor report didn't show any physical evidence as it relates to the allegations—

BY THE COURT; All right, are there any other complaints—

BY MR. DALTON: I believe he feels that maybe he should have an expert to testify on his behalf regarding the children's case—

BY THE COURT; What we are going to do is this, obviously the motion is going to be denied. These complaints are a day late and a dollar short. Mr. Cooper, I am one of the easiest Judges to get along with, my courtroom temperament is pretty even keel, almost always pretty hard to get me out of balance. I understand that this is an important day for you. I am not going to short change your rights, I am not going to let anyone else short change your rights, I don't believe that if you saw the videos it would change anything in this case. However, we are going to let you see the videos right now, would someone in Court personnel set up the camera and we will play them for the Court—here give this—see that—

BY MR. DALTON; Again I did inform him of all the—what the child—

BY THE COURT; Mr. Dalton, your tenacity as an attorney is not questioned by this Court, I have never known you to short circuit anyone and you don't even give me a break, you are pretty tough, so I don't think there's any question about you doing your job—Mr. Cooper—

BY DEFENDANT: Your Honor, also yesterday while there was a break Ms. Meeghan, did you not say to Mr. (inaudible) that you and Dan Dalton have been accused by people down at the jail you guys having something going on, did you or did you not—

BY MS. LEE; What's the relevant to that—

BY THE COURT; Mr. Cooper, Mr. Cooper—

BY DEFENDANT; Did I ask her—

BY THE COURT; Mr. Cooper, Mr. Cooper, this is not TV, I am only going to consider what I have heard in this courtroom, whatever anybody does in their private life and it's going to take a whole lot for me to think the remotest—

BY DEFENDANT; She was sitting right there, he was right there—  
officer—

BY THE COURT; You want to see the video or do you want to have a circus—

BY DEFENDANT; Yes, I want to see it—You are fired—

BY THE COURT; No, he is not fired—

BY DEFENDANT; Yes, he is, I have legal right—

BY THE COURT; Do you want to see the video—

BY DEFENDANT; No, I don't—I want legal rights, I want a new attorney—

BY THE COURT; Show the defendant is indicating he does not want to see the video—

BY DEFENDANT; I want a new attorney—I want it on the record—

BY THE COURT; You will not get a new attorney— now do you want to proceed with no attorney—

BY DEFENDANT; I still get another trial—I am done, you are not going to sell me down the river—

BY MR. DALTON; Your Honor, may I have a moment with Mr. Cooper—

BY THE COURT; Yes, you may have a moment—

BY MR. DALTON: Thank you, maybe five moments—

BY THE COURT; We are not going to clear the courtroom. Mr. Cooper is not going to take over, is there some private area behind that wall—okay, go back there, he will have to be reshackled, everyone else can stay in place—

TIME; 2:35 PM

WHERE UPON THERE IS A SHORT CONFERENCE

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PROCEEDINGS RESUME

BY THE COURT; All right, I think under the circumstances you are going to leave Mr. Cooper shackled and for the record we have had a bit of a disturbance, some of it wasn't quite caught on the audio transcription but the

Court Reporter was present and I indicated to the Court Reporter and the Court record and now for the transcription that the defendant is back in Court with counsel and under the circumstances I think he better stay shackled for his protection and everyone else. Are we ready to proceed.

BY MR. DALTON: Yes, Your Honor.

BY MR. MC HUGH; Yes.

BY THE COURT; All right, Mr. Dalton.

By MR. DALTON; We would call Mr. Cooper to the stand.

BY THE COURT; Mr. Cooper, please come up—

BY DEFENDANT; I am doing this under objection—

BY THE COURT; I will note that for the record."

¶ 13 After the exchange, defendant testified that he lived approximately 200 feet from the home of A.J.H. and A.H. Defendant's daughter, S.P.-C., was friends with A.H. and A.J.H., and the girls spent the night at his house twice while S.P.-C. was present. When A.J.H. and A.H. visited S.P.-C., defendant allowed the girls to watch television on his bed, but he did not sleep in the same room as the girls. Defendant never exposed his penis to A.J.H. and A.H., and he did not touch the girls in any sexual way.

¶ 14 Defendant said that he had a quadruple-bypass surgery in 2012. After the surgery, the doctors discovered a new blockage, and in December or January, defendant underwent surgery to place a stent in his blocked arteries. The stent was placed through defendant's groin, which required defendant to shave his genital area for several months after the procedure. Defendant's heart surgeries left him impotent.

¶ 15 The trial court found that A.J.H. and A.H. were credible and defendant's testimony was not credible. The court found defendant guilty of all of the charged offenses. After a hearing, the court sentenced defendant to 12 years' imprisonment for predatory criminal sexual assault of a child and a consecutive term of 4 years' probation for aggravated criminal sexual abuse.<sup>1</sup> Defendant appeals.

¶ 16 ANALYSIS

¶ 17 Defendant argues that "[b]ecause the court merely 'noted for the record' when the defendant objected to testifying, and failed to tell him that he did not have to testify, the convictions must be reversed and the matter remanded for a new trial—because it cannot be determined beyond a reasonable doubt that the defendant testifying did not contribute to the guilty verdicts." Upon review, we find that defendant's statement, when viewed in the context of the entire colloquy, was not an objection to testifying at trial, but instead, was a continuing objection to defense counsel's representation.

¶ 18 A defendant has a fundamental constitutional right to testify at his trial or to elect not to testify. *Harris v. New York*, 401 U.S. 222, 225 (1971); *People v. Madej*, 177 Ill. 2d 116, 145-46 (1997). The decision of whether to testify belongs to defendant; however, defendant should make that decision with the advice of counsel. *People v. Frieberg*, 305 Ill. App. 3d 840, 851 (1999). The trial court is "not required to advise a defendant of his right to testify, to inquire whether he knowingly and intelligently waived that right, or to set of record defendant's decision on this matter." *People v. Smith*, 176 Ill. 2d 217, 235 (1997). Defense counsel bears the

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<sup>1</sup>The trial court did not enter a sentence on the indecent solicitation of a child, criminal sexual abuse, and two sexual exploitation of a child charges.

responsibility to advise a defendant of whether or not to testify. *People v. Hernandez*, 351 Ill. App. 3d 28, 38-39 (2004).

¶ 19 In this case, we do not believe that defendant's objection was directed at his decision to testify. Prior to the statement at issue, defense counsel notified the court that defendant had not previously seen the victims' video-recorded interviews, and defendant thought that he needed an expert witness to testify on his behalf. Defendant interrupted defense counsel's subsequent conversation with the court to ask the court about a purported rumor. Thereafter, defendant attempted to fire defense counsel, and the court refused to appoint new counsel. The transcript was temporarily stopped to allow defense counsel to meet in private with defendant, and when the proceedings resumed, the court noted that a "disturbance" had occurred. The court ordered that defendant remain shackled during the remainder of the proceedings, and defense counsel called defendant to testify. In response, defendant said "I am doing this under objection." Once defendant took the witness stand, he testified without hesitation or further objection. Viewing the above facts in their totality, we find that defendant's objection constituted a continued opposition to defense counsel's representation instead of an invocation of his right to remain silent and refuse to testify.

¶ 20 Even if we were to find that defendant objected to testifying, the court did not have a duty to advise defendant of his right to remain silent. Defendant was represented by counsel at trial, and counsel was responsible for advising defendant of his right to testify or not testify. *Id.* at 38-39. Defendant does not argue that counsel failed to inform him of this right, and the trial court did not err when it only noted defendant's objection.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Mercer County is affirmed.

