2015 IL App (4th) 130019-U

NO. 4-13-0019

FILED
January 22, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES H. DAVIS, Defendant-Appellant.	))))))))	Appeal from Circuit Court of Champaign County No. 11CF1058 Honorable Thomas J. Difanis, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the evidence was sufficient to sustain defendant's convictions.

¶ 2 In October 2012, a jury found defendant, James H. Davis, guilty of predatory criminal sexual assault and indecent solicitation of a minor. In November 2012, the trial court sentenced defendant to a 35-year prison term for the predatory-criminal-sexual-assault conviction, to be served consecutively to a 15-year term for the indecent-solicitation-of-a-minor conviction.

¶ 3 Defendant appeals, arguing the State failed to prove his guilt beyond a reasonable doubt. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The Charges

¶ 6 In July 2011, the State charged defendant by information with predatory criminal sexual assault, a Class X felony (720 ILCS 5/11-1.40(a)(1) (West 2010)) (count I), and indecent solicitation of a minor, a Class 1 felony (720 ILCS 5/11-6(a) (West 2010)) (count II). In count I, the State alleged defendant, who was 17 years of age or older, committed an act of sexual penetration with T.P. (born April 20, 2006) in that he placed his sex organ on her mouth. In count II, the State alleged defendant, who was 17 years of age or older, with the intent to commit predatory criminal sexual assault, knowingly solicited K.P. (born January 3, 2003) to perform an act of sexual penetration. The information alleged both offenses occurred on July 4, 2011.

¶ 7 B. The Interview at the Children's Advocacy Center

¶ 8 On July 5, 2011, Barbara Traylor, a child-protection advanced specialist with the Department of Children and Family Services, interviewed the minors at the Children's Advocacy Center (CAC). An audio-video recording of each interview was memorialized on a digital video disc (DVD). The record contains a copy of the DVD, as well as a transcript of both interviews.

¶ 9 1. *K.P.'s Interview*

¶ 10 K.P. stated she was eight years old and lived with her mother, Gloria P., and sister, T.P., as well as her brother and aunt. K.P. stated she was sleeping with Gloria when somebody came over to their apartment. K.P. went to her own bed. When K.P. awoke again, T.P. and her brother were already awake. A man was sitting on the couch in the living room and asked K.P. to sit next to him. The man then went into the bathroom.

¶ 11 K.P. went to Gloria's room to ask for food but Gloria denied her request. As K.P. walked back to her bedroom, the man grabbed K.P.'s wrist and told her to "come here." The zipper on the man's pants was open. The man said, "no, come down here," directing her to sit on the floor, and then asked K.P., "you want to suck my d?" K.P. explained the man was referring

to his "private part." Though K.P. would not say the word the man said, she spelled it for Traylor, "D-I-C-K."

¶ 12 When K.P. told the man "no," he zipped his pants back up. K.P. went to go tell her mother. Gloria asked K.P. who was at the apartment, to which K.P. replied, "the boy that was over here last night." Gloria left her bedroom and asked the man about what had just been said. The man denied asking K.P. to perform oral sex on him.

¶ 13 K.P. stated the man came over "yesterday night," while she was in bed with her mother. K.P. left her mother's bed because the man came over. At this time, K.P. did not get a good look at the man because her eyes were "kind of crusty." Traylor asked K.P. whether it was dark outside, to which K.P. replied, "It was like kinda in the morning a little. It was like 1:00 probably. *** [I]t was kinda light, because I was up all night until my mama came back" from her friend's house. At this time, K.P. noticed the man was wearing a black "do-rag" on his head. The man was wearing the same "do-rag" when he asked K.P. to perform oral sex on him.

¶ 14 Traylor asked K.P. what color the man was, to which K.P. replied, "Uh, I didn't actually see that. I told you I didn't actually like see his face *** like really see it." K.P. recalled the man was wearing shorts and a shirt, but could not recall the color of the clothing. Additionally, K.P. recalled the man "was kinda [*sic*] light *** a mixed color or something."

¶ 15 K.P. stated her sister, T.P., was in their bedroom when the man asked K.P. to perform oral sex. Traylor asked K.P. whether T.P. had seen the incident, and K.P. replied, "you got [*sic*] to ask her. I don't know." Traylor then asked K.P. whether the man said anything to T.P., to which K.P. replied, "Yeah, but that's her side of the story." K.P. did not see the man do anything to T.P. because she was sleeping. T.P. did not tell K.P. what the man had done or said to her.

¶ 16 2. *T.P.'s Interview*

¶ 17 T.P. then entered the interview room and gave the following statement. T.P. stated she was five years old and was entering kindergarten in the fall. T.P. knew she was at CAC to speak with Traylor about what a man named "Raveon" did to her and K.P.

¶ 18 T.P. stated the man took "his stuff out and then he put them on my lips." Using a diagram of a man's body typically used in this type of interview, T.P. indicated the man's "stuff" was his penis. T.P. stated the man did this to her while she was in her bedroom.

¶ 19 T.P. told Traylor she originally went to sleep in Gloria's room. At 6 a.m., Gloria directed T.P. to leave her room because a man had arrived. T.P. knew it was 6 a.m. because she saw a clock and knows her numbers.

¶ 20 T.P. told Traylor the man told K.P. to "come here" and then asked her, "do you want to suck my 'd'?" K.P. told the man "no."

¶ 21 T.P. stated she had seen the man—"Raveon"—in her house on prior occasions. T.P. described what "Raveon" was wearing: a black shirt, long black jeans, and black shoes. The man had braided hair but T.P. did not remember "anything on top of his head."

¶ 22 3. *The State's Section 115-10 Motion*

¶ 23 In October 2011, the State filed a motion pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2010)) requesting the trial court to admit K.P.'s and T.P.'s statements to Traylor into evidence. Following a January 2012 hearing, the court granted the State's motion. At trial, the DVD recordings of K.P.'s and T.P.'s statements were played for the jury.

¶ 24 C. Defendant's Jury Trial

¶ 25 In October 2012, the matter proceeded to a jury trial, at which the following evidence was presented.

¶ 26 1. *The State's Evidence*

¶ 27 a. K.P.'s Testimony

¶ 28 The State first called K.P., who was nine years old at the time of her testimony. K.P.'s trial testimony was largely consistent with her previous statement to Traylor. K.P. provided additional information about the incident and subsequent investigation, which follows.

¶ 29 After the incident, the police came to the apartment. Officer Shane Standifer swabbed K.P.'s arm for deoxyribonucleic acid (DNA). Later testimony indicated the swab of K.P.'s arm contained "a very small, minute amount of male DNA." The DNA analysis established defendant did not deposit the male DNA present in the swab.

¶ 30 K.P. also testified regarding a photographic lineup she completed at the direction of Detective Robb Morris of the Champaign police department. The police showed K.P. photographs of six men and she recognized defendant's face as that of her attacker. K.P. placed her initials on a separate form, indicating she had selected the picture of defendant. The assistant State's Attorney then asked K.P. to look around the courtroom to identify her attacker, but K.P. did not point out anyone in the courtroom.

¶ 31 On cross-examination, K.P. testified she does not know when the man entered the house but admitted she told Traylor the man entered the house around 1 a.m. When she woke, K.P. heard two people talking in the apartment—a man and T.P. K.P. then stated she went back to sleep. When she woke up again, which was after the sun had come up, K.P. saw the man sitting on the couch. K.P. did not check the clock at this time.

¶ 32 K.P. testified the man was wearing blue jeans, a black T-shirt "with little skulls on the front," and a black "do-rag" on his head. K.P. could not remember whether defendant was wearing "full-length" jeans or jean shorts.

¶ 33 When asked by defense counsel, K.P. remembered telling Traylor she did not actually see her attacker's face. K.P. then stated she did not tell Traylor she did not see her attacker; rather, K.P. told Traylor she saw him "just a little." K.P. explained, "when I woke up and really did wipe my face and stuff, I did see him. I only told [Traylor] that, because I didn't see him at first when I just woke up. But after I got used to the light, I actually did see him."

¶ 34 Defense counsel asked K.P. how she knew to put her initials by defendant's picture in the photographic lineup when she did not see her attacker's face. K.P. replied, "Because I didn't know that's what I was doing." Later, defense counsel asked K.P. how she knew to choose the photograph in the lineup. K.P. replied, "Because I remembered the guy later."

¶ 35 K.P. testified this incident did not occur in her bedroom. K.P. remembered telling Traylor she was in her room but explained she meant she was in her room before the incident occurred. Additionally, at trial, K.P. did not mention she originally went to sleep in her mother's bed and was asked by her mother to leave her bedroom when a man arrived at the apartment.

¶ 36 b. T.P.'s Testimony

¶ 37 The State next called T.P., who was six years old at the time of her testimony. T.P.'s testimony was largely consistent with her previous statement to Traylor. T.P. provided additional information about the incident and subsequent investigation, which follows.

¶ 38 T.P. did not know the man's name at that time, but her mother subsequently told her the man's name was "Avion." Later that day, the police came to the house. Officer Standifer

swabbed T.P.'s lip for DNA. A stipulation subsequently read to the jury indicated the swab of T.P.'s lip did not contain any male DNA.

¶ 39 T.P. was then asked about the photographic lineup she completed at the direction of Detective Robb Morris. T.P. testified she was showed some photographs by a police officer. T.P. picked one of the photographs and placed her initials on a separate form, indicating she had selected the picture of defendant.

¶ 40 The State asked T.P. whether the man in her apartment that day—the man she called "Avion"—was in the courtroom. The following exchange occurred between T.P. and the assistant State's Attorney:

"A: Not—

Q: Do you see him?

A: I—yes.

Q: I'm sorry?

A: Huh?"

¶ 41 On cross-examination, T.P. stated she remembered telling Traylor she first saw the man in her apartment at 6 a.m. T.P. testified the man was wearing a "do-rag" and "blue jeans." When asked by defense counsel what color defendant's pants were, T.P. stated they were black and red, but "mostly black." T.P. remembered seeing an alligator design on the man's pants.

¶ 42 T.P. did not remember telling Traylor she was in her mother's bedroom, sleeping in her bed. T.P. was in her own bed and not her mother's. T.P. could not remember why she woke up at 6 a.m.

¶ 43 Defense counsel also asked T.P. about the photographic lineup she completed. T.P. testified her mother was in the room when she completed the lineup. T.P. remembered being showed 16 photographs but could not remember why she put her initials on the form accompanying the lineup.

¶ 44 c. Gloria P.'s Testimony

¶ 45 The State next called the victims' mother, Gloria P., to testify. In 2007, Gloria pleaded guilty to aggravated battery and was sentenced to probation, which she completed successfully. Gloria testified, in July 2011, she was living at home with her sister and three children.

¶ 46 Gloria testified, on July 3, 2011, she went to Danville to party and play cards while her children stayed at home with her sister. Gloria returned from Danville around 2 or 3 a.m. Gloria consumed two alcoholic beverages in Danville but was not intoxicated by the time she returned home. When she arrived home, Gloria went to bed.

¶ 47 Gloria testified the next thing she remembered was hearing a knock on the back door around 8:45 a.m. A man named "James" was at the door. At that time, Gloria did not know James' last name, but she later learned it was "Davis." The man went by the street name "Ten Cent." When asked whether James, or "Ten Cent," was in the courtroom, Gloria identified defendant.

¶ 48 Gloria met defendant while walking to the store "a week, maybe two weeks" before the incident. Defendant had been to her apartment two or three times before the incident when her children were not present. Gloria denied being romantically involved with defendant—he was just a friend. When James knocked on the door, he told Gloria he could not

get into his own house, which was only about a block away, and needed to "kill a little bit of time" at her apartment. Gloria let defendant into the apartment.

¶ 49 Gloria and defendant went straight into Gloria's bedroom. The children were in their own bedrooms at this time. Gloria and defendant had a 5 to 10 minute conversation about their Fourth-of-July plans and then went to sleep. Gloria testified the next thing she remembered was defendant waking her up and asking to use the bathroom. Gloria gave defendant her permission and he left Gloria's bedroom.

¶ 50 Gloria testified the next thing she remembered was receiving a telephone call from her mother at 10:16 a.m. At this time, Gloria was alone in her room, leading her to think defendant had left after using the bathroom.

¶ 51 About two minutes after Gloria received her mother's call, K.P. ran into her bedroom, looking nervous but not scared. K.P. said to her mother, "that man out there just told me to suck his d***." Gloria asked K.P. whether the man touched her and then went into the living room to confront defendant, who was sitting on the couch with his legs open and fly unzipped. Gloria confronted defendant about what he had just said to K.P and then told him to leave the apartment. Gloria testified the confrontation took "five minutes or less."

¶ 52 Once defendant left, Gloria went back to her room and continued questioning K.P. T.P. then came into the room and told Gloria "the man on the couch tried to stick his pee-pee in her mouth." T.P. told Gloria the man's penis touched her on her bottom lip. Gloria became upset and went out looking for defendant in the area in which she thought he lived. After searching unsuccessfully for 10 to 15 minutes, Gloria returned to her apartment and called the police. When the police arrived, Gloria told them the incident "had just happened."

¶ 53 The next day, on July 5, 2011, Gloria took both K.P. and T.P. to CAC to be interviewed by Traylor. Gloria and the children had not discussed the incident because "it hurted [*sic*] to hear it" and the officer asked her not to talk about it until after the children's interview with Traylor. Gloria did not know anyone named "Raveon" or "Avion," and she had never heard the name before.

¶ 54 On cross-examination, Gloria testified defendant was an acquaintance. Gloria did not remember telling the police dispatcher the incident had occurred only five minutes before she called. Gloria remembered telling the dispatcher "it had just happened" but did not remember "putting a time on it." Gloria acknowledged the police came back to her apartment on the day of the incident to clarify her timeline.

¶ 55 Defense counsel asked Gloria about the phone call she received from her mother at 10:16 a.m. Gloria testified she told police about this phone call during one of the three interviews she had with the police following the incident. When Gloria confronted defendant, she did not push him out the front door. Defendant left through the back door, and if the police report said differently, it was incorrect.

¶ 56 Gloria denied a man was in her room prior to 6 a.m. and if her children said differently, they were mistaken. Gloria told police defendant was wearing shorts and a white T-shirt. Gloria denied the first time she told police she went out looking for defendant was when Detective Morris questioned her on July 5, 2011.

¶ 57 On July 5, 2011, Detective Morris came to Gloria's apartment and told her defendant could not have committed these offenses at the time she stated it happened because defendant was at Family Dollar buying charcoal and lighter fluid. Gloria testified this interview was not the first time she told police it happened earlier than 10:57 a.m.

¶ 58 When police questioned Gloria on the first day, she was very upset. Gloria explained, "everything happened in a matter of minutes to me." The police officers pressed Gloria to provide an exact time and she kept stating, "it just happened." The following day, Gloria was much calmer when she spoke with police. At this time, Gloria told Detective Morris about the phone call she received from her mother at 10:16 a.m. When Gloria originally told police the incident occurred only "five minutes" before she called police, she was merely estimating the time that had elapsed. To Gloria, it seemed like only five minutes had elapsed because her "adrenalin[e] was pumping, and it all didn't even seem like that long to me."

¶ 59 d. Detective Robb Morris's Testimony

¶ 60 The State called Detective Robb Morris, who testified he was assigned to investigate the sexual assaults of K.P. and T.P. On July 4, 2011, Detective Morris met with defendant in the course of his investigation. Detective Morris learned defendant was born on January 14, 1975, which made him 36 years old at the time of the offense.

¶ 61 In the course of his investigation, Detective Morris obtained security-camera footage from a Walmart in Urbana, Illinois, which showed defendant entering the store shortly after 6 a.m on July 4, 2011. Detective Morris also obtained security-camera footage from the Family Dollar near both defendant's and Gloria's residences. The footage showed defendant entering the Family Dollar at 10:55 a.m. on July 4, 2011. Additionally, the footage showed defendant near the checkout line at 11:05 a.m.

¶ 62 Detective Morris described the neighborhood in which both defendant and Gloria lived at the time of the incident. Detective Morris testified it took him 2 minutes and 45 seconds to walk from Gloria's residence to defendant's. From defendant's residence, it took him 3

minutes and 16 seconds to walk to the Family Dollar from which defendant bought charcoal and lighter fluid.

¶ 63 On February 3, 2012, Detective Morris met with K.P. and T.P. to conduct a photographic lineup. Detective Morris first met with K.P. and asked Gloria to keep T.P. in a different room so he could conduct the lineup one-on-one. Detective Morris gave K.P. instructions as to how to do the lineup that were tailored for her age. Detective Morris explained to each child they were not required to select any of the photographs. Detective Morris told the children their attacker might not be pictured in the lineup.

¶ 64 After he gave her his instructions, no one spoke to K.P. or told her which picture to select. K.P. studied the six-photograph lineup for 30 or 40 seconds and selected defendant's picture. K.P. memorialized her selection by placing her initials on a separate form.

¶ 65 Detective Morris testified after K.P. completed the lineup, she left the room and T.P. entered. Detective Morris again tailored his instructions to suit T.P.'s age. T.P. studied the lineup for about a minute before pointing to the picture of defendant and stating, "That's him." As did K.P., T.P. placed her initials by her selection on a separate form.

¶ 66 On cross-examination, Detective Morris testified he was present for the girls' interview with Traylor but could not recall either child telling Traylor they could not determine their attacker's race. Nor did Detective Morris remember K.P. telling Traylor she did not see her attacker's face. Detective Morris acknowledged that although the offenses allegedly occurred in July 2011, he waited until February 2012, seven months later, to conduct the photographic lineup.

¶ 67 On July 4, 2011, Gloria maintained the incident occurred five minutes before she called the police at 11:02 a.m. While explaining the incident to Detective Morris, Gloria

primarily referred to defendant using his street name, "Ten Cent." Detective Morris knew defendant as "Ten Cent." After speaking with Gloria, Detective Morris went to speak with defendant and ultimately arrested him. Officer Timothy Atteberry transported defendant to the police station while Detective Morris remained at defendant's residence to speak with his girlfriend, Sharnita Patrick.

¶ 68 Detective Morris testified Patrick said she and defendant were at the nearby Family Dollar at the time the incident allegedly occurred. Patrick showed Detective Morris the receipt of their purchase, which indicated defendant and Patrick finished checking out at 11:08 a.m. Based on this information and the surveillance tape from Family Dollar, Detective Morris released defendant from custody.

¶ 69 Detective Morris testified Gloria never called him to clarify the timeline. The next day, Detective Morris spoke with Gloria, attempting to verify what time the incident occurred. By questioning her the next day, Detective Morris thought he would benefit from her having calmed down from the excitement of the previous day. When he originally spoke with Gloria, Detective Morris did not view her "five minutes ago" timeframe as a clear indication of the timeline of events; rather, he viewed it as Gloria' best effort, given the circumstances, to estimate the exact time of the offense.

¶ 70 Detective Morris testified defendant, at the time of his arrest, was wearing "a white T-shirt that was covered by a black T-shirt; dark-colored, very long shorts; and tennis shoes." Detective Morris could not recall whether defendant was wearing a "do-rag" at that time.

¶ 71 Detective Morris also testified Gloria did not tell him she had gone out looking for defendant until he spoke with her on July 5, 2011. It was only after Detective Morris told Gloria defendant was elsewhere five minutes before her phone call to the police that Gloria told

Detective Morris she went out looking for defendant before she made the call. Detective Morris also testified Gloria did not mention the phone call from her mother until he spoke with her on July 5, 2011.

¶ 72 e. Officer Timothy Atteberry's Testimony

¶ 73 The State also called Officer Timothy Atteberry of the Champaign police department. On July 4, 2011, at 11:12 a.m., Officer Atteberry was dispatched to Gloria's apartment. The dispatch indicated an "attempted sexual abuse" had "occurred minutes prior." Officer Atteberry testified the call was placed at 11:02 a.m. When he arrived at the apartment, Officer Atteberry spoke with Gloria. Gloria told Officer Atteberry what had occurred earlier that morning. Officer Atteberry could not recall whether Gloria told him she immediately called the police. Additionally, Officer Atteberry testified he did not interview K.P. or T.P. at this time but spoke with Gloria's sister, Rose, who told him she did not hear or see anything despite being present in the apartment during the incident.

¶ 74 On cross-examination, Officer Atteberry testified when he received the call, the dispatcher told him the incident had occurred "five minutes earlier." Officer Atteberry acknowledged this would mean the incident occurred at 10:57 a.m. When he originally spoke with Gloria, the five-minutes-ago timeframe "was never in doubt." After Detective Morris learned from defendant he was at the Family Dollar around 11 a.m., he directed Officer Atteberry to obtain surveillance video from the nearby Family Dollar and clarify the timeline with Gloria. At this time, Gloria did not change her timeline of what had occurred.

¶ 75 f. Dana Pitchford's Testimony

¶ 76 The State next called Dana Pitchford, who testified she was employed with the Illinois State Police as a forensic scientist. Pitchford testified the samples collected from K.P.

and T.P. were "touch DNA," which results from skin touching a surface and leaving DNA behind. According to Pitchford, everyone leaves DNA differently—some leave a large amount of DNA behind with only a touch, while others deposit very little with the same touch. Further, Pitchford testified "it's not common to always identify a profile just by touching something." Pitchford would not expect to find an attacker's DNA on an arm the attacker touched once or twice. If an attacker touched someone with his penis instead of his hand, Pitchford would not expect to find DNA left behind unless there was bodily fluid on the attacker's penis. Once DNA is left behind, environmental conditions affect its preservation. Putting on clothing or wetting the area could remove any DNA evidence. On cross-examination, Pitchford acknowledged that when someone grabs another, the friction caused by the force and pull would likely leave behind DNA.

¶ 77 Pitchford testified the forensic-science laboratory also received Gloria's sheets, comforter, and "tapings" from her couch. The laboratory did not analyze the bedding and "tapings," however, because Gloria represented defendant had been in her home prior to this occasion and was in her bed on the date in question. Pitchford went on to add that while the presence of defendant's DNA would show defendant had been in the apartment, it would not prove he was there at the time the offense occurred. She also explained that while DNA analysis can identify one's gender, it cannot discern the age of the person to whom the DNA belongs. Therefore, the DNA in the swab of K.P.'s arm could have been from a thirty-year-old man or a two-year-old boy.

¶ 78 g. Barbara Traylor's Testimony

¶ 79 The State called Barbara Traylor, who testified, on July 5, 2011, she interviewed both K.P. and T.P. at CAC. At the time of the interviews, K.P. was eight years old and T.P. was five years old. The DVD recording of each interview was played for the jury.

¶ 80 The State asked Traylor about a child's ability to create a reliable timeline. Traylor testified a child's age affects his or her ability to create a timeline. Traylor would not expect a victim under age 10 to form a coherent timeline of his or her attack.

¶ 81 2. *The Defendant's Evidence*

¶ 82 a. Maurice Conley's Testimony

¶ 83 Defendant presented Maurice Conley as his first witness. Between 2003 and 2011, Conley had been convicted of three felony offenses. On July 4, 2011, Conley first saw defendant at a party in the "wee hours of the morning," around 3 or 4 a.m. When the police broke up the party, defendant asked Conley for a ride and to "hang out." Conley and another man, Tyrone Jasper, left the party with defendant. The three men planned to stay awake until 6 a.m., at which time they could buy more alcohol. Conley, Jasper, and defendant ultimately purchased more liquor at Walmart.

¶ 84 After the men left Walmart, they went to the Woodstone townhomes in Urbana, where they finished "a 12 pack and a fifth." Defendant left after they finished the alcohol. Conley, however, could only estimate the last time he saw defendant was around 8 or 8:30 a.m. Conley estimated it was around 8 a.m. because "it took some time for [the men] to drink" the alcohol they had purchased around 6 a.m. Conley did not know where defendant went after the three men split up.

¶ 85 b. Tyrone Jasper's Testimony

¶ 86 Defendant also presented the testimony of Tyrone Jasper, who had been convicted of four felony offenses since 2003. Jasper's testimony was consistent with Conley's account of what occurred the morning of July 4, 2011. Like Conley, Jasper testified he was not sure what time defendant left. Jasper's "best guess" was defendant left around 9 a.m. Jasper was unable to recall whether defendant left on foot or if someone had picked him up. On cross-examination, Jasper testified he was "probably" intoxicated that night.

¶ 87 c. Sharnita Patrick's Testimony

¶ 88 Defendant then called his ex-girlfriend, Sharnita Patrick, who testified she had two felony convictions—obstruction of justice in 2005 and forgery in 2007. In July 2011, Patrick lived with defendant and her two-year-old daughter. Patrick was no longer romantically involved with defendant.

¶ 89 Patrick testified, on July 3, 2011, defendant left their apartment around 10:30 p.m. and returned home around 4 a.m. Patrick and defendant exchanged "some choice words," which prompted defendant to leave the apartment at about 4:30 a.m. After defendant left, he and Patrick spoke on the phone on four to six occasions. Defendant wanted to know whether Patrick was still upset with him.

¶ 90 Patrick testified defendant came back to their apartment around 8 a.m. Patrick argued with defendant about how he had been out all night before their Fourth of July barbecue. Patrick then told defendant to call his sister, Stephanie Davis, because they needed money from her to buy charcoal and lighter fluid. Defendant called Stephanie "about six times before [he] got a chance to get through." Defendant used a landline telephone and not a cell phone.

¶ 91 As shown by a printout from the telephone company, the phone calls made by defendant to his sister all took place between 8:40 a.m. and 9:23 a.m. After defendant called

Stephanie, he remained at home and continued to argue with Patrick. Because Stephanie needed to get dressed, she did not arrive at defendant's and Patrick's apartment until 10 or 10:30 a.m.

¶ 92 Patrick testified when Stephanie arrived, she gave defendant a $20 bill and left after speaking with defendant for two to five minutes. When Stephanie left, Patrick and defendant waited about 10 to 15 minutes before leaving for the Family Dollar, which is only two blocks from their apartment. When Detective Morris spoke with Patrick, she produced the receipt for their purchases at Family Dollar that day.

¶ 93 On cross-examination, Patrick testified she never gave the phone records to Detective Morris despite "ordering" them two days after she first spoke with him. When she received the records, Patrick took them to the public defender's office. Patrick denied she failed to tell Detective Morris about defendant's calls to Stephanie.

¶ 94 On July 4, 2011, Patrick called defendant for the last time around 6 a.m., and he said he was on his way home. Patrick did not remember telling Detective Morris, during a previous interview, that defendant called her at 7:15 a.m. and told her he was on his way home. Patrick denied telling Morris that defendant arrived home for the second time at 8:40 a.m.—defendant arrived between 8 and 8:30 a.m.

¶ 95 Once defendant arrived home for the second time, Patrick testified, she and defendant waited two hours before they left for Family Dollar. Patrick did not lose sight of defendant in the apartment until they left for Family Dollar.

¶ 96 d. Stephanie Davis's Testimony

¶ 97 Defendant then called his sister, Stephanie Davis, to testify. In 2006, Stephanie was convicted for state benefits fraud. When she got home from working the overnight shift, Stephanie went to sleep and was awakened by a phone call from defendant, who was seeking

$20 to buy charcoal and lighter fluid. Stephanie received the first phone call from defendant's "house number" around 8:40 a.m. Defendant called "repeatedly, probably *** seven times." Stephanie testified she received the last call from defendant at 9:23 a.m. After defendant's last call, Stephanie got up and went to his house. Stephanie testified it took her five or six minutes to get to defendant and Patrick's apartment and she arrived around 9:45 or 9:50 a.m. After giving defendant a $20 bill, she stayed for about 15 or 20 minutes and left. Stephanie was not contacted by police until days before the trial.

¶ 98 On cross-examination, Stephanie testified she answered each one of defendant's seven phone calls to her. The following colloquy took place between Stephanie and the assistant State's Attorney:

> "Q: So what was it, was there something he forgot to tell you?
>
> A: No, he was just rushing me, and I move when I'm ready.
>
> Q: Okay. Basically so your recollection is that he called you at 8:40 and 28 seconds?
>
> A: Mm-hmm.
>
> Q: He called you again less than 40 seconds later to ask why hadn't you come yet?
>
> A: Yeah.
>
> Q: Called you again at the same second. Called you again ten minutes later and said where are you, and then called again in 20 minutes after that and said, where are you?
>
> A: Yes."

¶ 99 3. *The State's Rebuttal Evidence*

¶ 100 The State called Detective Morris in rebuttal. When Detective Morris spoke with Patrick on July 4, 2011, she told him defendant arrived at 8:40 a.m. and remained at the house thereafter. On July 5, 2011, Detective Morris spoke with defendant, who indicated he got a ride and arrived home for the final time around 10 a.m. on July 4, 2011. Defendant related to Detective Morris that he and Patrick left within five or ten minutes of his arrival home. When Detective Morris asked defendant whether he came home briefly around 4 a.m., defendant stated he did not. Finally, during this interview, defendant never mentioned Davis or the phone calls he had made to her.

¶ 101 At the conclusion of this evidence, the jury found defendant guilty on both counts.

¶ 102 D. Posttrial Proceedings

¶ 103 In November 2012, defendant filed a posttrial motion for a new trial. Later that month, the trial court denied defendant's motion and sentenced him to consecutive prison terms of 35 years on count I and 15 years on count II. In January 2013, the court denied defendant's motion to reconsider his sentence.

¶ 104 This appeal followed.

¶ 105 II. ANALYSIS

¶ 106 On appeal, defendant argues the State failed to prove his guilt beyond a reasonable doubt. Specifically, defendant argues his conviction must be reversed because (1) no physical evidence placed defendant in Gloria's apartment or indicated he was the victims' attacker; (2) he presented an alibi defense that was corroborated by both testimonial and physical evidence; (3) K.P. and T.P. could not identify defendant in court and their out-of-court identifications were not reliable; and (4) the victims' mother changed her story once she learned

defendant could prove he was elsewhere at the time she originally told police the incident occurred. Defendant asserts these four bases, taken in conjunction with one another, cast reasonable doubt on his conviction.

¶ 107 When met with a challenge to the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Woods*, 214 Ill. 2d 455, 470, 828 N.E.2d 247, 257 (2005). Our function, as a court of review, is not to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E. 2d 267, 277 (1985). "[I]t is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide what weight should be given to the witnesses' testimony." *Maple v. Gustafson*, 151 Ill. 2d 445, 452, 603 N.E.2d 508, 511-12 (1992). Accordingly, we give great deference to the trier of fact and will reverse only where the evidence is so improbable or unsatisfactory as to raise a reasonable doubt as to the defendant's guilt. *People v. Saxon*, 374 Ill. App. 3d 409, 416, 871 N.E.2d 244, 250 (2007).

¶ 108 A. The Eyewitness Identifications

¶ 109 Defendant argues because neither K.P. nor T.P. could identify him in open court and their out-of-court identifications were unreliable, his conviction is suspect.

¶ 110 First, we note defendant's assertion "there was no in-court identification of defendant" is rebutted by the record. In this case, K.P. did not identify defendant as her attacker in open court. T.P.'s in-court identification testimony is vague—it is difficult to discern from the transcript whether T.P. identified defendant. However, at trial, Gloria identified defendant as the man she saw sitting on her couch after K.P. told her what happened. While Gloria did not personally observe defendant's advances on her two daughters, she testified she saw defendant

sitting on her couch with his pants unzipped immediately after K.P. entered her room and told her, "that man out there told me to suck his d***."

¶ 111 Nonetheless, defendant contends in the absence of an in-court identification, the State relied on the minors' out-of-court identification of defendant during the photographic lineup. Defendant acknowledges the propriety of this procedure (see *People v. Bowen*, 298 Ill. App. 3d 829, 835-36, 699 N.E.2d 1117, 1121 (1998)) but contends K.P.'s and T.P.'s out-of-court identifications of defendant are not reliable. Specifically, defendant contends the photographic lineups are unreliable because seven months elapsed between the date the offense was committed and the date the girls identified him in the lineup. Additionally, defendant asserts the disparities between K.P.'s and T.P.'s descriptions of their attacker casts further doubt upon their identifications.

¶ 112 In evaluating the reliability of a witness's identification of a criminal defendant, courts are guided by the factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972). *People v. Slim*, 127 Ill. 2d 302, 307, 537 N.E.2d 317, 319 (1989). These factors include:

> "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Id.* at 308, 537 N.E.2d at 319.

¶ 113 Defendant focuses on the time that elapsed between the assaults and the photographic lineup. Specifically, defendant contends seven months passed between the offense and the date the girls selected defendant's photo from the lineup, which renders the minors'

identification unreliable. While the seven-month lapse between the crime and the minors' identifications might be significant, it goes only to the weight of the testimony, making it a question for the jury. *People v. Holmes*, 141 Ill. 2d 204, 241-42, 565 N.E.2d 950, 967 (1990). In this case, the jury was instructed to weigh the identification testimony in accordance with the five factors set forth in *Slim*. See Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000) (identification testimony). Defense counsel cross-examined Detective Morris about the seven-month lapse, yet the jury found the victims' out-of-court identifications sufficiently reliable. Accordingly, we find the seven-month lapse, standing alone, did not render the identification unreliable.

¶ 114 Defendant also notes the inconsistency between K.P.'s and T.P.'s descriptions of the perpetrator, both to Traylor and during their testimony at trial. Specifically, defendant points out K.P. and T.P. both testified their attacker was wearing blue jeans and a "do-rag," but, during her interview with Traylor, T.P. stated defendant was not wearing anything on his head. Additionally, K.P. testified the man was wearing long pants but told Traylor he was wearing shorts. Finally, T.P. later corrected her testimony, stating defendant's pants were "mostly black," with red "on the side," and contained an alligator design, which were unusual features not reported by K.P. at any time.

¶ 115 Although K.P.'s and T.P.'s descriptions of their attacker were not wholly consistent, minor variances in witnesses' accounts are to be expected where the witnesses viewed their attacker under traumatic circumstances. See *People v. Calabrese*, 398 Ill. App. 3d 98, 124, 924 N.E.2d 6, 27 (2010); *People v. Brooks*, 187 Ill. 2d 91, 133, 718 N.E.2d 88, 112 (1999). Additionally, it was the jury's responsibility to resolve the inconsistency between the victims' description of their attacker's clothing. *Slim*, 127 Ill. 2d at 308, 537 N.E.2d at 319. In this case,

defense counsel fully explored these variances during his cross-examination of K.P., T.P., and Traylor. The jury apparently resolved the inconsistencies against defendant and we find no reason to disturb this finding.

¶ 116 Further, Detective Morris's description of what defendant was wearing at the time of his arrest could explain these inconsistencies. Detective Morris recalled defendant was wearing "a white T-shirt that was covered by a black T-shirt[,] dark-colored, very long shorts, and dark tennis shoes," but he could not remember whether defendant was wearing a "do-rag." The fact defendant was wearing "very long shorts" could explain why K.P. originally told Traylor her attacker was wearing shorts but, at trial, testified he was wearing pants. The fact defendant's shorts were "dark colored" could explain why T.P. stated her attacker was wearing both "blue jeans" and jeans that were "mostly black."

¶ 117 Moreover, sufficient safeguards were in place to ensure the reliability of the photographic lineups. Detective Morris explained he tailored his instructions to K.P.'s and T.P.'s age. Detective Morris explained to each child they were not required to select any of the photographs. Detective Morris told the children their attacker might not be pictured in the lineup. Neither Detective Morris nor Gloria told the victims which photograph to select. Additionally, each minor completed the lineup outside the presence of the other minor. In light of Detective Morris's testimony, a reasonable jury could have found K.P.'s and T.P.'s out-of-court identifications reliable.

¶ 118 B. The Change in Gloria's Account of July 4, 2011

¶ 119 Defendant asserts Gloria changed her story when she learned defendant had an alibi. Defendant contends only one conclusion can be drawn from the fact she changed her story: Gloria wanted to implicate defendant for this offense.

¶ 120 Where a finding of guilt rests on eyewitness testimony, "a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 279, 818 N.E.2d 304, 308 (2004). "It has long been the province of the trier of fact to determine the effect of prior inconsistent statements upon the credibility of a witness since the fact of an inconsistent extrajudicial statement does not, *per se*, destroy the probative value of testimony, and the trier of fact may accept the credibility of the witness notwithstanding the impeaching inconsistent statement." *People v. Pavelich*, 76 Ill. App. 3d 779, 782, 395 N.E.2d 202, 204 (1979). We give great deference to the jury's decision to accept witnesses' testimony, as the jury saw and heard the witnesses and is thus in a superior position to judge their credibility. *Cunningham*, 212 Ill. 2d at 280, 818 N.E.2d at 308.

¶ 121 In this case, Gloria's account of the events changed over the course of the police investigation. The record shows Gloria, on July 4, 2011, called the police at 11:02 a.m. and reported an attempted sexual assault had occurred at her residence five minutes prior. Later that day, when Gloria spoke with Officer Atteberry, she again related the attack occurred only minutes before she called the police. After speaking with defendant and Sharnita Patrick, the police obtained video from the nearby Family Dollar and learned defendant was in the store five minutes before Gloria called the police. Based on this information, Detective Morris released defendant from custody.

¶ 122 The next day, Detective Morris interviewed Gloria to obtain more details and make certain of the timeline of events. According to Detective Morris, Gloria seemed "much calmer" and appeared to be thinking more clearly than she was the previous day. At this time, Gloria indicated she was awakened by a phone call from her mother at 10:16 a.m. Shortly

thereafter, K.P. entered Gloria's bedroom and told Gloria what defendant said to her. After Gloria confronted defendant and told him to leave the apartment, T.P. told Gloria what defendant had done to her. Gloria, upset that she had let defendant leave before finding out about his encounter with T.P., left the apartment to look for defendant. After looking for approximately 15 minutes, she called the police and reported the assaults.

¶ 123 Further, Gloria explained her "adrenalin[e] was pumping" when she first called the police, and she was attempting to convey the incident had occurred "not too long before" she called the police. Additionally, Gloria indicated she told the police she was not sure of the actual time but, when pressed to provide a time, she estimated it was "five minutes" before she called.

¶ 124 Defendant analogizes Gloria's varying statements to those of the victim in *People v. Herman*, 407 Ill. App. 3d 688, 945 N.E.2d 54 (2011). In *Herman*, the defendant, a police officer, was convicted of aggravated criminal sexual assault, criminal sexual assault, kidnaping, and official police misconduct. The victim, a self-described crack-cocaine addict, initially stated the defendant assaulted her sometime after 5:25 a.m., while the defendant was on duty. *Id*. at 688-89, 945 N.E.2d at 55. Throughout the course of the investigation, the victim related her story to several police officers and medical personnel. *Id*. at 705, 945 N.E.2d at 68. The victim's timeline of the encounter varied several times—she related it occurred anywhere between 3 and 5 a.m. *Id.*

¶ 125 At trial, the defendant's theory was that there was a consensual encounter between the victim and him earlier in the evening, prior to his being on duty, and that the victim had a motive to fabricate a rape for money to support her drug addiction. *Id*. at 689, 945 N.E.2d at 55. The defendant presented evidence of the victim's attempt to extort $5,000 from him. *Id.* at 698, 945 N.E.2d at 62.

¶ 126 The First District reversed the defendant's convictions. The court first noted the physical evidence "was as consistent with defendant's testimony of a consensual encounter as it was with [the victim's] testimony of force," which meant the prosecution's case "rested almost entirely on the credibility of [the victim]." *Id.* at 704, 945 N.E.2d at 67. The court found the victim's testimony was "fraught with inconsistencies and contradictions, most notably related to the time line of events related to the encounter." *Id.* at 705, 945 N.E.2d at 68. In contrast, the court found the defendant's alibi testimony was "internally consistent, unimpeached and unrebutted." *Id.* at 708-09, 945 N.E.2d at 70. The court recognized it was the province of the fact finder to resolve the inconsistencies but determined the inconsistencies in the victim's story were not "minor" and "made it impossible for any fact finder reasonably to accept any part of it." *Id.* at 707, 945 N.E.2d at 69.

¶ 127 *Herman* is distinguishable. In this case, Gloria lacked even an arguable motive to fabricate defendant's involvement. In *Herman*, on the other hand, the defendant presented evidence showing the victim had a motive to fabricate her story and, in fact, the evidence showed the victim in *Herman* had attempted to extort money from the defendant to support her drug addiction. Additionally, the inconsistencies in Gloria's account were minor. Her timeline changed only once, by a matter of 41 minutes, whereas in *Herman*, the victim's timeline changed several times and gave a two-hour window during which the offense occurred. Further, Gloria adequately explained the development of her timeline. She stated she was upset when she gave her statements on July 4, 2011. Gloria testified it seemed to her as if it all happened in a matter of minutes. Before giving her statement on July 5, 2011, Gloria was much calmer and thinking clearly. In fact, Detective Morris viewed Gloria's original "five minutes ago" statement as her

best effort to estimate the time given the circumstances. Finally, we note, unlike the defendant's alibi in *Herman*, defendant's alibi here was impeached and contained several inconsistencies.

¶ 128 Additionally, the jury was instructed to view a witness's testimony with heightened scrutiny where that witness previously provided an inconsistent statement. See Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000) (prior inconsistent statements). Defense counsel fully explored the inconsistencies in Gloria's accounts during his cross-examination of Gloria, Detective Morris, and Officer Atteberry. The jury was charged with the responsibility to resolve the inconsistencies and the effect of her prior statement to police. *Pavelich*, 76 Ill. App. 3d at 782, 395 N.E.2d at 204. The jury did so against defendant and we see no reason to disturb its findings.

¶ 129 Further, based on Gloria's testimony explaining the change in her story, the jury could reasonably discount her initially stated timeline as being an inaccurate estimate of when the incident took place. This is especially true given the absence of any evidence showing an apparent bias or motive to lie. Accordingly, we find no reason to disturb the jury's finding of guilt based on the fact Gloria changed her story the day after the offense.

¶ 130 C. Lack of Physical Evidence

¶ 131 Defendant argues the unreliability of the identification of him and Gloria's testimony, coupled with the fact "no physical evidence linked [him] to either of the girls, or could even show that he was ever present in [Gloria's] residence," casts reasonable doubt on his conviction. In fact, defendant asserts, the DNA test results were exculpatory because (1) no male DNA was recovered from the swab of T.P.'s lip and (2) defendant was excluded as being the donor of the male DNA found in the swab of K.P.'s arm. We disagree.

¶ 132 While it is true defendant's DNA was not found on the swabs taken from either victim, a lack of physical evidence in a sexual-assault case is not fatal to the State's case. *People v. DuPree*, 161 Ill. App. 3d 951, 961, 514 N.E.2d 583, 589 (1987). Additionally, the fact defendant was excluded as a possible donor of the male DNA found in the swab of K.P.'s arm is of no consequence, given the fact K.P. lived with her two-year-old brother, who could have deposited DNA onto K.P.'s arm. Further, despite the State's failure to present physical evidence linking defendant to Gloria's apartment, "[t]he lack of physical evidence in a case does not raise a reasonable doubt where an eyewitness has positively identified the defendant as the perpetrator of the crime." *People v. Reed*, 396 Ill. App. 3d 636, 649, 919 N.E.2d 1106, 1116 (2009). In this case, as discussed herein, three eyewitnesses identified defendant as K.P.'s and T.P.'s attacker. Accordingly, a rational trier of fact could have accepted the identification testimony over the lack of physical evidence linking defendant to the victims and Gloria's apartment.

¶ 133 Moreover, Dana Pitchford provided a reasonable explanation as to why DNA evidence linking defendant to this case was not recovered. Pitchford explained it is not common to leave a DNA profile behind by just touching something. Also, the forensic-science laboratory declined to test Gloria's bedsheets, comforter, and the "tapings" because Gloria indicated defendant had been in her apartment prior to July 4, 2011. Pitchford explained because DNA evidence does not indicate *when* the DNA was deposited, those items could not show defendant was in the apartment *at the time the offenses occurred*. The jury was entitled to accept Pitchford's testimony to explain the lack of physical evidence linking defendant to the crime scene. *Gustafson*, 151 Ill. 2d at 452, 603 N.E.2d at 511-12.

¶ 134 D. Defendant's Alibi

¶ 135 Finally, defendant asserts he presented a credible alibi defense that was corroborated by physical and testimonial evidence. Defendant argues his plausible, substantiated alibi, coupled with the uncertainty surrounding K.P.'s and T.P.'s identification and Gloria's testimony, is sufficient to warrant reversal.

¶ 136 "The weight to be given alibi evidence is a question of credibility for the trier of fact," and "there is no obligation on the trier of fact to accept alibi testimony over positive identification of an accused." *Slim*, 127 Ill. 2d at 315, 537 N.E.2d at 323. However, a court may reverse a conviction where the defendant presents uncontradicted evidence of an alibi and uncertainty surrounds the identification of the defendant. *People v. McGee*, 21 Ill. 2d 440, 445, 173 N.E.2d 434, 437 (1961).

¶ 137 Here, defendant presented an alibi showing his whereabouts during the morning on July 4, 2011. The surveillance videos from Walmart and Family Dollar show defendant was in those stores at the time he said he was. Additionally, the phone records corroborate defendant's alibi by showing calls were made from Sharnita Patrick's residence to Stephanie Davis's residence.

¶ 138 However, defendant's witnesses were impeached and his alibi contained several inconsistencies. For instance, Sharnita Patrick testified defendant called Stephanie Davis "about six times before we got a chance to get through," whereas Davis testified she answered each one of defendant's phone calls that morning. Maurice Conley and Tyrone Jasper each testified they were drinking alcohol with defendant in the morning on July 4, 2011, and neither could recall what time defendant left. Conley testified he last saw defendant around 8 or 8:30 a.m., while Jasper's "best guess" was defendant left "around [9 a.m.]" When defendant first spoke with Detective Morris, he stated he went out on July 3, 2011, and did not return home until 10 a.m.

However, Patrick testified defendant returned home around 4 a.m., left by 4:30 a.m., and then returned, for the final time, around 8 a.m.

¶ 139 The jury was entitled to judge the credibility of defendant's witnesses and to settle the inconsistencies in defendant's alibi against defendant. *Slim*, 127 Ill. 2d at 315, 537 N.E.2d at 323. The jury was not bound to accept his alibi. *Id*. Further, as shown above, the eyewitness identifications of defendant were sufficiently reliable to sustain defendant's conviction. Accordingly, we conclude a rational trier of fact could have found the essential elements of the charged offenses beyond a reasonable doubt.

¶ 140 III. CONCLUSION

¶ 141 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 142 Affirmed.