2015 IL App (4th) 130587-U

NO. 4-13-0587

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 20, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
BRIAN BOWALD,	)	No. 13CF9
Defendant-Appellant.	)	
	)	Honorable
	)	Charles M. Feeney,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Pope and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The evidence is sufficient to support the conviction of count I of the indictment, charging defendant with predatory criminal sexual assault of a child.

(2) The sentences are not an abuse of discretion.

¶ 2 Defendant, Brian Bowald, is serving an aggregate prison sentence of 66 years for multiple counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008); 720 ILCS 5/11-1.40(a)(1) (West 2012)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008); 720 ILCS 5/11-1.60(c)(1)(i) (West 2012)). This is a direct appeal by him. He argues the State failed to prove him guilty of count I of the indictment, the count alleging he committed predatory criminal sexual assault of a child by penetrating the victim's vagina with his penis. He also argues that 15 years' imprisonment for each of the counts of predatory criminal sexual assault of a child is too harsh.

¶ 3 Looking at the evidence in the light most favorable to the prosecution, we conclude a rational jury could find defendant guilty, beyond a reasonable doubt, of count I of the indictment. We are unconvinced the sentences are an abuse of discretion. Therefore, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. The Indictment

¶ 6 In February 2013, a grand jury returned an indictment, which charged defendant with four counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008); 720 ILCS 5/11-1.40(a)(1) (West 2012)) and five counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008); 720 ILCS 5/11-1.60(c)(1)(i) (West 2012)). The alleged victim was B.B., born December 7, 2002. According to the indictment, defendant repeatedly had sexual contact with her during the period of January 1, 2010, to January 14, 2013, when she was as young as 7 and as old as 10.

¶ 7 Specifically, the four counts of predatory criminal sexual assault of a child alleged that defendant placed his (1) penis in her vagina, (2) mouth on her vagina, (3) finger in her vagina, and (4) finger in her anus. The five counts of aggravated criminal sexual abuse alleged that he (1) placed his penis on her buttocks, (2) placed her hands on his penis, (3) placed his mouth on her breasts, (4) placed his hands on her breasts, and (5) ejaculated onto her unclothed body.

¶ 8 B. Pertinent Evidence in the Jury Trial

¶ 9 1. *White's Interview of B.B.*

¶ 10 In this appeal, defendant claims the evidence was insufficient to convict him of count I of the indictment, the count charging him with placing his penis in the victim's vagina.

He does not challenge his convictions of the other counts. Therefore, we will discuss only the evidence pertinent to count I.

¶ 11 In the jury trial, which was held in May 2013, the State called B.B. as a witness, and she testified to various sexual offenses that defendant had committed against her. She testified to all the offenses *except* the offense in count I: she never testified he had put his penis in her vagina.

¶ 12 Even so, the jury heard B.B. say that defendant had put his penis in her vagina: the jury heard her say so not in her testimony, but in an audio-video recording of her interview with Tara White of the Children's Advocacy Center. White interviewed B.B. on January 16, 2013, and in the jury trial, the prosecutor played the digital video disc (DVD) of the interview.

¶ 13 The DVD is in the record. When answering White's questions in the interview, B.B. had a tendency, like many children her age, to say "uh-huh," with an upward intonation, for an affirmative response and "uh-uh," with a downward intonation, for a negative response. In our transcription, we will adhere to her diction, but we will add "yes" or "no" in brackets. We will signify a trailing off or a pause by an ellipsis consisting of three periods. Our transcription begins in the midst of the interview:

> "Q. You told me about Brian using his fingers and his tongue. Has he ever used any other part of his body?
>
> A. Um, no. And his . . . that's all he does. It's his tongue, his hands.
>
> Q. OK. His tongue and his hand?

A. Oh, and there—and then he comes to when I'm, like, cleaning my room, he comes up to me, and his wiener touches my butt, which makes me very vicious.

Q. OK. He comes up to you, and his wiener is touching your butt?

A. [Nods her head].

Q. Can you tell me about that?

A. Well, one day I was getting changed, uh, and in my room, while my door was closed, with my sign on it, and he came in, and I looked behind me: it was touching my butt.

Q. OK. Were his clothes on or off?

A. Uh, his pants were off. His shirt was on.

Q. His pants were off? OK. You said you were changing. Were . . . so did you have underwear or pants on?

A. Um, I had underwear on—

Q. —OK—

A. —because I was changing to PJs.

Q. OK, and you said that his wiener touched your butt?

A. Uh-huh [(yes)].

Q. OK, um, was that on the outside of your underwear or on your skin?

A. On my skin. He put it inside it.

Q. He put it inside?

A. My underwear, yeah.

Q. OK, did it go on the outside of your butt or the inside of your butt?

A. Out.

Q. Out? OK. So, he just touched you with it?

A. Uh-huh [(yes)].

Q. Did anything come out of his wiener?

A. Uh-uh [(no)].

Q. OK. OK. Has that ever happened before?

A. It's always happened.

Q. With him touching you with his wiener? OK. Has he touched you anywhere else on your body with his wiener?

A. Uh, I think on the other parts he has once."

As B.B. gave that answer, she looked to her left, at a drawing of a naked girl, depicted front and back, which was affixed to an easel on the wall. Earlier in the interview, as she and White were going over the drawing to reach an understanding of what B.B. called different parts of the body, B.B. said she typically called the vagina "other parts." Accordingly, with a black felt marker, White circled the vaginal area in the drawing and labeled it, in block letters, "other parts." With the prior understanding that "other parts" meant the vagina and with the drawing so annotated, B.B. told White she thought defendant had once touched her "other parts" with his "wiener." White then asked her:

"Q. OK. Do you remember that?

A. Uh-uh [(no)].

Q. OK. OK. But you think that maybe he has touched your other parts?

A. Uh-huh [(yes)].

Q. OK. On the outside or the inside?

A. Um, sometimes on the inside and sometimes the out.

Q. Sometimes on the inside? OK. Um, so that has happened more than once?

A. It happened twice or three—three times or twice.

Q. OK. OK. Uh, can you tell me about that?

A. Um, it's hard to explain. Um, he, like, I one day, I was cleaning my room, and I had a nightgown on. It was in the summer, so . . . um, and he came up to me, behind me, pulled my shirt and nightgown up and pulled my underwear down and did, uh, my, touched it with my other parts.

Q. OK. He touched you with what?

A. His wiener.

Q. OK. So you had a nightgown on?

A. Uh-huh [(yes)].

Q. And he pulled that up, and he pulled your underwear down?

A. Uh-huh [(yes)].

Q. And he touched your other parts with his wiener?

A. Uh-huh [(yes)].

Q. OK. Did that go on the inside or the outside?

A. Um, it actually went on the inside.

Q. It went on the inside? OK. Do you remember how long that went on for?

A. Um, I can't.

Q. OK. That's OK. Um, what did that feel like?

A. It felt really gross.

Q. It felt really gross? OK. Do you know, um, if anything like that gunk came out of his wiener?

A. It didn't.

Q. It didn't. OK. Do you know why he stopped touching you?

A. He never did yet, that . . .

Q. I mean, um, I'm sorry. That was a bad question. When, um, that time that you were telling me about with the nightgown and he touched you with his wiener, do you know why he stopped that time?

A. Um, I think he might have heard somebody coming.

Q. OK.

A. Anytime somebody comes, he stops, even though I want him to."

¶ 14 2. *The Testimony of Maureen Hofmann*

¶ 15 Maureen Hofmann testified she was an advanced practice nurse at the Pediatric Resource Center, a doctor's office in Peoria that examined children who allegedly had been neglected or physically or sexually abused. She was certified as an advanced forensic nurse and as a pediatric sexual assault nurse examiner. She had examined 250 children, 240 of whom had been brought in because they might have been sexually abused.

¶ 16 Hofmann evaluated B.B. on January 16, 2013. She asked B.B. if she "ever had any pain from [her] front or [her] back private parts." B.B. responded: " ['Y]eah, my front.['] " The prosecutor asked Hofmann:

> "Q. Did you ask her anything based upon her statement to you, ['Y]eah, from my front[']?
>
> A. I said, ['C]an you tell me more about that[?']
>
> Q. Did she respond?
>
> A. She said, ['W]ell, when he touches me and sticks his fingers in there, it hurts.[']
>
> Q. Based upon her stating that, did you ask any other questions?
>
> A. I asked her then if she had ever had any bleeding from her front private parts or her back private part.
>
> Q. Did she respond to that question?
>
> A. She said, [']I would go to the bathroom, I would check, and two times there was blood.[']
>
> * * *

Q. When you asked her if there was anything else she wanted to—more details she wanted to provide to you, and she said, ['N]o[']; is that right?

A. Yes.

Q. Okay. What were the results of the examination?

A. B.B. had a normal physical exam, and she had a normal external anal/genital exam.

Q. What does that mean as far as being normal?

* * *

A. A normal genital exam means that the tissue in her anal/genital area looked as it should. What we are looking at is the tissue in all of the vaginal area, and all of the anal area, and then taking a very close look at the tissue called the hymen. And the hymen is the name of the tissue that surrounds the opening to the vagina."

¶ 17 Hofmann explained that the mucosal tissue of the hymen healed quickly and therefore it was uncommon to find an injury more than 72 hours after the infliction of a trauma. Also, she explained, the hymen was elastic; because it stretched, it was not easily injured.

¶ 18 C. The Verdicts

¶ 19 Again, the jury found defendant guilty of counts I to IV, which charged him with predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008); 720 ILCS 5/11-1.40(a)(1) (West 2012)), and counts V to IX, which charged him with aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008); 720 ILCS 5/11-1.60(c)(1)(i) (West 2012)).

¶ 20 D. The Sentencing Hearing

¶ 21 In June 2013, the trial court held a sentencing hearing. The parties stipulated that defendant had one previous felony conviction, from 2002: the offense was unlawful restraint of a 17-year-old, Victoria Bowald (born September 14, 1985). On the positive side of the ledger, defendant, who was 51 years old, had been employed all his life, and letters from colleagues, former foster children, and community leaders attested to his good character and cited many instances of his service to the community.

¶ 22 The trial court gave a "significant amount of weight" to the previous felony conviction, considering that it was against a minor. The court acknowledged defendant's industry and his contributions to the community, but the court regarded his respectable persona as a cover for serious wrongdoing. The court said:

> "There's no—it's hard to envision how somebody who beyond any doubt has done such great things in the community, has been a positive influence on many young people, has operated a business, has dedicated himself as evidenced by the letters to the—gratuitously to the well-being of others. And for those that enjoy fiction, it's a Dr. Jekyll and Mr. Hyde type situation. Because the very positive things that you did mask the darkness that—the great crime and the great harm done to an innocent child at your hands over a significant period of time and on repeated occasions."

¶ 23 Deeming the protection of "society and future young people" as more important than "the end of [defendant's] life," the trial court imposed 15-year prison terms on each of the first four counts of the indictment, ordering that those terms run consecutively. The court

imposed six-year prison terms on counts V, VI, and IX and four-year prison terms on counts VII and VIII, ordering that those terms run concurrently with each other but consecutively to the first four counts.

¶ 24 In July 2013, the trial court denied defendant's motion for a new trial as well as his motion to reduce the sentences.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 A. The Sufficiency of the Evidence as to Count I

¶ 28 Defendant claims the evidence is insufficient to support his conviction of count I, the count charging him with committing a predatory criminal sexual assault of B.B. by penetrating her vagina with his penis. He bases that claim on the following observations. When Hofmann asked B.B. if she had any "more details" other than the penetration of her vagina by defendant's fingers, she answered no. She never mentioned he also had penetrated her vagina with his penis—and in fact Hofmann found no physical indication of any vaginal penetration. Likewise, in the trial, when she was under oath, B.B. never said that defendant had penetrated her vagina with his penis.

¶ 29 Only in White's interview of her did B.B. say that defendant had done so. Defendant argues, however, that this statement is insufficient as a matter of law because it is vague, self-contradictory, and the product of suggestion by White. He argues:

> "After [B.B.] detailed instances where the defendant touched her vagina with his hands and tongue, White asked whether the defendant had touched her with any other part of his body. [B.B.] responded, 'no, that's all he does [*sic*] is with his tongue and hands.'

> [Citation to record.] White then asked whether the defendant had touched [B.B.] anywhere else with his wiener, and [B.B.] responded that, 'I think on the other parts he has once.' [Citation to record.] When White first asked [B.B.] whether she remembered him touching her 'other parts' with his wiener, [B.B.] indicated that she did not remember such an incident. [Citation to record.] It was only after White asked [B.B.] whether she thought the defendant had 'maybe' touched her 'other parts' that [B.B.] remembered that 'it happened twice or three times.' [Citation to record.] [B.B.] then told White that the defendant had touched her 'other parts' with his wiener. When White asked [B.B.] whether the defendant touched inside or outside her 'other parts,' [B.B.] responded that, 'it actually went on the inside.' [Citation to record.]"

¶ 30 This account of the interview can be a little misleading. Granted, as defendant says, B.B. initially denied defendant ever used any part of his body other than his fingers and tongue. But the next thing that happened, after the initial denial, was not a leading question by White as to whether defendant had touched B.B. anywhere else with his penis. Rather, the next thing that happened was White's question, "His tongue and his hand?" White had a tendency to repeat, as a question, what B.B. had just got done telling her. After White asked, "His tongue and his hand?"—which was nothing more than a reiteration, in interrogative form, of what B.B. had just said—B.B. added that, "[o]h" (on second thought), defendant also had touched her on the buttocks with his penis.

¶ 31 After questioning B.B. about that incident, White asked her: "Has he touched you anywhere else on your body with his wiener?"—a nonleading question. B.B. answered: "Uh, I think on the other parts he has once." Again, the "other parts" are the vagina. White then asked her: "Do you remember that?" and B.B. answered no. The next question White asked was "But you think that maybe he has touched your other parts?" Taken out of context, that question might appear to be leading, but in context, it is merely a reiteration of what B.B. already said ("Uh, I think on the other parts he has once.") B.B. then answered yes and, in response to further questioning, recounted the nightgown incident.

¶ 32 We acknowledge that B.B. changed her mind in the interview: at first, she stated she could not remember his touching her other parts with his wiener, and a moment later, she stated she remembered his doing so on two or three occasions. But we are aware of no case holding that if a witness first claims not to remember and then, after a moment's reflection, says in effect, "Oh, yes, I remember now," the witness's account is insufficient as a matter of law to sustain a conviction. "Defendant raises a credibility issue and, in such cases, all evidence must be viewed in a light most favorable to the prosecution. Conflicts in the evidence and the credibility of witnesses are for the jury to resolve; it is not our function to retry defendant." *People v. Pryor*, 170 Ill. App. 3d 262, 268 (1988).

¶ 33 B. Distinguishable Cases

¶ 34 Defendant compares his own case to *People v. Hestand*, 362 Ill. App. 3d 272 (2005), and *People v. Kelly*, 185 Ill. App. 3d 43 (1989), in which the appellate court found insufficient evidence of sexual penetration. As we will discuss, however, both of those cases are distinguishable.

¶ 35 1. *Hestand*

¶ 36 In *Hestand*, the State alleged that the defendant had committed criminal sexual assault (720 ILCS 5/12-13(a)(1), (a)(2) (West 2000)) by placing his penis in T.H.'s vagina. *Hestand*, 362 Ill. App. 3d at 274. Also, the State alleged he had committed aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(ii) (West 2000)) by fondling her vagina. *Id.*

¶ 37 In the trial, T.H. testified that the defendant had put his penis in her vagina, but she never testified he had fondled her vagina. *Id.* at 278. Although she testified he had fondled her breasts, "[n]o evidence was presented that [he had] used his hand in fondling [her] vagina." *Id.* Therefore, the appellate court vacated the conviction of aggravated criminal sexual abuse, which was premised on the alleged fondling of her vagina. *Id.* at 279.

¶ 38 Defendant argues that count I in his case is like the allegation of vagina-fondling in *Hestand*. On the contrary, the present case is distinguishable because the record contains evidence supporting count I. B.B. stated to White that defendant had touched her "other parts" with his "wiener" and that "it actually went on the inside."

¶ 39 2. *Kelly*

¶ 40 In *Kelly*, the appellate court found insufficient proof of penetration because the five-year-old victim "testified only that [the defendant] had 'touched' her in her 'naughty place.' " *Kelly*, 185 Ill. App. 3d at 51-52. Evidently, the victim never was asked what the "naughty place" was.

¶ 41 The present case is distinguishable because we know what B.B. meant by "other parts." At the beginning of the interview, she told White she was accustomed to refer to the vagina (or that item in the drawing) as "other parts."

¶ 42 C. The Severity of the Sentences

¶ 43 Defendant argues that an aggregate 66-year prison sentence is too severe, considering his scanty criminal record and his lifetime of gainful employment and service to the community. He reminds us that he is 51 years old and that because he must serve 85% of his prison sentences (see 730 ILCS 5/3-6-3(a)(2)(ii) (West 2008); 730 ILCS 5/3-6-3(a)(2)(ii) (West 2012)), the trial court effectively has sentenced him to life imprisonment: an aggregate sentence that, according to him, is far in excess of what would be needed to protect the community.

¶ 44 We review the sentences deferentially, asking whether the trial court abused its discretion. See *People v. Snyder*, 2011 IL 111382, ¶ 36. Defendant seems to focus on the sentences for predatory criminal sexual assault of a child (counts I to IV)—understandably so, since they are consecutive to each other and add up to 60 years. Sentence by sentence, though, these punishments are not severe. As defendant says, predatory criminal sexual assault of a child is a Class X felony, for which the punishment is "a term of imprisonment of not less than 6 years and not more than 60 years." 720 ILCS 5/12-14.1(b)(1) (West 2008); 720 ILCS 5/11-1.40(b)(1) (West 2012). Fifteen years' imprisonment for that offense is near the low end of the range. For each of the first four counts of the indictment, defendant received a sentence near the low end, presumably because of his lifetime of employment and service to the community. And yet, because of his previous felony conviction of unlawfully restraining a 17-year-old, the trial court was unconvinced he deserved a lesser sentence than 15 years.

¶ 45 In sum, we are unconvinced the trial court abused its discretion in the sentences it imposed on defendant. A person can go to prison for a long time as a result of committing several offenses, each of which is a serious offense. A long aggregate sentence of imprisonment does not necessarily mean the trial court was too severe. It would be wrong to play down the seriousness of any one offense. If a person is convicted of several serious offenses and statutory

law requires that the prison terms run consecutively, moderate terms of imprisonment for each offense can add up to *de facto* life imprisonment, as in the present case. The heavy total punishment is a function of the multiplicity of serious offenses, not a severe sentencing judge.

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, we affirm the trial court's judgment, and we award the State $50 in costs.

¶ 48 Affirmed.