

NOTICE
Rule 23 Order filed February 11, 2015. Modified upon denial of rehearing March 20, 2015.

2015 IL App (5th) 130092-U

NO. 5-13-0092

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Marion County.
)	
v.)	No. 12-CF-2
)	
GEORGE S. MARCUM,)	Honorable
)	Sherri L. E. Tungate,
Defendant-Appellant.)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The State's evidence was sufficient to sustain the defendant's conviction for aggravated criminal sexual abuse.

¶ 2 **FACTS**

¶ 3 In January 2012, the State filed a one-count information charging the defendant, George S. Marcum, with aggravated criminal sexual abuse (720 ILCS 5/11-1.60(d) (West 2010)). The charge alleged that on December 31, 2011, the defendant had knowingly touched the breast of V.K. "for the purpose of [the defendant's] sexual gratification or arousal." The charge further alleged that when the contact occurred, V.K. was at least 13 years of age but under 17 years of age, and the defendant was at least 5 years older than

her. In December 2012, the cause proceeded to a bench trial where the following evidence was adduced.

¶ 4 V.K. testified that on December 31, 2011, she was 13 years old and had spent the night at her best friend Gabby's house, as she had done "almost every weekend." At around 10 p.m., V.K. and Gabby were watching a movie in the living room, while Gabby's mother, Paula Marcum, was in her bedroom. Gabby's stepfather, the defendant, subsequently arrived home and "seemed drunk." V.K. testified that the defendant smelled of alcohol, was "stumbling along," and "couldn't keep his balance very well." The defendant then stood in front of the television that the girls were watching and started "dancing provocatively." He also made "lewd comments," such as, "I'm hot for a 46-year-old," and, "[Y]ou know you're checking me out."

¶ 5 After going into the kitchen to get something to eat, the defendant returned to the living room and began "bugging" the girls again. At that point, Gabby left the room to get Paula, and while V.K. and the defendant were alone, he poked her in the side and grabbed her breast. V.K. testified that she had been sitting in a chair at the time. She further testified that the defendant had said something when he grabbed her, but she could not remember what.

¶ 6 After the defendant grabbed V.K., she immediately went to Paula and told her what had happened. In response, Paula had Gabby and V.K. wait in Gabby's bedroom, while she went into the living room to confront the defendant. V.K. stated that after she heard Paula and the defendant yelling at each other, the defendant had come into Gabby's room and began yelling at V.K. V.K. testified that the defendant was "in [her] face,"

denying that he had touched her. V.K. testified that she had angrily looked away from him, "trying to restrain" herself.

¶ 7 On cross-examination, V.K. testified that she had been to the defendant's home numerous times during the four years preceding the incident in question and had never had "any problems" with him. She explained that the defendant had sometimes "annoyed [her] a little bit, but [she] was polite and tolerated him because [he] was Gabby's stepdad." V.K. testified that when the defendant grabbed her breast, he had used one hand. When asked if she felt like the defendant "was trying to make a move on [her,] for lack of a better way to phrase that," V.K. stated that "[i]t didn't seem like that, but it felt really awkward" and had "bothered" her.

¶ 8 Gabby testified that when the defendant returned home on the night of December 31, 2011, it had appeared to her that he was "drunk." Gabby stated that while she and V.K. were in the living room watching a movie, the defendant had danced "[p]ervertedly" in front of them and had made numerous inappropriate comments. Gabby explained that the defendant's "perverted slurs" included references to his virility and lack of venereal diseases. The defendant had also said something "about [Gabby's] period." Gabby described the defendant's behavior as "childish," and she recalled "feeling embarrassed."

¶ 9 Meanwhile, from her bedroom down the hall, Paula was yelling for the defendant to come to bed. Gabby testified that "he wasn't listening," however, so she went to Paula's room to tell her that she needed to get the defendant out of the living room. V.K. then came into Paula's room, stating that the defendant had "touched her." Gabby testified that V.K. was "shaking" and "freaking out." Gabby and V.K. then went into

Gabby's room, where they could hear Paula and the defendant arguing in the kitchen. The defendant then burst into Gabby's room and yelled at V.K. that he had not touched her. Gabby testified that the defendant had been "very aggressive about it."

¶ 10 On cross-examination, Gabby stated that she had lived with the defendant since 2008, and he had never touched her inappropriately. She indicated that he had, however, made inappropriate comments to her on other occasions. On redirect, Gabby testified that the defendant had once made a comment "about [her] boobs" and had stated that she was "a looker."

¶ 11 Paula testified that before the defendant arrived home on the night of December 31, 2011, she had been in her bedroom getting some rest, while Gabby and V.K. were watching a movie in the living room. Paula heard the defendant come into the house and say things to the girls about venereal diseases and how "he was hung." Paula stated that she had been yelling for the defendant to come to bed when Gabby came into her room. V.K. then came in, stating that the defendant had "grabbed her boob." Paula indicated that when she confronted the defendant, he had denied that anything had happened.

¶ 12 The defendant testified that after visiting his mother-in-law on the afternoon of December 31, 2011, he had gone home and asked Paula if she felt like "going out." When Paula indicated that she wanted to stay home, the defendant took a nap, went to visit his mother-in-law again, and then went to a bar and had some drinks. The defendant testified that he had consumed three vodka drinks and two beers that evening.

¶ 13 The defendant testified that when he arrived home around 10:15 p.m., Paula was in the back bedroom, and Gabby and V.K. were in the living room watching a movie.

The defendant stated that he had danced in front of the girls, "kind of harassing them." He then got "ignorant" and "stupid" and began making comments to them. The defendant explained that the girls had not gotten "upset at first," but when "it went too far," Gabby had gone to get Paula. The defendant testified that he had then gone into the kitchen to get a piece of pizza and that when he returned to the living room, he got "up in [V.K.'s] face," which "made her mad." The defendant indicated that the only contact he made with V.K. had occurred when he had "tried to tickle her or something." The defendant denied that the contact he had made with V.K. was of a sexual nature, had been meant for his gratification, or had been made with any sexual intent.

¶ 14 The defendant testified that after V.K. left the room, he had gone into the kitchen and was eating pizza when Paula appeared. Paula told him that V.K. had stated that he had grabbed her breast. The defendant testified that the accusation had angered him, and he told Paula that he had only poked and tickled V.K. He then confronted V.K. and told her that she was lying.

¶ 15 The defendant testified that he could not recall all of what he had said to the girls that night, but he indicated that he was just trying to irritate and aggravate them. The defendant stated that he had been around children all of his life and had "never been accused of anything like this." The defendant apologized for what had happened.

¶ 16 On cross-examination, the defendant stated that he was "tipsy" on the night in question but "wasn't drunk." Although he could not recall exactly what comments he had made to the girls, he acknowledged that they were "sexual in nature." The defendant testified that when he was harassing the girls, "it wasn't just a one-way deal," and "they

were badgering [him with] questions and stuff[,] too." The defendant indicated that he had poked V.K. in the rib with one finger but had otherwise had no physical contact with her. The defendant stated that he was still embarrassed by his conduct that night.

¶ 17 In closing arguments, the State maintained that the defendant's and V.K.'s varying accounts as to how he had touched her could not be "reconciled." The State argued, however, that V.K. was "eminently credible," had nothing to gain by falsely accusing the defendant, and clearly knew "the difference between being poked in the side and having her breast grabbed." The State further argued that the defendant's suggestion that "this was horseplay with no sexual overtones or intent" was contradicted by the sexual nature of the comments that he had made to the girls moments before he grabbed V.K.'s breast.

¶ 18 In response, referencing V.K.'s testimony indicating that she did not believe that the defendant had tried "to make a move on her," defense counsel argued that even assuming that the defendant had grabbed V.K.'s breast, the State had failed to prove that he had done so with the intent to sexually gratify either of them. Noting that Paula and Gabby were down the hall just "a few feet away" and that the defendant and V.K. had known each other for years, counsel maintained that V.K. knew that the defendant "wasn't trying to bed her down." Asserting that the defendant's conduct was "not of a sexual nature," counsel suggested that at most, the defendant had committed misdemeanor battery by making physical contact of an insulting or provoking nature (see 720 ILCS 5/12-3(a) (West 2012)).

¶ 19 The trial court ultimately found the defendant guilty as charged. The court stated that it did not "find the defendant to be credible at all" and that he was "clearly

minimizing" his conduct. Stating that V.K. was credible, the court noted that she, Gabby, and Paula, had provided consistent accounts of what had occurred. Further noting that by the defendant's own admission, the comments he had made to the girls were sexual in nature, the court determined that based on "the grabbing of the breast and the comments he made," the State had proven beyond a reasonable doubt that the defendant had acted with the intent to sexually gratify himself.

¶ 20 In February 2013, the trial court sentenced the defendant to an agreed-upon four-year term of sex-offender-specific probation. The defendant subsequently filed a timely notice of appeal.

¶ 21

DISCUSSION

¶ 22 The defendant argues that although the evidence adduced at trial was sufficient to support a finding that he had touched V.K.'s breast, his conviction for aggravated criminal sexual abuse should be reduced to a misdemeanor-battery conviction because the State failed to prove beyond a reasonable doubt that he acted with the intent to sexually gratify himself. We disagree.

¶ 23 When reviewing the sufficiency of the evidence supporting a criminal conviction, it is not the function of the reviewing court to retry the defendant. *People v. Ward*, 215 Ill. 2d 317, 322 (2005). Rather, "[t]he relevant inquiry is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* Under this standard, a reviewing court "will not reverse a conviction unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of [the] defendant's guilt."

People v. Evans, 209 Ill. 2d 194, 209 (2004). "It is well established that the trier of fact is in the best position to assess the credibility of witnesses, determine the weight to be accorded their testimony, decide what inferences to draw from the evidence, and resolve any factual disputes arising from conflicting or inconsistent testimony." *People v. Myles*, 257 Ill. App. 3d 872, 884 (1994).

¶ 24 In the present case, the State was required to prove that the defendant knowingly touched V.K.'s breast for the purpose of his sexual gratification or arousal. See 720 ILCS 5/11-0.1, 11-160(d) (West 2010). Again referencing V.K.'s testimony indicating that she did not believe that the defendant had tried "to make a move on her," the defendant argues that the State failed to prove that he knowingly touched V.K. with the intent to sexually gratify himself.

¶ 25 Because the term "sexual gratification" is not restrictively defined, its meaning is determined by the trier of fact's assessment of the evidence presented for its consideration. *People v. Alexander*, 369 Ill. App. 3d 955, 957 (2007). "The intent to arouse or satisfy sexual desires can be established by circumstantial evidence, and the trier of fact may infer a defendant's intent from his conduct." *People v. Burton*, 399 Ill. App. 3d 809, 813 (2010). When determining whether a defendant's conduct was sexual in nature, all relevant circumstances surrounding the conduct can properly be considered. *People v. Ostrowski*, 394 Ill. App. 3d 82, 92-93 (2009). Relevant circumstances include whether anyone else was present; whether there was a legitimate, nonsexual purpose for the contact; and the respective conduct of the defendant and the victim before and after the contact. *Id.* at 93. In some instances, however, "[a] defendant's intent to arouse or

gratify himself sexually can be inferred solely from the nature of the act." *Burton*, 399 Ill. App. 3d at 813.

¶ 26 Illinois courts have recognized that an adult male's intentional touching of a female's breast is an inherently sexual act from which an intent to sexually gratify or arouse can be inferred. *Burton*, 399 Ill. App. 3d at 813-15; *People v. Goebel*, 161 Ill. App. 3d 113, 125 (1987). "[T]ouching a female's breast generally carries a sexual purpose," and "[t]he only possible exception is a medical examination." *Burton*, 399 Ill. App. 3d at 815. On appeal, the defendant maintains that such a presumption is "illogical" and that "[s]ome other fact or facts must also exist to prove that such contact was for the purpose of the defendant's sexual gratification or arousal." Even if this were true, however, the defendant ignores that the trial court did not discern a sexual purpose solely from his intentional touching of V.K.'s breast. The court specifically found that the lewd comments the defendant made prior to the contact coupled with the act itself established that he had grabbed V.K.'s breast for his sexual gratification. That the defendant and V.K. were alone when the contact occurred further supports the trial court's finding, as does the evidence regarding her reaction to the contact and the defendant's reaction when confronted with her complaint. See *Ostrowski*, 394 Ill. App. 3d at 93; see also *People v. Milka*, 211 Ill. 2d 150, 181 (2004) ("A false exculpatory statement is 'probative of a defendant's consciousness of guilt.' " (quoting *People v. Shaw*, 278 Ill. App. 3d 939, 951 (1996))).

¶ 27 Lastly, as the trial court did below, we reject the defendant's suggestion that V.K.'s testimony indicating that she did not believe that he had tried "to make a move on her"

somehow precludes the conclusion that he grabbed her for the purpose of sexual gratification or arousal. Notwithstanding that whatever "make a move" meant to V.K. was never clarified, her subjective belief as to what the defendant's conduct might have led to was irrelevant to the determination of whether he had grabbed her breast to sexually gratify himself. Moreover, V.K. explained that although it did not "seem like" the defendant had tried to "make a move on her," his grabbing of her breast "felt really awkward" and "bothered" her. She also indicated that she had to "restrain" herself and look away from the defendant when he denied having touched her. Additionally, Gabby testified that when V.K. came into Paula's room and reported what had happened, V.K. was "shaking" and "freaking out." The defendant's intimation that V.K. viewed the defendant's touching as a platonic act of "horseplay" is thus belied by the record.

¶ 28 In any event, to the extent that V.K.'s testimony indicating that she did not believe that the defendant had tried to "make a move" on her created an evidentiary conflict, the trier of fact is responsible for resolving any conflicting inferences produced by the evidence, and we will not substitute our judgment on such matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001); *People v. Campbell*, 146 Ill. 2d 363, 380 (1992). Such is the case because we must give "due consideration to the fact that the court *** saw and heard the witnesses." *People v. Smith*, 185 Ill. 2d 532, 541 (1999).

¶ 29 Viewing the evidence adduced at trial in the light most favorable to the State, the trial court could have readily concluded that with his inhibitions lowered by his consumption of alcohol, the defendant's sexually flirtatious conduct with the girls culminated in his grabbing of V.K.'s breast while they were alone in the living room. The

circumstances surrounding the contact and the contact's inherently sexual nature also support the trial court's findings that the defendant had acted with the intent to sexually gratify himself and at trial, he had attempted to minimize his conduct. The evidence before the court was not so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt, and we accordingly affirm his conviction. *Cf. Ostrowski*, 394 Ill. App. 3d at 92-97 (reversing the defendant's aggravated-criminal-sexual-abuse conviction where the circumstances surrounding his act of kissing his granddaughter on the lips "at a public festival while playing on the ground" did not support a finding that he had done so for the purpose of sexual gratification or arousal).

¶ 30

CONCLUSION

¶ 31 Our original order in this case was filed on February 11, 2015. On March 6, 2015, the State filed a petition for rehearing. We hereby enter this modified order denying the State's petition for rehearing and, for the foregoing reasons, affirm the defendant's conviction.

¶ 32 Affirmed.