FOURTH DIVISION
March 3, 2016

No. 1-13-2734

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 14630
	)	
TOMMIE NAYLOR,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant not entitled to new trial based on exclusion of results of DNA database search where, assuming that such exclusion was erroneous, other evidence against defendant was overwhelming. State proved penetration element of aggravated criminal sexual assault count beyond reasonable doubt where nurse testified that victim said that defendant had penetrated her vagina with his finger.

¶ 2 In 2009, defendant Tommie Naylor was charged with several counts of aggravated criminal sexual assault and aggravated criminal sexual abuse in relation to the 2006 sexual assault of 16-year-old T.B. According to the State, a DNA sample retrieved in a separate sexual assault case had been linked to a DNA sample recovered from T.B.'s vaginal swab, and DNA from defendant's buccal swab matched the DNA on the vaginal swab. Prior to trial, defendant moved for a search of the Illinois State Police's DNA database pursuant to section 116-5 of the

Code of Criminal Procedure of 1963 (725 ILCS 5/116-5 (West 2012)), in hopes of undermining the State's evidence that the odds of another unrelated black male's profile matching defendant's at 13 loci were 1 in 9 quadrillion.[1] While the trial court granted defendant's request for a database search, it declined defendant's request to have the database search results verified. Then, the court subsequently ruled that the database search results were inadmissible because they had not been verified. After a jury trial, defendant was convicted of all counts.

¶ 3 On appeal, defendant argues that the trial court violated his right to present a defense by preventing him from verifying the results of the database search. Defendant argues that, without verification, there was no way for defendant to present evidence to challenge the State's probability analysis.

¶ 4 We decline to reach the issue of whether the trial court erred in denying defendant the opportunity to have the search results verified because, even if it did, that error would be harmless in light of the other, overwhelming evidence against defendant. T.B. identified defendant in a photo array, a physical lineup, and in court after having an opportunity to view defendant's face for a significant amount of time in broad daylight. She was also able to recount 6 of the 7 digits of her attacker's license plate number, which matched 6 of the 7 digits on defendant's license plate. And defendant's car matched T.B.'s description of her attacker's car. Finally, T.B.'s identification was strongly corroborated by evidence that defendant had sexually assaulted another young woman in a very similar manner two years later.

[1] "Loci are locations on DNA that contain genetic material. *** It is variations in the loci—variations in the genetic material—that establish the DNA profile." *U.S. v. Jenkins*, 887 A.2d 1013, 1017 (D.C. Ct. App. 2005).

¶ 5 Defendant also urges us to reduce one of his convictions for aggravated criminal sexual assault to a conviction for aggravated criminal sexual abuse because the State failed to prove the essential element of penetration. Specifically, defendant argues that this element could not be proven because T.B. testified that she could not remember whether defendant penetrated her with his finger. We disagree, as the nurse who treated T.B. after the assault testified that T.B. said that defendant had penetrated her vagina with his finger, and that statement was admissible as an exception to the rule against hearsay evidence. We affirm defendant's convictions and sentence.

¶ 6 I. BACKGROUND

¶ 7 A. Pretrial Proceedings

¶ 8 On April 6, 2013, defendant filed a motion seeking a search of the Illinois State Police DNA database pursuant to section 116-5. Defendant requested the search in order to effectively cross-examine the State's DNA expert, who had determined that the probability that defendant's profile would randomly match another unrelated black individual's DNA profile at 13 loci was 1 in 9 quadrillion. Defense counsel noted that he had subpoenaed the Illinois State Police for the results of a database search a month earlier but had received no response.

¶ 9 At the hearing on defendant's motion, the trial court asked how long the database search would take, as the case had been pending for a significant amount of time. The State responded that the database search would not take a long amount of time, but that the verification process would because it would require "comparing each profile that comes up as a match, *** having an analyst compare them to each other." While the State could not give the court "a specific time frame," it knew that the verification could not be completed by the scheduled trial date. The trial court granted defendant's motion for the database search but denied the request for verification.

¶ 10 On May 2, 2013, Donald Parker, a forensic scientist of the Illinois State Police Division of Forensic Services, produced a report on the results of the database search. At the time of the search the database "contained 455,628 DNA profiles," and the search showed that "1,936 pairs of specimens had 13 locus associations." Parker qualified that finding as follows:

> "These associations have not been verified to identify the following: 'No Matches' (DNA profiles do not truly match), 'Offender Duplicates' (multiple samples from the same individual) and 'Twins' (Apparent Genetic Siblings/Identical Twins). Historically, the only profiles determined to be true matches from these types of searches were 'Offender Duplicates' and 'Twins.'
>
> This data *** does not invalidate the statistical random match probabilities offered in this case. The offender database has not been separated out into ethnic groups, it contains profiles from duplicates, and includes relatives. All of these conditions violate the prerequisite of having a population database of randomly selected, unrelated individuals that recognizes ethnic differences."

¶ 11 The State filed a motion *in limine* to exclude evidence of the database search, noting that the search results had not been verified, "making these results utterly useless." The court reserved ruling on the motion until a later date when Parker could be questioned about the results in court.

¶ 12 B. Trial and Sentencing

¶ 13 T.B. testified that, on May 10, 2006, she was 16 years old and a junior in high school. Around 3 or 4 p.m. that day, she was waiting for a bus at the corner of 75th Street and Lafayette Avenue in Chicago. No one else was at the bus stop.

¶ 14 T.B. testified that a man sitting in a black, four-door car offered her a ride. She declined, but the man, whom she identified as defendant, approached her and grabbed her wrist. T.B. testified that defendant said, "Get in the car or I'm going to kill you." T.B. said that defendant had something in his hand.

¶ 15 T.B. testified that defendant pulled her into the car and got into the driver's seat. Defendant drove south on Lafayette for several blocks, then turned west. T.B. testified that, as defendant was driving, he said, "I ain't about to rape you, I'm better than that."

¶ 16 T.B. testified that defendant pulled the car into an alley. T.B. climbed into the backseat of the car, in hopes of escaping, but she could not open the back doors of the car.

¶ 17 Defendant turned around, faced T.B., and told her that he wanted her to make noises like he and T.B. were having sex so that his girlfriend would get jealous. T.B. refused, and defendant asked T.B. to touch her breasts and her vagina. T.B. again refused, and defendant turned to face T.B., pulled down his pants, and began to masturbate. T.B. testified that defendant had a screwdriver in his hand, which he held toward T.B. Defendant said that he would kill T.B. if she did not comply with his orders. T.B. testified that she took one of her breasts out of her bra and pulled down her pants and began to touch herself.

¶ 18 T.B. testified that defendant reached into the backseat and touched her breasts and vagina. The State asked whether defendant "touch[ed] the outside or the inside" of her vagina, and T.B. replied, "I don't remember. I do remember he touched me down there."

¶ 19 T.B. said that defendant climbed into the backseat and continued to masturbate while pointing the screwdriver at her. T.B. testified that defendant "kept telling" her "to tell him to f*** [her]." She complied because defendant was holding the screwdriver next to her neck and he said that he was going to kill her.

¶ 20 T.B. testified that defendant climbed on top of her and put his penis in her vagina. T.B. told defendant to stop, but he did not. Defendant eventually got off of T.B. and wiped his penis with a towel. T.B. testified that defendant told her that she could not tell the police that she had been raped because he had a camera in the car that recorded her "telling [him] to f*** [her]." Defendant then opened the car door and let T.B. out.

¶ 21 When T.B. got out of the car, she noticed the license plate number of the car. She testified that she only remembered the first six digits of the number, which she later gave to the police. On cross-examination, T.B. testified that she was not wearing her glasses when she looked at the license plate, but that she had no trouble identifying the numbers because she was "pretty close" to them.

¶ 22 T.B. testified that she ran down the alley until she came upon a group of construction workers working on a house. The workers called the police for T.B., and an ambulance eventually took T.B. to Holy Cross Hospital. T.B. testified that, at the hospital, she gave a nurse her clothes, and a doctor swabbed her vagina.

¶ 23 Karen Mazur, the nurse who treated T.B. at the hospital, testified that T.B. told her "that [a man] had penetrated her [vagina] with his penis and his finger." Mazur observed scratches on T.B.'s cheek and left arm, as well as "a red mark" on her leg. Mazur testified that she and a doctor took a vaginal swab from T.B., collected her clothes including her underwear, and turned the swab and clothes over to the police.

¶ 24 The State also presented evidence that defendant had committed another sexual assault on November 12, 2008. C.B., who was 15 years old at the time, testified that, on that night, she was walking to a gas station when she saw a black sport-utility vehicle (SUV) parked at the entrance to an alley. The car had a sticker for a motorcycle club on the back of it.

¶ 25 C.B. testified that, as she passed the SUV, she heard a man say, "Hey, you," 3 or 4 times. After the fourth time, the man grabbed C.B.'s arm and said, "[D]on't say nothing [*sic*]. Don't scream or I'll cut you." The man pulled C.B. to the SUV and pushed her into the rear passenger's seat.

¶ 26 When the man opened the car door to push C.B. in, the interior light turned on. At that point, C.B. was able to see the man's face. In court, she identified defendant as the man. C.B. testified that defendant was wearing clothing with the United States Postal Service's logo on it.

¶ 27 C.B. testified that defendant drove into the alley, pulled over, and got into the backseat with her. Defendant left an object in the front seat of the car, which C.B. thought was a knife. Defendant told C.B. to take her belt off, then said, "I don't have to rape you, I have a wife at home." Defendant held C.B. down, took off her belt, pulled her pants down, and put his penis in her vagina. C.B. testified that defendant raped her for four or five minutes, then got back into the driver's seat and drove to a nearby intersection, where he told C.B. to get out of the car. C.B. testified that she ran home and told her mother what had happened. C.B.'s mother called the police.

¶ 28 Detective Clifford Martin testified that he was assigned to investigate C.B.'s case. As part of his investigation, Martin reviewed the reports from T.B.'s case and noticed that T.B. had given the police six digits from her attacker's license plate. Martin testified that he put those six digits into the Illinois Secretary of State's database, then went through the possible seventh number, zero through nine. One of those license plate numbers corresponded to a 1995 dark Oldsmobile SUV that was registered to defendant. Martin continued to search the database and found that defendant had a motorcycle registered to him, that he was employed by the United States Postal Service, and that he lived within half of a mile of the location of T.B.'s assault.

¶ 29 On June 30, 2009, Martin composed a photo array that included defendant's picture. Both T.B. and C.B. picked defendant out of the photo array "without hesitation." The next day, T.B. and C.B. viewed an in-person lineup at the police station, where they again identified defendant as their attacker.

¶ 30 Alvin Dvorak, a United States postal inspector, testified that, on July 1, 2009, he was assigned to assist the Chicago police in arresting defendant. Dvorak testified that defendant was employed as a mail handler at the Chicago bulk mail center in Forest Park, Illinois at the time. Defendant had been employed by the postal service since May 1993. Dvorak testified that, according to the post office's records, defendant clocked out of work on May 10, 2006 and on November 12, 2008 at 2 p.m. Dvorak also said that not all employees of the bulk mail center wore uniforms, but that some individuals wore clothing with postal service logos on them.

¶ 31 Detective Lorne Gushiniere, one of the police officers who arrested defendant on July 1, 2009, testified that, when he told defendant that he was the subject of an investigation, defendant started crying.

¶ 32 The State also presented DNA evidence against defendant. Testing by the Illinois State Police uncovered semen on T.B.'s vaginal swab and her underwear. A male DNA profile was developed from those samples, which was compared to DNA from a buccal swab taken from defendant's cheek after his arrest. Meredith Misker, a forensic scientist with the Illinois State Police, opined that defendant's profile matched the profiles on the vaginal swab and underwear. Misker testified that the profile "would be expected to occur in approximately one in 9 quadrillion black, one in 17 quadrillion white, or one in 7.5 quadrillion Hispanic unrelated individuals."

¶ 33 Before the State rested, the court conducted an examination of Donald Parker regarding the results of the DNA database search he performed at defendant's request. Parker testified that he was not able to verify the results of the search, which showed that 1,936 matches had occurred at 13 loci. Parker explained that verification "would involve looking at these matches to see if there [was] potential offender duplicates or potential twins that would account for these matches." According to Parker, without verification, the results of the database search were "meaningless." Parker added that he had never seen unrelated individuals' DNA match at 13 loci before. The trial court granted the State's motion to bar evidence of the database search because the results were "meaningless."

¶ 34 Defendant elected not to testify or present any evidence on his behalf. The jury found defendant guilty of aggravated criminal sexual assault based on defendant's penetration of T.B.'s vagina with his penis, as well as his penetration of T.B.'s vagina with his finger. The jury also found defendant guilty of aggravated criminal sexual abuse for touching T.B.'s breasts.

¶ 35 The trial court denied defendant's motion for a new trial, which argued in part that the court had denied defendant his right to present a defense and cross-examine the State's witnesses when it declined to let defendant seek verification of the DNA database search and excluded the results of that search. The trial court repeatedly characterized the evidence of guilt as "overwhelming."

¶ 36 At sentencing, in aggravation, the State admitted the testimony of a third young woman, S.D., who testified that in November 2008, defendant forced her into a car and sexually assaulted her. S.D. testified that she was 16 years old at the time. The case against defendant for S.D.'s sexual assault was currently pending in another courtroom.

¶ 37 The trial court found that defendant was a "danger to civilized society" and "beyond rehabilitation." The court sentenced defendant to an aggregate sentence of 87 years in prison: 40 years' incarceration on each count of aggravated criminal sexual assault, one based on the penis-to-vagina penetration and the other based on the finger-to-vagina penetration, and 7 years' incarceration for aggravated criminal sexual abuse. This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 A. Right to Present a Defense

¶ 40 Defendant first argues that the trial court deprived him of his right to present a complete defense when it prevented him from having the results of the Illinois State Police database search verified. Defendant argues that, by failing to order the results verified, the trial court rendered the results of the database search useless.

¶ 41 The State argues that the trial court did not err in denying defendant's request for verification because defendant cannot show that verification would have yielded results helpful to his case. The State also argues that any error in denying defendant verification was harmless.

¶ 42 We decline to reach the question of whether the trial court violated defendant's constitutional right to present a complete defense by denying defendant's request for verification because we agree with the State that any error in denying that request was harmless beyond a reasonable doubt. See, *e.g.*, *People v. Littleton*, 2014 IL App (1st) 121950, ¶ 72 (declining to reach question of whether constitutional right of confrontation violated where any error was harmless). The Illinois Supreme Court has recognized three approaches to determining whether an error is harmless beyond a reasonable doubt: (1) whether the error contributed to the defendant's conviction; (2) whether the other evidence in the case overwhelmingly supported the defendant's conviction; and (3) whether the excluded evidence would have been duplicative or

cumulative. *People v. Blue*, 205 Ill. 2d 1, 26 (2001). In this case, applying the second approach, we conclude that any error was harmless.

¶ 43 Leaving the DNA evidence aside, the evidence linking defendant to T.B.'s rape was overwhelming. T.B. identified defendant in court, in a live lineup, and in a photo array without hesitating, and she never wavered from her identification. No evidence showed that the lineup or photo array procedures were in any way suggestive or unreliable. And the circumstances of the offense bolstered the reliability of T.B.'s identification. Defendant assaulted T.B. in broad daylight, and she had ample time to view defendant in close proximity in the backseat of the car.

¶ 44 Crucially, T.B. was able to record 6 of the 7 digits from the license plate of the car in which she was raped. Defendant's license plate shared those six digits. Moreover, defendant lived within a half-mile of T.B.'s assault. This evidence strongly supported T.B.'s identification of defendant.

¶ 45 As did the evidence that defendant had also raped C.B., which the State used to prove defendant's propensity to commit sexual assault. See 725 ILCS 5/115-7.3(a), (b) (West 2012) (in prosecution for aggravated criminal sexual assault, evidence of another sex crime may be used for any purposes for which it is relevant). The details of C.B.'s assault bore a striking resemblance to T.B.'s assault: in both cases, defendant picked up an adolescent girl walking down the street, drove her into an alley, threatened to kill her, told her that he was not going to rape her, and then raped her before letting her go. And, like T.B., C.B. quickly identified defendant as her attacker without any hesitation.

¶ 46 In sum, even without the DNA evidence, we agree with the trial court that the State produced overwhelming evidence of defendant's guilt. T.B. and C.B.'s identifications of

defendant, coupled with the fact that his license plate matched the license plate of T.B.'s attacker, show that no reasonable jury would have voted for acquittal.

¶ 47 We find *Littleton*, 2014 IL App (1st) 121950, to be instructive regarding the overwhelming nature of the State's evidence in this case. In *Littleton*, this court held that the erroneous admission of hearsay was harmless based on the strength of the other evidence in the case. *Id.* ¶¶ 68-70. Specifically, at the defendant's robbery trial, the victim had identified the defendant "after observing him for several minutes in broad daylight," the defendant's car matched the description of the robber's car given by the victim, the police observed the defendant in the area of the robbery one month later, and the State presented evidence of other robberies that the defendant had committed that were similar to the robbery for which he was on trial. *Id.* ¶¶ 68-69. Like *Littleton*, in this case, T.B. identified defendant after having observed him in close proximity for several minutes in broad daylight, defendant's car matched the description of the offender's car (including the particularly devastating license-plate number evidence), and evidence of defendant's rape of C.B. corroborated T.B.'s identification.

¶ 48 Defendant argues that the exclusion of the database search results could not be harmless because "every shred of evidence (other than DNA) *** was gleaned from the investigation following the DNA hit." But the fact that some evidence was collected before other evidence has no bearing on our assessment of the strength of the evidence at trial. And, as we noted above, that evidence overwhelmingly proved defendant's guilt. Thus, we conclude that any error in the exclusion of the DNA database search results was harmless beyond a reasonable doubt.

¶ 49 B. Proof of Penetration

¶ 50 Defendant next claims that the State failed to prove that he committed aggravated criminal sexual assault by penetrating T.B.'s vagina with his finger. Defendant notes that T.B.

could not remember whether defendant's finger entered her vagina. The State counters that the jury could infer that defendant inserted his finger into T.B.'s vagina from her testimony that defendant touched her vagina, plus the testimony of the nurse who treated T.B. at the hospital that T.B. said that defendant had penetrated her vagina with his finger.

¶ 51 When assessing the sufficiency of the evidence proving a criminal defendant's guilt, we determine whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the essential elements of the crime to be proved beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). We will not substitute our judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's testimony, or the reasonable inferences to be drawn from the evidence. *Id.* A defendant's conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 52 In order to prove a defendant guilty of aggravated criminal sexual assault, the State is required to prove that the defendant committed an act of sexual penetration. 720 ILCS 5/12-13(a), 12-14(a) (West 2006). The Criminal Code of 1961 defines "sexual penetration" as either: (1) any contact, however, slight between the sex organ or anus of one person by an object, sex organ, mouth, or anus of another person; or (2) "any intrusion, however slight, of any part of the body of one person *** or object into the sex organ or anus of another person." 720 ILCS 5/12-12(f) (West 2006). Here, because the State alleged that defendant penetrated T.B.'s vagina with his finger (and not his sex organ, mouth, anus, or an inanimate object), it was required to prove intrusion under the second definition.

¶ 53 The State proved intrusion because the nurse who treated T.B. at the hospital on the day of the incident said that T.B. told her that defendant "had penetrated her [vagina] with his penis and his finger." Although this testimony was hearsay, it was admissible as a statement made for purposes of medical treatment. See 725 ILCS 5/115-13 (West 2006) ("statements made by the victim to medical personnel for purposes of medical diagnosis or treatment" that are "reasonably pertinent to diagnosis or treatment" are admissible "as an exception to the hearsay rule"); *In re T.T.*, 384 Ill. App. 3d 147, 164 (2008) (victim's "statements explaining how she was penetrated" admissible under section 115-13). Viewing this testimony in the light most favorable to the State, the State proved that defendant inserted his finger into T.B.'s vagina, thus proving the intrusion element of the offense.

¶ 54 We acknowledge that, at trial, T.B. could not recall whether defendant had penetrated her with his finger or touched the outside of her vagina. But that does not erase the nurse's testimony regarding T.B.'s description of the rape. Notably, T.B. did not testify that defendant did *not* penetrate her with his finger; she simply could not remember. Thus, the nurse's testimony did not even conflict with T.B.'s description of the attack. In any event, the trier of fact balanced any discrepancy and resolved it in favor of the nurse’s positive memory over T.B.’s lack of memory. We will not second-guess the jury’s determination. *Ross*, 229 Ill. 2d at 272.

¶ 55 Defendant cites *People v. Maggette*, 195 Ill. 2d 336, 352 (2001), but the evidence of any intrusion in that case was far more vague than the evidence in this case. In *Magette*, the victim testified that the defendant rubbed her vagina over her underwear and put his hand " 'underneath [her] panties and *in* [her] vagina[l] area.' " (Emphasis in original.) *Id.* Our supreme court held that the mere rubbing of the victim's vagina and the "brief and vague reference to her vaginal area" was insufficient to prove intrusion. *Id.* Here, the nurse directly stated that T.B. told her that

defendant "penetrated" her vagina with his finger. Unlike the evidence in *Maggette*, the evidence here proved intrusion because it did not simply prove rubbing or involve a brief and vague reference to T.B.'s vagina. Taken in the light most favorable to the State, the evidence of intrusion was sufficient to prove defendant guilty of aggravated criminal sexual assault.

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, we affirm defendant's convictions and sentence. Any error in the exclusion of the DNA database search results was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt, and the State proved that defendant penetrated T.B. with his finger beyond a reasonable doubt.

¶ 58 Affirmed.