2018 IL App (1st) 171120-U

No. 1-17-1120

Order filed June 14, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 16 MC5 2738
	)	
JOSEPH MUTHANA,	)	Honorable
	)	Patrick T. Rogers,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for battery is affirmed over his contention that the State failed to prove beyond a reasonable doubt that he knowingly made contact with the victim.

¶ 2 Following a bench trial, defendant Joseph Muthana was found guilty of one count of battery (720 ILCS 5/12-3(a)(2) (West 2016)) and sentenced to 12 months' supervision. On appeal, defendant contends that the evidence was insufficient to support his conviction. We affirm.

¶ 3 Defendant was arrested on May 23, 2016. He was subsequently charged with misdemeanor battery, alleging that he knowingly touched the groin of the victim, K.M., in an insulting nature, at the Massage Envy in Oak Lawn.

¶ 4 At trial, K.M. testified that on May 23, 2016, she was a licensed massage therapist at Massage Envy. At 7:00 p.m., K.M. was assigned a client, whom she identified in court as defendant. K.M was assigned to defendant because he had requested a different massage therapist than the one he was originally assigned. K.M. greeted defendant in a waiting room, and accompanied him to a room with a massage table. K.M. instructed defendant to remove his clothing to his level of comfort, and to lie on the massage table face down, underneath a top sheet. K.M. left the room while defendant undressed, and when she returned, defendant was positioned face down in the face cradle. Defendant's arms were perpendicular to himself on the table.

¶ 5 At the beginning of the massage, K.M. stood in front of defendant's head, and performed "compressions" down his back, over the blanket. She then undraped the portion of the blanket covering defendant's back. She did some more compressions before moving to the right side of defendant's body. At that point, defendant started moving his arm around. K.M. asked if everything was okay, and defendant said that his arm hurt. K.M. sat on a stool and pulled defendant's arm across her lap so she could perform a joint mobilization. According to K.M., defendant was immobilized during the procedure. As K.M. brought defendant's arm across her lap, defendant grabbed her knee.

¶ 6 K.M. finished the joint mobilization, then stood up, at defendant's right side, and continued to massage defendant's back. As K.M. reached his lower back, defendant placed his

right arm onto the massage table and "brushed" it up against K.M.'s thigh. K.M. did not find such a motion to be totally out of the ordinary, however, it did set "something off" in her "head," and made her uncomfortable. K.M. continued to massage defendant because she could not tell if the motion was purposeful, and assumed defendant was trying to get comfortable.

¶ 7 As K.M. moved around during the massage, defendant's arm went "wherever [she] would go." K.M. assumed defendant's arm was uncomfortable, and therefore moved to the left side of his body. Defendant's arm had returned to being "perpendicular at the top of the table." K.M. continued to massage defendant, and stood with one foot in front of the other, so she could get some power to her stroke. As she did so, defendant grabbed her between the legs, pulled her closer to the table, and said "come close; I want to feel the sensation." K.M. asked defendant to repeat himself. She then told defendant "I'm sorry; I have to excuse myself," and left the room. She never gave defendant permission to touch her groin. K.M. testified that when defendant touched her groin, she felt uncomfortable, upset, and sick to her stomach.

¶ 8 Upon excusing herself from the room, K.M. immediately went to the front desk, where Michele Ostler and Nicole Galloso were present. K.M., who was upset and crying, told Ostler what had happened during the massage. Ostler and Galloso escorted K.M. to the manager's office, and called the manager. After K.M. learned that defendant had left the premises, she tried to gain her composure. She eventually "collected" herself and took her last scheduled appointment of the day. After her last appointment, K.M.'s boyfriend arrived and encouraged her to call the police. Ostler called the police because K.M. was inconsolable.

¶ 9 On cross-examination, K.M. testified that she had never before performed a massage on defendant and did not know how long defendant had been a customer at Massage Envy. K.M.

acknowledged that she did not know defendant had multiple sclerosis (MS) and that, in her training, she was taught that people with MS have incredible nerve pain. Defendant informed K.M. he wanted a "light, fluffy massage," because his previous massage therapist was too rough. K.M., who is 4'10", adjusted the massage table to a height half way between her knee and hip. She was wearing gym shoes, which made "shuffling" noises on the carpeted floor of the treatment room.

¶ 10 During cross-examination, K.M. demonstrated the joint mobilization on defense counsel and her boyfriend. When she brought defendant's hand across her lap, defendant cupped her knee. K.M. did not like it when defendant touched her knee, so she stood up and completed the joint mobilization. This involved placing defendant's arm underneath her armpit, and using her full body, particularly her legs and shoulders, to manipulate defendant's arm. She acknowledged that, during the mobilization procedure, she got closer to defendant, but did so for the purpose of the massage. K.M. explained that she stood up to perform the joint mobilization because that is how she had been trained to avoid "a situation." When defendant brushed up against K.M.'s legs and knee, she wanted to stop the massage, but did not have "enough" under Massage Envy protocol to end the session.

¶ 11 K.M. explained that, because defendant was touching her "throughout" the massage, she moved to the left side of his body to see if it was "all in [her] head." She stated that she changed her position to help avoid what she thought was "just something going on with the right side of his body." K.M. demonstrated with her boyfriend how she was positioned relative to defendant when he grabbed her groin. After defendant grabbed her groin and said "I want to feel the sensation," K.M. asked defendant to repeat what he said. Defendant repeated that he wanted to

feel the "sensation." By the time defendant repeated himself, K.M. had backed herself against the wall. K.M. initially testified that she did not know what defendant meant when he said he wanted to feel the "sensation," but later testified that, based on her intuition, defendant was referring to sexual gratification.

¶ 12 Michele Ostler testified that, on May 23, 2016, she was working as a front desk associate at Massage Envy. Around 7:00 p.m., Ostler assigned K.M. a patient, whom Ostler identified in court as defendant. Ostler assigned K.M. to defendant because he had requested a new therapist. About 20 to 30 minutes after the massage started, K.M. emerged alone from the massage room and approached Ostler. K.M. was distraught and crying, and informed Ostler that she no longer wanted to perform the massage. Ostler brought K.M. to the manager's office, and called the owner of the company. Per the owner's recommendation, Ostler activated the video record feature on her phone and then knocked on the door to the massage room, and asked defendant to get dressed. Defendant stated that he was already dressed, and met Ostler in the front of the building, where she asked him to leave the premises. She told defendant not to return and that there was "some uncomfortableness with the therapist." Defendant nodded and left. After K.M. completed her next massage appointment, Ostler called the police on behalf of K.M., who was distraught.

¶ 13 On cross-examination, Ostler testified that this was not defendant's first session at Massage Envy, and that he asked for a new therapist because his previous therapist's pressure was too deep. She also told defendant that he would not be refunded for the session.

¶ 14 The parties admitted the video Ostler recorded into evidence as a joint exhibit. The video is not included in the record on appeal. The State rested.

¶ 15 Defendant testified that he has MS, and often receives massages because he has very limited feeling in his right hand and arm. Defendant can only feel his left hand. He went to Massage Envy, on May 23, 2016, for the last appointment under his year-long membership agreement. When defendant arrived for his appointment, he asked to change therapists because he was trying to find the best therapist who could bring more sensation to his hand. During the massage, he used the word "sensation" because he wanted to get feeling in his hand. He explained that joint mobilization helps him get feeling in his hand, and, when he said he wanted to feel the sensation, he was asking K.M. to perform joint mobilization. Defendant denied knowingly touching K.M.'s groin, or any part of her body, and testified that he has had "tens of therapists" without incident of any kind. During the massage, defendant was face down on the table, and did not remove his head from the face cradle. Because of his MS and his position on the table, he would not have the ability to know where K.M. was standing to touch her groin. Defendant did not remember any pulling, or "any of this stuff."

¶ 16 On cross-examination, defendant testified that he has been receiving massages since developing MS, and has gone to two other establishments besides Massage Envy. Defendant acknowledged that K.M. accurately demonstrated how he was lying on the massage table, and, that during the demonstration, K.M. was standing on the left side of her boyfriend's body. K.M. did not cry when she left the room, but instead said "excuse me" and exited the room. After K.M. left the room, defendant was shocked, and had wondered if he said something wrong. Defendant remained in the room and put his clothes back on because he was "at a loss" and did not know what he had said or done to make her upset. Ostler knocked on the door to the massage room, after which defendant followed her to the front desk area, where she told him to leave the

premises. Defendant was ashamed when he was arrested at his home, and testified that during his arrest, he could not remember anything. Afterward, defendant called Massage Envy and tried to talk to "them."

¶ 17 The trial court found defendant guilty of battery. In announcing its ruling, the court noted that the evidence depended on the credibility of the witnesses. The court pointed out that defendant made physical contact with K.M.'s groin while she was on the left side of his body, despite his complaints of having an issue with his right hand. The court also noted defendant's testimony of seeing numerous therapists to relieve his condition did not make sense because if he had a massage therapist that "he thought was doing the right job, he would not be going through ten therapists." The court further noted that somebody in defendant's position would have a more emotional and emphatic response than what it heard in the video.

¶ 18 The case proceeded to sentencing, and the trial court sentenced defendant to 12 months' supervision. Defendant filed a "Motion for Judgment Not Withstanding Verdict or, Alternatively, Motion for New Trial," and subsequently amended that motion. The court denied defendant's amended motion. Defendant timely appeals.

¶ 19 On appeal, defendant contends that the State failed to prove him guilty of battery beyond a reasonable doubt. When reviewing the sufficiency of the evidence of a criminal conviction, "it is not this court's role to retry the defendant; rather, we determine 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." *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *People v. Ward*, 215 Ill. 2d 317, 322 (2005)). It is "the trier of fact's responsibility to determine the witnesses'

credibility and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence; we will not substitute our judgment for that of the trier of fact on these matters." *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). The same standard of review applies whether the evidence is direct or circumstantial. *People v. Brown*, 2013 IL 114196, ¶ 49. A reviewing court will not reverse a conviction unless the evidence is " 'unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt.' " *People v. Jackson*, 232 Ill. 2d 246, 281 (2009) (quoting *People v. Campbell*, 146 Ill. 2d 363, 375 (1992)).

¶ 20 A person "commits battery if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3(a) (West 2016). " 'A particular physical contact may be deemed insulting or provoking based upon the factual context in which it occurs.' " *People v. Peck*, 260 Ill. App. 3d 812, 814 (1994) (quoting *People v. d'Avis*, 250 Ill. App. 3d 649, 651 (1993)).

¶ 21 In this court, defendant argues that the State failed to prove beyond a reasonable doubt that he knowingly touched K.M. or that he intended to touch her.

¶ 22 To sustain a conviction for battery, the State must prove that defendant's conduct was knowing or intentional, and not accidental. *People v. Phillips*, 392 Ill. App. 3d 243, 258 (2009). A person " 'acts knowingly' if 'he is consciously aware that his conduct is of such nature' that it is 'practically certain' to cause the result proscribed by the offense." *Id.* (quoting 720 ILCS 5/4-5 (West 2004)); see also 720 ILCS 5/4-5 (West 2016). " 'Because of its very nature, the mental element of an offense, such as knowledge, is ordinarily established by circumstantial evidence

rather than by direct proof.' " *People v. Jasoni*, 2012 IL App (2d) 110217 ¶ 20 (quoting *People v. Farrokhi*, 91 Ill. App. 3d 421, 427 (1980)); see also *People v. Rader*, 272 Ill.App.3d 796, 806 (1995) (An admission by a defendant is not required for the trier of fact to conclude that a defendant had knowledge of something).

¶ 23 After reviewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found that defendant knowingly made physical contact with K.M. The record shows that, during the massage, defendant repeatedly touched K.M. and, ultimately, grabbed her groin area. K.M. testified that, as she moved around, defendant's arm went wherever she would go. During the massage, defendant grabbed K.M.'s knee and "brushed" her thigh. Although K.M. did not find defendant's contact with her thigh to be totally out of the ordinary, it did set "something off" in her "head," and made her uncomfortable. K.M. continued to massage defendant because she could not tell if the motion was purposeful, and assumed defendant was trying to get comfortable. K.M. explained that, because defendant was touching her "throughout" the massage, she moved to the left side of his body to see if it was "all in [her] head." Defendant then grabbed K.M. between her legs and pulled her closer to the table. As he did so, he said "come close; I want to feel the sensation." This evidence, and the reasonable inferences therefrom, was sufficient to establish that defendant knowingly touched K.M. in an insulting or provoking nature, and thus sustain his conviction for battery.

¶ 24 Defendant nevertheless argues that the evidence was insufficient to support his conviction because the State's evidence is improbable, unconvincing, and contrary to human experience. See *People v. Dawson*, 22 Ill. 2d 260, 264-65 (1961) ("[I]t is the duty of this court to examine the evidence in a criminal case and if it is so unsatisfactory and unreasonable as to raise

a serious doubt of defendant's guilt, the conviction must be reversed* * *Where the State's evidence is improbable, unconvincing and contrary to human experience, we have not hesitated to reverse the judgments of conviction."). In support of this argument, defendant points out that during the massage: he was lying face down with his head in the face cradle; K.M. was moving around him; K.M. initiated contact with him and was trying to give him "what he wanted"; his arm was immobilized when it brushed against K.M.'s thigh; and that before he touched her groin, K.M. did not express her discomfort with him, and even got closer to him after he grabbed her knee.

¶ 25 Defendant's arguments amount to requesting that we retry his case on review, and substitute the trial court's judgment with our own. This we will not do. *Hayashi*, 386 Ill. App. 3d at 122; *Ortiz*, 196 Ill. 2d at 259. As mentioned, it is "the trier of fact's responsibility to determine the witnesses' credibility and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence." *Ortiz*, 196 Ill. 2d at 259. Given its ruling, the court resolved these inconsistencies in favor of the State. In doing so, the court is not required to disregard the inferences that flow from the evidence or search out all possible explanations consistent with a defendant's innocence and raise them to a level of reasonable doubt. See *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 51. As mentioned, a defendant's conviction will be overturned only if the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of defendant's guilt. *Jackson*, 232 Ill. 2d at 281. This is not one of those cases.

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.