2018 IL App (3d) 160563-U

Order filed March 21, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0563 Circuit No. 15-CF-1527
DARREN JOHNSON,	)	Honorable Amy M. Bertani-Tomczak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice McDade concurred in the judgment.
Presiding Justice Carter dissented.

ORDER

¶ 1 *Held*: A defendant's convictions for residential burglary and attempted criminal sexual assault were reversed where the evidence adduced at trial was insufficient to prove beyond a reasonable doubt that the defendant intended to commit an act of sexual penetration through the use of force where the defendant never touched the complainant, he started pulling his pants up as soon as the complainant yelled at him, and he did not chase her when she ran out of the house.

¶ 2 The defendant appeals from his convictions of residential burglary and attempted criminal sexual assault. The defendant was also convicted of criminal trespass to residence, but he does not appeal that conviction.

¶ 3 FACTS

¶ 4 The defendant was charged with two counts of residential burglary (720 ILCS 5/19-3(a) (West 2014)), one count of attempted criminal sexual assault (720 ILCS 5/8-4 (West 2014)), and one count of criminal trespass to residence (720 ILCS 5/19-4(a)(2) (West 2014)) for allegedly entering the dwelling place of another on July 25, 2015, and attempting to commit a sexual assault.

¶ 5 The complainant testified that she was home alone on July 25, 2015, at around 4:30 p.m., when the defendant entered her home by an unlocked back patio door. The complainant was getting dressed in her bedroom on the second floor when she heard footsteps coming up the stairs. The complainant testified that the intruder, the defendant, stopped in the doorway and then started to take off his pants and shoes and said he was ready for her. The complainant did not know the defendant. The complainant testified that she could see his erect penis under his underwear. The complainant yelled at the defendant to leave the house. He pulled up his pants back up, which were about mid-thigh, and then took a step back and asked if anyone else was home. The complainant told him that her parents were in the backyard. The defendant took another step back and peered into the other bedrooms, and the complainant was able to run down the stairs and out of the house. The complainant's written statement the night of the event was similar but stated that the defendant went down the stairs before the complainant. Also, it stated that the defendant started to take off his pants and shoes but did not mention seeing his underwear or erect penis. At trial, the complainant clarified that she went down the steps first

when the defendant stepped back to look in the other bedrooms. The defendant never touched the complainant, and he did not chase her.

¶ 6 When she called 911, the complainant said that a man tried to rape her, but she did not say anything about seeing the defendant's underwear or erect penis. She did describe what he was wearing. Shorewood police officer Dan Koopman testified that he spoke with the complainant about 15 minutes after her 911 call. She described the defendant coming into her house, coming up the stairs, starting to take off his pants and shoes, and saying that he was ready for her. Koopman testified that, at the scene, the complainant said that she ran down the stairs ahead of the defendant, but in her written report a few hours later, the complainant said that the defendant went downstairs first.

¶ 7 Office Danielle Malone, with the Shorewood Police Department, testified that she reviewed the complainant's written statement and asked her some additional questions. Malone asked the complainant how far the defendant had pulled his pants down. The complainant told Malone that the defendant pulled his pants down about halfway and she could see his underwear. In response to Malone's question whether the defendant was aroused, the complainant said that yes, his underwear was not flat.

¶ 8 The defendant was convicted of all four counts. The trial court sentenced the defendant to three consecutive terms of 4 years and 6 months in prison on each of the first three counts (two counts of residential burglary and one count of attempted criminal sexual assault), and a concurrent term of 2 years in prison for criminal trespass to a residence. Additionally, the defendant was required to register as a sex offender. The defendant appealed his convictions for residential burglary and attempted criminal sexual assault.

¶ 9 ANALYSIS

¶ 10 The defendant argues that the State failed to prove beyond a reasonable doubt that, at the time of entering or remaining in the complainant's home, he intended to engage in an act of sexual penetration by force or threat of force. The defendant contends that the evidence indicates that the defendant had a desire to engage in sexual activity, but there was insufficient evidence that he ever intended to do so by force. The State argues that the circumstantial evidence was sufficient to establish that the defendant had the intent to commit a criminal sexual assault when he entered the complainant's home.

¶ 11 The defendant was charged with residential burglary, which occurs when a person "knowingly and without authority enters or knowingly and without authority remains within the dwelling place of another, or any part thereof, with the intent to commit therein a felony or theft." 720 ILCS 5/19-3(a)(3) (West 2014). The defendant only challenges one element – his intent to commit a felony at the time he entered or remained in the complainant's home. The felony that the State charged and sought to prove was a criminal sexual assault, which occurs when a person commits an act of sexual penetration with force or threat of force. 720 ILCS 5/11-1.20(a)(1) (2014).

¶ 12 The trial court found that the State proved the defendant's intent to use force or threat of force to have sex with the complainant - the defendant went directly to the complainant's bedroom, announced his intent, took his pants partially down, and had an erection. Intent is generally proven by circumstantial evidence and is measured at the time of the entering or remaining in the residence. *People v. Monigan*, 204 Ill. App. 3d 686, 688 (1990); *People v. Maggette*, 195 Ill. 2d 336, 353 (2001). The question of whether the requisite intent existed is a question for the trier of fact, which will not be overturned unless the evidence is contrary to the verdict or so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of guilt.

Monigan, 204 Ill. App. 3d at 689. When reviewing a challenge to the sufficiency of the evidence, the reviewing court considers whether, viewing the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Belknap*, 2014 IL 117094, ¶ 67.

¶ 13 In support of his argument that the evidence did not support a finding that the defendant intended to have sex with the complainant by force or threat of force, the defendant cites to the case of *People v. Matthews*, 44 Ill. App. 3d 342 (1976). The defendant in *Matthews* entered the complainant's home through an unlocked door and sat down across from her in the living room after she had ordered him to leave. *Id.* at 343. He said that he wanted to have sex with her and then got up and walked toward the rear of the house. *Id.* The complainant ran out of the house and returned with her neighbor, finding the defendant still there and naked from the waist down. *Id.* The *Matthews* court concluded that the defendant's words and act of breaking into the complainant's house were insufficient to prove beyond a reasonable doubt that the defendant intended to commit an act of intercourse through the use of force. *Id.* at 344.

¶ 14 The Illinois Supreme Court, citing *Matthews* with approval, reached the same conclusion in *People v. Toolate*, 101 Ill. 2d 301, 306 (1984). In *Toolate*, the defendant broke into a woman's house in the middle of the night, moved furniture around her bed, touched her on the left side while she was sleeping, and was standing over her bed when she woke up. *Id.* at 302. The Court concluded that whatever the defendant's intent, there was no evidence of an intent to engage in sexual activity by force and no evidence of a threat of force. *Id.* at 305. The defendant had no weapon, he did not harm or threaten harm the woman, he was fully clothed, he touched the woman but did not caress or fondle her, he made no attempt to stop her from getting out of bed, he left when asked to leave, and he did not disguise his identity. *Id.* at 305-06. The *Toolate* court

contrasted these actions with cases where the defendant wrestled the victim to the floor and attempted to unbutton her shirt (*People v. Tackett*, 91 Ill. App. 3d 410 (1980)) and where the defendant was partially masked and held a screwdriver to the victim's throat (*People v. Clerk*, 68 Ill. App. 3d 1021 (1979)).

¶ 15 We reach the same conclusion in this case. The defendant's words and actions indicate a desire to have sex, but despite the fact the defendant was larger than the complainant he did not make any move toward the complainant to restrain or overpower her. Even after ascertaining there was no one else in the house, he made no effort to touch her or to stop her from leaving the room or going down the stairs. When the complainant yelled at the defendant he began pulling up his pants and he did not chase her when she ran out of the house. There were no prior interactions between the complainant and the defendant. *Cf. People v. Cunningham*, 265 Ill. App. 3d 3, 7 (1994) (evidence of numerous obscene phone calls supported the inference that the defendant intended to subject the victim to unwanted sexual contact). Because there was no evidence the defendant threatened or used force of any kind, the evidence is insufficient that the defendant had the intent to commit a criminal sexual assault and therefore the convictions for residential burglary cannot stand. Even though we have found that defendant did not commit the crime as charged, our decision does not minimize the terrifying and traumatic experience the defendant's action created for this complainant.

¶ 16 The defendant was also convicted of attempted criminal sexual assault, and he contends that conviction should also be reversed. As stated above, criminal sexual assault occurs when a person commits an act of sexual penetration with force or threat of force. 720 ILCS 5/11-1.20(a)(1) (2014). A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission

of that offense. 720 ILCS 5/8-4(a) (West 2014). We have already found that there was insufficient evidence of the defendant's intent to commit a criminal sexual assault. Thus, we also reverse this conviction. Since we are reversing the defendant's conviction for attempted criminal sexual assault, we also vacate the order certifying him as a sex offender.

¶ 17 The defendant does not challenge his conviction for criminal trespass to a residence, so we affirm that conviction and sentence.

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Will County is reversed in part and affirmed in part.

¶ 20 Affirmed in part and reversed in part.

¶ 21 PRESIDING JUSTICE CARTER, dissenting.

¶ 22 I respectfully dissent because I would conclude that a rational trier of fact could have found the essential elements of the charged crimes proven beyond a reasonable doubt. See *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (when a criminal defendant challenges the sufficiency of the evidence, a reviewing court must determine whether, after 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 proven beyond a reasonable doubt).

¶ 23 Here, in order to prove defendant was guilty of residential burglary as alleged in this case, the State was required to present sufficient evidence that defendant unlawfully entered the victim's home with the intent to use force, or the threat of force, to commit an act of sexual penetration. See 720 ILCS 5/19-3(a) (West 2014) (a person commits residential burglary by knowingly and without authority entering or remaining within the dwelling place of another with the intent to commit therein a felony or theft); 720 ILCS 5/11-1.20(a)(1) (West 2014) (a person commits the felony of criminal sexual assault by committing an act of sexual penetration with

force or the threat of force). Force or the threat of force includes, but is not limited to, when the accused either threatens force or violence and the victim reasonably believes the accused has the ability to execute that threat, or the when the accused overcomes the victim by use of superior strength or size, physical restraint, or physical confinement. 720 ICLS 5/11-0.1 (West 2014). Important factors to consider include the size and strength of the defendant and victim and the location and conditions under which the assault occurred. *People v. Hines*, 105 Ill. App. 3d 35, 37 (1982). There is no specific standard regarding the amount of force which the State is required to prove in order to prove a criminal sexual assault, and each individual case must be considered on its own specific facts. *People v. Alexander*, 2014 IL App (1st) 112207, ¶ 52.

¶ 24 In this case, defendant's intent to commit "an act of sexual penetration" was made clear where the 30-year-old defendant, who was a stranger to the victim, snuck up on the unsuspecting 19-year-old victim while she was in her bedroom, stood in her bedroom doorway, stated, "I'm ready for you," and pulled down his pants to reveal his erect penis inside his underwear. See *People v. Toolate*, 101 Ill. 2d 301, 307 (1984) (citing to *People v. Clerk*, 68 Ill. App. 3d 1021 (1979)) and indicating the intent of the defendant in *Clerk* to have sexual intercourse was "made clear" by defendant telling the complainant to lie on the floor and defendant unbuckling his belt and unzipping his pants). Defendant's intent to use "force" to commit an act of sexual penetration can be inferred where defendant, who was much larger than the victim,[1] stood in the victim's bedroom doorway, which would have blocked her means of escape, and defendant stated that he was "ready" for the victim, pulled down his pants to reveal an erect penis inside his underwear, and disregarded the victim's frantic cries for him to leave her home. Although the victim told defendant to leave, he did not leave but, rather, attempted to establish whether anyone

[1] The record shows that defendant was approximately six feet and one inch tall and weighed over 200 pounds and the victim was five feet and six inches tall and weighed approximately 130 pounds.

else was in the home. Thus, when the evidence is viewed in the light most favorable to the State, I would conclude that a rational trier of fact could have found that defendant unlawfully entered the victim's home with the intent to commit criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2014)).

¶ 25 Additionally, I would conclude that defendant was proven guilty of attempted criminal sexual assault beyond a reasonable doubt. A person commits "attempt" of a crime when, with intent to commit a specific offense, the person does "any act which constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2014). A substantial step should put the accused in a "dangerous proximity" to success. *People v. Hawkins*, 311 Ill. App. 3d 418, 424 (2000). An attempt occurs when a defendant crosses the line where preparation ends and actual execution of a criminal act begins. *Id*. at 426-27. Whether a defendant's conduct constitutes a substantial step toward the commission of a specific crime is a question of fact to be determined on a case-by-case basis from the unique facts and circumstances of the case. *People v. Norris*, 399 Ill. App. 3d 525, 530 (2010) (whether a defendant's conduct constitutes a substantial step toward commission of a crime is an issue as to the sufficiency of the evidence, not a question of law, and the *Collins* standard applies).

¶ 26 As I discussed above, I would conclude that a rational trier of fact could have found that defendant had the intent to commit criminal sexual assault. I also conclude that a rational trier of fact could have found defendant's actions constituted a substantial step toward committing criminal sexual assault, where defendant entered the home without authority, blocked the unsuspecting victim in her bedroom by standing the bedroom doorway, pulled down his pants to reveal an erect penis, and indicated he was "ready" for the victim. Defendant's "attempt" was only interrupted when the victim seized the opportunity to run past defendant and out of the

home after defendant took a step back from the doorway to peer into the other bedroom to determine if anyone else was home. See *id.* at 424 (an attempted crime is complete upon defendant completing a substantial step with the requisite intent, with defendant falling short of completion through means other than voluntarily relenting). In other words, defendant did not voluntarily relent in this case, but was unable to proceed because the victim escaped. See *id. a*t 431 (when a substantial step toward the commission of the crime has already been taken with the requisite intent, abandonment of the criminal purpose upon the resistance of the potential victim does not render the step already taken insubstantial). Thus, I would find that based on the facts presented in this case, when viewed in the light most favorable to the State, a rational trier of fact could have found defendant guilty of attempted criminal sexual assault beyond a reasonable doubt, despite the fact that defendant did not completely remove his clothing, did not remove the victim's clothing, did not act aggressively, did not threaten the victim, and did not chase the victim when she ran out of the house. See *id.* at 427-28 (emphasis on what the defendant did not do is an inappropriate test for determining whether a substantial step toward the commission of a crime was taken).

¶ 27 Accordingly, I would affirm defendant's convictions for residential burglary and attempted criminal sexual assault.