2019 IL App (2d) 160664-U
No. 2-16-0664
Order filed January 25, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN T. RUSHING, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 16-DV-322 Honorable Mary E. O'Connor, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The State proved defendant guilty beyond a reasonable doubt of domestic battery and interference with the reporting of domestic violence: although the victim did not directly observe the offenses, her testimony was sufficient circumstantial evidence of defendant's guilt.

¶ 2 Defendant, John T. Rushing, appeals from his convictions of domestic battery (bodily harm) (720 ILCS 5/12-3.2(a)(1) (West 2016)) and unlawful interference with the reporting of domestic violence (720 ILCS 5/12-3.5(a) (West 2016)). He asserts that the testimony of the victim and primary witness for the State, C.L., was insufficient to support his convictions. We hold that C.L.'s testimony was not so unsatisfactory that it could not be credited. We further

hold that, once credited, it established circumstances inconsistent with defendant's innocence. Thus, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with three misdemeanor counts based on incidents early in the morning of March 17, 2016, which involved a single victim, C.L. Those charges were: domestic battery (bodily harm); domestic battery (physical contact of a provoking nature) (720 ILCS 5/12-3.2(a)(2) (West 2016)); and unlawful interference with the reporting of domestic violence. Defendant had a jury trial.

¶ 5 C.L. testified that, in March 2016, she was living at the Highland Manor Motel with defendant, who had then been her boyfriend for about three months. They never brought anyone else into the room.

¶ 6 On March 16, 2016, they watched television in the evening. C.L. went to bed around midnight, but defendant stayed up. C.L. woke up at about 2 or 3 a.m. Defendant was still up; he was upset because C.L. had touched him, and he accused her of sticking him with a dirty needle. C.L. told him that he was "paranoid" and that he should go to sleep. She thought then that she was too worried to fall back asleep.

¶ 7 The next thing that C.L. remembered, it was about 4 a.m., and she realized that "[e]verything hurt." (The State phrased the question as when she next "woke up.") She looked around and saw defendant sitting and smoking a cigarette. When she looked at him, he said that she " 'had it coming.' "

¶ 8 C.L. felt as though she was going to vomit, so she got up and went into the bathroom. As she leaned over the toilet, defendant threw his lit cigarette toward her head. After a while, she went back to the bed. She glanced toward her nearby phone, and, as she did so, defendant said,

" '[I]f you call the police I'll make it worse.' " He then walked over to her, put on a pair of leather gloves, and started "making fists." A "minute or so" later, he took his gloves off and brought her a water bottle, suggesting that she should hold it against the swelling on her face. C.L. told him that she thought that she should go to a hospital. Defendant said that they would have to wait " 'till 10 or 11,' " after he paid for the room. C.L. pulled the covers over herself to wait. After some uncertain time, she started to feel cold. She looked around and saw that the door to the room was wide open and that defendant was no longer in the room. She also discovered that "the phone that was sitting there was gone." C.L. also had in the room with her a "government phone" and a phone belonging to someone else. Neither of those was where she expected it to be.

¶ 9 The State asked C.L., "Did you find your two original phones in that hotel?" She responded, "No." She then testified that, when she could not find those phones, she tried unsuccessfully to use the room phone to call 911. Eventually, she found another phone—one that she thought was nonfunctional—in her cosmetics bag. To her surprise, she succeeded in making a 911 call from it.

¶ 10 Law enforcement officers and paramedics arrived in response to the call, and the paramedics eventually took her to the hospital. Her injuries included a broken nose, a "fractured cheek," and a dislocated jaw. A photograph of C.L.'s injuries also showed marks on her neck, and she testified that her hands also hurt. She had no memory of how those injuries were inflicted. She wrote a statement for the police while she was in the hospital, but she could not do so immediately because she "couldn't think straight."

¶ 11 Defendant's cross-examination of C.L. focused initially on whether they were actually in a relationship. She explained that they were "having sex and *** living together." Defendant's

questions then shifted to whether C.L. was, as her written statement and a petition for an order of protection said, asleep when the beating started, or whether she merely had her eyes closed. C.L. was uncertain what those documents said. Shown the wording in the petition for an order of protection, she noted that she had dictated it. She could not remember if she had included in the statement for the police the detail of defendant's putting on gloves to threaten her—she had not—but she said that everything in the statement was correct. She agreed that neither her police statement nor her petition for an order of protection included defendant's throwing a lighted cigarette at her. Asked whether the phones that she had looked for on March 17 were really gone from the motel room, she said that, two days later, she had found them in the room, wrapped up in a towel.

¶ 12 On redirect, C.L. said that her memory was fuzzy because of the head injury she sustained in the attack. She had balance problems since her injuries.

¶ 13 Deputy Curtis Bryant of the Du Page County sheriff's department testified that he was dispatched at 6:17 a.m. to respond to C.L.'s 911 call. She responded to his knock on the motel room door. She had visible marks on her face and neck and was "scared, distraught, [and] upset." She seemed confused, but had no difficulty communicating. Bryant photographed her injuries while the paramedics were attending to her.

¶ 14 Deputy James Buckardt testified that he and a training officer had been dispatched to the motel at about 6:15 a.m. C.L. was in the back of an ambulance when he arrived. She was traumatized, but nevertheless gave Buckardt enough information for him to report a suspect. The two officers spoke to C.L. again while she was at the hospital emergency room, but were unable to obtain a written statement from her. When they visited the hospital again at about 2 p.m., C.L. wrote a statement for them.

¶ 15 Defendant rested without presenting evidence. The jury found defendant guilty on all counts. Defendant moved for a new trial, asserting *inter alia* that the evidence had been insufficient. The court denied the motion and entered judgment on the convictions of domestic battery (bodily harm) and unlawful interference with the reporting of domestic violence. After sentencing, defendant filed a timely notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant asserts that, because C.L. did not observe her attacker, her testimony was insufficient to sustain a conviction. He also argues that, because C.L. had no recollection of the attack, her testimony merely established "suspicious circumstances," and did not link him to the attack. Finally, he suggests that C.L.'s testimony was so unreliable that it could not support proof beyond a reasonable doubt of his guilt.

¶ 18 We hold that C.L.'s testimony was sufficient to allow the jury to properly conclude that the circumstances of her injuries were so incriminating that defendant's guilt had been established beyond a reasonable doubt. When we review a challenge to the sufficiency of the evidence, the issue is 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 beyond a reasonable doubt.' " (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "[I]n weighing evidence, the trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). Thus, even when the evidence does not exclude some scenario consistent with innocence, a jury may nevertheless "rely on the reasonable inferences that flow from the unrebutted evidence"; put another way,

"[t]he State need not disprove or rule out all possible factual scenarios." *People v. Newton*, 2018 IL 122958, ¶ 27. "[W]here the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt," but, "[i]n conducting this inquiry, the reviewing court must not retry the defendant." *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004). "Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280.

¶ 19 Here, although C.L. could not testify directly to defendant's beating her and hiding her phones, her testimony provided sufficient circumstantial evidence of both acts. Proof beyond a reasonable doubt can exist despite the existence of "possible explanations consistent with innocence" (*Jackson*, 232 Ill. 2d at 281), but here, defendant's behavior, as attested to by C.L., was such that a rational jury could conclude that it was inconsistent with his innocence. Moreover, C.L.'s testimony was not so impeached that "no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280.

¶ 20 C.L.'s testimony set out circumstances that the jury could reasonably conclude were inconsistent with defendant's innocence. Regarding the domestic battery charges, C.L. testified to the following: (1) that only defendant was in the motel room with her before and after she received her injuries; (2) that he seemed angry with her the night before she was injured; (3) that, after she received the injuries, he told her that she " 'had it coming' " and that if she called the police he would " 'make it worse' "; and (4) that he did not show any sign of concern for her injuries such as would be ordinary if one's paramour suffered unexpected injuries as notable as C.L's. Regarding the charge of interfering with the reporting of domestic violence, C.L. further

testified to the following: (1) that she saw her phone nearby after she returned from the bathroom after caring for her injuries; (2) that that phone was gone when she got out of bed again after defendant left the room; and (3) that she later found that phone and another usable phone wrapped up in a towel in the motel room. Unless one wholly discounts C.L.'s testimony, to conclude that defendant was not the assailant, one must believe that an unknown person came into the room and beat C.L.—either in or out of defendant's presence—and that he had no response to the crime except to tell C.L. that her injuries could wait. Moreover, defendant's actions are inconsistent with C.L's suffering accidental injuries; among other things, his comments that she " 'had it coming' " and that if she called the police he would " 'make it worse' " make no sense as a response to such injuries. Similarly, unless one wholly discounts C.L.'s testimony, to conclude that defendant did not interfere with her report, one must believe either that the true assailant returned later to hide the phones or that defendant had some innocent reason for wrapping the phones in a towel. The State need not exclude every reasonable hypothesis of the defendant's innocence. *People v. Larson*, 379 Ill. App. 3d 642, 654 (2008). But here, assuming that the jury could credit C.L's testimony, the jury could reasonably exclude all but the most *unreasonable* hypotheses of defendant's innocence.

¶ 21 Defendant sets out three arguments as to why C.L.'s testimony was insufficient. The first two arguments rest on the premise that we have just rejected: that C.L.'s testimony merely established suspicious circumstances, not patently incriminating ones. We address those two arguments briefly. His third argument rests on the premise that C.L.'s testimony was impeached to the extent that it could not support proof beyond a reasonable doubt. We disagree, and we address that argument in greater detail.

¶ 22 First, defendant argues that C.L. did not observe the attack and that the "ability to observe is crucial to establishing the identity of an assailant." Because we have concluded that C.L's testimony, taken as true, provided adequate circumstantial evidence that defendant was the assailant, we disagree. In support of this point, defendant relies on *People v. Thompson*, 121 Ill. App. 2d 163 (1970). In *Thompson*, the victim was raped by a man who prevented her from getting a clear view of him. *Thompson*, 121 Ill. App. 2d at 167-68. The reviewing court rejected the adequacy of the victim's identification of the defendant, given her lack of opportunity to view her assailant, while nevertheless recognizing that the flawed identification was fatal to the State's case only because nothing else tied the defendant to the rape:

> "From the testimony of the complaining witness we believe that the circumstances surrounding the attack did not afford her a favorable opportunity for a clear and positive identification of the defendant as her assailant. Since the complaining witness lacked a sufficient opportunity to observe her assailant, *and the State failed to introduce any other evidence connecting the defendant with the crime*, we find that he was not proven guilty beyond a reasonable doubt." (Emphasis added.) *Thompson*, 121 Ill. App. 2d at 168.

Thompson is thus factually distinguishable by the circumstantial evidence that we previously discussed. Defendant further relies on *People v. Ehlert*, 211 Ill. 2d 192 (2004). *Ehlert* is apposite only for its holding that "the fact that [a] defendant is 'probably' guilty does not equate with guilt beyond a reasonable doubt." *Ehlert*, 211 Ill. 2d at 213. We accept the principle, but, as we stated, the jury here could properly conclude that C.L.'s testimony described behavior by defendant that was inconsistent with his innocence.

¶ 23 Defendant next argues that, because C.L. lacked any memory of how she came to lose consciousness, the evidence was insufficient to connect him to the attack. We disagree for the reasons already stated. On this point, defendant cites two cases, which he asserts are distinguishable, in which reviewing courts upheld convictions. He suggests that *People v. Gray*, 2017 IL 120958, supports reversal because the victim in that case could testify that she remembered the defendant starting to choke her. He suggests that *People v. Jenk*, 2016 IL App (1st) 143177, supports reversal because the victim remembered part of the struggle and the defendant had a history of abusing the victim. Defendant is correct that the testimony of the victims in both those cases was more direct evidence of guilt than was C.L.'s testimony. However, we deem that C.L.'s testimony taken in whole established behavior by defendant inconsistent with his innocence.

¶ 24 Finally, defendant argues that C.L.'s credibility "was so undermined by her own trial testimony that it is not sufficient proof beyond a reasonable doubt of any of the propositions necessary to sustain the charge." Although we recognize that C.L.'s ability to observe was limited by unconsciousness and "fuzzy" recollection, those understandable limitations did not make it necessarily unreasonable for the jury to credit her testimony. "While credibility of a witness is within the province of the trier of fact, and the finding of the jury on such matters is entitled to great weight, the jury's determination is not conclusive." *People v. Smith*, 185 Ill. 2d 532, 542 (1999). Thus, we must reverse a conviction where the evidence is "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of [the] defendant's guilt." *Smith*, 185 Ill. 2d at 542. This is not such a case. Although C.L. frankly admitted that her recollection was—understandably—"fuzzy," she was clear about what she did remember. Moreover, as we

next discuss, nothing to which she testified was implausible, and the specific flaws to which defendant points are essentially inconsequential.

¶ 25 Defendant argues that C.L.'s own inconsistent statements and testimony discredited her. He contends first that she was impeached by her failure to include in her statement to police and her petition for an order of protection the facts that defendant threw a lighted cigarette at her and that he made fists at her. That is true, but it is only mildly impeaching. Witness statements rarely include every possible detail, and the significance of particular facts might not be apparent to a witness. Thus, although defendants frequently argue that details that a witness did not include in his or her original statement must be recent fabrications, no authority exists to suggest that new details alone are inherently discrediting. Defendant contends second that C.L. was discredited by the inconsistency of her testifying on direct examination that she could not find her phones in the motel room, but, on cross-examination, that she found them two days later, wrapped in a towel. We hold that a reasonable jury could conclude that that was not a true inconsistency. C.L., in the course of describing her experiences on the morning of March 17, 2016, responded to the State's question of whether she found the phones in the room with an unqualified "no." A more precise answer would have been, "not until two days later." However, C.L.'s answer was consistent with her relating the events of that particular morning.

¶ 26 Defendant cites *Smith* as a case that supports reversal. We deem *Smith* both factually and legally distinguishable. In *Smith*, the defendant was charged with being the gunman in a fatal shooting occurring just outside a bar. The State presented the testimony of a series of witnesses who had seen some of the incidents surrounding the shooting. That testimony tended to implicate one of three men who had come into the bar that evening. However, only one witness, Debrah Caraway, testified to seeing who fired the shot; the shooting took place under conditions

such that the other witnesses to the shooting could not identify a suspect. *Smith*, 185 Ill. 2d at 535-41, 542. But Caraway's statements and testimony were inconsistent on points other than the shooter's identity, including how regularly she used cocaine. *Smith*, 185 Ill. 2d at 538. Further, Caraway had an apparent motive to implicate the defendant based on her personal relationships. *Smith*, 185 Ill. 2d at 544. Moreover, Caraway's testimony conflicted with that of the unimpeached witnesses on many details of the shooting. *Smith*, 185 Ill. 2d at 542-45. The supreme court therefore held that Caraway's testimony was so "contradicted in important respects by the testimony of the State's more reliable witnesses and was in other respects sufficiently impeached so as to severely undermine its credibility"; it was therefore insufficient to support the identification of the defendant as the shooter. *Smith*, 185 Ill. 2d at 542. This case and *Smith* thus have little in common. We have already noted that C.L.'s testimony, unlike Caraway's, was not significantly inconsistent or seriously impeached. Further, C.L.'s testimony was uncontradicted. To be sure, C.L.'s recollection was "fuzzy"—as she herself recognized. That might have presented a problem if she had testified to observations that placed great demands on her memory and powers of observation. But C.L. testified to simple matters, particularly to defendant's presence in the room before and after the attack, his comments to her, and his lack of sympathetic reaction to her injuries. A jury could reasonably conclude that even a person with "fuzzy" recollection could testify accurately to these facts.

¶ 27 For all these reasons, we hold that the evidence was sufficient to sustain defendant's convictions.

¶ 28 III. CONCLUSION

¶ 29 The judgment of the circuit court of Du Page County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 30 Affirmed.