

No. 1-12-0926

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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. 08 CR 12062
)	
ROGELIO MARTINEZ,)	Honorable
)	Dennis J. Porter,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

O R D E R

¶ 1 **Held:** Where the trial court's finding that defendant was fit to stand trial was not against the manifest weight of the evidence, defendant's convictions for predatory criminal sexual assault and aggravated criminal sexual abuse are affirmed.

¶ 2 Following a bench trial, defendant Rogelio Martinez was convicted of three counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse for multiple acts perpetrated upon his 11-year-old niece. The trial court sentenced defendant to consecutive

prison terms of 8 years for each count of sexual assault and 4 years for the sexual abuse conviction, for an aggregate sentence of 28 years' imprisonment. On appeal, defendant solely contends the trial court erred when it determined he was fit to stand trial because objective psychological testing indicated severe impairment in his ability to consult with his public defender. We affirm.

¶ 3 In a 40-count indictment, defendant was charged with 10 counts of predatory criminal sexual assault, 20 counts of criminal sexual assault, 4 counts of aggravated criminal sexual abuse and 6 counts of criminal sexual abuse. In May 2009, during pre-trial proceedings, defense counsel informed the court that she had retained a "consulting expert" to interview defendant. Counsel did not specify the purpose of the expert. The following month, counsel informed the court that she was having defendant "evaluated by an expert." Several months later, defense counsel filed a 12-page psychological evaluation from the defense's retained expert, Dr. Joan Leska, a licensed clinical psychologist. Dr. Leska found defendant unfit to stand trial based on his inability to effectively communicate with his attorney and assist in his defense. The State then requested that defendant be evaluated by Forensic Clinical Services. In July 2010, the State filed evaluations from a psychologist, Dr. Susan Messina, and a psychiatrist, Dr. Nishad Nadkarni, from Forensic Clinical Services, both finding defendant fit to stand trial. The trial court then scheduled a hearing to determine defendant's fitness to stand trial.

¶ 4 At the fitness hearing, Dr. Nishad Nadkarni testified that he had been a forensic psychiatrist with Forensic Clinical Services for six years, and previously testified as an expert in the field of forensic psychiatry 185 times in Illinois and 6 times in Wisconsin. Dr. Nadkarni performs 10 to 12 court-ordered fitness evaluations per week. Dr. Nadkarni interviewed defendant on July 8, 2010, to determine if defendant was fit for trial. Prior to the interview, Dr.

Nadkarni reviewed several documents including the trial court's order requesting an opinion regarding defendant's fitness to stand trial and fitness with medication, a psychological summary prepared by Dr. Messina of Forensic Clinical Services, the psychological evaluation prepared by Dr. Leska, and the police arrest report and documentation, including a statement by defendant. Dr. Nadkarni also reviewed a psychosocial history prepared by Marci Lerner, L.C.S.W., based on Lerner's interview with defendant's mother and sister. In addition, Dr. Nadkarni reviewed an admission evaluation form from Cermak Health Services dated October 25, 2008, in which defendant complained of hearing voices and threatened to commit suicide unless his mother posted bond for him to be released from jail. Personnel at Cermak diagnosed defendant with malingering and sent him back to jail without medication. Dr. Nadkarni explained that conditional suicide threats are not consistent with *bona fide* mental illness, but instead, are a motivation to be released from custody. Dr. Nadkarni did not ask defendant about hearing voices because defendant did not complain of that problem to him. There was no indication that defendant had ever seen a doctor for a mental health issue prior to his arrest in this case.

¶ 5 In reviewing Dr. Messina's report, Dr. Nadkarni learned that Dr. Messina had performed a number of psychological tests on defendant and came to the conclusion within a reasonable degree of medical certainty that defendant was fit to stand trial. Dr. Messina conducted tests for memory and tests for malingering (including the TOMM and "M-Fast" tests). Dr. Messina found no evidence of malingering. Dr. Nadkarni explained that he did not discuss the psychological tests with Dr. Messina because it is not their general practice to collaborate with each other regarding their evaluations, but instead, they conduct independent examinations. Dr. Nadkarni further explained that, in general, psychiatrists do not conduct psychological tests, and therefore, it is common practice to have a psychologist perform some of those tests.

¶ 6 Dr. Nadkarni interviewed defendant alone for 35 minutes. The doctor began by advising defendant that their discussion was not confidential, and he noted that defendant was well-groomed and appropriately dressed. When Dr. Nadkarni first observed defendant in the jail's holding area, defendant appeared fine and was interacting with others. However, when defendant entered the examination room, he began mumbling and peering about as if he was out of touch with reality. Dr. Nadkarni advised defendant that he would inform the court if defendant was not cooperative, and defendant agreed to cooperate. Dr. Nadkarni asked defendant a series of questions, and defendant answered all of the questions in a rational, logical manner without any repetition required from the doctor. Dr. Nadkarni found no evidence of psychosis, mood disorder, or cognitive impairment.

¶ 7 To determine fitness, Dr. Nadkarni looks for two things: (1) whether the person has the cognitive ability to communicate and understand the nature of the charge, courtroom procedures, and the roles of various court personnel; and (2) whether the person has the capacity to assist counsel rationally in his defense if he so chooses. Dr. Nadkarni asked defendant a series of more detailed questions regarding each of those issues, and defendant responded in an appropriate manner. Specifically, Dr. Nadkarni asked defendant how many people sit on a jury and what their role is. Defendant replied that the jury is "12 from the State whose job is they go to see if you're found guilty or not." The doctor asked defendant what it means to plead not guilty, and defendant replied "go further to a bench or jury trial." Defendant further explained that a guilty plea meant that the charges were true and you return to jail.

¶ 8 Dr. Nadkarni also asked defendant a series of questions to test his knowledge, and rated defendant's intelligence level at the lower end of the average range based upon how articulate defendant was and his general conversation during the evaluation. Defendant answered all of the

doctor's questions, but in general, had to be encouraged by the doctor to fully participate in the examination. Dr. Nadkarni found no indication defendant had any symptoms of a major mental illness such as psychosis or major depression. Defendant denied having any psychiatric problems or problems with functioning, sleeping or eating. Dr. Nadkarni found that defendant was in touch with reality and able to make simple calculations. Initially, defendant was evasive about his criminal history, but after the doctor pushed the issue, defendant stated that he had been arrested less than 10 times, but never incarcerated, which agreed with defendant's arrest record. At the conclusion of the interview, and after reviewing all of the reports and documentation, Dr. Nadkarni opined within a reasonable degree of medical and forensic psychiatric certainty that defendant was fit to stand trial.

¶ 9 Dr. Joan Leska testified that she is a clinical psychologist who has been in private practice for 21 years, with 60% of her practice concentrating on forensic work. Dr. Leska estimated that she completed about 55 evaluations for fitness for trial during her career and has testified as an expert regarding fitness evaluations five or six times. Dr. Leska was retained by the defense to conduct a fitness evaluation of defendant. Dr. Leska acknowledged that all of her evaluations have been on behalf of the defense, and the majority of her work has come from the public defender's office. When Dr. Leska first met with defendant in June 2009, defendant refused to sign her consent form out of fear. Dr. Leska could not discern defendant's fears or rationale because his thoughts were disorganized and his communication was very poor. Defendant's speech was fragmented, his ideas were loosely associated, and she could not follow his thought process. Dr. Leska informed counsel about the problem. A few months later, counsel told Dr. Leska that he had spoken with defendant on numerous occasions and encountered great difficulty communicating with him. Counsel said that defendant never

finished a sentence, and defendant's remarks were illogical, confusing, and at times, irrelevant.

Dr. Leska agreed to meet with defendant again.

¶ 10 Prior to evaluating defendant, Dr. Leska reviewed numerous documents including the grand jury indictment and transcript, board of education records, defendant's arrest record and criminal history, Chicago police general progress and supplemental reports, defendant's statement to police, Illinois State Police laboratory results, and Chicago Children's Advocacy Center and medical examination results. Dr. Leska met with defendant on four separate occasions for a total of 10½ hours and administered three tests to him: the Evaluation for Competency to Stand Trial, Revised (ECST-R), a shortened version of the Minnesota Multi-Phasic Personality Inventory 2 (MMPI-2), and the Structured Interview of Reported Symptoms (SIRS). Dr. Leska also interviewed defendant's mother and sister.

¶ 11 During their initial meeting, defendant appeared unkempt, but improved over time. Throughout their meetings, defendant was oriented as to the time, date and their location. Defendant had very poor eye contact with the doctor. Defendant spoke in quiet, fragmented sentences, mumbling at times, and rarely completed a thought. His answers to questions often veered off on irrelevant tangents. Defendant had difficulty connecting his ideas in a linear fashion, which was very confusing, and at times, incoherent. Defendant appeared depressed and fearful, but denied any depressive symptoms. Defendant did not exhibit any obvious delusional or psychotic thoughts, but Dr. Leska believed he was possibly responding to internal stimuli when he stopped speaking mid-sentence. Defendant initially denied hearing voices. However, defendant's mother, Julietta Martinez, subsequently told Dr. Leska that after a few traumatic incidents, defendant claimed he heard people talking in the house, and she told him he was crazy. On one occasion, defendant awoke with a scratch on his arm and told his mother it was evidence

there were people in their house. Thereafter, Dr. Leska asked defendant about these incidents, and he then admitted to hearing voices over a long period of time, but was reluctant to discuss it any further. During Dr. Leska's evaluations, defendant was not taking medication.

¶ 12 Defendant's mother, Julietta, and his sister, Marisa Martinez, told Dr. Leska that defendant had no developmental issues and never attended special education classes. While in grade school, defendant was obsessed with neatness and became upset if anyone disturbed his belongings. Dr. Leska stated that such behavior sometimes indicates an anxiety disorder. The family reported that defendant dropped out of school during the ninth grade because he was being bullied by his classmates. They further said that defendant functioned below his age level in terms of ambition, employment, friends and dating, and he was very dependent on his family. The family reported two traumatic incidents that occurred when defendant was 17 and 18 years old. In the first incident, defendant was shot by a stray bullet while riding his bicycle in his neighborhood. Defendant was hospitalized, but the bullet was not removed because it was too close to his spine for surgery. During the second incident, defendant was outside with a male and female friend when a drive-by shooting occurred and the girl was killed. Defendant's family reported that he was a changed person following that shooting. Defendant became relatively mute, not speaking to anyone, and only spoke when he pushed people away or made "off the wall" comments. Defendant became reclusive, stopped attending to his hygiene, and was very agitated if anyone demanded he leave the house or talk with them. It was around this same time that defendant claimed he was hearing voices in the house. From this time until the time of his arrest in this case, defendant occasionally went out with friends, had a couple of failed attempts at jobs with no legitimate work history, and mostly remained inside his house.

¶ 13 Dr. Leska testified that the first test she administered to defendant was the ECST-R, a standardized test commonly used in forensic psychology to determine levels of impairment. The test evaluates competency for ability to consult with counsel, factual and rational understanding of courtroom proceedings, and a general rational score. The test indicated defendant was moderately impaired regarding his factual understanding of courtroom proceedings because, although he understood the adversarial nature of the proceeding, he misunderstood key concepts, and his explanations were irrational and inaccurate. Defendant was severely impaired regarding his rational understanding of courtroom proceedings. The test also indicated defendant was extremely impaired in his ability to consult with counsel, primarily due to his disordered thinking. There was no evidence defendant was feigning competency on this test.

¶ 14 The second test Dr. Leska administered was the MMPI, which is the most widely used objective personality test for determining if a person has a psychiatric disorder. Defendant answered "yes" to all of the questions, claiming he had psychiatric symptoms rarely seen in a legitimate psychiatric population, which indicated defendant exaggerated or feigned his answers, rendering the test invalid. When Dr. Leska asked defendant why he marked all of his answers "yes," he replied he wanted all of his answers to be right.

¶ 15 Due to defendant's performance on the MMPI test, Dr. Leska then administered the SIRS test, which is the most comprehensive assessment specifically designed to identify people who are malingering or feigning psychiatric symptoms. Defendant's test results indicated he was answering honestly and not malingering.

¶ 16 Dr. Leska diagnosed defendant with psychotic disorder not otherwise specified, with a provisional diagnosis of chronic posttraumatic stress disorder. After completing her evaluation, Dr. Leska opined that defendant was unfit to stand trial, based predominantly on his inability to

communicate rationally and effectively with his attorney. Dr. Leska recommended defendant be transferred to a residential psychiatric treatment facility where he could receive a definitive diagnosis, be treated with psychotropic medications, and be restored to fitness within one year.

¶ 17 Dr. Leska acknowledged that an M-FAST test administered by Dr. Messina indicated that defendant was malingering. She asserted, however, that Dr. Messina should have conducted further testing, such as the SIRS test, or obtained other corroborative data to confirm her diagnosis, but did not do so. Dr. Leska also disagreed with Dr. Nadkarni's opinion, and said his evaluation was designed by Forensic Clinical Services and is only used in Cook County. After reviewing the reports from Dr. Messina and Dr. Nadkarni, Dr. Leska re-administered the ECST-R test to defendant. The test results were slightly better, but still indicated defendant had a severe impairment regarding his ability to consult with counsel. Dr. Leska explained that the slight improvement was likely the result of defendant becoming educated on the correct answers regarding courtroom proceedings after being advised of those answers by the doctors throughout all of his evaluations. Following her re-evaluation, Dr. Leska again concluded that defendant was unfit to stand trial based on his inability to rationally and effectively communicate with his attorney and assist in his defense.

¶ 18 Dr. Leska acknowledged that defendant sufficiently understood the roles of the court personnel and the courtroom proceedings. Defendant also understood the charges and the possible sentencing penalty he was facing. Dr. Leska agreed that in determining whether a defendant has the ability to assist his attorney, it is important to determine if the defendant has a memory of the offense and a rational view of what occurred. However, Dr. Leska does not discuss the facts of the case with the defendant, but instead, interviews defense counsel. Dr. Leska testified that she never asks a defendant about the actual case so that he will not

incriminate himself. Dr. Leska further acknowledged that a person could be mentally ill, but still fit to stand trial.

¶ 19 The trial court found that the evidence of malingering supported the differences between the two opinions of defendant's fitness. The court specifically noted that Dr. Leska testified that the MMPI test was invalid due to defendant's malingering during that test, which left a disparity between Dr. Leska's tests. The court further noted that Dr. Nadkarni did not rely upon any evidence of malingering when he concluded defendant was fit to stand trial. The court expressly stated that it found Dr. Nadkarni's testimony credible, and noted that Dr. Nadkarni does not work for one particular party. Based on its findings, the trial court concluded that the State proved by a preponderance of the evidence that defendant was fit to stand trial.

¶ 20 Because defendant does not contest the sufficiency of the evidence sustaining his convictions, a detailed discussion of the facts of this case is not necessary. The evidence established that in September 2007, May 2008 and June 2008, defendant committed acts of sexual penetration upon his 11-year-old niece, E.L., by making contact between his penis and her vagina and anus. The evidence further established that in September 2007, defendant fondled E.L.'s breast with his hand for the purpose of sexual arousal or gratification. The trial court found that E.L.'s testimony was very credible, and was corroborated by the testimony of three other witnesses, including Chicago police detective Jose Castaneda, who testified that defendant admitted to him that he had sexual intercourse with E.L. on at least two occasions. The trial court found that the State proved defendant guilty beyond a reasonable doubt of three counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse. The court subsequently sentenced defendant to consecutive prison terms of 8 years for each count of sexual

assault and 4 years for the sexual abuse conviction, for an aggregate sentence of 28 years' imprisonment.

¶ 21 On appeal, defendant solely contends the trial court erred when it determined he was fit to stand trial because the objective psychological testing by Dr. Leska indicated he had a severe impairment in his ability to consult with his public defender. Defendant claims Dr. Leska's testing was corroborated by reports that defendant had difficulty communicating with Dr. Leska, counsel, and his family members. Defendant concedes that he understands the legal system and legal proceedings, but asserts that he was unable to help his attorney prepare his defense. Defendant asks this court to reverse his conviction and remand his case for a new fitness hearing to determine his present ability to assist with his defense.

¶ 22 A defendant is presumed to be fit to stand trial. 725 ILCS 5/104-10 (West 2008). Defendant is unfit when he is unable to understand the nature and purpose of the court proceedings or cannot assist with his defense due to his mental or physical condition. 725 ILCS 5/104-10 (West 2008); *People v. Haynes*, 174 Ill. 2d 204, 226 (1996). Fitness refers only to defendant's ability to function within the context of a trial. *Haynes*, 174 Ill. 2d at 226. The fact that defendant suffers from a mental illness does not necessarily raise a *bona fide* doubt of his ability to assist counsel. *People v. Eddmonds*, 143 Ill. 2d 501, 519 (1991). "A defendant may be competent to participate at trial even though his mind is otherwise unsound." *Eddmonds*, 143 Ill. 2d at 519.

¶ 23 When a *bona fide* doubt of defendant's fitness is raised, the trial court must hold a fitness hearing before proceeding any further. 725 ILCS 5/104-11(a) (West 2008); *Haynes*, 174 Ill. 2d at 226. The State then has the burden of proving, by a preponderance of the evidence, that defendant is fit before proceedings may resume. 725 ILCS 5/104-11(c) (West 2008); *People v.*

Jamison, 197 Ill. 2d 135, 152 (2001). The ultimate issue of defendant's fitness is determined by the trial court, not the experts. *People v. Coleman*, 168 Ill. 2d 509, 525 (1995). It is the trial court's responsibility to assess the credibility and weight to be given to the psychiatric expert testimony. *Coleman*, 168 Ill. 2d at 525. "The mere fact that a psychiatrist expresses the opinion that the defendant was unfit does not require a similar finding by the trial court." *Coleman*, 168 Ill. 2d at 525. The trial court's ruling on defendant's fitness will not be reversed unless it is against the manifest weight of the evidence. *Jamison*, 197 Ill. 2d at 153.

¶ 24 Here, we find that the trial court's ruling that defendant was fit to stand trial was not against the manifest weight of the evidence. Initially, we find it significant to note that a *bona fide* doubt of defendant's fitness never existed in this case. The record reveals that at no time did defense counsel ever inform the court that he was having difficulty communicating with defendant, nor did counsel voice concern regarding defendant's fitness. Instead, counsel informed the court that the defense had retained a "consulting expert" to interview defendant. It was not until 10 months later, when the defense filed Dr. Leska's evaluation finding defendant unfit, that the issue of defendant's fitness was raised with the court.

¶ 25 We also find it significant to note that when Dr. Nadkarni first observed defendant in the holding area at the jail, defendant appeared fine and was interacting with other inmates. However, once defendant entered the examination room with Dr. Nadkarni, he began mumbling and acting as though he was out of touch with reality. At that point, Dr. Nadkarni advised defendant that he would inform the court if defendant was not cooperative, and defendant then became cooperative and answered the doctor's questions. Defendant's behavior suggests a possible attempt at malingering, which was halted when Dr. Nadkarni warned defendant that the court would be notified of his refusal to cooperate.

¶ 26 Dr. Nadkarni testified that defendant answered all of his questions in a rational, logical manner without any repetition required from the doctor. Dr. Nadkarni found no evidence of defendant exhibiting cognitive impairment, mood disorder, or a major mental illness such as psychosis or depression. Dr. Nadkarni expressly stated that one of the factors he looks for when determining a person's fitness is whether that person has the capacity to assist counsel rationally in his defense, if he so chooses. The doctor then asked defendant a series of detailed questions related to that issue, and found that defendant responded in an appropriate manner. Dr. Nadkarni further found that defendant was in touch with reality and able to make simple calculations. Defendant denied having any psychiatric problems or problems with functioning, sleeping or eating. Based on his interview and his review of numerous reports and documentation, Dr. Nadkarni opined within a reasonable degree of medical and forensic psychiatric certainty that defendant was fit to stand trial.

¶ 27 Although Dr. Leska testified that defendant was unfit, the trial court found a disparity between her tests, one of which was rendered invalid due to defendant's malingering. Dr. Leska's testimony that defendant was unable to effectively communicate with his attorney was directly contradicted by Dr. Nadkarni's testimony that defendant was capable of doing so. It was the trial court's responsibility to assess the credibility of the psychiatric experts, weigh their conflicting testimony, and determine whether defendant was fit to stand trial. The court expressly stated that it found Dr. Nadkarni's testimony credible, and noted that, contrary to Dr. Leska, who was retained by defendant, Dr. Nadkarni does not work for one particular party. The court's decision to accept the conclusion of Dr. Nadkarni and reject that of Dr. Leska was not manifestly erroneous. *Haynes*, 174 Ill. 2d at 232. Accordingly, the trial court's determination that defendant was fit to stand trial was not against the manifest weight of the evidence.

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¶ 28 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.