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2014 IL App (3d) 110935-U

Order filed April 2, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

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. 3-11-0935
TREVOR R. ZIRKIN,)	Circuit No. 09-CM-4339
Defendant-Appellant.)	Honorable Brian E. Barrett, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in denying defendant's motion for a new trial.

¶ 2 Following a bench trial, the Will County circuit court convicted defendant, Trevor Zirkon, on two counts of criminal sexual abuse pursuant to section 12-15(c) of Criminal Code of 1961 (720 ILCS 5/12-15(c) (West 2010)) (renumbered and amended as § 11-1.50(c) by Pub. Act 96-1551, art. II, § 5 (eff. July 1, 2011)). The trial court sentenced defendant to 45 days'

incarceration and 24 months' sex offender probation, including the requirement that defendant register as a sex offender.

¶ 3 Defendant appeals, claiming the trial court erred in denying his motion for a new trial based on newly discovered testimony of an occurrence witness that exonerated defendant.

¶ 4 We affirm.

¶ 5 **BACKGROUND**

¶ 6 Defendant was charged by information with seven counts of criminal sexual abuse, a Class A misdemeanor (720 ILCS 5/12-15(c) (West 2010)) (renumbered and amended as § 11-1.50(c) by Public Act 96-1551, art. II, § 5 (eff. July 1, 2011)). The information alleged that defendant engaged in various acts of sexual penetration in August and September of 2009 with M.M. (counts I and II), S.M. (counts III and IV), and C.B. (counts V through VII). All three girls were between the ages of 13 and 17. Defendant was less than five years older than the victims at the time of the incidents.

¶ 7 Defendant filed a motion to sever certain counts. The trial court ordered that counts I and II concerning M.M. be severed, and that counts III through VII be tried together. The instant appeal concerns only counts I and II. Defendant waived a jury trial and the cause proceeded to a bench trial on June 13 through 15, and 21, 2011.

¶ 8 At trial, M.M. testified that she was born in October 1993 and was 17 years old. In the fall of 2011, she would be a senior in high school. M.M. first met defendant through a friend in August of 2009, when she was 15 years old. She testified that she was introduced to defendant at a gas station parking lot. Her friend was driving. M.M. told defendant she was 15. Defendant told her he was 19 and went to her school. She gave defendant money and asked him to buy her

cigarettes, which he did. Defendant drove M.M. to the townhouse he shared with his father. A few hours later, he drove her home and the two exchanged phone numbers.

¶ 9 A few days later, defendant texted M.M. and picked her up outside her house at around 9 p.m. He then picked up M.M.'s friend and classmate, Nicki Starkey, at Starkey's home. Defendant then drove both girls to his home, where they met D.J. (David) Russo. Russo lived with defendant and his father, and had a room in the basement.

¶ 10 After that evening, Russo and Starkey started dating. M.M. testified that she, defendant, Russo and Starkey went into the basement and watched television for a few hours. Russo and Starkey sat on the bed in the basement while she and defendant sat on the floor. M.M. and defendant began kissing and touching each other. They got under a blanket and took off their clothes. M.M. performed oral sex on defendant for about 20 minutes. He then put on a condom and the two had vaginal intercourse for approximately an hour until he ejaculated. M.M. testified the sexual activity was consensual. Sometime between 10 and 11p.m., defendant drove M.M. and Starkey home. They parted on good terms. They later lost touch with one another.

¶ 11 M.M. testified that she did not report the incident to anyone. Naperville detectives Ogan and Elliot later approached M.M. and questioned her about the incident. Detective Ogan had handled past cases involving defendant when defendant was a juvenile. At first, M.M. indicated she did not want to talk to them. The officers told her that her name had been brought up by other people. M.M. then relayed to the officers what happened. Ogan and Elliot asked her if she knew anyone else defendant had been intimate with. She said she did not.

¶ 12 Defendant's father, Ronald Zirkin, testified that defendant was born in December 1989 and was 21 years old at the time of trial. Following Mr. Zirkin's testimony, the State rested.

¶ 13 The defense called two witnesses, Detective Ogan and defendant. Detective Ogan testified that he and Detective Jordan interviewed M.M. on October 22, 2009. She was the only person they spoke to about the offenses alleged in counts I and II. M.M. did not mention being with defendant or being at his home on any other occasion other than the time they had sex. She never said defendant bought her cigarettes. At first, she denied having sex with defendant. Later, she stated that they did have sex. She also said she told defendant she was 15. Detective Ogan also interviewed other girls about allegations that they had sex with defendant when they were 15. Some of them admitted to having done so; some did not.

¶ 14 Defendant testified that he was born in Decemeber 1989 and was 21 years old. He graduated from Nequa Valley High School in 2008. In August 2009, he lived at his parents' house in Naperville. His friend D.J. Russo also lived there and had a room in the basement. Russo was dating Nicki Starkey. Defendant stated he was exclusively dating Nicki Fredrico at the time. He denied having sex with M.M. On the evening of August 21 or 22, 2009, Russo wanted to spend time with Starkey, but did not have a driver's license. Defendant agreed to pick up Starkey with Russo. When they arrived at Starkey's house, she asked him to pick up her friend M.M. Defendant agreed, and he drove them all back to his home. He denied ever buying M.M. cigarettes. He stated he did not know how old she was. They arrived back at defendant's home around 11:35 or 11:40 p.m. All four of them smoked, talked, and watched movies and music videos. Russo and Starkey spent part of the night downstairs in Russo's room in the basement. M.M. wore makeup and said her driver's license was suspended. Defendant testified M.M. never said she was 15; she just said that she went to Nequa Valley High School. He guessed she was 17 or 18, but did not specifically ask her because he was not interested in her. They never touched each other or had sex.

¶ 15 The defense rested. The State called Melissa Katchen as a rebuttal witness. Katchen testified that like M.M., she was 17 years old and was going into her senior year at Nequa Valley High School. Katchen knew both M.M. and defendant. Katchen testified that defendant admitted to her that he had had sex with M.M. She could not recall exactly when the conversation took place; it could have been in June, July, or August of 2009. She could similarly not recall where the conversation took place. At the time of trial, Katchen was on felony bond in DuPage County.

¶ 16 The State again rested. Defendant testified in rebuttal and denied telling Katchen that he had had sex with M.M.

¶ 17 Following closing arguments, the trial court found defendant guilty on both counts of criminal sexual abuse. The court stated that it believed M.M. looked younger than 17 and that it found M.M. and Katchen more credible than defendant.

¶ 18 On August 16, 2011, defendant filed a motion to reconsider, arguing that the State failed to prove defendant guilty beyond a reasonable doubt. On that same date, defendant also filed a motion for a new trial or to reopen the proofs. Defendant argued therein that David Russo moved out of state and joined the Marines shortly after the alleged offenses and did not leave a forwarding address. The defense attempted to find him, but was unable to do so until Russo returned to Naperville and spoke to defendant's father on July 4, 2011. Russo then told defendant's father that nothing happened between defendant and M.M. on the night in question.

¶ 19 On September 22, 2011, defendant filed a motion to dismiss. That motion stated that on or around Halloween 2009, in response to questioning, Russo told a Naperville police officer believed to be Tim Ogan that he knew of no sexual contact between the defendant and M.M. The motion further argued that the State listed Russo as a potential witness, but did not indicate

he possessed exculpatory information. Appended to the motion was an affidavit from Russo stating, *inter alia*, that: M.M. told him she was 17; when Russo asked, defendant stated nothing had happened between him and M.M.; that defendant thought M.M. was weird and they had nothing in common; that Russo was approached by a Naperville police officer around Halloween of 2009, and Russo told the officer nothing happened between defendant and M.M.; defendant and M.M. never kissed or had sex in his presence; M.M. never entered his room in the basement of defendant's house; and that M.M. has a reputation in the community for lying and being manipulative and untrustworthy.

¶ 20 The court held a hearing on defendant's posttrial motions on October 21, 2011. Russo and Ogan testified.

¶ 21 Russo testified that he and defendant used to be good friends. When Russo joined the Marines and left for California in October or November of 2009, he did not leave a forwarding address with the Zirkins or anyone else. At the time of the hearing, he was living in Moore, Oklahoma. He and defendant had parted on bad terms.

¶ 22 Russo was living at defendant's home when the incident in question occurred. At the time, he and Starkey went downstairs to his bedroom. Defendant and M.M. remained upstairs. Russo stated that he decided to testify at the hearing because he did not believe it was right that defendant had been accused of something he did not do. Russo also stated that he would not have allowed defendant to have sex with M.M. in his room.

¶ 23 Russo stated that Detective Ogan approached him a few months after Starkey and M.M. were at defendant's house. Ogan asked him whether anything had happened between defendant and M.M., to which he responded in the negative. Ogan told him he should not associate with defendant. The police never contacted Russo regarding the case again.

¶ 24 Ogan, on the other hand, denied ever meeting with Russo in connection with this case. Russo was mentioned in his report based on a statement made by M.M., but Ogan never interviewed him. According to his report, M.M. said Starkey and Russo were present when M.M. had sex with defendant. Ogan testified that he decided not to try to get statements from either Russo or Starkey.

¶ 25 Russo testified in rebuttal that he was positive Ogan questioned him about the case.

¶ 26 The trial court denied defendant's motion to dismiss, finding that Russo was not credible, that Ogan had no affirmative duty to interview Russo, and that the defense could have contacted Russo and called him as a witness at trial.

¶ 27 The defense then argued in support of the motion to reopen proofs and for a new trial, contending that Russo left prior to trial, his cell phone was no longer in service, and the defense had no way of contacting him. The trial court also denied those motions, stating once again that the defense could have found Russo. The court noted that Russo's testimony did not preclude the possibility that defendant had sex with M.M., insofar as Russo said he and Starkey went downstairs at some point while defendant and M.M. remained upstairs. The court further found that, even if he were to accept Russo's testimony, he still did not find defendant's testimony credible. The court also denied defendant's motion to reconsider.

¶ 28 At the sentencing hearing on November 15, 2011, the judge ultimately imposed a sentence of 2 years' sex offender probation, including a term of 45 days' incarceration and the requirement that defendant register as a sex offender. Defendant filed his notice of appeal on December 19, 2011.

¶ 29 On December 29, 2011, counts III through VII were dismissed. Defendant pled guilty to amended counts III and V charging him with misdemeanor battery of C.B. The court sentenced

him to a term of two years' conditional discharge to be served concurrently with his term of sex offender probation.

¶ 30 On June 3, 2013, the Illinois Supreme Court granted entered a supervisory order, directing this court to allow the December 19, 2011, notice of appeal to stand as a validly filed notice of appeal.

¶ 31 ANALYSIS

¶ 32 Defendant's sole argument on appeal is that the trial court erroneously denied his motion for a new trial based on newly-discovered evidence of actual innocence.

¶ 33 To warrant a new trial, newly discovered evidence must (1) be so conclusive it would likely change the outcome of the trial; (2) be material and not merely cumulative; and (3) must have been discovered after trial and could not have been discovered sooner. *People v. Molstad*, 101 Ill. 2d 128, 134 (1984). The "burden is upon the applicant to rebut the presumption that the verdict is correct and to show that there has been no lack of diligence." *People v. Smith*, 177 Ill. 2d 53, 87 (1997) (quoting *People v. Holtzman*, 1 Ill. 2d 562, 569 (1953)). "New evidence need not necessarily establish the defendant's innocence." *People v. Carter*, 2013 IL App (2d) 110703, ¶ 75 (citing *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1034 (2011)). "Instead, a new trial is warranted if all of the facts and surrounding circumstances, including the new evidence, warrant closer scrutiny to determine the guilt of innocence of the defendant. *Id.* Requests for a new trial based on newly discovered evidence are not looked upon with favor by the courts and must be closely scrutinized." *Id.*

¶ 34 A ruling on a motion for a new trial asserting newly discovered evidence is reviewed for abuse of discretion. *Smith*, 177 Ill. 2d at 82. "Abuse may be found only if a trial court's evaluation is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the

view adopted by the trial court." *People v. Beard*, 356 Ill. App. 3d 236, 243 (2005) (citing *People v. Donoho*, 204 Ill. 2d 159, 182 (2003)).

¶ 35 Defendant contends that the trial court should reopen the proofs or grant him a new trial based on the testimony of Russo, who was unavailable at trial but discovered only after defendant was convicted. We disagree.

¶ 36 First, defendant has failed to adequately explain why the evidence contained in Russo's affidavit or his testimony on the motion for a new trial could not have been discovered sooner through the exercise of due diligence. "An unbroken line of precedent holds that evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of those facts may have been unknown, unavailable or uncooperative." *People v. Jones*, 399 Ill. App. 3d 341, 364 (2010) (citing *People v. Coleman*, 381 Ill. App. 3d 561, 568 (2008) and *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007)).

¶ 37 Defendant failed to meet his burden of establishing that he practiced due diligence in attempting to locate Russo. As the State points out, Russo joined the Marines in 2008 while living with the Zirkins, and he was still a Marine at the time of trial. It is certainly not speculative for the trial court to have found that defense counsel could have located Russo by running a military search. As an employee of the federal government and a member of our armed forces, it is not as if Russo could have vanished into thin air. There was also testimony that Starkey and Russo continued to date for a number of months after the incident, even while Russo was still living in Arizona. Defense counsel never made a motion to continue the case based upon Russo's unavailability as a witness. In fact, aside from his bare allegation that Russo was unavailable, defendant presented no evidence regarding his attempts to contact or find Russo prior to trial.

¶ 38 Nor does the information in Russo's affidavit or his testimony at the evidentiary hearing constitute newly discovered evidence of actual innocence. Russo averred that defendant and M.M. had never kissed or had sex in his presence. Russo testified at the hearing that defendant and M.M. remained upstairs on the night in question, while he and Starkey went downstairs to his room. He also stated he was approached by Detective Ogan and questioned about whether anything had happened between M.M. and defendant. All of this information defendant already knew or could have known about. *People v. Harris*, 206 Ill. 2d 293 (2002), is instructive. In that case, petitioner sought to introduce as newly discovered evidence affidavits of his brothers, dated after his trial, which alleged petitioner was with his brothers on the night of the crime. In rejecting petitioner's claim, the court held that despite the fact that the affidavits were signed after petitioner was convicted, he nevertheless could have discovered the evidence within them earlier through due diligence. Thus, the court held that the affidavits did not constitute newly discovered evidence. *Id.* at 301.

¶ 39 Finally, and perhaps most importantly, the evidence defendant argues warrants a new trial is not of such a conclusive character that it would likely change the result on retrial. Defendant specifically points to the conflicting testimony of M.M. and Russo. While M.M. testified that she and defendant had sex downstairs in Starkey and Russo's presence, Russo testified that he and Starkey went downstairs to be alone and defendant and M.M. remained upstairs. According to defendant, this direct contradiction to M.M.'s testimony warrants a new trial.

¶ 40 It is, however, completely within the trial court's discretion to find that Russo lacked almost any credibility whatsoever. The trial judge may properly consider the credibility of any new witnesses in determining whether a defendant is entitled to a new trial. After an evidentiary hearing, the trial judge must weigh the testimony of witnesses, make credibility determinations,

and resolve conflicts in the evidence in determining whether allegedly new evidence warrants a new trial. *Carter*, 2013 IL App (2d) 110703, ¶¶ 77, 82. Where a judge finds a new witness to be incredible, the new testimony does not establish a basis for closer scrutiny of defendant's guilt. *Id.* at ¶ 84. Thus it does not warrant a new trial.

¶ 41 Defendant relies heavily on *People v. Molstad*, 101 Ill. 2d 128 (1984), where the supreme court found that defendant should be given a new trial based on the assertions of five codefendants that defendant was not involved. The court ruled that that defendant should receive a new trial because "[a] better determination of Molstad's guilt could be made if [the girlfriend's] testimony could be balanced against the testimony of Molstad's codefendants *** who were at the scene of the crime[.]" *Id.* at 134. We find defendant's reliance misplaced; *Molstad* is distinguishable from the case at bar. The trial court in *Molstad* denied defendant's motions for a new trial or to reopen the proofs outright without an evidentiary hearing. Here, the trial court held a hearing on defendant's motion and was able to weigh the evidence and assess the credibility of the "previously unavailable" occurrence witness Russo.

¶ 42 In making its credibility determination, the trial court pointed to a number of inconsistencies in Russo's testimony. The court noted that Russo initially said, "I was right there and there was no sexual contact." Yet later, he stated that he left defendant and M.M. alone while he went downstairs with Starkey to watch a movie. As the court pointed out, if Russo was really downstairs, defendant and M.M. could have had sex upstairs unbeknownst to Russo. Russo could not have been in two places at once. Russo also stated he was questioned by Detective Ogan, though Ogan testified he never questioned or interviewed Russo in connection with the case.

