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2012 IL App (3d) 100426-U

Order filed February 15, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0426
v.	)	Circuit No. 09-CF-1655
	)	
JERRY D. JENKINS,	)	Honorable
	)	Amy Bertani-Tomczak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's due process rights were not violated by the State's failure to disclose that the victim was being investigated for retail thefts at the time of the defendant's trial because the evidence was not material. No error occurred when the defendant stood trial wearing inmate clothing because he did not object to being tried in such clothing. Finally, the evidence was sufficient to convict the defendant of criminal sexual assault and criminal sexual abuse.

¶ 2 After a bench trial, the defendant, Jerry D. Jenkins, was found guilty of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2008)) and criminal sexual abuse (720 ILCS 5/12-

15(a)(2) (West 2008)). After the defendant was found guilty, the charge for criminal sexual abuse merged into the offense of criminal sexual assault, and the defendant was sentenced to four years' imprisonment. On appeal, the defendant argues that: (1) the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963); (2) the trial court erred by allowing the defendant to be tried while wearing inmate clothing; and (3) the State failed to prove the defendant guilty beyond a reasonable doubt. We affirm.

¶ 3 FACTS

¶ 4 The defendant's trial began on March 16, 2010. The victim, K.S., testified that on July 21, 2009, she went to the home of her daughter, A.S., for dinner. K.S. stated that she arrived at A.S.'s house sometime between 6 and 7 p.m., and when she arrived the defendant was there, along with A.S.; A.S.'s son, Armani; and A.S.'s boyfriend, Michael Lewis. The defendant was Lewis's father. K.S. had not met the defendant before that night, and the only conversation she had with him was when she offered to make him a plate of food. She also indicated that she had taken some of A.S.'s Xanax that night before she went to bed.

¶ 5 K.S. testified that they finished dinner around 11 p.m., and that she fell asleep on the couch with Armani shortly after that. She awoke around 12:30 a.m., and went to sleep in Armani's room, leaving him on the couch. She stated that she went to bed wearing a light green shirt and brown pants.

¶ 6 When K.S. awoke the next morning, her pants were off, and A.S., Armani, and the defendant were in the room. A.S. was yelling, and saying that she had seen the defendant "touching" K.S. After the incident, A.S. called the police, and K.S. went to the hospital and a rape kit was collected. At the hospital, K.S. did not mention taking Xanax the night before.

¶ 7 K.S. also testified that she was in custody in Racine County, Wisconsin, for making a false application to the Wisconsin works program, failing to disclose changes to the Wisconsin works program, and for failing to report increases in her financial statement. She stated that she was still awaiting sentencing on those charges.

¶ 8 A.S. testified that on the night in question, she had asked Lewis if K.S. could come over for dinner. She stated that K.S. arrived around 8 p.m., and the defendant came at approximately 10 p.m. She identified the defendant as the individual "in an inmate uniform for the Will County jail." She stated that when K.S. went to bed, she was wearing a pair of leopard pajama pants and a green or turquoise shirt.

¶ 9 When A.S. awoke the next morning, she went to use the restroom. On her way to the bathroom, she peered into Armani's room and saw the defendant standing at the foot of the bed, and K.S.'s leopard pants on the floor. She saw the defendant put his index finger inside K.S.'s vagina and he was "protruding it in and out."

¶ 10 A.S. stated that she did not know what to do, so she went into the bathroom and slammed the door. She then went to talk to Lewis, and told him that he had to confront the defendant. A.S. went back into the bedroom and started screaming at K.S. She also hit K.S. three times on her arm to wake her up because she was a heavy sleeper. The defendant was no longer in the room. A.S. denied giving her mother Xanax that night.

¶ 11 Detective Moises Avila testified that he interviewed K.S., A.S., and the defendant. He stated that A.S. saw the defendant's finger inside K.S.'s vagina. The State published a video showing the police interview with the defendant. Although the video is not part of the record on appeal, according to the closing arguments of the attorneys, the defendant stated that K.S.'s pants

were already off of her body. He admitted looking at K.S. because she was lying there naked, but denied touching her.

¶ 12 The defense called Officer Richard Trafton, who testified that he interviewed A.S. the day of the incident. According to his testimony, when he initially interviewed A.S., she stated that she had observed the defendant "manipulating" K.S.'s vaginal area.

¶ 13 On March 22, 2010, after noting that the case basically came down to the credibility of the witnesses, the trial court found the defendant guilty of both charges. Prior to sentencing, the defendant filed an amended motion for a new trial, alleging that a warrant was issued for K.S.'s arrest the same day the defendant was found guilty. The crimes at issue involved retail thefts that occurred on November 20, 2009. The defendant argued that he did not learn of this information until after trial.

¶ 14 In response, the State advised that a different detective from the Joliet police department conducted the investigation into the retail thefts, and that the two assistant State's Attorneys prosecuting the defendant had discovered the warrant "through happenstance." The State responded that a store employee did not sign a lineup form until late February 2010, and that a Law Enforcement Agencies Data System search was not run on the case until after the testimony in the current case concluded. The State further advised that K.S. was taken back to Racine County to serve additional time, and as a result it was only "speculative" whether K.S. was given any benefit for her testimony.

¶ 15 The trial court denied the motion for a new trial. The defendant was sentenced to four years' imprisonment. He appealed.

¶ 16 ANALYSIS

¶ 17 I. *Brady* Violation

¶ 18 The defendant argues on appeal that he is entitled to a new trial because the State violated his due process rights by failing to disclose that the police were investigating K.S. for retail thefts prior to and during his trial. We disagree.

¶ 19 To establish a *Brady* violation, a defendant must show that: "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either wilfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008). Favorable evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The defendant must show that the suppressed evidence " 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *People v. Coleman*, 183 Ill. 2d 366, 393 (1998) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). Impeachment evidence may be considered material to the defendant's guilt. *People v. Harris*, 206 Ill. 2d 293 (2002).

¶ 20 The defendant argues that the undisclosed evidence was material because it undermined K.S.'s credibility, and it demonstrated that K.S. had a strong incentive to cooperate with the State. Regarding the first argument, we note that K.S.'s credibility was already damaged due to her felony convictions for falsifying information to the Wisconsin works program. The defendant replies that these crimes are different than the "active" stealing that takes place during a retail theft; however, the distinction is immaterial as both crimes involve acts of dishonesty.

¶ 21 The defendant further argues that knowledge of an investigation would have provided an

incentive for K.S. to testify favorably for the State. However, the defendant presented no evidence that K.S. knew that she was potentially facing charges at the time of trial. See *People v. Leannah*, 72 Ill. App. 3d 504 (1979) (stating that the burden is on defendant to show that contents of the suppressed evidence were material to the defendant's case).

¶ 22 Moreover, even assuming there was some incentive for K.S. to testify favorably for the State, there is no reason to believe that this would have changed the result at trial. Specifically, it was K.S.'s daughter, A.S., who witnessed the defendant assaulting the victim. Contrary to the defendant's assertion, K.S.'s testimony was not critical for establishing that either criminal sexual assault or criminal sexual abuse took place. As will be discussed below, A.S.'s testimony was sufficient to prove that the defendant committed both offenses. Therefore, we cannot say that further impeaching K.S. would have put the whole case in such a different light so as to undermine confidence in the outcome. As the defendant cannot establish that the undisclosed evidence was material, his *Brady* claim must fail.

¶ 23 II. Inmate Clothing

¶ 24 The defendant's second argument on appeal was that the trial court erred by allowing him to stand trial in inmate clothing. He acknowledges that he did not raise an objection at trial, and thus the defendant's argument must be reviewed under the plain error doctrine. *People v. Hammonds*, No. 1-08-0194, 2011 WL 2694579 (Ill. App. May 6, 2011).

¶ 25 However, under the first step of the plain error test, we must first determine whether an error occurred. *Id.* In the instant case, we find that there was no error because the defendant was not compelled to stand trial while wearing inmate clothing.

¶ 26 In *Estelle v. Williams*, 425 U.S. 501 (1976), the Supreme Court recognized that

presenting the accused before a jury in prison attire could possibly affect a juror's judgment. However, the Court also stated that if the defendant fails to object to standing trial in prison clothing, no constitutional violation occurs. *Id.* The Court reasoned that some defendants may prefer to be tried in prison clothing so as to garner sympathy from the jury, and therefore a constitutional violation only occurs when the defendant is compelled to be tried in inmate clothing. *Id.*

¶ 27 The record reflects that the defendant never objected to wearing the Will County inmate uniform, and therefore he was not compelled against his will to be tried in prison clothing. Nor is the trial court required to ask the defendant or his counsel if the defendant was deliberately standing trial in jail clothing. *Id.* Accordingly, no error occurred regarding the defendant's clothing at the time of trial, and as a result there was no plain error.

¶ 28 III. Sufficiency of the Evidence

¶ 29 The defendant's final argument on appeal is that he was not proven guilty beyond a reasonable doubt. He alleges that there was insufficient evidence to prove that a crime ever occurred, and that there was not enough evidence to convict him of the more serious offense of criminal sexual assault.

¶ 30 When a defendant challenges the sufficiency of the evidence supporting his conviction, a reviewing court must determine whether, when viewing the evidence in 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. Collins*, 214 Ill. 2d 206 (2005). Upon review, the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence.

People v. Ross, 229 Ill. 2d 255 (2008). We will set aside a defendant's conviction only when we find the evidence was insufficient or so improbable or unsatisfactory that a reasonable doubt exists as to the defendant's guilt. *People v. Ortiz*, 196, Ill. 2d 236 (2001).

¶ 31 In the instant case, the defendant alleges that the evidence was insufficient to prove that a crime occurred. He claims that K.S. and A.S. were unreliable, there were multiple inconsistencies between the testimony of K.S. and A.S., and that their version of events was generally implausible. However, the trial court specifically noted that the case came down to a matter of credibility, and clearly found that the witnesses were sufficiently credible to convict the defendant. As stated above, it is the trier of fact's responsibility to judge the credibility of the witnesses and draw reasonable inferences from the evidence (*Ross*, 229 Ill. 2d 255), and we will not retry the defendant on appeal. *People v. Givens*, 237 Ill. 2d 311 (2010).

¶ 32 While there are several inconsistencies between the testimony of K.S. and A.S., such as what time the defendant came over for dinner, whether A.S. had given K.S. Xanax the night before, how K.S. was awakened, and whether the defendant was in the room when K.S. awoke, we do not find that this evidence is so unsatisfactory such that reasonable doubt exists as to the defendant's guilt. In support of his position, the defendant relies on *People v. Cowan*, 209 Ill. App. 3d 994 (1991) and *People v. Herman*, 407 Ill. App. 3d 688 (2011), where the appellate courts reversed the defendants' convictions for sex crimes because the victims in those cases gave severely inconsistent testimony. However, the instant case is distinguishable from *Cowan* and *Herman* in that not only did the victim testify to the assault, but so did A.S., who witnessed the act being performed on her mother. As opposed to *Cowan* and *Herman*, there was more evidence than one inconsistent victim that testified to the actual assault.

¶ 33 In addition, K.S. and A.S. were consistent in that they both testified that K.S.: (1) was a very heavy sleeper, (2) went to bed wearing a green shirt and brown or leopard pants, and (3) woke up without those pants. Furthermore, they both testified that A.S. was screaming when K.S. woke up.

¶ 34 Finally, the defendant argues that there was insufficient evidence to convict him of criminal sexual assault. To prove criminal sexual assault, the State needed to prove that the defendant committed an act of sexual penetration with the victim knowing that she was unable to understand the nature of the act or was unable to give knowing consent. 720 ILCS 5/12-13(a)(2) (West 2008). Specifically, the defendant argues that there was insufficient evidence of penetration because, according to Officer Trafton, when A.S. described the incident she indicated that the defendant was manipulating her mother's vaginal area, but at trial she stated that she saw his index finger protruding in and out of her vagina.

¶ 35 Initially, we note that A.S.'s trial testimony was not the only time she stated that she witnessed the defendant penetrating K.S. Specifically, A.S. told Detective Avila that she had seen the defendant's finger in K.S.'s vagina. Moreover, even assuming that "manipulating" is not penetration, A.S. later testified to a clear act of penetration during trial. It is up to the finder of fact, in this case the trial court, to resolve any inconsistencies in the testimony. *Ross*, 229 Ill. 2d 255. A.S.'s direct eyewitness testimony that the defendant put his finger inside K.S.'s vagina, taken in the light most favorable to the State, is certainly sufficient to allow a fact-finder to conclude that an intrusion occurred.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 38 Affirmed.