2012 IL App (1st) 072580-UB

SIXTH DIVISION
February 17, 2012

No. 1-07-2580

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 05 CR 17593
	)	
REGINALD BURNETT,	)	Honorable
	)	Joseph G. Kasmierski, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Joseph Gordon and McBride concurred in the judgment.

O R D E R

¶ 1 ***Held*:** The evidence was sufficient to prove defendant guilty of predatory criminal sexual assault of a child beyond a reasonable doubt. The trial court did not err and defense counsel did not render ineffective assistance. The statements by the prosecutor in opening and closing arguments did not warrant reversal. The trial court's failure to rule *in limine* on the admissibility of defendant's earlier convictions as impeachment was harmless beyond a reasonable doubt.

¶ 2 Defendant Reginald Burnett was convicted after a jury trial of two counts of predatory criminal sexual assault of L.A., a nine-year-old girl. He was sentenced to two consecutive terms

of 10 years in prison. Defendant appeals, arguing: (1) the evidence was insufficient; (2) defense counsel rendered ineffective assistance in failing to obtain a jury instruction on the lesser-included offense of aggravated criminal sexual abuse; (3) the prosecutor misstated the law and the facts in opening and closing arguments; and (4) the trial court should have ruled on the admissibility of defendant's earlier convictions as impeachment before defendant testified. We affirmed defendant's conviction in *People v. Burnett*, No. 1-07-2580 (2010) (unpublished order under Supreme Court Rule 23). We have since been directed by the supreme court under its supervisory authority to reconsider our decision in light of *People v. Mullins*, 242 Ill. 2d 1, 949 N.E.2d 611 (2011). We affirm.

¶ 3 Defendant, age 46, was arrested on July 6, 2005, after the victim's older sister and guardian Kimberly West and her cousin Nancy Nalls discovered blood on the victim's underwear. The victim reported defendant had tried to penetrate her anally and vaginally on the night of July 2, 2005, at the home of her grandmother, Dorothy West. Defendant was Dorothy's boyfriend. Kimberly called the police. Defendant was arrested and charged in a 28-count indictment with predatory criminal sexual assault of a child, aggravated criminal sexual abuse and criminal sexual assault. The State proceeded on two counts of predatory criminal sexual assault, nolle prossing the other counts. The indictments alleged defendant, who was over age 17, "intentionally or knowingly committed an act of sexual penetration upon [the victim], to wit: contact between [defendant's] penis and [the victim's] anus, and [the victim] was under [13] years of age when the act was committed." The same acts were alleged as to the victim's vagina.

¶ 4 Before trial, defendant moved to suppress his statements. He claimed he was not advised

of his rights under *Miranda* and he had been interrogated while suffering from heroin withdrawal and diabetes symptoms. After a hearing the trial court denied the motion to suppress. Defendant also moved for an order *in limine* to bar the State from introducing his earlier felony convictions as impeachment if he testified. The State reported defendant's past convictions included aggravated battery in 1994, possession of a controlled substance with intent to deliver in 1996, and possession of a controlled substance in 1999 and 2001. The trial court deferred its ruling on defendant's motion *in limine* until after defendant testified. The trial judge said: "If [defendant] testifies I will evaluate his testimony and the nature of these offenses to determine whether any of them are admissible."

¶ 5 The trial court also heard the State's motion to admit the hearsay testimony of witnesses to whom the victim made statements. The trial court deemed admissible the testimony of Kimberly West, Nancy Nalls and Carrie Stelnicki, a clinical social worker and forensic examiner who interviewed the victim.

¶ 6 The victim testified at trial. She said on the night of the incident she was awakened when defendant lay down on the bed where she was sleeping and pulled down her underwear. Dorothy was asleep in another room. The victim said defendant placed his penis in her "behind." She also said she did not know if defendant's penis went inside her vagina but it touched her vagina and her anus. The victim tried to squeeze her legs together but defendant opened them with his hands. She tried to yell but he covered her mouth. Defendant said, "give me five more humps." He stopped after she felt something wet on her leg. The victim did not tell anyone what had happened because defendant had told her he would kill her family members if she told. On

cross-examination, the victim said she kicked and bit but did not cry out when defendant first pulled down her pants. She said defendant touched her with his penis in the "middle" of her "behind," not just on her "butt cheeks." She denied telling Kimberly that defendant placed his penis inside her vagina: "I said that he didn't put it inside me, he put it like by it, tried to."

¶ 7 Kimberly West's testimony about the victim's earlier statements corroborated the victim's testimony. On cross-examination, Kimberly admitted the victim behaved normally on the day after the alleged incident. Nancy Nalls' testimony also corroborated the victim's testimony. Nancy said the spots she first saw on the victim's underwear were more red in color than the brown spots that appeared on the underwear shown at trial.

¶ 8 Carrie Stelnicki, a forensic interviewer with the Chicago Children's Advocacy Center, said the victim told her defendant put his penis in the "middle part" of her vagina. When Stelnicki asked the victim what she meant by the term vagina, the victim pointed to her vaginal area. The victim said defendant first tried to put his penis in her butt. The victim said she told her cousin Nancy about the incident because her "pocketbook" was hurting. The victim pointed to her vaginal area when Stelnicki asked what she meant by her "pocketbook." On cross-examination, Stelnicki admitted she did not ask the victim where she learned the term "vagina."

¶ 9 Dr. Norell Rosado, a pediatrician at Stroger Hospital and a specialist in child abuse, testified that he examined the victim on July 6, 2005, four days after the alleged incident. Rosado said the victim's vagina and anus appeared normal but this did not contradict the victim's claims because about 95% of the time, an exam is normal even when something happened. This is because structures in the vagina and anus are elastic and injuries in those areas can heal very

quickly. Rosado said most children who have no sexual experience cannot distinguish whether a penis went inside, or merely rubbed against, a vagina or anus.

¶ 10 Officer Brian Tierney testified that he responded to Kimberly's 911 call. Kimberly gave him a plastic bag containing a child's underwear with what appeared to be blood on them. Kimberly and the victim identified defendant as the perpetrator of a sexual assault and Tierney arrested defendant.

¶ 11 Detective Charles Morris testified. He was assigned to the Children's Advocacy Center where he investigated complaints of criminal sexual assault. Morris interviewed defendant after advising him of his rights under *Miranda*. Defendant first admitted he had wrestled with the victim. Defendant said he believed the victim had a rash because she was scratching her vagina. Defendant told Morris in a later interview that the victim removed her shorts, straddled him, rubbed her vagina on his penis and got on her knees and rubbed his penis on her butt. Defendant told Morris that the victim said she wanted to have sex with him. Defendant told Morris the victim was "fast" and was always rubbing up against him. On cross-examination, Morris admitted that in his first interview with defendant, defendant denied ever touching the victim and agreed to a buccal swab. In a second interview, defendant said his front was touching the victim's rear when she knelt down. Morris said defendant reported being "drug sick" but Morris did not know defendant was later taken to the hospital.

¶ 12 Evidence of an examination of the victim's underwear was admitted by stipulation. The examination did not reveal blood, semen or other biological material. There were no hairs, fibers or debris suitable for analysis.

¶ 13 Assistant State's Attorney Beth Bergmann testified that she met with defendant on July 7, 2005. She advised defendant of his rights under *Miranda* and he agreed to give a handwritten statement. She read the signed statement to the jury. It stated that the victim initiated sexual activity with defendant, including taking his penis from his "drawers" and playing with it. Defendant said the victim took off her underwear and rubbed her butt against defendant's penis. Defendant described the contact as "skin to skin" against the victim's buttocks. He denied penetrating the victim's anus with his penis. On cross-examination, Bergmann denied knowing defendant was suffering from heroin withdrawal or symptoms of diabetes when she spoke to him.

¶ 14 Defense counsel moved for a directed finding which the trial court denied.

¶ 15 Defendant testified. He did not renew his request for a motion *in limine* to exclude his earlier convictions as impeachment. Defendant said he had been a heroin addict for 15 years and was also a diabetic. Defense counsel elicited defendant's admission that he was convicted of possession of cocaine in 1996 and possession of heroin 1999. Defendant denied placing his penis in the victim's vagina or anus. Defendant said he was sick from being off heroin when he was interviewed by the police. Defendant denied telling the police the victim played with his penis. He denied signing the handwritten statement. On cross-examination, defendant denied that he touched the victim inappropriately or that she acted inappropriately toward him. He said when he gave a statement to Bergmann, his "mind was just gone from the drugs and the diabetes." Defendant admitted the police took him to the hospital before he gave his statement. The doctor at the hospital gave him a prescription for diabetes medicine but not the medicine itself.

¶ 16 The State called defendant's sister Cathy Jones who said the signatures on the handwritten statement were her brother's. Police Officer Margaret Sallustio testified she saw defendant sign the statement.

¶ 17 In a preliminary jury instruction conference, defense counsel said defendant might ask for an instruction on the lesser-included offense of aggravated criminal sexual abuse. The trial court said, "I don't know if it would apply. We'll talk about it again tomorrow." The next day, defense counsel formally requested a lesser-included offense instruction but called the offense criminal sexual abuse instead of aggravated criminal sexual abuse. Defense counsel argued the instruction was appropriate based on testimony that defendant's penis made contact with only the victim's buttocks and not her anus. The trial court refused on grounds the instruction was not justified by the evidence.

¶ 18 The State in closing argument proceeded on the theory that the victim was credible and defendant was not credible. The State did not mention defendant's earlier convictions of drug possession. The trial court instructed the jury, stating that neither the opening statements nor closing arguments were evidence and comments not based on the evidence should be disregarded. The jury returned a verdict of guilty. Defendant filed a motion for a new trial, alleging, among other things, that the trial court erred in refusing to instruct the jury on the lesser-included offense of aggravated criminal sexual abuse. The trial court denied this motion and sentenced defendant to two consecutive 10-year prison terms.

¶ 19 Defendant first argues on appeal that the evidence failed to prove beyond a reasonable doubt that he sexually penetrated the victim. "When a defendant challenges the sufficiency of the

evidence supporting [his] conviction, a reviewing court must determine whether, 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. Williams*, 193 Ill. 2d 306, 338, 739 N.E.2d 455 (2000). It is the province of the judge or jury as trier of fact "to determine the credibility of witnesses, to weigh their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence." *Williams*, 193 Ill. 2d at 338. We will not disturb a defendant's conviction on grounds of insufficient evidence "unless the proof is so improbable or unsatisfactory that a reasonable doubt exists as to the defendant's guilt." *Williams*, 193 Ill. 2d at 338.

¶ 20 Predatory criminal sexual assault of a child occurs when an accused age 17 or older commits an act of sexual penetration against a victim under the age of 13. 720 ILCS 5/12-14.1(a)(1) (West 2004). Sexual penetration is "*any contact, however slight,* between the sex organ or anus of one person by *** the sex organ, mouth or anus of another person." (Emphasis added.) 720 ILCS 5/12-12(f) (West 2004); *People v. Raymond*, 404 Ill. App. 3d 1028, 1039, 938 N.E.2d 131 (2010). Evidence of the emission of semen is not required to prove sexual penetration. 720 ILCS 5/12-12(f) (West 2004); *Raymond*, 404 Ill. App. 3d at 1039. The statutory definition of penetration does not require physical penetration, but merely requires contact. *People v. Moore*, 199 Ill. App. 3d 747, 773, 557 N.E.2d 537 (1990). Medical evidence is not required to sustain a conviction of criminal sexual assault. *People v. Le*, 346 Ill. App. 3d 41, 50, 803 N.E.2d 552 (2004).

¶ 21 Here, the victim testified that defendant's penis touched her vagina and the "middle" part

of her "behind." This testimony supports the conclusion that defendant's penis touched the victim's vagina and anus. The victim's testimony was unimpeached on cross-examination. Further, the testimony of Kimberly West and Carrie Stelnicki showed the victim's accounts of the incident had remained consistent over time. Evidence that defendant's penis touched the victim's anus and vagina was not overcome by Dr. Rosado's testimony that he found no physical evidence of penetration or by the lack of biological material on the victim's underwear. See *Le*, 346 Ill. App. 3d at 50 ("there is no longer a requirement that a victim's testimony be corroborated by physical or medical evidence in order to sustain a conviction for criminal sexual assault"). The evidence here supports the conclusion that a rational jury could have found defendant guilty of predatory criminal sexual assault of a child beyond a reasonable doubt.

¶ 22 Defendant next argues that the trial court erred in failing to instruct the jury on the lesser-included offense of aggravated criminal sexual abuse and defense counsel rendered ineffective assistance in failing to tender this instruction. Where, as here, a defendant fails to tender a jury instruction at trial, the defendant cannot complain on appeal that the instruction was not given. *People v. Huckstead*, 91 Ill. 2d 536, 543, 440 N.E.2d 1248 (1982). It is undisputed that defendant did not tender an instruction on the lesser-included offense of aggravated criminal sexual abuse. See *People v. Kolton*, 219 Ill. 2d 353, 372, 848 N.E.2d 950 (2006) (discussing aggravated criminal sexual abuse as a lesser-included offense of predatory criminal sexual assault of a child where the elements of the lesser offense were alleged in the indictment). Defendant maintains in the alternative that he suffered ineffective assistance of counsel because his attorney failed to correctly articulate and tender a written jury instruction on aggravated criminal sexual

abuse.

¶ 23 Claims of ineffective assistance of counsel are reviewed under the two-pronged test of *Strickland v. Washington*, 466 U.S. 668, 687, 694, 80 L. Ed. 2d 674, 693, 698, 104 S. Ct. 2052, 2064, 2068 (1984) (adopted in Illinois in *People v. Albanese*, 125 Ill. 2d 100, 105, 531 N.E.2d 17 (1988)). A defendant proves ineffective assistance by showing: (1) defense counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance so prejudiced the defendant that his trial was unfair. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693, 104 S. Ct. at 2064. Under the first prong, the defendant must show his attorney did not provide reasonable assistance within the range of prevailing professional norms. *Strickland*, 466 U.S. at 687-88, 80 L. Ed. 2d at 693-94, 104 S. Ct. at 2064-65. Under the second prong, the defendant must show a reasonable probability that the trial's outcome would have been different if not for counsel's unprofessional errors. *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698, 104 S. Ct. at 2068.

¶ 24 "Due process requires that an instruction on a lesser-included offense be given only when the evidence so warrants." *People v. W.T.*, 255 Ill. App. 3d 335, 350, 626 N.E.2d 747 (1994). The only evidence defendant presented at trial was his testimony that he did not touch the victim inappropriately and the victim did not act inappropriately toward him. This amounts to an "all or nothing" defense. *W.T.*, 255 Ill. App. 3d at 350. See *People v. Benford*, 349 Ill. App. 3d 721, 729, 812 N.E.2d 714 (2004) (a defendant seeking either an outright acquittal or a conviction of the charged offense and not a conviction of a lesser-included offense sets forth an "all or nothing" defense). Under this trial strategy, it would have been inconsistent for defense counsel to proffer

an instruction on the lesser-included offense of aggravated criminal sexual abuse. To do so would risk interfering with counsel's theory that defendant could not be guilty of the charged offense because he did not touch the victim inappropriately. *W.T.*, 255 Ill. App. 3d at 350-51. For this reason, defense counsel's failure to tender a lesser-included offense instruction did not fall below an objective standard of reasonableness. *W.T.*, 255 Ill. App. 3d at 351. Defendant has not established the first prong of *Strickland* and his claim of ineffective assistance of counsel must fail.

¶ 25 Defendant next argues he is entitled to a new trial because the prosecutor misstated the law and the facts in opening and closing arguments. Defendant maintains the prosecutor asserted in closing argument that the victim said, "[h]e tried to put it in my anus," despite the absence of testimony to this effect. Defendant argues the prosecutor misstated the law by saying the State had proved penetration by showing defendant's penis touched the victim's "behind," even though the law requires a showing that defendant's penis touched the victim's anus. Defendant complains that the prosecutor also encouraged the jury to consider the victim's suffering during intrusive physical examinations and in testifying before strangers. The State maintains defendant waived these issues by failing to object at trial and include specific claims of error in his posttrial motions. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988) (a defendant forfeits review of issues by failing to object to them at trial and raise them in his posttrial motion). We agree defendant waived these issues. But even if the issues were properly preserved, the prosecutor's comments are not reversible error.

¶ 26 Prosecutors have wide latitude in opening and closing arguments to comment on evidence

and draw reasonable inferences from it. *People v. Lane*, 256 Ill. App. 3d 38, 56, 628 N.E.2d 682 (1993). Prosecutors may not argue facts not in evidence but such remarks do not warrant reversal unless they are so prejudicial as to constitute a material factor in the defendant's conviction. *Lane*, 256 Ill. App. 3d at 56. An instruction to the jurors to disregard arguments not based on the evidence tends to cure prejudice from misstatements about the evidence. *People v. Garcia*, 231 Ill. App. 3d 460, 472, 596 N.E.2d 1308 (1992).

¶ 27 We have reviewed the opening and closing arguments and conclude the remarks in question were not so prejudicial as to warrant reversal. Potential prejudice from the prosecutor's statements was cured by the jury instruction.

¶ 28 Finally, defendant argues the trial court abused its discretion in deferring until after his testimony its ruling on his motion *in limine* to bar his earlier convictions as impeachment. He maintains the court's refusal to rule in advance interfered with his ability to make an informed decision on whether or not to testify in this matter.

¶ 29 In *People v. Averett*, 237 Ill. 2d 1, 927 N.E.2d 1191 (2010), our supreme court reaffirmed its holding in *People v. Patrick*, 233 Ill. 2d 62, 908 N.E.2d 1 (2009), that "a trial court abuses its discretion if it fails to rule on a motion *in limine* to bar evidence of prior convictions for impeachment purposes when it has sufficient information to make the ruling." *Averett*, 237 Ill. 2d at 10 (citing *Patrick*, 233 Ill. 2d at 70-73).

¶ 30 In *People v. Mullins*, 242 Ill. 2d 1, 23, 949 N.E.2d 611 (2011), the court revisited *Averett* to clarify that a "reserved ruling error" is amenable to a harmless-error analysis rather than a *de facto* structural error requiring automatic reversal. The court reasoned that while the "reserved-

ruling error" discussed in *Averett* and *Patrick* is "serious," it is not comparable to other "structural" errors recognized by the court, such as the complete denial of counsel or trial by a biased judge or jury. *Mullins*, 242 Ill. 2d at 22. Because a "reserved-ruling error" is not structural, it does not require the automatic reversal of a defendant's conviction. *Mullins*, 242 Ill. 2d at 22 (citing *Averett*, 237 Ill. 2d at 14). "Rather, courts of review must determine whether the trial court's error was harmless beyond a reasonable doubt," with the State bearing the burden of proof. *Mullins*, 242 Ill. 2d at 23. The inquiry is whether, in the absence of the error, the outcome of the trial would have been different. *Mullins*, 242 Ill. 2d at 23.

¶ 31 In determining whether the trial court's error in reserving ruling on a defendant's motion *in limine* was harmless beyond a reasonable doubt, we consider three factors: (1) the defendant's need to testify in order to present a defense; (2) whether the parties mentioned the defendant's prior conviction(s) in argument; and (3) the strength of the evidence against the defendant. *Mullins*, 242 Ill. 2d at 23-25.

¶ 32 Here there is no question that the trial court abused its discretion under *Patrick* and its progeny by deferring its ruling on defendant's motion *in limine* to bar evidence of his earlier convictions for impeachment purposes. But, we find the error harmless.

¶ 33 Defense counsel elicited defendant's admission at the outset of direct examination that defendant had been a drug addict and offender. See *People v. Sergeant*, 326 Ill. App. 3d 974, 982, 762 N.E.2d 518 (2001) (it is a sound trial strategy for defense counsel to inform the jury "up front" of earlier convictions when faced with the prospect of the defendant being impeached with the conviction). Defense counsel, by disclosing the convictions "up front," eliminated the chance

that the State would further diminish defendant's credibility by eliciting the damaging convictions on cross-examination.

¶ 34 In light of the State's evidence that defendant claimed to be "drug sick," and the evidence elicited during defendant's testimony that "his mind was just gone from the drugs and the diabetes," it is also clear that defendant's explanation for his confessions was his drug addiction. As a result, defendant would necessarily have put his addiction before the jury and it is likely he would have needed to testify in order to explain the statements he made to the police.[1]

¶ 35 Further, the victim's testimony was unimpeached on cross-examination and her credibility was enhanced by the testimony of West, Nalls and Stelnicki, who established that the victim's version of the occurrence had not changed. Dr. Rosado's testimony established that the normal appearance of the victim's anus and vagina could be consistent with her testimony that defendant assaulted her.

¶ 36 Finally, unlike the prosecutor in *Patrick*, at no time did the State point to defendant's earlier convictions in closing arguments. See *Mullins*, 242 Ill. 2d at 24-25 (citing *Averett*, 237 Ill. 2d at 11, citing *Patrick*, 233 Ill. 2d at 75-76); *People v. Weatherspoon*, 394 Ill. App. 3d 839, 858, 915 N.E.2d 761 (2009) (*pet. for leave to appeal denied*, 234 Ill 2d 549, 920 N.E.2d 1080 (2009)). We conclude the evidence was overwhelming and the verdict would not have been different if the trial court had ruled on defendant's pretrial motion *in limine* to bar the State's introduction of

[1] The court additionally notes that as defendant needed to inform the jury of his drug addiction to explain his statements, the jury being informed of defendant's drug related convictions caused little prejudice, if any.

his earlier convictions as impeachment.

¶ 37 In summary, we conclude: (1) the evidence was sufficient to prove defendant guilty of predatory criminal sexual assault of a child beyond a reasonable doubt; (2) the trial court did not err and defense counsel did not render ineffective assistance where jury instructions for a lesser-included offense were not proffered; (3) the statements by the prosecutor in opening and closing arguments did not warrant reversal; and (4) the trial court's failure to rule *in limine* on the admissibility of defendant's earlier convictions as impeachment was harmless beyond a reasonable doubt based on the holdings in *Mullins*, *Averett* and *Patrick*. For these reasons, the judgment of the circuit court is affirmed.

¶ 38 Affirmed.