

THIRD DIVISION
November 16, 2011

No. 1-09-3351

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 07 CR 12140
	)	
JANKO VUCETIC,	)	Honorable
	)	John J. Fleming,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Neville concurred in the judgment.

ORDER

Held: The trial court did not err in admitting the out-of-court statements of a minor to a child-advocacy forensic interviewer where the statements were elicited by non-leading, open-ended questioning, the minor gave the interviewer details that she did not have beforehand, neither the minor nor defendant's use of language was unusual, and the minor had both reported and described the offenses shortly thereafter. Moreover, any error in admitting the evidence was harmless beyond a reasonable doubt where there was ample unchallenged evidence to support defendant's conviction in that the minor's trial testimony was corroborated by video evidence and an eyewitness.

¶ 1 Following a jury trial, defendant Janko Vucetic was convicted of predatory criminal sexual assault and aggravated criminal sexual abuse and sentenced to consecutive prison terms

of 20 and 7 years. Defendant contends on appeal that the court erred in admitting the out-of-court statement of the minor victim to a child-advocacy forensic interviewer where the State failed to prove that the statement had sufficient indicia of reliability to overcome its hearsay nature.

¶ 2 Defendant was charged with various counts of predatory criminal sexual assault and aggravated criminal sexual abuse against Tyra J., who was alleged to be under 13 years old at the time of the offenses in April 2007.

¶ 3 Before trial, the State moved pursuant to section 115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10 (West 2008)) to introduce into evidence statements by Tyra to Diane Siegel, a forensic interviewer with the Children's Advocacy Center (Center) in the presence of a police detective and assistant State's Attorney (ASA). The statements, in which Tyra alleged that defendant sexually assaulted and abused her, had been recorded in the detective's written report attached to the motion.

¶ 4 Defendant responded, arguing that the statements did not provide sufficient safeguards of reliability as required by section 115-10. He noted that the statements were elicited only after substantial adult intervention, including questioning by relatives, police, ASAs, and child advocates, and argued that they were not "outcry" statements but were gathered by interested persons after defendant's arrest. He also alleged that the language used in the statements was inconsistent with Tyra's age and defendant's limited English language skills. Lastly, he argued that the statements were inconsistent in that Tyra described two separate incidents and stated that she had told her grandparents but they "had no appropriate parental response to her reports."

¶ 5 At the motion hearing, Diane Siegel testified that she is a forensic interviewer for the Center and, on April 30, 2007, she interviewed Tyra at the Center for about an hour. A detective and ASA observed the interview from outside the interview room through a one-way mirror and

did not participate. Before the interview, Siegel read the Center intake form with Tyra's basic information and the police allegation form. The latter included a basic description of the allegations and the date of the alleged incident. During the interview, Siegel did not take notes, explaining that the Center's protocol was for a police officer or detective to take notes rather than the interviewer so that she had never taken notes in any of the hundreds of interviews she conducted. Before the instant hearing, Siegel refreshed her recollection with the police notes, and she admitted on cross-examination that some of her testimony was based on the forms she reviewed before the interview.

¶ 6 When the interview began, Siegel introduced herself to Tyra, including that her job is to talk with children. She told Tyra that she was not in trouble and could tell Siegel anything she wanted to in any words she chose. Siegel then discussed with Tyra matters such as school and her personal likes and dislikes to assess her development and build rapport. Tyra stated that she was eight years old and in the second grade. Siegel also asked questions to determine whether Tyra knew the difference between truth and lies, concluding from Tyra's answers that she did. When Siegel turned to the substance of the interview, she asked Tyra open-ended non-leading questions such as "tell me about..." or "tell me everything that happened..." then followed up with open-ended clarifying questions.

¶ 7 When Siegel asked Tyra why she was at the center, she replied "Janko raped me," explaining that Janko was "the maintenance man" and that he raped her twice. Siegel asked Tyra to tell her everything that happened with Janko. Tyra stated that he took her to his home, where he tried to pull her into a bedroom but she screamed. Janko pulled her pants down and "licked her pussy" and put his finger inside her "pussy." He then pulled down his pants, pulled out his "dick" and made Tyra touch it with her hand and suck it. When Siegel asked Tyra what she was referring to by "pussy" and "dick," Tyra gestured both times towards her genital area. At some

point during the incident, Tyra asked Janko "if she could watch the movie with the dicks and the pussies," and when Siegel asked her to tell her about the movies, Tyra explained that her "grandfather had seen the movies with the dicks and the pussies." Siegel reminded Tyra that she said Janko raped her twice and asked about the second incident. Tyra stated that the second incident occurred in the office and that Janko put his tongue in her mouth and then her "pussy" before telling her to suck his "dick." Janko told Tyra not to tell anyone, but Tyra told Siegel that she told her grandparents. When Siegel followed up on this statement, Tyra stated that she told her grandfather "on the same day it happened," without distinguishing which of the two incidents she meant. When Siegel asked Tyra if "anyone had seen Janko do those things to her," she replied that "Anthony, Charles, and Tyrese" had seen.

¶ 8 Following arguments of the parties, the court found that Siegel's testimony to Tyra's statement would be admitted as corroborating evidence to Tyra's trial testimony. The court noted that Siegel asked non-leading open-ended questions. As to Siegel's use of notes and reports, the court noted that the police allegation form was "very brief" stating in substance that the offender "pulled the victim's pants down and licked the victim's vagina and stuck his tongue in her mouth," so that Siegel had few details with which she could have led Tyra.

¶ 9 Just before trial, defendant reiterated his objection to the admission of Siegel's section 115-10 evidence, and the court denied the objection.

¶ 10 At trial, Tyra identified defendant as Janko, the maintenance man in her apartment building. In his apartment in the same building, he touched her "stuff," which she identified as her vagina, with his tongue and hand. He also touched her inappropriately in an office in the apartment building. The court admitted into evidence a videotape of the second incident, which depicted defendant kissing Tyra and placing her hand in his pants. Tyra explained that when her hand was in his pants, she was touching his penis, and when they kissed, his tongue was in her

mouth. Defendant had Tyra pull her pants down and he tried put his penis into her before she fled. Tyra reported the incidents to her grandfather and personally called "911." After the police responded to her call, Tyra was examined by a physician and interviewed by police and ASAs.

¶ 11 Tyreece Carodine, Tyra's brother, testified that, on April 20, 2007, he looked into defendant's apartment and saw defendant kneeling in front of Tyra as her pants were down and then saw defendant lick Tyra's vagina. The next day, the 21st, Tyreece saw defendant with Tyra in the building office. Tyra's pants were down, and defendant pulled his pants down and exposed his penis, at which point Tyra ran from the room.

¶ 12 Clyda Stewart, grandmother of Tyra and Tyreece, testified that defendant was a resident janitor in their apartment building and that she had spoken with him in English. Defendant was a friend of both Stewart and her partner, who was not Tyra's grandfather but was referred to by Tyra as such. Stewart first heard of Tyra's allegations when the police responded to Tyra's call. Tyra told her what had happened with defendant while they were at the hospital for her medical examination. Tyra was interviewed by police officers, a detective, and an ASA as well as the interview at the Center. Stewart's partner died after the incident but before trial.

¶ 13 Dr. Susan Fuchs testified that she was the physician who examined Tyra at the hospital on April 21, 2007. Tyra told Dr. Fuchs that a maintenance man had licked her vagina and tried to kiss her. Tyra's medical examination was normal, but the acts alleged by Tyra would not necessarily have caused physical injury.

¶ 14 Diane Siegel testified consistently with her hearing testimony. She added that, in her experience, the use of terms like rape, "pussy" and "dick" by eight-year-olds was not unusual.

¶ 15 Police lieutenant Dragan Lakich testified that he translated a detective's May 2007 interview with defendant into and out of Serbo-Croatian.

¶ 16 Following closing arguments, instructions, and deliberations, the jury found defendant

guilty of predatory criminal sexual assault for touching Tyra's vagina with his mouth in the apartment and of three separate instances of aggravated criminal sexual abuse. The jury found him not guilty of predatory criminal sexual assault for touching her vagina with his finger or touching her vagina with his mouth in the office.

¶ 17 In his post-trial motion, defendant challenged the sufficiency of the evidence, denial of an objection to particular testimony by Siegel, certain jury instructions, and closing arguments. Defendant did not challenge the overall admission of Siegel's testimony or the court's admissibility ruling under section 115-10. Following a hearing where defendant rested on his written motion, the court denied the motion.

¶ 18 The court sentenced defendant to 20 years' imprisonment for predatory criminal sexual assault, to be served consecutively to concurrent 7-year terms for the three counts of aggravated criminal sexual abuse. Defendant's motion to reconsider his sentence was denied, and this appeal timely followed.

¶ 19 On appeal, defendant contends that the court erred in admitting Tyra's out-of-court statement to Siegel where the State failed to prove that the statement had sufficient indicia of reliability to overcome its hearsay nature.

¶ 20 Hearsay – a statement, other than one made by the witness during his or her trial testimony, offered in evidence to prove the truth of the matter asserted – is generally inadmissible as trial evidence. Ill. Rs. Evid. 801 & 802 (eff. Jan. 1, 2011). Section 115-10 (725 ILCS 5/115-10 (West 2008)) provides for a hearsay exception in cases alleging that "a physical or sexual act [was] perpetrated upon or against a child under the age of 13," including predatory criminal sexual assault and aggravated criminal sexual abuse (720 ILCS 5/12-14.1, -16 (West 2008)), whereby the court can admit "testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element

of an offense which is the subject of a prosecution for a sexual or physical act against that victim." 725 ILCS 5/115-10(a)(2) (West 2008). The court may admit such a statement only if (1) the child either testifies or "is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement," (2) the statement in question was made before the child became 13 or within three months after the commission of the offense, whichever occurs later, and (3) the court finds after a hearing "that the time, content, and circumstances of the statement provide sufficient safeguards of reliability." 725 ILCS 5/115-10(b) (West 2008).

¶ 21 In assessing the reliability of a child's out-of-court statement, the court considers the totality of the circumstances; the relevant factors include the child's mental state, spontaneous and consistent repetition of the incident, use of terminology unexpected of a child of similar age, and lack of a motive to fabricate. *People v. Major-Flisk*, 398 Ill. App. 3d 491, 508-09 (2010). Statements "shall not be excluded on the basis that they were obtained as a result of interviews conducted pursuant to a protocol adopted by a Child Advocacy Advisory Board *** or that an interviewer or witness to the interview was or is an employee, agent, or investigator of a State's Attorney's office." 725 ILCS 5/115-10(e) (West 2008). The trial court's decision to admit statements into evidence is reviewed for an abuse of discretion and thus will be set aside only where decision was arbitrary or fanciful or where no reasonable person would agree with the court. *Major-Flisk*, 398 Ill. App. 3d at 508. Moreover, an error regarding the admission of evidence is harmless where, considering the entire trial as a whole, the defendant would have been convicted regardless of the error. *People v. Mullins*, 242 Ill. 2d 1, 23-25 (2011).

¶ 22 Here, as the trial court noted, Siegel asked Tyra non-leading open-ended questions during the interview in question and Tyra's description of the two incidents with defendant went beyond what Siegel could have gleaned from the reports available to her. Tyra reported the incidents to her grandfather and to police almost immediately after the second incident – with Tyra

personally phoning the police – and implicated defendant that same day to Dr. Fuchs. We do not find Tyra's use of terminology precocious for her age of eight years at the time of the interview, especially but by no means solely in light of the fact that she had been exposed to some degree to pornographic movies before the incidents. In light of the evidence that defendant was fluent in Serbo-Croatian but able to communicate in English, telling Tyra to not tell anyone about the incidents was not beyond defendant's apparent language abilities.

¶ 23 Lastly, defendant emphasizes that relatives and authorities had spoken with Tyra before the interview at issue, contending that this constitutes "substantial adult intervention" of the kind our supreme court found objectionable in *People v. Zwart*, 151 Ill. 2d 37, 46 (1992). However,

"[i]n *Zwart*, before the complainant made any statements implicating the defendant, she talked with a police officer, a Department of Children and Family Services' worker, and a counselor at Mount Sinai Hospital. The State did not introduce any evidence about the substance of these discussions. Therefore, the court was concerned that these adults might have convinced the victim that the defendant had abused her when, in fact, he had not. [Citation.] In this case, [the minor victim] implicated defendant immediately. In addition, most of the adults who talked with [the minor] before she talked with [the police interviewer] were called as witnesses and testified as to the substance of their conversations with [the minor]." *People v. West*, 158 Ill. 2d 155, 165 (1994).

Moreover, the minor in *Zwart* was three years old, incompetent to testify at trial and "particularly susceptible to suggestion," while the minor in *West* was seven years old and testified at trial. *West*, 158 Ill. 2d at 158, 165; *Zwart*, 151 Ill. 2d at 39, 41, 45. The instant case is more akin to

West, where our supreme court upheld the admission of the minor's statement, than *Zwart*.

¶ 24 We also note that, in section 115-10(e), the legislature has clearly demonstrated its intent that the participation of the authorities in a case before a forensic interview should not impeach that interview in the absence of some evidence to the contrary. Because forensic interviews are performed by the Center only after a case has been reported to authorities, who perform an interview an alleged victim of a crime as soon as reasonably possible – both facts the trial court would be well aware of from experience – adopting the proposition that the interview should thus be presumed unreliable would cast an undue pall over forensic interviews that would be contrary to the treatment of such interviews in section 115-10(e).

¶ 25 For the aforementioned reasons, we find that the trial court did not abuse its discretion in admitting Siegel's testimony to Tyra's forensic interview statements.

¶ 26 Moreover, assuming *arguendo* that Siegel's testimony was erroneously admitted, there was ample properly-admitted evidence to convict defendant. Tyra's testimony was corroborated by video evidence as well as eyewitness testimony from her brother, and with Dr. Fuchs she both implicated defendant and described at least some of his actions on the day of the second incident. Thus, any error in admitting Siegel's testimony was harmless beyond a reasonable doubt.

¶ 27 Accordingly, the judgment of the circuit court is affirmed.

¶ 28 Affirmed.