2012 IL App (1st) 111055-U

FIRST DIVISION
DECEMBER 3, 2012

1-11-1055

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. 10 MC1 193050
	)	
JOSE ROBLES,	)	Honorable
	)	Clarence L. Burch,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant was proven guilty beyond a reasonable doubt. Admission of prior consistent statements of the victim did not prejudice the defendant. The prosecution did not shift the burden of proof to the defendant in closing argument.

¶ 2 In a bench trial, defendant Jose Robles was convicted of two counts of battery and sentenced to one year of probation. On appeal he contends that his guilt was not established beyond a reasonable doubt. Alternatively, he contends that he is entitled to a new trial because prior consistent statements of the victim were admitted as substantive evidence, and because the State's final argument shifted the burden of proof to him.

¶ 3 On February 17, 2011, a bench trial for this matter commenced in the circuit court of Cook County. The victim, F.A., who was 11 years old at the time of trial, testified that the defendant was her godfather. He provided child care to her after school, and she customarily went to his home almost every day after school. In the fall of 2009, F.A. slept overnight at the defendant's home in

a bed with the defendant's granddaughter. When she awoke in the morning, the defendant was standing in front of her, touching her vaginal area with his hands. F.A. moved her legs and the defendant left the room. F.A. did not tell anyone about the incident at that time because she was frightened. In December 2009, F.A. was at the defendant's home as he packed for a trip to Mexico. F.A. and the defendant's granddaughter were coloring. F.A. testified that when the defendant's granddaughter went to the bathroom, the defendant put his hand under her shorts "in the middle of [her] butt." On another occasion, F.A. and the defendant's granddaughter were watching movies at the defendant's home when, according to F.A., the defendant touched her through her clothes, on her "butt" and her back. F.A. testified that after the defendant went to Mexico, she told her mother what happened. She also testified that she did not know if the defendant had ever touched her other than those three times.

¶ 4 On cross-examination, F.A. testified that it was her godmother, Maria, who usually babysat her, as the defendant was often at work in Indiana. F.A. stated that her brother, Emanuel, and the defendant's granddaughter were both at the defendant's home when the defendant touched her while she was watching movies. Emanuel was five years old at the time of trial and therefore was three or four years old at the time of the occurrence, which was approximately 18 months earlier. F.A.'s godmother, Maria, was also at home, but she was in the kitchen when the incident occurred. The time when the defendant touched her while she was sleeping next to the defendant's granddaughter, he placed his finger in F.A.'s "front privates." Emanuel was also at the house at that time, but he slept in Maria's bed in another room. F.A. did not know if Maria was at the house when this occurred. On the third occasion, when the defendant touched her while she was coloring, Emanuel was also in the room. Maria was also at home on that third occasion, but she was in the kitchen. F.A. also testified that when the defendant touched her that time he did so "really hard" and it "hurt a lot." F.A. testified that the first time the defendant touched her she was between the ages of six and seven. On one occasion, while she was watching a movie at the defendant's home, he unzipped

his pants, took out his "weenie," and put her hand on it. This was the only time he had touched her with his "weenie," but on other occasions when she passed by him in his bedroom he would have his pants unzipped and he would show it to her. F.A. also testified on cross-examination that the defendant had placed his finger in her "front privates" on three different occasions at his home. She denied that he ever touched her chest.

¶ 5 F.A.'s mother, Patricia A., testified that the defendant and Maria had taken care of F.A. in their Chicago home since F.A. was very young. F.A. spent the night at their house three or four times. On January 9, 2010, F.A. told Patricia A. that the defendant had been touching her on her chest, her vaginal area, and her "butt" area. F.A. did not specify the dates when this occurred or the number of times it had occurred. F.A. did say that she had not told Patricia A. earlier because she was afraid.

¶ 6 On cross-examination, Patricia A. testified that when F.A. told her about the incidents with the defendant, F.A. said that the defendant placed his penis inside her vagina. F.A. also told Patricia A. that the defendant placed his finger inside her vagina "very hard" and with much force. Patricia A. denied that F.A. ever told her that the defendant placed his penis in F.A.'s anus, or that he placed his mouth on F.A.'s "private parts." Patricia A. testified that the defendant had touched her breast once when F.A. was only one year old. There were times when the defendant would ask Patricia A. to watch pornographic movies with him. On one occasion, Patricia A. and Maria, the defendant's wife, left the house so the defendant could watch pornographic movies. Patricia A. continued to allow her children to stay at the defendant and Maria's home because she trusted Maria, and the children were left with Maria. Patricia A. denied that she ever stated that she had "feelings" for the defendant's son-in-law, Marsaleno Perez.

¶ 7 Testifying for the defense, Ada Perez-Almuhtaseb stated that she was employed by the Department of Children and Family Services and worked with the Children's Advocacy Center of Chicago. She spoke to F.A. at school on January 15, 2010. F.A. told her that the defendant touched

her breasts, her vagina and her "butt" with his hands, fingers, and penis. Ada did not elicit further details at that time. Chicago police detective Franchina testified that in January 2010, she observed F.A. being interviewed at the Children's Advocacy Center. At that time, F.A. stated that the first time the defendant touched her was when she was nine years old. F.A. also stated that the defendant had touched her breasts, placed his finger in her anus, placed his penis in her anus and vagina, and placed his mouth on her vagina.

¶ 8 On cross-examination, over the defendant's objections, Franchina testified that in the interview, F.A. described specific instances of abuse by the defendant. For example, F.A. said that on one occasion, when she was sleeping at the defendant's home, the defendant put his hands inside her shorts while she slept. On a different occasion, the defendant put his hands in the back of F.A.'s pants and touched her anus. F.A. also stated in this interview that she was frightened of the defendant. According to Franchina, F.A. related a total of five or six specific instances of touching by the defendant when she was nine and ten years old, although F.A. could not recall the exact dates of these incidents. On redirect examination, Franchina testified that F.A. related one instance of the defendant inserting his penis into her vagina and "squishing up and down."

¶ 9 The defendant's son, Emanuel Robles, testified for the defense that in December 2009, Patricia A. met with him and members of his family, including his brother-in-law, Marsaleno Perez. At that meeting, Patricia A. confessed to having romantic feelings for Marsaleno.

¶ 10 The defendant's wife, Maria Robles, testified that she had never seen the defendant touch F.A. in an inappropriate way. She also testified that the defendant was never alone with F.A. She babysat F.A. and her brother Emanuel for eight years. During that time, the defendant was working seven days a week at an Indiana casino. In December they would vacation in Mexico. Maria testified that the defendant had very little contact with F.A. and Emanuel. When the defendant was present with the children, Maria was also there. On the four or five occasions when F.A. slept overnight, Maria would sleep in the same room. Maria denied that there were pornographic movies

in her house, or that she and Patricia A. had ever left the house so the defendant could watch pornographic movies. Maria also testified that at a family meeting Patricia A. confessed that she had feelings for Maria's son-in-law, Marsaleno Perez.

¶ 11 On cross-examination Maria stated that the defendant might have been alone with F.A. on occasions when Maria would go into the bathroom or the kitchen.

¶ 12 The parties stipulated that, if called to testify, Dr. Nuha Shair of the Children's Advocacy Center would state that she performed an "anogenital" examination of F.A., and that examination did not confirm or refute a history of sexual abuse.

¶ 13 Based upon this evidence, the defendant was convicted of two counts of battery and was sentenced to one year of probation.

¶ 14 The defendant first contends that the State failed to prove him guilty beyond a reasonable doubt. In reviewing the sufficiency of the evidence in a criminal case, we view that evidence in the light most favorable to the State and we must determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). We will reverse a criminal conviction only where the evidence is so unreasonable, improbable, or unsatisfactory that reasonable doubt of the defendant's guilt remains. *Id.* In determining the defendant's guilt, the trier of fact is not required to seek out all possible explanations consistent with innocence and elevate them to support a finding of reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 15 F.A.'s testimony concerning two instances of inappropriate sexual touching by the defendant supported the finding that the defendant was guilty of two counts of battery. F.A. testified that in one instance, when she spent the night at the defendant's home, she awoke to find that he had placed his hands under her shorts on her vaginal area. She testified that in another instance the defendant placed his hands in the middle of her "butt" under her shorts. This testimony established that the defendant had committed two batteries by making physical contact of an insulting or provoking

nature with F.A. 720 ILCS 5/12-3(a)(2) (West 2010). The defendant also argues that F.A. was not credible where she did not make an immediate outcry concerning these actions. However, F.A. testified that she did not do so because she was frightened. We note that F.A. is a young child and it is reasonable to believe her testimony that fear prevented an immediate outcry. After the defendant traveled to Mexico, F.A. did tell her mother that the defendant touched her "butt" and her vaginal area. The defendant also argues that he would not have committed the vaginal touching while his granddaughter was also in the bed with F.A. However, F.A. testified that she had been sleeping when she awoke to find the defendant touching her. The trial court could have inferred that the defendant's granddaughter was still sleeping when this occurred. F.A. testified that when the defendant touched her in the middle of her "butt," she and the defendant's granddaughter had been coloring, but the defendant's granddaughter had gone to the bathroom. Although F.A. testified that her brother, Emanuel, was also in the room, he was only three or four years old at the time.

¶ 16 As the defendant notes, F.A.'s testimony was impeached as to some aspects of her story. However, this impeachment was not of F.A.'s statements concerning those actions by the defendant which supported his conviction for two batteries. Furthermore, the impeachment presented a matter of credibility to be resolved by the trial court as the trier of fact. *People v. Hawkins*, 243 Ill. App. 3d 210, 221 (1993).

¶ 17 The defendant also contends that there was no physical or medical evidence that F.A. had been penetrated vaginally or anally. We note that the results of the medical examination of F.A. conducted by Dr. Shair were equivocal. Dr. Shair's conclusion was that based upon the examination, which she performed in F.A., she could not confirm or refute sexual abuse.

¶ 18 The defendant contends that the evidence in this case is less convincing than that presented in *People v. Judge*, 221 Ill. App. 3d 753 (1991), in which the defendant's conviction for aggravated criminal sexual assault was overturned. However, in *Judge*, the seven-year-old complainant testified that she and her younger sister were sitting on a couch, watching television, when the defendant

dragged her from the couch across the floor and into a bedroom where he threw her on a bed before touching her vagina. *Judge*, 221 Ill. App. 3d at 754. The complainant testified that her sister did not see these actions even though she had been sitting next to the complainant when the incident occurred. *Id.* Furthermore, in *Judge*, the trial court relied upon medical testimony as corroborating the complainant's account when the doctor testified that redness to complainant's vagina gave him the "impression" of sexual abuse, even though he admitted that it was possible or probable that an ointment applied to that area by complainant to treat a rash could have caused the redness. *Id.* at 755-56. Additionally, no marks or bruises were discovered on the complainant's body despite the rough treatment to which she alleged she had been subjected. *Id.* at 761. Finally, the complainant's mother, who testified that complainant made a prompt outcry to her, was proven to have made an unfounded charge of sexual abuse of someone else's child. *Id.* We do not believe the defendant's reliance on *Judge* is well founded.

¶ 19 In this case, the medical evidence was not alleged to have corroborated F.A.'s account and therefore there was no improper reliance upon it. Furthermore, although F.A. was with the defendant's granddaughter when the two acts for which the defendant was convicted, allegedly occurred, in one instance there was evidence from which the trier of fact could infer that the granddaughter was asleep at the time of the occurrence and therefore could not have witnessed it. F.A. testified that in the other instance, the defendant's granddaughter had left the room before the occurrence. Although F.A.'s younger brother, Emanuel was in the room when the defendant allegedly improperly touched her, he was only three or four years old. We therefore do not find that the facts of *Judge,* which supported reversal of that conviction, to be analogous to the facts of this case and supportive of reversal. Accordingly, we hold that the defendant's guilt was established beyond a reasonable doubt.

¶ 20 We next consider the defendant's claim that he was prejudiced when the trial court permitted the State to elicit from detective Franchina, testimony of prior consistent statements made by F.A.

Franchina's testimony on direct examination by the defendant was that she observed an interview in which F.A. said that the defendant first touched her was when she was nine years old. F.A. also stated that the defendant touched her breasts, placed his finger in her anus, placed his penis in her anus and vagina, and placed his mouth on her vagina. On cross-examination, over the defendant's objections, Franchina testified that F.A. also specified that on one occasion the defendant put his hands inside her shorts while she was sleeping. On a different occasion, the defendant put his hands in the back of F.A.'s pants and touched her anus. The defendant contends that these prior consistent statements should have been excluded by the trial judge.

¶ 21 The defendant failed to raise this objection in his motion for new trial and therefore forfeited the issue. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Furthermore, it was the defendant who elicited testimony from Franchina and from Ada Perez-Almuhtaseb regarding F.A.'s report that the defendant had touched her anus. Although Franchina also specified that F.A. stated other facts to which she did not testify at trial, F.A.'s statement concerning the defendant touching her anus tended to corroborate her trial testimony. Under these circumstances there is no prejudice arising from Franchina's testimony regarding pretrial statements by F.A., which were consistent with F.A.'s trial testimony.

¶ 22 The defendant's final contention is that the State improperly shifted the burden of proof to him when, in closing argument, the State argued that the defendant could not answer why F.A. would lie about the claims she made concerning the defendant's actions. The defendant asserts that by this argument, the State was suggesting that the defendant could only be acquitted if the defense could show that F.A. had a motivation to lie. However, the entire defense was based upon an effort to show that F.A. was lying in her trial testimony. The defense presented evidence of pretrial statements made by F.A. which concerned other instances in which the defendant had allegedly touched and molested her. In final argument, the defense also pointed to a medical report which did not support F.A.'s claims, although that report also stated that the medical evidence did not refute

F.A.'s claims. The defense also asserted that "as far as [F.A.'s] truthfulness," there was no corroboration of her statements by physical evidence or by other witnesses who were present when these acts occurred. This was not an instance of the State attempting to shift the burden of proof to the defendant. Compare *People v. Weinstein*, 35 Ill. 2d 467, 469-70 (1966) (Prosecutor repeatedly argued to the jury that the defendant had the burden of presenting evidence which created a reasonable doubt of the defendant's guilt.). When the prosecution attacks a particular theory presented by the defense, this does not constitute an attempt to shift the burden of proof but, rather, an effort to refute the defense and advance the State's case. *People v. Phillips*, 127 Ill. 2d 499, 526 (1989). Here, where the defendant's theory of the case was that the victim was lying, and the defendant introduced evidence to that effect and argued that theory in closing argument, it was proper for the State to counter that argument by questioning why the victim would lie about the defendant's actions under the facts and circumstances of the case. We accordingly find no error in this argument by the State.

¶ 23 For the reasons set forth in this order, we affirm the defendant's convictions and sentence.

¶ 24 Affirmed.