FIFTH DIVISION
JUNE 13, 2014

No. 1-12-1644

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 CR 13162
	)	
ANTOINE MACK,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant's conviction for criminal sexual abuse affirmed over his contention that the evidence was insufficient to sustain his conviction; judgment affirmed.

¶ 2 Following a jury trial, defendant Antoine Mack was found guilty of attempted robbery and criminal sexual abuse, then sentenced to concurrent terms of five years' imprisonment. On appeal, he contends that the evidence was insufficient to prove him guilty of criminal sexual abuse beyond a reasonable doubt.

¶ 3 At trial, the 28-year-old victim, W.T., testified that after the gay pride parade on June 27, 2010, she and her friend Aidra rode the red-line elevated train to the Belmont stop. They exited at 11:30 p.m. and went into a few clubs in the area. The victim testified that she did not drink at the clubs, but a short while later, she and Aidra went to a liquor store at the corner of Belmont and Sheffield Avenues. Aidra went in alone while the victim waited outside. Defendant approached her there, and they had a "general conversation" about what they were doing. When Aidra exited the liquor store, she and the victim walked away, and Aidra poured Tequila in the victim's 8 oz. water bottle with juice mixed in. They walked around the area of Belmont and Sheffield Avenues, and met up with three friends of Aidra.

¶ 4 About 2:30 a.m., the victim bought a sandwich, and she and her friends walked to Chicago Style Pizza. As they were doing so, defendant approached the victim, who was in the back of the group. As Aidra and her three other friends crossed an intersection, defendant grabbed the victim by her neck, choking her. He used his other hand to cover her mouth and nose, and said, "give me your money." He then dropped her to the ground, and she fell on her stomach.

¶ 5 Defendant sat on top of the victim, and she told defendant she could not breathe. He responded that he wanted her money, and she placed her arm out to give him her purse. Defendant then placed his left hand under her dress and inside her underwear and touched her anus. The victim testified that defendant also had his penis against her buttocks and that it was erect. The victim told him to just take her purse and that she could not breathe, and defendant responded, "we were just playing, right?" While defendant was on top of her, she urinated on herself because she was frightened. A police officer pulled defendant off of her, but she did not

go to the hospital because she did not have any internal injuries and wanted to go home.

¶ 6 On cross-examination, the victim testified that she told the police officer at the scene that she was attacked, but did not tell him that she felt defendant's erect penis against her buttocks. The victim explained that she was crying, and just relieved that defendant was off of her. The victim also testified that she did not tell the officer that she urinated on herself, but that he saw the urine on the ground. At the police station the victim spoke with Detective Cella. She did not recall if she told the detective that defendant placed his right hand in her underwear, but recalled that she was crying when she told him what happened.

¶ 7 On redirect, the victim testified that she did not tell Detective Cella every detail of the attack. She explained that she "didn't feel completely comfortable talking to him."

¶ 8 Chicago police officer Dan Moynihan testified that at 3:15 a.m. on June 28, 2010, he was patrolling the area of Belmont and Sheffield Avenues, and as he drove by 3043 North Sheffield Avenue, he heard a female whimpering and saying, "I can't breathe, just let me breathe a little bit." He then noticed defendant lying on top of the victim with his right arm around her neck. The victim was facedown and crying, and the officer exited his car. Officer Moynihan noticed that defendant had his left hand between himself and the victim, and that there was a purse and a sandwich next to them. When he approached, defendant got up, and the officer told him to get back down on the ground.

¶ 9 Officer Moynihan further testified that the victim was "a little bit hysterical and kind of shaken up." He also testified that he has encountered people under the influence of alcohol thousands of times, and that based on his experience and observations of the victim, he did not believe that she was intoxicated. Officer Moynihan testified that the victim never told him that

she urinated on herself, and he did not observe that she had done so, and he noted that she refused medical attention.

¶ 10 The defense then called Detective John Cella. He testified that the victim told him that defendant inserted his right hand in her underwear.

¶ 11 During deliberations, the jury sent the court two notes, asking why the assault charge was dropped, and if they could get access to the testimony of the victim. The court noted that with regard to the first question, the charge dropped was an aggravated battery charge, and that its response was that they have the evidence and the law and to continue to deliberate. The court's answer to the second question was that no transcript is available. The jury was unable to reach a verdict that day, and was sequestered over night. At 10:20 a.m. the next day, the jury entered a verdict, finding defendant guilty of attempted robbery and criminal sexual abuse.

¶ 12 Defendant filed a motion for a new trial, which the trial court denied. In doing so, the court noted that the jurors were the finders of fact and judges of the credibility of the witnesses, and that it would not overturn the will and desire of the 12 jurors who heard the evidence and whose job it was to assess the credibility of the witnesses and decide the facts of the case.

¶ 13 On appeal, defendant contends that the evidence was insufficient to prove him guilty of criminal sexual abuse beyond a reasonable doubt. He maintains that the victim's testimony was uncorroborated and so inconsistent as to be incredible. Defendant does not contest the sufficiency of the evidence to sustain his conviction for attempted robbery, and, accordingly, has waived any issue regarding it. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 14 When defendant challenges the sufficiency of the evidence to sustain his conviction the proper standard of review is whether, after 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. Cunningham*, 212 Ill. 2d 274, 279-80 (2004). This standard recognizes the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A criminal conviction will be reversed only if the evidence is so unsatisfactory as to raise a reasonable doubt of guilt. *Campbell*, 146 Ill. 2d at 375. For the reasons that follow, we do not find this to be such a case.

¶ 15 To sustain the conviction for criminal sexual abuse, the State was required to prove beyond a reasonable doubt that defendant committed an act of sexual conduct by the use of force or threat of force. 720 ILCS 5/12-15(a)(1) (West 2010). Sexual conduct is defined, in relevant part, as any intentional or knowing touching or fondling of the victim either directly or through clothing, of the sex organs, anus or breast of the victim for the purpose of sexual gratification or arousal of the accused. 720 ILCS 5/12-12(e) (West 2010).

¶ 16 Here, the victim testified that defendant forcefully pushed her to the ground and while holding her neck and choking her, he used his other hand to place it under her dress and inside her underwear. He then touched her anus. While he was doing this, he also pressed his erect penis against her buttocks. Officer Moynihan, who was patrolling the area, heard the victim whimpering and crying, and saw defendant on top of her with his hand between himself and the victim. This evidence if believed by the trier of fact, was sufficient to prove defendant guilty of criminal sexual abuse beyond a reasonable doubt. 720 ILCS 5/12-12(e) (West 2010).

¶ 17 Notwithstanding, defendant maintains that there was at least reasonable doubt of his guilt because his conviction rested entirely on the victim's testimony, which was wholly

uncorroborated by any physical evidence and contained crucial inconsistencies. He maintains that the victim's testimony was inconsistent regarding which hand defendant inserted into her underwear, and claims that her testimony that she urinated on herself and that Officer Moynihan pulled defendant off of her was contradicted by Officer Moynihan's testimony that he had not observed the victim urinate on herself and that he did not pull defendant off of her. Defendant further notes that Officer Moynihan did not testify to noticing defendant's erect penis when he stood up.

¶ 18 The inconsistencies pointed out by defendant are minor discrepancies which do not of themselves create a reasonable doubt as to defendant's guilt. *People v. Bowen*, 241 Ill. App. 3d 608, 620 (1993). There is no requirement that the testimony of the victim of a sex-related offense be corroborated. *People v. Schott*, 145 Ill. 2d 188, 202-03 (1991); see also *People v. Le*, 346 Ill. App. 3d 41, 50-51 (2004). Moreover, the lack of physical evidence in this case is consistent with the victim's testimony that defendant had touched her anus and pressed his erect penis against her buttocks, but there was no sexual penetration or ejaculation. *People v. Delgado*, 376 Ill. App. 3d 307, 311 (2007); see also *People v. Jackson*, 2012 IL App (1st) 100398, ¶41.

¶ 19 Defendant, nonetheless, cites *People v. Rivera*, 2011 IL App (2d) 091060, in support of his contention that the lack of physical or medical evidence supports reversal. *Rivera* does not stand for this proposition. In *Rivera*, 2011 IL App (2d) 091060, ¶¶29-30, unlike here, the extensive DNA and fingerprint evidence from the crime specifically excluded defendant as the rapist and murderer, and, accordingly, *Rivera* is factually inapposite to this case.

¶ 20 We also find, contrary to defendant's contention, that the victim's failure to tell the police

officers that defendant pressed his erect penis against her buttocks did not undermine her credibility where she explained that she did not tell the specifics to the responding officer because she was upset, and was uncomfortable talking to Detective Cella about the incident. Defendant, however, contends that the victim's failure to report this fact amounts to an assertion of the nonexistence of the fact, citing *People v. Henry*, 47 Ill. 2d 312, 321 (1970). We disagree and find *Henry* inapplicable to the case at bar.

¶ 21 In *Henry*, 47 Ill. 2d at 319-22, the supreme court found that it was reversible error for the trial court to refuse to allow a witness to be impeached by her prior omission. The supreme court explained that the rule is that the omission of a witness to state a particular fact under circumstances rendering it incumbent upon him to, or likely that he would, state such fact, if true, may be shown to discredit his testimony as to such fact, and that a failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the nonexistence of the fact. *Henry*, 47 Ill. 2d at 320-21. Here, in contrast to *Henry*, defense counsel was allowed to examine the victim with respect to any omissions in her initial statements to police for impeachment purposes. Her omission was thus before the trier of fact which had the superior opportunity to observe her as she testified (*People v. Berland*, 74 Ill. 2d 286, 305-06 (1978)), and clearly found her credible despite any inconsistencies in her testimony. Moreover, under the circumstances of this case, it is not surprising that the victim would be, as she explained, too uncomfortable and upset to tell the male police officers that defendant pressed his erect penis against her buttocks.

¶ 22 Defendant further contends that the victim's consumption of alcohol over a period of several hours suggests that her recollection of the events might have been blurred by the effects

of the alcohol. The victim testified that a short while after 11:30 p.m., she drank an 8 oz. water bottle with tequila and juice over a period of more than three hours. There was no showing that the victim was intoxicated from this drink, and, to the contrary, Officer Moynihan testified that based on his experience and observations of the victim, she was not intoxicated when he encountered her at the scene.

¶ 23 Defendant also contends that the questions posed by the jury and the almost five-hour deliberation indicates that the jury found the victim's credibility to be a close question, citing *People v. Palmer*, 125 Ill. App. 3d 703, 712 (1984). In *Palmer*, 125 Ill. App. 3d at 708, the jury began deliberating at 4:15 p.m. and continued to 11 p.m., then reconvened the next day at 9:30 a.m., and when at 10:25 a.m. the jury informed the court that it could not reach a unanimous verdict, the court told the jury to continue to deliberate. On appeal, defendant argued that the court coerced the verdict by instructing the jury to continue deliberations, and this court found that the issue was not waived because the evidence was closely balanced in light of the jury's deliberation and note. *Palmer*, 125 Ill. App. 3d at 712. Here, unlike *Palmer*, the jury did not inform the court that it could not reach a unanimous decision, and the jury returned a verdict the following morning after resuming deliberations. We reject defendant's premise that a lengthy deliberation necessarily means that the evidence was closely balanced, and find that the less than five-hour deliberation in this case was not lengthy (*People v. Nugen*, 399 Ill. App. 3d 575, 584 (2010)), and that the notes the jury sent the court during deliberations merely reflect that the jury took its job seriously and conscientiously worked to come to a just decision (*People v. Minniweather*, 301 Ill. App. 3d 574, 580 (1998)).

¶ 24 By its verdict, the jury clearly accepted the victim's testimony. Our review of the record discloses no basis to disturb the credibility determinations made by the jury (*People v. Berland*, 74 Ill. 2d 286, 306-07 (1978)), nor the finding of guilt based thereon (*People v. Tenney*, 347 Ill. App. 3d 359, 367-68 (2004); *People v. Bofman*, 283 Ill. App. 3d 546, 553 (1996)). Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.