2014 IL App (1st) 123247-U

FIRST DIVISION
December 29, 2014

No. 1-12-3247

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 19411
	)	
LARRY EUBANKS,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

Held: We hold the State failed to satisfy its burden of proving defendant guilty beyond a reasonable doubt of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2010)) because it failed to present sufficient evidence to prove the element of sexual penetration. Accordingly, we reverse defendant's conviction for criminal sexual assault as alleged in count 2 of the indictment. We affirm defendant's other conviction for criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2010)) and his conviction for criminal sexual abuse (720 ILCS 5/12-15(a)(1) (West 2010)) and remand the matter for resentencing.

¶ 1 After a bench trial, the circuit court of Cook County convicted defendant, Larry Eubanks, of two counts of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2010)) and one count of criminal sexual abuse (720 ILCS 5/12-15(a)(1) (West 2010)) for conduct occurring on October 10-11, 2010. The court found him not guilty of one count of criminal sexual abuse. The circuit court merged defendant's conviction for criminal sexual abuse with his conviction for criminal sexual assault under count 2 of the indictment and sentenced him to consecutive seven year sentences for his criminal sexual assault convictions.

¶ 2 Defendant challenges the sufficiency of the evidence against him for his conviction for criminal sexual assault as alleged in count 2 of the indictment arguing that the State failed to prove the element of sexual penetration with his fingers. Defendant does not challenge his other conviction for criminal sexual assault based on contact with his penis or his conviction for criminal sexual abuse. We hold the State failed to satisfy its burden of proving defendant guilty beyond a reasonable doubt of criminal sexual assault because it failed to present sufficient evidence to prove the element of sexual penetration. We affirm his other conviction for criminal sexual assault and his conviction for criminal sexual abuse and remand the matter for resentencing.

¶ 3 JURISDICTION

¶ 4 The circuit court sentenced defendant on October 12, 2012. Defendant timely filed his notice of appeal on that same day. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013).

¶ 5 BACKGROUND

¶ 6 A grand jury indicted defendant with two counts of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2010)) and two counts of criminal sexual abuse (720 ILCS 5/12-15(a)(1), (2)(West 2010) for conduct that occurred on October 10-11, 2010. At issue here, count 2 alleged defendant committed criminal sexual assault in that he "knowingly committed an act of sexual penetration upon [B.W.] to wit: an intrusion in that [defendant] inserted his fingers into [B.W.'s] vagina by the use of force or threat of force." The other counts against defendant in the indictment, not at issue here, were as follows: under count 1, defendant knowingly committed an act of sexual penetration by force or threat of force when his penis came into contact with B.W.'s vagina; and under counts 3 and 4, defendant knowingly committed acts of sexual conduct when he fondled B.W.'s vagina for the purpose of his own sexual gratification or arousal with knowledge that the victim was unable to give knowing consent and by the use or threat of force.

¶ 7 At trial, B.W., the victim, testified that on October 10, 2010, she was a college student but was staying at defendant's house because he was going to take her back to school the following morning. Defendant is the victim's father. Defendant lived with his wife, Kinyara Stith, and their two other minor children. B.W., defendant, and defendant's two other children ate dinner and watched television in defendant's room. B.W. went to sleep in defendant's bed. She was wearing a "tank top, bra, underwear, shorts." Defendant's wife worked the overnight shift that night, and did not arrive home until the early morning hours the next day. Defendant was sitting in a chair in the bedroom when B.W. went to sleep. The other children went to sleep in their rooms.

¶ 8 B.W. testified she woke up and noticed defendant in the bed, but she went back to sleep. When B.W. awoke a second time, defendant "was laying very closely to" her. Defendant's arm touched her arm. She moved away from defendant and went back to sleep. She awoke a third time because defendant was "caressing" her "butt *** and the back of [her] thighs." She did not move away from him. B.W. testified defendant "then was behind me, towards my feet, and he separated by legs apart." B.W. described defendant's subsequent actions as follows:

"Q. After your dad separated your thighs, what did he do next?

A. He caressed my vagina through my pants with his hand.

Q. And after that what happened?

A. He moved my shorts over and caressed my vagina through my underwear.

Q. After that, what happened?

A. He moved my underwear and caressed my vagina with his raw hands.

Q. With his what?

A. Raw hands, his fingers.

Q. When you say "raw hands," it was his skin touching your skin?

A. Yes."

When asked "how long did this go on while [defendant] was touching your vagina over and under your clothes with his hands," B.W. responded "[m]aybe a couple of minutes, five minutes." B.W. testified she was "scared and *** shocked." Defendant then walked out of the room.

¶ 9 A couple of minutes later, defendant returned to the room. B.W. was lying on her stomach while defendant was on the bed behind her near her feet. B.W. testified defendant then

tried to insert his penis into her vagina, but it "wouldn't go all the way in." B.W. testified "more of it went in" when defendant inserted his penis into her vagina a second time. After this second instance, B.W. "jumped and basically went into *** a ball." B.W. testified that defendant's insertion of his penis into her vagina the second time hurt her and caused her pain. She then ran into the bathroom crying and called her grandmother. Her grandmother picked her up from a restaurant parking lot near defendant's house. She was then taken to the hospital by her grandmother, where a nurse collected a sexual assault kit from her.

¶ 10 On cross-examination, B.W. testified defendant "started to caress my vagina through my shorts with his fingers. Then he caressed my vagina through my underwear with his fingers. And then it was skin to skin contact with his fingers and my vagina." She agreed that in the second instance where defendant touched his penis to her vagina, defendant's penis went into her vagina.

¶ 11 B.W.'s maternal grandmother, Barbara W., testified consistently with B.W.'s account regarding picking B.W. up in the restaurant parking lot and taking her to the hospital.

¶ 12 Dr. Hossfeld, an emergency room physician, testified he treated B.W. soon after the incident. B.W. told Dr. Hossfeld that defendant put his penis in her vagina. Dr. Hossfeld performed a vaginal exam on B.W., and found B.W. "had a small laceration, a cut, around the bottom of her vagina, towards the, almost outside, but the mucous membrane it's called, the lining of the vagina." Dr. Hossfeld testified the size of the cut as "maybe a centimeter, less than half an inch, small." He thought the cut "was less than a day old." When asked "what would cause a cut like *** that," Dr. Hossfeld answered "it would be somebody trying to force something too big into her vagina." On cross-examination, Dr. Hossfeld testified that his chart did not indicate any bruising on B.W.'s body.

¶ 13 Michelle Moody a forensic scientist with the Illinois State Police Forensic Science Center testified regarding her analysis of the sexual assault kit taken from B.W. at the hospital. Moody examined the vaginal swabs from the kit for the presence of semen and saliva. She did not find any semen and the results of the saliva test were "inconclusive." She removed the cotton portion of the vaginal swab to preserve it for DNA analysis. Michael Mathews, a forensic scientist with the Illinois State Police Forensic Science Center testified he received a buccal swab standard collected from defendant. Lisa Kell, a forensic DNA analyst and forensic biologist with the Illinois State Police Forensic Center testified that DNA is found in every tissue of the human body and also found in bodily secretions. She explained that DNA does not differ from tissue to tissue in one person but it does differ from person to person. She identified the presence of male DNA in B.W.'s vaginal swab.

¶ 14 Karri Brauddus, a forensic scientist with the Illinois State Police Forensic Science Command testified she tested the vaginal swab and the buccal swab taken from defendant in this case. She conducted a "partial YSTR DNA profile" that matched defendant's "YSTR profile." On cross-examination, she agreed that defendant's profile was found on the vaginal swab. When asked if she could "tell the court what part of [defendant's] body contributed that," Brauddus answered "[n]o, I cannot." Brauddus was also asked on cross-examination whether a DNA profile could "get there from merely touching a vagina," to which Brauddus responded "[i]ts possible." She explained that "it depends on the shedding of skin cells." She further explained that "[s]ome people shed lots of skin cells, some people shed very few. So simple touching is possible." Brauddus did not know how the vaginal swabs were collected.

¶ 15 Defendant's son, also named Larry Eubanks, testified he received a phone call on October 11, 2010, from B.W., his sister. After speaking with B.W., he "[c]hanged [his] Facebook

status." He testified he changed his status to " ' I wish I change my last name, and I am not a junior because I am nothing like him.' " He later received a message on his phone from defendant, who stated that he understood why he made the changes to his Facebook page. Eubanks sent defendant a text message, asking him why he did it. Defendant responded by stating " 'I don't know why I did it, but it is a demon living inside of me.' "

¶ 16 The parties stipulated that the sexual assault kit collected from B.W. and the buccal swab collected from defendant were maintained in the proper chain of custody. The parties further stipulated that on October 13, 2010, defendant was "six foot ten and 260 pounds."

¶ 17 After the State rested their case-in-chief, the circuit court denied defendant's motion for a directed verdict.

¶ 18 Kinyarda Stith, defendant's wife, testified on his behalf. Stith testified that she returned home at 5:45 in the morning of October 11, 2010. She found defendant and B.W. sleeping. She sat down on a chair. Defendant then came out and joked around with her about making breakfast. After a few minutes, she heard crying from the bathroom. Eventually, she saw defendant in the bathroom sitting on the toilet seat while B.W. sat in the bathtub. When she asked B.W. "what's wrong," B.W. did not respond. She agreed that she and defendant were in the restaurant parking lot trying to talk to B.W. and that she told B.W. to call the police. She told defendant to leave her house. She no longer lives with defendant.

¶ 19 The parties stipulated that B.W. told detectives on October 11, 2010, that defendant had removed her shorts.

¶ 20 The circuit court found defendant guilty of both counts of criminal sexual assault (720 ILCS 5/12-13(a)(1)(West 2010)), and one count of criminal sexual abuse (720 ILCS

5/12-15(a)(1) (West 2010)). The circuit court found defendant not guilty of one count of criminal sexual abuse. 720 ILCS 5/12-15(a)(2) (West 2010).

¶ 21 On count 1, the circuit court sentenced defendant to seven years' imprisonment for criminal sexual assault. 720 ILCS 5/12-13(a)(1) (West 2010). The circuit court merged defendant's conviction for criminal sexual abuse (720 ILCS 5/12-15(a)(1) (West 2010)) under count 4 of the indictment with his conviction for criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2010)) under count 2 of the indictment, and imposed a consecutive seven year sentence. Defendant timely appealed.

¶ 22 ANALYSIS

¶ 23 Defendant challenges the sufficiency of the evidence against him for one of his convictions of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2010)) arguing that the State failed to present evidence that his fingers penetrated B.W.'s vagina. According to defendant, the State did not present any evidence of an actual intrusion sufficient to convict him of criminal sexual assault. Rather, defendant contends that the record only establishes that defendant touched the exterior of B.W.'s vagina.

¶ 24 In response, the State argues that the circuit court properly inferred from the evidence that defendant committed the act of sexual penetration with his fingers based on three pieces of evidence: B.W.'s testimony; B.W.'s vaginal laceration; and defendant's partial DNA match as found on B.W.'s vaginal swab. The State admits that B.W. did "not explicitly state that defendant's fingers intruded into her vagina," but contends that her testimony that defendant's bare fingers caressed her vagina, combined with the physical evidence of the laceration to B.W.'s vagina and the presence of defendant's DNA on B.W.'s vaginal swab, allow a reasonable trier of fact to infer the element of intrusion. Furthermore, the State argues that "[a]lthough the

testimony did not explicitly establish that defendant had intruded on B.W.'s vagina, her testimony did not explicitly exclude this inference either."

¶ 25 In reply, defendant argues that evidence concerning the laceration on B.W.'s vagina in no way supports an inference of intrusion by his fingers. Rather, defendant argues that such evidence shows the laceration was caused by his penis. Defendant points to B.W.'s testimony that defendant caressed her vagina, but that she felt pain when defendant tried to insert his penis; and that the emergency room physician testified that the laceration was caused by "somebody trying to force something too big into [B.W.'s] vagina." Defendant discounts the State's reliance on DNA evidence by arguing that the State presented no evidence that the vaginal swab was taken from the interior of B.W.'s vagina or that the DNA was deposited by his fingers as opposed to his penis.

¶ 26 The due process clause of the fourteenth amendment to the United States Constitution ensures that an accused defendant is not convicted of a crime "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *People v. Carpenter*, 228 Ill. 2d 250, 264 (2008); *People v. Brown*, 2013 IL 114196, ¶ 52 ("the State bears the burden of proving beyond a reasonable doubt each element of a charged offense and the defendant's guilt."). When presented with a challenge to the sufficiency of the evidence, we must determine " ' whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In doing so, we will not substitute our judgment for the trier of fact or retry the defendant. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). This standard applies to both circumstantial and direct

evidence as well as to both jury and bench trials. *People v. Ehlert*, 211 Ill. 2d 192, 202 (2000); *Brown*, 2013 IL 114196, ¶ 48.

¶ 27 The trier of fact's credibility determinations are entitled to great weight as it saw and heard the witnesses. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). Additionally, "a reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *People v. Givens*, 237 Ill. 2d 311, 334 (2010). Although we give great deference to the trier of fact, its acceptance of testimony is neither binding nor conclusive. *Id.* at 115. We will not allow unreasonable inferences from the record. *Cunningham*, 212 Ill. 2d at 280. If, after a careful examination of the evidence, we conclude that there was insufficient evidence of defendant's guilt beyond a reasonable doubt, the conviction must be reversed. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). "Accordingly, a conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *Wheeler*, 226 Ill. 2d at 115.

¶ 28 The Criminal Code of 1961(Code) provides that a criminal sexual assault occurs when a defendant "commits an act of sexual penetration by the use of force or threat of force." 720 ILCS 5/12-13(a)(1) (West 2010). Section 12-12(f) of the Code defines the term sexual penetration as:

> "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth, or anus of another person, *or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person*, including but not limited to cunnilingus, fellatio, or anal penetration. Evidence of emission of semen is not required to

> prove sexual penetration." (Emphasis added.) 720 ILCS 5/12-12(f) (West 2010).

¶ 29 Our supreme court has interpreted section 12-12(f) of the Code as defining two types of conduct: (1) the "contact" clause, which refers to "any *contact* between the sex organ or anus of one person by an object, the sex organ, mouth, or anus of another person;" and (2) the "intrusion" clause, which refers to "any *intrusion* of any part of the body of one person or of any animal or object into the sex organ or anus of another person." (Emphasis in original.) *People v. Maggette*, 195 Ill. 2d 336, 346-347 (2001). The term "object" as used in the contact clause does not include body parts. *Id.* at 350. Count 2 of the indictment alleges defendant committed criminal sexual assault in that he "knowingly committed an act of sexual penetration upon [B.W.] to wit: an intrusion in that [defendant] inserted his fingers into [B.W.'s] vagina by the use of force or threat of force," Accordingly, only the intrusion clause, *i.e.*, "any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person," is at issue here. 720 ILCS 5/12-12(f) (West 2010).

¶ 30 In *People v. Maggette*, 195 Ill. 2d 336 (2001), our supreme court addressed the intrusion clause as defined in section 12-12(f) of the Code in relation to a defendant's conviction for criminal sexual assault. *Id.* at 352. The victim in *Maggette* testified on direct examination that the defendant had rubbed her vagina over her underwear. *Id.* at 342, 352. On cross-examination, however, the victim testified as follows:

> " ' I remember [defendant] caressing me through my – to my knowledge it was – my panties was still up but he was just rubbing and caressing me through – he got underneath my panties – and I felt underneath my panties and *in* my vagina area

> and through it just right through it and his fingers going underneath it.' " (Emphasis in original.) *Id.* at 352.

Our supreme court first agreed with the appellate court's holding that " '[m]ere touching or rubbing of a victim's sex organ or anus with a hand or finger does not prove sexual penetration and cannot, therefore, constitute criminal sexual assault.' " *Id*. (quoting *People v. Maggette*, 311 Ill. App. 3d 388, 397 (2000)). Regarding the victim's testimony on cross-examination, our supreme court held "[t]he victim's brief and vague reference to her vaginal area is not sufficient to prove an 'intrusion' and cannot support a conviction of criminal sexual assault." *Id.* at 352. Accordingly, the *Maggette* court vacated the defendant's conviction for criminal sexual assault. *Id.*

¶ 31 B.W., the victim in this case, similar to the victim in *Maggette*, testified defendant contacted her sex organ in the following ways: "[h]e caressed my vagina through my pants with his hand;" "[h]e moved my shorts over and caressed my vagina through my underwear;" and "[h]e moved my underwear and caressed my vagina with his raw hands." B.W. added that when she referred to defendant's raw hands, it included "his fingers" and meant that defendant's skin touched her skin. Applying our supreme court's holding in *Maggette* to B.W.'s testimony, we hold that B.W.'s testimony cannot support a conviction for criminal sexual assault because it does not prove intrusion to satisfy the element of sexual penetration. " 'Mere touching or rubbing of a victim's sex organ or anus with a hand or finger does not prove sexual penetration and cannot, therefore, constitute criminal sexual assault.' " *Id*. (quoting *Maggette*, 311 Ill. App. 3d at 397). B.W.'s testimony that defendant caressed her sex organ, like the victim in *Maggette*, does not establish the element of sexual penetration as defined by section 12-12(f) of the Code.

¶ 32 The State points to two other pieces of physical evidence that it contends satisfies the element of sexual penetration: the laceration to B.W.'s vagina, and defendant's partial DNA match as found on B.W.'s vaginal swab. Dr. Hossfeld, the emergency room physician, testified B.W. had a laceration on her vagina and explained its cause as "somebody trying to force something too big into her vagina." Defendant's DNA was identified on B.W.'s vaginal swab. B.W. testified, in addition to her above testimony regarding defendant caressing her sex organ, that defendant later inserted his penis into her vagina. B.W. testified this hurt and caused her pain.

¶ 33 It is undisputed that defendant committed an act of sexual penetration upon B.W. with his penis, which served as the basis for his other conviction for criminal sexual assault. At issue here, however, is whether the State proved beyond a reasonable doubt that defendant committed an act of sexual penetration upon B.W. based on the intrusion of his fingers into her sex organ. The State's witnesses who conducted the DNA analysis explained that DNA does not differ between an individual's tissues. They were not able to determine which of defendant's body parts deposited the DNA. The State did not present any evidence indicating whether the vaginal swab was taken from the interior or exterior of B.W.'s vagina. At the very least, this evidence raises a reasonable doubt regarding the collection of the DNA and which of defendant's body parts deposited the DNA. Similarly, neither Dr. Hossfeld's testimony, nor B.W.'s testimony, establish which of defendant's body parts caused the cut. At the very least, B.W.'s testimony and the evidence of the laceration raise a reasonable doubt as what caused the cut, defendant's finger or his penis. After reviewing the above evidence, we hold that the State did not prove beyond a reasonable doubt that defendant's fingers caused the laceration or deposited the DNA as found on B.W.'s vaginal swab.

¶ 34 Accordingly, we reverse defendant's conviction under count 2 of the indictment for criminal sexual assault because the State failed to present sufficient evidence to prove that defendant committed criminal sexual assault by knowingly committing an act of sexual penetration by an intrusion of his fingers into the sex organ of another person by the use of force or the threat of force. We affirm defendant's remaining conviction for criminal sexual assault under count 1 and criminal sexual abuse under count 4. The circuit court merged defendant's conviction for criminal sexual abuse under count 4 with his conviction for criminal sexual assault under count 2. Therefore, we remand the matter to the circuit court for resentencing.

¶ 35 CONCLUSION

¶ 36 The judgment of the circuit court of Cook County is affirmed in part and reversed in part. Cause remanded for resentencing.

¶ 37 Affirmed in part and reversed in part. Cause remanded.