2015 IL App (1st) 130699-U

THIRD DIVISION
June 30, 2015

No. 1-13-0699

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. 09 CR 11139
	)	
COREY LEE,	)	The Honorable
	)	Noreen Valeria-Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to sustain defendant's conviction for criminal sexual assault because trial testimony revealed the sexual act was nonconsensual. The trial court did not err in allowing the State to introduce, as other-crimes, text messages alluding to prior instances of domestic violence because the evidence was not used or considered for propensity purposes. In addition, the trial court did not err in admitting into evidence text messages sent by the victim to defendant accusing him of sexual assault because the record is devoid of any suggestion the trial court considered the text messages substantively. Finally, the trial court adequately

conducted a *Krankel* inquiry into defendant's post-trial claims of ineffective assistance of counsel. We affirm.

¶ 2 Following a bench trial, defendant Corey Lee was found guilty of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)) and sentenced to eight years in prison. On appeal, defendant contends that the State failed to prove the offense of criminal sexual assault beyond a reasonable doubt because the evidence was insufficient to prove the sexual act was nonconsensual. Defendant also contends that the trial court erred by allowing the State to introduce into evidence, as other-crimes, prejudicial text messages that alluded to prior, unproven instances of domestic violence. In addition, defendant contends that the trial court erred in allowing into evidence text messages in which the victim accused defendant of sexual assault as inadmissible prior consistent statements. Finally, defendant contends that the trial court erred in failing to conduct an adequate *Krankel* inquiry into defendant's post-trial claims for ineffective assistance of counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On May 22, 2009, defendant allegedly raped his on-and-off again girlfriend K.B. and was charged with criminal sexual assault in violation of 720 ILCS 5/12-13(a)(1) (West 2008). Prior to trial, the State moved to introduce other-crimes evidence; specifically a series of text messages sent between defendant and K.B., which alluded to prior instances of domestic violence. The State argued the text messages were necessary to prove defendant's intent and state of mind, as well as provide context as to why K.B. did not struggle with defendant during the incident. Defendant, however, argued the material was inadmissible because there was no police record or order of protection to verify any incident of prior domestic violence. Following a hearing, the trial court admitted the series of text messages into evidence.

¶ 5 At trial, K.B. testified that she met defendant in 2005 when she was eighteen-years-old and gave birth to their son Corey the following year. K.B. ended her relationship with defendant when Corey was six-months old due to defendant's infidelity. K.B., however, regularly brought Corey to visit defendant at his home on the weekends. Subsequently, K.B. and defendant resumed a sexual relationship and defendant tried to win K.B.'s affections by buying her balloons and a stuffed bear. The night before the incident, K.B. dropped Corey off at defendant's home and met up with some friends. K.B. received approximately 12 phone calls from defendant that evening, but only answered one call to make sure Corey was alright. K.B. declined defendant's invitation to come over, but he continued to contact her.

¶ 6 The following day, K.B. went to defendant's home to pick-up Corey. She parked her car with her hazard lights on in front of defendant's building, because she was hoping to avoid a confrontation with defendant. Her gut told her they "were going to get into it because [she] didn't answer [her] phone." Prior to entering the apartment, she heard defendant say, "[s]hut up. Don't move no matter what you hear." K.B. entered and observed defendant's two three-year-old nephews in the living room and went into the bedroom to wake Corey and collect his things. Defendant then entered and closed the door. He questioned K.B. about not answering her phone. K.B. was frightened and began to walk backwards backing herself into a corner. Defendant moved toward K.B. with his fist up open-handed. She began to cry and begged defendant not to hit her. He reiterated that he felt disrespected because she did not answer her phone. He "kept asking [her] who was [she] with and where was [she] at," alluding to her being with another man. Defendant then asked K.B. to disrobe and she said "no." He took his shirt off and said, "if [she was] going to do it raw with someone else, then [she could] do it raw with him." Defendant then forced K.B. on the bed. She did not fight back because defendant had his hand up to hit her and

Corey was asleep on the bed. Defendant then took K.B's belt off, pulled down her pants and underwear, and took his own pants off. Corey awoke because he heard K.B. crying out for defendant "to stop," but Corey only glanced at K.B. and went right back to sleep. Defendant then forced his penis into K.B.'s vagina. It lasted for "maybe two to three minutes" and he ejaculated. Defendant, who was unaware that K.B. was wearing an intrauterine device (IUD), said, "if we had another [child], it would make everything better." Defendant's phone rang and K.B. immediately ran into the bathroom to text her cousin. She then grabbed Corey and fled the apartment.

¶ 7 Shortly thereafter, K.B. told defendant's mother and K.B's grandmother what had transpired between K.B. and defendant. K.B. also told Danny Casaccio, K.B.'s boss from Leamington Foods, when he called her the following day to find out why she did not report to work. She met Casaccio at the store and he escorted her to the Northlake Police Department (NPD) to report the incident and then to Elmhurst Hospital, where doctors performed a rape kit. She did not initially tell the police because she was hesitant "to tell on [her] child['s] father." At this time, the trial court allowed K.B. to read into evidence a series of text messages exchanged between her and defendant alluding to past instances of domestic violence.

¶ 8 On cross-examination, K.B. testified that she visited defendant in jail two or three times, answered one of defendant's letters, and sent him three pictures of Corey. She acknowledged being in a relationship with another man when the incident occurred and that she did not regularly stay over at defendant's home. She testified that she did not try to wake Corey up during the incident because he was a hard sleeper. In addition, she never reported past domestic violence to the police, family or work or tried to get an order of protection.

¶ 10 Casaccio, owner of Leamington Foods, testified that K.B. started working for him as a bagger when she was 15-years-old and worked her way up to computer coordinator. The day after the incident, he called K.B. out of concern and instructed her to go to the Hillside store and meet him through the back entrance to avoid her coworkers. She was distraught and told him about the incident with defendant. He then drove her to the NPD and the hospital, where he waited until K.B.'s family member arrived.

¶ 11 Rosilyn Kattiyaman, a registered nurse at Elmhurst hospital, testified that she administered a sexual assault evidence kit on K.B. who appeared upset and teary-eyed. The sexual assault evidence kit was painful. On cross-examination, Kattiyaman stated there was no visible trauma to K.B.'s anus or vaginal area. K.B. also did not tell Kattiyaman that she had sex with another man within 72 hours prior to the exam.

¶ 12 Sergeant Chris Mowinski, a NPD officer, testified that after speaking with K.B. he placed defendant under arrest. Sergeant Mowinski also sent two officers to collect the clothes K.B. wore at the time of the alleged assault and digitally documented the text messages on K.B.'s cell phone that K.B. exchanged with defendant. Sergeant Mowinski recovered defendant's phone, but did not search it until a warrant was issued at a later date. No text messages were recovered.

¶ 13 The parties stipulated that the sperm fraction obtained from the sexual assault kit was a mixture of male donors and defendant was the major donor. The State rested and the trial court denied defendant's motion for a directed verdict.

¶ 14 Defendant testified on his own behalf that the day before the alleged rape, K.B. asked defendant to babysit Corey while she met up with a couple of friends. K.B. told defendant she was coming back to defendant's home to spend the night and he left a key under the mat. But K.B. did not show up until the following morning. Defendant asked her why she did not come

over as planned, but she just had a blank look on her face. He was upset because she lied to him and he was always honest with her. They got into a "conversation" about it and "she just kept on saying [she] don't have to answer [to him]." Defendant then went to collect Corey's belongings in the bedroom and K.B. followed defendant. She told him to get a condom, but he refused because it was not their usual practice. Defendant told her to lay down on the bed and disrobe, which she did voluntarily. She inserted his penis into her vagina and they had sexual intercourse. She never said no or indicated she did not want to have sexual intercourse. She only indicated she wanted to use a condom because she was not wearing an IUD. But defendant believed contraception was unnecessary because she wanted "a little girl" anyway. Afterwards, he received a phone call and K.B. got dressed and went into the bathroom. She then immediately left with Corey. K.B. visited defendant in jail two or three times with his mother and two or three times on her own.

¶ 15 On cross-examination, defendant testified that he had sexual intercourse with K.B. three week prior to the alleged rape. K.B. was always welcome to spend the night if he was not already engaged with another paramour. It was his idea to end their formal relationship and he did not buy her balloons or a stuffed bear. K.B. visited him the first few months of his incarceration, but had not visited him in years. Corey was not a heavy sleeper, but he did not wake up when they were having sex.

¶ 16 The trial court found defendant guilty of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)). During the sentencing hearing, defendant asked the court for leave to file a motion for a new trial based on ineffective assistance of counsel because he "wasn't satisfied with the verdict." The trial court denied defendant's motion and sentenced defendant to eight years in prison. Defendant then filed this timely appeal.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant contends the State failed to prove the offense of criminal sexual assault beyond a reasonable doubt because there was insufficient evidence that the sexual act was nonconsensual. When a sufficiency of the evidence challenge is raised, the question for the reviewing court is 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 were proven beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). We will not overturn a criminal conviction on appeal unless the evidence is so improbable or unsatisfactory as to supply reasonable doubt of defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The testimony of a single witness, if positive and credible, is sufficient to convict, even if it is contradicted by the defendant. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2008). It is in the province of the trier of fact to determine the credibility of witnesses and to resolve any conflicts in the testimony. *People v. Sykes*, 341 Ill. App. 3d 950, 983 (2003). We will not substitute our judgment for that of the trier of fact on these matters. *Siguenza-Brito*, 235 Ill. 2d at 224-25.

¶ 19 Pursuant to section 12-13(a)(1) (720 ILCS 5/12-13(a)(1) (West 2008)), the State must prove defendant committed an act of sexual penetration and used force or the threat of force. Section 12-17(a) provides that consent is a defense to certain offenses, including criminal sexual assault. 720 ILCS 5/12-17(a) (West 2008). Consent is defined as "a freely given agreement to the act of sexual penetration or sexual conduct in question." 720 ILCS 5/12-17(a) (West 2008). In addition, "[l]ack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent." *Id.*

¶ 20 Here, we conclude the trial court had sufficient evidence to find defendant guilty beyond a reasonable doubt. Defendant's argument is essentially an attack on the credibility of K.B.'s

claim of criminal sexual assault. K.B. testified she did not consent to sexual intercourse with defendant. She gave a detailed account of how defendant was angry at her for disrespecting him and backed her into a corner in his bedroom raising his hand to hit her. Defendant then forced K.B. down on the bed next to their son with his hand raised so she could not get up. He pulled down K.B.'s pants and underwear after she refused to disrobe and inserted his penis into her vagina. She repeatedly "begged him to stop" and told him "no." Other witnesses, such as Casaccio, Nurse Kattiyaman and Sergeant Mowinski testified regarding K.B.'s demeanor and actions following the assault. In addition, defendant testified as to his own version of events. The trial court concluded that it "did not find [defendant] credible in his testimony. [It] did, however, find that [K.B.] in this matter was credible in her testimony and it was on that basis that [it] believed the State proved its case beyond a reasonable doubt." See *People v. Bowen*, 241 Ill. App. 3d 608, 619 (1993) ("[t]he trial court, sitting as trier of fact, had the duty to assess the credibility of the witnesses, resolve the inconsistencies and conflicts in the evidence and was free to disbelieve all or part of defendant's testimony if it so chose").

¶ 21 Furthermore, we reject defendant's argument that the lack of medical evidence of physical injury indicates K.B. consented to sexual intercourse with defendant. A victim need not subject herself to serious bodily harm by resisting in order to establish that penetration was nonconsensual. See *People v. Le*, 346 Ill. App. 3d 41, 50 (2004) (there is no "requirement that a victim's testimony be corroborated by physical or medical evidence in order to sustain a conviction for criminal sexual assault."). Accordingly, viewing the evidence in a light most favorable to the State, there was sufficient evidence to support defendant's conviction beyond a reasonable doubt.

¶ 22 Defendant next contends that the trial court erred when it allowed the State to introduce, as other-crimes evidence, prejudicial text messages alluding to past instances of domestic violence. Following a pretrial hearing, the trial court admitted the series of text messages into evidence and K.B. read them aloud to the trial court during her direct examination. The following messages, in relevant part, revealed:

> K.B. to Defendant: "I told u was going to press charges too. I been dealing with this the whole time I have known u. I gave you to[o] many chances. I told u I'm not the same lil girl."
>
> K.B. to Defendant: "U fucked up big time cause now you choose the wrong girl. I have warned you not to fuck with me over the past 3 yrs everytime u put you hand on me even when u pulled the knives on me I still didn't do anything. But I can't take it no more. U fucken crazy."
>
> Defendant to K.B.: "U have pulled knives on me too, and u have made me have sex with u plenty of times before. You wouldn't let me leave out of the house."
>
> K.B. to Defendant: "I have nothing to say to u but I don't have to tell u anything u just need to control yo temp."
>
> Defendant to K.B.: "There wouldn't be a temp if there were no lies.."
>
> K.B. to Defendant: "U still think it will be us. It won't and never will be[.] [A] woman should never be ba[cked] into a wall about to get her ass beat. Never."
>
> Defendant to K.B.: "Never should a woman put herself in a position to be backed into a wall or get her ass beat, and never should a woman have to lie."

¶ 23 Generally, evidence of offenses, acts, and wrongs other than those for which defendant is being tried is inadmissible. *People v. Bobo*, 375 Ill. App. 3d 966, 971 (2007). The rationale is

that such evidence would persuade a jury into convicting a defendant merely because the jury believes the defendant "is a bad person deserving punishment, rather than on the basis of facts related to the offense on trial." *People v. McCray*, 273 Ill. App. 3d 396, 400 (1995). Such evidence is admissible, however, if it is relevant to establish any material fact other than defendant's propensity to commit a crime. *Bobo* at 971. Such purposes include but are not limited to: motive, intent, identity, and accident or absence of mistake. *People v. Dabbs*, 239 Ill. 2d 277, 283 (2010). Even relevant evidence, however, is inadmissible if the prejudicial effect of admitting that evidence substantially outweighs any probative value. *People v. Santos*, 211 Ill. 2d 395, 419 (2004). Whether evidence is relevant and admissible is a determination reserved for the judgment of the trial court and such determinations will not be reversed absent an abuse of discretion. *People v. Lynn*, 388 Ill. App. 3d 272, 280 (2009).

¶ 24 The trial court did not abuse its discretion in admitting the text messages because the other-crimes evidence was probative of defendant's intent, motive and K.B.'s state of mind. Specifically, the other-crimes evidence established defendant's hostility toward K.B. and their antagonistic relationship. In addition, the other-crimes evidence was relevant to show that K.B. feared defendant, which is why she did not fight back harder. See *People v. Heard*, 187 Ill. 2d 36 (1999) (the court determined that other crime evidence was admissible to show the defendant's continuing hostility and animosity toward the victim and the volatile state of their relationship); *People v. Illgen*, 145 Ill. 2d 353, 367 (1991) ("evidence that the defendant physically assaulted his wife throughout their marriage was relevant to show their antagonistic relationship and, thus, tended to establish the defendant's motive to kill her").

¶ 25 Furthermore, the record is devoid of any indication that the trial court considered the other-crimes evidence for propensity purposes. This was a bench trial and we presume that the

trial court knows the law and considered only admissible evidence in reaching its determination. See *People v. Naylor*, 229 Ill. 2d 584, 603 (2008) ("when a trial court is the trier of fact a reviewing court presumes that the trial court considered only admissible evidence and disregarded inadmissible evidence in reaching its conclusion"). Moreover, the record suggests the other-crimes evidence played a small role in determining defendant's guilt. The trial court even noted at defendant's motion for a new trial that it did not consider the other-crimes evidence for propensity purposes, but simply "took it into consideration with respect to [K.B] indicating that just prior to them having sex, she surrendered for fear of being abused physically." Thus, the trial court did not abuse its discretion in this matter.

¶ 26 Defendant further contends that some of these messages were improperly introduced as prior consistent statements by the victim. These messages, in pertinent part, read as follows:

> "Fuck you. I cried and begged yesterday for you not to and didn't. I hope u fucken rot in hell. U didn't think about me yesterday so fuck u."
>
> "U fucked me after I told you not to."
>
> "..that shit had me.. [crying] cause I was scared and u still was acting like u didn't care about me saying no. U really need help.. U know I'm not lying, but I told u I was going to press charges and u didn't think about [C]orey at all."

¶ 27 Ordinarily, a defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). If a defendant fails to satisfy either prong of this test, his challenge is considered forfeited on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant acknowledges that he failed to object to the other-crimes evidence as inadmissible hearsay both

at trial and on his motion for a new trial, but nonetheless, asks this court to review this claim as plain error.

¶ 28 We may consider unpreserved error pursuant to the plain error doctrine where the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). Before applying either prong of the plain error doctrine, however, we must first determine whether an error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 29 Hearsay is defined as "testimony of an out-of-court statement offered to establish the truth of the matter asserted therein, and resting for its value upon the credibility of the out-of-court asserter." *People v. Rogers*, 81 Ill. 2d 571, 577 (1980). Although statements made prior to trial are generally inadmissible for the purpose of corroborating trial testimony or rehabilitating a witness, a prior consistent statement is admissible to rebut an express or implied suggestion on cross-examination that the witness is motivated to testify falsely or his testimony is a recent fabrication. *People v. Randolph*, 2014 IL App (1st) 113624, ¶ 15. To be admissible, the prior consistent statement must have been made before the time of the alleged fabrication, influence, or motive came into being. *People v. Bobiek*, 271 Ill. App. 3d 239, 243 (1995). A prior consistent statement admitted on this basis may be used solely to rehabilitate the witness, not as substantive evidence. *Randolph*, 2014 IL App (1st) 113624, ¶ 15. We review the admission of such evidence for abuse of discretion. *People v. Mullen*, 313 Ill. App. 3d 718, 730 (2000).

¶ 30 Here, although defendant contends the text messages were inadmissible as prior consistent statements, the State's motion *in limine* specifically states that it did not seek to

introduce the statements defendant now objects to under any exception to the hearsay rule. Rather, the State introduced these statements as part of a text exchange between defendant and K.B. as other-crimes evidence of domestic violence. The record is devoid of any suggestion that the State admitted the text messages to bolster K.B.'s credibility. Furthermore, this was a bench trial and we presume that the trial judge knows the law and there is no evidence in the record to suggest the text messages were considered substantively. See *People v. McLaurin*, 2015 IL App (1st) 131362, ¶ 34; quoting *People v. Gaultney*, 174 Ill. 2d 410, 420 (1996) ("a reviewing court 'ordinarily presume[s] that the trial judge knows and follows the law unless the record indicates otherwise'"). Thus, if there was any error here it was harmless at best.

¶ 31 Defendant finally contends that the trial court failed to adequately conduct a *Krankel* inquiry into defendant's post-trial claims of ineffective assistance of counsel. Thus, the operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel. *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 80. A trial court may base its decision in a *Krankel* inquiry on: (1) trial counsel's answers and explanations; (2) a brief discussion between the trial court and the defendant; or (3) its knowledge of trial counsel's performance at trial and the insufficiency of the defendant's allegations on their face. *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 40. When reviewing the adequacy of a *Krankel* hearing, the applicable standard of review depends on what action the trial court took on the defendant's motion. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. "If the trial court made no determination on the merits, then our standard of review is *de novo*." *Id.* However, "if a trial court has reached a determination on the merits of a defendant's ineffective assistance of counsel claim, we will reverse only if the trial court's action was manifestly erroneous." *Id.* Manifest error means error which is "clearly plain, evident, and

indisputable." *People v. Ruiz*, 177 Ill. 2d 368, 384–85 (1997). Here, the trial court denied defendant's motion on the merits, therefore we review the trial court's ruling for manifest error.

¶ 32 In the *case subjudice*, the trial court extensively questioned defendant regarding his concerns surrounding his trial counsel's performance. Beyond defendant repeatedly noting that he "wasn't satisfied with the verdict," defendant argued there was other evidence that should have been presented, such as Facebook messages, K.B.'s visits and correspondence with defendant in jail and his nephews' testimony. The trial court determined that "some of that stuff did come in" at trial and the rest was "trial strategy." See *People v. Ward*, 371 Ill. App. 3d 382, 433 (2007) ("decisions of what witnesses to call and what evidence to present are generally unassailable matters of trial strategy that cannot form the basis of a claim of ineffective assistance of counsel"); *People v. Flemming*, 2015 IL App (1st) 111925-B, ¶ 19, citing *People v. Moore*, 207 Ill. 2d 68, 78 (2003) (the trial court is not required to question defense counsel and a brief discussion between the trial court and the defendant is sufficient.) In addition, the trial court observed that defense counsel "gave great arguments" and "did everything he could to present the defense's theory" of the case. Accordingly, the trial court did not err in dismissing defendant's claim.

¶ 33 For the foregoing reasons, we affirm the trial court's judgment.

¶ 34 Affirmed.