FOURTH DIVISION
January 28, 2016

No. 1-14-0303

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. 12 CR 5017
	)	
GIOVANNY MERCADO,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was proven guilty of criminal sexual assault beyond a reasonable doubt because the evidence at trial established that defendant placed his penis into the victim's vagina when she was unable to consent to sexual contact. The one-act, one-crime rule requires that one of defendant's two convictions for criminal sexual assault be vacated because the evidence at trial established only one instance of penis-to-vagina contact.

¶ 2 Following a bench trial, defendant Giovanny Mercado was found guilty of two counts of criminal sexual assault and sentenced to two concurrent six-year prison terms. On appeal, he contends that he was not proven guilty beyond a reasonable doubt because, among other things,

the victim's testimony was rendered "unreliable" by her inability to remember certain events and no independent witness testimony established that the victim was too incapacitated to consent. He also contends that one of his two convictions for criminal sexual assault must be vacated pursuant to the one-act, one-crime rule. We affirm in part and vacate in part.

¶ 3 Defendant was charged by indictment with criminal sexual assault after a February 2012, incident involving the victim, his cousin, J.R.

¶ 4 The victim testified that on the night of February 11, 2012, she called defendant to join her at a party at a friend's house. Defendant arrived with Christian Burciaga. At one point, defendant drove with the victim to a liquor store where "clear liquor" was purchased. Back at the party, the victim drank mixed drinks and shots. Defendant also drank. The victim was intoxicated. At some point, the group left the party. The victim remembered grabbing her bookbag and being in the backseat of a car. Defendant and Burciaga were in the frontseat. The victim did not remember getting into the car, as she was "in and out of counscious[ness]" because she "drank a lot." The victim remembered smoking "weed" with defendant and Burciaga and going through the drive-thru of a McDonald's. She then passed out.

¶ 5 The next thing the victim remembered was "a bunch of fries and catchup [*sic*] all over the place." Her face was toward the seat and defendant was behind her. The victim's pants and underwear were down around her ankles and her tampon was gone. Defendant's penis was in her vagina. As soon as she felt movement, the victim turned around and asked where Burciaga was because she did not know what was going on and the last thing she remembered was that Burciaga was in the car. She felt like defendant was trying to "fool" her by telling her to look in a different direction for Burciaga. Defendant then pulled up his pants and got into the driver's side

of the car. The next thing the victim remembered was waking up in bed. She did not remember how she got from defendant's car to her home. The victim was "completely wet" as though she "took a shower with [her] mother's robe on." Her clothes were on the floor. She could not find her bookbag or her phone. She called defendant, but could not reach him. She then called her aunt, learned that defendant was home, and stated that she would be by to get her "stuff."

¶ 6 The victim met defendant at his car and stated that she needed her phone. She acted "as if nothing happened." Defendant said he did not remember anything about the previous night and the victim agreed. She did not want to "say it," and could not believe what had happened. She was in denial. The victim went home, called a friend and went to that person's home. There, she told her friend what had happened and this person convinced her "to say something." The victim then told her boyfriend, her mother, and her sister. She later went to a hospital and spoke to the police. The victim did not give defendant consent to place his penis in her vagina and did not give him any indication that she was okay with him putting his penis in her vagina.

¶ 7 During cross-examination, the victim acknowledged that she did not know how many drinks she had that night because everyone was "taking shots." She thought it was more than 5, but less than 10. Although she did not remember leaving the party, she would have walked out of the house and to the car. The victim remembered talking to defendant and Burciaga in the car, but did not remember the topic. She also remembered going to McDonald's and ordering a cheeseburger and fries. She remembered speaking to a detective but not the exact words she used. The victim did not remember telling a detective that she was blacked out the entire time until she woke up in the backseat of the car. She did not know if she was carried to the car or

when Burciaga got out of the car. After retrieving her phone from defendant's car, the victim kissed him good-bye. She did not remember looking at a car with her mother later that day.

¶ 8 Detective Carrie Iser testified that she spoke to defendant at a police station and that defendant made a statement that was memorialized. This statement was then published.

¶ 9 In his statement, defendant stated that after driving the victim and Burciaga to the liquor store, they returned to the victim's friend's house and drank vodka. Defendant also drank a Mike's Hard Lemonade. Defendant stated that he knew the victim was drunk because she could not stand still. He stated that when he and the victim go out on weekends, she usually gets drunk, "blacks out," and does not recall what happens to her.

¶ 10 Defendant further stated that after driving Burciaga home, he drove to McDonald's to get the victim something to eat before driving to the victim's block. When defendant asked the victim if she was going to get out of the car, she asked him to give her five minutes. The victim's eyes were closed and she was leaning against the passenger door. After two or three minutes defendant became annoyed that the victim had not gotten out of the car, and thought she was blacked out, so he went to the backseat. The victim would not get out of the car and kept mumbling. Defendant then stated that he sat next to the victim and pulled her pants and underwear down to her knees. The victim did not say anything. He then placed his penis inside the victim's vagina. At this point, she made a noise. Approximately eight seconds later, the victim told him to keep going and put her arm on his head. Defendant became scared, pulled his penis out of the victim's vagina, pulled up his pants and got back into the frontseat. He did not know how the victim got her pants up. He dropped the victim off and watched her walk inside.

¶ 11 Christian Burciaga testified that when they left the party, the victim was able to walk outside and get into the car. During the 15-minute drive to his house, he did not see the victim go in and out of consciousness. He did not think she was slumped down in the seat and did not remember if she was leaning against the side of the car. When he said good-bye, the victim was seated upright and was conscious. During cross-examination, Burciaga testified that he did not remember if they smoked "weed" in the car, but he remembered smoking at the party. He was focused on his phone during the car ride, not the victim.

¶ 12 Maria Mercado, the victim's mother and defendant's aunt, testified that the victim woke her up and asked to borrow her phone. The victim then borrowed her car to retrieve something from defendant's car. The victim returned, then went back out. Maria and the victim looked at a car for sale that afternoon. The victim then went out again. The victim returned to the house around 7 p.m. It was at this point that the victim, who was crying, said "something bad happened to her." The victim explained that she woke up in the middle of defendant "trying to rape" her. Maria thought the victim was "very, very hurt" but not upset.

¶ 13 During cross-examination, Maria acknowledged that she was concerned about her family and did not want her nephew to go to jail. Maria characterized the victim as intoxicated, thoughtful and "really out of, *** this world" that morning. It was as if "she didn't even know where she was." Although Maria asked the victim what was wrong, the victim told her not ask questions and said she was fine. Maria did not remember telling an assistant State's Attorney (ASA) that the victim was upset and quiet when asked what was wrong. She did not remember speaking to police or an ASA. During redirect, Maria testified that the victim had lied to her in

the past, but this time she did not know "if they have [done] something bad to each other." The victim still smelled of alcohol that morning and stated that she was "wasted" the night before.

¶ 14 Defendant testified that he cared a lot about the victim who was "kind of like an outcast in the family." When they went to parties together, the victim always drank. That night, defendant shared a gallon-sized bottle of vodka with the victim, Burciaga and one of the victim's friends. Defendant also had a beer. When they left the party, the victim was "on her feet," and was "well aware of what was going on." The victim was able to walk to the car and get into the backseat. During the drive to Burciaga's house, they talked about the party. The victim spoke in "really cohesive sentences." After dropping Burciaga off, it was the victim's idea to go to McDonald's. She ordered, gave defendant money to pay, and then put the change away.

¶ 15 After getting food, defendant began to drive the victim home, however, the victim stated she did not want to go home because she was too drunk. Defendant parked a few blocks away and waited five minutes. The victim then told him to come to the backseat and help her find her phone. When defendant got into the back seat, the victim began "groping" his pants. "One thing led to another" and all defendant remembered, because they were "pretty drunk," was kissing the victim and engaging in "intimate activities." The victim kissed defendant on the neck, unzipped his pants and began to stroke his penis. They engaged in sexual intercourse for "a good minute, minute or two." However, when defendant realized he was having sex with his cousin, he stopped. Although the victim wanted to keep going, defendant refused, put his pants back on and got back into the frontseat. At trial, defendant testified that the victim "never once told me to stop." Rather, she said "keep going" three seconds into the encounter. After defendant inserted

his penis into the victim's vagina, she put her right hand on his neck. The victim was never unresponsive. When they arrived at the victim's house, she said good-bye and went inside.

¶ 16 The next morning, the victim came to get her phone out of defendant's car. She stated that they were "really messed up" the night before and defendant agreed. After she got the phone, she gave defendant a hug and kiss and defendant went to work. Later, defendant received a phone call from Maria asking what happened the night before and stating that she was taking the victim to the hospital. Defendant offered to "talk about it," and went to the hospital with his mother "to try to settle the whole situation." He thought he "did nothing wrong," although it is "definitely a wrong thing" to have sex with your cousin. He was taken into custody at the hospital. Defendant eventually gave a statement because he "was willing to say anything" to get "out of there." He testified that they put "words in [his] mouth," that is, the ASA told him what to say. The police told him to give a "confession statement" and they would "handle everything." He was never told that he was going to jail. Defendant testified that at no point was the victim "unconscious or mentally unable to consent to anything" and that she was the one who initiated the encounter by groping him.

¶ 17 During cross-examination, defendant denied that they smoked "weed" in the car; rather, they smoked before the party. He explained that the victim called him to pick her up, they picked up Burciaga, and then they all went to the party. The victim was able to yell her food order from the backseat. She later asked him to help find her phone. It was then that the victim began to grope and kiss him. He did not tell the police about the details of the encounter because he "figured" the victim was ashamed that they had sex and would come forward to "testify" that she was wrong. The police did not give him the option to indentify the victim as the initiator; rather,

they told him to confess. He denied telling the police that the victim's eyes were closed, that she was leaning up against the car door and that she kept mumbling. Defendant "clearly" said that she was "pretty conscious." However, he was willing "to do anything" to leave and did not read the statement. He admitted stating that the victim gets drunk and blacks out, but denied saying that he thought she was blacked out that night.

¶ 18 Detective Iser testified in rebuttal that she never told defendant that if he confessed, she would work the whole thing out or what to say in his statement.

¶ 19 In finding defendant guilty of two counts of criminal sexual assault, the trial court stated it did not "buy" defendant's "whole scenario" of being seduced by the victim. Defendant was subsequently sentenced to two concurrent six-year prison terms.

¶ 20 When reviewing a challenge to the sufficiency of the evidence, the relevant question 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. Brown*, 2013 IL 114196, ¶ 48. The trier of fact is responsible for evaluating the credibility of the witnesses, weighing witness testimony, and determining what inferences to draw from the evidence. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). A reviewing court will not retry the defendant (*People v. Lloyd*, 2013 IL 113510, ¶ 42), or substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of witnesses (*Brown*, 2013 IL 114196, ¶ 48). This court reverses a defendant's conviction only where the evidence is so unreasonable, improbable or unsatisfactory that a reasonable doubt of his guilt remains. *Id.*

¶ 21 To sustain defendant's conviction for criminal sexual assault in the case at bar, the State was required to prove beyond a reasonable doubt that defendant knew the victim was “unable to

understand the nature of the act or [was] unable to give knowing consent." 720 ILCS 5/11-1.20(a)(2) (West 2012). In this context, "consent," refers to the victim's "freely given agreement" to the sexual contact in question. 720 ILCS 5/11-1.70(a) (West 2012).

¶ 22 The inquiry therefore focuses on "the defendant's particular knowledge of a victim's ability to understand the act or give knowing consent and must be determined by examining the unique facts of each case." *People v. Lloyd*, 2013 IL 113510, ¶ 33; see also *People v. Whitten*, 269 Ill. App. 3d 1037, 1042-43 (1995) (the focus is on what a defendant knew or should have known regarding the victim's willingness or ability to give knowing consent). If a defendant knows that the victim "may be unable, for any reason, to give consent" to a sexual act, he should abstain from engaging in any sexual contact with her. *Whitten*, 269 Ill. App. 3d at 1043.

¶ 23 Here, the evidence at trial established, through the victim's testimony and defendant's inculpatory statement, that after the intoxicated victim passed out in the backseat of defendant's car, defendant pulled the victim's pants and underwear down and inserted his penis into her vagina. Although defendant testified that the sexual encounter was consensual and initiated by the victim, the trial court found the "whole scenario" advanced by defendant incredible. It was for the trial court, as the trier of fact, to determine each witness's credibility and what weight to afford to each witness's testimony; we will not substitute our judgment for that of the trial court on these issues. See *Brown*, 2013 IL 114196, ¶ 48 (a reviewing court will not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of witnesses). Ultimately, viewing the evidence in the light most favorable to the State, as we must (*id*.), this court cannot say that no rational trier of fact could have found

defendant guilty of criminal sexual assault when defendant, who thought that the victim was blacked out, pulled the victim's clothing down and then placed his penis in her vagina.

¶ 24 Defendant concedes that the issue in this case is a "credibility determination" between the version of events detailed by the victim's testimony and defendant's inculpatory statement and defendant's testimony at trial. He contends, however, that the victim's memory is "lacking" because she recalls only the facts that incriminate him and that the State presented no testimony, *i.e.*, independent witnesses, to corroborate the victim's testimony that she was too incapacitated to consent. He also argues that he "disavowed" his inculpatory statement at trial and that even if the victim had blacked out, that did not mean that she was unable to give consent or that he should have been aware that she could not consent.

¶ 25 Initially, we reject defendant's conclusion he was not proven guilty beyond a reasonable doubt because the State did not present witnesses at trial to corroborate the victim's testimony that she was intoxicated and therefore too incapacitated to consent to sexual contact. Defendant sets forth no authority for the proposition that the victim's testimony needed to be corroborated to sustain his conviction. In fact, the law is precisely the opposite. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) ("It remains the firm holding of this court that the testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant."). The record also reveals that defendant's own testimony corroborated the victim's assertion that she was intoxicated because defendant testified that the victim always drinks when they go out and that she drank one-fourth of a gallon-sized bottle of vodka at the party. Maria also testified that the victim acted intoxicated and still smelled of alcohol the next morning.

¶ 26 To the extent that the victim could not remember certain events, she admitted that she had gaps in her memory at trial but testified that she never gave defendant consent to put his penis in her vagina or gave any indication that she was okay with him putting his penis in her vagina. It was for the trial court, as the trier of fact, to evaluate the victim's credibility and to determine what weight to afford her testimony in light the fact that she did not remember everything. See *Brown*, 2013 IL 114196, ¶ 48.

¶ 27 Here, defendant testified at trial that the victim initiated the sexual encounter and "disavowed" his inculpatory statement. Defendant's statement, however, indicated that he knew the victim was drunk because she could not stand still. After he parked the car, the victim's eyes were closed and she was leaning against the car door. When she did not get out of the car, defendant thought she was blacked out and got into the backseat. The victim did not do anything when he pulled down her pants and underwear, and she did not move until eight seconds after defendant inserted his penis into her vagina. The version of events detailed in defendant's statement certainly made him aware that the victim was unable to give consent to sexual activity. See *Whitten*, 269 Ill. App. 3d at 1043. Although defendant testified that he only made a statement because he wanted to go home and thought that the victim would come forward and clear things up, the trial court did not "buy" the version of events that defendant testified to at trial. A trier of fact is not required to disregard the interferences that normally flow from the evidence or to seek out all possible explanations consistent with a defendant's innocence and elevate them to reasonable doubt. See *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60.

¶ 28 Ultimately, this court cannot say that no rational trier of fact could have found defendant guilty when the evidence at trial established that defendant's response to the intoxicated victim

passing out in the backseat of his car was to pull down her pants and underwear and insert his penis into her vagina. *Brown*, 2013 IL 114196, ¶ 48. This court reverses a defendant's conviction only where the evidence is so unreasonable or unsatisfactory that a reasonable doubt of his guilt remains (*id.*); this is not one of those cases. Therefore, we affirm defendant's conviction for criminal sexual assault.

¶ 29 Defendant next contends that one of his convictions for criminal sexual assault must be vacated pursuant to the one-act, one-crime doctrine because the evidence at trial established only one instance of penis-to-vagina contact.

¶ 30 Initially, we note that defendant never raised this argument in the trial court. However, we will review defendant's contention on this issue, as "a violation of the one-act, one-crime doctrine affects the integrity of the judicial process, thus satisfying the second prong of the plain-error analysis." *People v. Span*, 2011 IL App (1st) 083037, ¶ 81.

¶ 31 The State concedes, and we agree, that defendant should have been convicted of one count of criminal sexual assault based on contact between his penis and the victim's vagina when the trial court found that there was one instance of penis-to-vagina contact. Our supreme court has held that "[p]rejudice results to the defendant * * * in those instances where more than one offense is carved from the same physical act." *People v. King*, 66 Ill. 2d 551, 566 (1977). Because adjudications for more than one offense cannot be carved from the same criminal act (*id.*), one of defendant's convictions for criminal sexual assault must be vacated. We therefore vacate defendant's conviction for criminal sexual assault based upon the victim's inability to understand the nature of the act (count 2), pursuant to the one-act, one-crime rule. See *King*, 66 Ill. 2d at 566.

¶ 32 For the foregoing reasons, we vacate defendant's conviction as to count 2. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 33 Affirmed in part; vacated in part.