2017 IL App (1st) 150661-U

No. 1-15-0661

Order filed June 14, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 4527
	)	
TYREESE RUSSELL,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Where the evidence at trial was sufficient to prove beyond a reasonable doubt that the victim suffered "bodily harm," defendant's convictions for aggravated criminal sexual assault are affirmed. The mittimus is corrected to reflect a term of mandatory supervised release of three years to natural life.

¶ 2 Following a bench trial, defendant Tyreese Russell was convicted of two counts of aggravated criminal sexual assault. He was sentenced to two consecutive terms of seven years' imprisonment, to be followed by a mandatory supervised release (MSR) term of four years to

natural life. On appeal, defendant contends that his convictions must be reduced to criminal sexual assault because the State failed to prove beyond a reasonable doubt that the victim, K.D., sustained bodily harm. He further contends that the mittimus should be corrected to reflect that he is subject to a minimum term of three years of MSR, as opposed to four. For the reasons that follow, we affirm defendant's convictions and order correction of the mittimus.

¶ 3 Defendant's convictions arose from the events of July 4, 2012. Following his arrest, defendant was charged with (1) aggravated criminal sexual assault for penetrating K.D.'s vagina with his penis and causing bodily harm in that he "grabbed [K.D.] about the neck"; (2) aggravated criminal sexual assault for penetrating K.D.'s mouth with his penis and causing bodily harm in that he "grabbed [K.D.] about the neck"; and (3) aggravated battery for committing a battery and strangling K.D. in that he "grabbed [K.D.] about the neck."

¶ 4 At trial, K.D. testified that she first met defendant in late June or early July of 2012, when she was 17. She had been shopping with a friend on State Street in Chicago and noticed defendant checking her out on the sidewalk. Defendant, who was wearing a work name tag, approached her and introduced himself, and they exchanged numbers. Over the next couple of days, K.D. and defendant texted back and forth. On July 4, 2012, defendant suggested via text that they should meet up. K.D. agreed and went to the 51st Street CTA station, where defendant picked her up in his two-door SUV. K.D. testified that she asked defendant to take her to a clothing store, and that he said he would do so after they were done talking. Defendant then drove K.D. around while they talked. Eventually he drove down an alley and parked between two abandoned buildings. They talked some more and kissed, and then defendant asked K.D. if she wanted to move to the back seat so they could "get closer." K.D. thought that they were

going to "like, basically cuddle or put my legs on his legs and talk and get to know each other," so she agreed. She did not have any intent to have sex with defendant.

¶ 5 After defendant and K.D. climbed into the back seat, defendant asked K.D. if he could give her oral sex, and she said no. Defendant forcefully reached for her shorts and pulled them down. K.D. testified that she said, "Stop. What are you doing? Stop," and put her hands by her vagina. Defendant forcibly removed K.D.'s underwear as she continued to tell him "no" and "stop." Defendant tried to put his penis in her vagina but she pushed him back, asked him what he was doing, and repeated that he should stop. Defendant pushed K.D., got on top of her, and inserted his penis into her vagina, at which time K.D. started crying. Defendant then choked K.D., which K.D. described as, "Coming from my end, his thumbs were on my windpipe, like, trying to crush my windpipe, and he was doing it strong." When asked follow-up questions regarding the choking, K.D. agreed that defendant's hands were also grabbing the sides of her neck and that she was having trouble breathing.

¶ 6 K.D. testified that she kicked defendant in the leg or stomach. Defendant then asked her if she knew how to give oral sex. When she said she did not, defendant said, "[G]o ahead, do it, or I'm going to shoot you with my gun." K.D. stated that she gave defendant oral sex for about 10 seconds because she thought he had a gun. Defendant then told her to lie down again. K.D. testified that she complied "Because I thought he was going to hurt me some more." Defendant got on top of her, inserted his penis into her vagina, choked her, and ejaculated. He then reached into the front seat and grabbed her purse and phone. As K.D. put on her underwear and shorts, defendant deleted all their text messages from her phone and changed the last four digits of his phone number. He then fixed his pants, they both climbed back into the front seats, and they

drove off. K.D. explained that she did not get out of the car right away because she did not know where she was. However, when they stopped at a stop sign, she got out and ran. K.D. called the police and then went to a friend's house.

¶ 7 After talking with the police at her friend's house, K.D. went to the University of Chicago hospital, where she was examined by a doctor who administered a "rape kit." She also spoke with detectives. The next day, she met with two officers who showed her a photo array. She identified defendant in the array. On July 8, 2012, she also identified defendant in a lineup.

¶ 8 On cross-examination, K.D. admitted that while she was in the SUV with defendant, she falsely told him that she had a child. She explained that she lied "to get out the car." K.D. stated that she told the police she had lied to defendant about having a sick child, and that she told the police she kicked defendant. She denied telling a detective that defendant asked her for a hug, which she gave him, or that defendant said he would buy her clothes to wear on the 4th of July. K.D. answered "Yes" when asked whether defendant choked her with both hands, whether he choked her "very hard," and whether he had both of his hands around her neck. She admitted that the choking did not make her vomit or pass out, but agreed that he forcefully applied pressure to her neck, stated that the choking lasted for 5 to 10 seconds, and said, "I couldn't breathe and I kicked." K.D. agreed that there was no physical damage to her clothing.

¶ 9 Dr. Reginald Saint-Hilaire testified that he treated K.D. in the emergency room on the day in question, and that she told him she had been "forcibly assaulted in a sexual manner" and had been choked. Dr. Saint-Hilaire obtained her consent to proceed with a sexual assault examination and forensic evidence collection. During the exam, Dr. Saint-Hilaire noticed abrasions on both the right and the left side of K.D.'s neck, a bruise on the left side of her neck,

an abrasion on the back of her neck, and redness between her shoulder blades. He opined that these marks were consistent with K.D.'s report of being choked. Dr. Saint-Hilaire testified that K.D.'s pelvic exam was normal. He agreed that this result was not inconsistent with having been sexually assaulted, and explained that up to 80% of sexual assault victims do not exhibit signs of injury that are visible to the naked eye. Dr. Saint-Hilaire also collected oral and vaginal swabs, pubic hair combings, and a blood sample. He noted in his paperwork that K.D. had reported vaginal pain, but did not recall whether she complained of any other pain.

¶ 10 On cross-examination, Dr. Saint-Hilaire testified that the abrasions on the right and left sides of K.D.'s neck were one centimeter long and linear. He acknowledged that he wrote in his emergency department notes that K.D. was in no respiratory or cardiac distress and that she was not having difficulty moving her neck. He also agreed that the abrasions on K.D.'s neck, though consistent with being choked, could have been formed "a hundred other ways," including as a result of passionate kissing or contact with the surface of a person's teeth.

¶ 11 On redirect, Dr. Saint-Hilaire testified that he wrote in the medical notes with regard to the psychiatric behavioral component of the exam, "patient visibly distressed given recent events," and that a nurse entered a notation that K.D. reported "pain to my neck where he choked me." He explained that he did not note the abrasions on K.D.'s neck in the hospital's medical records because he did not see the marks at first, but that he did document them in the forensic report after conducting a full sexual assault examination.

¶ 12 Assistant State's Attorney Amanda Pillsbury testified that on July 9, 2012, she interviewed defendant while he was in custody. After being advised of his *Miranda* rights, defendant told Pillsbury that he and K.D. met up on the day in question and drove around. He

stated that they had not had any kind of sex, and that the closest he ever got to K.D. was giving her a hug. He also reported that K.D. told him she had a daughter who was in the hospital.

¶ 13 The parties stipulated to forensic evidence showing that defendant's DNA matched DNA extracted from semen present on a vaginal swab collected from K.D. in the emergency room.

¶ 14 Defendant introduced several stipulations. First, it was stipulated that if called, Chicago police officer John Nichols would have testified that on the day in question, he met with K.D. and did not notice any injuries to her neck or any other part of her body that was visible to him, and that K.D. did not tell him she kicked defendant or that defendant asked her if he could give her oral sex. Next, it was stipulated that Chicago police detective Darren Crowder would have testified that when he interviewed K.D. at the hospital, she told him defendant had said he would buy her clothing to wear on the 4th of July, but did not tell him that she kicked defendant or that defendant asked if he could give her oral sex. Third, it was stipulated that if called, Chicago police detective Robert Burns would have testified that when he interviewed K.D. on July 9, 2012, she said that defendant asked her for a hug and she gave him one, but that she did not tell him she kicked defendant or that defendant asked her if he could give her oral sex. Fourth, it was stipulated that if called, Chicago police officer E. Carlos would have testified that when he met K.D. on July 5, 2012, he did not notice any injuries to her neck or any other part of her body that was visible to him, and that on July 9, 2012, he made out a police report that indicated K.D. was not injured.

¶ 15 Defendant testified that in July, 2012, he was 19 years old and working at the Secretary of State's office in downtown Chicago. About a week before the 4th of July, he was on lunch break when he saw K.D. and another woman, walked up to them, and introduced himself. He and

K.D. exchanged numbers and, over the next several days, texted each other. At some point during these text message exchanges, defendant promised K.D. he would buy her clothes for the 4th of July.

¶ 16 Shortly after noon on July 4, 2012, defendant received a text from K.D., asking him to pick her up at the 51st Street CTA station. Although he had plans to attend a barbecue with friends in Dolton at 4 p.m. that day, defendant agreed to meet K.D. He drove to the station, K.D. got into his two-door SUV, and they proceeded to drive around, talk, and listen to music. Eventually, defendant parked on the road across the street from a park a few blocks from his house. Defendant testified that he did not park behind any abandoned buildings.

¶ 17 Defendant testified that after he parked, he asked K.D. for a hug. She complied, and then defendant kissed her and she kissed him back. Defendant asked K.D. if she wanted to move to the back seat so they "could be closer," and she said yes. K.D. climbed over the console while defendant got out of the car and walked around to the passenger side. When he opened the door, K.D. was lying down across the back seat with one leg on the seat and her other foot on the floor. Defendant "positioned [him]self" between K.D.'s legs and began kissing her on the lips, neck, chest, and stomach. He then unbuckled her belt, pulled down her shorts and underwear, pulled down his own shorts and underwear, and began penetrating her vagina with his penis. While they had sex, K.D. held defendant, moaned, and kissed him. At no point did K.D. resist, tell him to stop, try to push him off, or kick him. After defendant ejaculated, he sat up and asked if he "could get some head." K.D. smiled, got on her knees, and performed oral sex on him for about 10 seconds. Then K.D. stopped and lay back down across the back seat. She said, "Come here," so defendant kissed her neck and penetrated her vagina with his penis again. After they had sex,

defendant and K.D. both pulled up their underwear and shorts and returned to the front seats. Defendant denied ever choking, forcing, or threatening to shoot K.D.

¶ 18 Defendant testified that as they drove away from the park back toward the 51st Street CTA station, K.D. asked him if he was still going to take her shopping to buy clothes for the 4th of July. Defendant responded that he was not going to be able to take her that day because he "had somewhere to be." At that point, K.D.'s demeanor changed. According to defendant, she got upset, began to use profanity toward him, "got loud and real disrespectful," and accused him of lying to her and using her for sex. Defendant told K.D. to calm down, that he had not lied, and that he could take her shopping another day. At a stop sign, K.D. got out of the SUV, slammed the door, and walked away. Defendant drove home, showered and changed clothes, and went to his friends' barbecue. Defendant denied ever having deleted information from K.D.'s phone.

¶ 19 On July 8, 2012, when defendant learned the police wanted to talk with him, he went straight to the police station. There, a detective questioned him aggressively and accused him of rape. The next day, when he was interviewed by an Assistant State's Attorney in the detective's presence, defendant was scared. Although he reported driving around with K.D. on the 4th of July and talking with her about her daughter being in the hospital, he panicked and said he had not had sex with K.D.

¶ 20 The trial court found defendant guilty of both charges of aggravated criminal sexual assault and the single count of aggravated battery, and indicated that the aggravated battery count would merge with the first count of aggravated criminal sexual assault. The court reasoned that K.D. testified believably but defendant was impeached significantly by his statement to the

Assistant State's Attorney that he had not engaged in sexual activity with K.D. Regarding the issues of force, injury, and bodily harm, the court stated as follows:

> "The evidence of force, there is not a tremendous amount of force used. As far as the State is alleging that there is some force used, but it is not the kind of force that would leave significant damage to the victim over a long period of time or even a relatively short period of time[.]
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> ***
>
> [T]here is some medication [*sic*] corroboration in the doctor's testimony regarding the marks on the victim. Now, it is true that it is not tremendously -- as I indicated tremendously significant damage to her skin, but there is some, and I think the victim is telling the truth here and the defendant is not quite frankly."

¶ 21 The trial court thereafter denied defendant's posttrial motion and subsequently sentenced him to two consecutive terms of seven years' imprisonment, to be followed by an MSR term of four years to natural life.

¶ 22 On appeal, defendant contends that his convictions must be reduced from aggravated criminal sexual assault to criminal sexual assault because the State failed to prove beyond a reasonable doubt that K.D. sustained bodily harm. He asserts that the only evidence of bodily harm was one-centimeter abrasions, a bruise, and redness; that while Dr. Saint-Hilaire documented these marks in the report included in the sexual assault kit, he did not find them significant enough to note in the hospital medical record; that none of the police officers who came into contact with K.D. noticed or documented any injury or bodily harm; and that K.D. never testified about sustaining any injury or experiencing pain. Defendant maintains that

although K.D.'s testimony was sufficient to support a finding of force necessary to prove criminal sexual assault, it was insufficient to establish the element of bodily harm necessary to aggravate the offenses. He further argues that Dr. Saint-Hilaire's testimony failed to sufficiently link the physical marks on K.D.'s neck to the incident.

¶ 23 When reviewing the sufficiency of the evidence, the relevant inquiry 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 beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 131 (1999). Reversal is justified where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 24 A person commits aggravated criminal sexual assault under the subsection of the statute charged in the instant case if he commits criminal sexual assault and causes bodily harm to the victim. 720 ILCS 5/11-1.30(a)(2) (West 2012). "Bodily harm," for purposes of aggravated criminal sexual assault, "consists of 'physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent.' " *People v. Bishop*, 218 Ill. 2d 232, 249-50 (2006) (quoting *People v. Mays*, 91 Ill. 2d 251, 256 (1982)). When determining whether a defendant's actions caused bodily harm to a victim, the trier of fact may consider direct evidence of an injury or may infer an injury based upon circumstantial evidence in light of common experience. *Bishop*, 218 Ill. 2d at 250.

¶ 25 We conclude that the record supports the trial court's finding that defendant caused bodily harm to K.D. when he choked her. At trial, K.D. described the first choking incident as follows: "Coming from my end, his thumbs were on my windpipe, like, trying to crush my windpipe, and he was doing it strong." K.D. related that defendant's hands were also grabbing the sides of her neck, that she was having trouble breathing, that she subsequently complied with his direction to lie down because she thought he was going to "hurt" her some more, and that he choked her a second time toward the end of the assault. On cross-examination, K.D. clarified that defendant choked her with both hands, agreed that he choked her "very hard" and forcefully applied pressure to her neck, and said she could not breathe.

¶ 26 Based on these statements alone, the trial court could have reasonably inferred that defendant's acts caused pain to K.D. See *Bishop*, 218 Ill. 2d at 250 (determining that the jury could infer the defendant's acts caused pain to the victim where she testified that anal penetration caused her to cry). However, K.D.'s testimony was not the only evidence of bodily harm introduced at trial. Dr. Saint-Hilaire testified that his sexual assault examination of K.D. revealed abrasions on the right side, left side, and back of her neck, as well as a bruise on the left side of her neck, all of which were consistent with being choked. Moreover, a nurse entered a notation in the medical records that K.D. reported "pain to my neck where he choked me." Thus, the medical evidence also supports a finding of "physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent." *Mays*, 91 Ill. 2d at 256.

¶ 27 In his brief, defendant acknowledges, but asks us to reject as wrongly decided and distinguishable, this court's decision in *People v. Johnson*, 2015 IL App (1st) 123249. We disagree with defendant's assessment of *Johnson* and, contrary to his position, find it informative

to the instant case. In *Johnson*, the defendant was charged with, among other things, aggravated criminal sexual assault based on an allegation that he choked the victim during a sexual assault. *Id*. ¶ 3. At trial, the victim testified that the defendant approached her from behind and started choking her by putting his arm around her neck. *Id*. ¶ 5. She testified that his arm around her neck felt "tight" and that she had "a little bit" of trouble breathing." *Id*. He later choked her again, applying pressure that made it "a little bit" difficult to breathe. *Id*. ¶ 7. The emergency room physician who examined the victim after the assault did not document any trauma to the victim's neck. *Id*. ¶ 11. The jury found the defendant guilty of aggravated criminal sexual assault causing bodily harm. *Id*. ¶ 17.

¶ 28 On appeal in *Johnson*, the defendant contended that his conviction should be reduced to criminal sexual assault because the aggravating factor of bodily harm was not proved beyond a reasonable doubt where the victim did not testify that she felt any physical pain from defendant choking her. *Id*. ¶ 1. We rejected the defendant's contention, finding that although the victim did not explicitly testify that she felt physical pain when the defendant was choking her, "common experience" dictated that the victim would have felt physical pain when she was involuntarily moved by the defendant, who had his arm around her neck, applying pressure to the point that it felt "tight." *Id*. ¶ 32. We explained that the victim's testimony that the defendant applied pressure on her airway, which felt tight, coupled with her testimony that she had "a little bit" of trouble breathing while she was being choked, provided sufficient evidence for the jury to reasonably infer based on common experience and knowledge of choking that the victim felt physical pain. *Id*. Finally, we noted that the lack of "damage" to the victim's neck did not preclude a finding of bodily harm where the state was only burdened with proving some level of physical pain. *Id*.

¶ 29 Defendant asserts that the *Johnson* court's inference that the victim felt pain when she was choked "was too great a leap and took away the State's obligation to prove bodily harm beyond a reasonable doubt" and "conflate[d] the elements of force and bodily harm." Although we agree that bodily harm is not inherent in the use of force found in criminal sexual assault (*People v. Hengl*, 144 Ill. App. 3d 405, 408 (1986)), we disagree with defendant that the *Johnson* court made an improper inference and substituted proof of the element of force for proof of the element of harm. While we do not rely on *Johnson* in deciding the instant case, its holding does support our finding here that evidence of "hard" or "strong" choking, accompanied by difficulty breathing or the inability to breathe, is sufficient to establish bodily harm, especially where medical evidence corroborates the victim's testimony. Finally, because our decision in the instant case does not depend on *Johnson*, we need not discuss defendant's arguments distinguishing *Johnson* on its facts.

¶ 30 Viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could conclude that K.D. suffered bodily harm due to being choked by defendant. Accordingly, the evidence was sufficient to support defendant's convictions for aggravated criminal sexual assault. Defendant's contention fails.

¶ 31 Next, defendant contends, the State concedes, and we agree, that the mittimus should be corrected to reflect that he is subject to a minimum term of three years of MSR, as opposed to four. The appropriate term of MSR for an individual convicted of aggravated criminal sexual assault is an indeterminate range of three years to natural life. 730 ILCS 5/5-8-1(d)(4) (West 2012). Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we order the clerk of the circuit court to correct the mittimus to reflect this term of MSR. See

People v. Latona, 184 Ill. 2d 260, 278 (1998) (a mittimus may be amended at any time); *People v. Smith*, 2016 IL App (1st) 140039, ¶ 19 (the appellate court may correct the mittimus without remanding to the trial court).

¶ 32 For the reasons explained above, we affirm the judgment of the circuit court of Cook County and order correction of the mittimus.

¶ 33 Affirmed; mittimus corrected.