No. 2—09—1238
Order filed June 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07—CF—3809
	)	
JORGE A.M.	)	Honorable
	)	T. Jordan Gallagher,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

Held: Evidence was sufficient to sustain trial court's verdict of guilty of aggravated criminal sexual assault and criminal sexual assault.

Defendant, Jorge A.M., appeals from his convictions of aggravated criminal sexual assault (720 ILCS 5/12—14(a)(2) (West 2008)) and criminal sexual assault (720 ILCS 5/12—13(a)(1) (West 2008)) following a bench trial. We affirm.

On January 23, 2008, defendant was charged in a five-count indictment. Count I alleged criminal sexual assault in that defendant committed an act of sexual penetration by placing his mouth

on the vagina of M.M. knowing she was unable to give knowing consent; count II alleged that defendant committed criminal sexual assault on M.M. by forcibly placing his penis in her mouth; count III alleged criminal sexual assault in that defendant by the use of force placed his penis in M.M.'s vagina; count IV alleged aggravated criminal sexual assault in that defendant by use of force bit M.M.'s sexual organ causing her bodily harm; and count V alleged defendant committed aggravated criminal sexual assault against M.M. by forcibly placing his penis into her vagina causing tears and/or lacerations. Prior to trial, the State *nol prossed* count I, whereupon the counts of the indictment were renumbered (so that count II became count I, etc.).

The bench trial commenced on April 27, 2009, with the following evidence presented by the State. Elgin, Illinois, police officer Greg Schneider was dispatched to 3050 Hughesdale in Elgin a little before 4 a.m. on December 26, 2007. Upon arrival, Schneider met with the victim, M.M., who spoke only Spanish. Schneider observed that M.M. was scared, crying, and appeared to be in pain as she was having trouble standing or walking. Schneider and another officer at the scene, Officer Hudson, spoke with M.M. through a Language Line. They ascertained from M.M. that she was in pain and needed to go to the hospital. Schneider then encountered defendant in the basement of the home, where he lived with M.M., who was his estranged wife, and their two children. The upper story of the home was occupied by the owners. After speaking with defendant, Schneider took him to jail and then went to the hospital to check on M.M.

Officer Shelly Hudson arrived at the scene the morning of December 26, 2007, approximately at the same time as Officer Schneider. She saw M.M. sitting on the edge of a bed. M.M. was crying and grimacing as though in pain. She was bent over, clutching herself. Hudson testified "[f]rom [M.M.'s] appearances [*sic*], it looked to me like she was hurting or in some type of pain." Hudson

noticed that M.M.'s socks were sprinkled with a dark reddish substance. M.M. explained that the substance was "*sangre*," which Hudson understood to be Spanish for "blood." During the time that Hudson sat in the room with M.M., M.M. continued to hold herself and grimace with pain, so Hudson took M.M. to the hospital.

M.M. was the State's next witness. She testified through an interpreter that she had been married to defendant for five years. They had two daughters, one five years old, and the other one was two years old at the time of trial. They lived with M.M.'s sister in the basement of the Elgin home. Her sister and older daughter slept together in one bedroom, and M.M. and the baby occupied another bedroom. Defendant slept on the living room couch. M.M. and defendant had not been sleeping together for two months. According to M.M., they had agreed to divorce, but then defendant changed his mind. Whenever defendant tried to sleep with M.M. in the bedroom, she would go to the living room to sleep. Approximately a week before December 26, 2007, defendant tried to be intimate with M.M., but she told him she did not want to be with him anymore, and she left the bed.

M.M. testified that she spent Christmas day at home. Defendant was not there. At about 11 p.m. she went to sleep in the bedroom where her baby's crib was kept. The baby was sleeping in the crib, and her other daughter was in her own bedroom. M.M. testified that she awoke with pain in her vagina. She testified that defendant was biting her "vaginal parts," and she felt a lot of bad pain. She testified, "I felt so much pain." She described it as "immense pain." According to M.M., she told defendant "no" three or four times. She did not scream because her daughters were sleeping nearby and she did not want to cause them trauma. She said she tried to get away, but defendant put her in a position where he pulled her head down and placed his penis in her mouth. She did not

want to do this, but she felt harassed and obligated to do it because she was afraid "worse things would happen." Then, without understanding how it happened, she was on top of defendant and they were having sex.

During this, she told him she did not want to be with him because their relationship was not working.

M.M. testified that defendant went into the bathroom. She felt nauseous. Defendant came back into the bedroom and said to her, "You pig, you didn't tell me that you were having your period." According to M.M., she told him he knew she was not having her period because she was on a type of birth control that prevented it. Then, when she got out of bed, she felt blood dripping from her vagina. She tried to walk, but she was unable to take big steps. She testified "[t]he pain was terrible." She showed herself to defendant and said, "[L]ook what you did to me." According to M.M., he said, "[Y]es, sorry, I bit you."

M.M. testified that defendant hid the underwear she had been wearing in bed in his clothes hamper. She took her underwear and the shorts she was wearing, which were also in the hamper, and put them under her bed. When she went upstairs to get help from the owners of the house, defendant grabbed her hand and guided her downstairs. She asked him to leave her alone, saying she was "very afraid of him." Because her daughters were present, she behaved "as if nothing had happened." When she asked him to leave her alone, defendant went into the living room and lay down on the sofa. As soon as she saw that defendant was asleep, she went upstairs and asked the owners to call the police.

According to M.M., she told the police she wanted to go to the hospital because "with the pain that I felt, I wanted to go and have a doctor check me." M.M. identified the clothing that she

pulled out of the hamper and placed under her bed. She also identified photographs that showed blood on

a blanket, a pillow, in her underwear, on the comforter, and on the bed sheet.

Officer Miriam Uribe was the State's next witness. Spanish was Uribe's first language, and she was able to speak with M.M. at the hospital. When she saw M.M., she observed that M.M. had red, swollen eyes, and that she appeared to be in pain. Uribe described M.M. as being upset and traumatized. Uribe collected evidence at the hospital and took photos of M.M.'s vaginal injuries. Uribe also collected evidence from M.M.'s house.

The State next called Dr. Gihum Michael Lee, M.D. to testify. Dr. Lee was the emergency room doctor who treated M.M. on December 26, 2007. Dr. Lee testified that M.M. reported that she had pain in her vaginal area and that she had been assaulted. Dr. Lee testified that M.M. told him it was non-consensual sex. M.M. related to him that defendant was performing oral sex and bit her in the vaginal area. Dr. Lee made a gynecological examination of M.M. He observed a laceration to her right labia minora that was approximately one centimeter in size. There was no active bleeding, and the laceration was consistent with a human bite. The wound appeared to be acute, that is, having been inflicted within the last day. Dr. Lee testified that it would be a painful injury. Dr. Lee identified a photograph that depicted the laceration. Dr. Lee's further examination of M.M. revealed a laceration to her cervix "close to the os on her left side." The doctor identified a photograph of this wound. His opinion was that the cervical laceration resulted from a traumatic injury.

Nurse Rebecca Erickson testified next. She was present in the emergency room when Dr. Lee examined M.M. on December 26, 2007. Nurse Erickson brought M.M. into the examination

room in a wheelchair. She described M.M. as tearful and distraught, "just very upset at the time." Speaking with M.M. through a Language Line, Erickson learned that M.M. was sexually assaulted. During the gynecological examination, Officer Uribe translated for M.M. Erickson collected specimens for a rape kit from M.M. Throughout, M.M. was tearful and upset and had to be asked to repeat herself because "she was just upset and crying." M.M. complained of pain to her vaginal area. The doctor treated M.M. with antibiotics to prevent infection and administered morphine for the pain.

Cynthia Torrisi, a forensic scientist with the State of Illinois crime laboratory testified for the State next. Torrisi analyzed M.M.'s vaginal swabs from the rape kit collected by Nurse Erickson and determined that semen was present. Laurie Lee, also a forensic scientist with expertise in DNA analysis, identified a male DNA profile on the vaginal swabs that matched defendant. Lee also identified M.M.'s DNA on the vaginal swabs.

The State rested, whereupon defendant moved for a directed finding, which the trial court denied. Defendant presented no evidence. The trial court found defendant guilty on (renumbered) count I; not guilty on count II; guilty on count III; and not guilty on count IV. The court sentenced defendant to six years' imprisonment on count III and four years' imprisonment on count I, to be served consecutively. Defendant filed a timely appeal.

In this appeal, defendant contends that the State failed to prove that defendant threatened or used force and failed to prove that M.M. did not consent to the act. A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When presented with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the

defendant. *Collins*, 106 Ill. 2d at 261. Rather, the relevant question 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. *Collins*, 106 Ill. 2d at 261; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Renumbered count I of the indictment charged defendant with criminal sexual assault. Section 12—13(a)(1) of the Criminal Code (Code) provides that an accused commits criminal sexual assault if he or she commits an act of sexual penetration by the use of force or threat of force. 720 ILCS 5/12—13(a)(1) (West 2008). Section 12—12(d) of the Code defines "force or threat of force" as follows:

> "(d) 'Force or threat of force' means the use of force or violence, or the threat of force or violence, including but not limited to the following situations:
>
> (1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believed that the accused had the ability to execute the threat; or
>
> (2) when the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement." 720 ILCS 5/12—12(d) (West 2008).

Renumbered count III of the indictment charged defendant with aggravated criminal sexual assault. Section 12—14(a)(2) of the Code provides that an accused commits aggravated criminal sexual assault if he or she commits a criminal sexual assault and the accused caused bodily harm to the victim. 720 ILCS 5/12—14(a)(2) (West 2008). Every act of sexual intercourse involves force in the sense of energy or motion, but not every act of sexual intercourse involves force that will unlawfully overcome the other participant. *People v. Kinney*, 294 Ill. App. 3d 903, 908 (1998). Thus, "force"

within the meaning of the above statutes does not mean the force inherent to all sexual penetration, but physical compulsion, or a threat of physical compulsion that causes the victim to submit to sexual penetration against his or her will. *People v. Denbo*, 372 Ill. App. 3d 994, 1005 (2007). If the State proves that there was an act of penetration by force, that evidence demonstrates that the act was nonconsensual. *People v. Haywood*, 118 Ill. 2d 263, 274 (1987).

Defendant in our case contends that M.M., from the start, consented to sexual relations and the biting was an accidental part of the consensual sex. Defendant claims that M.M.'s testimony was "implausible and unconvincing." He argues that he would have had to remove her clothing without waking her before assaulting her, and it is implausible to believe that she would not have awakened while he was taking off her shorts and panties. Defendant argues that relations were consensual because M.M. testified she had been having a dream about reconciliation with defendant just before she woke. Defendant claims he was engaged in oral sex to which M.M. consented, and he did not realize he had bitten her. Defendant further argues that, despite M.M.'s testimony that she told defendant "no," sexual relations between them continued for 15 minutes during which M.M. was on top of defendant and did not walk away. Defendant asserts that M.M.'s failure to cry out for help even though others were close by is evidence she consented. Defendant contends that M.M.'s trial testimony was implausible because she told police at the hospital that she awoke to defendant performing oral sex and then experienced the bite. Defendant argues that "human experience and common sense" suggest that any reasonable person who awoke to one's spouse giving her oral sex would consent. In sum, defendant concludes that there was no force involved because M.M. consented to the activity.

We first examine what defendant contends was impeachment of M.M.'s testimony by her prior inconsistent statement to police at the hospital. On direct examination, M.M. testified that pain in her vagina awakened her. On cross-examination, defense counsel attempted to elicit from her that she told police that she awoke when she felt defendant giving her oral sex. M.M. testified on cross-examination, "Well, yes, because at the same time [defendant] was giving me oral sex, it also hurt me." When defense counsel said, "You told [the police] that he bit you after you had woken up," M.M. stated, "It's a lie." On cross-examination of Officer Uribe, who spoke to M.M. at the hospital, the following occurred:

> "Q [By Defense Counsel]: Now, do you recall her telling you, meaning [M.M.], that she awoke when she felt [defendant] giving her oral sex? Do you remember her saying that to you?"
>
> A. Yes.
>
> Q. And that she told him *** no?"
>
> A. That is correct.
>
> Q. And then do you recall her telling you, M.M. telling you while he was performing oral sex on her, he bit down hard?
>
> A. Yes, sir, that is correct."

On redirect examination, Officer Uribe testified that when she asked M.M. what had occurred, she left it an "open ended question." Uribe described M.M. as upset and traumatized, so Uribe did not ask M.M. in which order events occurred. Given the circumstances, the supposed impeachment was not so significant that it renders M.M.'s testimony inherently implausible. It is the province of the

trier of fact to judge the credibility of witnesses, weigh the testimony, and determine matters of fact. *People v. Rogers*, 27 Ill. App. 3d 123, 127 (1975).

Defendant also points to Dr. Lee's testimony where he said that M.M. told him she had awakened to defendant performing oral sex on her and "had bitten her in the vaginal area." In context, Dr. Lee also testified that M.M. told him defendant had assaulted her, "and it was nonconsensual sex according to [M.M]." Dr. Lee's testimony did not impeach M.M.

Contrary to defendant's assertions, there is evidence of force in the record. M.M. and defendant were estranged at the time of the incident. M.M. had previously refused intimate contact with defendant, who was sleeping on the living room sofa instead of their bedroom. Defendant was not home on December 26, 2007, when M.M. went to bed clad in her shorts and panties. She awoke when she felt "bad" pain, "immense" pain. She told defendant no three or four times. She felt blood dripping from her vagina, and the photographs in evidence show fairly large amounts of blood on the sheet, pillow, blanket, comforter, and underwear. Defendant attempted to hide the bloody panties in his clothes hamper. Police at the scene observed M.M. to be in such pain she had difficulty walking and talking. The emergency room physician described a one-centimeter laceration to M.M.'s labia minora that was consistent with a human bite, which would cause her pain. Dr. Lee prescribed no mere aspirin for pain, but gave M.M. morphine. It is incredible to believe that M.M. consented to sexual contact resulting in a debilitating bite. Moreover, when M.M. attempted to disengage, defendant forced her head down to his penis. She testified that she felt harassed and obligated because she was afraid "worse things would happen." As soon as defendant was asleep on the living room couch, M.M. summoned help.

Defendant cites *Denbo* where the appellate court reversed the defendant's conviction of aggravated criminal sexual assault. *Denbo* presented a question of withdrawal of consent, which is not present here. *Denbo*, 372 Ill. App. 3d at 1006. Defendant also relies on *People v. Taylor*, 48 Ill. 2d 91 (1971). In *Taylor*, our supreme court reversed the defendant's rape conviction where the victim, who was the same size and weight as the defendant, did not resist him at any time, never once mentioned she was afraid of the defendant, submitted to the defendant without any threats or roughness on his part, voluntarily removed her clothing, and kissed the defendant goodbye. *Taylor*, 48 Ill. 2d at 99. *Taylor* is inapposite. In our case, defendant committed violence on M.M. while she was asleep, violence that necessitated medical treatment, including morphine. Defendant prevented M.M. from disengaging, and M.M. expressed fear that something worse would happen if she did not submit. Defendant initially prevented M.M. from getting help from the people upstairs by grabbing her hand and guiding her back into the basement. Looking at the evidence in the light most favorable to the State, we conclude that any rational trier of fact could find, beyond a reasonable doubt, that the elements of criminal sexual assault and aggravated criminal sexual assault were proved. Accordingly, the judgment of the circuit court of Kane County is affirmed.

Affirmed.