2012 IL App (2d) 110020-U
No. 2-11-0020
Order filed September 18, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kendall County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-241
JOE P. HARVEY, JR.,	)	Honorable T. Clint Hull,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: Defendant does not contest his conviction of predatory criminal sexual assault, but his conviction of aggravated battery of a child must be reversed because the State failed to prove defendant guilty beyond a reasonable doubt.

¶ 1 Defendant, Joe P. Harvey, Jr., confessed to rubbing his penis between the buttocks of a four-month-old girl, who exhibited bruising on the upper legs and buttocks and a tear in the skin of her anus. The victim also was diagnosed with a fractured right tibia. Following a bench trial, defendant was convicted of one count each of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010) (recodified at 720 ILCS 5/11-1.40 (West Supp. 2011)) and aggravated

battery of a child (720 ILCS 5/12-4.3(a) (West 2010) (recodified at 720 ILCS 5/12-3.05(b) (West Supp. 2011)). The trial court imposed consecutive prison terms of 25 years and 10 years for the respective offenses. Defendant appeals only the aggravated battery conviction, arguing that the State failed to prove him guilty beyond a reasonable doubt of breaking the victim's tibia. We agree. We affirm the conviction and 25-year sentence for predatory criminal sexual assault under section 12-14.1(a)(1) and reverse the conviction and 10-year sentence of aggravated battery of a child under section 12-4.3(a).

¶ 2 I. FACTS

¶ 3 Destiny Whetstone was two months' pregnant when she met defendant. Destiny's daughter, J.W., was born on February 22, 2009. Destiny and defendant never had sexual relations, but Destiny convinced defendant that she was his girlfriend. Defendant gave Destiny money and let her use his car and mobile phone. Destiny has several criminal convictions.

¶ 4 Defendant, who was 27 years old, lived in Montgomery with his mother, his maternal grandparents, his brother, and his brother's daughter. Defendant's sister and her daughter often stayed at the house too. In May 2009, Destiny met defendant's family and began leaving J.W. at the home for extended periods so Destiny could use drugs. J.W. suffered from diaper rash and was sick and wheezing when Destiny began leaving the baby at the house. Defendant's family took care of J.W. Destiny admitted leaving J.W. with the family for extended periods but insisted she would visit the house every day.

¶ 5 On June 15, 2009, when J.W. was almost four months' old, Destiny left J.W. with defendant's family and went off to use drugs for several days. On June 17, 2009, the date of the

incident, defendant's mother and sister each changed J.W.'s diaper, but neither woman noticed anything unusual.

¶ 6 Defendant's mother testified that J.W. usually would sleep in her room and not in defendant's room. However, sometime after 11 p.m., J.W. was put to bed in defendant's bedroom. Defendant's mother heard the baby crying in the early morning hours. She knocked on the door, but there was no response. Defendant's mother later told detectives that what she heard was a "blood-curdling scream," and when she knocked on defendant's door, he said everything was fine. At trial, defendant's mother denied the statements and explained that J.W. cried that way when she was hungry. In defendant's recorded interview with the police, he admitted that J.W. screamed but explained that she did so simply because she woke up and that it occurred before the assault.

¶ 7 As defendant was leaving for work the next morning, defendants' mother changed J.W.'s diaper in the dark and did not notice anything unusual. However, later that morning, defendant's mother changed J.W.'s diaper again and spotted a bruise on J.W.'s buttocks that she had not seen before. Defendant's mother showed defendant's sister the bruise, and they called Destiny. Defendant's sister and Destiny took J.W. to the hospital, where they saw more bruising on the baby's buttocks.

¶ 8 Dr. Lulu Ozcakir examined J.W. in the emergency room. Dr. Ozcakir described J.W. as "active, alert, and not in distress." Dr. Ozcakir noticed bruising on J.W.'s buttocks and right inner thigh, and also spotted a red area in the cleft of the buttocks. Dr. Ozcakir could not say with certainty what caused the marks, but they could have been caused by something hard, like an erect penis, being pressed into the area. In Dr. Ozcakir's opinion, the marks were not accidental and were not caused by striking the baby. The hospital's protocol for suspected child abuse required a skeletal

survey, which "showed there may be a suggestion of right tibial fracture." A soft cast was applied to J.W.'s leg.

¶ 9 Kendall County sheriff's detective Michael J. Peters and sheriff's deputy David Geisen went to the hospital where they took photographs of the marks on J.W. At 6:30 p.m., the officers visited defendant at his home, and defendant's grandparents brought him to the sheriff's office at the officers' request. Detective Peters conducted a videotaped interview, but the trial court suppressed the statements after finding that the police officers deliberately withheld *Miranda* warnings.

¶ 10 Defendant was released at 2:25 a.m. Around 3 a.m., defendant called Destiny and told her that he had rubbed his penis between J.W.'s buttocks. Destiny alerted the police to defendant's phone call, and the police obtained authorization for an overhear. At 6 p.m. on June 19, 2009, Destiny called defendant from a phone in the sheriff's office. During the recorded conversation, defendant told Destiny that what he had said the previous night was true. Defendant admitted to Destiny that he started to rub his penis between J.W.'s buttocks but could not go through with it because he felt disgusted with himself. Around 8 p.m., detective Peters contacted defendant and asked him to return to the sheriff's office so he could clarify some of his prior statements.

¶ 11 Defendant arrived at the sheriff's office and was placed in an interview room, where deputy Michael Disera and assistant State's Attorney Brenda Karales administered *Miranda* warnings and obtained defendant's consent to videotape an interview. Defendant said that, on the night of the incident, he awoke in his bed around 3:30 or 4 a.m. with a partial erection and with J.W. sleeping on his chest. Defendant unfastened J.W.'s "onesie" and removed her diaper. J.W. continued to sleep when defendant, while lying on his back, placed his erect penis between her legs and rocked her up and down, five or six times, for 15 to 20 seconds. Defendant did not ejaculate, but admitted that he

pushed J.W. as far down onto his pelvis as he could and rocked J.W. back and forth with skin-to-skin contact. Defendant denied ever moving his hands from the small of the baby's back and denied touching her legs. He also said that she did not wake up during the assault.

¶ 12 Defendant felt disgusted with himself and stopped. Defendant set J.W. on the bed and wondered how he could have done something like that. Defendant went back to sleep. Defendant admitted that the red marks between J.W.'s legs could have been friction burns although he said he was being gentle. Defendant stated there was a very good possibility that the shaft of his penis caused J.W.'s tear in her anus.

¶ 13 When asked how the victim's leg could have been fractured, defendant said he did not know and denied holding her legs at all. Defendant denied deputy Disera's suggestion that defendant might have tossed J.W. when he became disgusted with himself. Claiming that he suffers from night terrors, defendant suggested that he might have rolled over J.W. while she was sleeping. Defendant was arrested at the end of the interview.

¶ 14 On July 9, 2009, defendant was charged with a three-count indictment. Count 1 charged defendant with predatory criminal sexual assault of a child (see 720 ILCS 5/12-14.1(a)(1) (West 2010)) in that he placed his penis against J.W.'s anus. Count 2 charged defendant with aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2010)) in that he knowingly caused great bodily harm to J.W., a child under the age of 13 years, when he struck J.W. with his fist. Count 3 charged defendant with aggravated sexual abuse (see 720 ILCS 5/12-16(c)(1)(I) (West 2010)) in that he committed an act of sexual conduct with J.W.

¶ 15 At trial, Dr. Mohshin Sheikh, an expert in radiology, testified to J.W.'s right leg injury. Dr. Sheikh examined the whole-skeleton x-ray taken on June 18, 2010, and determined that J.W.'s right

tibia was fractured. The fracture appeared as a small bump on the x-ray. Dr. Sheikh explained that a baby's bones are flexible and do not crack but rather buckle slightly and bend like a greenstick. Dr. Sheikh further explained that this type of mechanical injury could be caused by applying pressure to the bone either by putting one's hands on both sides of the fracture and bending or by pulling in one direction with one hand. Moreover, Dr. Sheikh ruled out an accidental fall from walking because J.W. was too young to walk. Also, the fracture could not have been caused by bad nutrition. Dr. Sheikh could not say for sure when the fracture occurred but concluded that it would have been within days of when the x-ray was taken, as early as June 15, 2009.

¶ 16 The parties stipulated to the testimony of Dr. Brian Lindell, who examined J.W. on July 7, 2009, and reviewed J.W.'s x-ray. Dr. Lindell reported that J.W. was kicking well and using her leg normally. Dr. Lindell was "not 100% convinced there was a tibia fracture" because there was no boney reaction. Dr. Lindell further opined that he could not determine when the tibia fracture occurred because he observed no tenderness or swelling of the leg.

¶ 17 Dr. Ozcakir, the expert in pediatrics who had examined J.W. in the emergency room, stated that the redness she saw on the cleft of J.W.'s buttocks was not accidental and that an erect penis could have caused it. As to J.W.'s leg injury, Dr. Ozcakir concurred with the other doctors' opinions, concluding that she could not tell exactly when the tibia fracture occurred.

¶ 18 Dr. Sangita Rangala, a child abuse expert who examined J.W. on June 19, 2009, testified that the red marks between the cleft of J.W.'s buttocks were consistent with rubbing by an erect penis and were not accidental. Dr. Rangala also observed a skin tear in J.W.'s anus, which was not common in a child who was J.W.'s age. Dr. Rangala concluded that the tear would have been caused by some sort of trauma, consistent with rubbing by an erect penis. Dr. Rangala noted that the bruises

on J.W.'s buttocks would be most commonly caused by a handgrip. Finally, the doctor concluded that J.W.'s tibia fracture would be rare to see in victims of sexual abuse.

¶ 19 Defendant admitted at trial that he slept in the bed with J.W. on the night of the incident, but he denied abusing her. Defendant testified that he falsely told the police that he sexually abused J.W. because he received threatening telephone calls from unknown friends of Destiny.

¶ 20 During closing argument, the State argued a different theory of the cause of the victim's fractured tibia. The aggravated battery charge in the indictment had alleged that defendant inflicted great bodily harm by striking J.W. with his fist, but the State argued to the trial court that defendant fractured the tibia by holding J.W.'s leg and rocking her up and down on the shaft of his penis. The State argued that the allegations in the aggravated battery charge gave defendant sufficient notice of the charged offense and that defendant had the opportunity to explain any type of injuries that J.W. suffered. The court agreed with the State and rejected the defense's argument that the variance between the aggravated battery charge and the evidence barred conviction. Defendant does not raise the notice issue on appeal.

¶ 21 The trial court found defendant guilty on all three counts, merged the charges of predatory criminal sexual assault and aggravated sexual abuse, and denied defendant's subsequent motion for a new trial. The court sentenced defendant to consecutive prison terms of 25 years for predatory criminal sexual assault and 10 years for aggravated battery, with both subject to the truth-in-sentencing requirement that he serve 85% of his sentence. This timely appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant does not challenge his conviction of predatory criminal sexual assault. However, he argues that the evidence does not support the conviction of aggravated battery of a

child. The State argues that circumstantial evidence supports the conviction. When a court reviews the sufficiency of the evidence, 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." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); see *People v. Phillips*, 215 Ill. 2d 554, 569-70 (2005) (citing *People v. Collins*, 106 Ill. 2d 237, 261 (1985)). This standard of review does not allow the reviewing court to substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses. *People v. Sutherland*, 155 Ill. 2d 1, 17 (1992) (quoting *People v. Campbell*, 146 Ill. 2d 363, 375 (1992)). Reviewing courts apply this standard regardless of whether the evidence is direct or circumstantial (*Campbell*, 146 Ill. 2d at 374-75), and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction (*People v. Hall*, 194 Ill. 2d 305, 330 (2000)). Thus, the standard of review gives "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319; see *People v. Nitz*, 143 Ill. 2d 82, 95 (1991). A conviction will be affirmed unless the evidence is "so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilty." *Collins*, 106 Ill. 2d at 261.

¶ 24 We agree with defendant that, after viewing the evidence in light most favorable to the State, any rational trier of fact could not have found defendant guilty beyond a reasonable doubt of aggravated battery because the State failed to present sufficient evidence that defendant caused a fracture of J.W.'s leg.

¶ 25 The relevant version of the statute defining aggravated battery of a child provides in part that "[a] person of the age 18 years and upwards who intentionally or knowingly, and without legal justification and by any means, causes great bodily harm or permanent disability or disfigurement to any child under the age of 13 years *** commits the offense of aggravated battery of a child." 720 ILCS 5/12-4.3(a) (West 2010).

¶ 26 Acknowledging our deferential standard of review, defendant does not dispute the age-related elements of the offense or the trial court's findings that J.W.'s tibia was fractured and that such an injury qualifies as great bodily harm. However, defendant argues that the remaining evidence does not support the rational inference that he caused the fracture. Defendant argues that the mere possibility that he caused the injury while he was alone with the victim is not proof beyond a reasonable doubt, especially in light of the experts' opinions that dating the fracture more precisely than within a few days was impossible.

¶ 27 The State responds that the circumstantial evidence proved beyond a reasonable doubt that defendant fractured J.W.'s tibia by gripping her leg as he moved her up and down on the shaft of his penis. Specifically, the State cites evidence that (1) the trial court could find that defendant had the opportunity to grip and break J.W.'s leg during the assault; (2) no injuries were observed before the assault; and (3) the victim's scream could have occurred when defendant broke J.W.'s leg.

¶ 28 First, we acknowledge that defendant had the opportunity to break J.W.'s leg during the assault and the trial court did not believe defendant's testimony that his hands never left the small of the victim's back. Defendant consistently denied gripping J.W.'s buttocks, but Dr. Rangala opined that the pattern of bruises on J.W.'s buttocks would most commonly be caused by a handgrip. However, there is no evidence that defendant actually gripped the victim's lower leg. Defendant

denied gripping J.W. on the legs, and the bruises on J.W.'s buttocks only corroborate Dr. Rangala's testimony that defendant gripped her buttocks. The photographic evidence also shows some bruising on J.W.'s upper legs, but that does not shed any light on the lower right leg injury. While the State presented ample evidence of a fracture and the location of the fracture, the trial court heard no testimony and saw no physical evidence that defendant gripped J.W.'s lower leg.

¶ 29 Second, there is no evidence of when the fracture occurred to support the inference that defendant caused the injury. Dr. Sheikh opined that the fracture would have occurred within days of the x-ray and that there was no way to tell the hour or minute the injury occurred. Dr. Sheikh conceded that J.W. could have suffered the fracture as early as June 15, 2009, the day that Destiny dropped off the baby at defendant's house. The parties stipulated that Dr. Lindell would testify that he also could not determine when the fracture occurred because he observed no tenderness or swelling of the leg. Dr. Ozcakir also opined that she could not say exactly when the fracture occurred. The photographs taken of J.W. in the emergency room show no injury to her lower right leg and Dr. Ozcakir described her as "active, alert, and not in distress." No witness testified to observing any sign of a fracture until a radiologist examined the x-rays. There was no evidence that the victim did not have the fracture before the sexual assault. Also, Dr. Rangala testified that such a fracture would be rare in cases of sexual abuse. Thus, the evidence shows that J.W. suffered a tibial fracture from an unknown cause sometime between June 15, 2009, and the diagnosis and that the injury was in the process of healing when it was discovered. These facts present neither evidence nor a reasonable inference to be drawn from the evidence that defendant caused the fracture.

¶ 30 Third, although defendant's mother testified to hearing a "blood-curdling" scream on the night of the incident, she also testified that J.W. screamed that way when hungry. Even if the finder

of fact rejected the explanation, the victim's scream could have been triggered by the tearing of her anus, rather than by a leg fracture. Dr. Rangala testified that the bruises on J.W.'s buttocks could be caused by a handgrip, that a tear in the skin at the anus was not common in a child of J.W.'s age, and that the tearing would occur only due to some sort of trauma. In contrast, the expert testified that J.W.'s tibial fracture would be rare in victims of sexual abuse.

¶ 31 We sympathize greatly with the infant victim, who tragically suffered from sexual violence in her first weeks of life. However, the absence of evidence at trial that defendant knowingly or intentionally fractured J.W.'s lower leg compels us to agree with defendant that a rational trier of fact could not infer beyond a reasonable doubt that defendant was the cause of the baby's great bodily injury. The State's theory — advanced for the first time during closing argument — is completely undermined by the experts' testimony concerning the uncertain timing of the fracture, how the fracture was caused, and the rarity of observing such a fracture as part of a sexual assault. Even after viewing the evidence in the light most favorable to the prosecution, we hold that any rational trier of fact could not have found defendant guilty beyond a reasonable doubt of aggravated battery of a child. See *Collins*, 106 Ill. 2d at 261.

¶ 32 III. CONCLUSION

¶ 33 Defendant's conviction of predatory criminal sexual assault is affirmed and the conviction of aggravated battery of a child is reversed.

¶ 34 Affirmed in part and reversed in part.