2012 IL App (2d) 110235-U
No. 2-11-0235
Order filed September 24, 2012



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Du Page County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 09-CF-64 |
| JHOVANNY BRITO, | ) | Honorable George J. Bakalis, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held*: The State proved defendant guilty beyond a reasonable doubt of criminal sexual assault: although the trial court rejected tangential aspects of the victim's testimony, it was entitled to credit her version of the offense, which was corroborated by other evidence, and to reject defendant's version.

¶ 2 Following a bench trial in the circuit court of Du Page County, defendant, Jhovanny Brito, was found guilty of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)) and sentenced to a five-year term of imprisonment. On appeal, defendant challenges the sufficiency of the State's evidence. We affirm.

¶ 3 At trial, the victim, L.N., testified that in November 2008 she was 21 years of age. On November 3, 2008, she had dinner and two or three beers with a girlfriend, Alex, at an establishment called "Pub 222." L.N. arrived at approximately 5 p.m. and, at about 7 or 7:30 p.m., L.N. walked home and another friend, Jordan, picked her up and drove her to his house. They watched television and L.N. had "maybe one more beer or two." Jordan took L.N. home at approximately 9:45 p.m. L.N. then drove to a bar called "Boondocks." The record establishes that Boondocks is located in West Chicago near the southeast corner of Hawthorne Lane and MacQueen Drive. The front of the building faces north toward Hawthorne Lane.

¶ 4 L.N. testified that she had arranged to meet Alex and Alex's boyfriend at Boondocks. L.N. arrived there at approximately 10:15 p.m. and sat at the bar with Alex. While there, she had two or three beers and a couple of shots. At some point, L.N. handed her car keys over to Danny Reynoso. Alex left before 11 p.m., and sometime after 11 p.m. Mike Dornan arrived at Boondocks. L.N. knew Dornan because he was, or had previously been, married to one of L.N.'s close friends. L.N. spoke to Dornan, who had come to the bar with defendant. L.N. testified that she had never met defendant before that evening. She might have engaged in small talk with him. At some point, while L.N. was seated on a barstool, defendant began rubbing her back. He persisted in doing so even though L.N. told him to stop and "smacked" his hand away.

¶ 5 Later, L.N., Dornan, and defendant went outside to smoke. They exited the building and walked down a paved walkway that runs west along the rear of the building. Boondocks's rear patio is located south of the walkway. The walkway provides access to another patio, which is perpendicular to the walkway and runs along the west side of the building. The west edge of the patio and the walkway lead to a grassy expanse. L.N. testified that the group stood at the end of the

walkway near a wooden railing that partly separated the walkway and the side patio from the grassy area. After approximately five minutes, Dornan returned inside the bar. L.N. testified that, at that point, defendant tried putting his hands down the front of her pants. L.N. told defendant to stop and tried to push him away. According to L.N., defendant pushed her a few feet beyond the patio onto the grass at the side of bar. He then pushed her to the ground and placed his penis in her vagina. Defendant placed his full weight on top of L.N. and she was unable to push him away. She screamed at defendant to get off of her. Defendant remained on top of L.N. for several minutes, during which she continued to scream. Afterward, L.N. pulled her underwear and her pants back on, walked over to the back patio, and sat down. Shortly thereafter, Dornan walked onto the patio and L.N. told him what had happened. The next person L.N. encountered was Summer MacDonald. L.N. related the incident to MacDonald as well. L.N. was crying and she had mud in her hair and on her clothing. L.N. testified that, after the attack was over, defendant remained at the scene for a minute or two and then left.

¶ 6 The police arrived within 10 minutes, and L.N. spoke with a female officer. L.N. was later transported by ambulance to the emergency room of a local hospital, where potential evidence was collected with a rape kit. L.N. was also given emergency contraceptive pills, which she took as directed. However, five days before Christmas L.N. learned that she was pregnant. She gave birth to a daughter on July 20, 2009. Paternity testing established that defendant was the child's father.

¶ 7 Summer MacDonald testified that she was at Boondocks on November 3, 2008. Although not employed there, she was learning how to bartend. Near closing time, Summer went out to the parking lot to put some guitars in her car. The guitars belonged to her husband; Danny Reynoso had borrowed them. While putting the guitars away, Summer heard a "girl" screaming. The screams

were coming from the side of the building and they lasted for under two minutes. Summer testified that she observed defendant walking around the side of the building. Summer reentered the bar and told the owner, David Lipka, that she had heard somebody screaming. Summer located her husband, Josh MacDonald. He was on the back patio with Reynoso, Dornan, and L.N. L.N. appeared to be distressed and she had mud in her hair and on her clothes. According to Summer, L.N. was "crying her eyes out," and she told Summer that she had been raped.

¶ 8 Josh MacDonald testified that he was tending bar at Boondocks on the night in question. Near closing time, Reynoso told Josh that there was a problem outside. Josh went out to the patio, where he encountered defendant, L.N., and Dornan. Josh told them to leave. Defendant began walking quickly toward the parking lot, but L.N. and Dornan remained. Josh then noticed that L.N. appeared to be shaken up and that her clothes were dirty. When Josh asked L.N. if she was okay, she replied that she had been raped.

¶ 9 West Chicago police officer Megan Perry testified that she spoke with L.N. at Boondocks. L.N. was sobbing and seemed to be distraught. L.N. told Perry that she had been raped on the patio. She stated that she had gone outside to smoke a cigarette and that her assailant had followed her. Later, L.N. indicated that she had been assaulted on the grass, not the patio. Perry's testimony indicated that L.N. told her that, when she went outside to smoke, she stood near the northwest corner of the patio. A paramedic, an emergency room nurse, and an emergency room physician also testified that L.N. had told them that she had been sexually assaulted.

¶ 10 Julio Calabrese, a detective with the West Chicago police department, interviewed defendant in the early morning hours of November 4, 2008. Defendant indicated that on the previous day he had been working the second shift at a business located within walking distance of Boondocks. He

and Dornan, a coworker, shared a pitcher of beer at Boondocks during a break at 9 p.m. They returned to Boondocks after their shift ended, which was approximately 11:10 p.m. Defendant told Calabrese that they remained for about 20 minutes. Defendant had a pitcher of beer, a bottle of beer, and a couple of shots. He called his wife for a ride home. Defendant told Calabrese that he and Dornan went outside to smoke with a "girl" Dornan knew. Dornan then went back into the bar. Defendant smoked a cigarette and then walked to the parking lot to meet his wife. Defendant denied having sex with L.N., or otherwise touching or fondling her.

¶ 11 Dornan testified that, inside the bar, it appeared that defendant was touching L.N.'s back for about five minutes. Dornan denied ever telling anyone that L.N. had slapped defendant. At approximately 11:35 or 11:40 p.m., defendant and L.N. went outside to smoke. Dornan went into the bathroom before joining them outside several minutes later. When he did, he observed defendant and L.N. standing on the north end of the side patio. They were both buttoning or buckling their pants. L.N. repeatedly told Dornan that defendant had raped her. Dornan spent the next few minutes trying to figure out what had happened. Dornan testified that L.N. was speaking in a "raised voice," although he acknowledged that he had prepared a written statement for the police in which he indicated that L.N. was hysterical. After a few minutes, Reynoso came outside, but Dornan told him to go away. Later, Josh MacDonald came outside and told Dornan, defendant, and L.N. to leave the premises.

¶ 12 On cross-examination, Dornan acknowledged that, in his written statement, he indicated that he had gone outside with defendant and L.N. to smoke. He did not mention having gone into the bathroom before joining them outside. According to his written statement, when he finished his cigarette, he went back inside. He then went outside to rejoin defendant and L.N. It was then,

according to the statement, that he found L.N. "In histarics" [*sic*]. It was stipulated that Dornan told a West Chicago police officer that L.N. had slapped defendant's hand when he moved it from the middle of her back to her lower back. Dornan told the officer that defendant then placed his hand higher on L.N.'s back and that it appeared that she did not mind.

¶ 13 Defendant's wife, Lessenia Castellanos, testified that, on November 3, 2008, she expected defendant to return from work at around 11:30 p.m. When failed to do so, she called his cellular telephone. Defendant did not answer the call, and Castellanos did not leave a voice mail message. She was able to reach defendant shortly before midnight and it was agreed that she would drive defendant home from Boondocks. Defendant's father would drive defendant's car home. Castellanos picked defendant up in Boondocks's parking lot.

¶ 14 Defendant testified that he and Dornan went to Boondocks at 7 p.m. on November 3, 2008, during a break from work. They shared a pitcher of beer during that break and returned to Boondocks for another pitcher of beer during their 9:30 p.m. break. They returned to Boondocks once more shortly after their shift ended at 11 p.m. L.N. walked up to them with a beer in her hand, and Dornan introduced her to defendant. Although defendant was married, he told L.N. that he was single. Defendant described L.N.'s demeanor as "happy." They talked and defendant rubbed L.N.'s lower back. According to defendant, L.N. did not react. After talking for about 15 or 20 minutes, defendant, L.N., and Dornan went to the side patio to smoke. Dornan left when he finished his cigarette. Defendant and L.N. started kissing near the middle of the side patio. Defendant asked L.N. if she wanted to go to his car, which had tinted windows. She did not respond. They ended up on the grass on the north side of the patio, where they engaged in sexual intercourse for about 30 seconds. When they were done, defendant received a call from his wife on his cellular telephone.

Defendant did not answer the call. When he told L.N. that his wife had called, L.N. looked angry and upset. About that time, Dornan returned, and L.N. repeatedly told him that defendant had raped her. Someone else came outside and told defendant, Dornan, and L.N. that it was "last call" and that they had to leave. Josh MacDonald came outside next and started yelling that they had to leave. Defendant complied. As he was walking toward his car, he received a call from his wife and asked her to pick him up. They went home, and defendant went to sleep.

¶ 15 After 1 a.m., defendant's wife woke him and advised him that the police wanted to speak with him. They went to Boondocks and were then taken to the police station, where defendant spoke with Calabrese. Defendant did not tell Calabrese that he had had sex with L.N. Defendant did not want his wife to find out what had happened. Defendant testified that Calabrese never specifically asked him whether he had had consensual sex with L.N. That same morning, defendant's wife told him that "the police had told her already," at which point he confessed to his wife that he had a "sexual relationship."

¶ 16 Following the close of evidence, the trial court found that L.N. was mistaken in her testimony that the offense occurred in the grass on the west side of the bar, beyond the paved walkway. Rather, the trial court concluded that the offense occurred on the grass beyond the north edge of the side patio. Otherwise, however, the court found that L.N.'s version of the events was credible and that defendant's version was not.

¶ 17 The sole issue raised on appeal is whether the State presented sufficient evidence to sustain defendant's conviction. A reviewing court will not set aside a criminal conviction 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 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 prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and determining what inferences to draw, and a reviewing court ordinarily will not substitute its judgment on these matters for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 18 Defendant argues that the trial court erred in finding L.N.'s testimony credible. According to defendant, there are "flaws in [L.N.'s] testimony which fatally undermine the reasonableness of the court's conclusion that the sex between [defendant and L.N.] was not consensual." First, defendant directs us to the trial court's finding that L.N. was mistaken as to the precise location where the alleged sexual assault took place. L.N.'s testimony placed the assault directly beyond the end of the paved walkway leading west from the door to the back patio area. The trial court concluded that the assault occurred at the location where defendant claimed he engaged in consensual sex with L.N.—the grass near the north edge of the side patio. The trier of fact is not required to discount a witness's testimony in its entirety merely because the trier of fact rejects part of his or her testimony. *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004). "[I]t is for the fact finder to judge how flaws in part of [a witness's] testimony affect the credibility of the whole," so long as the judgment is reasonable in light of the record. *Id.* This is the case even where a witness was found to have knowingly provided false testimony: the factfinder "may reject [the witness's] entire testimony but is not bound to do so." *Id.*

¶ 19 In the present case, the trial court did not find that L.N. deliberately testified falsely. Rather, the court concluded that she was mistaken. We see nothing unreasonable about the trial court's finding of credibility despite its conclusion that L.N. was mistaken about whether the sexual assault took place to the west of the side patio or to the north of it, but was not mistaken about her testimony that she had been assaulted. See, *e.g.*, *People v. Guerrero*, 2011 IL App (2d) 090972, ¶¶ 85-87 (finding that sufficient evidence supported all but one of the defendant's convictions on multiple counts of criminal sexual assault and aggravated criminal sexual abuse, despite arguments that the victim's testimony was incredible, inconsistent, and lacked critical details). Similar to the reasoning employed by the reviewing court in *Guerrero*, discrepancies in L.N.'s accounts given in the immediate aftermath of the offense, and her inability at trial to recall certain details, do not render her testimony unworthy of belief. Moreover, the assessment of witness credibility was a matter for the trial court to resolve as the trier of fact. See *Cooper*, 194 Ill. 2d at 431.

¶ 20 Defendant also argues that "[t]he improbable and unsatisfactory basis for [L.N.'s] testimony and the court's interpretation of it is accentuated when the sequence of events is examined with respect to the interplay between [L.N. and defendant] before they both left to have a smoke outside." L.N. testified that, while inside the bar, defendant rubbed her back and she slapped his hand away. Defendant poses the question "why [L.N.] would have accompanied a man who had just merited a slapping to the far and remote end of the side patio for a smoke." Again, the trial court heard the testimony from the witnesses, assessed their credibility, and resolved any inconsistencies or discrepancies. See *Guerrero*, 2011 IL App (2d) 090972, ¶¶ 88-89 (finding that sufficient evidence supported the defendant's convictions on multiple counts of criminal sexual assault and aggravated criminal sexual abuse, despite the defendant's complaint that the victim's actions were not consistent

with having been sexually assaulted). Our function is not to second guess the trial court's determination of witness credibility, and we decline to do so here. See *People v. Maxwell*, 2011 IL App (4th) 100434, § 93 (finding the State's evidence against the defendant sufficient to convict him of predatory criminal sexual assault, criminal sexual assault, and aggravated criminal sexual abuse despite the victim being unsure about the defendant ejaculating).

¶ 21 In concluding that L.N. did not consent to having sexual intercourse with defendant, the trial court remarked that, "[a]lthough not an impossibility, it is not likely that a young woman, even after having consumed a fair amount of alcohol, would within a minute or so of being left alone with the defendant, consent to a quick sexual encounter which required her to lay on the grass on a cool evening in the dirt, getting her cloths [*sic*] and her hair matted with mud." Defendant argues that the trial court failed to consider that defendant and L.N. were together in the bar before they went outside to smoke and that L.N. had "acquiesced" when defendant rubbed her back.

¶ 22 Defendant's argument does not persuade this court to reach a different conclusion. In a bench trial, it is presumed the trial court considered only competent evidence in reaching a verdict. *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). Moreover, our duty to consider all the evidence on review does not necessitate a point-by-point discussion of every piece of evidence as well as every possible inference that could be drawn therefrom. See *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007). To do so would effectively constitute a retrial on appeal, which task is not a function of this court. *Id.* (citing *People v. Smith*, 185 Ill. 2d 532, 541 (1999)); see also *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) (stating that it is not the function of a reviewing court to retry the defendant).

¶ 23 In the present case, the trial court was presented with evidence describing the interaction between L.N. and defendant. We note that defendant's testimony did not suggest that L.N. exhibited

any sexual interest in him while they were inside the bar. That the most defendant can assert is that L.N. "acquiesced" to a backrub is insufficient to create a reasonable doubt with respect to his guilt. See *People v. Hall*, 194 Ill. 2d 305, 332 (2000) (stating that even "the trier of fact is not required to disregard inferences which flow normally from the evidence and to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt"). "When a defendant elects to explain the circumstances of a crime, he is bound to tell a reasonable story or be judged by its improbabilities and inconsistencies." *People v. Nyberg*, 275 Ill. App. 3d 570, 579 (1995). The trial court was not required to accept defendant's theory, and our review does not encompass a retrial on defendant's theory. Rather, we ask, after considering all of the evidence in the light most favorable to the prosecution, whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt, which question we answer in the affirmative.

¶ 24 In reviewing the evidence, we note that defendant's credibility as a witness was substantially undermined by his lack of truthfulness when initially interviewed by police. At that time, he denied that he had engaged in sexual intercourse—consensual or otherwise—with L.N. Defendant argues that he lied because he was fearful that his wife would learn of his infidelity. Even if that is true, it merely highlights defendant's readiness to lie to avoid the adverse consequences of telling the truth. Thus, his explanation for lying to police does little for his credibility as a witness.

¶ 25 In contrast, L.N.'s testimony was bolstered by Summer MacDonald's testimony that she heard screaming and by L.N.'s prompt report that she had been sexually assaulted. Although defendant argues that Summer was not a credible witness, credibility determinations are the responsibility of the trial court. See *Siguenza-Brito*, 235 Ill. 2d at 228 (stating that, in a bench trial, it is the trial court's role, sitting as the trier of fact, to determine the credibility of witnesses).

Defendant attempts to discredit L.N.'s character in an effort to minimize the significance of L.N.'s outcry, accusing L.N. of claiming that a "rape" had occurred because she was embarrassed by what defendant refers to as a "sexual escapade in a state of drunkenness." Although defendant's friend, Dornan, testified that he saw defendant and L.N. buttoning or buckling their pants, his testimony was thoroughly impeached. Contrary to defendant's assertion, "the presence of a motive to lie does not render complainant's testimony unconvincing in and of itself." *People v. Sexton*, 162 Ill. App. 3d 607, 613 (1987). Having reviewed the record in its entirety, we conclude this is not a case where the complaining witness's testimony is so fraught with inconsistencies and contradictions as to create a reasonable doubt of defendant's guilt. See *People v. Schott*, 145 Ill. 2d 188 (1991).

¶ 26 Finally, we reject defendant's argument that the trial court improperly considered, as evidence of guilt, his leaving Boondocks after being accused of sexual assault. Defendant argues that the trial court's reasoning was flawed because he left at Josh MacDonald's insistence. In *People v. Grathler*, 368 Ill. App. 3d 802, 808 (2006), the trial court found the defendant's flight from the police, varying statements to the police, and apologies to the victim demonstrated his consciousness of guilt. Similarly, here, and despite defendant's theory to the contrary, the trial court could properly have considered his conduct at Boondocks, as well as his conduct toward the police, in determining his consciousness of guilt.

¶ 27 After viewing the evidence in the light most favorable to the State, we hold that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. We, therefore, affirm the judgment of the circuit court of Du Page County.

¶ 28 Affirmed.