2011 IL App (2d) 110276-U
No. 2-11-0276
Order filed August 2, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Boone County.
Plaintiff-Appellee,	)	
v.	)	No. 07-CF-265
BRIAN J. MAPLES,	)	Honorable Fernando L. Engelsma,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

Held: The evidence adduced at trial was sufficient to prove beyond a reasonable doubt that defendant used force in committing criminal sexual assault. Defendant has forfeited the argument that the trial court erred by admitting hearsay statements made to medical personnel. Affirmed.

¶ 1 Following a jury trial, defendant, Brian J. Maples, was convicted of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2006)), and received a four-year term of imprisonment. Defendant appeals, contending that the State failed to prove him guilty beyond a reasonable doubt of criminal sexual assault because it failed to prove he committed an act of sexual penetration by the use of force

or threat of force, and that the trial court erred by admitting the hearsay testimony of the victim's statements to medical personnel. We affirm.

¶ 2 FACTS

¶ 3 Defendant was charged with three counts of criminal sexual assault against his niece, Amy E. The incident occurred on Sunday, May 6, 2007. At the time, Amy was a 19-year-old student at Northern Illinois University. Each count alleged that defendant sexually penetrated Amy's vagina by the use of force. Count 1 alleged penetration by defendant's mouth, count 2 alleged penetration by defendant's penis, and count 3 alleged penetration by defendant's finger.

¶ 4 At trial, Amy testified that she had moved out of her college dormitory to live with defendant, his wife, and four children after she started suffering from depression. She had a good relationship with defendant prior to the incident in question. On Saturday, May 5, 2007, Amy decided to go camping with defendant and his family, who were already staying in a camper at the Holiday Acres campground. She arrived at the campground between 5 and 6 p.m. All of them sat around the campfire that night. Defendant was drinking beer. Around 9:30 p.m., defendant's wife and children went to sleep inside the camper. Amy and defendant stayed up and talked by the campfire. Defendant continued to drink beer. Amy did not drink any alcohol at that time.

¶ 5 Around 11:00 p.m., defendant drove Amy to a bar near the campground. Defendant drank shots and mixed drinks there and bought Amy drinks. Amy drank "a lot" at the bar. She drank shots and mixed drinks quickly to avoid getting caught for underage drinking. They stayed until the bar closed at 2:00 a.m. Both were intoxicated when they left the bar and returned to the campsite. Defendant walked back to the campsite. Amy drove defendant's car.

¶ 6 Once there, they talked with neighboring campers and walked around the grounds. While walking through a wooded area, defendant began to act "really awkward" and was "trying to come towards" her. Amy felt as if defendant intended to kiss her. She was uncomfortable and put some distance between them. Then they walked into an "open area" with a picnic table and two "port-a-potties." Amy and defendant sat at the picnic table and talked. Suddenly, defendant stood up, pulled down his pants to expose his penis, and told Amy to touch his penis. Amy refused to touch his penis. She got up and said she had to use the bathroom. Once inside the port-a-potty, Amy used her cell phone and called her friend, Cory Makarral. When she left the port-a-potty, defendant led her back to the picnic table.

¶ 7 Amy could not remember walking back to the picnic table. The next thing she remembered was laying on top of the picnic table with her pants pulled down around her mid-thighs. Defendant "had [her] pants down," and was "putting his penis or his finger inside of" her while telling her to get off of the phone. Amy could not see what was inserted inside of her, but "it hurt" and felt like multiple stabbing inside of her vagina. She was crying and was talking to Cory on the cell phone because she "had no idea what to do." Amy "kept telling [defendant] to stop," but he did not. Defendant placed his hands around Amy's torso, and he pinched her whenever she told him to stop and "every time [she] talked to Cory because Cory was still on the phone." Amy tried to move off of the picnic table to get away, but defendant would not allow that. While she felt the stabbing feeling in her vagina, Amy called defendant "Uncle Bri-Bri," a name she sometimes called defendant, and he responded by telling her to "shut up." To her, defendant's demeanor was "really scary," his voice was "cruel and mean," and she was "really scared because he had never acted that way before to [her]."

¶ 8 After defendant stopped "poking" Amy's vagina, he changed positions and began licking it. Amy was still on the cell phone. She then flipped her legs over her head, rolled off of the table, pulled up her pants, and went back to the campsite. Amy could not remember if defendant walked back with her to the campsite. She grabbed her keys to leave immediately but then saw defendant again at the campsite and "his penis was still hanging out of his pants and he was telling [her] to finish him." Amy said no and defendant said "he wanted to make [her] come and he really wanted to try again." She told him no again, and he told her to go sleep with her cousins in the camper. Amy went to the camper because she was scared defendant would "attack [her] in some other way and stop [her] from leaving."

¶ 9 Everyone in the camper was asleep. Defendant went to sleep next to his wife, and Amy positioned herself next to her cousins. After defendant was asleep, Amy left the camper around 5 a.m. Still intoxicated, she drove her car to her mother's house in Yorkville, arriving around 7 or 7:30 a.m. Once there, she immediately threw up, took a shower, and went to sleep. Amy woke around 10 a.m. Feeling sore in the vaginal area, she called a friend who advised her to take a bath in hot water to "try and soothe everything." Amy went to Rush Copley Hospital in Aurora after her brother told her that she needed to have medical personnel administer a sexual assault examination.

¶ 10 During cross examination, Amy testified that she could not remember what she and defendant were talking about immediately before he exposed his penis to her, and defendant did not try to stop her from going to the port-a-potty after this occurred. She did not kick or scream when she went back to the picnic table, and she did not remember how her pants got down. Amy called numerous friends during the hours surrounding the incident, but she never called 911. In her written statement to police, Amy did not tell police that defendant pinched her or that she tried to get away by moving

her legs. Amy also did not mention the repeated stabbing feeling, and she did not indicate that she kept telling defendant to stop when he was inside her. Amy did tell police that she had told defendant to stop and she had said "no" to defendant when he exposed himself to her.

¶ 11 During redirect examination, Amy stated that she blacked out that night but could not remember how often. Although she did not recall how her pants got down, Amy did not pull them down herself. Amy never consented to defendant touching her in any way and she told defendant to stop "over and over again." Amy stated that she was on the phone with Cory "the whole time" she was on the picnic table. During re-cross examination, Amy testified that she did not remember how her pants got down because she had been blacked out at the time.

¶ 12 Cory testified that on May 6, 2007, around 2 a.m., he was drinking alcohol in a dormitory room at Illinois State University, but he was not intoxicated at the time. He had numerous phone calls with Amy, and each call ended with her hanging up. Between 3:48 and 4 a.m., Amy's voice appeared calm, but then it changed to "very bothered and worried." She sounded upset when she told Cory that her "uncle [was] trying to do stuff with me." Following this statement, the call ended. At some point during the next couple of calls, Cory asked Amy "if [defendant] was trying to go inside of her," to which she replied "yes."

¶ 13 During cross examination, Cory stated that he did not attend Illinois State University and was there for a dormitory party. He was 20 years old at the time. Cory started drinking around 1 a.m. and drank between 8 and 10 beers. He was not sure how many phone calls he had with Amy between 2 a.m. and 5 a.m., but he thought it was between 5 and 14 calls.

¶ 14 Jodi Wilhelmi, a nurse at Rush Copley Hospital, examined Amy around 4:40 p.m. on May 6, 2007, and collected evidence. Prior to the exam, Wilhelmi testified that Amy had told her that she

had been sexually assaulted by defendant. Amy also related the following. When everybody else had gone to sleep, Amy and her uncle went to a bar. Afterwards, they returned to the campsite and walked around it. After that, they walked to an open field and her uncle "started coming on to me." Around 3 a.m., defendant took his penis out of his pants and told Amy to touch it. She then went to the bathroom and came back. Amy remembered lying on her back on a picnic table and seeing her pants pulled down. Amy said that "[h]is head was down there and I was whimpering and he was yelling at me *** I felt something in me and I pulled away and fell off the picnic table. I got up and we ended up back at the camper and he had his penis hanging out of his pants and he told me to finish him off. I said no and he told me he wanted to make me come. We went back into the camper and then I left." Amy could not determine if she had been penetrated by a penis, finger, or foreign object. Wilhelmi stated that Amy was crying when she related the incident. Amy also told Wilhelmi that there were acts of masturbation performed by defendant upon her and by her upon defendant. Amy told Wilhelmi that defendant did not ejaculate and was not wearing a condom.

¶ 15 Wilhelmi performed an external examination of Amy's vaginal area. She noted that Amy's labia and vulva appeared tender, red, and swollen, and that there was a white discharge around the vulva. Wilhelmi also indicated that Amy had two abrasions on her lower back, one on her knee, one on her shin, and one on the back of her left shoulder.

¶ 16 On cross-examination, Wilhelmi testified that she did not document that Amy was crying during the examination, but she nevertheless recalled that she was crying. Wilhelmi also testified that Amy's exact words were "my uncle had sex with me," not "my uncle sexually assaulted me." On redirect examination, Wilhelmi testified that Amy's chief complaint was sexual assault and that Amy did say that defendant assaulted her.

¶ 17 Dawn Fritz, who was staying in a camper on the same lot as defendant's family camper, testified for the defense that she was looking out of a neighbor's camper window when she saw defendant and Amy leaving the port-a-potty together and walking out to the woods. Amy was "[s]kipping back to the woods." Fritz thought it odd that defendant and Amy were inside the port-a-potty together. Later, Fritz saw defendant and Amy individually enter and leave the port-a-potty, while the other talked on the phone outside the facility. Then she saw Amy and defendant both walk back into the woods. Fritz saw them do this about three times. She did not hear any screaming or yelling coming from the woods. Later, Fritz saw defendant and Amy sitting and talking on a picnic table, which was about 10 or 15 feet away from the camper.

¶ 18 Angelique Maples, defendant's wife, also testified for the defense. She stated that Amy lived with her, defendant, and their four children, ages two, four, six, and nine, in 2007. She awoke when Amy and defendant entered the camper on the morning of May 6, 2007, sometime between 4:30 and 5 a.m. Amy saw her but said nothing to her and went straight to bed. Amy had planned on staying with the family at the campsite on Sunday, May 6, but she did not.

¶ 19 Laboratory testing was performed on vaginal, oral, and anal swabs taken on May 6, 2007, and on the clothing Amy said she was wearing at the time of the incident. The oral and anal swabs tested negative for sperm, and the results of the test of the vaginal swab was inconclusive because no sperm cell could be positively identified. One cell that could potentially have been semen from the crotch area of Amy's jeans produced inconclusive results. Although the test for semen was inconclusive, one of the forensic scientists who testified found that defendant's DNA matched DNA found on Amy's jeans. Such a match would be expected in all paternally related males, about one in 230 unrelated black males, one in 300 unrelated Hispanic males, and one in 430 unrelated white males.

¶ 20 Following deliberation, the jury found defendant guilty of count 3 (finger to vagina) but not guilty of count 1 (mouth to vagina), and they were deadlocked as to count 2 (penis penetration). Thereafter, the judge directed a verdict in defendant's favor as to count 2. Defendant was subsequently sentenced to the minimum prison term of four years. This timely appeal follows.

¶ 21 ANALYSIS

¶ 22 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt of criminal sexual assault because it failed to prove he committed an act of sexual penetration by the use of force or threat of force, and that the trial court erred by admitting the hearsay testimony of the victim's statements to medical personnel.

¶ 23 Criminal Sexual Assault

¶ 24 Defendant's first argument on appeal is that the State failed to prove him guilty of criminal sexual assault. When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, our inquiry is limited to "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); accord *People v. Cox*, 195 Ill. 2d 378, 387 (2001). It is the responsibility of the trier of fact to "fairly *** 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. "Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *People v. Everhart*, 405 Ill. App. 3d 687, 704 (2010) (citing *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)). Only where

the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330.

¶ 25 A person commits the offense of criminal sexual assault when he commits an act of sexual penetration by the use of force or threat of force. 720 ILCS 5/12-13(a)(1) (West 2006).

¶ 26 "Force," within the meaning of section 12-13(a)(1) of the Code, does not mean the force inherent to all sexual penetration—for example, the exertion of the hand in the act of pushing into the vagina—but physical compulsion, or a threat of physical compulsion, that causes the victim to submit to the sexual penetration against his or her will. *People v. Denbo*, 372 Ill. App. 3d 994, 1005 (2007) (citing 720 ILCS 5/12-12(d) (West 2004)).

¶ 27 Defendant concedes that a rational finder of fact could conclude that Amy had some type of sexual experience with him. However, defendant maintains that Amy's testimony regarding the use or threat of force is contrary to human experience, improbable, and unconvincing so that no trier of fact could have found her testimony credible and therefore his conviction for criminal sexual assault should be reversed. In support, defendant points to four aspects of Amy's testimony that is nonsensical and contrary to human experience. First, despite being intoxicated and "blacked out" when her pants were pulled down, Amy testified that she did not pull them down. Defendant maintains that a person who cannot recall how her pants were pulled down would know that she was not the one who lowered them, implying that she gave her consent to do so. Second, Amy repeatedly told defendant to stop while she was on the phone with her friend Cory, yet Cory never testified that he heard Amy tell defendant to stop and Amy acknowledged that in her written statement to the police she did not indicate that she kept telling defendant to stop when he was inside of her. Third, Amy did not scream, cry out for help, or try to escape. Fourth, Amy was seen leaving a port-a-potty

with defendant and skipping into the woods with him. She also went inside defendant's family camper and did not tell her aunt that defendant assaulted her. Defendant also points out that the jury apparently did not believe all of Amy's testimony and had doubts about her credibility because they found defendant not guilty of the alleged oral penetration of Amy's vagina, despite the fact that Amy testified that Brian licked her vagina.

¶ 28 Most, if not all, of the points raised by defendant were argued to and rejected by the jury. Amy's apparent blackout before the assault began, the fact that she did not know how her pants were pulled down, that she did not cry out for help or try to escape, what is termed her bizarre behavior of skipping into the woods with defendant after they were seen leaving a port-a-potty together, were all facts presented to the jury. It was within the province of the jury to assess the credibility of the witnesses and assign weight to their testimony, resolve any conflicts in the evidence, and draw reasonable inferences therefrom. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). The jury weighed the evidence and found Amy credible regarding the offense for which defendant was convicted. We will not re-weigh the evidence or substitute our credibility determination for that of the jury.

¶ 29 We also observe that merely because Amy did not know precisely how defendant took her pants down is not inconsistent with her knowing that she did not consent to defendant penetrating her. Additionally, Cory never testified as to whether or not he heard Amy tell her uncle to stop assaulting her because neither the State nor defendant asked Cory this question at trial. The fact that Cory did not testify as to whether he heard Amy tell defendant to stop does not suggest that he did not hear Amy tell defendant to stop or that Amy did not tell defendant to stop. It is also unclear exactly when the assault occurred and whether Cory was actually on the phone with Amy during the time when Amy told defendant to stop.

¶ 30 We further reject the argument regarding Amy's failure to cry out for help or attempt to escape. That a victim does not cry out for help or try to escape is not determinative on the issues of whether the victim was forced to have sex or whether she consented to having sex, especially if she was in fear of being harmed, which Amy testified to. "The significance of the failure to cry out or attempt to escape depends upon the circumstances of each case and are merely factors to be considered by the trier of fact in weighing the witnesses' testimony." *People v. Bowen*, 241 Ill. App. 3d 608, 620 (1993).

¶ 31 We also find unavailing defendant's argument that the jury had doubts about Amy's credibility because they found defendant not guilty of the alleged oral penetration of Amy's vagina. An apparent inconsistency in a jury's verdict does not undermine the sufficiency of the evidence on the charge for which defendant was convicted. What defendant characterizes as inconsistent results may also be characterized as the jury doing its job to carefully weigh the evidence. See *People v. Cardamone*, 381 Ill. App. 3d 462, 513 (2008).

¶ 32 Finally, we point out that the jury was free to believe Amy's version of the assault, which contained ample evidence of the use of force. Although Amy may not have been able to recall how her pants were pulled down, as noted, she did testify that she did not take them down. Amy also testified to being held down and pinched during the assault and she repeatedly told defendant to stop. Amy described defendant's demeanor as mean and cruel and that she did not leave when she had the chance because she feared that defendant might attack her in some other way and stop her from leaving. In addition, there was physical evidence presented showing injury to Amy's lower back, knee, shin, and on the back of her left shoulder. 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 offense of criminal sexual assault beyond a reasonable doubt.

¶ 33 Hearsay Testimony

¶ 34 Defendant next argues that the trial court abused its discretion by admitting into evidence inadmissible hearsay statements made by Amy to Nurse Wilhelmi. When Amy went to the hospital for a medical examination following the assault, she gave a statement to Wilhelmi. Wilhelmi read to the jury 11 separate statements about the assault that she received during her triage of Amy.

¶ 35 Section 115-13 of the Code of Criminal Procedure of 1963 offers a statutory exception to the hearsay rule for statements made for the purpose of medical diagnosis. 725 ILCS 5/115-13 (West 2006). Defendant admits that at least three of these comment fell within the section 115-13 exception. To the extent defendant wishes to parse any of the statements, such an approach has been rejected as inconsistent with legislative intent. See, *e.g.*, *People v. White*, 198 Ill. App. 3d 641, 655-56 (1990) (citing *People v. Rushing*, 192 Ill. App. 3d 444, 453 (1989)).

¶ 36 Defendant also concedes that he did not object to the admission of any of the statements at trial but argues on appeal that we should review his argument under the first prong of the plain error doctrine, as defendant believes the evidence in the case was closely balanced. We find defendant has forfeited his argument because defense counsel made a clear tactical decision to allow this testimony to be presented so that he could highlight certain statements that were consistent with his theory of defense.

¶ 37 When Wilhelmi first began to recall what Amy told her, she stated that the first thing Amy said was that she was "sexually assaulted by her uncle." Defense counsel did not object to this statement on the basis that it did not fall within the parameters of section 115-13. Instead, counsel

stated: "Judge, I'm going to have to object to that, it's not what the chart says. It says my uncle had sex with me." It is apparent that when the alleged hearsay statement was first presented at trial, defendant was solely concerned with the issue of consent. As pointed out by the State, defendant does not even contest that he engaged in sexual activity with his niece on appeal. According to defendant, Amy told Wilhelmi that "my uncle had sex with me" and did not tell her that "my uncle sexually assaulted me." This hearsay statement did not contradict defendant's defense of consent. During cross-examination, defendant again brought up the specific words that Wilhelmi recorded in her notes—"my uncle had sex with me," which defendant had previously allowed to be read to the jury without objection. Defendant also elicited testimony from Wilhelmi that Amy told her that she had masturbated defendant the night of the attack. Additionally, this was consistent with the consent defense that was the central theme of defendant's closing argument.

¶ 38 Clearly, the failure to object to the improper evidence was not inadvertent but rather was a conscious choice by defense counsel to pursue a definite strategy. See *People v. Burch*, 22 Ill. App. 3d 950, 957 (1974). Because it was a matter of trial strategy to allow the challenged testimony to be admitted, defendant may not now complain of his failure to object to the statements.

¶ 39 CONCLUSION

¶ 40 For the preceding reasons, the judgment of the circuit court of Boone County is affirmed.

¶ 41 Affirmed.