

2014 IL App (2d) 121379-U
No. 2-12-1379
Order filed July 8, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-3014
)	
CARLOS PORCAYO-BAHENA,)	Honorable
)	Daniel B. Shanes,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly barred defendant from impeaching a defense witness with prior inconsistent statements, as the witness's proffered testimony would have been "merely disappointing and not damaging" to defendant's case.
- ¶ 2 Following a jury trial, defendant, Carlos Porcayo-Bahena, was convicted of one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)) and six counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)). The trial court sentenced defendant to 11 years' imprisonment for predatory criminal sexual assault, to be served consecutively to concurrent terms of 6 years' imprisonment for aggravated criminal

sexual abuse. Defendant timely appealed and argues that he was denied his constitutional right to present a defense. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Testimony at defendant's jury trial generally established as follows. There are two minor victims in this case, L.O. (born June 20, 1997) and A.O. (born December 7, 1998). They are sisters, and defendant is their uncle. L.O. testified to three incidents of abuse. The first occurred in October 2008, near the time she was baptized, when she was spending the night at the home of defendant and his wife, Joanna. During the morning of L.O.'s visit, Joanna told L.O. to go upstairs to defendant's bedroom and wake him for church. L.O. went upstairs to defendant's bedroom, jumped on defendant's bed, and lay down next to him. Defendant put his hand under L.O.'s shirt and touched her breasts. Defendant attempted to touch L.O.'s vagina but stopped when Joanna entered the room.

¶ 5 According to L.O., the second incident occurred in the basement of defendant's home, when L.O. and A.O. were spending the night at defendant's home. L.O. was sitting next to defendant in the dark on a couch watching a movie. A.O. was sitting on the other side of defendant. Defendant put his hand under L.O.'s shirt and bra and touched her breasts while the movie was playing. When A.O. went upstairs to get popcorn, defendant got off the couch, knelt down, pulled down L.O.'s pants and underwear, and put his mouth on L.O.'s vagina and on her breasts. Defendant also put his tongue in L.O.'s vagina. When they heard A.O. start to come back downstairs, defendant told L.O. to pull up her pants and fix her shirt. When A.O. went upstairs a second time, defendant again pulled down L.O.'s pants and put his tongue in her vagina and on her breasts. He also touched her vagina with his hands.

¶ 6 L.O. testified that the third incident occurred around Christmas in 2008. L.O. and A.O.

were at their grandmother's house when defendant arrived with Joanna and their son. Defendant's family and the girls went out to pick up presents and returned to the grandmother's house about an hour later. Defendant asked L.O. if she wanted to spend the night, and she told him no. Later, when defendant was driving L.O. home, he reached over and put his hand under her bra and fondled her breasts.

¶ 7 L.O. testified that she told her cousin, Raul Porcayo, via text what had happened with defendant. She did not tell him the details; she just told him that defendant had touched her.

¶ 8 A.O. testified that, in August 2010, she was at her grandmother's house with defendant when her grandmother asked defendant to show her his pictures from a recent trip. Defendant said that he had to go home to get them and asked A.O. to go with him. When they arrived at defendant's house, defendant told A.O. to come inside and help him look for the pictures. In defendant's bedroom, defendant pushed A.O. onto the bed, pushed up her shirt, and touched her breasts under her bra. Defendant started to unzip and pull down A.O.'s pants but A.O. screamed, and he stopped. Defendant picked up a photo album and they returned to A.O.'s grandmother's house. Three days later, A.O. told L.O. about the incident. The girls told their mother, Maria, and she took them to the police department.

¶ 9 Four witnesses testified for the defense. Police officer Larry Thomas testified that he met with L.O., A.O., and Maria, during the evening of August 19, 2010. L.O. told him that she stayed at defendant's house for three weeks and that, during that time, while watching a movie, defendant removed all of L.O.'s clothing and rubbed and touched her entire body. A.O. told Thomas that on one occasion she was present in defendant's bedroom looking for pictures and defendant removed her shirt and bra. A.O. did not tell him that he touched her zipper or removed her shorts. On cross-examination, Thomas clarified that he does not conduct an

investigation; rather, he takes the initial complaint and forwards it on to an investigator with the juvenile detective division.

¶ 10 Raul testified that he and L.O. sometimes texted each other on the weekends. She never told him that anyone had ever touched her inappropriately or that defendant had ever touched her in a sexual way.

¶ 11 Julia Porcayo, defendant's mother, testified that Maria was her daughter and that L.O. and A.O. were her granddaughters. Julia testified that she had cared for L.O. and A.O. at her home after school and during school vacations. Defendant would help with transportation. It was normal for the girls to exchange hugs and kisses with defendant. Around Christmas 2008, defendant and his wife took L.O. and A.O. to her other son's house to pick up presents. After picking up the presents, L.O. and A.O. returned to her house and defendant left with his family. In August 2010, when A.O. and defendant left her house to retrieve defendant's vacation pictures, they were gone for only 5 to 10 minutes. When they returned, they had a family meal and there was no indication that A.O. was upset or that anything was wrong. The next day, the family went to the beach together.

¶ 12 Joanna Hernandez, defendant's wife, testified that L.O. and A.O. had spent the night at her house many times and often watched movies in the basement. She could not recall a time when defendant was alone in the basement with L.O. and A.O. There was never a time during a sleepover when she asked L.O. to go upstairs and wake defendant. There was never a time around Christmas when defendant drove L.O. anywhere by herself. According to Joanna, her and defendant's relationship with Maria changed after the baptism, because Maria had not wanted the girls baptized and Joanna would not allow Maria's boyfriend to attend a postbaptism party at her house.

¶ 13 During the course of the proceedings, defense counsel told the trial court that he wanted to establish an alleged motive on the part of Maria to facilitate false charges against defendant so that she and her daughters could benefit from the “U visa” program, which permits crime victims and certain family members to apply for temporary legal status in the United States. Based on a proffer that Maria would deny knowledge of the U visa program, defense counsel told the trial court that he would call another witness, Esperanza Centena, to impeach Maria with prior inconsistent statements showing Maria’s knowledge of the program and that Maria was present when other family members were counseling Centena about the program. According to defense counsel, Centena would testify that Maria had encouraged her to prosecute Centena’s husband for abuse to obtain U visas for herself and her children.

¶ 14 In response to defense counsel’s argument, the court noted that, unless defense counsel put forth evidence that Maria, L.O., and A.O. were in the country illegally, the evidence concerning the U visa program would not be relevant. Anticipating the possibility that defense counsel’s line of questioning might incriminate Maria, the court appointed counsel for Maria for this limited purpose. Following appointed counsel’s consultation with Maria, the following colloquy occurred:

“[MARIA’S COUNSEL]: *** I again asked our client if she in the summer of 2010 knew what a U visa was or what the benefits of a U visa was. She said no. She had heard people talk about a U visa, but she doesn’t understand what it does. The other thing is that she would be invoking her Fifth Amendment rights in regards to any status here in the United States.

THE COURT: The Court finds that if the witness were to be questioned about her status in the United States and the proffer, under the circumstances she would have a

valid basis to assert a privilege, [counsel], because in sum you believe she would incriminate herself?

[MARIA'S APPOINTED COUNSEL]: Yes. Sir.

THE COURT: Without—strike that. That's one thing. However, she could still be asked theoretically about this conversation. There is no constitutional issue in that regard about that, but that gets us back to the impeachment issue. If she were to testify, as [counsel] represented, that she did not have this knowledge, it was not part of that conversation, the next step would have to be for her to be impeached as we discussed before. The Court finds it's not an appropriate impeachment because the party calling the witness is disappointed rather than damaged and, therefore, that would not come in. Without evidence in front of the jury that there would be some benefit to her or the children or her and the children collectively, the whole thing is not relevant. It can't be tied together. Not only that, but as we have seen over the last few hours that we have talked about this it is fraught with uncertainty and confusion. And if we are uncertain and confused, imagine what this jury will be."

¶ 15 Thereafter, the jury found defendant guilty of one count of predatory criminal sexual assault and six counts of aggravated criminal sexual abuse. Defendant's motion for a new trial was denied. Following a sentencing hearing, the trial court sentenced defendant to 11 years' imprisonment for predatory criminal sexual assault, to be served consecutively to concurrent terms of 6 years' imprisonment for aggravated criminal sexual abuse. Defendant filed a motion for reconsideration of his sentence, and it was denied. Defendant timely appealed.

¶ 16

II. ANALYSIS

¶ 17 Defendant argues that the trial court denied him the right to present a complete defense at his jury trial by ruling that he could not impeach Maria with prior inconsistent statements. In response, the State maintains that the trial court's evidentiary ruling concerning Maria's testimony was not an abuse of discretion and did not prevent defendant from presenting his defense.

¶ 18 We first address our standard of review. Defendant argues that, although a trial court's decision to exclude evidence is ordinarily reviewed for an abuse of discretion (see *People v. Buss*, 187 Ill. 2d 144, 219 (1999)), the issue of whether a defendant was afforded the opportunity to present a complete defense is a question of law and should be reviewed *de novo*. In support of his argument defendant relies on *People v. Foskey*, 136 Ill. 2d 66, 76 (1990). In *Foskey*, the supreme court reviewed *de novo* the trial court's denial of a motion to suppress, because neither the facts nor the credibility of the witnesses were in controversy. *Id.* In response, the State argues that *Foskey* does not apply, because here, unlike in *Foskey*, the facts and witness credibility are in controversy. We need not determine the proper standard of review in this case, because even applying the *de novo* standard we would affirm the trial court's determination.

¶ 19 We turn now to the merits. "[A] defendant has a constitutional right to present witnesses in his defense." *People v. Carini*, 357 Ill. App. 3d 103, 118 (2005). Nevertheless, "that right is not unfettered and is subject to the standard rules for the admissibility of evidence." *Id.*; see *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). Illinois Rule of Evidence 607 (eff. Jan. 1, 2011) permits a party to impeach his own witness with a prior inconsistent statement but "only upon a showing of affirmative damage." A party must show that the witness's "testimony has damaged, rather than failed to support the position of the impeaching party." *People v. Weaver*, 92 Ill. 2d 545, 563 (1982). "It is only when the witness'[s] testimony is more damaging than his complete

failure to testify would have been that impeachment is useful.” *Id.* at 563-64. In *People v. Cruz*, 162 Ill. 2d 314, 360 (1994), the supreme court explained what it meant by damaging testimony:

“ ‘Damage’ as referred to in *Weaver* does not occur where a party interrogates a witness about a fact which would be favorable to the examiner if true, but then receives a reply which is merely negative in its effect on the examiner’s case. [Citations.] Such testimony is merely disappointing and not damaging since the examiner’s case is no worse off than if the witness had not testified. ‘Affirmative damage results only from testimony that gives positive aid to an adversary’s case.’ ”

¶ 20 Defendant argues that Maria’s proffered testimony was sufficiently damaging to defendant’s case to warrant impeachment by prior inconsistent statements. We disagree. Defendant sought to establish a motive on the part of Maria to encourage false charges against defendant. According to defendant, Maria had hoped to apply for temporary legal status in the United States under the U visa program, which was available to crime victims and their families. However, if defendant asked Maria whether she had knowledge of the U visa program and she replied that she did not (as the proffer established), defendant’s case would be no worse off than had Maria not testified at all. Maria’s denial of knowledge of the U visa program would be disappointing to defendant, but it would not affirmatively damage defendant. Further, the trial court allowed Maria to assert her Fifth Amendment privilege as to her immigration status. (Defendant does not challenge that ruling.) Thus, as the trial court noted, without evidence that the U visa program would provide some benefit to Maria and the victims, the testimony was not relevant.

¶ 21 Accordingly, we find that the trial court's ruling that defendant could not impeach Maria should she testify regarding her lack of knowledge of the U visa program was not error and did not deprive defendant of his right to present a defense.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm.

¶ 24 Affirmed.