2018 IL App (2d) 170049-U
No. 2-17-0049
Order filed March 15, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 15-CF-653
JOSE L. VALENTE,	)	Honorable Liam C. Brennan,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of criminal sexual abuse (as the predicate for home invasion): under the circumstances, the trial court was entitled to find that defendant touched the victim's breast (as opposed to another part of her chest) and did so for the purpose of his sexual gratification; (2) the State proved defendant guilty beyond a reasonable doubt of residential burglary as charged, as the evidence showed that defendant "remained" in the victim's residence with the intent to commit a felony even though he also "entered" with that intent; (3) defendant's convictions of home invasion and a predicate criminal sexual abuse did not violate the one-act, one-crime rule.

¶ 2 Following a bench trial, defendant, Jose L. Valente, was convicted of home invasion (720 ILCS 5/19-6(a)(6) (West 2014)), residential burglary (720 ILCS 5/19-3(a) (West 2014)), and criminal sexual abuse (720 ILCS 5/11-1.50(a)(2) (West 2014)). He appeals, contending that (1) he was not proved guilty beyond a reasonable doubt of criminal sexual abuse as charged in the indictment, because the evidence that he touched the victim's breast and that he did so for purposes of his sexual gratification was unsatisfactory; (2) he was not proved guilty beyond a reasonable doubt of residential burglary, because there was no evidence that he "remained" in the victim's house for purposes of committing a felony; and (3) because criminal sexual abuse was the predicate felony for home invasion, he could not be convicted of both home invasion and criminal sexual abuse. We affirm.

¶ 3 An indictment alleged that defendant committed home invasion by entering the home of M.C. and committing criminal sexual abuse. The indictment further alleged that defendant committed criminal sexual abuse by knowingly touching M.C.'s breast, knowing that she was unable to give knowing consent.

¶ 4 At trial, 20-year-old M.C. testified that, in the early morning of March 29, 2015, she was awakened by a man touching her. The man, later identified as defendant, was touching her under her shirt and trying to pull down her pants. When the prosecutor asked M.C. specifically where defendant touched her, the following exchange occurred:

> "A. Up to my breast about, this side.
>
> Q. Was that hand touching your breast?
>
> A. Going towards it, yes.
>
> Q. Did it touch your breast?
>
> A. Just about."

¶ 5 The prosecutor then briefly switched to another topic before returning to the subject:

"Q. And let's go back to just about touching your breast. Did you feel it on any other portion of the upper part of your body? Did you feel the hand?

* * *

A. Well, it just about touched the side of it.

Q. You say it just about touched the side or it did touch the side?

A. It did touch.

Q. It did touch the side of your breast?

A. Yes.

Q. What did touch the side of your breast?

A. His hand."

¶ 6 M.C. testified that, as she awakened, she looked down and saw defendant lying there. She could not see him well, because her room was dark and defendant had "a big hoodie on, like a mask" covering his face. Defendant said that his name she could call was him "Ishmael." He then said that his name was "Marcus."

¶ 7 M.C. asked defendant what he was doing. He said that she had told him he could sleep over, although this was not true. M.C. threatened to call the police. Defendant said to go ahead and call them.

¶ 8 She got out of bed and began running toward her parents' bedroom door screaming for help. Defendant left during this time. Her parents awoke after a minute or two and she told them to hurry up and call the police. M.C.'s sister, C.C., woke up and called the police on her cell phone.

¶ 9 Officer Besch interviewed M.C. at the scene. She told him that the man had not touched her on the breast. She testified at trial that this was untrue. The prosecutor asked, "And you, in fact, were touched on your breast?" M.C. answered, "I was." Defense counsel objected. The trial court admonished the prosecutor not to lead the witness but did not explicitly sustain the objection or strike the answer.

¶ 10 M.C. later learned that defendant was the person in her bedroom. She knew him from school, but they were not friends. On redirect, she explained that her sister was a friend of defendant's girlfriend, Carina.

¶ 11 On cross-examination, M.C. acknowledged that she did not tell the police that defendant had touched her breast. She acknowledged giving written and videotaped statements to Detective Greg Garofalo. She told him that defendant had touched her only in the "chest area." She explained at trial that she felt uncomfortable talking about it.

¶ 12 C.C. testified that she was awakened by her sister screaming. At her mother's direction, she called 911. She knew defendant as the boyfriend of her ex-friend, Carina. She and defendant were not really friends. She had never "hung out" or had a romantic relationship with defendant.

¶ 13 While the police were still at the house, she noticed that she had a missed call from a number she did not recognize. She relayed the number to the police.

¶ 14 Vienna Peterson, M.C.'s mother, testified that she heard M.C. banging on her door and yelling, " ['H]e is getting away.['] " She looked out the window and saw a man wearing a gray "hoodie" and dark pants running away from the house. She wanted to let the family's Rottweiler out to chase the man, but her husband, James Peterson, prevented her by holding the door shut. Instead, her husband drove around the neighborhood, but he did not see anyone.

¶ 15 M.C. told her that the man had "tried to rape" her and that he had touched her breast. Vienna did not know defendant, but knew Carina, who had been friends with C.C.

¶ 16 Garofalo testified that, after going to the Peterson house on March 29, he learned from C.C. that she had two missed calls on her phone. She did not recognize the number. Using the police department's resources, Garofalo traced the number to defendant.

¶ 17 Garofalo interviewed defendant. Defendant acknowledged that the phone number was his. He said that he called C.C. about midnight because a mutual friend, "Jasmine," needed a place to stay for the night. However, Garofalo subsequently looked at defendant's phone and did not see any calls from that time period.

¶ 18 Garofalo took defendant to the police station, where he agreed to give a statement. However, he did not want it recorded, because he did not want his girlfriend to find out about it.

¶ 19 Defendant said that he called C.C. twice around 3 a.m. looking for a place for Jasmine to stay. He initially denied going to the Peterson house. However, he later said that he left Alex Medina and Jasmine at his house and walked over to the Peterson house. He entered through the front door, which was unlocked. He began checking interior doors within the residence. The first two he tried were locked, but the third was unlocked so he went in.

¶ 20 Defendant discovered that he was in M.C.'s room. He did not think she would care that he was there, because they knew each other from high school and had a mutual friend, Jasmine. He had "hooked up" with both sisters in the past. He began grabbing her chest and hip area to try to wake her up. He was hoping that she would get in the mood to have sex with him.

¶ 21 M.C. woke up and asked who he was. Defendant jokingly said that his name was "Lalo." Defendant said, " ['I thought you said I could sleep over.'] " M.C. jumped up, screamed, and ran out the bedroom door. She began pounding on her stepfather's bedroom door trying to wake

him up. According to defendant, his friends were waiting for him. Given that M.C. "wasn't having it," he decided to leave. He ran out the front door and met Medina and Jasmine at his residence.

¶ 22 Defendant said that he touched M.C. "on the chest and on the hip area." Later, Garofalo clarified that defendant stated that he touched M.C.'s breast.

¶ 23 Defendant then prepared two written statements. In the first statement, defendant wrote that he was drinking with some friends, including Jasmine. Defendant and a friend wanted it to be a "guy night," so they wanted to "get rid of" Jasmine. Defendant suggested dropping her off with C.C. Defendant walked through the front door of the house looking for C.C. but ended up talking to M.C. As defendant was talking with M.C., "[s]he got spooked cause [*sic*] I'm waking her up in the middle of night and didn't get what I was trying to tell her." Defendant then left the house. He added that while he was talking with M.C. he tried to wake her up to see if she wanted to "hang" since they had "hooked up in the past."

¶ 24 In the second statement, defendant wrote that when he was trying to wake up M.C. he "touch [*sic*] her on the chest to see if she wakes up and gets in the mood to hang and kick it but she wake [*sic*] up confuse [*sic*] I didn't touch her ~~privates~~ vagina or even went underneath her clothes all over the clothes."

¶ 25 After defendant wrote out the second statement, he was taken to the booking area and eventually placed in a holding cell. A short time later, officers returned to the holding cell to find defendant trying to hang himself with a sheet. Defendant was saying, " ['l]et me die.['] "

¶ 26 On cross-examination, Garofalo said that, after defendant wrote the first two paragraphs of the first statement, he was told to be more specific, after which he wrote the third paragraph.

The officers continued to interview defendant for about two more hours. During that time, he stated that he touched M.C.'s chest area, and he was asked to provide a second statement.

¶ 27 The trial court found defendant guilty of residential burglary, criminal sexual abuse, and home invasion, but not guilty of attempted criminal sexual assault. The court specifically addressed whether the State proved that defendant touched M.C.'s breast.

¶ 28 The court acknowledged that M.C. was equivocal about whether defendant touched her breast. The court noted that she demonstrated in court that defendant touched her on the side of the rib cage to the right of her right breast but not on the breast. This concern was compounded by the fact that she acknowledged not telling the officers that defendant touched her breast. Nevertheless, she later testified that defendant did touch her breast. The court found that, standing alone, M.C.'s testimony "raises questions that would not allow a court to find criminal sexual abuse based upon the touching of the breast beyond a reasonable doubt."

¶ 29 The court noted, however, that M.C.'s testimony was not standing alone, because defendant admitted to touching her breast. It noted that defendant, in his written statement, acknowledged touching M.C.'s chest. The court then stated:

> "Now, what does he mean when he says he touched her chest? I would propose that if someone says I touched her chest to get her in the mood, a lot of people would interpret that as the breast. There are other parts of the chest besides the breast. There's no question of that. But what did the defendant mean? And it really does come down to ultimately the credibility of Detective Garofalo when he says that the defendant indicated he touched [M.C.]'s breast and used the word breast and chest interchangeably.
>
> The Court finds Detective Garofalo credible; and it makes sense in the context of the defendant writing, I touched her chest to see if I could get her in the mood. And I

> think that I can accept the explanation of the victim in terms of why she didn't want to say he touched the breast in light of everything that happened, the trauma of it and the fact that she's talking to males. I do have to point out, she does say ultimately in her statement that he touched her chest."

¶ 30 The court sentenced defendant to nine years' imprisonment for home invasion and a concurrent three-year term for criminal sexual abuse, with the residential burglary conviction merging into that for home invasion. Defendant timely appeals.

¶ 31 Defendant first contends that he was not proved guilty beyond a reasonable doubt of criminal sexual abuse and, by extension, home invasion. He argues that the indictment alleged that he committed criminal sexual abuse by touching M.C.'s breast and that criminal sexual abuse was the predicate offense for home invasion. However, he maintains, the evidence that he touched M.C.'s breast was shaky at best.

¶ 32 He contends that it was only after repeated questioning by the prosecutor that M.C. testified that he touched her breast. Further, he contends, she never told the investigating officers that he touched her breast, which led the trial court to observe that her testimony standing alone was insufficient to prove defendant's guilt beyond a reasonable doubt.

¶ 33 Defendant contends that Garofalo's testimony about defendant's statements is similarly flawed. According to defendant, his written statements do not use the word "breast." Garofalo merely testified that defendant admitted to touching M.C.'s breast, and he explained the apparent discrepancy with the written statements by explaining that defendant used the words "breast" and "chest" interchangeably.

¶ 34 It is not our function to retry defendant. See *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). Rather, it is the trier of fact's function to judge the witnesses' credibility, resolve

conflicts in the evidence, and draw conclusions based on all the evidence. *People v. Titone*, 115 Ill. 2d 413, 422 (1986). We will not substitute our judgment for that of the trier of fact on these matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). On review of a guilty verdict, we ask only whether any rational trier of fact could have reached the same conclusion when viewing the evidence in the light most favorable to the prosecution. *Id.*

¶ 35 Moreover, the trier of fact is free to accept or reject as much or as little of a witness's testimony as it pleases. *People v. Logan*, 352 Ill. App. 3d 73, 80-81 (2004). The conviction will stand if all of the evidence taken together reasonably satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 36 Here, M.C. testified that defendant touched her breast, and defendant, according to Garofalo, admitted doing so. The trial court was aware of all the evidentiary infirmities that defendant mentions. It acknowledged that M.C.'s reluctance to say that defendant touched her breast meant that her testimony alone was insufficient to prove defendant's guilt beyond a reasonable doubt (although it apparently accepted her explanation that she was embarrassed by the incident and was reluctant to talk about it). The court found credible, however, Garofalo's testimony that defendant admitted touching her breast. The court further accepted Garofalo's explanation that, although the word "chest" appears in defendant's written statements, defendant used the words interchangeably. Also, the court further noted that, given defendant's admission that he touched M.C. in the hope of getting her in the mood to have sex, it was logical that he touched her breast rather than some other area that could be generally described as part of her chest.

¶ 37 Defendant further contends that the State failed to prove that any touching was for purposes of defendant's sexual gratification. See 720 ILCS 5/11-1.50(a)(2) (West 2014). We disagree.

¶ 38 To obtain a conviction of criminal sexual abuse, the State need not present direct evidence to prove that the act was committed for purposes of sexual gratification. *People v. Kolton*, 347 Ill. App. 3d 142, 150 (2004). Here, viewed in the light most favorable to the State, the evidence showed that defendant entered M.C.'s home in the early morning hours. As the trial court noted, he entered stealthily so as not to wake her parents or the family Rottweiler. He touched M.C.'s breast under her clothing and tried to pull down her pants. When she asked him who he was, he gave one or more false names. Most significantly, Garofalo testified that defendant said that he wanted to get her in the mood to have sex.

¶ 39 Defendant argues that his written statements are inconsistent with Garofalo's testimony about his intent. As the trial court noted, defendant's written statements seem designed to minimize his culpability. The court found more credible Garofalo's testimony about defendant's oral statements. In any event, while the meaning of defendant's written statement that he touched M.C. on her chest "to see if she wakes up and gets in the mood to hang and kick it" is obscure, it is not necessarily inconsistent with his oral statement that he wanted to get M.C. in the mood for sex. Thus, the State proved that defendant's touching of M.C. was intended for his sexual gratification.

¶ 40 Defendant next contends that he was not guilty of residential burglary, because the State failed to prove that he "remained" in M.C.'s home for an illegal purpose as the indictment charged. He argues that the State's theory, with which the trial court agreed, was that he *entered* the home with the intent to commit criminal sexual abuse. Accordingly, he contends, he should

have been charged under a theory of unlawful entry. See 720 ILCS 5/19-3(a) (West 2014). He further argues that, if we assume that he formed his criminal intent after he entered the house, the evidence showed that he left immediately after M.C. woke up and began screaming.

¶ 41 "A person commits residential burglary when he or she knowingly and without authority enters or knowingly and without authority remains within the dwelling place of another, or any part thereof, with the intent to commit therein a felony or theft." *Id.* Thus, one can violate the statute in two ways: by unlawfully entering a residence or by unlawfully remaining within the residence with the intent to commit a felony or theft. *People v. Dillavou*, 2011 IL App (2d) 091194, ¶ 9. The fallacy of defendant's argument, though, is that the two alternative provisions are not mutually exclusive.

¶ 42 As defendant correctly notes, the "without authority remains" provision of the residential burglary statute is meant to cover the situation where one enters a home lawfully and innocently but, after entering, forms the intent to commit a theft or felony. Thus, in *Dillavou*, we said, "[A] defendant is guilty of residential burglary if he remains in the home of another with the intent to steal. That is, a defendant is guilty of residential burglary if, while inside a house in which he has the authority to be, he forms the intent to commit a theft therein." *Id.* ¶ 12. The second statement applied to the specific facts of the case. But the more general first statement is also true, even when the entry was unlawful.

¶ 43 In *Dillavou*, the defendant was doing construction work in a home when he stole a red pouch containing a camera. We assumed that he formed the intent to steal only after he saw the red pouch in a readily accessible location. (We rejected the defendant's proffered explanation that he believed the red pouch contained a tape measure.) However, we did not suggest that the defendant's conviction would have been reversed had there been evidence that he intended to

commit a theft before he entered the residence. A defendant can both enter a residence intending to commit a felony or theft and remain inside with the same intent, for at least some time. Defendant did exactly this.

¶ 44 Defendant's final contention is that, under the one-act, one-crime rule, he may not be convicted of both home invasion based on criminal sexual abuse and criminal sexual abuse. A defendant may not be convicted of more than one offense based on the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977).

> "Decisions following *King* have explained that the one-act, one-crime doctrine involves a two-step analysis. [Citation.] First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper." *People v. Miller*, 238 Ill. 2d 161, 165 (2010).

¶ 45 *Miller* held that the "abstract elements" test applies when the issue is whether one charged offense is a lesser included offense of another. *Id.* at 173. Under that approach, we compare the statutory elements of the two offenses. If all of the elements of one offense are included within the other offense, and the first offense contains no element not included in the second offense, the first offense is a lesser included offense of the second. *Id.* at 166. By contrast, the "charging-instrument" approach is used to decide whether an *uncharged* offense is a lesser included offense of a charged offense. Under that approach, the court looks to the charging instrument to see whether the description of the greater offense contains a "broad foundation" or "main outline" of the lesser offense. (Internal quotations marks omitted.) *Id.*

¶ 46 Defendant argues that he may not be convicted of both home invasion based on an intent to commit criminal sexual abuse and of the predicate felony. He acknowledges, however, that in *People v. Bouchee*, 2011 IL App (2d) 090542, we held that the defendant could be convicted of both criminal sexual assault and home invasion based on criminal sexual assault. *Id.* ¶ 10. We held that, under the abstract-elements test, it was possible to commit home invasion without committing criminal sexual assault, as other offenses may serve as the predicate for home invasion. Even limiting the analysis to the subsection under which the defendant was charged, it was possible to commit home invasion without committing criminal sexual assault. *Id.*

¶ 47 Defendant argues that *Bouchee* is distinguishable because, in this case, the predicate felony was criminal sexual abuse rather than criminal sexual assault; but that is a distinction that makes no difference. In *Bouchee*, we held that it was possible to commit the offense of home invasion without necessarily committing the offense of criminal sexual assault (*id.*); so, too, is it possible to commit home invasion without necessarily committing criminal sexual abuse.

¶ 48 To the extent defendant relies on *People v. Gillespie*, 2014 IL App (4th) 121146, we find his reliance unpersuasive. In *Gillespie*, the defendant was convicted of aggravated criminal sexual assault and armed robbery; the criminal sexual assault charge was aggravated specifically because the defendant committed the offense during the course of the armed robbery. *Id.* ¶ 4. The Fourth District held that this was an impermissible one-act, one-crime violation and distinguished our decision in *Bouchee* on the ground that the main offense in *Bouchee* was home invasion, while the main offense in *Gillespie* was aggravated criminal sexual assault. *Id.* ¶ 18. Defendant here entirely ignores the distinction that court in *Gillespie* found significant. In any event, we note that defendant relies on additional, later language in *Gillespie* which disagreed with our analysis in *Bouchee* (as well as with the Third District's decision in *People v.*

Fuller, 2013 IL App (3d) 110391, which followed *Bouchee*). To the extent *Gillespie*'s criticism of *Bouchee* is not *dicta*, we certainly recognize and respect the Fourth District's decision to decline to follow our approach. See generally *In re Marriage of Gutman*, 232 Ill. 2d 145, 150 (2008) (explaining that appellate panels are of equal stature and lack the authority to overrule one another). That said, we respectfully decline to follow *Gillespie* and continue to adhere to our holding in *Bouchee*.

¶ 49 In sum, the judgment of the circuit court of Du Page County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 50 Affirmed.