2011 IL App (3d) 100667-U

Order filed September 27, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICK VINSON, Defendant-Appellant.	) Appeal from the Circuit Court) of the 10th Judicial Circuit,) Tazewell County, Illinois,)) Appeal No. 3-10-0667) Circuit No. 09-CF-488)) Honorable) Richard E. Grawey,) Judge, Presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's arguments concerning improper closing arguments and the chain of custody of a DNA sample were forfeited because they were not properly preserved for review. The State's alleged failure to tender a statement claiming that the defendant found the victim to be physically attractive was not prejudicial. In addition, the trial court did not abuse its discretion in allowing a sexual assault nurse examiner to testify as an expert witness. Finally, there was sufficient evidence for a rational trier of fact to find the defendant guilty beyond a reasonable doubt.

¶ 2 After a bench trial, the defendant, Rick Vinson, was convicted of two counts of criminal sexual assault (720 ILCS 5/12-13(a)(1), (a)(2) (West 2008)) and sentenced to a total of eight

years in the Department of Corrections. On appeal, the defendant argues that numerous errors below deprived him of the right to a fair trial, and that he was not proven guilty beyond a reasonable doubt. We affirm.

¶ 3 FACTS

¶ 4 The defendant was charged by way of indictment with four counts of criminal sexual assault that occurred on February 1, 2009. Count 1 alleged that the defendant, by the use of force or threat of force, knowingly committed an act of sexual penetration upon E.M. in that he placed his penis in her vagina. Count 2 alleged that the defendant put his penis in the vagina of E.M. while she was unable to give knowing consent. Count 3 stated that the defendant placed his finger in the vagina of E.M. by the use of force or threat of force, and count 4 alleged that the defendant put his finger in her vagina when she was unable to give knowing consent.

¶ 5 Prior to trial, the defendant filed a motion to quash a search warrant and to suppress any evidence recovered under the warrant. The evidence at issue was a sample of the defendant's deoxyribonucleic acid (DNA). The motion to quash the search warrant was granted because the warrant was executed more than 96 hours after it was issued. However, the defendant was ordered to submit a buccal standard for DNA analysis.

¶ 6 At trial, E.M. testified first for the State. She stated that on the night of the incident she was out at a bar drinking with some friends. E.M. testified that she started drinking at about 7:30 p.m. at a bar in Morton, Illinois, and had between four or five mixed drinks. She then went to a second bar, and had four or five more drinks. E.M. and her friends stayed at the bar until it closed at 2 a.m.

¶ 7 After the bar closed, E.M. and her friends went to the apartment of Jarrett Pine, who lived

approximately five minutes away. E.M. testified that Pine, Katy Miller, Trent Blunier, and other people she did not know all came to the apartment. One of the people that she did not know was the defendant.

¶ 8 E.M. stated that she was at Pine's apartment for about an hour before she began drinking again. During that time, she went out to the garage to see what kind of alcohol was available, because Pine kept his alcohol in the garage. The defendant accompanied E.M. out to the garage, and they had a conversation about the different types of alcohol. E.M. returned to the apartment and someone mixed her a drink, but she only took a sip of it because it was too strong. The defendant then handed her a second drink because she did not like the first one. E.M. testified that she had about two or three sips of that drink, and then she began feeling different. Although she had not felt very intoxicated up until that point, she became angry, started yelling, and wanted to fight. She also started to feel nauseous, and she was no longer steady on her feet.

¶ 9 At this point in the night, E.M. decided to lie down on the couch in the living room. She was only on the couch a couple minutes before she had to run to the bathroom and vomit. While she was in the bathroom, Miller and the defendant were with her. Miller left to go get some water, and when she returned the door was closed. Miller began pounding on the door because it was locked. The defendant and Miller began arguing because the defendant said he was an emergency medical technician (EMT) and could take care of E.M., while Miller stated that she was E.M.'s friend and she should be the one taking care of her. E.M. passed out in the bathroom.

¶ 10 When E.M. woke the first time, she was lying on the couch, and Miller and the defendant were talking. Miller eventually went upstairs to go to sleep. E.M. passed out again. The next time she awoke, she was flipped over. Her face was in the back of the couch, and her arms over

her head. There was a blanket over her face. E.M. felt someone unbuckling her belt and pulling her pants and underwear down past her knees. The person then pulled her right leg up and began unzipping his pants. The perpetrator tried to put his penis inside her, but he was not in the right area. E.M. said she tried to scream and fight, but she could not move or make any noise. She said the person tried a couple more times before pulling her underwear and pants back up.

¶ 11 E.M. blacked out again, and when she awoke her pants and underwear were once again pulled down. She felt two fingers go inside her vagina and pull out a tampon. The perpetrator then put his penis inside E.M. and assaulted her. When he finished, he put E.M.'s tampon back in, pulled her underwear and pants back up, and kissed her on the forehead. E.M. said she did not open her eyes during the assault because she did not have control over her body, and would be unable to defend herself in the event of an attack.

¶ 12 The next morning, E.M. went home to her apartment and changed tampons. She also told her friend Brenna McDermott about the assault. McDermott took E.M. to the hospital, and E.M. was examined by a nurse, Whitney Clark, and a doctor, Richard Castillo. During the examination, E.M. was asked to take a urine test. She took out her tampon, wrapped it in paper towels or toilet paper, and put it in the garbage can in the bathroom. E.M. returned to the hospital later that afternoon to do the sexual assault kit.

¶ 13 On cross-examination, E.M. admitted that she gave a statement to the chief of police on February 7, 2009. She further admitted that in that statement she did not mention two separate assaults.

¶ 14 Miller testified that she had been best friends with E.M. since the second grade. Miller stated that after the bar closed at 2 a.m., she and E.M. went to Pine's apartment. At that time,

E.M. was "buzzed" but not intoxicated. During the party, Miller noticed that E.M. had disappeared for approximately 30 to 45 minutes, and she found her in the garage with the defendant.

¶ 15 At some point, E.M. became sick. Miller testified that the defendant went into the bathroom with E.M. Miller remained in the kitchen for a while but eventually went to check on her. When she went to the bathroom, she discovered that the door was locked. She banged on the door, and the defendant said that E.M. was fine and that he was an EMT. Miller insisted on coming in, and the defendant opened the door. Miller checked on E.M. and then went back to the kitchen, telling the defendant to leave the door open. Several minutes later, another party guest, Chelsie Ackley, left, followed by Blunier. Miller went back downstairs and, with the help of the defendant, moved E.M. to the couch and covered her with a blanket.

¶ 16 Miller further testified that Pine left the apartment while she was still in the bathroom, leaving her, E.M., and the defendant as the only people in the apartment. Miller and the defendant talked for approximately 45 minutes while E.M. was passed out on the couch. During that conversation, the defendant indicated that he was not physically attracted to E.M. Miller then went upstairs to go to sleep.

¶ 17 Blunier testified that he was at the second bar when E.M. arrived. He stated that he used to work at that bar as a bartender, and that he knew the defendant as an acquaintance and customer. As Blunier and the others were discussing going to Pine's apartment, the defendant asked if he could come, and Blunier invited him.

¶ 18 At the apartment, Blunier mixed E.M. a drink, which she gave back to him because it was too strong. Blunier went out on the patio to smoke, and the defendant accompanied him. They

had a conversation about E.M., and the defendant asked him "what her sexual relationship was with any other man." They proceeded to talk about how attractive E.M. was.

¶ 19 Shortly after, Blunier saw E.M. head for the bathroom. Blunier saw the defendant and Miller place E.M. on the couch and cover her with a blanket. He then left the party shortly after Ackley, leaving Pine, Miller, E.M., and the defendant at the apartment.

¶ 20 On his way home, Blunier received a call from Ackley stating that she had slid into a ditch. Blunier turned around to meet up with her, but also slid into a ditch. Pine then had to pull Ackley out of the ditch. Pine and Ackley then attempted to pull Blunier out of the ditch, but in the process they became stuck and had to call two other people to assist them. The whole process took several hours to complete.

¶ 21 After he was pulled from the ditch, Blunier stopped at a store to get batteries for his flashlight because it had died during the night. He returned to Pine's apartment, and noticed Ackley in Pine's truck and Pine in the garage. He "went to the back door and in passing I saw [Pine] in the garage and he mentioned something about the door being locked."

¶ 22 Pine testified that after E.M. was placed on the couch, Ackley and Blunier left the party. Approximately five minutes later, he received a call from Ackley that she had slid into a ditch. He then called Blunier, and he left the apartment.

¶ 23 After pulling Ackley out of the ditch, Pine drove Ackley's car back to his apartment, and Ackley drove his truck. Pine wanted to grab a jacket before pulling Blunier out of the ditch. He testified that he had difficulty getting back into his apartment because the back door was locked, and this was unusual because he never locks it. Pine stated he never locked his door because he locked himself out the first night he stayed in that apartment.

¶ 24 Pine testified that he had beaten on the door until the defendant opened it. Pine then got his coat and ran back out. He was in the apartment for less than a minute. Ackley also testified that Pine was in the apartment for about a minute.

¶ 25 Officer Robert Abel testified that he accompanied Chief James Edwards to the defendant's residence to execute a search warrant for the defendant's DNA. The DNA obtained from the defendant was eventually suppressed, but a new buccal swab was collected for testing. Chief Edwards testified to collecting the buccal swab from the defendant, but he did not make an in-court identification of the defendant. The State moved to admit the buccal swab into evidence, and the defendant did not object.

¶ 26 Stacie Speith testified as an expert in Y-Short Tandem Repeat (Y-STR) analysis. Speith explained that Y-STR analysis targets only the Y chromosome, and it is a useful test to use when there is a sample that has a lot of female DNA but a only a small amount of male DNA because it ignores all the female DNA and only focuses on the male DNA. She stated that the analysis looks at the 11 locations on the Y chromosome.

¶ 27 Speith testified that she performed a Y-STR analysis on a tampon that was submitted for analysis. She was able to obtain 9 of the 11 locations from the sample. She then compared it to the standard submitted by the defendant, and those 9 locations were consistent with the same locations in the defendant's sample. She found that the same sample would occur in approximately 1 in 1,800 unrelated Caucasian males. She concluded that the defendant could not be excluded as the source of DNA on the tampon, but she did not positively identify the defendant as the source of DNA.

¶ 28 Clark testified as the nurse who examined E.M. and also as a sexual assault nurse

examiner (SANE). Clark testified that she had a bachelor's degree in nursing and had worked as a nurse for almost five years. She explained that in order to become a SANE nurse, she had to attend a 40-hour class and do a number of clinical hours within 12 months. Over the defendant's objection, the court allowed her to testify as an expert witness, stating "she certainly has experience and training that are beyond the experience and training of a lay person and certainly beyond the training and experience of this Court."

¶ 29 During her testimony, Clark testified about rape trauma syndrome, but did not know what the Diagnostic and Statistical Manual, Fourth Edition, Text Revision (DSM 4 TR) was. She testified that patients who experience rape trauma syndrome will not remember details about the traumatic events that happened to them. She opined that it was common for sexual assault victims to remember bits and pieces about the trauma they endured, and that their memory of the event would improve over time.

¶ 30 Clark further testified that someone who had been administered gamma hydroxybutyrate (GHB) would possibly experience, nausea, vomiting, loss of muscle control, headaches, and problems with their vision. She stated that E.M.'s symptoms were consistent with someone who had been administered GHB.

¶ 31 Clark also explained that she examined E.M. both times E.M. came to the hospital. She stated that E.M. went to the bathroom to give a urine sample, and when she came back into the exam room E.M. had her tampon wrapped in toilet paper. E.M. asked what she should do with it, and Clark told E.M. to throw it away. Later, when E.M. came back to do the rape kit, Clark went to the exam room and removed the tampon from the garbage can. Clark placed it in a brown paper bag and gave it to Chief Edwards. The State then moved to admit the tampon into

evidence, and the defendant offered no objection. However, the defendant did raise the chain of custody issue during closing arguments in an effort to establish reasonable doubt.

¶ 32 The defendant's witness, Dr. Barbara Llewellyn, testified as an expert witness in Y-STR and DNA analysis. She stated that, based on her experience, all she could conclude from the analysis was that the defendant could not be excluded as the source of DNA collected from the tampon. She also agreed with the steps Speith took in her analysis.

¶ 33 After the presentation of evidence, the trial court found the defendant guilty of all four counts. In its oral order, the court stated that E.M. was an entirely credible witness, and that it was obvious she was unable to give knowing consent to the acts that were perpetrated upon her. The court also explained that the locked door was "indicative of someone wanting to have a little bit of time before someone went through that door." The DNA evidence was considered to the extent that the defendant was not excluded as the source of male DNA on the tampon. Regarding the chain of custody, the court found "the testimony sufficient for that chain of custody to be made and ha[d] no problem with that."

¶ 34 The court further explained that it gave little weight to Clark's testimony regarding GHB and rape trauma syndrome because a finding that the defendant had administered GHB to E.M. was not required, and because people "recollect memory sometimes in pieces over time." The court stated that recovering memory "bit by bit" was no different than how people recollect memories in general.

¶ 35 At sentencing, the trial court merged count 1 into count 3, and count 2 into count 4. The defendant was sentenced to four years consecutive on each of the two counts. He appealed.

¶ 36 ANALYSIS

¶ 37 On appeal, the defendant argues: (1) the State failed to establish a chain of custody for the admission of DNA evidence; (2) the State committed a discovery violation by failing to tender statements of the defendant; (3) the State made improper arguments during closing argument; (4) the State improperly introduced evidence obtained from the quashed search warrant; (5) the trial court erred by allowing the State to introduce expert testimony from a nonexpert; and (6) the defendant was not proven guilty beyond a reasonable doubt. We address each argument in turn.

¶ 38 A. Chain of Custody

¶ 39 The defendant alleges that the State failed to establish a sufficient chain of custody for the DNA material collected in this case. Specifically, the defendant argues that the tampon was never connected to E.M. during trial, and she was never asked to identify it. In addition, the defendant argues that the State failed to properly connect DNA recovered from the tampon to the defendant because Chief Edwards did not do an in-court identification of the defendant when he testified to collecting the buccal swab from the defendant.

¶ 40 We find that this argument has been forfeited. It is well settled that a defendant must object at trial, as well as raise the issue in a posttrial motion to preserve any alleged error for review. *People v. Woods*, 214 Ill. 2d 455 (2005). Although the defendant raised the chain of custody issues in his posttrial motion, he did not object to the admission of either the tampon or the buccal swab into evidence. In addition, the defendant does not argue that we should consider this argument under the plain error test.

¶ 41 We note that the defendant did raise the chain of custody issues in his closing argument; however, the objection was not timely and therefore waived. If the defendant had made a timely

and specific objection to the foundation of the DNA evidence, the State would have had a reasonable opportunity to correct any deficiency in the foundation of proof. *Id.* Instead, the defendant did not raise an objection to the chain of custody until closing argument, thus depriving the State of the opportunity to lay a sufficient foundation, if, indeed, the foundation was insufficient. Therefore, we hold that this issue was not adequately preserved for our review.

¶ 42 B. Discovery Violation

¶ 43 The defendant next alleges that the State committed a discovery violation by failing to tender a statement that the defendant made to Blunier, specifically that the defendant found E.M. attractive. However, even if a discovery violation occurred, the defendant must still demonstrate that he was prejudiced by the statement. *People v. Lovejoy*, 235 Ill. 2d 97 (2009). The defendant argues that he was prejudiced because the statement contradicted an earlier statement by Miller that the defendant did not find E.M. physically attractive. He claims that he prepared for trial based on the assumption that he would not have to counter any motive of physical attraction.

¶ 44 The record demonstrates that, even assuming that a discovery violation occurred, the defendant was not prejudiced by the State's failure to tender the statement. The trial court considered the defendant's attraction, or lack thereof, to be "a peripheral issue if there ever was one." The trial court also stated that if the defendant was not physically attracted to E.M., he could have taken the stand in that regard. The defendant argues that this suggestion violated his right to remain silent and not testify. U.S. Const., amend. V.

¶ 45 In reviewing the trial court's statement, we are convinced that the defendant was not

deprived of any constitutional right. Instead, the trial court was explaining why the defendant was not prejudiced by the failure to receive Blunier's statement before trial. The court simply pointed out that the statement did not unfairly deprive the defendant of his right to testify at trial. The court further explained that "I am saying on the issue of whether he found the victim physically attractive or not, whether you knew about that comment before trial or during trial, the decision you would make would be the same as to whether or not you would put your client on the stand[.]" In other words, the defendant was not prejudiced by the late notice of the statement because he still had sufficient time to decide if he wanted to testify about his lack of attraction to E.M. Certainly, there is no evidence that the trial court considered the defendant's decision not to testify in an unfavorable manner. Accordingly, we find that the trial court's statement was proper and that the defendant was not prejudiced by the State's alleged failure to tender Blunier's statement prior to trial.

¶ 46 C. Closing Arguments

¶ 47 The defendant argues that the prosecutor made improper remarks during closing argument. While the defendant concedes that the statements do not warrant reversal by themselves, he argues that when all of the other errors are combined, reversal is required. We find that we do not need to discuss the statements because the issue was forfeited. Specifically, the defendant failed to object to the statements during closing argument, thus forfeiting the issue. *People v. Agee*, 85 Ill. App. 3d 74 (1980). Moreover, the defendant does not argue that we should consider the issue under the plain error test.

¶ 48 D. Violating Court Order

¶ 49 We do not consider the defendant's fourth argument on appeal because it does not comply

with Supreme Court Rule 341(h)(7) (eff. July 1, 2008). The rule specifies that points not argued in the opening brief are considered waived. *Id.* It is also well-established that "mere contentions, without argument or citation of authority, do not merit consideration on appeal." *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 401 Ill. App. 3d 868, 881 (2010) (quoting *People v. Hood*, 210 Ill. App. 3d 743, 746 (1991)).

¶ 50 In the instant case, the defendant argues that the State introduced evidence from the quashed search warrant over the defendant's objection. The defendant's argument contains a total of three sentences, with one record citation, and one citation to authority. The defendant does not explain what evidence the State improperly used, and he does not argue why the evidence was improper. Accordingly, because the defendant only raises this issue on appeal but does not argue it, we find that this issue has been waived.

¶ 51 E. Expert Testimony

¶ 52 The defendant next contends that the trial court erred by allowing Clark to testify as an expert. The defendant argues that Clark should not have qualified as an expert witness because she did not know of the DSM 4 TR, but nonetheless testified about a psychological disorder and its effect on memory. In addition, the defendant notes that Clark's certification as a SANE nurse is not recognized by the state of Illinois, but instead is a program offered through the Illinois Attorney General's office. A trial court's determination that a witness is qualified to testify as an expert will not be disturbed absent an abuse of discretion. *Alm v. Loyola University Medical Center*, 373 Ill. App. 3d 1 (2007).

¶ 53 An individual will be permitted to testify as an expert if her experience and qualifications afford her knowledge which is not common to lay persons and where such testimony will aid the

trier of fact in reaching its conclusion. *People v. Shinohara*, 375 Ill. App. 3d 85 (2007). There is no precise requirement regarding how an expert acquires skill or experience, and an expert may acquire knowledge through practical experience rather than scientific study, training, or research. *Id.*

¶ 54 In this case, the trial court specifically found that Clark had experience beyond that of an ordinary lay person. Moreover, Clark testified that she had received approximately 40 hours of classroom instruction regarding sexual assault, and that she had to complete a number of clinical hours to fulfill the requirements of her certification. Allowing Clark to testify as a SANE nurse was not an abuse of discretion.

¶ 55 In addition, the defendant's main qualms with Clark's testimony, namely that she was allowed to testify as an expert in rape cases and GHB, was not prejudicial to the defendant because the trial court gave little weight to her testimony on those subjects. The court stated, "GHB is not an issue that needs to be proven beyond a reasonable doubt and the Court makes no finding with regard to whether or not she ingested GHB***[t]he testimony was given little weight in my conclusions." The court also gave little weight to Clark's testimony about sexual assault victims' memories improving over time. Furthermore, Clark was not asked, and did not give, her expert opinion as to whether E.M. had been the victim of sexual assault. Therefore, any "expert" testimony Clark gave was given in the context of treating E.M. See *People v. Taylor*, 409 Ill. App. 3d 881 (2011).

¶ 56 F. Guilty Beyond a Reasonable Doubt

¶ 57 The defendant's final contention is that the evidence was insufficient to prove him guilty beyond a reasonable doubt. We disagree.

¶ 58 Due process requires proof of guilt beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255 (2008). When reviewing a challenge to the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Id.* "Under this standard, the reviewing court does not retry the defendant, and the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence." *Id.* at 272. A conviction will be reversed when there is a reasonable doubt as to the defendant's guilt because the evidence is so unreasonable, improbable, or unsatisfactory. *Id.*

¶ 59 There was more than sufficient evidence to convict the defendant of criminal sexual assault. The trial court first found that E.M. was a credible witness, and that the case depended on her credibility. The credible testimony of one witness is sufficient to support a conviction for criminal sexual assault. *People v. Tigner*, 194 Ill. App. 3d 600 (1990).

¶ 60 The evidence also supports the State's theory that the defendant was the only individual who had the opportunity to commit the acts perpetrated on E.M. The witnesses at trial corroborated one another. Miller, Blunier, and Pine all testified that Ackley, Blunier, and Pine left the apartment in that order. Miller and Pine both stated that the only people left in the apartment after Pine left were Miller, E.M., and the defendant.

¶ 61 Contrary to the defendant's assertion, the testimony about the locked door further corroborates the witnesses' stories. Pine testified that he briefly returned home to get a jacket after pulling Ackley out of the ditch. He drove Ackley's car, and Ackley drove his truck because

it drove better in poor weather. Pine remembered that the door was locked because he never locks his door, and he gave a plausible reason as to why. Ackley testified similarly to Pine, and stated that he had been in the apartment for about a minute.

¶ 62 The defendant states that Blunier testified to the door being locked when he and Pine returned to the apartment prior to eating breakfast, thus contradicting Pine's story. However, this is not an accurate depiction of the testimony. Blunier testified that when he returned to the apartment with Pine, Pine mentioned "something" about the door being locked. Although unclear, Pine could have been referring to the fact that the door was locked when he returned home the first time, and not that the door was currently locked.

¶ 63 Finally, the fact that the DNA evidence did not exclude the defendant as the source of the semen on the tampon is significant, especially when all of the above testimony establishes that the defendant was the only male at the apartment for a sufficient amount of time. Based on the above, we find that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.

¶ 64 CONCLUSION

¶ 65 For the foregoing reasons, the judgment of the circuit court of Tazewell County is affirmed.

¶ 66 Affirmed.