2013 IL App (4th) 110758-U

NO. 4-11-0758

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 2, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Logan County
DENNIS ANDERSON, JR.,	)	No. 09CF108
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas M. Harris, Jr.,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt of two counts of predatory criminal sexual assault, and the trial court did not err in instructing the jury.

¶ 2 In February 2011, a jury found defendant Dennis Anderson, Jr., guilty of two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)). The trial court sentenced defendant to consecutive 15-year prison terms. Defendant appeals, arguing the State failed to prove him guilty beyond a reasonable doubt and the jury received erroneous jury instructions which permitted it to convict defendant of two counts of predatory criminal sexual assault even if the jury found only one act of penetration. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In July 2009, the State charged defendant by an amended information with two

counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)). Count I alleged defendant, who was over 17 years of age, "committed an act of sexual penetration with M.K., who was under 13 years of age when the act was committed, in that said defendant made contact with his penis and the anus of M.K." Count II alleged defendant "committed an act of sexual penetration with M.K. *** in that said defendant made contact with his penis and the vagina of M.K." M.K. was born on April 7, 2005. Both offenses were alleged to have occurred on January 21, 2009.

¶ 5 At defendant's trial in February 2011, M.K. testified she was five years old and attended kindergarten. Bethany Anderson was her babysitter when the incident in question allegedly occurred. M.K. testified the last time she went to Bethany's house she wore pajamas and a pull-up diaper. After she arrived, she went to the couch in the living room to sleep. When asked if anything happened when she was asleep, she said no. After M.K. became upset while testifying, the trial court took an approximate 10-minute break and allowed M.K. to leave the courtroom and go into the trial judge's chambers with the victim witness coordinator to regain her composure. After returning from the break, she was unable to give any testimony about the allegations in question. M.K. testified she talked to a lady in Springfield "in the room with mirrors" about defendant. When asked why she talked to the lady in Springfield about defendant, she replied "[t]hey all wanted to know." She said she was scared to testify. On redirect examination, when asked whether she told a nurse defendant "stuck his weiner in her butt," M.K. responded affirmatively. M.K. testified defendant did this at Bethany's house. When asked to circle on a drawing of a girl where defendant touched her with his penis, she circled the girl's butt and vaginal area. On re-cross-examination, M.K. testified she did not remember defendant

touching her butt or her "kiss-cat" with his penis. (The record reflects both "kiss-cat" and "kitt-cat" were used by counsel and some of the witnesses to denote how M.K. referred to her vaginal area.)

¶ 6 Bethany Anderson testified she was married to defendant. Defendant's nickname was DJ. According to her testimony, defendant and M.K.'s father were cousins. She had babysat M.K. and her infant sister prior to the day of the alleged assaults by defendant. M.K. and her sister arrived at her home on the day in question between 5:35 and 5:40 a.m. Bethany and M.K.'s mother talked for a few minutes before M.K.'s mother left. M.K. went to the couch in the living room. Bethany left the living room to check on her youngest child, who was crying in Bethany's bedroom. M.K. was still on the couch, and defendant went to the restroom to brush his teeth. While in the bedroom, she heard M.K. "not really crying but whimpering." She asked M.K. what was wrong, but M.K. did not say anything. Defendant then told her and M.K. goodbye and left for work. After defendant was gone, M.K. was still not acting right, and Bethany asked her again what was wrong. M.K. said defendant had "stuck his weiner in her butt." After M.K. made this statement, Bethany called her grandfather, a retired sheriff, because she did not know what to do. She then contacted her husband and M.K.'s parents. M.K.'s parents came to the house and took M.K. to the hospital. Bethany testified M.K. had put the pajamas and pull-up diaper she had been wearing in her diaper bag, which she gave to M.K.'s mother.

¶ 7 On cross-examination, Bethany testified defendant was dressed with the exception of his boots when M.K.'s mother dropped M.K. and her sister off at the house. When she left the bedroom after hearing M.K. whimpering, defendant was in the kitchen. She testified she was in the bedroom no more than three or four minutes. M.K. was still in her pajamas and was wearing

a pull-up diaper. When she called defendant after talking to her grandfather, defendant told her to contact M.K.'s parents and get M.K. checked because he wanted the situation "straightened out." Defendant told her he had not done anything to M.K.

¶ 8 Jennifer Kirk, M.K.'s mother, testified she dropped the children off at Bethany Anderson's house between 5:30 and 5:45 a.m. on the day in question. After Bethany contacted her, she and her husband, Kevin Kirk, went to Bethany's house, picked up their kids, and then left. Bethany told Jennifer she had saved the pull-up M.K. was wearing and did not wipe her off. Bethany also told Jennifer to take M.K. to the hospital. The pajamas and pull-up diaper were in the diaper bag which Jennifer took with her when they left. Jennifer testified they took M.K. to the Abraham Lincoln Memorial Hospital (Memorial Hospital) in Lincoln. After M.K. was examined at Memorial Hospital, a nurse named Gretchen asked if they had any evidence with them. Jennifer gave the nurse the clothes M.K. had been wearing.

¶ 9 Gretchen Gleason, a registered nurse at the Memorial Hospital emergency room, testified M.K. was one of her patients. M.K. eventually told her on questioning defendant had stuck his "weiner" in her "butt." Gleason testified she did a sexual assault or rape kit on M.K. Gleason testified M.K. did not say anything about defendant putting his "weiner" in her vaginal area or "kitt-cat."

¶ 10 Dr. Worlali Nutakor, an emergency room physician at Memorial Hospital, treated M.K. on the day of the alleged offenses. M.K. told Dr. Nutakor someone "stuck his weiner in her butt." Based upon his initial visual examination and the age of M.K., Dr. Nutakor decided not to do an invasive examination. Nutakor testified nothing looked unusual during his visual examination.

¶ 11 Dr. Careyana Brenham testified she is a physician at Southern Illinois University Family Medicine and has special training in child abuse and child sexual abuse. She saw M.K. for a medical forensic exam on February 3, 2009, after M.K. was referred by the Sangamon County Child Advocacy Center (CAC). She initially asked M.K. open-ended questions about whether anyone had touched her, hurt her, or made her uncomfortable. M.K. shook her head no. Dr. Brenham then asked her more specific questions, including whether defendant had touched her genitals. She described M.K. as being nervous and not wanting to talk. M.K. shook her head no. Dr. Brenham did not find M.K.'s answers unusual as it is not uncommon for children who have previously disclosed sexual abuse not to want to disclose it to her because they are nervous, uncomfortable, and worried about the physical examination aspect of their visit. Using a colposcope, Dr. Brenham did not see any signs of bruising, tears, irritation, or redness on the outside of the genital area. When she tried to examine the inside of M.K.'s genital area, M.K. became very upset and did not want to proceed with the examination. According to Dr. Brenham, M.K. was very fearful. Dr. Brenham testified she briefly saw the interior genitalia and did not see any signs of trauma. Dr. Brenham could not come to a conclusion whether M.K. had been sexually abused or assaulted. She testified it is normal in cases of sexual abuse to have a normal exam. According to Dr. Brenham, the majority of children seen for sexual abuse exams do not have findings of acute or residual trauma.

¶ 12 Tracy Pearson, a forensic interviewer with the CAC, testified she interviewed M.K. on January 27, 2009, six days after the alleged assault, at the interview room at the CAC in Springfield. The room contains a mirrored system where the interview can be observed by people outside the room. The State introduced a recording of the interview, which was played

for the jury. During the interview, M.K. said defendant tried to put his "weiner" in her "butt." M.K. said she was on her "tummy," and DJ pulled her pull-up diaper all the way down and then pulled it up. She also said DJ had boxers on and pulled them down too. She showed Pearson where on her body DJ put his "weiner" and said he first put it in her "butt" and then in her "kiss-cat." She also said when Bethany came out, she (M.K.) was shaking. M.K. also said she was crying and shaking when she was lying on her stomach and DJ was trying to stick his "weiner" in her "butt."

¶ 13 Detective Paul Adams of the Lincoln police department testified he interviewed defendant at the Lincoln police department. Illinois Department of Children and Family Services (DCFS) caseworker Diana Humberg was also present for the interview. Defendant denied having any contact with or touching M.K. in any way. Defendant told the police he was in the kitchen when he heard M.K. whimpering in the living room. Defendant told Adams there was no reason why his deoxyribonucleic acid (DNA) would be on the vaginal or anal areas of her body or her pull-up diaper.

¶ 14 Aaron Small, a forensic scientist 3 with the Illinois State Police forensic laboratory in Springfield, tested the pull-up diaper for the presence of semen. He identified three stains on the pull-up he wanted to test. One of the stains tested negative for semen. The other two areas indicated the presence of semen. However, he did not conclusively identify it as semen because he could not identify any sperm cells. He also performed tests for the presence of semen on the vaginal, anal, and oral swabs that were part of the sexual assault kit. The testing was indicative of semen but no sperm was identified.

¶ 15 Cory Formea, also a forensic scientist 3 specializing in forensic biology and DNA

analysis at the Illinois State Police forensic science laboratory in Springfield, performed DNA testing on the stains found on the pull-up diaper. Defendant could not be excluded as the source of a minor male DNA stain found in M.K.'s pull-up diaper. Formea testified on 10 out of 13 areas analyzed he could say with confidence that the minor male profile was present. The "profile would be expected to occur in one and one trillion blacks, one in 46 billion whites, and one in 51 billion hispanics unrelated to the individual." When asked how the fact defendant and M.K.'s father were cousins would affect the statistical analysis, Formea testified:

> "It would not change the actual statistical results. We would expect that a related individual to [defendant] would share alleles with [defendant], but he would not have the same profile as [defendant] and thus the profile would not be—his profile and the cousin's profile would not change the statistical evaluation because I'm not only giving you the probability of finding this profile that I identified in the population. I'm not saying you know [defendant's] profile would be found this often. I hope I explained that well enough."

Formea also testified the stains were indicative of semen but not conclusively semen because of the lack of sperm.

¶ 16 Gilbert Birk testified he was Bethany Anderson's grandfather. Bethany called him on the morning of the alleged assaults. Birk told Bethany to contact defendant and M.K.'s parents. Birk and his wife went to Bethany's house after receiving the phone call. According to Birk, M.K. did not seem upset when he got to Bethany's house. However, Birk testified M.K.

told his wife defendant "stuck his weiner in her butt."

¶ 17 Defendant testified he clocked into work on the day in question at 5:58 a.m. He testified it took between 8 and 10 minutes to drive to his workplace. Defendant denied touching M.K. the morning in question. He also stated he wears boxer shorts every day.

¶ 18 The jury found defendant guilty of both counts of predatory criminal sexual assault of a child.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 A. Sufficiency of the State's Evidence

¶ 22 Defendant argues the State's evidence was insufficient to convict him of two counts of predatory criminal sexual assault because he only had several minutes to commit the two alleged assaults on M.K. in the living room of his house with his wife not very far away in a bedroom with their infant child. According to defendant, "there was simply not time for the assault to occur."

¶ 23 When reviewing a challenge to the sufficiency of the evidence, a court of review will not disturb a verdict if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999). It is not the function of this court to retry a defendant when defendant raises a challenge to the sufficiency of the evidence to convict. The testimony of a single witness is sufficient to convict, even when contradicted by the defendant, if the testimony is positive and the witness credible. *People v. Anderson*, 325 Ill. App. 3d 624, 634, 759 N.E.2d 83, 92 (2001). The State does not have to

corroborate a victim's testimony with physical or scientific evidence in order to convict a defendant. *People v. Willer*, 281 Ill. App. 3d 939, 948-49, 667 N.E.2d 708, 715 (1996).

¶ 24 Defendant argues it was not possible for him to have committed the two counts of predatory criminal sexual assault of a child. In his brief, defendant states:

> "According to the [S]tate, *** in the three or four minutes Bethany was absent, [defendant] would have had to disrobe so that M.K. could see his boxer shorts. He would have had to pull down M.K.'s pajamas and pull-up. He would have had to penetrate both her anus and her vagina and ejaculate, as the state believes it discovered semen on the pull-up and the vaginal and anal swabs. [Defendant] would then have had to dress, and pull M.K.'s pajamas and pull-up back into place. This simply is not a plausible scenario for so short a period of time."

The jury obviously disagreed. A rational trier of fact could have found defendant was able to commit the two offenses during the period of time in question. No evidence was introduced to show defendant actually ejaculated during the two assaults.

¶ 25 Defendant also argues M.K. gave inconsistent statements. However, a jury can find a witness credible despite inconsistent testimony and prior statements. See *People v. Booker*, 224 Ill. App. 3d 542, 550, 585 N.E.2d 1274, 1280 (1992). As the State points out in its brief, the jury could have easily determined the inconsistencies in M.K.'s statements and testimony were the result of her age, embarrassment, and reluctance to talk about the sexual abuse.

¶ 26 Defendant also points out the doctors who examined M.K. found no visible trauma to her rectum, anus, or vagina. However, Dr. Brenham testified this did not mean she was not assaulted. According to Dr. Brenham's testimony, a lack of visible trauma is quite normal when a child has made an allegation of sexual abuse. Further, defendant was only charged with making contact with his penis and M.K.'s anus and vagina.

¶ 27 In addition to the detailed pretrial statements and the testimony of M.K. with regard to the charged offenses, the State presented evidence regarding stains on M.K.'s pull-up diaper. Preliminary testing on two of the stains indicated the possible presence of semen. A "P30" protein test indicated the presence of semen, although not conclusively because no actual sperm was found. High levels of "P30" proteins are found in semen, amniotic fluid, and breast milk. Jennifer Kirk testified M.K.'s baby sister was on formula on January 21, 2009, the date of the offense.

¶ 28 The vaginal and anal swabs done on M.K. also indicated the presence of semen, although no sperm was identified. According to defendant, "content to conclude that the stains could be semen, the state experts did not attempt to prove that other bodily fluids were not the source of the stains." However, as the State rightfully points out in its brief, the jury could certainly consider the indicated presence of semen in M.K.'s diaper as supporting M.K.'s statement defendant put his penis on the vaginal and anal areas of her body.

¶ 29 The State also presented DNA evidence. The State's DNA expert performed tests on the stains from the pull-up diaper, the vaginal swabs, and the anal swabs. The stains contained M.K.'s DNA and male DNA. Defendant could not be excluded as the source of the male DNA. The State presented evidence the male DNA profile found by the State's expert on

the pull-up diaper could be expected to occur in one in one trillion blacks, one in 46 billion whites, and one in 51 billion hispanics unrelated to the individual. During its direct examination of its expert witness, the State and the expert had the following exchange:

> "[THE STATE:] When you indicated it was for unrelated, in this case if the minor's, the alleged victim [M.K.'s] father and [defendant] are related as cousins, how does that affect your statistical analysis?
>
> [EXPERT WITNESS:] It would not change the actual statistical results. We would expect that a related individual to [defendant] would share alleles with [defendant], but he would not have the same profile as [defendant] and thus the profile would not be—his profile and the cousin's profile would not change the statistical evaluation because I'm not only giving you the probability of finding this profile that I identified in the population. I'm not saying you know [defendant's] profile would be found this often. I hope I explained that well enough."

Defendant argues the probabilities presented by the State are questionable because the State's expert testified those probabilities were for unrelated individuals but M.K.'s father is defendant's cousin. While the expert's testimony was somewhat confusing, the expert recognized he might not be explaining himself very well. However, defendant's trial counsel did not follow up with any additional questions on this topic to clarify the expert's testimony. Regardless of any confusion caused by the expert's testimony regarding statistical probabilities, the expert only

testified defendant could not be excluded as the source of the DNA. The expert did not testify defendant's DNA exactly matched the DNA found in the pull-up diaper.

¶ 30 Defendant further argues his DNA could have contaminated M.K.'s pull-up diaper in his home without him committing the sexual assaults in question. While this is hypothetically possible, this would not explain away the State's evidence the stains in M.K.'s pull-up diaper were indicative of semen.

¶ 31 Defendant also argues "no reasonable person would disrobe to sexually assault a young girl when his wife was mere feet away and might appear at any moment." However, disrobing would not be required to accomplish this assault. Further, no reasonable person would ever sexually assault a toddler, regardless of the proximity of the nearest other potential witness. However, toddlers are still victimized in this manner by people who engage in behavior beyond reason. The jury obviously concluded defendant did not act like a "reasonable person" on January 21, 2009. A rational trier of fact could have reached this conclusion.

¶ 32 Defendant criticizes individual parts of the State's case. However, when the State's evidence is viewed as a whole, the State presented a very strong case against defendant. Defendant had been alone with M.K. when the charged offenses allegedly occurred. M.K. told defendant's wife defendant had sexually assaulted her shortly after the alleged assaults occurred following defendant's departure from home to go to work. While M.K. initially only told defendant's wife defendant put his "weiner" in her "butt," she later stated he had also touched his "weiner" to her "kiss-cat," which she identified as her vaginal area. M.K.'s pull-up diaper contained stains consistent with semen. Further, defendant could not be excluded as the source of DNA from the stains found in M.K.'s pull-up diaper. Defendant's wife testified M.K. was

crying and not acting normal. M.K. told Pearson she was shaking and crying when DJ tried to put his "weiner" in her "butt." The State clearly presented sufficient evidence for a rational jury to convict defendant of both counts of predatory criminal sexual assault of a child.

¶ 33 B. Jury Instruction

¶ 34 Defendant also argues he was denied a fair trial because the elements instruction provided to the jury did not require the jury to find a separate act of penetration to support each count of predatory criminal sexual assault. According to defendant:

> "The elements instruction twice states that the jury has to find 'an' act of sexual penetration. The instruction does not state that the jury has to find a different act of penetration to support each charge. Thus, once the jury found that [defendant] committed one act of penetration, it was fully justified in convicting [defendant] of both counts of predatory sexual assault, as the ages of M.K. and [defendant] were not in dispute."

¶ 35 Without objection, the trial court orally instructed the jury with a modified version of Illinois Pattern Jury Instruction, Criminal, No. 11.104 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 11.104), as follows:

> "A person commits the offense of Predatory Criminal Sexual Assault of a Child when he intentionally commits an act of sexual penetration when he is 17 years of age or older and the victim is under 13 years of age when the act is committed.
>
> To sustain the charge of Predatory Criminal Sexual Assault

of a Child in Count I that the defendant allegedly *made contact with his penis and the anus* of [M.K.], the State must prove the following propositions:

First proposition: That the defendant intentionally committed an act of sexual penetration with [M.K.]; and

Second proposition: That the defendant was 17 years of age or older when the act was committed; and

Third proposition: That [M.K.] was under 13 years of age when the act was committed.

If you find from your consideration of all the evidence that each one of these propositions have been proved beyond a reasonable doubt, you should find the defendant guilty of Count I.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty of Count I.

To sustain the charge of Predatory Criminal Sexual Assault of a Child in Count II that the defendant allegedly *made contact with his penis and the vagina* of [M.K.], the State must prove the following propositions:

First proposition: That the defendant intentionally committed an act of sexual penetration with [M.K.]; and

Second proposition: That the defendant was 17 years of age or older when the act was committed; and

Third proposition: That [M.K.] was under 13 years of age when the act was committed.

If you find from your consideration of all the evidence that each one of these propositions have been proved beyond a reasonable doubt, you should find the defendant guilty of Count II.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty of Count II." (Emphases added.)

¶ 36 The State argues defendant forfeited this issue when he failed to object to the instruction given, failed to request an instruction regarding the number of acts that had to be done, and failed to raise the issue in his posttrial motion. See *People v. Sargent*, 239 Ill. 2d 166, 188-89, 940 N.E.2d 1045, 1058 (2010). In *Sargent*, our supreme court stated:

"Supreme Court Rule 366(b)(2)(i) (155 Ill. 2d R. 366(b)(2)(i)) expressly provides that '[n]o party may raise on appeal the failure to give an instruction unless the party shall have tendered it.' In addition, our court has held that a defendant will be deemed to have procedurally defaulted his right to obtain review of any supposed jury instruction error if he failed to object to the instruction or offer an alternative at trial and did not raise the issue

in a posttrial motion. *People v. Piatkowski*, 225 Ill. 2d 551, 564 [, 870 N.E.2d 403] (2007).

Limited relief from this principle is provided by Supreme Court Rule 451(c) (177 Ill. 2d R. 451(c)), which states that 'substantial defects' in criminal jury instructions 'are not waived by failure to make timely objections thereto if the interests of justice require.' ***

The purpose of Rule 451(c) is to permit correction of grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed. The rule is coextensive with the plain-error clause of Supreme Court Rule 615(a) (134 Ill. 2d R. 615(a))." *Sargent*, 239 Ill. 2d at 188-89, 940 N.E.2d at 1058.

When determining whether something constitutes plain error, we must first determine whether error occurred. *People v. Walker*, 392 Ill. App. 3d 277, 294, 911 N.E.2d 439, 456 (2009).

¶ 37 The State argues the jury was properly instructed. We agree. Our supreme court has stated:

"The function of jury instructions is to convey to the jury the law that applies to the evidence presented. See *People v. Fuller*, 205 Ill. 2d 308, 343[, 793 N.E.2d 526] (2002). Jury instructions should not be misleading or confusing (see *People v. Bush*, 157 Ill. 2d 248, 254[, 623 N.E.2d 1361] (1993)), but their

> correctness depends upon not whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them (*People v. Lozada*, 211 Ill. App. 3d 817, 822[, 570 N.E.2d 737] (1991))." *People v. Herron*, 215 Ill. 2d 167, 187-88, 830 N.E.2d 467, 480 (2005).

Ordinary persons acting as jurors would have understood a conviction on count I required them to find defendant intentionally committed an act of sexual penetration by contacting his penis and the anus of M.K. Further, ordinary persons acting as jurors would have also understood a conviction on count II required them to find defendant intentionally made contact with his penis and M.K.'s vagina. Because we find the trial court did not err in instructing the jury, we need proceed no further with our analysis.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the circuit court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 40 Affirmed.