

No. 1-11-0180

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 16544
)	
DION THOMPSON,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Salone and Justice Sterba concurred in the judgment.

ORDER

- ¶ 1 *Held:* State proved that defendant committed attempted aggravated criminal sexual assault beyond a reasonable doubt and was not required to establish that defendant had the specific intent to cause bodily harm; attempted criminal sexual assault and attempted aggravated criminal sexual assault are not identical and thus their penalties are not unconstitutionally disproportionate; mittimus amended.
- ¶ 2 Following a bench trial, defendant, Dion Thompson, was convicted of aggravated criminal sexual assault (Count I) and attempted aggravated criminal sexual assault (Count VII), then sentenced to respective, consecutive terms of six and four years' imprisonment. On appeal, he contends that his conviction for attempted aggravated criminal sexual assault (Count VII) should be

reduced to attempted criminal sexual assault because the State failed to prove that he acted with the specific intent to cause bodily harm. In the alternative, defendant contends that attempted criminal sexual assault and attempted aggravated criminal sexual assault are the same offense, and therefore, their penalties are unconstitutionally disproportionate. Defendant finally requests that his mittimus be corrected to accurately reflect his pre-sentence custody credit.

¶ 3 The record shows that defendant, who was 17 years old, was charged with, *inter alia*, aggravated criminal sexual assault and attempted aggravated criminal sexual assault of the minor victim, L.C., on August 22, 2008. As to the former charge, the State alleged that defendant knowingly committed an act of sexual penetration on the victim by forcing his penis into her vagina by the use or threat of force and caused bodily harm to her, namely, bruising and redness about the body. In the latter charge, the State alleged that defendant, with the intent to commit the offense of aggravated criminal sexual assault, attempted to make contact with his penis to the victim's mouth by the use or threat of force and caused bodily harm to her (bruising and redness about the body) which constituted a substantial step toward the commission of the offense of aggravated criminal sexual assault.

¶ 4 At trial, the victim, L.C., testified that in August 2008, she was 14 years old, and had run away from her mother's home. On the night of August 22, 2008, she entered an abandoned house, and while there, she heard a window break, ran into the master bedroom and locked the door. Defendant gained entry to the room, and asked her if she would have sex with him. The victim told defendant "no," and he then sat down next to her and kept asking her to have sex with him. She kept telling him no, and he then "got aggressive," and started pulling her clothes off, and choking her with his hands. She fought him, and he punched her in the face.

¶ 5 Defendant eventually pulled off her pants and the shorts she was wearing underneath them, and placed his penis inside of her vagina. She started to cry, and then L.M., who was 13 years old,

entered the room, and defendant asked him, "[d]o you want to get some of this." Defendant then left the room, L.M. climbed between the victim's legs, and when she tried to get him off of her, he placed his penis inside her vagina. Defendant returned to the room, told L.M. and another boy, T.D., to hold her legs, and defendant climbed on top of her and tried unsuccessfully to put his penis in her mouth. While he was making this attempt, one of the other boys told defendant to be careful because she might bite his penis, and defendant responded that he would kill her if she bit him. L.M. then climbed between her legs and placed his penis in her vagina again, and when T.D. and L.M. left the room, defendant stayed "stomping [her], beating [her], and trying to rape [her] some more." Defendant bit her on the breast and placed a hickey on her neck, picked her up, placed her against the wall, pulled out the hair extensions that were glued to her scalp, and kicked her. He then ran out of the room.

¶ 6 The victim dressed and ran out of the house, eventually ending up on a porch on Greenwood Avenue, where defendant and T.D. came up to her. Defendant asked her why was she scared, and she responded, "[l]ook what you just did to me, and you expect me not to be scared." Defendant responded that he was told she was a "hoe" and "easy." She told him it was obvious she was not easy if she fought him and told him no. At that point, a woman, Theresa Black, came to the porch, and the victim went home with Black. The victim told Black what happened, and an ambulance and police were called. At the hospital, the victim told police and the doctors what happened to her, and two days after the incident, she identified defendant in a lineup as the person who "raped and beat" her.

¶ 7 The victim stated that as a result of the incident, she had bruises to her face, neck, arms, legs and back, and patches of her hair were gone. She also identified photographs showing some of the injuries she received: a bite mark to her breast, the carpet burns to her legs and arms, the darkness around her neck, the "knot behind [her] ear where [defendant] stomped" her, and the "leftover tracks

that was in [her] head." The victim further testified that she did not consent to any of the offenders placing their penises in her vagina or her mouth.

¶ 8 Theresa Black testified that a day before the incident, she saw the victim and complimented her on her hair weave. At 4 p.m. on August 22, 2008, she saw the victim sitting on a porch crying with defendant next to her. The victim's hair was damaged in that the "tracks [were] ripped out," and her clothing was ripped and falling off of her. Black asked the victim what happened, but she just stared at her. Black took the victim to her house, and called police because she looked like she was in pain, and an ambulance was called. The victim asked Black to accompany her in the ambulance, and once they were at the hospital, she told Black what had happened to her.

¶ 9 T.D., who was 15 years old, acknowledged that, in exchange for his truthful testimony at trial, he had agreed to plead guilty to criminal sexual assault for the State's recommendation of a four-year prison sentence. He then testified that on August 21, 2008, he saw the victim at the park, but he and defendant did not talk to her. The next day he went to the abandoned house at 9122 South Greenwood Avenue, and was told someone was in there, although he did not know if it was a boy or girl. T.D. later testified that he was told there was a female in the house, and entered with defendant through a broken window. He did not recall if L.M., his younger brother, was with them.

¶ 10 T.D. further testified that they went up the stairs, and that defendant went into a room and shut the door. While defendant was in the room, T.D. heard someone fighting, and went inside where he saw defendant on top of the naked victim trying to force his penis inside her vagina. T.D. observed defendant hit the victim in the face, and try to force his penis in her mouth. When T.D. told defendant not to do that because the victim would bite his penis, defendant responded, "[i]f she bites me, I will kill her." As T.D. was getting ready to leave, he saw his brother L.M. come in and have sex with the victim who was kicking, and held the victim's legs down. At some point, he left

and L.M. followed him out. T.D. denied holding the victim's legs apart so L.M. could penetrate her vagina with his penis. He further testified that after the incident, defendant told him he was going to change his hair and clothes so that he would not look suspicious.

¶ 11 The parties stipulated that semen was identified on the vaginal and anal swabs collected from the victim. The parties further stipulated that the DNA profile identified in the vaginal swabs from the victim matched defendant's DNA profile.

¶ 12 Chicago police detective Shirley Colvin testified that she interviewed T.D. after the incident. T.D. told her that as he entered the room, he observed defendant beating the victim while sitting on her chest.

¶ 13 Defendant testified that he went to the abandoned house with T.D. on the date in question because T.D. told him there was a girl there willing to have sex. They entered the house through an already broken window, and when he entered the bedroom, he saw the victim, whom he had never seen before, and a lot of condoms. The victim agreed to have sex with him, and during the intercourse, the victim never told him no or to stop. Defendant stated that he used a condom when he had sex with the victim, and denied ejaculating.

¶ 14 Defendant further testified that after he had sex with the victim, he left the room, and T.D. entered and had sex with her. Defendant stayed outside the room while T.D. was in there, and when L.M. entered the house, T.D. exited the room, and L.M. entered and had sex with the victim. T.D. and defendant entered the room while L.M. was having sex with the victim and observed that the victim was pushing L.M. away with her hand. Defendant and T.D. then exited the room, but shortly thereafter, they went back in, and L.M. got angry and asked the victim if she wanted to have sex again, but she said, "no." L.M. then struck the victim across the face, and ran behind defendant. The angry victim ran towards him like she was going to hit him, so defendant pushed her away. The three boys then ran out of the house.

¶ 15 Defendant further testified that about 30 minutes after they left the house, he saw the victim sitting on a porch at 92nd Street and Greenwood Avenue. She had her head down and looked sad, and when he asked her what was wrong, she shook her head. About five minutes later, he went home.

¶ 16 Defendant denied punching, hitting or stomping on the victim, or telling a detective that he hit the victim several times. He further testified that he did not rip any hair or weave off of the victim's head, and stated that the photograph of hair shown to him in court was in the room when he entered, and was never on the victim's head. Defendant further stated that T.D. told him that the girl in the house was a "bustout," which meant she would have sex with the whole neighborhood, and he thought the victim was "easy."

¶ 17 Chicago police detective Clifford Martin testified that he interviewed defendant. After he advised him of his rights, defendant told him that as the victim came towards him, he hit her several times and she fell to the ground. Defendant also told the detective that L.M. hit the victim in the face and pulled out her weave, then kicked her in the head before they fled.

¶ 18 At the close of evidence, the court found defendant guilty of aggravated criminal sexual assault (vaginal intercourse) and attempted aggravated criminal sexual assault (attempt to insert penis in victim's mouth). In doing so, the court noted that the three boys learned that there was a "very promiscuous and agreeably so" girl in the abandoned house and went there to check that out. They found the girl in the house strewn with condoms, which was consistent with what they had expected to find. The court concluded that there clearly was sexual activity between the victim and defendant, and that "[t]hings got worse and deeper" when it became clear that the girl was not exactly what she was advertised to be. The court determined that she did not want to have the encounter with defendant, and that there were some marks and bruises left on the victim because she was "taken against her will."

¶ 19 Defendant filed a motion to reconsider alleging that the victim was promiscuous and agreed to the sexual encounters, that he did not try to force his penis into the victim's vagina or mouth, that he did not cause bodily harm to the victim, and that the redness and bruises to the victim's body predated the events of August 22, 2008. At the proceeding on the motion, defense counsel argued that, at best, the State proved beyond a reasonable doubt that defendant committed criminal sexual assault, but not aggravated criminal sexual assault because none of the aggravated triggering factors were present, and there was no bodily harm to the victim. The court, however, denied the motion, noting that several witnesses inculpated defendant, and that it did not see any error in its findings.

¶ 20 On appeal, defendant first claims that the State failed to prove an essential element of the offense of attempted aggravated criminal sexual assault. He specifically claims that the State was required, but failed, to prove that he acted with the "specific intent" to cause the victim bodily harm, and, therefore, requests this court to reduce his conviction of attempted aggravated criminal sexual assault to attempted criminal sexual assault

¶ 21 When a defendant challenges the sufficiency of the evidence to sustain his conviction, the standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278-80 (2004). This standard recognizes the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill 2d. 363, 375 (1992). A criminal conviction will be reversed only if the evidence is so unsatisfactory as to raise a reasonable doubt of guilt. *People v. Jordan*, 130 Ill. App. 3d 810, 813 (1985). For the reasons that follow, we do not find this to be such a case.

¶ 22 At issue is defendant's conviction for attempted aggravated criminal sexual assault. The relevant statutes provide that a person commits an attempt when, with intent to commit a specific

offense, in this case criminal sexual assault, he does any act which constitutes a substantial step toward the commission of the offense. 720 ILCS 5/8-4(a) (West 2010). A person commits criminal sexual assault if he commits an act of sexual penetration by the use of or threat of force. 720 ILCS 5/12-13(a) (West 2010). A person commits the offense of aggravated criminal sexual assault if he, in relevant part, commits criminal sexual assault *and* the following aggravating circumstances existed during the commission of the offense: the accused caused bodily harm. (Emphasis added.) 720 ILCS 5/12-14(a)(2) (West 2010).

¶ 23 We initially observe that defendant does not dispute that he intended to commit criminal sexual assault, or that he took a substantial step toward the commission of the offense or that there was bodily harm. By failing to argue these issues, he has waived them for further review. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Defendant maintains, however, that the State failed to prove beyond a reasonable doubt that he had the specific intent to cause the aggravating factor of bodily harm, and therefore, his conviction should be reduced to attempted criminal sexual assault.

¶ 24 In *People v. Childs*, 407 Ill. App. 3d 1123 (2011), the Fourth District appellate court addressed the issue of whether the State must prove that defendant had the specific intent to cause the aggravating factor of bodily harm in a prosecution for attempted aggravated criminal sexual assault. That court set forth the requirements of aggravated criminal sexual assault, *i.e.*, sexual penetration by the use of force, or threat of force, accompanied by a statutorily enumerated aggravating factor during the commission of the criminal sexual assault, which, in its case, was also bodily harm. *Childs*, 407 Ill. App. 3d at 1131. Because the offense of aggravated criminal sexual assault does not prescribe a mental state, the court implied the mental state of intent, knowledge or recklessness, and found that where bodily harm is caused to the victim, the State was not required to prove that such harm was inflicted knowingly or intentionally. *Childs*, 407 Ill. App. 3d at 1131, citing *People v. Russell*, 234 Ill. App. 3d 684, 688 (1992). In accordance with the aggravated

criminal sexual assault statute, however, the court found that the State was required to prove that defendant intended to commit a sexual assault on the victim, and, in the process, inflicted bodily harm upon her. *Childs*, 407 Ill. App. 3d at 1132. We find that reasoning sound, and likewise, find here that the State was not required to prove that defendant had the specific intent to cause the victim bodily harm where it proved that defendant intended to commit a criminal sexual assault on the victim and inflicted bodily harm in the process.

¶ 25 In reaching that conclusion, we necessarily reject defendant's contention that section 4-3 of the Criminal Code of 1961 (Code) (720 ILCS 5/4-3 (West 2010)) "mandate[s] that the mental state, specific intent, be applied to all elements of the offense." That section provides that a person is not guilty of an offense, other than an offense which involves absolute liability, unless, with respect to each element described by the statute defining the offense, he acts while having one of the mental states described in sections 4-4 through 4-7, and that if the statute defining an offense prescribed a particular mental state with respect to the offense as a whole, without distinguishing among the elements thereof, the prescribed mental state applies to each such element; if the statute does not prescribe a particular mental state applicable to an element of an offense (other than an offense which involves absolute liability), any mental state defined in sections 4-4, 4-5, or 4-6 is applicable. 720 ILCS 5/4-3(a), (b) (West 2010) (sections 4-4 through 4-7 describe mental states of intentionally, knowingly, recklessly and negligently).

¶ 26 Here, defendant was convicted of, in pertinent part, attempted aggravated criminal sexual assault. As noted above, the elements of attempt are 1) an "*intent to commit a specific offense*," and 2) an overt *act* constituting a substantial step toward the commission of that offense. (Emphasis added.) 720 ILCS 5/8-4(a) (West 2010); *Childs*, 407 Ill. App. 3d at 1131. The attempt statute distinguishes the mental state of specific intent as actually being its first element, namely, the intent to commit a particular offense, but the required mental state is not applied to the actions

accomplishing that offense, which in this case, included the aggravating act of causing bodily harm. Thus, even an inadvertent or accidental infliction of bodily harm is sufficient to subject defendant to conviction of attempted aggravated criminal sexual assault. *Childs*, 407 Ill. App. 3d at 1131.

¶ 27 Notwithstanding, the evidence presented in this case shows that defendant intended to commit a sexual assault on the victim where he attempted to force his penis into the victim's mouth, and also caused her bodily harm where he pulled out the weave glued to her head, left a bite mark on her chest, and repeatedly punched the victim, hit her and stomped on her, causing bruises and redness to her. This evidence was thus sufficient for the trial court to conclude that defendant was proved guilty of attempted aggravated criminal sexual assault beyond a reasonable doubt. *Childs*, 407 Ill. App. 3d at 1132; 720 ILCS 5/12-13(a), 14(a)(2) (West 2010); 720 ILCS 5/8-4(a) (West 2010).

¶ 28 In the alternative, defendant maintains that if there is no specific intent element required for the aggravating factor of "caused bodily harm," then the elements of attempted aggravated criminal sexual assault and attempted criminal sexual assault are identical because where there is a non-consensual sexual act, bodily harm "is virtually always present." As a result, he maintains that the penalties of the two are unconstitutionally disproportionate, and, therefore, this court must construe the statutes to spread the specific intent over both elements of the act of sexual penetration and infliction of bodily harm, so as to avoid a finding of unconstitutionality.

¶ 29 We disagree. Criminal sexual assault requires that defendant commit an act of sexual penetration by the use of force or threat of force, and sexual penetration means, in relevant part, *any contact, however slight*, between the sex organ of one person and the mouth, or sex organ of another person. (Emphasis added.) 720 ILCS 5/12-13(a), 12(f) (West 2010). Aggravated criminal sexual assault, on the other hand, additionally requires an aggravating factor, which, in this case, was "caused bodily harm." 720 ILCS 5/12-14(a)(2) (West 2010).

¶ 30 This court has held that any contact, however slight, does not necessarily amount to bodily harm (*People v. Lauderdale*, 228 Ill. App. 3d 830, 833 (1992)), and it, therefore, follows that any "attempt" at contact, however slight, does not necessarily amount to bodily harm. However, where, as here, defendant commits the offense of attempted criminal sexual assault *and* aggravating circumstances existed during the commission of the offense, namely, that the accused caused bodily harm, then the attempted criminal sexual assault offense is enhanced to attempted aggravated criminal sexual assault. (Emphasis added.) 720 ILCS 5/12-14(a)(2) (West 2010). We thus conclude that attempted criminal sexual assault and attempted aggravated criminal sexual assault are not identical and their penalties are not unconstitutionally disproportionate.

¶ 31 In reaching this conclusion, we find defendant's reliance on *People v. Christy*, 139 Ill. 2d 172, 177 (1990) misplaced because in that case the offenses in question, armed violence and aggravated kidnaping, had the same elements, *i.e.*, armed violence required that defendant committed any felony while armed with a dangerous weapon, and aggravated kidnaping was a felony and also required that defendant was armed with a dangerous weapon. Here, the elements of attempted criminal sexual assault and attempted aggravated criminal sexual assault are not identical as the aggravated offense has an additional enhancing aggravating factor.

¶ 32 Finally, the State maintains that defendant has conceded his conviction to Count I, aggravated criminal sexual assault, thereby waiving any future challenges to it. We observe that defendant indicated in his opening brief that he was "not mustering a similar attack on the conviction for aggravated criminal sexual assault under Count I" because "Count I did not require a specific intent to cause bodily harm, unlike Count VII." Then, in his reply to the State, he maintains that he is not waiving any future challenges to his conviction under Count I. We observe, contrary to the State's contention, that defendant has not conceded his conviction to Count I; however, and as noted above, any issues not raised on appeal are waived, and accordingly, we find that defendant has waived any

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argument on his conviction for aggravated criminal sexual assault (Count I) for failing to raise it in this court. Ill. S. Ct. R. 341(h)(7).

¶ 33 Defendant further contends, the State concedes and we agree that his mittimus should be corrected to reflect 845 days of pre-sentencing credit. Accordingly, we order that the mittimus be amended to reflect 845 days of pre-sentence custody credit. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 34 In light of the foregoing, we affirm the judgment of the circuit court of Cook County, and direct the clerk to amend the mittimus to reflect 845 days of pre-sentencing credit.

¶ 35 Affirmed; mittimus amended.