

2012 IL App. (2d) 110156-U
No. 2-11-0156
Order filed May 23, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of McHenry County.
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-103
)	
ZDZISLAW J. PAPUGA,)	Honorable
)	Joseph P. Condon,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

Held: The evidence was sufficient to sustain defendant's conviction for criminal sexual assault of a child despite impeachment of and lack of corroboration for the testimony of the complaining witness.

¶ 1 Defendant, Zdzislaw J. Papuga, appeals a judgment of the circuit court of McHenry County convicting him of one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006) now codified as amended at 720 ILCS 5/11-1.40 (West 2012)). He was sentenced to 20 years' imprisonment. Defendant now appeals, contending that he was not proved guilty beyond a reasonable doubt. For the reasons that follow, we affirm.

¶ 2 The parties are aware of the facts, and we will not restate them in detail here. Rather, we will provide a brief summary of pertinent testimony to facilitate an understanding of this appeal. Defendant is the victim's father. The victim, A.H., testified that defendant first had sexual contact with her when she was 11 or 12 years old. He was lying on a couch and asked her to lie down with him. They were under a blanket, and defendant touched her vagina. Another incident occurred in her bedroom. Defendant came into her room, took off her pants, and licked her vagina. A.H. testified that another incident occurred in her brother's room.¹ Defendant came in, took off A.H.'s pants, and licked her vagina. Defendant then took off his pants and placed A.H. on her stomach. A.H. testified, "[H]e took his penis out and stuck it in my butt." Defendant "started going in and out." She told defendant to stop, and he said, "If I do will you suck my penis." A.H. started crying. After defendant stopped, A.H. felt something wet on her back, which defendant wiped off. During cross-examination, A.H. testified that this incident occurred between her birthday (late September) and Christmas of 2007. On a subsequent occasion, defendant came into A.H.'s bedroom and licked her vagina.

¶ 3 A.H. was examined by an emergency-room physician, Dr. George Gallant, on February 11, 2008. He noted "extreme laxity of the rectal sphincter tone." He explained that this meant that her rectum was open when it normally would not be. He stated that this condition could be caused by the insertion of an object or penis into the rectum. On cross-examination, he testified that this condition could be caused by "repetitive, mechanical trauma." He did not believe that "three events of rectal penetration [could] cause this type of laxity." Dr. Anthony Scarcella reviewed A.H.'s

¹This is the incident charged in the indictment. All other incidents were admitted on the limited issue of intent.

medical records on defendant's behalf. He stated that the enlargement of A.H.'s anus could be caused by a number of things besides a sexual assault. He also stated that A.H.'s condition on February 11, 2008, would not have been the result of a sexual assault that occurred before Christmas 2007. We will discuss additional evidence as it is relevant to defendant's arguments and our analysis of them.

¶ 4 When a defendant challenges the sufficiency of the evidence, our role as a reviewing court is not to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, while viewing the record in the light most favorable to the State, we must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Evans*, 209 Ill. 2d 194, 209 (2004). A conviction will not be set aside unless the evidence is so improbably, unreasonable, or unsatisfactory that there remains a reasonable doubt regarding the defendant's guilt. *Hall*, 194 Ill. 2d at 330. Moreover, it is primarily the role of the finder of fact to assess the credibility of witnesses, resolve conflicts in the testimony, and assign weight to the evidence. *People v. Bull*, 185 Ill. 2d 179, 204-05 (1998). We may not simply substitute our judgment for the fact finder's on such matters. *People v. Slinkard*, 362 Ill. App. 3d 855, 857 (2005).

¶ 5 Defendant's arguments can be divided into two categories. First, he argues that the victim's condition on February 11, 2008, as well as the medical testimony based on the examination conducted that day, do not corroborate the victim's testimony that defendant inserted his penis in her anus sometime between late September 2007 and Christmas 2007. It is true that defendant was charged with placing his penis in the victim's anus between August 20, 2006, and December 25, 2007. It is also true that the victim testified that this incident occurred between late September 2007 and Christmas 2007. Dr. Scarcella testified that the victim's condition on February 11, 2008, would

not have been the result of a sexual assault occurring before December 25, 2007. Furthermore, Dr. Gallant opined that the victim's condition could not have resulted from three such assaults. In this case, the only incident involving anal penetration to which the victim testified was the one with which defendant was charged. As such, we agree with defendant that neither the victim's condition on February 11, 2008, nor the testimony of the doctors corroborated the victim's testimony about an assault occurring prior to December 25, 2007.

¶ 6 Nevertheless, the credible, positive testimony of a single witness (here, the victim) is sufficient to sustain a conviction. *People v. Swart*, 369 Ill. App. 3d 614, 634 (2006). Defendant argues that the victim's testimony is not credible. To this end, defendant asserts that the victim's testimony was impeached by a prior inconsistent statement as well as her failure to report certain aspects of the assault to the police when she had the opportunity to do so. We hold that these issues were properly submitted to and resolved by the jury.

¶ 7 It is true, of course, that a witness's credibility may be impeached by a prior statement that is inconsistent with the witness's trial testimony. *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 38. At trial, A.H. testified that defendant anally raped her in her brother's bedroom. Earlier, in a statement made to police, A.H. stated that the assault occurred in defendant's bedroom. Defendant further points out that A.H.'s trial testimony was more detailed than the statement she gave to the police. Specifically, defendant notes that A.H. testified that after defendant anally raped her, she felt something wet on her back, which defendant wiped off; that prior to anally raping her, defendant licked her vagina; and that, during an earlier assault, A.H. recognized that it was defendant who was assaulting her because he smelled of cigarette smoke. The parties stipulated that A.H. related none of these facts to the police during her earlier statement. A witness may be impeached by an omission

where the witness had an opportunity to make a statement and a person would have normally made such a statement under the circumstances. *People v. Conley*, 187 Ill. App. 3d 234, 244 (1989).

¶ 8 Initially, we note that defendant cites no case where, on facts similar to these, a reviewing court has disturbed a conviction. Moreover, assessing credibility is primarily for the trier of fact. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). In this case, all of these purported flaws in A.H.'s testimony were called to the jury's attention, and the jury, having had the opportunity to view her testimony firsthand, found A.H. credible. We find none of the purported deficiencies with A.H.'s testimony so compelling as to warrant reversal of the jury's decision.

¶ 9 We do not attach great significance to the fact that A.H. testified inconsistently with an earlier statement about the location of the assault. Disingenuously, defendant argues that "[t]his inconsistency is especially damaging to A.H.'s credibility where she said she was sexually abused by her father on only one occasion." This statement is false. Though only one assault involved anal rape, A.H. in fact testified to four incidents of sexual abuse. Indeed, defendant undercuts his own argument, stating, "If A.H. had testified to multiple incident of abuse, some confusion would be understandable on the question of where in the home specific incidents occurred." Since A.H. did testify to "multiple incidents of abuse," the significance of this impeachment—as defendant acknowledges—is severely diminished. We are aware that the other three incidents were admitted for a limited purpose. However, where, as here, defendant has made a factually inaccurate argument to which the other incidents are relevant, we deem it that defendant has opened the door for their consideration on this issue. See *People v. Harris*, 231 Ill. 2d 582, 590-91 (2008) (holding prior bad acts relevant to the defendant's credibility where he denied having ever having committed a crime). In short, if we were to reverse on this basis, we would simply be substituting our judgment for the

jury on the weight to which this impeachment evidence is entitled, which is something we cannot do (*Ortiz*, 196 Ill. 2d at 259).

¶ 10 Turning to the purported omissions, we do not find them sufficiently compelling—alone or in aggregate along with the prior inconsistent statement discussed above—to warrant disturbing the verdict of the jury. Generally, a witness may be impeached where the witness failed to relate a fact under circumstances that render it unlikely that the fact would have been omitted. *People v. Gonzalez*, 120 Ill. App. 3d 1029, 1038 (1983). Under circumstances where it is likely that the fact would have been reported, the witness’s silence is regarded as inconsistent with later trial testimony purporting to relate the fact. See *Id.* In that sense, silence is treated as a prior inconsistent statement. See *People v. Little*, 223 Ill. App. 3d 264, 275 (1991).

¶ 11 Initially, we find it a dubious proposition that a child victim of a sexual assault would be likely to relate a detail regarding how she identified her attacker. Defendant cites no case that would support such a notion. As such, we do not see how the fact that A.H. did not relate to the investigating officer that she identified defendant by the smell of cigarette smoke during one of the assaults has significant impeachment value.

¶ 12 Defendant also relies on A.H.’s failure to relate to the officer that she felt something wet on her back, which defendant wiped off, after defendant anally raped her and that A.H. did not mention that defendant licked her vagina before anally raping her. These details certainly relate to the actual attack and have some value as impeachment evidence. However, as the State points out, A.H.’s statement to the police occurred prior to her examination by Dr. Gallant. During that examination, A.H. was given the opportunity to tell medical personnel what had happened and she stated that she “preferred not to talk about it.” That a child-victim of a sexual assault is reluctant to

speaking about the details of the assault is not particularly surprising. See *Doe v. United States*, 976 F.2d 1071, 1079 (7th Cir. 1992). As such, we cannot say that it would have been natural or likely for A.H. to relate every conceivable detail of defendant's attack on her. Accordingly, though we recognize that there is some impeachment value to these omissions, it certainly does not rise to the level where the jury was not entitled to accept A.H.'s testimony. See *People v. Loera*, 250 Ill. App.3d 31, 42-43 (1993) ("Here, the jury was informed of all the factors bearing on the State's witnesses' credibility and we will not disturb its decision to believe them in spite of perceived credibility problems.").

¶ 13 In sum, A.H.'s testimony was sufficient to sustain defendant's conviction. We therefore affirm the judgment of the circuit court of McHenry County.

¶ 14 Affirmed.