

FIRST DIVISION
November 10, 2014

No. 1-12-1886

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

**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 61554
)	
RAFAEL DIAZ,)	Honorable
)	Michele M. Simmons,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held:* Diaz's conviction for aggravated criminal sexual assault is affirmed where the victim credibly testified about the assault and her testimony was corroborated by testimony from other witnesses. Also, defense counsel provided effective assistance even though he did not request a jury instruction on battery as a lesser-included offense of aggravated criminal sexual assault, because in this case battery was not a lesser-included offense. Furthermore, the trial court did not err in refusing to give the entire IPI Criminal 4th No. 3.11 instruction to the jury when giving it would not have affected the outcome of the trial, and the jury instructions given as a whole provided adequate guidance to the jury.

¶ 2 Defendant, Rafael Diaz, appeals his conviction for aggravated criminal sexual assault after a jury trial, and his sentence of 12 years' imprisonment. On appeal, Diaz contends (1) the State did not prove him guilty of aggravated criminal sexual assault beyond a reasonable doubt where no physical evidence corroborated the victim's testimony; (2) his trial counsel provided ineffective assistance when he failed to request a jury instruction for battery as a lesser-included offense; and (3) the trial court erred when it failed to give the jury, in its entirety, Illinois Pattern Jury Instruction Criminal 4th No. 3.11 (IPI Criminal 4th No. 3.11). Diaz also requests that this court amend his mittimus to reflect the correct number of days served in presentence custody. For the following reasons, we affirm Diaz's conviction and sentence, and order his mittimus amended to reflect the correct number of days served.

¶ 3 JURISDICTION

¶ 4 The trial court sentenced Diaz on June 28, 2012. He filed a notice of appeal on June 28, 2012. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 603 (eff. Oct. 1, 2010); R. 606 (eff. Mar. 20, 2009).

¶ 5 BACKGROUND

¶ 6 Diaz was charged with aggravated criminal sexual assault and home invasion in connection with an incident that occurred on August 31, 2008. At his jury trial, the victim, R.A.E., testified that on that date she worked until midnight at a McDonald's and when her shift ended, she went home to her trailer in Blue Island. She lived in the trailer with her husband, her five year old son, and her brothers Isidro and Antonio. When she arrived she saw Isidro alone

outside. She stated that he was not drinking beer. R.A.E. entered the trailer, showered, and went to bed next to her five year old son.

¶ 7 R.A.E. later awakened to find a man she identified as Diaz on top of her with his fingers in her vagina. She felt him sticking multiple fingers in her vagina "hard a lot of times." She defended herself and Diaz hit her, calling her a "fucking bitch." He kept hitting her and pulling her hair, and R.A.E. "bit his hand" and scratched him. Diaz threw her off the bed and continued to hit and kick her while she was on the floor. R.A.E. screamed for help and her brother Antonio, who slept on a couch in the living room, came into the room. Diaz released R.A.E. and fled. R.A.E. realized that her son was no longer on the bed, and she ran out of the trailer to look for him. She eventually found her son hiding under the bed.

¶ 8 R.A.E. spoke with officers after the incident. She stated at trial that she did not remember telling officers that when she arrived home from work, she saw Isidro drinking on the porch. She also did not recall whether she told officers that it was Isidro who came into her room and struggled with Diaz before chasing him out of the bedroom. According to their reports, R.A.E. told officers that after Diaz left the trailer, she locked the door and looked out the window, but the officers did not know whether she was referring to the door of the bedroom. She did not tell them she ran out of the trailer to look for her son. She also told officers that during the attack her son rolled out of bed and hid in the closet.

¶ 9 R.A.E. was taken to the hospital where she was interviewed and examined by Nurse Nancy Healy. With the help of a Spanish translator, R.A.E. told Nurse Healy that her assailant put four fingers inside of her and she experienced vaginal pain during the attack, although R.A.E. no longer felt pain. R.A.E. had bruising and swelling on both of her eyes, her forehead, and around her mouth. Her bra was torn and she had visible injuries to her shoulder, arm and back.

Nurse Healy performed a vaginal examination and administered a sexual assault kit for R.A.E., but she did not observe any injuries to R.A.E.'s vagina or in her pelvis and abdomen areas.

¶ 10 Antonio testified that he lived in the trailer with his sister, R.A.E., her husband and son, and his brother Isidro. On the night of August 31, 2008, he picked up his five year old nephew after work and saw Isidro on the porch. Isidro was not drinking. R.A.E. came home after midnight and she went into her room. Antonio fell asleep on the couch but awoke around 4 a.m. when he heard a noise at the door. Diaz entered the trailer and locked the door behind him. Diaz asked for directions to the bathroom and Antonio pointed him toward the back of the trailer. Five minutes later, he heard his sister scream so he went into her room. He opened the door and saw Diaz on the floor with R.A.E., holding her by her hair and hitting her in the face. Antonio told Diaz to calm down and then he ran for help. Antonio denied that Isidro was on the porch drinking that night. He told officers that Isidro tried to open the trailer door when he heard R.A.E. screaming, but it did not open.

¶ 11 Officer Robitz testified that after having a conversation with people, he started looking for Diaz. He found Diaz at home and drove him to the police station. The officer noticed scratches on Diaz's face.

¶ 12 Diaz testified that on August 31, 2008, he went to a trailer park in Blue Island to visit friends. During the course of the evening he drank over a case of beer. Around 1:30 a.m. to 1:45 a.m., he encountered Isidro who invited him back to Isidro's trailer for more drinks. Isidro and Diaz got into an argument over whether Diaz took Isidro's wallet, and Isidro threatened Diaz with a stick. Isidro soon discovered he was mistaken and apologized to Diaz. Diaz asked Isidro if he could use the bathroom and Isidro told him, "Go inside." Diaz entered the trailer and saw a young man on the couch. The man saw Diaz and asked him, "What's up?" in

Spanish, and Diaz asked him the direction to the bathroom. The man pointed toward the back of the trailer and Diaz walked down the hall. He looked in the first room, which contained a bed. He opened the door to the second room, turned on the light, and saw a person. He turned off the light, closed the door, and opened the door to the third room which was the bathroom.

¶ 13 After using the bathroom, Diaz walked out into the hall where he saw a shadow. Someone jumped out and attacked him, scratched his face, kicked him and kned him. Instinctively, Diaz hit his attacker and they fell to the floor. The attacker, R.A.E., yelled, "What are you doing in my house?" Diaz did not tell her that Isidro allowed him to use the bathroom. Instead, Diaz hit R.A.E. several times causing the injuries depicted in the photo exhibits presented at trial. The struggle lasted about 10 to 30 seconds, and then Diaz fled. As he ran out of the trailer, Diaz did not see the young man on the couch, nor did he see Isidro outside. Police officers later found Diaz at his house and took him to the police station.

¶ 14 Diaz acknowledged that when he first spoke with officers, he told them that while he was visiting the trailer a man in a red shirt came to him holding a stick, and Diaz then rode home on his bike. He subsequently told officers that the man in the red shirt accused Diaz of stealing his wallet, and they started fighting. During the fight, a woman pulled Diaz into the bedroom and onto the bed. At trial, Diaz admitted that his testimony differed from his statement to police because he had lied in his statement.

¶ 15 At the jury instruction conference, defense counsel proposed jury instructions on the lesser included offense of battery to the home invasion charge which the trial court denied because it believed the instruction was not appropriate given the evidence presented in the case. Defense counsel also proposed that the trial court should give IPI Criminal 4th No. 3.11 to the jury in its entirety so that the jury could consider inconsistent statements made by witnesses as

substantive evidence. The trial court acknowledged that the first and third paragraphs of IPI Criminal 4th No. 3.11 should be given, but it found that the inconsistent statements should not be used as substantive evidence because they were not made under oath and were admitted only for impeachment purposes.

¶ 16 The jury found Diaz guilty of aggravated criminal sexual assault, but not guilty of home invasion. The trial court sentenced him to 12 years' imprisonment and Diaz was awarded 1,206 days of pre-sentence custody credit. The trial court denied his motion to reconsider the sentence and Diaz filed this timely appeal.

¶ 17 ANALYSIS

¶ 18 Diaz first contends that the State did not prove him guilty of aggravated criminal sexual assault beyond a reasonable doubt where no physical evidence corroborated the victim's testimony. In considering the sufficiency of the evidence, we will not retry the defendant; instead, we view the evidence in the light most favorable to the State and determine whether any rational factfinder could have found the elements of the crime proved beyond a reasonable doubt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). The factfinder is in the best position to ascertain the credibility and demeanor of witnesses, and its determination is entitled to great weight. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). The factfinder also resolves conflicts and inconsistencies in the evidence. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). A reviewing court will not reverse a conviction unless the evidence is so improbable, unreasonable, or unsatisfactory as to create a reasonable doubt of defendant's guilt. *Evans*, 209 Ill. 2d at 209.

¶ 19 A person commits the crime of aggravated criminal sexual assault when he engages in an act of sexual penetration using force or threat of force, and causes bodily harm to the victim. 720 ILCS 5/12-13(a)(1), 12-14(a)(2) (West 2010). Since the statute provides that sexual

penetration includes even slight sexual contact, courts have found no "requirement that a victim's testimony be corroborated by physical or medical evidence" in order to sustain a conviction. *People v. Le*, 346 Ill. App. 3d 41, 50 (2004).

¶ 20 R.A.E. testified that she was asleep in her bed when she was awakened by Diaz who was on top of her sticking multiple fingers into her vagina. She defended herself and Diaz hit her, calling her a "fucking bitch." He kept hitting her and pulling her hair, and R.A.E. bit and scratched him. Diaz then threw her off the bed and continued to hit and kick her while she was on the floor. R.A.E. screamed for help and her brother Antonio, who slept on a couch in the living room, came into the room causing Diaz to release R.A.E. and flee. Her testimony was corroborated by Antonio, who testified that he fell asleep on the couch that night but awoke around 4 a.m. when he heard a noise at the door. Diaz entered the trailer and locked the door behind him. Diaz asked for directions to the bathroom and Antonio pointed him toward the back of the trailer. Five minutes later, he heard his sister scream so he went into her room. He opened the door and saw Diaz on the floor with R.A.E., holding her by her hair and hitting her in the face. Officer Robitz testified that when he picked up Diaz after the incident, he noticed scratches on Diaz's face. Nurse Healy noticed that R.A.E. had bruising and swelling on both of her eyes, her forehead, and around her mouth. Her bra was torn and she had visible injuries to her shoulder, arm, and back. R.A.E. told Healy that Diaz had inserted four fingers into her vagina although upon examination, Healy did not observe injuries to R.A.E.'s vagina or in her pelvic and abdomen areas. We find that the evidence, viewed in the light most favorable to the State, supports Diaz's conviction for aggravated criminal sexual assault beyond a reasonable doubt. See *People v. Alexander*, 2014 IL App (1st) 112207, ¶¶ 45-47 (defendant's conviction for criminal sexual assault affirmed where the victim credibly testified that she felt something

come out of her vagina, even though a pelvic examination on the victim revealed no tears or abrasions or other signs of injury.)

¶ 21 Diaz disagrees, arguing that inconsistencies in R.A.E.'s account of the incident, coupled with the fact that an examination revealed no visible injuries to R.A.E.'s vagina or to her pelvic and abdominal areas, rendered her testimony so incredible as to create a reasonable doubt of his guilt. As support, he cites *People v. Herman*, 407 Ill. App. 3d 688 (2011). In *Herman*, the defendant, a Chicago police officer, was charged with various offenses in connection with a sexual encounter he had with the complainant, "a self-described crack cocaine addict." *Id.* at 689. In reviewing the complainant's testimony, this court found it "fraught with inconsistencies and contradictions, most notably related to the time line of events related to the encounter." *Id.* at 705. The court noted that when she first reported the sexual assault to police officers, medical personnel and other witnesses, she stated that the assault occurred anywhere from 3 a.m. to 5 a.m. However, defendant provided uncontradicted evidence establishing his whereabouts that night from about 3 a.m. to 4:50 a.m. Defendant's whereabouts were also confirmed from 5:28 a.m. to 5:58 a.m. when he was on the data terminal sending messages. At trial, the complainant changed her timeline, testifying that she encountered defendant some time after 5:25 a.m. *Id.* at 705-706.

¶ 22 In addition to the timeline inconsistency, the complainant's testimony at trial as to where she sat in defendant's car after he picked her up, whether there was a "boombox" in the police car, and whether the car had a cage, was contradicted by other evidence. She also testified that the defendant had a gun in an ankle holster, but no such holster was ever found on him. *Id.* at 706-707. These inconsistencies, together with the fact that the physical evidence in the case "was as consistent with defendant's testimony of a consensual encounter as it was with

[complainant's] testimony of force," and that evidence suggested she had a propensity to lie, seriously undermined the complainant's credibility. *Id.* at 704-705. The court determined that since the trial court relied on the complainant's credibility to convict defendant, he was not proved guilty beyond a reasonable doubt and it reversed his conviction. *Id.* at 709.

¶ 23 *Herman* is distinguishable from the case at bar. Although R.A.E.'s testimony was inconsistent as to whether Isidro was drinking on the porch when she came home from work, how many fingers Diaz used when assaulting her, whether Isidro or Antonio came into her room after the attack, whether she locked herself in immediately after the attack, and whether she found her son hiding in the closet or under the bed, these details are collateral to her testimony about the sexual assault itself. Unlike the case in *Herman*, evidence of her facial and bodily injuries, as well as testimony from other witnesses, corroborated R.A.E.'s account of the attack. Although no other witness could corroborate R.A.E.'s testimony about the actual sexual assault, the trial court found her to be credible and such positive testimony from a credible witness "is sufficient to convict." *People v Smith*, 185 Ill. 2d 532, 541 (1999).

¶ 24 Furthermore, Diaz's contention that R.A.E.'s testimony was not credible because she suffered no physical injury despite having multiple fingers forced into her vagina, is not persuasive. See *Alexander*, 2014 IL App (1st) 112207, ¶ 47 (physical evidence of vaginal trauma not necessary to prove sexual assault). The jury is not required to accept any possible explanation consistent with innocence, "and raise those explanations to a level of reasonable doubt." *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. A reviewing court will not reverse a conviction "simply because the defendant tells us that a witness was not credible." *People v. Brown*, 185 Ill. 2d 229, 250 (1995).

¶ 25 Diaz next contends that his trial counsel provided ineffective assistance when he conceded that Diaz committed battery, but failed to request a jury instruction for battery as a lesser-included offense of aggravated criminal sexual assault. To prevail in his ineffective assistance of counsel claim, Diaz must prove that (1) counsel's performance fell below an objective standard of reasonableness; and (2) he was prejudiced by his counsel's substandard performance. *People v. Boyd*, 363 Ill. App. 3d 1027, 1034 (2006). Diaz must satisfy both prongs in order to prevail on his ineffective assistance of counsel claim. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). Diaz is entitled to competent, not perfect, representation and mistakes in trial strategy or judgment do not necessarily result in ineffective assistance. *People v. Calhoun*, 404 Ill. App. 3d 362, 383 (2010). To prevail, he must overcome the strong presumption that the challenged action was the product of sound trial strategy. *People v. Evans*, 186 Ill. 2d 83, 93 (1999).

¶ 26 Although a defendant generally may not be convicted of an offense for which he has not been charged, in some cases he may be entitled to a jury instruction on an uncharged, lesser-included offense. *People v. Ceja*, 204 Ill. 2d 332, 359 (2003). An "included offense" is "established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2-9(a) (West 2010). However, the identification of a lesser-included offense does not mean a defendant has the correlative right to have the jury instructed on the lesser offense. *People v. Baldwin*, 199 Ill. 2d 1, 13 (2002). The court must also examine whether the evidence at trial rationally supports a conviction for the lesser-included offense. *People v. Medina*, 221 Ill. 2d 394, 405 (2006). The decision to offer a jury instruction on a lesser-included offense is

generally viewed as one of trial strategy with no bearing on the competency of counsel. *People v. Evans*, 369 Ill. App. 3d 366, 383.

¶ 27 We must first determine whether battery is a lesser-included offense of aggravated criminal sexual assault in this case. A person commits a battery "if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual." 720 ILCS 5/12-3(a) (West 2010). Thus, in order to convict a defendant of battery the State must prove specific intent or knowledge to cause bodily harm, whereas such intent or knowledge is not an element of the offense of aggravated criminal sexual assault. *People v. Leonard*, 171 Ill. App. 3d 380, 390 (1988); *People v. Casey*, 179 Ill. App. 3d 737, 741-42 (1989). Here, the State charged Diaz with aggravated criminal sexual assault in that he "intentionally or knowingly committed an act of sexual penetration upon victim," and "caused bodily harm to victim." The State was not required to prove specific intent to cause bodily harm in order to convict Diaz of aggravated criminal sexual assault. Since he could be convicted of aggravated criminal sexual assault without proof of one of the necessary elements of battery, battery was not a lesser-included offense and counsel's failure to request a jury instruction on battery did not constitute error. See *Leonard*, 171 Ill. App. 3d at 390. Furthermore, if the jury wished to hold Diaz responsible for something other than aggravated criminal sexual assault, it had that option with the home invasion charge. Accordingly, defense counsel acted reasonably in not requesting the instruction and Diaz cannot prevail on his ineffective assistance of counsel claim.

¶ 28 Diaz also argues that he was denied a fair trial when the trial court did not instruct the jury with the entire IPI Criminal 4th No. 3.11 as requested by defense counsel. The purpose of jury instructions is to provide the jury with accurate legal principles to aid it in reaching a correct verdict. *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 44. When reviewing the adequacy

of jury instructions, this court must consider all of the instructions given as a unit to ascertain whether they fully and fairly cover the law. *People v. Lockett*, 273 Ill. App. 3d 1023, 1034 (1995). Whether to tender a particular jury instruction is a determination within the trial court's discretion, and a reviewing court will not overturn that determination absent an abuse of discretion. *Campbell*, 2012 IL App (1st) 101249, ¶ 44. The trial court abuses its discretion when the instructions are unclear, mislead the jury, or are not justified by the evidence and the law. *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 108.

¶ 29 IPI Criminal 4th No. 3.11 states in relevant part:

"The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case.

Evidence of this kind ordinarily may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in the courtroom.

However, you may consider a witness's earlier inconsistent statement as evidence without this limitation when:

[1] the statement was made under oath at a [(trial)(hearing)(proceeding)] [or]

[2] the statement narrates, describes, or explains an event or condition the witness had personal knowledge of; and [a] the statement was written or signed by the witness [or] the witness acknowledged under oath that he made the statement.

It is for you to determine [whether the witness made the earlier statement, and if so] what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which

it was made." IPI Criminal 4th No. 3.11.

¶ 30 The trial court below gave the jury the first paragraph of IPI Criminal 4th No. 3.11. Diaz contends that the jury should have also been instructed that the inconsistent statements could be considered as substantive evidence because Antonio admitted under oath that he had previously provided an inconsistent statement about Isidro's actions on the night of the assault. However, "[f]ailure to instruct the jury regarding the use of prior inconsistent statements as substantive evidence does not require reversal unless there is a reasonable probability that the outcome of the trial would have been changed had the jury been properly instructed." *People v. Fierer*, 260 Ill. App. 3d 136, 148 (1994). Diaz argues that at trial Antonio stated that Isidro made no attempt to enter the trailer after hearing R.A.E. scream, but acknowledged telling officers just after the assault that Isidro did attempt to enter the trailer. Diaz makes no argument as to why the statement that Isidro attempted to enter the trailer, if considered as substantive evidence, would have changed the outcome of the trial and we are not persuaded that Antonio's testimony on this minor collateral matter would have made a difference. The trial court did not abuse its discretion in refusing to give this paragraph of IPI Criminal 4th No. 3.11.

¶ 31 Diaz also contends that the trial court erred in failing to give the last paragraph of IPI Criminal 4th No. 3.11. If the trial court erred, the error was harmless. The trial court specifically instructed the jury that "you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in light of all the evidence in the case." The trial court further instructed the jury that "believability of a witness may be challenged by evidence that on some

former occasion he made a statement that was not consistent with his testimony in the case. Evidence of this kind may be considered by you only for the limited purpose of deciding the weight to be given to the testimony you heard from witnesses in this courtroom." Therefore, the instructions given as a whole provided adequate guidance to the jury on the issue of what weight to give a witness's inconsistent statements, which is the issue addressed by the last paragraph of IPI Criminal 4th No. 3.11. See *Luckett*, 273 Ill. App. 3d at 1035; *Cooper*, 2013 IL App (1st) 113030, ¶ 113.

¶ 32 Diaz's final contention is that the trial court did not award him the proper amount of pre-trial sentencing custody credit and he asks this court to amend his mittimus to reflect two additional days of presentence credit, for a total of 1,028 days. The State agrees with Diaz on this issue. We order the clerk of the circuit court to correct Diaz's mittimus to reflect 1,028 days of presentence custody credit.

¶ 33 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 34 Affirmed; mittimus corrected.