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2014 IL App (3d) 120698-U

Order filed May 20, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-12-0698
LARRY L. SMITH,)	Circuit No. 11-CF-268
Defendant-Appellant.)	Honorable Paul L. Mangieri, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Lytton and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant's criminal sexual assault conviction violates the one-act, one-crime rule; (2) the evidence was sufficient to prove defendant committed an act of sexual penetration; (3) the trial court did not err in quashing the subpoena of the mental health records of S.F. and Susan; and (4) the cause is remanded for application of the \$5-per-day credit toward defendant's fines.

¶ 2 Defendant, Larry L. Smith, was convicted of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) and criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2010)). The trial court sentenced defendant to consecutive terms of 12 years'

imprisonment for predatory criminal sexual assault of a child and 6 years' imprisonment for criminal sexual assault. On appeal, defendant argues: (1) his criminal sexual assault conviction should be vacated under the one-act, one-crime rule; (2) his convictions should be reduced to aggravated criminal sexual abuse; (3) the trial court erred in quashing the subpoena of the mental health records of S.F. and S.F.'s mother, Susan F.; and (4) his fines should be reduced to reflect application of his \$5-per-day presentence incarceration credit. We affirm in part, reverse in part, and remand for further proceedings.

¶ 3

FACTS

¶ 4

On June 20, 2011, defendant was charged by information with committing one count of predatory criminal sexual assault of a child between June 16 and August 16, 2010 and criminal sexual assault between June 16 and August 16, 2010. The charge for predatory criminal sexual assault of a child alleged defendant:

"committed an act of sexual penetration with S.F., who was under 13 years of age when the act was committed, in that the said defendant placed his fingers in the vagina of S.F."

The charge for criminal sexual assault alleged:

"said defendant, father of S.F., committed an act of sexual penetration with S.F., who was under 18 years of age when the act was committed, in that said defendant placed his finger in the vagina of S.F."

¶ 5

Prior to trial, defendant subpoenaed various mental health reports prepared for the Department of Children and Family Services (DCFS) in juvenile case No. 05-JA-231. The subpoenaed reports included psychiatric examinations and psychological evaluations of S.F. and defendant. By agreement of the parties, the court construed the subpoena as also seeking the

mental health records of Susan. Catholic Charities filed a motion to quash the subpoena arguing the information sought was protected by the Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/1 *et seq.* (West 2010)).

¶ 6 At the hearing on the motion to quash, defendant testified the mental health records contained false statements regarding the allegations, but he was unaware of any specific information regarding the examinations of S.F. or Susan. On cross-examination, defendant said he did not know how the records would be relevant to his case. At the conclusion of the hearing, the trial court found that neither S.F. nor Susan had introduced their mental conditions as an element of their claim and granted Catholic Charities' motion to quash.

¶ 7 On April 10, 2012, the case proceeded to a bench trial. S.F. testified during trial and stated she was seven years old. She explained defendant was her father but, at the time of the trial, S.F. no longer lived with defendant. She indicated when she was six years old she lived with defendant in a three bedroom home. She shared a bedroom with her brother, J.F. Defendant slept in a nearby bedroom. Defendant's friend, Sondra Weidner, stayed in a separate, third bedroom.

¶ 8 While living at defendant's house, S.F. said defendant touched her "front private area." S.F. remembered this took place while she sat on defendant's lap in the living room and recalled that she was wearing a nightgown and underwear when defendant touched under her clothes in a rubbing motion. According to S.F., the rubbing hurt. S.F. stated the touching occurred more than once but she could not recall the exact number of times.

¶ 9 Sometime after the living room incident, S.F. and J.F. spent a day with Susan at a hotel. S.F. told Susan defendant had touched her private area and was physically abusive. S.F. reported

the touching occurred in the living room. She also reported this to Tonya Welch, a DCFS caseworker. S.F. denied saying defendant had touched her in the bedroom.

¶ 10 Welch also testified during the trial and stated that in August 2010, Welch removed S.F. and her brother, J.F., from defendant's home. During the ride to the foster parent's home, S.F. told Welch defendant rubbed her vagina with his fingers, made S.F. sleep in his bed while he was undressed, and rubbed Noxzema on S.F.'s genitals.

¶ 11 Several months later, S.F. also told Welch defendant "used his fingers to go inside of her vagina." Welch asked S.F. to demonstrate defendant's act on her shirt sleeve by imagining that Welch's cuff was the edge of S.F.'s underwear. S.F. placed two fingers under the edge of the sleeve and moved them in a circular motion.

¶ 12 Weidner testified that she had dated defendant, but at the time the children were living with defendant she was just a friend. From June to August 2010, defendant, S.F., and J.F. lived in Weidner's home. Weidner and defendant had separate bedrooms, and the children shared a bedroom that was divided with bookcases. In the evenings, the children generally watched television in defendant's lap, and Weidner did not notice defendant act unusual while either of the children were sitting in his lap. While living with Weidner, S.F. never made any statements regarding sexual abuse. If S.F. had reported such abuse, Weidner would have been required to report the incident because she was a nurse.

¶ 13 Rebecca Rossman, executive director of the Knox County Child Advocacy Center, conducted two video-recorded interviews with S.F. in August 2010 and April 2011. The recordings of the interviews were admitted into evidence. During the August 2010 interview, S.F. said no one had ever touched her private areas. After the question, S.F. stopped verbally

responding. Rossman felt S.F. had "clos[ed] down," and Rossman ended the interview shortly thereafter.

¶ 14 In the April 2011 interview, S.F. identified the male and female genitalia on anatomical diagrams as the "private area." S.F. said defendant touched her "private area" below her clothes while she was sitting on defendant's lap. S.F. remembered defendant touched her on the inside of her private area and it hurt. S.F. reported that the touching occurred more than once.

¶ 15 Susan testified that she was the mother of S.F. and J.F. In August 2010, Susan was alone with the children at a hotel in Peoria when S.F. said her "dad rubs her." Susan understood S.F.'s statement to mean defendant touched her outer pubic area. S.F. told Susan the incident took place while she was in bed with defendant. When defendant returned to pick up the children, Susan confronted defendant with S.F.'s statements. Defendant appeared shocked and denied inappropriately touching S.F. The following day, Susan notified Welch of S.F.'s statement.

¶ 16 Defendant testified that between June and August 2010, S.F. and J.F. lived with him. During this period, defendant was never in the bedroom alone with S.F., did not sleep with his children, and did not touch S.F. S.F. occasionally sat on defendant's lap while he watched television in the living room. However, S.F. never spoke to defendant about being touched inappropriately and defendant denied touching or placing his fingers inside S.F.'s vagina.

¶ 17 The court found that there were some inconsistencies in S.F.'s testimony regarding the location of the sexual assault, but found S.F.'s testimony was consistent as to the inappropriate touching and penetration in the living room. The court found defendant guilty of predatory criminal sexual assault of a child and criminal sexual assault.

¶ 18 During the sentencing hearing, defendant argued the one-act, one-crime rule required any sentence imposed to run concurrently. The court disagreed with defendant and imposed

consecutive sentences of 12 years' imprisonment for predatory criminal sexual assault of a child and 6 years' imprisonment for criminal sexual assault. The judgment sheet awarded defendant credit for 93 days of presentence custody. Defendant appeals.

¶ 19

ANALYSIS

¶ 20

I. One-Act, One-Crime

¶ 21

Defendant argues his conviction for criminal sexual assault should be vacated because it was based on the same act alleged in the charging instrument for predatory criminal sexual assault. The State argues defendant has forfeited review of this issue. We agree with the State; however, defendant argues in reply for plain error review. The plain error rule allows a reviewing court to address unpreserved errors affecting substantial rights if: (1) the evidence is closely balanced; or (2) fundamental fairness requires review. *People v. Carter*, 213 Ill. 2d 295 (2004). "[A]n alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule." *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). Therefore, we review defendant's convictions under the second prong of the plain error rule.

¶ 22

The application of the one-act, one-crime rule presents a question of law, which we review *de novo*. *People v. Johnson*, 237 Ill. 2d 81 (2010). Under the rule, a defendant may not be convicted of multiple offenses that, as charged, are based upon the same physical act. *Id.* If a defendant is charged and later convicted of two offenses based upon the same physical act, the conviction for the less serious offense must be vacated. *Id.* An act is any overt or outward manifestation which will support a different offense. *People v. King*, 66 Ill. 2d 551 (1977).

¶ 23

Here, defendant was charged with committing predatory criminal sexual assault of a child, a Class X felony (720 ILCS 5/12-14.1(a)(1), (b)(1) (West 2010)) occurring between June

16 and August 16, 2010, and criminal sexual assault, a Class 1 felony (720 ILCS 5/12-13(a)(3), (b)(1) (West 2010)) occurring between the same dates. Each Count alleges “an act” of digital penetration of S.F.'s vagina but did not allege different locations or time periods for each charged act. The court concluded the evidence established an act of sexual penetration but noted there was some inconsistency where the act took place presumably because the location described in S.F.'s testimony differed from the location reported by Welch and Susan. For example, S.F. testified defendant touched and rubbed her "front private area" while she was sitting on his lap in the living room. In contrast, Welch and Susan testified that S.F. reported the occurrence of an incident in the bedroom.

¶ 24 We note S.F. also ambiguously mentioned defendant touched her on other occasions, but testified during trial no event occurred in the bedroom as reported by Welch and Susan. Based on this record, we conclude the evidence established a single act of penetration beyond a reasonable doubt and reverse defendant's criminal sexual assault conviction and sentence on one-act one-crime grounds.

¶ 25 II. Sufficiency of the Evidence

¶ 26 Defendant argues the evidence was insufficient because the State failed to prove that defendant committed any act of sexual penetration beyond a reasonable doubt. See *People v. Maggette*, 195 Ill. 2d 336 (2001). We focus our analysis on the predatory criminal sexual assault of a child conviction as our resolution of the first issue renders an analysis of the criminal sexual assault conviction unnecessary.

¶ 27 "In reviewing the sufficiency of the evidence in a criminal case, our inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *People v.*

Baskerville, 2012 IL 111056, ¶ 31. As a court of review, we will not retry a 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. *People v. Ross*, 229 Ill. 2d 255 (2008). We will not reverse a criminal conviction unless the evidence was so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt. *People v. Rowell*, 229 Ill. 2d 82 (2008).

¶ 28 To prove the offense of predatory criminal sexual assault of a child, the State must show beyond a reasonable doubt that a defendant was 17 years of age or older and committed an act of sexual penetration with a victim who was under 13 years of age. 720 ILCS 5/12-14.1(a)(1) (West 2010). In the instant case, the parties only contest the sufficiency of the evidence of penetration. Section 12-12(f) of the Criminal Code of 1961 defines sexual penetration as:

"any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration."
720 ILCS 5/12-12(f) (West 2010).

¶ 29 Defendant contends that the instant case is analogous to *Maggette*, 195 Ill. 2d 336. The *Maggette* defendant was convicted of criminal sexual assault based on evidence he rubbed the vagina of the victim through her clothing with his finger. *Id.* On review, our supreme court stated that section 12-12(f) defines two broad categories of penetration: (1) "contact between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person;" and (2) "any *intrusion* of any part of the body of one person or of any animal or object into the sex organ or anus of another person." (Emphasis in original.) *Id.* at 347. The *Maggette* court

held the contact clause did not apply because defendant's hand was not an "object" within the section 12-12(f) definition. *Maggette*, 195 Ill. 2d at 350. The court reasoned "[t]o adopt the State's interpretation of the term 'object' would render the term 'any part of the body' in the 'intrusion' clause of this section mere surplusage." *Id.*

¶ 30 While instructive, the *Maggette* decision is not dispositive of the present issue. Unlike *Maggette*, evidence of intrusive penetration was presented during defendant's trial. In the videorecording of the April 2011 interview, S.F. told Rossman defendant touched her on the inside of her "private area" and it hurt. At trial, S.F. also said the rubbing hurt, and Welch testified S.F. said defendant put his fingers inside her vagina. Consequently, direct evidence of intrusion was presented at trial, and S.F.'s statement that the rubbing hurt strengthened the inference that defendant's rubbing was intrusive. We conclude the evidence was sufficient for the trier of fact to find an act of penetration and convict defendant of predatory criminal sexual assault of a child.

¶ 31

III. Mental Health Records

¶ 32 Defendant argues the trial court erred in quashing his subpoena of the mental health records of S.F. and Susan. Defendant contends the court should have issued the subpoena, inspected the records *in camera*, and forwarded to defendant any items relevant to the witnesses' credibility. By failing to follow this procedure, the trial court infringed on defendant's rights to due process and to confront witnesses against him.

¶ 33 We review the trial court's limitation on discovery for an abuse of discretion. *People v. Graham*, 406 Ill. App. 3d 1183 (2011). We review the issue of whether defendant was denied due process of law *de novo*. *People v. K.S.*, 387 Ill. App. 3d 570 (2008).

¶ 34 Evidence of a witness's mental condition is admissible to the extent it bears on the credibility of the witness's testimony. *Id.* However, there is a two-step procedure for discovery of mental health records. First, a defendant must show the requested records are material and relevant to the witness's credibility. *Id.* Next, if the witness asserts her statutory privilege, then an *in camera* hearing is held on this question. *Id.*; see also 740 ILCS 110/10(a) (West 2010).

¶ 35 In the instant case, the trial court conducted a hearing on Catholic Charities' motion to quash the mental health records subpoenaed by defendant. At the hearing, defendant failed to establish that the mental health records of S.F. and Susan were material and relevant to their credibility or his defense. Defendant testified that he thought S.F. and Susan had made false statements resulting in the charged allegations, but he was unable to explain why the records were relevant. Consequently, defendant was afforded the process prescribed under Illinois law to examine a witness's mental health records, but failed to satisfy the first step. Without a showing of materiality and relevance, an *in camera* review was not warranted.

¶ 36 Finally, we note defendant was afforded an opportunity to confront S.F. and Susan as both witnesses testified and were subject to cross-examination.

¶ 37 IV. \$5-per-day Credit

¶ 38 Defendant asks this court to reduce his fines to reflect application of his \$5-per-day presentence incarceration credit.

¶ 39 Section 110-14 of the Code of Criminal Procedure of 1963 provides a defendant who is assessed a fine is allowed a credit of \$5 for each day spent in custody on a bailable offense for which he did not post bail. 725 ILCS 5/110-14 (West 2010). That credit can be applied to fines; however, it cannot be applied to fees. *People v. Jones*, 223 Ill. 2d 569 (2006).

¶ 40 Here, the sentencing order indicated defendant spent 93 days in presentence custody, and thus he is entitled to a credit of up to \$465. The trial court failed to provide defendant with a credit towards his fines. Therefore, we remand the cause for a determination of which assessments were fines and the application of a credit of up to \$465 towards those fines.

¶ 41 CONCLUSION

¶ 42 The judgment of the circuit court of Knox County is affirmed in part, reversed in part, and remanded with directions.

¶ 43 Affirmed in part, reversed in part, and remanded with directions.