NOTICE
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2014 IL App (5th) 130185-U

NO. 5-13-0185

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 09-CF-339
	)	
KEITH KIRGAN,	)	Honorable
	)	Michael D. McHaney,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Justices Stewart and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: No error by trial court because means of penetration alleged in charging instrument was mere surplusage and State was only required to prove that some type of sexual penetration occurred; sufficient evidence was presented for conviction to stand; defendant not deprived of right to counsel of choice where defendant did not object when attorney requested leave to withdraw.

¶ 2 The defendant, Keith Kirgan, was convicted following a bench trial in the circuit court of Marion County of criminal sexual assault and criminal sexual abuse, and was sentenced to serve 30 years in the Illinois Department of Corrections on the conviction for criminal sexual assault. He was not sentenced on the conviction for criminal sexual abuse, because the court found it merged with the conviction for criminal sexual assault. This is the defendant's direct appeal. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal are derived from the testimony adduced at the defendant's bench trial and from the record on appeal, and are as follows. On April 5, 2009, the victim, W.P., who was then 17 years old, visited the home of her friends, Nikki Bray and Steven Kirgan, after having received parental permission to spend the night there. The three then traveled to the home of Steven's father, the defendant. At the defendant's home, the defendant offered Xanax to W.P., who took half of one pill. Nikki accepted, and ingested, a Xanax pill from the defendant as well. Out of earshot of the two young women, the defendant told Steven that the defendant had put something into the drinks he had given the young women, and that he planned to have sex with W.P. when she passed out. This led to an argument between Steven and the defendant, and the defendant eventually apologized. In their statements to police, both young women noted that the drinks provided to them by the defendant tasted strange. After learning that the defendant had put Xanax in their drinks, the young women dumped out the remainder of the drinks.

¶ 5 W.P. subsequently lay down on a pallet on the living room floor to watch a movie. She passed out approximately 20 minutes into the movie. Nikki also passed out on the living room floor. When W.P. regained consciousness, she realized that her pants and underwear had been pulled down, and she saw the naked defendant lying next to her, with his arm around her shoulder. At approximately the same time, Steven entered the living room and observed his father lying naked next to the disrobed W.P. Steven "freaked out," got W.P. out to his car, then returned to the home and retrieved Nikki.

Nikki then heard the defendant state that there had been a misunderstanding, and that all he and W.P. had done was "make out."

¶ 6 When Steven and the women arrived at Steven's mother's house, Steven was crying, upset, and bewildered, and told his mother that his father had done something Steven "couldn't believe." Steven's mother took them all to the hospital, where W.P. reported that she was possibly sexually assaulted. Her clothing was collected as evidence, and Dr. Roberto Garcia examined her. Dr. Garcia did not detect physical injuries to W.P., but applied swabs from a sexual assault evidence collection kit to W.P.'s body. Specifically, he swabbed around W.P.'s vagina, then applied a swab to the "para anal" region of W.P., circling it "millimeters" around her anus; with a separate swab, he collected a separate sample from "just inside" her anus. He collected the external sample before the internal one, and tried not to touch the second swab to the external area before inserting it. Semen that matched that DNA profile of the defendant was found on W.P.'s underwear, on a swab of her leg or thigh area, and on the anal swabs. An expert forensic scientist testified that both anal swabs were light brown in color, indicating contact with fecal material.

¶ 7 At trial, Steven and Nikki testified that they did not recall making statements to the police consistent with the above facts, but they did not deny having made those statements. At the conclusion of the trial, the judge noted that Steven's and Nikki's inability to recall making statements to the police was "convenient" and stated that there was no doubt in his mind that what they told the police and Steven's mother was exactly what had happened. The judge found the defendant guilty of count I (criminal sexual

assault) and count III (criminal sexual abuse). At sentencing, the judge ruled that count III merged with count I; accordingly, the judge imposed a sentence on count I only, said sentence being 30 years in the Illinois Department of Corrections. This timely appeal followed.

¶ 8 ANALYSIS

¶ 9 On appeal, the defendant first contends the trial court erred because, according to the defendant, the court allowed the State to proceed at trial "on a charge that did not encompass the elements in the information." The defendant also contends the court erred by allowing "any act of sexual conduct, despite the specificity of the alleged sexual conduct in the charging document, to be included in Count III during closing arguments." The defendant maintains that the variances between the charging instrument and what the State offered at trial were substantive, rather than formal, and thus constituted reversible error.

¶ 10 The defendant points out that count I alleged that the defendant committed criminal sexual assault in that he sexually penetrated W.P. by placing "his penis in the anus of W.P." He contends that with regard to count I, the State was allowed to "eliminate the insertion element that it set forth in the [charging instrument]" and instead prove only that there was contact between the defendant's penis and the anus of W.P. Therefore, the defendant contends, the State was not held to its burden of proving the specific means of penetration (penis in anus) alleged in the charging instrument, but was instead allowed to use "any act of penetration" to sustain the charge in count I. The problem with the defendant's argument, as the State correctly points out, is that "[t]he law

in Illinois has long been contrary to [his] position," because "[i]n a case involving sexual penetration, the specific type of penetration is not an element of the offense." *People v. Harper*, 251 Ill. App. 3d 801, 806 (1993). To the contrary, the State need only "show that some type of penetration occurred between the defendant and victim. The inclusion of specific conduct constituting sexual penetration in a charging instrument is mere surplusage." *Id*. at 806-07. As the State also correctly notes, sexual penetration is "any contact, however slight, between the sex organ or anus of one person by *** the sex organ *** of another person, or any intrusion, however slight, of any part of the body of one person *** into the sex organ or anus of another person." 720 ILCS 5/12-12(f) (West Supp. 2009). Accordingly, there was no error with regard to count I. With regard to count III, we agree with the State that because the trial court did not impose a sentence for the defendant's conviction on count III, finding instead that it was a lesser-included offense of count I and merged therewith, the defendant's claim of error with regard to count III is not properly before this court. See, *e.g.*, *People v. Shinohara*, 375 Ill. App. 3d 85, 116 (2007) (final judgment in criminal case is sentence; where no sentence is imposed, no appealable judgment exists).

¶ 11 The defendant next contends he was not proven guilty beyond a reasonable doubt. When we review claims regarding the sufficiency of the evidence, we ask "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found that the essential elements of the crime exist beyond a reasonable doubt." *People v. Lane*, 319 Ill. App. 3d 162, 169 (2001). We will not set aside a criminal conviction unless the conviction "is so improbable or unsatisfactory that a reasonable

doubt as to [the] defendant's guilt still remains," and we are cognizant of the fact that "[t]he credibility of a witness, the weight to be given to testimony, and reasonable inferences drawn therefrom are all the provinces for the trier of fact." *Id*. We also recognize that "largely circumstantial evidence can be sufficient to warrant a guilty verdict, and the standard of review is the reasonable-doubt standard, as with direct evidence." *Id*.

¶ 12 In the case at bar, we begin by noting, as does the State, that much of the defendant's argument with regard to this issue is based on the defendant's misapprehension of the law, discussed above, and his errant belief that the State was required to prove that "an intrusion, not merely contact" occurred. To the contrary, and as also discussed above, to sustain a conviction on count I, the State was required to prove only contact between the defendant's penis and the anus of W.P. See 720 ILCS 5/12-12(f) (West Supp. 2009). At trial, circumstantial evidence was presented that, when viewed in a light most favorable to the State, convinces us that a rational trier of fact could have found that the essential elements of the crime existed beyond a reasonable doubt. Steven's statements to police about the defendant's disclosure to Steven of the defendant's actions and intentions, as well as the statements of W.P. and Nikki, could lead a rational trier of fact to conclude, beyond a reasonable doubt, that the defendant placed illicit drugs in the drinks of the young women, and then, when W.P. passed out, had sexual contact with her that involved contact between his penis and her anus. The defendant's semen was found in W.P.'s anus and within millimeters of her anus, and both anal swabs were light brown in color, indicating contact with fecal matter. The

defendant's argument regarding the sufficiency of the evidence is without merit.

¶ 13 The defendant's final contention on appeal is that the trial court erred when it allowed the defendant's first attorney to withdraw without making an inquiry as to why the State claimed it might call that attorney as a witness in the case. The defendant couches his arguments in the language of a defendant's right to counsel being violated when that defendant's counsel of choice is disqualified against the wishes of the defendant. However, we agree with the State that in the case at bar, the defendant did not object to the withdrawal of his first attorney, and therefore we cannot find that he was deprived of his counsel of choice. When, on April 28, 2011, the defendant's first attorney notified the trial court of his motion to withdraw, the attorney stated that while the defendant did "not necessarily like it," he understood the necessity of the attorney's withdrawal. At a subsequent hearing, on June 8, 2011, the attorney stated that the defendant "understands it is just the way it was." At neither of these appearances did the defendant object to the withdrawal of his attorney, nor did he question the necessity of it. In fact, from June 8, 2011, until the commencement of his bench trial on February 28, 2013–nearly two years after the withdrawal of his initial attorney–the defendant made numerous court appearances, at which he never once complained that he was not being represented by his counsel of choice. Indeed, until the filing of this appeal, he never voiced any dissatisfaction with the withdrawal of his original trial attorney. Accordingly, although it is true, as the defendant contends, that there is a presumption in favor of a defendant maintaining his counsel of choice, there is no basis in this case for us to conclude that the defendant wished to go forward with his first attorney and was deprived

of that choice. To the contrary, we conclude that the defendant, by posing no objection to the withdrawal of his attorney prior to the filing of this appeal, acquiesced in his attorney's withdrawal.

¶ 14 Nevertheless, in his reply brief on appeal the defendant contends the trial judge abused his discretion by allowing the attorney to withdraw without first specifically asking the defendant if he objected to the withdrawal of his attorney. This contention, however, is not supported by any case law or statute. To the contrary, all of the cases cited by the defendant involve situations where a defendant raised an objection to the withdrawal or disqualification of his counsel. In the absence of case law or a statute in support of the proposition that a trial judge has an affirmative duty to ask a criminal defendant whether that defendant objects to the withdrawal of his attorney before allowing that attorney to withdraw, we decline to craft such a duty from whole cloth. Moreover, we find no other abuse of discretion in the judge's decision to allow the attorney to withdraw.

¶ 15 CONCLUSION

¶ 16 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 17 Affirmed.