2016 IL App (1st) 151891-U

FIFTH DIVISION
December 30, 2016

No. 1-15-1891

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.	)	12 CR 9171
	)	
RAFAEL MEZA,	)	Honorable
	)	Geary W. Kull,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

HELD: The trial court did not err by admitting out-of-court statements made by child victim of sexual abuse. The trial court did not improperly shift the burden of proof to the defendant. And the evidence was sufficient to prove defendant guilty of predatory criminal sexual assault of a child beyond a reasonable doubt.

¶ 1 In May 2012, defendant Rafael Meza was indicted on several counts of sexually assaulting and abusing his niece-in-law, M.P. (born March 18, 2002), beginning when she was approximately six or seven years of age. At the time of defendant's bench trial in February 2015, M.P. was twelve years old and defendant was forty-one years of age. Following the bench trial, defendant was convicted of one count of predatory criminal sexual assault of a child in violation of section 11-1.40(a)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/11-1.40(a)(1) (West 2014)). After defendant's motions for a directed finding and new trial were denied, he was sentenced to 6 years' imprisonment. Defendant raises a number of issues on appeal, none of which warrant reversal of his conviction or sentence.

¶ 2 BACKGROUND

¶ 3 Prior to trial, the State moved pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/115-10 (West 2008)), to admit certain out-of-court statements made by M.P. She made these statements to Maria Ramirez during a forensic interview conducted by Ramirez. Ramirez was employed as a bilingual forensic interviewer with the Proviso Child Advocacy Center (CAC).

¶ 4 At the hearing on the motion, Ramirez testified that at the time she interviewed M.P., the child was nine years of age. Ramirez conducted the interview primarily in Spanish. According to Ramirez, M.P. stated that the defendant started touching her when she was approximately six years old. M.P. claimed the defendant touched her when he came into her room to play and "color" with her. M.P. told Ramirez that the defendant touched her on her "cola" and "chi-chis," which she described as her vagina and breasts. M.P. further stated that the defendant had "touched her with his hand on her vagina, and he had sucked on her breast area with his mouth."

¶ 5 M.P. told Ramirez that the defendant used his "thing" to touch her "cola," describing defendant's thing as the part of the body he "used to go pee." M.P. was given anatomically correct male and female dolls to identify her and the defendant's respective body parts and to demonstrate where and how defendant had touched her. M.P. told Ramirez that the defendant had an erection when he touched her, explaining that "it" was "standing." According to Ramirez, M.P. stated that she was six years old when the abuse occurred, but that the last time defendant had touched her was when she was nine years old.

¶ 6 M.P. told Ramirez that when the defendant was touching her, she wanted to yell out and tell her parents, but decided not to after the defendant told her that something would happen to her if she told her parents. M.P. stated that the defendant told her not to tell her father. According to Ramirez, M.P. indicated to her that she had told her mother and a friend at school about the incidents. M.P. stated that when she told her friend, the friend went and told their teacher.

¶ 7 Ramirez testified that during the interview, M.P. used age-appropriate language, she answered questions when asked, and although she seemed "somewhat uncomfortable," she was "engaged and open." Ramirez identified a transcript of the interview, which was transcribed in English.

¶ 8 After the presentation of evidence and argument, the trial court continued the case so it could review the transcript of the interview and make a ruling. Defense counsel subsequently stipulated that the transcript, which was translated from Spanish to English, was accurate and that there were no discrepancies with the video recording of the interview.

¶ 9 The trial court continued the case a second time, so it could review the video recording of the interview. The court ultimately determined that M.P.'s out-of-court statements she made

during her forensic interview with Ramirez were admissible under section 115-10 of the Criminal Code.

¶ 10 At trial, the first witness to testify for the State was M.P.'s mother, Annabel Santana. Santana testified that at the time of the incidents, she and her husband Daniel Perez, Sr. were living together with their two children, M.P. and her younger brother Daniel Perez, Jr. in a two bedroom apartment. Santana testified that the defendant is married to Anna Perez, her husband's sister.

¶ 11 Santana testified that when defendant came over to the apartment, he and M.P. would occasionally go into M.P.'s bedroom to play and "color." Santana testified that sometimes the bedroom door would be closed and she would tell M.P. to keep it open. According to Santana, M.P. told her that it was defendant who would close the bedroom door. Whenever Santana or her husband saw the bedroom door was closed, they would open it.

¶ 12 On cross-examination, Santana could not specifically recall the first time she learned of the alleged sexual abuse of M.P., but guessed it was around February or March of 2012, when M.P. came home from school crying because someone had made fun of her for kissing a boy. When Santana told M.P. she should not be kissing anyone, M.P. responded, "Mommy, I'm going to tell you something. There's somebody who touches me." Santana informed her husband about what M.P. had told her, and her husband then spoke with his sister, the defendant's wife. The sister told them that the defendant denied touching M.P. Santana testified that she and her husband decided not to notify the police after defendant denied touching M.P.

¶ 13 Santana testified that approximately a week after M.P. told her about the defendant's conduct, she received a home visit from a social worker who informed her that M.P. had been

telling classmates and teachers about the defendant touching her. One of the teachers had notified the police about the alleged sexual abuse.

¶ 14 M.P., who was twelve years old at the time of trial, testified next. She could not exactly remember how old she was when defendant first started touching her, but guessed she was around seven or eight years old. M.P. claimed the defendant started touching her when he came into her bedroom to play with her. M.P. physically demonstrated in court how the defendant used his hand to touch her breast area. She claimed the defendant touched her over and under her clothes.

¶ 15 M.P. testified the defendant made her feel "very afraid" when he threatened her and her parents. M.P. testified that when she was approximately nine or ten years old, the defendant closed her bedroom door and proceeded to show her his penis, which she described as his "thing." M.P. testified that the defendant licked her vagina, and would put his "thing" in her "bottom," which she explained was her "back cheeks." M.P. testified that the defendant showed her pictures on his cell phone of various men and women in "sexual encounters." She claimed she stopped looking at the pictures because her parents did not allow her to "see those things."

¶ 16 On cross-examination, M.P. testified that she was presently in the seventh grade and was either in the first or second grade when the defendant first started touching her. She testified that she was in the fourth grade when she told her mother about the incidents after her mother scolded her for kissing a boy at school. M.P. testified that her mother started to cry when she told her about the defendant touching her. M.P. claimed she told a classmate and her teacher about the touching incidents, but could not remember exactly when she told them. M.P. testified that on one occasion her father complied with her request to lay down in the bed with her after she told him she was afraid.

¶ 17 Police Officer Sean Vazquez of the Northlake Police Department began investigating the allegations of sexual abuse against the defendant after receiving a report of suspected child abuse from the Department of Children and Family Services (DCFS). As part of his investigation, the officer spoke with a teacher from M.P.'s school who had been an "outcry witness." Officer Vazquez also spoke with M.P.'s mother, who related that M.P. told her that the defendant had taught her how to kiss.

¶ 18 Officer Vazquez interviewed defendant after advising him of his *Miranda* rights. The interview was summarized in a police report. Defendant told the officer that when he visited his brother-in-law's house he would often play with M.P. because he believed her parents were neglecting her. Defendant claimed he would play with M.P. in her bedroom and they would start out by playing kids' games, but then she would close the bedroom door and "turn into a different person."

¶ 19 Defendant stated that M.P. wanted to play games of a sexual nature, including "truth or dare," and that she danced "provocatively for him." Defendant stated that on one occasion, M.P. exited the bathroom wearing only a bath towel and then exposed herself while dancing seductively. Defendant told the officer that on another occasion, he had fallen asleep in M.P.'s bed, and when he woke up, he noticed the bedroom door was closed and that M.P. was straddling and grinding on him in a sexual manner. Defendant claimed that on other occasions, M.P. would want to kiss him, but he would tell her "no and push her away." Defendant stated that M.P. would get behind him and grind her genital area around his neck. Defendant told the officer that this type of conduct went on for approximately a year and half to two years.

¶ 20 Defendant stated that on two prior occasions, M.P. saw him "naked unintentionally." He claimed the first time was when M.P. lifted up a bedsheet and saw him sleeping naked and the

second time was when she went into the mens' changing area at a swimming pool and saw him naked as he was changing into his swim suit.

¶ 21 After the officer's trial testimony, both parties agreed to adopt the testimony of forensic interviewer Ramirez and stipulated that if she were called to testify at trial, her testimony would be substantially similar to the testimony she gave at the section 115-10 hearing. The State then entered into evidence a transcript of the forensic interview as well as a video recording of the interview. The trial court subsequently denied defendant's motion for a directed finding.

¶ 22 Defendant did not testify at trial. He called one witness to testify on his behalf, his wife, Anna Perez. Perez testified that she and defendant visited her brother's apartment just about every weekend. Perez testified that she occasionally visited the apartment alone without the defendant, but that he never visited the apartment alone and never babysat M.P. Perez claimed that during their visits to the apartment, there would sometimes be drinking going on. Perez testified that this drinking would occur in the presence of M.P. Perez also testified that M.P. was exposed to adult-type television programs and music.

¶ 23 Perez claimed she never observed M.P.'s bedroom door closed when M.P. and defendant were in the bedroom. Perez testified that M.P. would sometimes ask her and defendant to come into her bedroom to help her with her homework and to play. Perez testified that on some occasions she would not accompany defendant into M.P.'s bedroom because she was talking with her brother and sister-in-law, and defendant would volunteer to help M.P. with her homework.

¶ 24 On cross-examination, Perez acknowledged that on certain occasions defendant would be alone with M.P. in her bedroom for up to an hour at a time. Perez also acknowledged that on some of these occasions, she would be busy talking with her brother and sister-in-law.

¶ 25 The defense rested at the conclusion of Perez's trial testimony. The trial court took the matter under advisement and continued the case so it could review the trial testimony, the transcript of the forensic interview, and the video recording of the interview.

¶ 26 The trial court ultimately found defendant guilty of count 2 of the indictment (mouth to vagina) but found him not guilty of count 1 (mouth to breast) or count 3 (penis penetration). After hearing arguments in aggravation and mitigation, the court sentenced defendant to 6 years' imprisonment. Defendant appeals his conviction.

¶ 27 ANALYSIS

¶ 28 Defendant first contends the trial court erred in admitting certain out-of-court statements M.P. made to Ramirez during the forensic interview. Defendant argues that the statements were not sufficiently reliable to qualify for admission under the exception to the hearsay rule provided for in section 115-10 of the Criminal Code.

¶ 29 Initially we note that the State argues defendant forfeited review of this claim by failing to include it in his posttrial motion. In response, defendant contends that no forfeiture occurred. Defendant claims that in his motion for a new trial he argued that he was not proven guilty beyond a reasonable doubt. He maintains that any evidence that was improperly admitted at trial is encompassed in his reasonable doubt argument. In the alternative, defendant maintains we should review this issue under the plain-error doctrine on the ground that the evidence was closely balanced. We need not decide whether defendant has forfeited his claim because whether we review his arguments on the merits or under the plain-error doctrine, we find no error. See *People v. Johnson*, 385 Ill. App. 3d 585, 596 (2008) (in order to find plain error, a reviewing court must first find that the trial court committed an error).

¶ 30 Section 115-10 of the Criminal Code allows for the admission of hearsay statements made by victims of physical or sexual abuse who are under 13 years of age. 725 ILCS 5/115-10(a)(1) (West 2008). In order for such statements to be admissible, the trial court must conduct a hearing and then make a determination that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. 725 ILCS 5/115-10(b)(1) (West 2008). After that determination is made, such statements may be admitted into evidence only if the State either produces the child to give testimony or shows that the child is unavailable as a witness and there is corroborative evidence of the acts which are the subjects of the statements. 725 ILCS 5/115-10(b)(1)(A), (b)(1)(B) (West 2008). In this case, M.P. was available and testified at trial regarding the alleged sexual abuse perpetrated upon her by the defendant.

¶ 31 In deciding whether an out-of-court statement is reliable for purposes of section 115-10 of the Criminal Code, a trial court must evaluate the totality of the circumstances surrounding the making of the statement. *People v. Simpkins*, 297 Ill. App. 3d 668, 676 (1998). Some of the factors a court may consider in making this evaluation include: the child's spontaneity and consistent repetition of the incident; the child's mental state when making the statement; the use of terminology unexpected of a child of similar age; and the child's lack of motive to fabricate. *People v. Sharp*, 391 Ill. App. 3d 947, 955 (2009). As the proponent of the statements, the State has the burden of establishing that the statements are reliable and not the result of adult prompting or manipulation. *Sharp*, 391 Ill. App. 3d at 955.

¶ 32 The admission of evidence pursuant to section 115-10 of the Criminal Code is reviewed for abuse of discretion. *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 96. A trial court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the same view. *Id.*

¶ 33 Defendant contends that M.P.'s statements were not sufficiently reliable to be admissible under section 115-10 of the Criminal Code based on the following grounds: the statements lacked consistency; there was a delayed outcry; there was no evidence of M.P.'s mental state when she spoke about the alleged sexual abuse; and the statements were the result of prompting and leading questions by forensic interviewer Ramirez. None of these arguments have merit.

¶ 34 A review of the record clearly shows that M.P. gave consistent versions of the sexual abuse perpetrated upon her by the defendant. We also reject defendant's contention that M.P.'s delay in reporting the abuse rendered her subsequent statements unreliable. Our courts have repeatedly recognized that a child's delay in reporting sexual abuse is a common occurrence and does not necessarily render subsequent statements unreliable or inadmissible but rather goes to the weight to be given the statement. See, *e.g.*, *People v. Jahn*, 246 Ill. App. 3d 689, 704 (1993). Here, we do not consider the delay to be significant especially in light of M.P.'s testimony that she was afraid to say anything because the defendant had threatened her and her parents.

¶ 35 We also disagree with the defendant's contention that there was a lack of evidence regarding M.P.'s mental state when she spoke about the abuse. This contention is belied by the record. The record shows that at the section 115-10 hearing, forensic interviewer Ramirez testified that during her interview of M.P., although M.P. seemed "somewhat uncomfortable," she was "engaged and open."

¶ 36 Finally, we reject defendant's contention that M.P.'s statements were the result of prompting and improperly leading questions by forensic interviewer Ramirez. "A question is leading when it is so framed as to suggest to the witness the answer which is desired." *Milner v. State*, 258 Ga. App. 425, 429, 574 S.E. 2d 457 (2002); see also *People v. Miles*, 351 Ill. App. 3d

857, 866 (2004) ("A 'leading question' is one 'that suggests the answer to the person being interrogated.' ")

¶ 37 Defendant identifies a number of questions Ramirez posed to M.P. during the forensic interview which he claims were leading questions. However, defendant does not explain nor argue how the questions were leading. He does not identify any questions which were improperly framed to suggest the answer sought. After reviewing the record, we see nothing impermissibly suggestive or leading about the questions Ramirez posed to M.P. during the forensic interview.

¶ 38 Defendant next contends his due process rights to a fair trial were violated when the trial court improperly shifted the burden of proof by posing questions as to why he had not alerted M.P.'s parents about her sexual conduct towards him. We disagree.

¶ 39 Constitutional due process requires that the State bear the burden of proving every essential element of the crime charged beyond a reasonable doubt. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). This burden never shifts to the accused, but remains with the State throughout the trial. *Id*.

¶ 40 At the outset, we note that this case was tried as a bench trial. Therefore, there was no concern that a jury might be confused or misled by the remarks made by the trial court. Moreover, upon our review of a trial court's judgment following a criminal bench trial, we are guided by the presumption that the court considered only competent evidence in reaching its decision and that it applied the proper standard to that evidence in determining the defendant's guilt or innocence. See *People v. Lester*, 102 Ill. App. 3d 761, 768 (1981); *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 28. This presumption may be rebutted only "when the record contains strong affirmative evidence to the contrary." *Howery*, 178 Ill. 2d at 32.

¶ 41 In arguing that the trial court improperly shifted the burden of proof, defendant relies on the following statement made by the trial court during its oral findings prior to finding him guilty:

> "[It is] uncontradicted that he spoke to the police about conduct with [M.P.] that, albeit not initiated by him, was conduct that would be alarming to any adult male. And that there was never an explanation as to what – even if I believe what he was saying, there is no explanation as to why he would not have gone to the parents of [M.P.] and mentioned the kind of conduct she was apparently exhibiting to him. But that's not in the record."

¶ 42 Defendant also takes issue with the following comments the trial court made in denying his motion for a new trial:

> "[I]f the conduct that he described about the child had taken place, that it was inconceivable to me that an individual who observed that type of conduct of a child, who to some extent he was peripherally related to, would not mention that type of conduct to that child's family was un – unusual to me, if not unbelievable."
>
> and
>
> "I was promised in opening statement some information about the child that would give me reason to believe that I should not believe her. I really never got that information. There was innuendo about tests and things of that nature, but none of those were ever really shown to be the case."

¶ 43 We do not believe that these isolated statements, when viewed in the context of the trial court's entire discussion of the evidence and credibility of the witnesses, constitutes strong affirmative evidence that the court improperly shifted the burden of proof to defendant. The trial court's comments were a reflection of its opinion that the defendant's version of events was

incredible and his position untenable, not an indication that the court shifted the burden of proof to defendant to prove his innocence. The trial court, as the trier of fact in a bench trial, is allowed to reject testimony of any witness, even uncontradicted testimony, based on its knowledge, common sense, and experience. *People v. Sherman*, 110 Ill. App. 3d 854, 860 (1982).

¶ 44 The trial court rejected the defendant's version of events. The trial court was free to make such assessments. This does not mean that the burden of proof was shifted to the defendant to prove his innocence. We find the trial court did not improperly shift the burden of proof to the defendant.

¶ 45 Defendant finally contends the evidence was insufficient to prove him guilty of predatory criminal sexual assault of a child beyond a reasonable doubt. A criminal conviction will not be set aside on grounds of insufficient evidence unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). When reviewing the sufficiency of the evidence in a criminal case, we must determine "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 crime beyond a reasonable doubt." *People v. Cooper*, 194 Ill.2d 419, 430-31 (2000). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, it is for the trier of fact to determine the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Enis*, 163 Ill. 2d 367, 393 (1994).

¶ 46 Defendant maintains that in finding him guilty of predatory criminal sexual assault of a child, the trial court only relied on the oral statement he gave to Officer Vazquez. Defendant

contends that nothing in the officer's testimony established the elements of the offense he was found guilty of committing.

¶ 47 In order to establish the defendant's guilt for predatory criminal sexual assault of a child in this case, the State was required to show that defendant was 17 years of age or older and committed an act of sexual penetration upon M.P., and that M.P. was under 13 years of age when the act was committed. 720 ILCS 5/11-1.40(a)(1) (West 2014). "Sexual penetration," as relevant in this case, is defined as "any contact, however slight between the sex organ" of one person and the mouth of another person.[1]

¶ 48 Contrary to the defendant's argument, our review of the record reveals that the trial court did not base its guilty finding only on the oral statement defendant gave to Officer Vazquez. This was made clear at the hearing on the defendant's motion for a new trial, where the court explicitly clarified that the defendant's statement "was not the 'determining factor' in the case." The court explained that the defendant's statement to the police officer "was a factor" that it "considered." The court then continued:

> "[T]he determining factor and the problem with – with the case is that I listened to, and observed, the testimony of a child who testified to conduct that, as I think the State argued, I couldn't find any way that she would have made up or any reason that she would have made up."

¶ 49 Thus, contrary to defendant's contention, the trial court did not base its guilty finding only on the oral statement defendant gave to Officer Vazquez, but also relied upon the testimony of M.P., which the court found was credible.

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[1] Effective July 1, 2011, the definition of "sexual penetration" was merged into the offense of predatory criminal sexual assault of a child and is now codified at 720 ILCS 5/11-1.40(a) (West 2014).

¶ 50 Viewing the evidence in a light most favorable to the State, we find a rational trier of fact could find beyond a reasonable doubt that defendant was guilty of predatory criminal sexual assault of a child. In sum, the evidence was not so unreasonable, improbable, or unsatisfactory that it raised a reasonable doubt of defendant's guilt.

¶ 51 Accordingly, for the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 52 Affirmed.