

2017 IL App (1st) 153325-U

No. 1-15-3325

Order filed August 9, 2017

Third Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 14 CR 3171
)	
ELVIN HEARD,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

ORDER

- ¶ 1 *Held:* The evidence was sufficient to prove defendant guilty beyond a reasonable doubt.
- ¶ 2 Following a bench trial, defendant Elvin Heard was convicted of criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2012)), aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2012)), and aggravated battery (720 ILCS 5/12-3.05(a)(5) (West 2012)). The trial court merged the aggravated battery count into the aggravated domestic battery count and sentenced defendant to six and three years in prison on the remaining counts, to be served consecutively.

On appeal, defendant contends that the State did not prove him guilty of each offense beyond a reasonable doubt. For the reasons below, we affirm defendant's convictions.

¶ 3 Defendant's convictions arose from an incident involving defendant and A.D., the victim, that took place during the early morning hours of December 26, 2013. A.D. and defendant are first cousins, and the incident occurred after they attended a family Christmas party hosted by another cousin, Chaquitta Dawson.

¶ 4 At trial, A.D. testified that, on December 25, 2013, A.D. arrived at Chaquitta's Christmas party between about 11:30 p.m. and 12 a.m. While at the party, she had about four shots of Tequila and testified that she was "functioning normally." During the party, defendant called her "his Sweet Georgia Bitch" and "slapped [her] on [her] behind." She felt uncomfortable but "just brushed it off."

¶ 5 At about 1 or 1:30 a.m., A.D. and defendant left the party together and walked to Shonda's apartment. A.D. was living with Shonda at the time, and defendant, his newborn baby, and his girlfriend, Rahila Kato, were staying at Shonda's apartment that evening. When they arrived at Shonda's apartment, it was quiet and they talked in the living room about the party. A.D. then went into her bedroom and laid on her bed with her clothes on. Then, defendant came into her bedroom, and they talked a little bit more. Defendant left A.D.'s bedroom, but he later returned and laid down on her bed. A.D. scooted her body up so that her back was to the headboard and looked "at him like he was crazy."

¶ 6 A.D. asked defendant what he was doing and "before [she] knew it," he grabbed the top of her body and pinned her to the bed. A.D. testified that defendant used "a lot of force," and that she tried to push his body away but he was "a lot bigger." A.D. told defendant to stop, but he did

not listen. Defendant took off her leggings. A.D. cried, told him to stop, and “there was a struggle.” After defendant pulled her leggings off, he pulled down his pants and “inserted his penis inside of [her].” A.D. cried, asked him to stop, and tried to yell. She testified that she was “in a state of shock, like I could not believe what he was doing,” that “it felt like forever,” and that, at some point, defendant took his penis out of her vagina.

¶ 7 Then, A.D. got up, put her leggings on, and told defendant that she was leaving. Defendant told her she “wasn’t going anywhere” and he was not going to let her kill herself. A.D. attempted to leave but defendant pinned her down and started choking her. She testified that defendant used “a lot of force,” she could “barely” breathe, and she was “gasping, trying to say stuff. I couldn’t really say anything because of his hands being around my neck.” A.D. described defendant’s demeanor as “very enraged, very angry.”

¶ 8 At this point, Shonda entered the room and yelled at defendant to let go of A.D., but she could not get him off of A.D. Then, A.D.’s cousins, Chaquitta and Elisha Hart, arrived and yelled at defendant to get off of A.D. When Chaquitta entered the room, defendant let go of A.D.’s neck and then left the room.

¶ 9 After the incident, A.D. felt “distraught” and told Chaquitta that defendant “just fucked me.” She testified that this meant that “he raped me.” A.D. went to her boyfriend’s house because defendant “just raped me and I was very terrified.” She also testified that she went to her boyfriend’s house, “Because I just didn’t know what to do. I know I wanted to get away from there. I wasn’t – I wanted to be with my boyfriend. I wanted to be away from that house and everybody.” Shonda called the police, but they never came.

¶ 10 When A.D. woke up on December 26, 2013, she went to the hospital and a nurse performed a rape kit. She told the nurse that she had been sexually assaulted by defendant. A.D. testified that People's Exhibit No. 1 was the outfit she was wearing on the night defendant raped her, and that there was a hole in her sweater from when defendant choked her.

¶ 11 On cross-examination, A.D. testified that, when defendant initially entered the room, she did not scream but that, when he pushed her on her back, she "was under the impression that I was screaming but I am not sure if anything was coming out. I was just in a state of shock, like I was in disbelief." Defendant did not put anything in, or over, her mouth to stop her from screaming. A.D. remembered "crying profusely and him taking his penis out and shoving his penis into my vagina."

¶ 12 A.D. also testified that no one saw the incident and that she did not punch, kick, scratch, or bite defendant. Her leggings were not torn or ripped. She did not call the police, but Shonda had called the police about defendant choking her. She testified that, when she spoke with Chaquitta after the incident, she told Chaquitta that defendant "fucked me and he raped me" A.D. did not tell Shonda or Kato what had happened. A.D. acknowledged that, in her written statement after the incident, she stated that she left the Christmas party at 2:30 a.m.

¶ 13 On re-direct, A.D. testified that defendant was "a lot bigger" and "a lot stronger" and that, when defendant was pinning her down, she felt shocked, in disbelief, and cried profusely. A.D. also testified that she told him to stop, asked him to leave, did not want him to take off her leggings, and did not consent to "defendant shoving his penis into [her] vagina."

¶ 14 Chaquitta Dawson testified that she had a "[b]rother and sister relationship" with defendant. At the party, defendant hit A.D. on her "butt and referred to her as his Georgia Bitch."

At about 1 a.m., A.D. and defendant left the party to go to Shonda's apartment. Later that night, Chaquitta received a call from Shonda, her mother, asking her to come to her home because "something was going on in her home." When Chaquitta arrived, Shonda told her, "Elvin [defendant] has Ashley [A.D.] in the room. He says that she is trying to kill herself." When Chaquitta got to the bedroom, A.D. was on the bed and defendant was choking her. A.D.'s eyes were rolled to the back of her head and she was "gasping for air."

¶ 15 Chaquitta squeezed her way through a crack of the door, as the bed was right next to the door and defendant's body was wedged up against it. Chaquitta, Hart, and Shonda started hitting defendant, but he would not let go of A.D. Chaquitta got in between defendant's arms and was able to stop him from choking A.D. A.D. and defendant were fully clothed, but A.D.'s sweater and pants were inside out and defendant's belt was unbuckled.

¶ 16 After the incident, A.D. told Chaquitta, " ' Quitta, that's a lie. That's a lie. No. He fucked me. He raped me. He raped me. That's a lie. I would never kill myself. That's a lie.' " She testified that A.D. was "scared" and "absolutely frightened." While Chaquitta was speaking with A.D., defendant was in the hallway and she heard Kato scream at defendant, " 'you are going to fuck your cousin while I am here' " and then defendant "charged" at Kato. She testified that the sweater that A.D. was wearing that night had a hole around the neck of it and she did not recall seeing the hole in A.D.'s sweater at the Christmas party.

¶ 17 On cross-examination, Chaquitta testified that she did not recall whether defendant had called A.D. a "Georgia Bitch" or a "Georgia Peach" and that she did not see any injuries on A.D. or defendant. She also testified that she could not recall whether, after the incident, she told the detective that A.D. had told her that defendant had raped her.

¶ 18 Shonda Dawson testified that she had a very close relationship with A.D., her niece, and a “super close” relationship with defendant, her nephew. On December 25, 2013, defendant, Kato, and their baby were staying with her that night. About two hours after Shonda went to bed, she got up to check her house and noticed that the back door was open. She went to A.D.’s bedroom and heard A.D. say, “get off me, get off me.” When she looked inside the bedroom, A.D. was on her back, and defendant was holding her down by her arms. A.D. was screaming, “let me go, let me go, let me go.” Defendant told Shonda that A.D. was “trying to kill herself” and that he was “trying to stop her from killing herself.” Shonda testified that A.D. “kept trying to get off the bed and he kept slamming her down, slamming her down.” Shonda told defendant to “let her go,” but defendant did not listen. Shonda called Chaquitta and yelled for her niece, Hart, who lives on the first floor of the apartment complex.

¶ 19 When Chaquitta and Hart arrived, they immediately ran to the bedroom and told defendant to let go of A.D. Defendant did not listen to them. Chaquitta and Hart eventually pried defendant away from A.D. and then pulled him out of the room. After that, Shonda and Kato, who were standing in the hallway, tried to calm defendant down. Kato was mad because defendant “had been caught” in A.D.’s room. Shonda called the police, but the police never called her back. Shonda did not want to come to court to testify, as defendant was “[her] favorite.”

¶ 20 On cross-examination, Shonda testified that on December 25, 2013, defendant’s daughter, Tianna, was sleeping on her couch in the living room, which is located right in front of A.D.’s bedroom. After the incident, she did not see anything unusual about A.D. or defendant’s clothes and did not have a conversation with A.D.

¶ 21 Elisha Hart, defendant's sister, testified that her back porch was across from Shonda's back porch. On December 26, 2013, Hart was awakened by Shonda yelling to Chaquitta, "come down here." When she arrived at Shonda's house, there was "a lot of commotion" and defendant was "erratic." He was yelling that A.D. was "trying [to] kill herself and he is trying to stop her." A.D. was upset and was crying and yelling.

¶ 22 When she got to the bedroom, she saw A.D.'s back touching the bed and defendant standing over her with his arms outstretched. She could not see defendant's hands, as it was a narrow doorway and defendant's body was blocking her from entering the room. Hart told defendant to get off of A.D, but he did not listen. Chaquitta was able to get through, and, at some point, defendant released A.D. Hart testified that she did not voluntarily come to court on the day of trial.

¶ 23 After Hart testified, the State presented various stipulations. If Brenda Jones, a nurse at Mercy Hospital, were called to testify, she would have testified that, on December 26, 2013, A.D. arrived at the emergency room at 2 p.m. that day. A.D. informed her that "she had been sexually assaulted by her cousin," and Jones collected biological evidence and clothing from A.D.

¶ 24 The parties stipulated that buccal swab standards were collected from defendant and A.D. A forensic scientist would have testified that he received a criminal sexual assault evidence collection kit with biological specimen from A.D. and that it was his opinion within a reasonable degree of scientific certainty that semen was indicated on the vaginal swab collected from A.D. Another forensic scientist would have testified that he conducted DNA analysis on the vaginal swabs collected from A.D. and on the buccal swabs collected from A.D. and defendant. He

would have testified that defendant's DNA profile matched the male DNA profile identified on the vaginal swabs.

¶ 25 Rahilo Kato, defendant's fiancé, testified on behalf of defendant. She testified that she went to the Christmas party with defendant, her son, and her stepdaughter, Tianna. At the party, she saw A.D. drink tequila and described A.D. as "tipsy" and "silly and goofy." She never saw A.D. and defendant together at the party, did not hear or see anything unusual between them, and did not see defendant hit A.D.

¶ 26 After Kato left the party, she went back to Shonda's apartment. Shonda, Shonda's five-year old daughter, and Kato's son were already at the apartment. Kato's bedroom was less than five feet away from Shonda's room and less than ten feet away from A.D.'s bedroom. When defendant arrived at Shonda's after the party, he woke up Kato and asked her if he could talk to A.D, as A.D. "was being hysterical and missed her father." Then, while defendant and A.D. were talking outside, Kato heard Shonda say, "She's on that drunk shit again. She always does this." Defendant tried to keep A.D. from going inside the apartment and arguing with Shonda.

¶ 27 Kato then went outside and saw defendant holding A.D. back, saying, "I am not going to let you go. You're drunk. I am not going to let you drive like this." Defendant picked A.D. up and carried her up the stairs into the apartment. Kato came to the hallway, and, in A.D.'s bedroom, she saw A.D. laying on the bed and defendant holding her hands down. Shonda then came out of her room and yelled, "here she goes again. This - - this can't go on in my house." Tianna and Shonda's five-year old daughter were also present at that time. Kato went to retrieve her belongings. When defendant saw Kato trying to leave, he told her that he did not want her to

leave. A.D. never told Kato that defendant had assaulted, raped, or had sex with her. Kato never saw defendant choke A.D.

¶ 28 On cross-examination, Kato confirmed that, when she left Shonda's apartment that night, she left without defendant. She also testified that she was not angry but was confused and did not understand what was going on.

¶ 29 Defendant presented a stipulation from Detective Wiggins from the Chicago police department. If Detective Wiggins were called to testify, he would have testified that his investigation revealed that, after A.D. and defendant arrived at Shonda's, they talked briefly in the living room, A.D. went into her bedroom, A.D. stayed in her bedroom for a short period of time, and then A.D. returned to the living room and talked with defendant for about ten minutes. Detective Wiggins would also have testified that A.D. stated that when defendant entered her bedroom, they talked for a few minutes, defendant left, and, about twenty minutes later, defendant came back and laid next to her.

¶ 30 Following argument, the trial court found defendant guilty of criminal sexual assault, aggravated domestic battery, and aggravated battery. It noted that "[t]here were some inconsistencies" and "some impeachment" but that it considered these "minor." It noted that Hart, defendant's sister, testified that defendant "had his arms outstretched and he was rocking back and forth, that she couldn't see where the hands were." It then stated, "But circumstantial evidence, along with the other testimony, is that *** - - his hands were around [A.D.'s] throat." At sentencing, the trial court merged the aggravated battery count into the aggravated domestic battery count and sentenced defendant to six years in prison for criminal sexual assault and three years in prison for aggravated domestic battery, to be served consecutively.

¶ 31 On appeal, defendant contends that the State did not prove him guilty of criminal sexual assault, aggravated domestic battery, and aggravated battery beyond a reasonable doubt. He argues that the State's witnesses, A.D., Chaquitta, Shonda, and Hart, were contradicted and substantially impeached and that their testimony was insufficient to establish his guilt. Defendant does not dispute that he engaged in the act of sexual penetration, but asserts that the State did not prove that the act was not consensual. Defendant requests that we reverse his convictions.

¶ 32 When we review the sufficiency of the evidence on appeal, the question 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 crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The trial court here, as the fact finder, is in a "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24. The trial court's factual determinations and credibility assessments "are entitled to 'great weight,' " as, unlike the reviewing court, it "had the opportunity to hear the witnesses and observe their demeanor in court." *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 41 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007)). The trial court must resolve the conflicting testimony. *People v. Quintana*, 332 Ill. App. 3d 96, 103 (2002).

¶ 33 We, as the reviewing court, will not retry a defendant (*People v. Giraud*, 2011 IL App (1st) 091261, ¶ 17), and we will not substitute our judgment for that of the fact finder on issues about the weight of the evidence or the credibility of the witnesses (*People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009)). We will only reverse a conviction if the credibility of the witnesses is so improbable that it raises a reasonable doubt (*People v. Mays*, 81 Ill. App. 3d 1090, 1099

(1980)), or if the evidence is “so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of the defendant’s guilt” (*Vaughn*, 2011 IL App (1st) 092834, ¶ 24).

¶ 34 To prove criminal sexual assault as charged, the State had to prove defendant used force or threat of force and committed an act of sexual penetration, *i.e.* that he made any contact, “however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus 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 5/11-1.20(a)(1) (West 2012); 720 ILCS 5/11-0.1 (West 2012).

¶ 35 “Force or threat of force” is defined as the use or threat of “force or violence” and includes, but is not limited to, when the accused (1) “threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believes that the accused has the ability to execute that threat,” or (2) “overcomes the victim by use of superior strength or size, physical restraint, or physical confinement.” 720 ILCS 5/11-0.1 (West 2012). To prove criminal sexual assault, “[t]here is no definite standard setting the amount of force needed to show that the parties engaged in nonconsensual intercourse, and each case must be considered on its own facts.” *People v. Le*, 346 Ill. App. 3d 41, 50 (2004). When considering the evidence of force, we may consider the size and strength of the defendant and the victim as well as the place and conditions under which the incident occurred. *People v. Hines*, 105 Ill. App. 3d 35, 37 (1982).

¶ 36 Consent is a defense to the criminal sexual assault offense as charged in this case and is defined as a “freely given agreement to the act of sexual penetration or sexual conduct.” 720 ILCS 5/11-1.70(a) (West 2012). However, “[l]ack of verbal or physical resistance or submission

by the victim resulting from the use of force or threat of force by the accused” does not constitute consent. 720 ILCS 5/11-1.70(a) (West 2012).

¶ 37 Defendant does not dispute that the act of sexual penetration occurred. Rather, he argues that the State did not present evidence to establish that the act was not consensual. We disagree. Viewing all the evidence in the light most favorable to the State, we find that the evidence was sufficient for any rational trier of fact to find that defendant engaged in an act of sexual penetration by the use of force and that A.D. did not consent to the act of sexual penetration.

¶ 38 A.D. specifically testified that she did not consent to the sexual penetration. She testified that, after the party, when defendant entered her bedroom and laid on her bed uninvited, she scooted her body up to her headboard to get distance from him. Defendant then grabbed her and pinned her down. A.D. repeatedly told him to stop and asked him to leave, cried “profusely,” and struggled with him when he tried to remove her leggings. This evidence supports that A.D. communicated her lack of consent in an objective manner. See *People v. Carlson*, 278 Ill. App. 3d 515, 521 (1996).

¶ 39 The evidence also supports that A.D. was overcome by defendant’s superior strength and size, as she testified that he used “a lot of force” and she could not push him off because he was “a lot bigger” and “a lot stronger.” She struggled with defendant when he was taking off her leggings, but was overcome by his force.

¶ 40 We find that A.D.’s testimony alone was sufficient to support the trial court’s guilty finding, as the victim’s testimony alone is sufficient to sustain a criminal sexual assault conviction. *Carlson*, 278 Ill. App. 3d at 521; see also *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Further, the issue of consent is “ultimately a matter of credibility, a question best left

to the trier of fact who heard the evidence and saw the demeanor of the witnesses.” *People v. Barbour*, 106 Ill. App. 3d 993, 998 (1982). The trial court here expressly stated that it “listened to the evidence and observed the witnesses while they were testifying and their demeanor” and found any inconsistencies and impeachment “minor.” Thus, based on the trial court’s guilty finding, it found A.D.’s testimony to be credible and accepted her account of the incident, which was its prerogative in its role as the trier of fact. See *People v. Moody*, 2016 IL App (1st) 130071, ¶ 52.

¶ 41 Defendant asserts that reasonable doubt existed regarding the consensual nature of the sexual encounter because A.D. did not seek medical treatment immediately and did not call the police. However, Shonda called the police and A.D. went to the hospital when she woke up at her boyfriend’s house, where she had gone because she was “very terrified” and “just didn’t know what to do.” At the hospital, she told the nurse that her cousin had sexually assaulted her. Thus, A.D. reported the assault as soon as she felt able and the record rebuts defendant’s assertion.

¶ 42 Defendant also claims that the evidence shows that the act was consensual, as no one in the apartment heard the sexual assault and A.D. did not call out for help before, during, or after the incident. However, “[m]erely because a victim does not cry out for help or try to escape at the slightest opportunity is not determinative on the issues of whether she was being forced to have sexual intercourse, or whether she consented to having sexual intercourse, especially if she was *** overcome by the superior strength of the assailant, or paralyzed by fear.” *People v. Bowen*, 241 Ill. App. 3d 608, 620 (1993). Here, the record supports that A.D. was attempting to yell but was overcome by defendant’s superior strength and paralyzed by fear. She testified, “she

was in a state of shock,” “was under the impression that I was screaming but I think I was more so in shock,” and her “mouth was open but I am not sure what was coming out, if anything was coming out.” Accordingly, we do not find that the fact that no one in the apartment heard the struggle and that A.D. was unable to scream for help demonstrates she consented to the act of sexual penetration.

¶ 43 Defendant further claims that the evidence was insufficient to support his convictions because the State did not present any hospital or medical records or photographs to show that A.D. was injured from the incident. He claims if he had sexually assaulted A.D. and then choked her, she would have had injuries to her vagina, neck, back, or head. However, to sustain a conviction, the State was not required to corroborate A.D.’s testimony with physical or medical evidence. *People v. Le*, 346 Ill. App. 3d 41, 50 (2004).

¶ 44 Furthermore, to convict defendant, the State did not have to prove that A.D. was physically injured. As previously discussed, to convict defendant of criminal sexual assault, the State had to prove that defendant used force, or threat of force, and committed an act of sexual penetration. 720 ILCS 5/11-1.20(a)(1) (West 2012); 720 ILCS 5/11-0.1 (West 2012). Physical injury is not an element of this offense.

¶ 45 Similarly, with respect to the battery convictions, physical injury is not a required element if, as here, the defendant “made physical contact of an insulting or provoking nature” with the victim. To prove aggravated domestic battery as charged, the State had to prove that, in committing a domestic battery, defendant strangled A.D., *i.e.* that he intentionally impeded A.D.’s normal breathing or circulation of her blood by applying pressure on her throat or neck or by blocking her nose or mouth. 720 ILCS 5/12-3.3(a-5) (West 2012). To prove that defendant

was committing domestic battery when he strangled A.D., it had to prove that he knowingly without legal justification caused bodily harm *or* made physical contact of an insulting or provoking nature with any family member or household member. 720 ILCS 5/12-3.2(a)(1)-(2) (West 2012). To prove aggravated battery, it had to prove that, in committing a battery, *i.e.* knowingly without legal justification causing bodily harm to *or* making physical contact of an insulting or provoking nature with A.D., defendant strangled her. 720 ILCS 5/12-3.05(a)(5) (West 2012); 720 ILCS 5/12-3(a) (West 2012).

¶ 46 Here, it is uncontested that A.D. and defendant were cousins, and thus, family members. And there is ample evidence in the record through A.D. and Chaquitta's testimony to show that defendant strangled A.D., *i.e.*, made physical contact of an insulting or provoking nature, after the sexual assault occurred. Thus, we do not agree with defendant that the State did not prove him guilty beyond a reasonable doubt because it did not present hospital records or photographs showing that A.D. sustained injuries from the sexual assault and battery.

¶ 47 Furthermore, we do not agree with defendant's argument that the evidence was insufficient because the State's witnesses, including A.D., were impeached and not credible. " 'Testimony may be found insufficient *** only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt.' " *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 41 (quoting *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)). The trial court, the trier of fact here, who listened to the witnesses and observed their demeanor, stated that the inconsistencies in the testimony were "minor" and that "there was some impeachment" but that it considered it "minor." From our review of the record as a whole, we cannot conclude that there were such gross inconsistencies in or impeachment of A.D.'s

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testimony or the testimony from the State's other witnesses that no reasonable person could accept it.

¶ 48 For the reasons explained above, we affirm defendant's convictions.

¶ 49 Affirmed.