2017 IL App (3d) 130419-U

Order filed January 5, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0419 Circuit No. 12-CF-181
DERRICK A. WRIGHT,	)	Honorable Walter D. Braud,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: Two of defendant's convictions must be vacated under one-act, one-crime principles.

¶ 2 Defendant, Derrick A. Wright, appeals his conviction for three counts of criminal sexual assault, arguing that two of his convictions must be vacated under one-act, one-crime principles. Defendant further argues the trial court erred by stating the prosecutor was above reproach, improperly considering the failure to introduce a motel receipt, failing to grant a continuance,

and considering improper factors at sentencing. We affirm in part, vacate in part, and remand for resentencing.

¶ 3 FACTS

¶ 4 In 2012, defendant was charged by information with three counts of criminal sexual assault, alleging he committed an act of sexual penetration with T.K.R. when T.K.R. was between the ages of 13 and 18 and defendant was 17 years or older and defendant: (1) held a position of trust in relation to T.K.R. (count I) (720 ILCS 5/12-13(a)(4) (West 2010)); (2) used force (count II) (720 ILCS 5/12-13(a)(1) (West 2010)); and (3) knew that T.K.R. was unable to give knowing consent (count III) (720 ILCS 5/12-13(a)(2) (West 2010)).[1] Defendant pled not guilty to all three counts and the matter proceeded to a bench trial.

¶ 5 T.K.R. testified that defendant was a friend of the family and that she had known him since she was in the third or fourth grade. T.K.R. said that she was not friends with defendant and did not "hang out" with him, but she was friends with one of his friends. On June 5, 2011, T.K.R. was 15 years old. T.K.R. said, "[H]e's always looked at me like I was supposed to be his niece. You know, I call his sister my 'God-mom', so I look at him as an uncle. And, like, if he's an uncle, I wouldn't think nothing of it or anything such would be wrong with [him having my cell phone number]." Defendant would text her "every now and then" to see how she was doing.

¶ 6 T.K.R. stated that she texted defendant, asking for money for a tattoo. A couple of weeks after she asked defendant for the money, he called her "and said that he had the money." That night, T.K.R. had been at a graduation party with her cousin, which ended at approximately 1 a.m. When T.K.R. returned to her grandmother's house, defendant picked her up so they could get the money. No one else was in the vehicle. They went to a house in Milan where defendant

[1]The criminal sexual assault statute was subsequently renumbered as 720 ILCS 5/11-1.20 by Public Act 96-1551 on July 1, 2011.

exited the car and went inside while T.K.R. stayed in the vehicle. When defendant came out of the house, T.K.R. exited the car and defendant met her at the back of the car on the passenger side. At that moment, defendant pushed T.K.R. against the vehicle. Defendant said, "It's only going to take a minute." He then held T.K.R. up against the car with his arms. Her stomach and chest were against the car. She tried to push defendant away, but could not. Defendant then pushed aside the crotch of her shorts and underwear and "shoved" his penis in her vagina. She said it did not last very long and he kept saying, "it's only going to take a minute. It's only going to take a minute. I'm almost done." When he was finished, he drove her back to her grandmother's house. On the ride there, they did not speak, defendant just handed T.K.R. the money.

¶ 7 T.K.R. said she had never dated defendant and never told defendant that she was 18 years old. Other than on June 5, 2011, she never had sexual intercourse with defendant.

¶ 8 Charles R. testified that he was T.K.R.'s father. He said he had known defendant since they were children. Before June 5, 2011, Charles had heard that defendant was trying to "get with" T.K.R. so he called defendant. Defendant said that he would never do that because she was like a niece to him. Charles then told defendant that T.K.R. was 16 years old.

¶ 9 T.K.R.'s mother, Lakenya H., testified that she met defendant in 1994 when she moved to Illinois from California. She was good friends with defendant's sister. Defendant initially met T.K.R. when she was three or four years old and saw her periodically as she was growing up.

¶ 10 Defendant testified at trial and admitted to having sexual intercourse with T.K.R. on June 5, 2011, but stated that the sex was consensual. Defendant and Branden Kelley picked up Elexus H. and then went to pick up T.K.R. at her grandmother's house around 1-1:30 a.m. T.K.R. sat in

the front seat with defendant and Branden sat in the back seat with Elexus. They drove to a house in Milan. Defendant said:

> "I pulled up at [a friend's] house, went in there, got some weed, was in there for about ten minutes maybe, ten minutes, came out, hopped in the car, left there, went straight to Denny's. We all went in there and got some food, left out of there and went straight to Motel 6. I went in there, got the room, came back outside, parked the car, we all went in the room. It was a double bed [room]. Lexus and Branden took one bed. Me and [T.K.R.] took another bed. After we ate, horsed around for a little bit, they had sex, we had sex, all consensual in the same room."

Defendant testified that T.K.R. never told defendant to stop. They then fell asleep and defendant dropped T.K.R. off at her grandmother's house the next morning around 10-10:30 a.m. They did not speak the next day because they were not in a relationship. Elexus's testimony corroborated defendant's version of events. During her own testimony, T.K.R. had denied knowing Branden Kelley and stated she was no longer friends with Elexus.

¶ 11 Defendant testified he knew Charles from around the neighborhood, but he did not know Lakenya other than maybe "seeing her around." He did not know T.K.R. through her family and had no reason to be aware of her age. Charles did not call defendant about the incident. Defendant said he paid for the motel room in cash and did not get a receipt, or if he did, he threw it away. He also did not have the Denny's receipt. He said his "attorney went to go check for all that but they said it was too late."

¶ 12 When making its determination whether defendant stood in a position of trust, the court said:

> "[Charles] supplied a critical piece of evidence when he testified that the defendant told him that he was like an uncle to the young lady and that she was like a niece. Now [Charles] was so upset that he could not have invented that if he tried. And the only person here that is close enough to the evidence to have supplied him with that is the prosecutor. There is [*sic*] no people running around in the hallway who would know how important that evidence was. This particular prosecutor is above reproach. Most prosecutors are above reproach, but this one I happen to know. So that I credit [Charles's] testimony. I believe him."

The court then found that it was proven beyond a reasonable doubt that a relationship of trust existed between defendant and T.K.R.

¶ 13 Concerning the issue of whether T.K.R. consented, the court said:

> "[A]s to Count I, there is no question from the evidence everybody admits that there was penetration, that the defendant inserted his penis in the vagina of [T.K.R.] The only question was whether she consented to it. [T.K.R.] said that she didn't. I have every reason to credit her testimony, that is I'll say for the record that I find her testimony to be true, and I find defendant's testimony to be untrue. Not only is the defendant harmed by the fact that he has all of these felony convictions, his testimony doesn't make sense. If he went to a hotel at 2:00 o'clock in the morning, and the hotel receipt is his passport, there is no way we're sitting here and I'm not looking at that passport. There is no way I'm not sitting here seeing the result of that successful subpoena on the records of Motel 6, which would bear [defendant's] name and proof that he was at the motel. Now would that clear him of all these charges? Probably not. But it would certainly

> cast a—and maybe not, who knows, but it would certainly have put a great big bucket of water on [T.K.R.'s] testimony and everybody around her. Now does [defendant] have to prove his own innocence? No, but once he takes the stand he lives by the same rules the State lives by. If they don't pursue leads, if they don't follow-up on things and expect me to rule in their favor just because I kind of like the way their case is going, it wouldn't happen. And [defendant] has the same, once he takes the stand, once he puts his case on, he can't ask me to credit that he went to a hotel at 2:00 o'clock in the morning after he's testified that he paid for a hotel receipt. I mean there is probably no one in this room who hasn't been to a hotel whether it's late at night no tell motel or just a regular motel. We've all been there one way or another and they give receipts and they keep the records forever. And if they didn't keep them forever, has there been some explanation why that's not there? No."

The court found defendant guilty on all three counts.

¶ 14 Defendant filed a posttrial motion and a motion for a new trial, which were denied. The trial court sentenced defendant to three concurrent sentences of 25 years' imprisonment.

¶ 15 ANALYSIS

¶ 16 On appeal, defendant argues that two of his convictions should be vacated based on one-act, one-crime principles. Defendant further raises a series of procedural arguments, including bias of the trial court, improper consideration of the failure to introduce the motel receipt, failure to grant a continuance to obtain Branden Kelley as a witness, and error at sentencing.

¶ 17 At the outset, defendant acknowledges that he forfeited the one-act, one-crime issue, but asks that we review it under the second prong of the plain error doctrine. "[I]t is well established

that a one-act, one-crime violation affects the integrity of the judicial process, thus satisfying the second prong of the plain-error test." *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009); see *People v. Clark*, 2016 IL 118845, ¶ 46.

¶ 18 Under the one-act, one-crime rule, a defendant may not be convicted of multiple offenses based on the same physical act. *People v. Almond*, 2015 IL 113817, ¶ 47. An "act" is "any overt or outward manifestation which will support a different offense." *People v. King*, 66 Ill. 2d 551, 566 (1977). The one-act, one-crime rule involves a two-step analysis. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, we ask whether defendant's conduct involved multiple acts or a single act. *Id.* If defendant's conduct involved multiple physical acts, multiple convictions are proper unless one offense is a lesser-included offense of another. *Id.*

¶ 19 Here, the State concedes, and we agree, that all three of defendant's convictions were based upon a single act of penetration. Therefore, two of the convictions must be vacated. "[The Illinois Supreme Court] has 'always held' that under the one-act, one-crime doctrine, sentence should be imposed on the more serious offense and the less serious offense should be vacated." *People v. Artis*, 232 Ill. 2d 156, 170 (2009) (quoting *People v. Lee*, 213 Ill. 2d 218, 226-27 (2004)). Our supreme court has also held that "where there are multiple convictions for aggravated criminal sexual assault based upon the same physical act, none of the offenses are [*sic*] more serious than any other." *Id.* at 172. This reasoning is applicable here. Though the court in *Artis*, in exercising its discretion, chose to remand the case for the trial court to decide which convictions to vacate, we elect to uphold the conviction for criminal sexual assault while defendant held a position of trust over T.K.R. (count I). We select this conviction because the evidence was sufficient to find that defendant held a position of trust over T.K.R. and none of defendant's procedural arguments defeat such a finding. We find the evidence, when viewed in

the light most favorable to the State, establishes the essential elements of the crime beyond a reasonable doubt. See *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). Accordingly, we vacate defendant's convictions for criminal sexual assault through the use of force (count II) and while knowing that T.K.R. was unable to give consent (count III).

¶ 20 In order to prove defendant guilty of criminal sexual assault while holding a position of trust over T.K.R., the State had to prove defendant: (1) committed an act of sexual penetration with T.K.R.; (2) was over the age of 17 while T.K.R. was between the ages of 13 and 18; and (3) held a position of trust, authority, or supervision in relation to the victim. See 720 ILCS 5/12-13(a)(4) (West 2010).

¶ 21 It was not disputed that T.K.R. and defendant had sexual intercourse while T.K.R. was between the ages of 13 and 18 and defendant was over the age of 17. Though defendant testified that he did not know T.K.R. through her family, the trial court found his testimony incredible and the testimony of Charles and T.K.R. credible. This other evidence was sufficient to find that defendant held a position of trust over T.K.R. T.K.R. testified that defendant was a friend of the family, and she had known him since she was in grade school. She further testified that defendant was like an uncle to her. T.K.R.'s father, Charles, testified that he had known defendant since they were children, and that defendant had specifically told him that he could never have a relationship with T.K.R. because she was like a niece to him. T.K.R.'s mother also testified that she was good friends with defendant's sister and that defendant met T.K.R. when she was young and saw her as she grew up. To summarize, the record, when viewed in the light most favorable to the State, establishes all three elements found in section 12-13(a)(4) of the Criminal Code of 2012. *Id.*

¶ 22 Turning to defendant's procedural arguments, we note that only one implicates the above conviction. Defendant argues that he "was denied a fair trial when the [court] improperly considered *** that a prosecution witness was credible based on the prosecutor's being 'above reproach.' " In essence, defendant is arguing that the court was biased in favor of the prosecutor and that this bias influenced the finding that Charles was credible. To consider this argument in context, we repeat the entirety of the court's statement when considering Charles's credibility:

> "[Charles] supplied a critical piece of evidence when he testified that the defendant told him that he was like an uncle to the young lady and that she was like a niece. Now [Charles] was so upset that he could not have invented that if he tried. And the only person here that is close enough to the evidence to have supplied him with that is the prosecutor. There is [*sic*] no people running around in the hallway who would know how important that evidence was. This particular prosecutor is above reproach. Most prosecutors are above reproach, *but this one I happen to know. So that I credit [Charles's] testimony. I believe him*." (Emphasis added.)

The isolated comment made by the court that the prosecutor was "above approach" was inappropriate. However, the comment, when viewed in the context of the trial court's entire oral ruling and the totality of the record, is insufficient to establish a disqualifying bias on the part of the trial court. When viewing the comments by the court in their totality, it appears that the court found Charles to be credible after witnessing his emotion while testifying. *People v. Bonutti*, 338 Ill. App. 3d 333, 343 (2003) (credibility determinations lie with the trial court as the trial court is in the best position to observe the demeanor of the witnesses while testifying). While the comment about the prosecutor is regrettable, we do not believe it establishes that the trial court

believed Charles merely because the trial court knew, trusted, and admired the prosecutor. Further, there was sufficient evidence, other than Charles's testimony, to support defendant's position of trust. Specifically, we note the testimony of T.K.R., whom the court found credible. *Supra* ¶ 5. We also note the testimony of T.K.R.'s mother. *Supra* ¶ 9.

¶ 23 As stated above, defendant's remaining arguments do not impact the conviction based on his holding a position of trust. Defendant's defense at trial was that T.K.R. consented to the sexual conduct. However, consent is only a defense to criminal sexual assault "where force or threat of force is an element of the offense." 720 ILCS 5/11-1.70 (West 2010). Therefore, the consent defense was only relevant to count II, which we have vacated. Defendant's arguments relating to whether the court improperly considered that defendant did not introduce a motel receipt and that the court improperly denied a continuance to obtain Branden Kelley as a witness[2] were only relevant to defendant's consent defense as they corroborated his story that he went on a "double date" with T.K.R., Elexus H., and Branden Kelley and had consensual sex in the motel room. Because those arguments do not impact defendant's conviction for criminal sexual assault while in a position of trust, we need not evaluate them.

¶ 24 We vacate two of defendant's convictions and remand this case for a new sentencing hearing on the position of trust conviction. Because we are remanding, we will not consider any alleged sentencing errors here on appeal.

¶ 25 CONCLUSION

¶ 26 The judgment of the circuit court of Rock Island County is affirmed in part, vacated in part, and remanded with directions.

[2]For purposes of the record, we note that we asked the parties to file a bystander's report regarding a meeting in chambers where defendant asked for a continuance to obtain Branden as a witness. The bystander's report confirmed that the request had been made, indicated that Branden would testify that defendant had been in a dating relationship with T.K.R., and noted that the decision was deferred.

¶ 27 Affirmed in part and vacated in part.

¶ 28 Cause remanded with directions.