FILED
June 27, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 150471-U

NO. 4-15-0471

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KEVIN HOLOHAN, Defendant-Appellant.	))))))))	Appeal from Circuit Court of Livingston County No. 14CF214 Honorable Robert M. Travers, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed defendant's conviction because the State failed to provide sufficient corroborating evidence to establish the *corpus delicti* of the offense of aggravated criminal sexual abuse.

¶ 2 In September 2014, the State charged defendant, Kevin Holohan (born April 16, 1982), with predatory criminal sexual assault of a child and aggravated criminal sexual abuse, alleging that he committed acts of sexual penetration and sexual conduct with T.W. (born June 19, 2006). At the 2014 bench trial, T.W. did not testify. The *only* evidence presented at trial to establish that defendant engaged in sexual conduct—an element of the offense of aggravated criminal sexual abuse—was based on defendant's own out-of-court statements. The trial court found defendant guilty of aggravated criminal sexual abuse and not guilty of predatory criminal sexual assault of a child. The court later sentenced defendant to 3 years of probation and 180 days in jail.

¶ 3 Defendant appeals, arguing that the State failed to establish the *corpus delicti* of aggravated criminal sexual abuse because the only evidence of sexual conduct was based on defendant's own statements. We agree and reverse defendant's conviction.

¶ 4 I. BACKGROUND

¶ 5 In September 2014, the State charged defendant with predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)), alleging that he committed acts of sexual penetration and sexual conduct with T.W.—the daughter of defendant's girlfriend, D.W.—who was under the age of 13. Specifically, the charges alleged that defendant placed his penis in the vagina of T.W. and touched the vagina of T.W.

¶ 6 At the November 2014 bench trial, T.W. did not testify because she was too scared to enter courtroom. As a result, the trial court reversed its prior decision to admit a video-recorded interview with T.W. conducted by a caseworker with the Children's Advocacy Center. The court ruled that admitting the interview would violate the confrontation clause of the sixth amendment (U.S. Const., amend. VI).

¶ 7 Detective Gary Beier testified that he conducted a recorded interview with defendant in October 2013. The State offered and the trial court admitted the recording into evidence. In the interview, defendant stated that he lived with D.W. and then seven-year-old T.W. Defendant explained that on two occasions in fall 2013, he took sleeping pills and woke to find his own semen on his body and T.W. lying naked nearby. Defendant explained that he did not remember having an orgasm on either occasion but deduced that he must have had one in his sleep on each occasion. He was unsure whether he had the orgasms spontaneously or whether T.W. touched him while he was sleeping.

¶ 8 D.W. testified that she began dating and living with defendant in 2009. In fall 2013, defendant told D.W. about two incidents that had occurred between him and T.W. As to the first incident, defendant told D.W. that he woke up to find T.W. naked and touching his penis. Defendant saw that he had semen on him. Regarding the second incident, defendant told D.W. that he woke up with his shorts down and T.W. naked in bed with him. Again, defendant had semen on him.

¶ 9 Defendant testified that during summer 2013, he told D.W. that T.W. was becoming "curious," in that she was asking questions about sex and trying to look at defendant's penis. Defendant described waking up on the couch and finding T.W. lying naked near his feet. Defendant described another occasion when he woke up in bed and found T.W. lying naked by his feet, hitting his leg. Defendant's shorts were pulled down toward his knees and he had semen on his leg. Defendant asked T.W., "What are you doing? You should not be in my room when I'm sleeping." T.W. responded by asking, "What's that white stuff?" Defendant then told T.W. to go to her bedroom. Prior to both incidents, defendant stated that he had taken over-the-counter sleeping aids. Defendant testified that he never touched T.W.'s vagina and never placed his penis in her vagina.

¶ 10 The trial court found defendant guilty of aggravated criminal sexual abuse and not guilty of predatory criminal sexual assault of a child. The court explained that D.W.'s testimony that defendant told her he awoke to T.W. touching his penis constituted the proof of "sexual conduct" necessary to prove aggravated criminal sexual abuse. See 720 ILCS 5/11-1.60(c)(1)(i) (West 2012). After the May 2015 sentencing hearing, the court sentenced defendant 3 years of probation and 180 days in jail.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Defendant argues that the State failed to establish the *corpus delicti* of aggravated criminal sexual abuse where the only evidence of sexual conduct was based on defendant's own statements. We agree and reverse defendant's conviction.

¶ 14 A. *Corpus Delicti*

¶ 15 "Under the law of Illinois, proof of an offense requires proof of two distinct propositions or facts beyond a reasonable doubt: (1) that a crime occurred, *i.e.*, the *corpus delicti*; and (2) that the crime was committed by the person charged." *People v. Sargent*, 239 Ill. 2d 166, 183, 940 N.E.2d 1045, 1055 (2010). "[P]roof of the *corpus delicti* may not rest exclusively on a defendant's extrajudicial confession, admission, or other statement." *Id.* If the State relies on a defendant's statements, the State must supplement those statements with "corroborating evidence independent of the defendant's own statement[s]." *Id.* The corroborating evidence need not be sufficient in itself to prove the offense beyond a reasonable doubt. *Id.* Instead, it must merely "tend to show" that the offense occurred. (Emphasis omitted.) *People v. Lara*, 2012 IL 112370, ¶ 18, 983 N.E.2d 959. "If a confession is not corroborated in this way, a conviction based on the confession cannot be sustained." *Sargent*, 239 Ill. 2d at 183, 940 N.E.2d at 1055.

¶ 16 B. The Offense of Aggravated Criminal Sexual Abuse

¶ 17 Section 11-1.60(c)(1)(i) provides that a person 17 years of age or older commits aggravated criminal sexual abuse when he commits an act of sexual conduct with a victim who is under 13 years of age. 720 ILCS 5/11-1.60(c)(1)(i) (West 2012). Sexual conduct is defined as follows:

> "[A]ny knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused,

or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1 (West 2012).

¶ 18 C. The Evidence of Sexual Conduct in This Case

¶ 19 In this case, the only evidence of sexual conduct presented was D.W.'s testimony that defendant told her that T.W. touched his penis. The State provided no corroborating evidence independent of defendant's own statement to D.W. D.W.'s testimony was merely a recitation of what defendant told her and was therefore not "independent" of defendant's out-of-court statement.

¶ 20 The State claims that it presented independent evidence to corroborate defendant's statement. However, the evidence described by the State was all based on defendant's statement. The State cites defendant's recorded statement, D.W.'s testimony reiterating defendant's statement, and defendant's own testimony. First, neither defendant's recorded statement nor his in-court testimony described an act of sexual conduct. Second, as explained above, D.W.'s testimony merely reiterated defendant's out-of-court statement. Had defendant never made a statement about the incidents, the State would have had no evidence to present on the element of sexual conduct. Therefore, the State failed to establish the *corpus delicti* of the offense of aggravated criminal sexual abuse.

¶ 21 The State's reliance on *People v. Vaughn*, 2011 IL App (1st) 092834, 961 N.E.2d 887, is misplaced. In *Vaughn*, the appellate court concluded that the evidence was sufficient to establish the *corpus delicti* of criminal sexual assault (720 ILCS 5/12-13 (West 2006)) based on the allegation that the defendant placed his finger inside his daughter's vagina. The evidence of

that act of sexual penetration consisted of the following: (1) the defendant's out-of-court admissions; and (2) the defendant's in-court testimony, in which he explicitly stated that he placed his finger inside his daughter's vagina. *Vaughn*, 2011 IL App (1st) 092834, ¶¶ 26-29, 961 N.E.2d 887.

¶ 22 The *Vaughn* court held that the defendant's testimony constituted sufficient corroboration of his out-of-court admissions. *Id.* The court reasoned that in-court testimony does not suffer from the same "mistrust inherent in extrajudicial statements." *Id.* ¶ 27. Therefore, as a matter of first impression, the court held that a defendant's in-court testimony can serve as the independent corroboration necessary to satisfy the *corpus delicti* rule.

¶ 23 Even if we were to agree with the *Vaughn* holding, the present case is distinguishable. In this case, defendant did not give in-court testimony to support the allegation of sexual conduct. Defendant's testimony did not explicitly describe an act of sexual conduct. The only in-court evidence of sexual conduct in this case was D.W.'s testimony describing defendant's *out-of-court* admission. *Vaughn* involved corroboration in the form of the defendant's in-court testimony, not the testimony of another witness describing the defendant's out-of-court statement. In this case, the only evidence establishing sexual conduct was based on defendant's out-of-court statement. Therefore, *Vaughn* is inapposite.

¶ 24 Further, the State's argument that D.W.'s hearsay testimony was properly admitted as the statement of a party opponent is of no moment. The issue in this case is not whether the State's evidence was properly admitted but, instead, whether the properly admitted evidence established the *corpus delicti* of the offense. Because the evidence did not establish the *corpus delicti*, defendant's conviction must be reversed. *Sargent*, 239 Ill. 2d at 183, 940 N.E.2d at 1055.

¶ 25 III. CONCLUSION

¶ 26 For the following reasons, we reverse the trial court's judgment.

¶ 27 Reversed.