2018 IL App (1st) 162771-U
No. 1-16-2771
October 29, 2018

FIRST DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellee,)	
)	No. 12 CR 0540701
v.)	
)	The Honorable
MIGUEL ALCANTAR,)	Timothy Joyce,
)	Judge Presiding.
Defendant-Appellant.)	

JUSTICE WALKER delivered the judgment of the court.
Justice Pierce and Justice Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty of predatory criminal sexual assault of a child and aggravated criminal sexual abuse beyond a reasonable doubt because the evidence presented was not so unreasonable; improbable, or unsatisfactory that no reasonable jury could find defendant guilty. The trial court did not abuse its discretion in denying defendant's request for leave to issue a subpoena *duces tecum* for medical records, in limiting defendant's expert testimony, or in denying the request for a new trial due to prosecutors repeated improper questions to which the trial court sustained the objections.

¶ 2 Following a jury trial, defendant Miguel Alcantar (Alcantar) was convicted of predatory criminal sexual assault and aggravated criminal sexual abuse. The trial court sentenced

Alcantar to 15 years in prison for predatory criminal sexual assault and to 3 years for aggravated criminal sexual abuse, with the sentences to run consecutively.

¶ 3 On appeal, Alcantar argues the evidence does not prove him guilty beyond a reasonable doubt, the trail court erred by denying his request to subpoena medical records, limiting evidence at trial, and refusing to grant a new trial.

¶ 4 BACKGROUND

¶ 5 A phone call on February 19, 2012, sent police to the home Alcantar shared with Rosalba Nunez (Nunez) and their children, 5-year-old J.A. and her younger sister N.A. Alcantar was not at home when police arrived. The officers took Nunez and J.A. to the Children's Advocacy Center (CAC) and to a hospital. Dr. Erika Castro (Castro) examined J.A., who told Castro that Alcantar touched her vaginal area and her nipples. Rebekah Stevenson (Stevenson) of CAC interviewed J.A. on February 20, 2012, and Stevenson recorded the interview.

¶ 6 A grand jury charged Alcantar with predatory criminal sexual assault and aggravated criminal sexual abuse.

¶ 7 Stevenson interviewed J.A. again two years later. In the second interview, unlike the first, J.A. said Alcantar molested both J.A. and N.A. in February 2012. Defense counsel asked the court to order the production of N.A.'s medical records from an examination performed in 2014. The trial court denied the request.

¶ 8 Defense counsel sent J.A.'s medical records and the statements of J.A. and Nunez to Dr. David Levine. Dr. Levine wrote a report in which he said:

"The history of the alleged assault is very inconsistent in the multiple reports by both the alleged victim, ***, and the mother ***.

[J.A.'s] report is very inconsistent especially between the initial report taken by Dr. Castro *** and the victim sensitive report on 2/20/12. The patient states the 2 alleged events happened on Monday and Wednesday in the report of Dr. Castro on 2/19 *** while the mother's reported the events were a week apart.

[J.A.] varies the location of the alleged assaults. ***

The patient is inconsistent with who was in the car when the second alleged incident occurred. ***

* * *

The initial physical exam performed by first year Family Practice Resident Dr. Castro *** is difficult to interpret as non-standard, non-specific documentation is used. ***

***

All labs including the state crime lab report are all normal. There was no semen identified on vaginal, oral, anal swabs, or underwear. There was no saliva identified on vaginal swabs or on miscellaneous breast swabs.

Conclusions:

In my expert medical opinion there is no evidence of a sexual assault."

¶ 9 The prosecution filed a motion to bar Dr. Levine from testifying. The trial court held Dr. Levine could testify that the medical reports do not constitute evidence of sexual abuse, but

he could not testify regarding the inconsistencies in J.A.'s accounts, and he could not "testify that there was no evidence of sexual abuse."

¶ 10 At the trial, J.A. testified that when she was five, Alcantar touched her nipples and her vaginal area. At first, she said she did not remember which part of Alcantar's body touched her, but later she said he used his finger. She saw blood on his finger when he removed it from her vaginal area. Alcantar touched J.A.'s nipples with his mouth. J.A. remembered that after Alcantar touched her, she went to Nunez's room for Nunez to change her diaper. She told Nunez that Alcantar touched her. A few minutes later, she heard Nunez and Alcantar screaming. Alcantar said J.A. lied. Nunez wanted to take J.A. to a hospital, but Alcantar refused.

¶ 11 J.A. testified that on another day, she rode with Alcantar when Alcantar drove his friend Jorge Chavez (Chavez) home. They went to a park and J.A. swam. Chavez remained in the car. Alcantar fingered J.A.'s vaginal area and put his mouth on her nipples. When they returned home Nunez changed J.A.'s diaper. Nunez asked J.A. whether Alcantar touched her again. J.A. did not remember her answer, but she remembered that police came to their home the following day.

¶ 12 Chavez testified he went to Alcantar's home on February 18, 2012. Alcantar drove Chavez home around 8 p.m., and J.A. rode in the car. Chavez did not go to any park with Alcantar and J.A., and he did not see Alcantar touch J.A. inappropriately.

¶ 13 Nunez testified about the incidents on February 12 and February 18. She said that on February 18, Alcantar left to drive Chavez home around 6 p.m., not 8 p.m. She let Alcantar take J.A. with him in the car because she feared Alcantar. He returned around 8 p.m. with

bloodshot eyes, smelling of beer. When Nunez put J.A. to bed, she noticed that J.A.'s vaginal area and nipples looked red and swollen. J.A. told her Alcantar put his finger in her vagina again, and he "pulled her breasts." Nunez confronted Alcantar, and Alcantar yelled that J.A. was a "fucking lying bitch." But they all slept at home that night. When Nunez woke up, Alcantar had already left for work. Nunez called her sister, and then the police arrived.

¶ 14 Dr. Marjorie Fujara, medical director of CAC, testified she examined J.A. on February 23, 2012. J.A. had a normal hymen and her vulva appeared somewhat red. Dr. Fujara said the redness could result from a number of innocent causes. Dr. Fujara could neither confirm nor refute J.A.'s assertions of sexual abuse. The following exchange concluded Dr. Fujara's direct examination:

> "Q *** [B]ased on your education, your training, your experience, did you come to an opinion within a reasonable degree of medical certainty as to whether or not [J.A.'s] medical examination was consistent with her statements during her exam on February 19th of 2012?
>
> MR. BENSON [Defense counsel]: Objection.
>
> THE COURT: Sustained.
>
> BY MS. CARLISLE [Prosecutor]:
>
> Q Let me try that question again.
>
> Based on your education, your training and experience, did you come to an opinion based on a reasonable degree of medical certainty, as to whether [J.A.'s]

> medical examination was consistent, your medical examination, that was consistent with what her statement was back –
>
> THE COURT: Sustained. That's not the proper subject of an expert witness. Sustained.
>
> BY MS. CARLISLE:
>
> Q Dr. Fujara, based on your education, your training and your experience, did you form an opinion with regards to your examination of [J.A.] within a reasonable degree of medical certainty that normal findings are typical with a history of sexual abuse?
>
> MR. BENSON: Objection.
>
> THE COURT: Sustained."

¶ 15 Dr. Levine testified many innocent acts could explain the redness Dr. Castro and Dr. Fujara saw.

¶ 16 Stevenson introduced the video recording of her February 20, 2012, interview of J.A. The jury watched and listened to the recording. The trial court also sent the recording and a transcript of the interview to the jury during deliberations.

¶ 17 The jury found Alcantar guilty of both predatory criminal sexual assault and aggravated criminal sexual abuse. The trial court denied Alcantar's posttrial motion and sentenced him to 15 years in prison for predatory criminal sexual assault and to 3 years for aggravated criminal sexual abuse, with the sentences to run consecutively. Alcantar now appeals. The

record on appeal includes neither the video recording of Stevenson's 2012 interview of J.A. nor the transcript of that interview.

¶ 18 ANALYSIS

¶ 19 Alcantar first argues that the evidence does not prove him guilty beyond a reasonable doubt. When a defendant challenges the sufficiency of the evidence supporting his conviction, a reviewing court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). It is the province of the judge or jury as trier of fact "to determine the credibility of witnesses, to weigh the testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence." *Williams*, 193 Ill. 2d at 338. We will not disturb a defendant's conviction on grounds of insufficient evidence unless the proof is so unreasonable, improbable, or unsatisfactory that no reasonable jury could find defendant guilty. *Williams*, 193 Ill. 2d at 338.

¶ 20 Predatory criminal sexual assault of a child occurs when an accused age 17 or older commits an act of sexual penetration against a victim under the age of 13. 720 ILCS 5/12-14.1(a)(1) (West 2004). Sexual penetration is "any contact, however slight, between the sex organ or anus of one person by the sex organ, mouth or anus of another person." 720 ILCS 5/12-12(f) (West 2004); *People v. Raymond*, 404 Ill. App. 3d 1028, 1039, (2010). Evidence of the emission of semen is not required to prove sexual penetration. 720 ILCS 5/12-12(f) (West 2004); *Raymond*, 404 Ill. App. 3d at 1039. The statutory definition of penetration does not require physical penetration, but merely requires contact. *People v. Moore*, 199 Ill. App.

3d 747 (1990). Medical evidence is not required to sustain a conviction of criminal sexual assault. *People v. Le*, 346 Ill. App. 3d 41, 50 (2004).

¶ 21 Aggravated criminal sexual abuse occurs when a "person commits an act of sexual conduct with a victim who is under 18 years of age and the person is a family member." 720 ILCS 5/12-16(b) (West 2008); *People v. Ostrowski*, 394 Ill. App. 3d 82, 91 (2009). The Code defines "sexual conduct" as "any intentional or knowing touching or fondling by the victim or the accused [of] *** any part of the body of a child under 13 years of age, for the purpose of sexual gratification or arousal of the victim or the accused." Ill. Rev. Stat., 1984 Supp., ch. 38, par. 12 - - 12(e); *People v. Creamer*, 143 Ill. App. 3d 64, 70 (1986). The statute defines a "family member" as" a parent, grandparent, or child, whether by whole blood, half-blood[,] or adoption and includes a step-grandparent, step-parent, or step-child." 720 ILCS 5/12-12(c) (West 2008); *People v. Stull*, 2014 IL App 4th 120704, ¶ 59.

¶ 22 In this case, the evidence, when viewed in the light most favorable to the prosecution, proved defendant guilty of predatory criminal sexual assault and aggravated criminal sexual abuse. There was no dispute at trial that defendant was over 17 years old at the time of the offenses and that J.A. was his daughter, and only five years old at the time of the offense.

¶ 23 J.A., nine years old at the time of trial, testified consistently about defendant's abuse of her when she was five years old. J.A. positively identified defendant, her father, in court as the person who inserted his finger in her vagina and touched and sucked on her breasts on two separate occasions. One time was in the bedroom of their home and the other time was when they drove Chavez home. J.A. recalled that she was sleeping in the bedroom when defendant came into the room, put a hand over her mouth and said not to say anything or he

would kill her mother. Defendant then touched her "Cola" which J.A. called her vagina area. J.A. testified it hurt when defendant touched her "Cola" and it felt "ugly." J.A. remembered seeing blood on defendant's finger when he stopped touching her there. J.A. further testified defendant also put his mouth on her "Chi-Chi," which J.A. called her breasts, and that also hurt. J.A. told her mother about what defendant had done later that evening when her mother was changing her diaper.

¶ 24 J.A. also testified that the other time defendant touched her was in a park when she went with defendant to drive Chavez home. Defendant again touched her "Cola" with his finger and her "Chi-Chi" with his mouth. J.A. admitted she did not tell her mother this time because defendant threatened to kill her mother.

¶ 25 Here, there was more than J.A.'s testimony. J.A.'s testimony was corroborated by her statements to her mother, Detective Myrna Muniz, Dr. Castro, and Stevenson. J.A. told each of these persons about defendant touching her vagina and her breasts. Based on this evidence, a reasonable jury could find defendant guilty.

¶ 26 Defendant next argues the trial court abused its discretion in denying his request for leave to issue a subpoena *duces tecum* for the medical records of J.A.'s younger sister, N.A. We will not overturn a trial court's discovery ruling unless the trial court abused its discretion and the ruling had prejudicial effect. *People v. Fairbanks*, 141 Ill. App. 3d 909, 915 (1986); *People v. Curtis*, 48 Ill. App. 3d 375, 383 (1977).

¶ 27 To justify a pre-trial subpoena, a defendant must show that (1) the documents are evidentiary and relevant, (2) the documents are not otherwise procurable reasonably in advance of trial by the exercise of due diligence, (3) the party cannot properly prepare for

trial without production and inspection in advance of trial and the failure to obtain an inspection may tend to unreasonably delay the trial, and (4) the application is made in good faith and is not intended as a general "fishing expedition." *United States v. Nixon*, 418 U.S. 683, 699-700 (1974); *People v. Shukovsky*, 128 Ill. 2d 210, 225 (1988). The decision on whether to grant a pre-trial subpoena *duces tecum* is committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. *Nixon*, 418 U.S. at 702. Unless, the trial court's ruling is arbitrary or finds no support in the record, the reviewing court should not disturb a trial court's finding. *Id*. This court can sustain the decision of the trial court on any grounds which are called for by the record, regardless of whether the trial court relied on those grounds and regardless of whether the trial court's reasoning was correct. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995).

¶ 28 Here, the trial court denied defendant's request for leave to issue a subpoena for medical records of N.A. to see if she was also sexually abused when she was less than a year old. The medical records had no relevance to the charges against defendant involving J.A. Based on this, the trial court did not abuse its discretion.

¶ 29 Alcantar also argues the trial court abused its discretion by limiting Dr. Levine's testimony and not allowing him to testify (1) that in his opinion "there was 'no evidence of sexual abuse' "; (2) that there were "purported inconsistencies" in statements made by J.A. and her mother; and (3) that J.A. "might have been influenced by suggestive testing, using improper investigative techniques."

¶ 30 Motions *in limine* involve the inherent power of the trial court to admit or exclude evidence. The trial court's ruling is reviewed for an abuse of discretion. *People v. Williams*, 188 Ill. 2d 365 (1999). An abuse of discretion occurs only when a trial court's ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would adopt the trial court's view. *People v. Cerda*, 2014 IL App. 1st 120484, ¶ 183.

¶ 31 "[E]videntiary motions, such as motions *in limine*, are directed to the trial court's discretion. *** [E]ven where an abuse of discretion has occurred, it will not warrant reversal of the judgment unless the record indicates *** substantial prejudice affecting the outcome of the trial." *In re Leona W.*, 228 Ill. 2d 439, 460 (2008). We find there was no substantial prejudice affecting the outcome of the trial because the evidence of Alcantar's guilt was overwhelming and supported the convictions. The trial court properly exercised its discretion in allowing Dr. Levine to testify at trial on matters that fell within the realm of expert opinion. We find no abuse of discretion here.

¶ 32 Finally, Alcantar asserts the prosecutor committed misconduct by repeated questions to Dr. Fujara after the trial court correctly sustained objections to the questions. Defendant claims the State engaged in a “pattern of misconduct” when it asked an improper question to Dr. Fujara, and attempted to rephrase the question despite sustained objections to the question. The prosecutor’s ineffective attempts to re-phrase a question to Dr. Fujara before moving on did not prejudice defendant where the witness never answered, the objections were sustained, and the jury was instructed to disregard the questions to which objections were sustained. A prosecutor's "[i]mproper remarks will not merit reversal unless they result in substantial prejudice to the defendant." *People v. Smith*, 141 Ill. 2d 40, 60 (1990). The trial

court cured any error, and defendant was not prejudiced. The prosecutor's repeated questions do not warrant reversal in this case.

¶ 33 CONCLUSION

¶ 34 Accordingly, we affirm the convictions and sentences.

¶ 35 Affirmed.