2018 IL App (1st) 171965-U

No. 1-17-1965

SIXTH DIVISION
NOVEMBER 2, 2018

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. 16 MC6 005866
	)	
SHELDON LEVINE,	)	Honorable
	)	Patrick K. Coughlin,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions are affirmed over his contentions that the State did not prove him guilty of public indecency and battery beyond a reasonable doubt because (1) the victim's testimony was incredible, improbable, uncorroborated, and (2) the trial court assumed facts not in evidence when it found him guilty.

¶ 2 Following a bench trial, defendant Sheldon Levine was convicted of public indecency (720 ILCS 5/11-30(a)(2) (West 2016)) and battery (720 ILCS 5/12-3(a)(2) (West 2016)) and sentenced to two years of probation. On appeal, defendant contends that the State did not prove

him guilty of public indecency and battery beyond a reasonable doubt because the victim's testimony was incredible, improbable, and uncorroborated. He also contends that, when the trial court found him guilty, it assumed facts not in evidence. For the following reasons we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 The evidence at the bench trial established that defendant had been the primary care physician for the victim, L.R, for seven years. Defendant prescribed medications for L.R. for various physical problems and conducted routine breast examinations on her because she had a lump in her breast in the past. Defendant's convictions arose from an incident that took place during L.R.'s general check-up appointment with defendant on September 8, 2016.

¶ 5 L.R. testified that on September 8, 2016, she had a monthly checkup appointment with defendant to get her medications. After the nurse brought her into a room and recorded her vital signs, L.R. waited for defendant. When defendant came into the room, L.R. was the only other person there and defendant sat down on his chair, checked the computer, and asked L.R. why she was there. L.R. told him she was there for a check-up and to get her medications. After L.R. and defendant had a conversation about the nature of her visit, defendant began the check-up. He asked her to lift up her shirt and bra to conduct a breast examination, which he "probably" does at every visit.

¶ 6 L.R. took her shirt and bra off and lay down. Defendant began the breast examination. L.R. closed her eyes because she was uncomfortable. Defendant started to aggressively rub her nipples with both of his hands. L.R. felt very uncomfortable. Defendant then said, "now you're excited. It's my turn to get excited." L.R. asked him "what the *** hell are you doing?" and

immediately sat up and noticed that his pants were down and his penis was on the table. L.R. could not see his pants and testified that they had to be past his knees. L.R. grabbed her stuff and started to leave the room. Defendant pulled up his pants and grabbed her arm forcefully with both of his hands, and said, "promise you don't say anything. I could lose everything." L.R. felt threatened and "like it was going to happen again." L.R. went to the police and told them what happened.

¶ 7 On cross-examination, L.R. testified that she received medications from defendant for various physical problems, including Norco for back pain. She was diagnosed with bipolar disorder when she was 22 years old and has taken medication for it. L.R. had a lump in her breast about a year before this incident, which is why defendant did breast examinations on her. L.R. could not recall what defendant was wearing but testified he usually wore a belt. Before the breast examination, defendant went through L.R.'s medication list and other problems she had. Defendant's pants were up and L.R. did not see anything abnormal about his pants or the way he was dressed. The breast examination took about four or five minutes until she realized what defendant was doing, after which she grabbed her shirt and put her bra on. By the time L.R. turned around, she saw his penis on the table and his pants down to his knees. Defendant's belt was undone and she saw his underwear. L.R. did not see defendant pull his pants down and, while his hands were on her breasts, he did not pull his pants down or undo his belt.

¶ 8 After L.R. left the room, she did not tell the front desk what had happened. She went to the police the next day and had a conversation with Detective Farkas. L.R. told Detective Farkas

that defendant said to her, "now you're excited, it's my turn to get excited."[1] L.R. also told Detective Farkas that she said to defendant, "what the hell are you doing?" and that defendant said to her, "promise you don't say anything to anyone. It will ruin my career." Detective Farkas took notes during the conversation but L.R. did not know what she wrote down.

¶ 9 On re-direct, L.R. testified that defendant continuously touched her breasts until she sat up and asked what he was doing. Her previous breast examinations were not like the one in this case, with a typical exam lasting about one minute. Defendant had aggressively rubbed her breasts during one examination in May 2016, though.

¶ 10 After the State rested, defendant filed a motion for directed finding, arguing that the incident did not take place in a public place, which is a requirement to be convicted under the public indecency statute. The court denied defendant's motion.

¶ 11 Defendant testified that he had been a doctor for 43 years and L.R. had been his patient for about 7 years. Defendant conducted about two or three breast examinations each day. On September 8, 2016, L.R. had an appointment with him because she wanted a mammogram. When defendant entered the examination room, L.R. was by herself and they greeted each other. Defendant was going to give L.R. refills on her medications, including Norco, a narcotic medication. If defendant had a patient taking Norco, he would order a urinalysis to check for abnormal drugs, as many of his patients did not tell him all the medications they were on.

¶ 12 When defendant conducted breast examinations, his procedure usually took about two minutes. There was no way he would have used both hands during L.R.'s examination because

[1] Detective Farkas's full name is not included in the report of proceedings. As noted by the State, the transcript refers to Farkas in male pronouns. However, in the State's brief, it refers to Farkas using female pronouns. We will also use female pronouns when referring to Farkas.

he could not get an accurate reading. L.R. told defendant that she sometimes took cocaine and, after the breast examination, defendant told L.R. that the Norco medication combined with the cocaine was making her bipolar disorder worse. He told her that, if her next urinalysis came back positive for cocaine, he was going to contact her psychiatrist and disability attorney. L.R. was irate, took her clothes, and started walking out of the room. As L.R. was just outside the door, defendant called her name, touched her on the shoulder, and said, "I promise I won't call your doctor, your psychiatrist and your disability doctor and let them know what happened. I won't do that." Defendant testified that L.R. seemed a little bit better after trial.

¶ 13 Defendant continued to testify that on the day of the incident, he was wearing diapers that did not have a zipper. Due to a previous prostate surgery, he was not capable of having an erection. He never pulled his pants down when he was examining L.R.'s breasts. He never said to L.R., "now that you're excited it's my turn to get excited" or "please don't say anything to anyone, it would ruin my career." L.R. never said to him, "what the hell are you doing?"

¶ 14 On cross-examination, defendant testified that he sometimes had issues regarding memory. L.R. wanted a referral for a breast examination and he explained to her that he had to examine her to determine what kind of mammogram she needed. Defendant had done about two breast examinations a year on L.R. for about seven years and she had never complained on those other occasions. Defendant denied that he aggressively touched L.R.'s breasts. He examined the nipples for 10 seconds, which was how long it usually took. After the examination, L.R. got up suddenly and was upset when he told her he was going to cut off all of her medicines. When defendant touched L.R. on the shoulder as she was walking out, he did not want her to leave because he was afraid she was going to tell everybody about the cocaine.

¶ 15 Hazel Crest police detective Farkas testified on behalf of defendant that she wrote the follow up report and spoke with L.R. on September 12, 2016. She did not write the initial report or speak with L.R. on September 9, 2016. Asked if L.R. told her that defendant had said, "now you're excited, it's my turn to get excited," Detective Farkas responded, "[i]f it's not in my report, it wouldn't have been said to me." Asked whether L.R. told her that defendant said, "promise you won't say anything to anyone, it would ruin my career," she testified that it sounded more familiar but according to her report, L.R. did not tell her that.

¶ 16 On cross-examination, Detective Farkas testified that she only wrote supplemental reports for this case, she had a brief conversation with L.R., and her intent was not to get her full statement at that time but to check up on the initial report to make sure the statements matched up.

¶ 17 After Detective Farkas testified, the parties discussed that defense counsel had asked L.R. about a conversation she had with Farkas on September 9, 2016, but Detective Farkas did not talk to L.R. until September 12, 2016. The parties then stipulated that L.R.'s testimony about statements she made after the incident were statements she made to Detective Farkas on September 12, 2016.

¶ 18 In closing, defense counsel argued: "how is it possible for this to happen in the way that [L.R.] said it did versus what the doctor said happened" and "based on the testimony of [L.R.], Judge, it absolutely makes no sense that it happened that way. It's impossible." The trial court then found defendant guilty of public indecency and battery. In doing so, it stated that it did not think L.R. was impeached and it thought that L.R.'s "account of what happened is what occurred."

¶ 19 The court subsequently denied defendant's motion for a new trial. In doing so, it stated that the case came down to a credibility determination, it found L.R. was "very credible," and it did not find defendant's testimony "very credible at all." It also stated that defendant argued that L.R. was impeached but that it did "not hear anything impeaching." The court sentenced defendant to two years of probation, which included the condition that he could not practice medicine.

¶ 20 ANALYSIS

¶ 21 We note that we have jurisdiction to review this matter, as defendant filed a timely notice of appeal following the denial of his motion for a new trial. Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); R. 606 (eff. July 1, 2017).

¶ 22 Defendant contends on appeal that the State did not prove him guilty of public indecency and battery beyond a reasonable doubt because L.R.'s testimony was incredible, improbable, uncorroborated, and in direct conflict with Farkas's testimony. He asserts that L.R. testified about actions that would be physically impossible for him to perform, her relationship as his patient for seven years casts doubt on her testimony, and her testimony was not corroborated. Defendant also claims that the trial court assumed facts not in evidence. He requests that we reverse his convictions.

¶ 23 When we review the sufficiency of the evidence, 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." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We must take all reasonable inferences in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. In a bench trial, as here, it is for the

trial court, as the fact finder, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). We will not retry a defendant or substitute our judgment for that of the fact finder. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). We will not reverse a conviction unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 225.

¶ 24 To prove defendant guilty of public indecency as charged, the State had to prove that he was over the age of 17 and performed, in a public place, a lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of defendant.[2] 720 ILCS 5/11-30(a)(2) (West 2016). To prove defendant guilty of battery as charged, the State had to prove that he knowingly without legal justification by any means (1) caused bodily harm to an individual or (2) made physical contact of an insulting or provoking nature with an individual. 720 ILCS 5/12-3(a)(2) (West 2016).

¶ 25 Viewing the evidence as a whole and in the light most favorable to the State, we conclude that the evidence was sufficient to prove defendant guilty of public indecency and battery beyond a reasonable doubt. L.R., who the trial court found credible, testified that, during a breast examination, defendant aggressively rubbed her breasts with both hands and said, "now you're excited. It's my turn to get excited." L.R. immediately sat up, asked him what he was doing, and saw that his pants were down and his penis was on the table. When L.R. grabbed her stuff and started to leave, defendant forcefully grabbed her arm, which made her feel threatened, and said,

[2]We note that defendant does not challenge on appeal the element that the act occurred in a public place. Regardless, section 11-30(b) defines "public place" as "any place where conduct may reasonably be expected to be viewed by others." 720 ILCS 5-11(b) (West 2016).

"promise you don't say anything. I could lose everything." This testimony alone was sufficient for the trial court to reasonably conclude that defendant was guilty of public indecency and battery. See *Siguenza-Brito*, 235 Ill. 2d at 228 ("the testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant").

¶ 26 Defendant contends that L.R.'s testimony was incredible and preposterous because it would have been physically impossible for him to have performed the actions in the way she testified they occurred. He claim's L.R.'s testimony was less probable given that she had a relationship with him that lasted seven years without incident. As previously discussed, it was the trial court's responsibility to resolve any inconsistencies in the testimony, assess the credibility of the witnesses, weigh the evidence, and draw reasonable inferences therefrom. See *Siguenza-Brito*, 235 Ill. 2d at 228. The trial court heard the testimony as well as defense counsel's argument that L.R.'s testimony about what happened was "impossible." After doing so, the court expressly found L.R. credible and that her "account of what happened is what occurred," which was its prerogative in its role as the fact finder. See *People v. Moody*, 2016 IL App (1st) 130071, ¶ 52. We will not substitute our judgment for that of the fact finder. *People v. Brown*, 2013 IL 114196, ¶ 48.

¶ 27 Further, from our review of the record and L.R.'s testimony, we cannot find that her testimony was insufficient such that no rational trier of fact could accept it beyond a reasonable doubt. *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 41 ("Testimony may be found insufficient *** only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt") (quoting *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)). We will therefore defer to the trial court's findings and will not reverse

defendant's convictions simply because he claims that L.R.'s testimony was incredible. See *Siguenza-Brito*, 235 Ill. 2d at 228. We note that defendant asserts that he vehemently denied committing a crime or making contact with L.R. in the manner to which she testified. However, the trial court was not required to accept defendant's version over L.R.'s competing version (See *People v. Villarreal*, 198 Ill. 2d 209, 231 (2001)) or accept any possible explanation that may be consistent with his innocence and elevate it to the status of reasonable doubt (See *Siguenza-Brito*, 235 Ill. 2d at 229).

¶ 28 Finally, defendant asserts that, in finding him guilty, the trial court assumed facts not in evidence. Defendant claims that there was no testimony to support the trial court's comments that defendant could have lowered his pants before the examination began or that he had his pants pulled down during the entire examination. We disagree. We find that the trial court's comments about when defendant pulled his pants down during the incident were reasonable inferences from the evidence that were related to the court's credibility determinations, *i.e.*, it found L.R. credible. L.R. testified that she lay down for the examination and that her eyes were closed during it and that, when she immediately sat up and asked what defendant was doing, she saw that his pants were down. From this evidence the trial court could reasonably infer that defendant lowered his pants before he started the examination, that he did so when L.R.'s eyes were closed, and that his pants were down during the entire examination.

¶ 29 Defendant also takes issue with the trial court's comments about Detective Farkas's investigation that it made at the hearing on his motion to reconsider. He asserts that the court assumed facts not in evidence because it stated that, "as far as the Court could tell, Detective Farkas didn't do any of the investigation at all other than just making some brief notations or

report as far as the statements." We find that the trial court's comments about the extent of Detective Farkas' investigation were reasonable inferences based on Detective Farkas' testimony, which included that she only wrote supplemental reports, did not write the initial report, had a brief conversation with L.R., and did not have the intent to get L.R.'s full statement.

¶ 30 Accordingly, because the trial court made reasonable inferences from the evidence based on its credibility determinations, we are unpersuaded by defendant's arguments that the evidence was insufficient and the trial court assumed facts not in evidence when it found him guilty.

¶ 31 CONCLUSION

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

¶ 33 Affirmed.