2018 IL App (1st) 172358-U

FOURTH DIVISION
September 20, 2018

No. 1-17-2358

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re N.L.K., a minor,	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois	)	Cook County.
	)	
Petitioner-Appellee,	)	
	)	No. 15 JD 60324
v.	)	
	)	
N.L.K.,	)	
	)	Honorable
Respondent-Appellant).	)	Donna L. Cooper,
	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not improperly consider evidence in reaching its decision, and (2) the evidence presented was sufficient to prove him guilty of criminal sexual assault beyond a reasonable doubt.

¶ 2 Respondent N.L.K., born June 15, 2000, was charged in a petition for adjudication of wardship with two counts of criminal sexual assault, three counts of criminal sexual abuse, and one count of battery. Following a bench trial, respondent was adjudicated delinquent based on one count of criminal sexual assault with no findings made as to the remaining counts. The trial

court subsequently sentenced respondent to a term of three years of probation and registration as sexual offender for 10 years.

¶ 3 Respondent appeals, arguing that (1) the evidence was not sufficient to support his adjudication of delinquency; and (2) the trial court's findings of fact included an improper consideration of evidence.

¶ 4 The following evidence was presented at respondent's March 2017 bench trial.

¶ 5 B.R. testified that she was born on February 15, 2003. On October 20, 2015, she was living with her mother, respondent's father, and respondent in Blue Island. Her mother was in a relationship with respondent's father, but they were not married. Her bedroom was next to respondent's bedroom and his bedroom's only door was into her room. Her room had a door into the rest of the home. Her mother and respondent's father shared a third bedroom at the front of the apartment. When initially asked about the details of October 20, 2015, B.R. responded, "I plead my Fifth." B.R. was informed that the fifth amendment was not applicable to her.

¶ 6 B.R. then testified that on October 20, 2015, she woke up in the middle of the night. When asked what caused her to wake up, B.R. stated she did not recall. She admitted that she had contact with the Blue Island police department. When asked what the reason was for that contact, B.R. responded, "It is the reason why we're in this room right now." She admitted she went to the hospital. B.R. testified she did not want to be there. The prosecutor asked her about the incident and whether it was right, she answered, "I'm not saying it wasn't right. It just happened. Things happen. I'm ready to move on from this. I don't want to stick to it. What is the reason we coming back here."

¶ 7 The prosecutor again asked B.R. what caused her to wake up, and she testified that respondent "tried to rape me." She did not recall what respondent did, she "just woke up." When

she woke up her mother and told her she felt someone touching her. B.R. testified that it was dark and she did not recall who was touching her, but admitted that her mother and respondent's father were present in their room. She told her mother respondent tried to touch her. Her mother had B.R. get in the bathtub because she felt pain in her buttocks. B.R. was not present when respondent talked about the incident.

¶ 8 When her mother asked if she wanted to call the police, B.R. said yes. She was taken to the hospital where they "took a swab." She later gave the interview and told them what happened. During cross-examination, B.R. testified that she did not see or hear respondent in her room that night.

¶ 9 The parties entered into a stipulation that Dr. Myra West is employed by LaRabida Children's Advocacy Center as a forensic interviewer and conducted a victim sensitive interview of B.R. The State also entered the videotaped interview of B.R. by Dr. West into evidence pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2014)).

¶ 10 The forensic interview took place on October 20, 2015 at approximately 3:45 p.m. with B.R. and Dr. West present. B.R. stated that she lived with her mother, respondent's father who she referred to as her stepfather, respondent who she referred to as her stepbrother, and a one-year-old brother. Her younger brother shared a room with her mother and stepfather. She was in the seventh grade. B.R. explained the difference between the truth and a lie. She agreed to tell the truth.

¶ 11 B.R. said she was there that day because she was sexually abused. She described sexual abuse as "when somebody tries to like put their hands on you and put body parts on you without

you giving permission or saying anything." She learned about the term and what constitutes sexual abuse at school with a guest speaker.

¶ 12 B.R. then detailed what happened to her. When she went to bed, she was wearing underwear, basketball shorts and a long sleeve shirt. At around 4:30 a.m. that morning, B.R. was asleep in her bedroom when she felt a "shock" of pain in her "rear end" that made her jump. B.R. described the pain as a "sharp" pain in her buttocks, specifically in her anus. She did not feel anything else, she just felt the pain. She jumped and moved away from respondent. Her shorts and underwear were pulled down to her thigh when she jumped. She felt him leave her bed. He went back into his room, which was connected to her bedroom. She did not see him go to his room because she was facing the wall, but she heard his footsteps. According to B.R., the only person who could have been in her bed was respondent because her mother and stepfather were in their room asleep and her bedroom windows were locked and the apartment doors were locked. B.R. then went to tell her mother and stepfather about what happened. She was crying. They went to talk to respondent. B.R.'s mother had B.R. sit in a bathtub with warm water after B.R. complained of pain in her buttocks. B.R.'s mother then called the police and B.R. went to the hospital.

¶ 13 Detective Jeff Werniak testified that he was employed by the Blue Island police department and he spoke with respondent at the police station on October 20, 2015. Respondent agreed to speak with the detective. Another officer and respondent's grandmother were also present. Respondent told him he lived with B.R., her mother, and his father in Blue Island.

¶ 14 Respondent had been having difficulty sleeping the last week or so prior to October 20, 2015. He kept waking up around 4 a.m. That night, he woke up, left his bedroom, went into B.R.'s bedroom, and crawled into bed with her. Respondent then pulled down B.R.'s shorts and

underwear and then inserted his penis into her anus. Respondent told the detective he did it because he was having trouble sleeping. When B.R. woke up, respondent thought this was wrong and should not have done that. He then got out of the bed and went back into his room. Respondent was confronted by his father and B.R.'s mother. He told them what happened. He was then taken to the police station by responding officers.

¶ 15 During cross-examination, Detective Werniak admitted that respondent's grandmother was not present when respondent detailed the sexual assault. According to the detective, in his past experience, minors "tend to be more comfortable speaking with the officer one-on-one and having the family member leave depending on the substance of what had occurred." He testified that respondent knew he had the option of keeping his grandmother in the room. The detective stated he spoke with B.R. and her mother before he talked to respondent.

¶ 16 The State then rested its case. Respondent did not present any evidence. Following arguments, the trial court adjudicated respondent delinquent on one count of criminal sexual assault and made the following findings.

> "Well, I heard the testimony of the witnesses when we commenced the trial, the testimony of the police officer, the testimony of the mother who was a reluctant witness. However, we have the testimony of the officer who indicated that he did interview the minor respondent in the presence of his grandmother that the minor respondent did not want to talk to him in front of the grandmother so the grandmother at his request left.
>
> The minor admitted to certain things to the detective concerning the night, that he had had sexual contact with the minor

> respondent – with the complaining witness. I had the opportunity to review the disk couple of times. I note that in her testimony with Dr. West she was certain. She was clear about what happened. She was forthcoming.
>
> She was a reluctant witness today. It's understandably so because you can tell in this court here she is testifying and her mother leaves the room, mother who usually in matters – the mother will remain and offer some support but mother just got up and walked out. I believe the young lady. I believed her on the disk. I understand she was reluctant to testify. I understand that there is a lot of family pressure going on today.
>
> *** I find the *** the complaining witnesses' testimony very credible. Therefore, there will be a finding of delinquency on *** one count."

¶ 17 The trial court subsequently sentenced respondent to three years of probation and required him to register as a sex offender for 10 years.

¶ 18 This appeal followed.

¶ 19 We first consider respondent's argument that the evidence was insufficient to establish his conviction of criminal sexual assault beyond a reasonable doubt. Specifically, he asserts that his conviction "rests entirely upon the wholly uncorroborated word of B.R., a girl who dramatically changed her testimony when presented in court and subjected to cross-examination." The State responds that respondent's argument is "meritless where minor

respondent himself provided corroboration when he confessed to sexually assaulting B.R. while she slept."

¶ 20 When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, our inquiry is limited to "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); accord *People v. Cox*, 195 Ill. 2d 378, 387 (2001). It is the responsibility of the trier of fact to "fairly *** resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id*.

¶ 21 The reviewing court must carefully examine the record evidence while bearing in mind that it was the fact finder who saw and heard the witnesses. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *Id*. However, the fact a judge did accept testimony does not guarantee it was reasonable to do so. Reasonable people may on occasion act unreasonably. Therefore, the fact finder's decision to accept testimony is entitled to great deference but is not conclusive and does not bind the reviewing court. *Id*. Only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330.

¶ 22 As charged in the present case, "[a] person commits criminal sexual assault if that person commits an act of sexual penetration" and "knows that the victim is ***unable to give knowing consent." 720 ILCS 5/11-1.20(a)(2) (West 2014). "Sexual penetration" is defined under the

Criminal Code of 2012 as "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***." 720 ILCS 5/11-0.1 (West 2014). Illinois courts have held that a person cannot give knowing consent if he or she was asleep. See *People v. Vaughn*, 2011 IL App (1st) 092834, ¶¶ 38-39; *People v. Taylor*, 345 Ill. App. 3d 1064, 1074-75 (2004).

¶ 23 In a prosecution for a physical or sexual act committed against a child under the age of 13, including a prosecution for criminal sexual assault, section 115-10 of the Code allows the following evidence to be admitted as an exception to the hearsay rule: (1) 'testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another,' and (2) 'testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.' " 725 ILCS 5/115-10(a) (West 2014). "Section 115-10 *** was enacted to provide for reliable, corroborating evidence of a child's 'outcry' statement." *People v. Bowen*, 183 Ill. 2d 103, 114 (1998). "[W]hether a minor victim testifies consistently, inconsistently, or by not responding to questions posed regarding the sexual acts alleged does not affect the admissibility—under section 115-10—of the minor's out-of-court statements to others that detailed a defendant's sexual acts." *People v. Applewhite*, 2016 IL App (4th) 140558, ¶ 65.

¶ 24 Respondent incorrectly frames his argument as an instance in which B.R.'s testimony was the only evidence presented by the State. He focuses on perceived inconsistencies between B.R.'s reluctant trial testimony in comparison with her statements during the interview as well as the lack of physical evidence. However, the State presented additional evidence. Significantly,

respondent fails to acknowledge the testimony of Detective Werniak detailing respondent's admission to sexually assaulting B.R. in his argument about the sufficiency of the evidence.

¶ 25 When we consider the evidence presented at trial in the light most favorable to the State, we conclude the evidence was sufficient to adjudicate respondent delinquent for criminal sexual assault beyond a reasonable doubt. Detective Werniak testified that he was assigned to investigate the criminal sexual assault of B.R. When speaking with respondent the day of the sexual assault, October 20, 2015, respondent admitted to sexually penetrating B.R.'s anus with his penis. Respondent told the detective that he could not sleep and went into B.R.'s room around 4 a.m. He crawled into B.R.'s bed and pulled down her shorts and underwear. He then inserted his penis into her anus. When B.R. awoke, respondent left B.R.'s bed and went into his room. He realized what he had done was wrong.

¶ 26 Also on October 20, 2015, B.R. gave an interview to Dr. West at LaRabida Children's Advocacy Center, which was admitted into evidence at trial. During the interview, B.R. described being awoken by a "sharp" pain in her buttocks. She then felt someone leave her bed. While she did not see respondent, B.R. stated respondent was the only possible perpetrator because when B.R. went to her mother's bedroom, both her mother and respondent's father were asleep in the room. She said when she woke up, her shorts and underwear had been pulled down. Her mother had her sit in the bathtub because B.R.'s buttocks hurt. B.R.'s mother called the police and B.R. was taken to the hospital.

¶ 27 Although B.R. testified at trial, she provided little detail of the incident and initially she attempted to invoke the fifth amendment. During her testimony, B.R. testified that respondent "tried to rape" her. She did not recall what respondent did to her, she "just woke up." When she woke up, B.R. told her mother that B.R. felt someone touching her. She testified that both her

mother and respondent's father were in their bedroom when she entered their room. She also stated that her mother had her take a bath because B.R. felt pain in her buttocks. When asked about the incident, B.R. responded, "[I]t wasn't right. It just happened. Things happen. I'm ready to move on from this. I don't want to stick to it. What is the reason we coming back here."

¶ 28 The trial court heard all the testimony and observed the witnesses. In considering B.R.'s testimony, the court recognized that she was "reluctant," but explicitly stated that it "believed her on the disk," referring to the videotaped interview. The court found B.R. to be "certain" and "clear about what happened. She was forthcoming." Based on the evidence presented, a rational trier of fact could have found the elements of criminal sexual assault where respondent inserted his penis into B.R.'s anus while she asleep and unable to consent. See *Vaughn*, 2011 IL App (1st) 092834, ¶¶ 38-39; *Taylor*, 345 Ill. App. 3d at 1074-75. Accordingly, we affirm respondent's adjudication of delinquency.

¶ 29 Next, respondent contends that the trial court improperly relied on facts not in evidence when adjudicating him delinquent after the bench trial. Specifically, respondent complains of the following statement made by the trial judge at the beginning of her findings: "Well, I heard the testimony of the witnesses when we commenced the trial, the testimony of the police officer, the testimony of the mother who was a reluctant witness." Later, when discussing B.R.'s testimony, the court commented as follows.

> "She was a reluctant witness today. It's understandably so because you can tell in this court here she is testifying and her mother leaves the room, mother who usually in matters -- the mother will remain and offer some support but mother just got up and walked out. I believe the young lady. I believed her on the

> disk. I understand she was reluctant to testify. I understand that there is a lot of family pressure going on today."

¶ 30 "[W]hen a trial court is the trier of fact a reviewing court presumes that the trial court considered only admissible evidence and disregarded inadmissible evidence in reaching its conclusion." *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). "Deliberations of the trial court are limited to the record, and any determination based upon private knowledge of the court, untested by cross-examination, constitutes a denial of due process." *People v. Jenk*, 2016 IL App (1st) 143177, ¶ 53. "Every presumption will be accorded the trial court that it considered only admissible evidence in reaching its conclusion." *Id*. "However, a defendant may rebut this presumption with recorded statements by the trial court." *Id*.

¶ 31 B.R.'s mother did not testify at trial, but did testify at the hearing on the State's motion to admit B.R.'s out-of-court statements pursuant to section 115-10 of the Code (725 ILCS 5/115-10 (West 2014)). According to respondent, the trial court erred in considering B.R.'s mother's testimony which was given at the section 115-10 hearing, not the trial, and that the court improperly assumed that B.R.'s reluctance to testify was caused by her mother leaving the courtroom. The State maintains that no error occurred because the comment about B.R.'s mother's testimony was incidental to the findings of fact and the full remarks by the trial court establish that the adjudication was based on the evidence.

¶ 32 While the trial court did mistakenly reference the testimony of B.R.'s mother in the beginning of its findings of fact, we find any error to be harmless because a full review of the trial court's remarks shows that the mother's testimony did not form a basis of the delinquency adjudication. After that one reference, the court did not reference B.R.'s mother's testimony again. In reaching its finding, the court focused on respondent's admission to the sexual contact

with B.R. to the detective and B.R.'s interview with Dr. West in which the court found her "clear," "forthcoming," and "very credible."

¶ 33 Further, the trial court's observations of B.R.'s mother leaving the courtroom and B.R.'s reluctant testimony were not error. The supreme court has acknowledged that fact finders "do not leave their common sense behind when they enter court." *People v. Runge*, 234 Ill. 2d 68, 146 (2009). The court here observed B.R.'s demeanor during her testimony as well as actions in the courtroom and was permitted to make reasonable inferences. Further, B.R.'s testimony demonstrated her reluctance, by initially attempting to plead the fifth amendment and later testifying that she was ready to move on from the incident. The evidence at trial also showed the family implication of the sexual assault where respondent was the son of B.R.'s mother's boyfriend. Moreover, the trial court's observation about B.R.'s testimony and her mother leaving the courtroom was not a factor in the court's findings of fact. As discussed above, the trial court's findings were based on respondent's admission and B.R.'s credible interview given the day of the sexual assault. Thus, we find both complained-of comments to benign and unrelated to the factual findings. Therefore, since there is no evidence showing otherwise, we presume that the trial court only considered admissible evidence in reaching its decision.

¶ 34 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 35 Affirmed.