2018 IL App (2d) 170730-U
No. 2-17-0730
Order filed January 10, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re TIMOTHY S., Jr., a Minor	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	No. 15-JD-320
	)	
(The People of the State of Illinois,	)	Honorable
Petitioner-Appellee, v. Timothy S., Jr.,	)	Patrick Yarbrough,
Respondent-Appellant.)	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence of penis-to-anus contact was sufficient to support conviction of aggravated criminal sexual assault.

¶ 2 The respondent minor, Timothy S., Jr., was adjudicated delinquent on two counts of aggravated criminal sexual assault, two counts of aggravated criminal sexual abuse, and one count of sexual exploitation of a minor. In this appeal, he challenges only the sufficiency of the evidence as to count 2, the aggravated criminal sexual assault charge alleging that he committed an act of sexual penetration of the anus of a child.

¶ 3 I. BACKGROUND

¶ 4 The charged conduct was alleged to have taken place between April 25, 2011, and March 31, 2012. At the time, Timothy was 12 years old. The victim was his half-sister, K.S., who was then 8 years old. The facts below are summarized from the evidence given at trial.

¶ 5 Timothy and K.S. have the same father. In 2011, Timothy was living with his father, brother, and step-mother, and K.S. was living with her mother, Ashley B. K.S. went to stay with her father every other weekend until March 2012, when he died. Timothy's alleged conduct took place during these visits, at times when the adults were out of the house. K.S. first told her mother about Timothy's conduct in August 2015. Her mother called the police, K.S. was interviewed, and Timothy was charged in November 2015.

¶ 6 The State filed a petition to admit K.S.'s out-of-court statements made to her mother and to Marisol Tischman, a child interviewer at the Carrie Lynn Children's Center in Rockford who had interviewed K.S. Tischman and Ashley B. testified as follows at the hearing on the State's petition.

¶ 7 Tischman interviewed K.S. on September 11, 2015. Tischman made a video recording of the interview that was played during the hearing. In the video, K.S. described repeated incidents in which Timothy removed her clothing and touched her. The first time, he pulled her pants down and touched her "privates" and her "boob" with his hand. At other times, he "humped" her on her "pee-pee" and her "butt" with both their clothes off. Asked whether Timothy put his "privates" on her or inside her, K.S. said that he rubbed his private "kind of inside" her private and it hurt. K.S. also said that Timothy's private was "on" her butt rather than inside her butt. By "humping," K.S. meant that Timothy was kind of bouncing on her.

¶ 8 Near the end of the interview, Tischman gave K.S. anatomical drawings of a boy and a girl and asked her to circle the places where Timothy touched her and the parts that Timothy

used to touch her. When Tischman asked her what she meant by "boob," K.S. circled the two breasts on the drawing of the girl and Tischman wrote "boobs" near the circles. When asked what she meant by her "private," K.S. circled the crotch area on the drawing of the front of the girl. When asked to show what she meant by "butt," K.S. circled the entire buttocks area in back, saying that Timothy would "like rub it and sometimes he would try to stick it in there, so like, all over." Tischman asked K.S. where Timothy rubbed, and K.S. drew Xs on the cheeks of the buttocks and on the anus area. When Tischman asked where Timothy would "stick it," K.S. drew another X on the anus area. Tischman drew lines to label the Xs on the cheeks "rub" and the X on the anus area "stick." On the drawing of the boy, K.S. circled the boy's hand and penis. The penis was what K.S. meant by "private" and "weiner" (*sic*). That was what he used to stick and rub on her butt. When Timothy tried to stick his private in, it was uncomfortable and "kind of" hurt.

¶ 9 Ashley B. testified that K.S. first told her about Timothy's conduct on August 14, 2015. K.S. had come home complaining of a stomachache and had lain on the couch crying. When Ashley asked what was wrong, K.S. was at first reluctant to tell her until Ashley assured her that Ashley would not be mad. K.S. then told her that Timothy had "raped" her, bringing her downstairs to look for a hockey ball and then pulling her pants down and touching her "privates" and her "boob." He stopped when he heard a car door slam. Ashley called the Winnebago County sheriff to report what K.S. had said. The next day, K.S. told Ashley that it had happened more than once and that anytime Timothy and K.S. were alone he would "force kiss and hump her."

¶ 10 The trial court granted the State's motion to admit K.S.'s statements to Tischman and Ashley, finding that they were sufficiently reliable based on the circumstances.

¶ 11 At the adjudicatory hearing that began on June 22, 2017, K.S. herself testified. Regarding the conduct charged in count 2 (the alleged "penetration" of her anus by Timothy's penis), K.S. testified that her "butt" meant the part of her body that she sat on. Timothy had touched her front and her butt with his "private," that is, the front part of his body where he went to the bathroom. The video of her interview with Tischman and the diagrams she marked during that interview were admitted into evidence. The State also called as a witness Shannon Kruger, a pediatric nurse practitioner and expert in child abuse who examined K.S. in September 2015. According to Kruger, K.S. said Timothy had put his private parts in her private parts, and said that when he did so it was painful but it had not caused bleeding. The examination of K.S. was normal and there were no signs of trauma to K.S.'s genital area or anus. In reviewing K.S.'s medical records, Kruger learned that in November 2012 and January 2014 K.S. had had urinary tract infections, which can be associated with sexual abuse.

¶ 12 Timothy also testified and denied abusing K.S. or touching her inappropriately. The defense also introduced evidence of Timothy's good character including interactions with younger children as a counselor at a youth camp, K.S.'s history of urinary tract infections throughout her life including when she was a toddler, and that K.S. had invited Timothy and his brother to stay at her house after a birthday party about five months before she reported the abuse.

¶ 13 The trial court adjudicated Timothy delinquent as to all counts. After denying Timothy's motion for a new trial, the trial court sentenced Timothy to probation until his 21st birthday and to 30 days in the Juvenile Justice Center, to be stayed pending compliance with the terms of probation.

¶ 14 II. ANALYSIS

¶ 15 On appeal, Timothy raises only one issue: the sufficiency of the evidence supporting his conviction on count 2, which charged him with the sexual penetration of K.S.'s anus. In evaluating the sufficiency of the evidence, it is not the province of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant question is " '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.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The weight to be given to the witnesses' testimony, the determination of their credibility, and the reasonable inferences to be drawn from the evidence are all matters within the jurisdiction of the trier of fact. *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *Collins*, 106 Ill. 2d at 261-62. Likewise, the resolution of any conflicts or inconsistencies in the evidence is also within the province of the fact finder. *Collins*, 106 Ill. 2d at 261-62. We will set aside a criminal conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Smith*, 185 Ill. 2d at 542.

¶ 16 In count 2, the State charged Timothy with violating section 11-1.30(b)(i) of the Criminal Code of 2012, which provides that a person commits the offense of aggravated criminal sexual assault when he is under 17 years of age and he "commits an act of sexual penetration with a victim who is under 9 years of age." 720 ILCS 5/11-1.30(b)(i) (West 2014). As relevant to the conduct charged here, "sexual penetration" means "any contact, however slight, between the sex organ or anus of one person and *** the sex organ *** of another person, or any intrusion, however, slight, of any part of the body of one person *** into the sex organ or anus of another person ***." 720 ILCS 5/11-0.1 (West 2014). Thus, to prove the charge, the State was required to prove beyond a reasonable doubt that Timothy's penis either (1) made at least some contact

with, or (2) intruded even slightly into, K.S.'s anus. Under the first type of "penetration," the State must prove actual contact. *People v. Atherton*, 406 Ill. App. 3d 598, 609 (2010).

¶ 17 The trial court found that the State had met this burden. Timothy contends that the evidence of "penetration," through either contact or intrusion, was insufficient to support his conviction. As noted above, on review we do not re-weigh the evidence; rather, we must affirm if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that the elements of the offense were proved.

¶ 18 That standard is met here. In the videotaped statement, K.S. drew an X directly on the anal area of the drawing of the girl's back side when asked where Timothy would try to stick his "private," *i.e.*, his penis. The trial court found that, by placing this mark, K.S. intended to indicate her anus as the place where Timothy would try to stick his penis. We agree. This evidence, which was clear and unambiguous, supports the reasonable inference that Timothy's penis contacted K.S.'s anus when he was trying to "stick it in" the area K.S. indicated in the diagram, *i.e.*, her anus. The finding of such contact was also supported by K.S.'s statement that when Timothy tried to "stick it in," it was uncomfortable and kind of hurt.

¶ 19 Timothy argues that this case is like *People v. Oliver*, 38 Ill. App. 3d 166 (1976), in which the reviewing court found the victim's testimony insufficient to establish penis-to-anus contact or intrusion. However, in *Oliver*, the reviewing court found that the victim's direct examination demonstrated that she "was quite unknowledgeable as to the meaning of the terms used" in the statute, and thus her testimony had not clearly established either contact with or intrusion into her anus. *Id*. at 170. Further, her husband testified that the victim had made an out-of-court statement that the defendant's penis had only contacted the cheeks of her buttocks. *Id*. Here, by contrast, K.S. clearly distinguished her anus, where Timothy would try to "stick it

in," from her butt cheeks, which Timothy "rubbed." She also distinguished both of these areas from her "private" (her genitals). Her testimony thus demonstrated a degree of detail and an understanding of her own anatomy that was lacking in *Oliver*.

¶ 20 Timothy also emphasizes K.S.'s testimony that Timothy put his penis "on" her butt rather than "in" it. However, this testimony indicates only that Timothy did not engage in one form of sexual penetration, that is, using his penis to intrude into K.S.'s anus. It does not rule out the other form of sexual penetration, contact between his penis and K.S.'s anus. Timothy also argues that K.S.'s denial that he put his penis "inside" her butt precludes any finding of contact because K.S.'s anus was located "inside her butt." This argument is factually incorrect. The anus is an opening in the surface of the skin. As such, contact may occur without intrusion. The relevant statute expressly provides that proof of either contact or intrusion was sufficient to prove sexual penetration. See 720 ILCS 5/11-1.30(b)(i) (West 2014).

¶ 21 In challenging the sufficiency of the evidence on count 2, Timothy asked that, if we found that evidence insufficient, we reduce his conviction on that count to the lesser included offense of aggravated criminal sexual abuse. Having found the evidence sufficient to support his conviction on the more serious charge, however, we need not address this request.

¶ 22 Lastly, we deny the State's request that we assess a State's Attorney fee pursuant to 55 ILCS 5/4-2002(a) (West 2014). Such fees are not properly assessed in delinquency appeals. *In re W.W.*, 97 Ill. 2d 53, 58 (1983).

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, the judgment of the circuit court of Winnebago County is affirmed.

¶ 25 Affirmed.