2018 IL App (3d) 170832-U

Order filed October 1, 2018.
Modified upon denial of rehearing November 27, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Henry County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0832
v.	)	Circuit No. 17-CM-106
	)	
MATTHEW M. HENDERSON,	)	Honorable Dana Roy McReynolds,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Carter and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Evidence was sufficient to sustain conviction for domestic battery; and (2) State's statutory notice of its intent to introduce hearsay statements was not deficient.

¶ 2 The defendant, Matthew M. Henderson, appeals following his conviction for domestic battery. He argues that the evidence adduced at his bench trial was insufficient to prove him guilty of the offense beyond a reasonable doubt. He also argues that the circuit court erred in

admitting hearsay testimony where the State's notice of intent to introduce hearsay evidence was deficient.

¶ 3 FACTS

¶ 4 The State charged the defendant via criminal complaint with three counts of domestic battery (720 ILCS 5/12-3.2(a)(1), (2) (West 2016)). Count I alleged that the defendant caused bodily harm to D.P. in that he struck him with a belt, leaving a red mark. Count II alleged that the defendant made physical contact of an insulting or provoking nature with D.P. in that he struck him with a belt. Count III alleged that the defendant made physical contact of an insulting or provoking nature with B.P. in that he struck him with a belt.

¶ 5 Sixteen days before trial, the State filed a "Notice Pursuant to 725 ILCS 5/115-10," in which it informed the defendant of its intent to introduce certain out-of-court statements made by D.P. The notice listed the following two pieces of hearsay:

> "1. out of court statement of [D.P.] to Shane P*** in which he complained of the alleged acts by defendant as set forth in the previously disclosed Kewanee Police Department police report, DVD footage of Officer Kingdon's body camera, and Geneseo Police Department police report;
>
> 2. out of court statement of [D.P.] to Johanna Hager, forensic interviewer at the Braveheart Child Advocacy Center in Cambridge, Illinois as set forth in the attached DVD footage of said interview and the previously disclosed Geneseo Police Department police report."

The matter proceeded to a bench trial on November 8, 2017.

¶ 6 At trial, Shane P. testified that he lived in Kewanee with his two children, D.P. and B.P., who were nine years old and six years old, respectively. The children's mother is Amy A., who

lived in Geneseo with the defendant, her boyfriend. The children lived primarily with Shane, but would stay with Amy for a weekend every other week.

¶ 7 Shane testified that the children were with Amy over Easter weekend that year, April 15 and 16, 2017. They departed Friday at 5 p.m. and returned Sunday at 5 p.m. When D.P. entered Shane's house, he showed Shane a red mark on his side and told Shane "he had gotten beat by [the defendant] with a belt." Shane asked D.P. if he was telling the truth. Shane testified that D.P. responded: "Yes, [the defendant] hit me with a belt." Shane took a photograph of the red mark on D.P.'s side, which was admitted into evidence.[1] D.P. also told Shane that the defendant struck B.P. with the belt nine times. Shane called the police.

¶ 8 When the police arrived, Shane conveyed the information to them, including the photograph he had taken. Later, Shane took D.P. to Cambridge, Illinois, so that a private interview could be conducted. Shane testified that he did not tell D.P. what to say in that interview, because the "DSF guy" who was working with Shane on the case instructed him not to talk about the incident with D.P.

¶ 9 On cross-examination, Shane agreed that he originally told the police that D.P.'s injury was on his lower back, rather than his side. He conceded that he had an ongoing custody dispute with Amy, he did not care for the defendant, and as a result of the present incident, a custody order prohibiting the defendant from seeing the children had been issued.

¶ 10 Johanna Hager testified that she was a forensic interviewer at the Braveheart Children's Advocacy Center in Cambridge. She interviewed D.P. regarding the incident in question on April 19, 2017. No one else was present in the room during the interview. The interview was recorded. The video recording of Hager's interview with D.P. was entered into evidence and

[1]The photograph of the red mark has not been included in the appellate record.

played in open court. That video recording has not been included in the appellate record. Hager testified that "the credibility of a child relies on their ability to not only tell me about something that's happened but to provide details around what's happened." Hager found D.P. to be "more credible" because he was able to provide details of events prior to and after the incident.

¶ 11 On cross-examination, Hager admitted that D.P. originally stated that B.P. was not physically disciplined, then later stated the opposite. Hager agreed that when she asked D.P. if he would agree to tell the truth, he merely nodded his head, rather than responding verbally. Hager agreed that D.P. referred to the defendant as "dad" more than once during the interview.

¶ 12 On redirect examination, Hager testified that she had not concluded that D.P. had been coached for the interview. She explained that when a child has been coached, they will recite details of the allegation, but will be unable to provide the surrounding details, such as what happened before or after the alleged incident. A coached child will also often request that the interviewer direct a question to his or her parents.

¶ 13 D.P. testified that he did not like the defendant, but he did not know why. When the prosecutor asked if the defendant had ever done anything to D.P. that he did not like, D.P. responded: "Been beating with a belt and whatnot." D.P. testified that the beating occurred in the defendant's father's house, where the defendant and Amy lived. He testified that the defendant struck him on the side with the belt eight or nine times. Amy, B.P., and D.P.'s younger sister were in the room when it happened.

¶ 14 D.P. recalled that the defendant had gone upstairs to retrieve the black belt. He did not recall why the defendant retrieved the belt. The defendant did not say anything to him, and he did not remember how the beating stopped. Though D.P. testified that the defendant did not do anything else with the belt, he also testified that the defendant struck B.P. with the belt prior to

striking D.P. He recalled that the defendant held the belt in a loop while he struck B.P. He did not know what B.P.'s reaction was and did not know why the defendant stopped striking B.P.

¶ 15 D.P. told Shane what happened and showed him the red mark on his body. D.P. testified that he told Shane the truth and that he also told Hager the truth.

¶ 16 On cross-examination, D.P. testified that the house in which Amy and the defendant lived belonged to "Grandpa Ron," who was also in the room when the defendant struck him with the belt. Amy had a friend named Amanda, but she was not in the room. D.P. testified that Shane did not like when D.P. called the defendant "dad," because Shane wanted to be the only one that was "dad."

¶ 17 Upon examination by the court, D.P. again testified that he did not know why the defendant hit him with the belt. He testified that he was tickling his one-year old sister, who was asleep. When the court asked if that was why the defendant got his belt, D.P. responded affirmatively.

¶ 18 Ronald Henderson, the defendant's father, testified that he owned the home in which Amy and the defendant lived. Though he testified that he was familiar with the names of Amy's sons, he could not recall their names. He testified that the children were at the house on Easter Sunday morning, as was Amy's friend, Amanda. Henderson testified that the defendant arrived at the house at 9:30 that morning. Henderson testified that the defendant sat in front of him all day, except when he went to the bathroom and when he placed Easter eggs in the back yard. At some point, Amy took the children to Walmart. The defendant went upstairs to his bedroom at 3 p.m. to sleep. Amy and the two boys left for Kewanee around 4 p.m. Henderson testified that D.P. and B.P. would call the defendant "dad." He had never known the defendant to hit the children.

¶ 19 Amy testified to the same general sequence of events on that Sunday. She testified that neither she nor the defendant struck either D.P. or B.P. with a belt. Amy had never seen the defendant use any sort of physical discipline with the children. Amy put D.P. in the corner three times that Sunday and spanked B.P. once with her hand. She testified that Shane did not like it when D.P. and B.P. referred to the defendant as "dad" and that it made him very upset.

¶ 20 Amanda Boyer testified that she was at the house from 11 a.m. to 3:25 p.m. on April 16, 2017. Both D.P. and B.P. received discipline while she was there, but never of a physical nature. She never saw Amy or the defendant strike either child with a belt. Boyer saw the boys bothering their little sister, but they were not disciplined for it.

¶ 21 The court found the defendant guilty on count I, stating of D.P.:

> "I found the child to be consistent in all respects with regard to what the father said that he said when he came home, what he said, and how he conducted himself at the forensic interview, and, more importantly, how he conducted himself here in court today, given this scenario that's here."

The court also noted Hager's opinion that D.P. had not been coached. Further, the court characterized Henderson's testimony as "combative and really not credible with regard to the activities that were going on all around him that day."

¶ 22 The court found that Amy's testimony was more consistent with the truth than the other defense witnesses, at least with respect to the boys receiving discipline that day, noting that Boyer may not have been in the house when the incident occurred. The court also remarked that "the photograph here clearly shows a—a mark consistent with being hit with *** a belt or similar object." The court found the defendant not guilty on count II, as well as on count III, the sole charge relating to B.P. The court sentenced the defendant to 12 months' conditional discharge.

¶ 23 ANALYSIS

¶ 24 On appeal, the defendant argues that the evidence adduced at his bench trial was insufficient to prove him guilty of the offense beyond a reasonable doubt. He also argues that the circuit court erred in admitting hearsay testimony where the State's notice of intent to introduce hearsay evidence was deficient.

¶ 25 I. Sufficiency of the Evidence

¶ 26 When a challenge is made to the sufficiency of the evidence at trial, we review to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31; *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In making this determination, we review the evidence in the light most favorable to the prosecution. *Baskerville*, 2012 IL 111056, ¶ 31.

¶ 27 It is not the purpose of a reviewing court to retry a defendant. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). Instead, great deference is given to the trier of fact. See, *e.g.*, *People v. Saxon*, 374 Ill. App. 3d 409, 416-17 (2007).

> "[I]n a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. [Citations.] A reviewing court will not reverse a conviction simply because the evidence is contradictory [citation] or because the defendant claims that a witness was not credible." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 28 We must begin our analysis by addressing the deficiencies in the appellate record. It is well-settled that it is the burden of the appellant to provide a record on appeal sufficient to support his or her claims of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). "[I]n the

absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392; see also *People v. Stewart*, 179 Ill. 2d 556, 565 (1997) ("When the record presented on appeal is incomplete, a court of review will indulge in every reasonable presumption favorable to the judgment from which the appeal is taken, including the presumption that the trial court ruled or acted correctly[.]").

¶ 29 The defendant has failed to provide this court with the two exhibits introduced by the State at his trial: the photograph of a red mark on D.P.'s body and the video recording of Hager's interview with D.P. at the child advocacy center. When the State raised the issue of the insufficient record in its brief, the defendant did not take any steps to supplement the record with the missing exhibits. Nor did the defendant even file a reply brief in an attempt to explain the missing exhibits. See *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 45 (noting that reviewing court will excuse an incomplete record where, *inter alia*, a defendant "can prove that the record is incomplete due to no fault of his own").

¶ 30 To be sure, this court would still be able to review the sufficiency of the evidence in the absence of the photograph, by simply deferring to the circuit court's characterization of that photograph as clearly showing "a mark consistent with being hit with *** a belt or similar object." The missing video recording, however, presents a far higher hurdle to our review.

¶ 31 That video recording, apparently, shows the victim being interviewed in the controlled setting of a child advocacy center, just three days after the incident in question. By all accounts, the video recording shows D.P. detailing for Hager what the defendant did to him. That interview was the basis for Hager's conclusion that D.P. had not been coached. The circuit court explicitly

relied on D.P.'s conduct and consistency in the interview when finding D.P. to be credible. To say that the video recording of the interview was a relevant piece of evidence would be a severe understatement.

¶ 32 The defendant thus asks this court to find that the State's evidence was insufficient, without providing us with a key piece of that evidence. Clearly, we cannot determine if the evidence is insufficient if we do not have the full extent of that evidence. Accordingly, we must indulge the presumption that the circuit court as trier of fact ruled correctly in finding that the evidence was sufficient to sustain a conviction for domestic battery. *Stewart*, 179 Ill. 2d at 565.

¶ 33 It is worth noting that even if we did find the issue reviewable on this record, but merely construed the missing video recording against the defendant, our result would be the same. The defendant's primary basis for arguing that the evidence was insufficient was that D.P. was not a credible witness for a variety of reasons. It is, however, purely the domain of the trier of fact to determine matters of witness credibility. *Siguenza-Brito*, 235 Ill. 2d at 228. Indeed, the circuit court in this bench trial expressly found D.P. credible and certain defense witnesses less credible, and set forth the reasons underlying those conclusions. We will not accept the defendant's invitation to substitute our own credibility determination for that made by the trier of fact. See *People v. Brown*, 2013 IL 114196, ¶ 48.

¶ 34 II. Notice of Hearsay

¶ 35 Section 115-10 of the Code of Criminal Procedure of 1963 (Code) provides that in a prosecution for, *inter alia*, a domestic battery committed against a child under 13 years of age, certain hearsay statements can be admissible. 725 ILCS 5/115-10(a) (West 2016). The Code mandates that "[t]he proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement." *Id.* § 115-10(d). The

defendant does not take exception to the time of the State's notice, but argues that the notice did not describe the proffered hearsay statements with the requisite level of particularity.

¶ 36 In *People v. Carter*, 244 Ill. App. 3d 792, 801 (1993), the sole case relied upon by the defendant for his contention of error, the First District noted that section 115-10(d) requires that a defendant "be provided with the specific hearsay testimony of the child victim which will be presented at trial in order to protect him against surprise, unfairness, and inadequate preparation." The *Carter* court concluded:

> "Although the trial court found that the furnishing of police reports and lists of potential witnesses satisfied the demand for notice, we do not agree. If only police reports, summaries, and lists of witnesses were required, these would be covered by general discovery, and no particular statutory provisions would be necessary. We read the statute as requiring more specific notice to defendant than that which would be forthcoming in response to an ordinary demand for discovery. The statutory provisions under consideration require that defendant be provided with the specific hearsay testimony of the child victim which will be presented at trial in order to protect him against surprise, unfairness, and inadequate preparation." *Id*.

¶ 37 Initially, *Carter* stands in direct opposite to an earlier case from this court, *People v. Burnett*, 239 Ill. App. 3d 582 (1993). In that case, we held that where the names of the hearsay witness had been included on witness lists, and where their statements were included in disclosed police reports, "there was certainly no surprise as to what their testimony might be." *Id*. at 587.

¶ 38 Although this court has already implicitly rejected the reasoning in *Carter*, we need not do so again here, as the facts in this case are very much distinguishable from those in *Carter*.

While the notice of intent to use hearsay in this case included references to previously disclosed police reports, it did not stop there. It also referenced previously disclosed video recordings of the actual statements sought to be introduced.[2] Thus, the defense had in its possession video recordings of the two statements in question, and was provided notice that the State intended to introduce the statements in those video recordings at trial. Short of attaching a verbatim transcript of those video recordings to its notice, it is difficult to imagine what further steps the State possibly could have taken. See *People v. Hubbard*, 264 Ill. App. 3d 188, 193 (1994) ("[T]here is no requirement that the State disclose a verbatim transcript of a witness' testimony."). In short, it would strain credulity to suggest that the defendant was, in any way, taken by surprise by the introduction of the hearsay statements in question.

¶ 39 III. Petition for Rehearing

¶ 40 Following the dissemination of the above order, the defendant's counsel on appeal filed a petition for rehearing in conjunction with a motion to supplement the appellate record. In the motion, counsel seeks to supplement the record with the missing pieces of evidence discussed above, namely, the photograph of D.P.'s injury and the video recording of D.P.'s child advocacy center interview. See *supra* ¶ 29.

¶ 41 In his motion to supplement, counsel attempts to explain why those exhibits were not originally included in the record. Counsel notes that he paid $60 to the Henry County clerk for the preparation and transmission of the court record and that Illinois Supreme Court Rule 321 (eff. Feb. 1, 1994) requires that the common law record include exhibits. Counsel continues:

> "Appellate counsel did not notice that the certification of record sheet submitted by the Henry County Clerk to the Appellate Court with the common law record

[2] The defendant does not argue on appeal—nor did he ever argue in the circuit court—that he was not actually provided with the video recordings referenced in the State's notice.

> and report of proceedings indicated that 0 volumes of exhibits were submitted to the appellate court. *** Appellate counsel was under the impression that because the common law record and report of proceedings are now required to be submitted electronically that the physical exhibits from the trial would be separately sent to the Appellate Court pursuant to the request that [counsel] filed. *** That apparently never happened."

¶ 42 Counsel goes on to explain that on October 2, 2018, the day after this order was released, he called the Henry County clerk's office. He learned that the exhibits in question had never been received by the clerk's office. Counsel next e-mailed the assistant state's attorney who prosecuted the case. She indicated that the two exhibits had been admitted into evidence but were withdrawn pursuant to the trial judge's standard operating procedures. The two exhibits were in the assistant state's attorney's case file. Thus, counsel now "respectfully requests an opportunity to obtain these Exhibits from the State and submit these exhibits to the Court."

¶ 43 As we stated in our order, a reviewing court will excuse an incomplete record where the defendant can prove that the incompleteness is no fault of his own. *Henderson*, 2011 IL App (1st) 090923, ¶ 45. First, the time for the defendant to prove this would have been during the pendency of the case. More importantly, counsel's present motion actually serves to prove the opposite, that the incompleteness of the record was due to his own mistakes.

¶ 44 Initially, counsel apparently assumed that any exhibits admitted at trial would be transmitted to the appellate record. However, especially where any incompleteness in the record will be construed against a defendant, it would behoove counsel to take steps to confirm his assumptions. *Stewart*, 179 Ill. 2d at 565.

¶ 45 Furthermore, it is simply undeniable that counsel was aware of the incompleteness of the record from an early stage. Counsel, who did not represent the defendant at the trial level, referenced both the photograph and video recording of the interview in his appellate brief. This despite obviously never having seen those pieces of evidence, and apparently, at that point, making no efforts to track them down. In our order, we pointed out that "we cannot determine if the evidence is insufficient if we do not have the full extent of that evidence." *Supra* ¶ 32. By this same logic, it is unclear how counsel reached the conclusion that the State's evidence was insufficient—and wrote a brief on that issue—without having actually seen the entirety of that evidence.

¶ 46 More alarmingly, the State explicitly raised the insufficient record in its brief. It stated, *inter alia*, that "[s]ince the DVD interview is not included in the record on appeal in this case, any doubts due to its absence should be resolved against defendant, including a presumption the trial court ruled correctly." Despite this argument, counsel made no effort at that point to track down the missing evidence. He did not file a motion to supplement the record. He did not even file a reply brief.

¶ 47 Only after our order was disseminated did counsel make any attempt to procure the photograph and the video recording. Indeed, his efforts demonstrate how easy it would have been for him to attain the necessary evidence in a timely manner—one phone call to the clerk's office and one e-mail to the assistant state's attorney. Had counsel taken these simple steps at any time *prior* to the filing of our order, this court would have had a complete record on which to address his insufficiency of the evidence claims. Instead, his motion to supplement the record is untimely, and therefore denied. The petition for rehearing is denied.

¶ 48 CONCLUSION

¶ 49 The judgment of the circuit court of Henry County is affirmed.

¶ 50 Affirmed.