2018 IL App (5th) 150348-U

NO. 5-15-0348

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Shelby County.
	)	
v.	)	No. 13-CF-103
	)	
JAMES M. SIMONS JR.,	)	Honorable
	)	Allan F. Lolie,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Cates and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: There is sufficient evidence in the record to support defendant's convictions for both aggravated criminal sexual abuse and indecent solicitation of a child.

¶ 2 After a bench trial in the circuit court of Shelby County, defendant, James M. Simons Jr., was convicted of aggravated criminal sexual abuse (720 ILCS 5/11-1.60 (c)(1)(i) (West 2012)) and indecent solicitation of a child (*id.* § 11-6(a)). The trial court sentenced defendant to four years in the Department of Corrections (Department) to be followed by two years of mandatory supervised release on count I and three years in the Department to be followed by one year of mandatory supervised release on count II and

ordered the sentences to run concurrently. In this direct appeal from the judgment below, defendant contends he was not proven guilty beyond a reasonable doubt of either of the charges. We affirm.

¶ 3 FACTS

¶ 4 On July 15, 2013, at approximately 4:45 p.m. defendant, age 21, contacted I.L.'s mother, Sarah, who was at work, and asked if he could pick up her son, I.L, to play and watch television at Sarah's sister's house where defendant was living. Sarah became acquainted with defendant when they both worked for the same employer. Defendant previously lived with Sarah, her husband, and their three children but moved in with Sarah's sister, Elizabeth, because she had more space. Defendant frequently babysat for Sarah's children. He also spent a good deal of time with Sarah's children while they lived together; however, this was the first time defendant requested to spend time alone with I.L. Sarah agreed and allowed defendant to pick up I.L.

¶ 5 When Sarah got off work, she drove to her sister's house to see if I.L. was ready to go home. Sarah testified that when she arrived at approximately 5:50 p.m., the house was "really quiet." She explained that she and defendant "had a silly relationship where we would try to scare each other on purpose," so she went upstairs to try to "startle" defendant. When she reached the top of the stairs, she noticed defendant's bedroom door was closed. As she approached the door, she heard defendant ask I.L. if he wanted to lie on top of him. She paused, waiting to see if anything else was said. When she did not hear anything, she attempted to open the door, but defendant stopped her at the halfway point. Sarah continued to joke around with defendant and said something such as, "Let

me in you silly goose." When she eventually got the door open, she found I.L. "totally naked."

¶ 6 Sarah testified she "started freaking out" and asked defendant why her son was naked. Initially, defendant said nothing but eventually answered that I.L. "wanted to be naked." Sarah told defendant that her son does not ask to be naked and demanded to know what was going on. Defendant told her nothing was going on. Sarah recalled that defendant did not have a shirt on and "had a pair of shorts of some kind on." She took I.L. to the car and strapped him in naked. Defendant kept saying, "Let me explain. There's nothing going on." Sarah then asked I.L. if defendant touched his "pee pee." I.L. responded in the affirmative. Sarah told defendant he needed to move out of her sister's house and she no longer wanted to see him. She then drove to her mother's house.

¶ 7 Sarah called her mother and told her she was coming over. When she arrived, her mother took I.L. in the house. Sarah remained outside crying. She tried to call her husband, but he did not answer. She eventually called the police. She estimated it took the police 30 minutes to arrive. She told the police officer what happened. The police officer told her the procedures that would be followed. Sarah wrote a statement, but she said she was "so emotional" she "couldn't bear to write what happened." With the help of the police, she arranged for I.L. to have an interview at the Child Advocacy Center (CAC) and for I.L. to have sexual abuse counseling. On cross-examination, Sarah admitted that in the summer of 2013 when she was at a mall with I.L. he took his clothes off and jumped into a fountain.

¶ 8 Sarah's mother, Stella, recounted the day Sarah called her and then showed up at her house with I.L. who was naked. Stella testified that she took I.L. in the house and told him they needed to find him some clothes. I.L. then told her that defendant took his clothes off of him and touched his "pee pee." Sarah said I.L. calls his penis his pee pee. I.L. told Stella he was at his Aunt B's when this occurred. Stella explained that "Aunt B" is what I.L. calls her other daughter Elizabeth.

¶ 9 I.L. was five at the time of the alleged incident and seven at the time of trial. He identified defendant as "James." He testified that he last saw defendant at his Aunt B's. The prosecutor asked "What happened at Aunt B's, if you remember?" I.L. responded, "Uh, James, uh, touched my pee pee." I.L. said it happened "upstairs." I.L. initially said it happened with his clothes on but then said, "No," it happened when his clothes were "off."

¶ 10 On cross-examination, I.L. admitted that on the day in question he went to the lake with defendant to go swimming, but the beach was closed. I.L. said he took his own clothes off. I.L. said he talked to other people about the incident and agreed that they told him what he was supposed to say. It is clear from the record that I.L. had trouble concentrating and was extremely active.

¶ 11 Michael Miller, who was the sheriff in Shelby County at the time of the alleged offense, testified that as he was exiting the state's attorney's office on October 25, 2013, he saw a little boy and a woman. Miller later learned it was I.L. and his mother. I.L. asked him whether he had his "Uncle James" in jail. Miller noticed I.L.'s mother "shaking her head yes," so Miller said maybe he did have him in jail. Miller said I.L. was insistent

that his Uncle James was in jail and then I.L. said, "Uncle James touched my pee pee in the bathtub and that's bad." When Miller got back to his office, he generated a report based upon what I.L. told him.

¶ 12 Robert McCall, the undersheriff of Shelby County, testified he was assigned defendant's case. He arranged for I.L. to have a forensic CAC interview. The interview was conducted by Sarah Miller, a Department of Children and Family Services (DCFS) investigator. The interview was conducted on July 18, 2013, in the basement of the sheriff's department. During the videotaped interview, I.L. stated that defendant touched his "pee pee." Based upon that interview, McCall attempted to arrange an interview with defendant.

¶ 13 McCall called defendant and told him I.L.'s mother had made a complaint. McCall stated that defendant acted surprised and inquired about the complaint. McCall told defendant he "knew very good well what the complaint was" and asked to speak to defendant in person. Defendant asked if he was going to be arrested or charged with a crime. McCall told him that that was a distinct possibility based upon the information he received. He told defendant it was his right to have an attorney present. Defendant said he would come to the sheriff's department the following day with an attorney to speak with McCall.

¶ 14 On the following day, July 19, 2013, defendant called McCall and said he was having vehicle problems and would be unable to make it to the sheriff's department. McCall told defendant he had until July 24 to appear, and if he failed to appear the

investigation would proceed without him. On July 23, 2013, defendant came to the sheriff's department and spoke to McCall.

¶ 15 Defendant told McCall he reached out to I.L.'s mother about arranging a visit between him and I.L. Defendant said he intended to take I.L. swimming, but the beach area was closed due to high water. Defendant then said he took I.L. back to the house where he lived. It was extremely hot, so they went to an upstairs bedroom with air conditioning. He told I.L. to take off his clothes because it was hot. Defendant stripped down to his boxer shorts. He and I.L. then laid down on the bed and watched television. Defendant denied touching I.L.'s penis or asking I.L. to lie on him.

¶ 16 When Sarah came in the room and saw them on the bed with I.L. naked, she became upset and removed I.L. Defendant attempted to explain to Sarah that nothing happened. Defendant said Sarah was so upset that when she left, he packed up his clothes and moved to Springfield.

¶ 17 Sarah Miller, a 25-year veteran of DCFS who has special training in interviewing children, testified she interviewed I.L. on July 18, 2013. During the interview, I.L. said defendant touched him on his "pee pee," which he identified as his penis. According to Miller, I.L. "actually pulled down his pants that he was wearing and demonstrated and identified James [defendant] as having touched his pee pee." Miller testified she did not get the impression that I.L. had been "coached" as to what to say during the interview. The trial court watched the taped interview.

¶ 18 After hearing all the evidence, including the testimony of the witnesses and the videotaped interview of I.L., the trial judge found defendant guilty of aggravated criminal

sexual abuse, specifically noting that he did not believe I.L. had been coached. The trial court also found defendant guilty of indecent solicitation, concluding that defendant asking I.L. to lie on top of him coupled with touching I.L.'s penis constituted solicitation. Defense counsel filed a motion for a new trial in which he alleged that (1) the State failed to prove defendant guilty beyond a reasonable doubt on both counts and (2) the circuit court erred in failing to sustain "the defendant's objections and/or not overruling the State's objections to the [d]efendant's motions and evidence." The trial court denied defendant's motion.

¶ 19 Both a presentence investigation report and a sex offender assessment were completed and made a part of the record. After a sentencing hearing, the trial court sentenced defendant to four years in the Department to be followed by two years of mandatory supervised release on count I and three years in the Department to be followed by one year of mandatory supervised release on count II. The trial court ordered the sentences to run concurrently. Defense counsel filed a motion to reconsider both the denial of the motion for a new trial and the sentence imposed. The trial court denied the motion in full. Defendant filed a timely notice of appeal.

¶ 20 ANALYSIS

¶ 21 On appeal, defendant contends he was not proven guilty beyond a reasonable doubt of either of the charges. We disagree.

¶ 22 When considering a challenge to the sufficiency of the evidence, it is not the function of a reviewing court to retry a defendant. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). Rather, in a bench trial, it is for the trial judge to determine the credibility of the

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). A reviewing court will not reverse a conviction simply because the evidence is contradictory or because a defendant claims a witness was not credible. *Id.* It is well settled that the testimony of a single witness, if positive and credible, is enough to convict, even if the defendant contradicts such testimony. *Id.*

¶ 23 I. AGGRAVATED CRIMINAL SEXUAL ABUSE

¶ 24 Here, the trial court found defendant guilty of aggravated criminal sexual abuse pursuant to section 11-1.60(c)(1)(i) of the Criminal Code of 2012 (Code), which provides as follows:

> "(c) A person commits aggravated criminal sexual abuse if:
>
> (1) that person is 17 years of age or over and: (i) commits an act of sexual conduct with a victim who is under 13 years of age[.]" 720 ILCS 5/11-1.60(c)(1)(i) (West 2012).

There is no question but that defendant was over the age of 17 and the I.L. was under the age of 13. The only question is whether an act of sexual abuse occurred.

¶ 25 A. Touching

¶ 26 Defendant first asserts that the evidence was insufficient to prove he touched I.L.'s penis because I.L.'s claims were uncorroborated by any other evidence, I.L.'s testimony contained numerous oddities and inconsistencies that made it too incredible to believe, and I.L. admitted he was coached as to what to say at trial. We are unconvinced.

¶ 27 At trial, I.L.'s mother testified defendant called her to arrange for I.L. to come to his house to play and watch television. When she arrived to pick up I.L., she found defendant and I.L. in an air-conditioned bedroom with I.L. naked and defendant nearly naked, just wearing some type of underwear or shorts. Before she entered the bedroom, which defendant attempted to stop her from entering, she heard defendant ask I.L. if he wanted to lie on top of him.

¶ 28 I.L. specifically testified defendant touched his "pee pee" while he was naked. I.L. said it happened at his aunt's house in an upstairs bedroom where defendant was staying. During his CAC interview, I.L. made similar allegations, namely that defendant touched his "pee pee" on more than one occasion.

¶ 29 In finding defendant guilty, the trial court specifically found I.L. credible, despite his hyperactivity and his assertion that he had been coached, stating in pertinent part as follows:

> "I don't think he's been coached. I don't find that. I don't think it odd that he may have spontaneously when he saw a policeman, meaning former Sheriff Miller, to say that that happened. He spontaneously blurts out all the time, at least in the short time I've dealt with him. Today in court he blurted out things that were totally not even related to why we are here. During the interview, he was constantly looking out at the room pointing out things. And I don't know if five year olds can form malicious intent, but apparently he liked James, the defendant. *** I think the State has met their burden in this case beyond a reasonable doubt."

While defendant makes much of the fact that I.L. was hyper and unable to focus, it is clear from the record that the trial court considered these issues but nevertheless found I.L. credible.

¶ 30 As to defendant's assertion that I.L. was coached, I.L.'s mother specifically denied coaching him. And the DCFS investigator who performed the CAC interview testified she saw no indication I.L. was coached. The trial court, which was in a better position than we to determine I.L.'s credibility, found I.L. credible despite defendant's protests to the contrary. Under these circumstances, we find there was sufficient evidence to prove defendant touched I.L.'s penis.

¶ 31 B. Proof of Sexual Gratification or Arousal

¶ 32 Defendant next contends that even if the evidence proved he touched I.L.'s penis, the evidence was insufficient to prove the touching was an act of sexual conduct because the State failed to offer any evidence to show the touching was done for the purpose of sexual gratification or arousal of I.L. or himself.

¶ 33 As previously set forth, aggravated criminal sexual abuse requires the commission of an act of "sexual conduct," which is defined in relevant part by section 11-0.1 of the Code as: "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused *** for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1 (West 2012). Intent to arouse or satisfy sexual desires can be established by circumstantial evidence, and the trier of fact may infer a defendant's intent from his

conduct. *People v. Balle*, 234 Ill. App. 3d 804, 813 (1992). A defendant's intent to arouse or gratify himself sexually can be inferred solely from the nature of the act. *Id.*

¶ 34 In our estimation, a 21-year-old male touching a naked five-year-old boy's penis carries the general presumption that it was done for a sexual purpose. The only exceptions we can think of are to assist in going to the bathroom or an accidental touching. Here, defendant specifically denied an accidental touching when he was interviewed by Officer McCall and was clearly not assisting I.L. in the bathroom, as the incident took place in defendant's bedroom. Additionally, the fact that defendant attempted to keep the door shut and stop I.L.'s mother Sarah from entering upon her arrival leads us to conclude that defendant touched I.L.'s penis for a sexual purpose.

¶ 35 As previously stated, it is not our job to retry the defendant. Here, the evidence was not so improbable or unsatisfactory that no rational trier of fact could have found defendant guilty. After reviewing the record in the light most favorable to the prosecution, we hold that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of aggravated criminal sexual abuse.

¶ 36 II. INDECENT SOLICITATION OF A CHILD

¶ 37 Defendant argues that no rational trier of fact could conclude from the evidence that defendant committed the offense of indecent solicitation of a child beyond a reasonable doubt. Defendant specifically asserts that Sarah's testimony that she heard defendant ask I.L. if he wanted to lie on him is not enough to demonstrate that defendant was soliciting I.L. to perform an act of sexual conduct. Again, we are unconvinced.

¶ 38 A person commits the offense of indecent solicitation of a child "if the person, with the intent that the offense of *** aggravated criminal sexual abuse be committed, knowingly solicits a child or one whom he or she believes to be a child to perform an act of sexual penetration or sexual conduct as defined in Section 11-.01 of this Code." 720 ILCS 5/11-6(a) (West 2012). " 'Solicit' means to command, authorize, urge, incite, request, or advise another to perform an act by any means including, but not limited to, in person, over the phone, in writing, by computer, or by advertisement of any kind." *Id.* § 11-6(b).

¶ 39 "The specific intent required to prove the elements of the offense may be inferred from the surrounding circumstances and acts of the defendant." *People v. Ruppenthal*, 331 Ill. App. 3d 916, 920 (2002). Whether or not the actual act even takes place is meaningless under the statute, as the crime of solicitation is complete when the words are spoken. *Id*. The trier of fact makes the factual determination regarding a defendant's intent, and we will not disturb that determination unless the evidence is so improbable that it raises a reasonable doubt as to the defendant's guilt. *People v. Patterson*, 314 Ill. App. 3d 962, 969 (2000).

¶ 40 In finding defendant guilty of indecent solicitation of a child, the trial court specifically stated as follows:

> "As to Count II—and that was just recently filed as we discussed—I do think the fact, again, a naked five-year-old, near naked 21-year-old allegation, which I have now said has been proven beyond a reasonable doubt of the penis touching by defendant, along with what the mother heard, I do think the fact that that does

constitute an act of sexual conduct, meaning the lay on me that would be required for the intent that the offense of aggravated criminal sexual abuse be committed. I do find the State has met their burden there as well. I find defendant guilty."

Here, we cannot say the evidence is so improbable that it raises a reasonable doubt as to defendant's guilt.

¶ 41 Sarah was adamant that she heard defendant ask I.L. if he wanted to lie on him. When she entered the bedroom, she found I.L. completely naked and defendant in his boxer shorts. We agree with the State that the compromising position in which defendant and I.L. were found, coupled with Sarah's testimony that defendant asked I.L. to lie on him, are sufficient to give rise to a reasonable inference that defendant sought sexual gratification or arousal, enough to convict defendant on count II.

¶ 42 CONCLUSION

¶ 43 After careful consideration of the record before us, we defer to the trier of fact and find there was sufficient evidence, along with reasonable inferences therefrom, to support the trial court's finding that defendant was guilty beyond a reasonable doubt on both counts I and II. Accordingly, we affirm the judgment of the circuit court of Shelby County.

¶ 44 Affirmed.