2019 IL App (1st) 171463-U

FIFTH DIVISION
Order filed: February 15, 2019

No. 1-17-1463

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. 15 CR 11793
	)	
YOVANI HERNANDEZ-ROJAS,	)	Honorable
	)	Marc W. Martin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to support the defendant's conviction for criminal sexual assault where the victim's testimony was corroborated by two other witnesses, medical professionals, and forensic scientists.

¶ 2 Following a bench trial, the defendant, Yovani Hernandez-Rojas, was convicted of two counts of criminal sexual assault and was sentenced to two consecutive four-year terms of imprisonment. On appeal, he contends that the evidence was insufficient to sustain a conviction because the State failed to prove that an act of sexual penetration occurred and that he knew that the victim was unable to give knowing consent. For the following reasons, we affirm.

¶ 3 In April 2016, the State charged the defendant with two counts of criminal sexual assault pursuant to section 5/11-1.20(a)(2) of the Criminal Code of 2012 (Code) (720 ILCS 5/11-1.20(a)(2) (West 2012)). The indictment alleged that the defendant penetrated, with his penis, the sex organ and anus of C.S, with the knowledge that she was unable to give knowing consent.

¶ 4 At trial, the State called C.S. who testified that, when she was 18, she consumed four alcoholic drinks and went to a house party hosted by her cousin, Sylvia Michelle Rodriquez, early in the morning of March 9, 2013. C.S. arrived at the party at approximately 12 a.m. with her four friends, Elizabeth Wagner[1], Rosendo Rivas, Tyler Whiteside, and Ulysses Felix. Rodriquez's parents were out of town and she was throwing a birthday party for her boyfriend, the defendant, whom C.S. identified in court. At the party, C.S. continued to drink, consuming beer and tequila. At one point, C.S. went to the bathroom and observed that her feminine pad was securely attached to her underwear by its wings.

¶ 5 Unable to remember anything else about the party, C.S.'s next memory was waking up on a couch in the living room and seeing Wagner on another couch. C.S. felt pain in her knees and feet and swelling on her face. She also noticed swelling in her anus, which she described as "really tender," "really loose," "soft," and "very painful." As she left Rodriquez's house, C.S. saw the defendant and Rodriquez asleep together in another room. Wagner drove C.S. home, stopping once for C.S. to throw up. Once home, C.S. fell asleep immediately. After waking later in the evening, C.S. went to the bathroom and noticed that her feminine pad was "scrunched," barely attached, and contained dried blood, even though she was no longer menstruating. She took a shower and noticed bruising on her knees, scratches on her feet, and that her anus and

[1] Years after the party, Elizabeth Wagner married Rosendo Rivas and took his last name. For clarity, we refer to Elizabeth by her maiden name, Wagner, and Rosendo by his given name, Rivas.

vagina were "very swollen and tender and very uncomfortable." C.S. told her mother and they went to the hospital where C.S. was examined, a sexual assault kit was collected, and police officers took photos of her injuries. On March 10, 2013, C.S. recovered the feminine pad from her bathroom trash and brought it to the police station. Lastly, she testified that she had not had sexual intercourse for several years prior to the party.

¶ 6 Next, Wagner testified that she witnessed C.S. consume three alcoholic drinks before the party and tequila and beer at the party. Wagner stated that C.S. was visibly drunk, slurring her words, and stumbling. Wagner testified that at approximately 2 a.m., she left the party for an hour to take Rivas home. While gone, the defendant called and text messaged her many times, asking when she would come back to the party. When she returned, C.S., Rodriquez, and the defendant were the only people in the house. The defendant, who Wagner described as not intoxicated "at all," approached her and told her that he could not wake C.S. Wagner stated that she found C.S. "passed out" on the couch and was unable to wake her. Wagner decided that she and C.S. would stay at Rodriquez's house instead of going home as planned. Wagner stated that C.S. only woke once, threw up, and went back to bed. Later in the morning, Wagner drove C.S. home, pulled over for her to throw up, and saw her go to bed immediately.

¶ 7 The parties stipulated that the defendant called Wagner 13 times between 2:42 a.m. and 3:34 a.m. In two of the text messages, which arrived at 2:44 a.m. and 2:58 a.m., the defendant asked Wagner when she would return to the party. There were no text messages or calls between 2:58 a.m. and 3:13 a.m.

¶ 8 Next, Whiteside testified that he observed C.S. consume two alcoholic drinks prior to the party and a shot and some beer at the party. Whiteside saw the defendant hand C.S. a cup of "something" and told him not to give her any more alcohol because she was "too intoxicated."

Nevertheless, the defendant gave C.S. the cup, but Whiteside took it and poured it out. Whiteside described C.S. as "wobbly" and saw her fall on the stairs and off a chair. Whiteside stated that while Wagner took Rivas home, he brought C.S. to the living room, laid her down on the floor, and waited for Wagner to return. Whiteside testified that the defendant approached him and told him that everyone needed to leave because Rodriquez's parents had returned home. Whiteside discussed with Felix whether they should wait for Wagner to return, but the defendant "rush[ed]" them to the door and locked it behind them. Whiteside stated that when he left with Felix around 2 a.m., C.S. was still "passed out" on the floor and the defendant was the only male in the house. Whiteside testified that the defendant "did not seem to be very intoxicated," as he was "making perfect sense," "walking in a straight line," and "behaving normal." Lastly, Whiteside stated that he spoke with police on March 12, 2013, and provided a buccal sample.

¶ 9 The parties stipulated to testimony from two medical professionals who treated C.S. at the hospital. If called to testify, nurse Deborah Waterson would state that she prepared C.S.'s sexual assault kit and collected vaginal, anal, and oral swabs, stain mark swabs from the wounds on the cheek, knees, and foot, and a blood standard. Second, if called to testify, Dr. Joellen Channon would state that she examined C.S., who reported having pain opening her mouth, washing her anus, and urinating. Dr. Channon would state that she found left cheek swelling, jaw abrasions, bruising to the right foot and knees, vaginal abrasions and tears, and anal tears, but no trauma to internal vaginal walls. It was Dr. Channon's medical opinion that C.S.'s injuries: (1) occurred within 72 hours of the hospital visit; and (2) were "consistent with sexual intercourse and/or penetration."

¶ 10 Next, Officer Michelle Defer of the Schaumburg police department testified that she met with C.S. at the police station on March 10, 2013, where C.S. gave her a blanket, two pairs of

pants, and a feminine pad. Officer Defer spoke with Dr. Channon and a nurse to obtain the results of C.S.'s medical exam. Officer Defer stated that she collected buccal samples from Whiteside and Felix, but not from Rivas because he was never alone with C.S.

¶ 11 Officer Defer testified that, on March 11, 2013, she interviewed the defendant at the station. She stated that the defendant described the party as "reckless" and that he drank beer and several different kinds of liquor, including four and a half cups of tequila. Further, the defendant told her that C.S. was intoxicated, "playfully punching him," and "acting dumb." Officer Defer stated that initially the defendant told her that he slept while Wagner left the party. However, once she told him that she knew about the phone calls and text messages that he made during that time, the defendant then said that "the time was a blur." When she asked him if he had sex with C.S., the defendant said that he did not know and that it "was the kind of night you drink, you go black out and you don't know what's going on." Officer Defer said that she asked the defendant again and he said that he had no clue, that he passed out, and that C.S. "probably came onto him or he probably came onto her." According to Officer Defer, the defendant first told her that he did not know if he and C.S. kissed, but later said that it was possible. When Officer Defer asked him if it was possible for his DNA to be found on the inside of C.S.'s underwear, the defendant responded that it was. Officer Defer testified that the defendant again noted that C.S. was drunk, that he was the only guy in the house, and that maybe C.S. raped him. She paraphrased the defendant by stating that he described C.S. as "a girl that is easy." Officer Defer stated that the defendant explained that it was "silly that they drank and maybe she did something stupid, maybe he did something stupid and it wasn't fair that she had drank and something stupid may have happened." Officer Defer also testified that the defendant told her that if C.S. "pursued charges that was bullshit" because it was his birthday and C.S. was "messed up." The defendant

provided a buccal sample. Officer Defer testified that on March 3, 2016, she arrested the defendant and that he denied penetrating or ejaculating on C.S.

¶ 12 The parties stipulated to the proper chain of custody for the defendant's buccal sample and to testimony from two forensic scientists with the Illinois State Police crime lab. First, if called to testify, Bill Cheng would state that he compared the DNA profiles of the defendant, Felix, Whiteside, and C.S. to cuttings from the feminine pad. The feminine pad contained DNA from: (1) a "major" female profile that was consistent with C.S.; (2) a "minor" female profile that was "not suitable for comparison;" and (3) sperm that contained insufficient DNA for identification. Second, if called to testify, Cindy Lee would state that she compared the evidence collected in C.S.'s sexual assault kit to the DNA profiles of the defendant, Felix, Whiteside, and C.S. and made the following findings: (1) semen was "indicated" on the feminine pad; (2) no spermatozoa was identified on the feminine pad; (3) "bloodlike" stains were noted on the pad and on the vaginal swab; and (4) no semen was indicated on C.S.'s underwear, on the vaginal, oral, or anal swabs, or on the injuries on her cheek, knees, or foot.

¶ 13 Lastly, the State called Karen Abbinanti, a forensic scientist with the Illinois State Police crime lab, who testified that she detected a "y chromosome" at "6 locations out of 23 that are possible" on the feminine pad. After comparing the "y chromosome" to the profiles of the defendant, Whiteside, and Felix, Abbinati found that Whiteside and Felix were not consistent. However, the defendant's profile was consistent at all six locations. On cross-examination, Abbinati testified that the substance on the feminine pad was "indicated" semen because the "protein 30" test was positive and the "AP test" was "plus one." However, no spermatozoa cells were microscopically identified, which is why the substance was not "identified" as semen. Thus, Abbinati explained that the substance may not have been semen, but rather another bodily

fluid, such as breast milk. The State rested.

¶ 14 The defendant did not testify in his case-in-chief, and entered a stipulation that if called to testify, Schaumburg police Officer Milan Strukle would state that he interviewed C.S. at the hospital and that, in her statement, C.S. said that she woke up at 12:30 p.m., took a shower, and noticed bleeding at 2:30 p.m. The defense rested.

¶ 15 The circuit court found the defendant guilty on two counts of criminal sexual assault, one for penetration to the anus and one for penetration to a sex organ. The circuit court found all five of the State's witnesses to be credible. The circuit court noted that the defendant rushed Whiteside and Felix out of the house under the pretext that Rodriquez's parents had come home, leaving the defendant as the only male at the party. Noting the 15-minute gap between 2:58 a.m. and 3:13 a.m. in the many phone calls and text messages the defendant made to Wagner, the circuit court found that it is a reasonable inference that the defendant was making sure "the coast was clear" and that the offenses occurred during the 15-minute gap. Although C.S. could not testify to the attack itself, the circuit court found that she testified credibly regarding the injuries to her anus and vagina that led her to believe that she had been sexually assaulted. The circuit court found that C.S.'s injuries were corroborated by Dr. Channon's medical findings, which concluded the injuries were consistent with sexual penetration and caused within 72 hours of the examination. The circuit court also found Officer Defer to be credible in testifying to the defendant's statements. Specifically, the circuit court noted that the defendant initially told Officer Defer that he was asleep when Wagner left the party, but revised his assertion after Officer Defer confronted him with the phone communications he made to Wagner during that time. The circuit court concluded that the defendant's false exculpatory statement was indicative of consciousness of guilt and that his statements constituted a tacit admission.

¶ 16 After denying the defendant's motion to reconsider, the circuit court sentenced the defendant to two consecutive four-year terms of imprisonment. This appeal followed.

¶ 17 The defendant contends that the evidence was insufficient to sustain his conviction for sexual criminal assault because the State failed to prove beyond a reasonable doubt that an act of sexual penetration occurred and that he knew that C.S. was unable to give knowing consent for the sexual acts. Additionally, the defendant argues that the circuit court erred in characterizing his statement as a false exculpatory, indicative of his consciousness of guilt.

¶ 18 As a preliminary matter, the defendant continuously referred to C.S. by her full name in his brief. It is the practice of the appellate court to refer to the victims of sex offenses by initials so as to protect their privacy. *People v. Munoz-Salgado*, 2016 IL App (2d) 140325, ¶ 17 n.1. Though not prohibited, we have long disapproved of using a victim's full name and we have consistently admonished parties to discontinue this improper practice. *Id.*; *People v. Leggans*, 253 Ill. App. 3d 724, 727 (1993). We do so here.

¶ 19 Additionally, we note that the defendant's brief on appeal fails to comply with Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017), which requires an appellant's brief to include his contentions on appeal and the reasons therefor, supported with citation of authority. *Salgado v. Marquez*, 35 Ill. App. 3d 1072, 1074 (2005). Although the defendant was convicted under section 5/11-1.20(a)(2) of the Code (720 ILCS 5/11-1.20(a)(2) (West 2012)), his brief quotes section 5/12-12(f), a definition of criminal sexual assault that was repealed more than seven years ago (720 ILCS 5/12-12(f) (repealed by Pub. Act 96-1551, Art. 2, § 6, (eff. July 1, 2011))). This court is under no obligation to act as an advocate for the appellant or to assume the burden of researching his case. *CE Design, Ltd. v. Speedway Crane, LLC*, 2015 IL App (1st) 132572, ¶ 18. Supreme Court Rules are not merely advisory suggestions, but rather rules to be followed.

Menard, Inc. v. 1945 Cornell, LLC, 2013 IL App (1st) 121422, ¶ 7. It is within this court's discretion to dismiss an appeal for an appellant's failure to follow those rules. *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 57. However, we will consider the case because the record is simple and the issue can easily be decided without the proper citations in the defendant's brief. *Tamraz v. Tamraz*, 2016 IL App (1st) 15184, ¶ 17.

¶ 20 Turning to the merits, for his first assignment of error, the defendant argues that the evidence was insufficient to sustain his conviction for sexual criminal assault because the State failed to prove beyond a reasonable doubt that he penetrated C.S with his penis. We disagree.

¶ 21 When a defendant challenges the sufficiency of the evidence, it is not the function of this court to retry him. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, the relevant question on appeal 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. *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). For a reviewing court to set aside a criminal conviction due to insufficient evidence, the evidence submitted must be so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 30.

¶ 22 To sustain a conviction of criminal sexual assault under section 5/11-1.20(a)(2) of Code, the State must prove beyond a reasonable doubt that the defendant: (1) committed "an act of sexual penetration;" and (2) knew that the victim was "unable to give knowing consent." 720 ILCS 5/11-1.20 (West 2012). The Code defines "sexual penetration" 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" or "any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person," including "anal

penetration." 720 ILCS 5/11-0.1 (West 2012). Evidence of emission of semen is not required to prove sexual penetration. *Id*.

¶ 23 Here, C.S. testified to the injuries to her vagina and anus, which were corroborated by Dr. Channon. Additionally, C.S. testified that her feminine pad contained dried blood, which was corroborated by the Illinois State Police crime lab. To attack C.S.'s testimony, the defendant improperly relies on *People v. Maggette*, 195 Ill. 2d. 336, 352 (2001), in which the Supreme Court found that there was insufficient evidence to establish sexual penetration because the victim's testimony was unclear as to whether she was touched underneath her underwear. The defendant argues that since C.S. cannot remember the attack, there is even less evidence here. However, as stated above, C.S.'s testimony was corroborated by a doctor and forensic scientists, distinguishing it from the testimony in *Maggette.*

¶ 24 Additionally, the parties stipulated that the fluid found on C.S.'s feminine pad was "indicated" semen. A forensic scientist testified as to which tests were conducted and that the fluid was "indicated," not "identified" semen because no spermatozoa cells were found. The circuit court, as the trier of fact, had the right and obligation to weigh that information and determine that the fluid was semen, rather than another bodily fluid, such as breast milk. *People v. Sutherland*, 223 Ill. 2d. 187, 242 (2006). Therefore, the State's evidence was sufficient to support the determination that an act of sexual penetration occurred.

¶ 25 For his second assignment of error, the defendant argues that the State failed to present sufficient evidence for a trier of fact to conclude beyond a reasonable doubt that he knew that C.S. was unable to give knowing consent. Again, we disagree.

¶ 26 In this context, "consent" refers to the victim's "freely given agreement to the act of sexual penetration." 720 ILCS 5/11–1.70 (West 2012). An otherwise competent person may be

temporarily incapable of giving consent because she is unconscious, asleep, or severely intoxicated. See *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 37; see also *People v. Fisher*, 281 Ill. App. 3d 395, 403 (1996). The focus is on what the defendant knew or reasonably should have known regarding the victim's willingness or ability to give knowing consent. *People v. Roldan*, 2015 IL App (1st) 131962, ¶ 19.

¶ 27 Here, both Wagner and Whiteside testified that, at the beginning of the party, C.S. was visibly intoxicated and was stumbling, falling, and slurring her words. In fact, Whiteside testified that he informed the defendant that C.S. was too drunk to continue drinking and instructed him to stop giving her alcohol. Additionally, the defendant admitted several times to Officer Defer that he knew that C.S. was intoxicated, describing her as "messed up." Wagner and Whiteside testified that, at the end of the party, C.S. "passed out" and was sleeping so soundly, they were unable to wake her. Moreover, Wagner testified that the defendant told her that he also tried to wake C.S., but was unable to do so. Accordingly, the record reveals that C.S. went from visibly and severely intoxicated to unconscious, which the defendant admitted to having known. Thus, there was sufficient evidence to find that the defendant knew or reasonably should have known that C.S. was unable to give knowing consent. *Roldan*, 2015 IL App (1st) 131962 at ¶ 19.

¶ 28 For his final assignment of error, the defendant contends that the circuit court improperly characterized his statements regarding his whereabouts as false exculpatory statements. A false exculpatory statement can be "probative of a defendant's consciousness of guilt." *People v. Milka*, 211 Ill. 2d 150, 181 (2004). The State's theory of the case was that the defendant assaulted C.S. while Wagner was absent from the party. Thus, the defendant's whereabouts during that period were critical. The defendant initially said that he was asleep during that time, but changed his assertion once Officer Defer confronted him with his phone communications

with Wagner. As the circuit court correctly concluded, the defendant's statements dealt directly with his alibi, and a false alibi can be a factor in establishing guilt beyond a reasonable doubt. *People v. Martin*, 80 Ill. App. 3d 281, 297 (1979). Thus, the circuit court did not err by considering the defendant's statement as a factor, along with the other evidence, in determining the defendant's guilt.

¶ 29 Based on the evidence, we find that a rational trier of fact could conclude that the defendant penetrated C.S.'s vagina and anus with his penis, with the knowledge that she was unable to give knowing consent. Therefore, we affirm the defendant's convictions of criminal sexual assault.

¶ 30 Affirmed.