2019 IL App (1st) 171791-U

FIRST DISTRICT
SECOND DIVISION
March 29, 2019

No. 1-17-1791

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 11 CR 21352
	)	
MARCO GERONIMO-OCAMPO,	)	Honorable
	)	Thomas V. Gainer,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment.
Justice Pucinski concurred in the judgment.
Justice Hyman dissented.

ORDER

¶ 1 *Held:* The evidence admitted against the defendant was insufficient to prove him guilty beyond a reasonable doubt of criminal sexual abuse.

¶ 2 Following a bench trial, the trial court initially found Marco Geronimo-Ocampo guilty of the charged offense of criminal sexual assault for committing an act of vaginal penetration against 14 year-old A.H., but *sua sponte* reversed that finding of guilt explaining that the court harbored a reasonable doubt that Geronimo-Ocampo digitally penetrated A.H. as she had testified. Accordingly, the court found Geronimo-Ocampo guilty of the lesser included offense of criminal sexual abuse.

¶ 3 On appeal, Geronimo-Ocampo claims that his conviction hinged on the victim's incredible testimony, which was insufficient to find him guilty beyond a reasonable doubt of criminal sexual

abuse. Geronimo-Ocampo also claims that the trial court improperly (i) considered his history of drinking in finding him guilty and (ii) shifted the burden of proof when the trial court asked defense counsel to explain Geronimo-Ocampo's presence, shortly before the attack, at a gas station at the same time as the victim. Finding the evidence insufficient to establish that Geronimo-Ocampo committed criminal sexual abuse, we reverse Geronimo-Ocampo's conviction.

¶ 4 I. Background

¶ 5 On August 8, 2014, at about 3 p.m., 14 year-old A.H. and her friend arrived at another friend's house, who lived "south."[1] A.H. and her friends were practicing for a dance group, and A.H. drank "a little" wine. A.H. got a ride to the house with her friend, but she had to take public transportation home, which required her to take two buses.[2] A.H. left to go home at about 9 p.m.

¶ 6 About three hours later, around midnight, the first bus A.H. took dropped her off at a bus stop near 2800 West Division Street, and she waited there for a westbound Division bus to take her home. It took A.H. a long time to get to that location because she got "lost on the bus" having recently moved to the area. While waiting for the next bus to come, A.H. decided to walk to a Citgo gas station located at 2805 West Division Street (at the southwest corner of Division and California) to get a soda and some chips because her stomach hurt. It was now between 12:15 a.m. and 12:30 a.m. Despite the late hour, the convenience store was well-lit and busy with many customers. While in the gas station, A.H. did not talk to anyone and no one talked to her. After purchasing a ginger ale and a bag of chips, A.H. left the gas station and started walking west down Division Street—still on the south side of the street—toward the bus stop to take the bus home.

¶ 7 While A.H. was walking west to the bus stop, a male, whom she later identified as Geronimo-

[1]The record does not include the address of A.H.'s friend's house or identify the neighborhood where she lived.

[2]The record similarly does not disclose what public transportation routes A.H. took or where her destination was.

Ocampo, jumped out of a dark-colored sports utility vehicle (SUV). After jumping out of the SUV, Geronimo-Ocampo asked A.H. if he could take her home and he would pay her to have sex with him. A.H. said, "No," and she started walking away. According to A.H., Geronimo-Ocampo then pushed her against a silver chain link fence and used his hand and weight to hold her against the fence. A.H. was wearing white shorts made of stretchy material. Geronimo-Ocampo used his other hand to pull her shorts to the side and attempted to touch her on her vagina. A.H. successfully resisted Geronimo-Ocampo by pushing him off her, and she started to walk away, again heading west.

¶ 8 A.H. walked about two to five feet before Geronimo-Ocampo came up behind her, wrapped his arms around her waist, picked her up, carried her up a little hill into a small garden-like area by some big bushy trees, and threw her down on the grass. The area was dark and no one else was around. Geronimo-Ocampo held A.H. on the ground using one hand, and he pulled her shorts to the side using his other hand and touched her by the opening of her vagina.

¶ 9 A.H. again pushed Geronimo-Ocampo off her, and she got up and ran in the same direction she was walking—west down Division Street. A.H. was crying as she ran away. The next time A.H. saw Geronimo-Ocampo, he was in his SUV driving in the same direction that she was running, and asked, "where [are you] going, come back."

¶ 10 As A.H. ran, she saw a woman, whose name she later learned was Jessica Diaz. Diaz lived at 2547 West Division Street, which was across the street from a bus stop. After Diaz got off the westbound bus that night, she crossed to the south side of the street to go home and heard a man hollering, "Come back; where are you going?" The man was in a dark-colored SUV, and his voice was coming from behind the bus at the bus stop on the north side of the street. Diaz looked back to see who the man was calling to, and Diaz saw A.H. walking toward her. Diaz did not see anyone else around. When A.H. got close to Diaz, she noticed A.H. was teary-eyed and breathing a little heavily, as if she had been running. Diaz asked A.H. if she was okay because she looked kind of scared. A.H. walked

forward and practically jumped into Diaz's arms. A.H. hugged Diaz because she was startled and happy to see someone. Diaz then saw the SUV pull off and drive down Division Street.

¶ 11 A.H. did not tell Diaz about the attack or say that the man in the SUV had done anything to her. Diaz let A.H. use her phone and A.H. tried to contact family members, but she could not reach anyone. Because Diaz did not know what else to do, she told A.H. that she was going to call the police. A.H. initially claimed to have called the police herself, but then claimed that she asked Diaz to call the police because A.H. had already returned the phone to Diaz. Diaz stayed with A.H. until the police arrived.

¶ 12 When the police arrived, A.H. did not report any injuries and refused medical treatment, including going to the hospital to be examined. A.H.'s clothes were not retrieved, preserved, or photographed. Although A.H. had to adjust her shorts, her shorts were not off of her, "ripped," or "anything." A.H. admitted to the officers that she had been drinking. According to A.H., the officers warned A.H. about lying about the attack and told her if she was lying, she could go to jail. The officers also asked A.H. if she knew the offender, and told her she should speak up if he was an ex-boyfriend. A.H. denied knowing the offender. The officers then drove A.H. home.

¶ 13 In the early morning hours of August 9th, Detective Andrew Burns, a 23-year veteran of the Chicago Police Department, began his investigation of an aggravated criminal sexual assault that occurred in the vicinity of the 2800 block of west Division Street. Burns spoke with A.H. at her home within a few hours of the incident. A.H. did not smell of alcohol and showed no signs of intoxication.

¶ 14 As part of the investigation, Burns and A.H. returned to the gas station. At the gas station, Burns obtained from the manager the surveillance camera footage corresponding with the time that A.H. was in the gas station. Burns downloaded the video and watched it with A.H., who identified in the video the individual who assaulted her after she left the gas station.

¶ 15 Burns returned to the police station and prepared a narrative along with still photographs of the individual identified in the surveillance video, which he gave to news affairs, and a community alert

was disseminated to the local news and radio stations. After the community alert was issued, Burns received an anonymous phone call between midnight and 1 a.m. on August 10th naming the individual shown in the community alert as "Marco Geronimo." Burns entered "Marco Geronimo" into the police database and obtained his photograph, and Burns recognized him as the same individual he saw in the surveillance footage. About an hour and half after the first phone call, Burns received a second phone call from a restaurant owner named Gus (no last name given), who stated that an employee told him that his wife saw Geronimo-Ocampo's picture on television as wanted for criminal sexual assault. Gus also informed Burns that Geronimo-Ocampo, an employee at a downtown Chicago restaurant, wanted to turn himself in. Around 2 a.m., Burns went to the restaurant and Geronimo-Ocampo surrendered. Geronimo-Ocampo was given *Miranda* warnings at the police station, and he did not make a statement. At 11:06 a.m. on August 10, 2014, A.H. signed a lineup photo spread advisory form and identified Geronimo-Ocampo in the photo lineup as the man who assaulted her.

¶ 16 Geronimo-Ocampo was charged with aggravated criminal sexual assault (digital penetration of A.H.'s vagina by use of force or threat of force while committing the offense of kidnapping) (720 ILCS 5/11-1.30(a)(3), (4) (West 2014)) and two counts of aggravated kidnapping (knowingly and secretly confined A.H. against her will while committing the offense of criminal sexual assault) (720 ILCS 5/10-2(a)(3) (West 2014)).

¶ 17 The case proceeded to a bench trial. The State's case consisted of testimony from A.H., Diaz, and Burns, all of whom testified to the events summarized above. The State also admitted into evidence as exhibits photographs of the area where A.H. testified that the incident occurred and the surveillance videos from the gas station. Because A.H. refused medical treatment, and her clothes were not preserved or photographed, no physical evidence was presented. A.H. made an in-court identification of Geronimo-Ocampo. Burns also made an in-court identification of Geronimo-Ocampo as the individual he saw in the surveillance videos.

¶ 18 We quote verbatim certain portions of A.H.'s testimony as relevant to the sufficiency of the evidence.

¶ 19 During A.H.'s direct testimony, the following exchange took place:

Q: And once he shoved you against that fence what did he do?

A: He was pulling my shorts to the side.

***

Q: Okay. And so do you know how many hands he was using to pull the shorts to the side?

A: One.

Q: And what was he doing with the other hand when he was trying to pull your shorts to the side?

A: Pushing me on the gate."

On cross-examination, A.H. testified:

"Q: He pushed you against the fence. And did he put his weight against you?

A: Yes.

Q: And did he touch you?

A: Yes.

Q: And is that when he tried to move your white shorts to the side and put his finger in your – I think you called it your vagina hole?

A: Yes.

***

Q: And then he put his finger in the area of your vagina?

A: No. He did that when he tried to take–well, he also tried to do that when we was standing right here too, but he put his fingers on my vagina.

Q: When he relocated you?

A: Yes.

Q: So you were able to resist him on that first encounter when he was leaning against you at the fence and then you were able to break away from him and move two or three or four or five feet, right?

A: Yes."

As to the second encounter, A.H. testified on direct examination:

"Q: Once he threw you on the ground what happened next?

A: He pushed me down, pulled my shorts to the side and inserted−his fingers on the top of my vagina, by my vagina hole.

***

Q: Okay. And once he pulled your shorts to the side what did he do with his hands?

A: He put his hands on top of my vagina.

THE COURT: He put his what?

A: He put his hands on my vagina.

THE COURT: His hand?

A: Yes. Well, his fingers.

THE COURT: Okay.

Q: And you said he put his fingers on your vagina, correct?

A: Yes.

Q: Now, where did his fingers go specifically on your vagina?

A: By my vagina hole.

Q: [ ] And after he put his fingers at your vagina hole what did you do?

A: I tried pushing him up off me−well, I pushed him up off me and I got up and I ran,

and as I was running I was crying."

During cross-examination as to the second encounter, A.H. testified:

"Q: Is that where he tried and successfully was able to move your shorts to the side and put his finger in your vaginal area?

A: Yes.

Q: And was that the sum and substance of the physical contact he had with you; at the gate he pushed against you and tried to do it and then when he relocated you he, in fact, was successful in putting his hand in your vaginal area?

A: Yes.

Q: Well, didn't you tell the first officer at the scene that when he pushed you against the fence he tried to kiss you and rub your breasts?

A. I told him that he was kissing on my neck and grabbing on me.

Q: And grabbing on you, meaning your breasts?

A: Yes.

Q: And then at the second location where he successfully touched you you were able to get away from him, weren't you?

A: Yes.

***

Q: So if there was a statement attributed by the police that while the assailant was trying to kiss your neck and grope your breasts and move your shorts to the side that he was able to pull out his penis and rub it against you, was that just something you forgot to say today?

A: Yes, that is something I forgot to say today."

The trial court separately examined A.H. regarding both encounters:

"THE COURT: [A.H.] the first time when he had you up against the fence and he was trying to pull your shorts back, describe for me exactly what he did with his hand.

***

A: And he was like pulling them [the shorts] and he was almost like in−like up in there trying to go put his fingers in there.

Q: Did he put his fingers in there?

A: Yes, but not right when we was at the gate.

Q: Like what?

A: Not when we was at the gate.

Q: Okay. So describe what he did when you were on the ground.

A: He did the same thing but this time he got his fingers right there in my vagina area and he was trying to force his fingers in there but I ended up pushing him off and getting up and running.

Q: Did he put his fingers up in you?

A: Yes."

¶ 20 During closing arguments, the trial court asked defense counsel to account for the fact that both Geronimo-Ocampo and A.H. were present at the exact same location at the exact same time. Counsel explained that it was just coincidence and there were plenty of other individuals at the gas station at that time.

¶ 21 The trial court acquitted Geronimo-Ocampo of the kidnapping charges because the incident occurred in public near a city sidewalk and the "kidnapping" consisted of moving A.H. from the sidewalk to a grassy area a short distance away. The trial court found Geronimo-Ocampo guilty of criminal sexual assault. The trial court continued the matter to allow defense counsel to research whether probation was a permissible sentence for criminal sexual assault. The trial court revoked

Geronimo-Ocampo's bond in the interim.

¶ 22 When court reconvened two days later, the trial judge informed the parties that he had himself obtained the trial transcript and had read A.H.'s testimony twice. As a result, the judge explained that he now had a reasonable doubt that Geronimo-Ocampo penetrated A.H.'s vagina with his fingers. Based on that reasonable doubt, the trial judge *sua sponte* reversed his finding of guilt on the criminal sexual assault charge (a class X felony) and found Geronimo-Ocampo guilty of the lesser included offense of criminal sexual abuse (a class 4 felony), which, unlike criminal sexual assault, was a probationable offense. The trial court did not reverse its order revoking bond, explaining that Geronimo-Ocampo attacked a stranger on the street.

¶ 23 During sentencing, the trial judge elaborated that he believed A.H.'s testimony that she was abused in a sexual manner by Geronimo-Ocampo, but did not find her testimony concerning penetration sufficient to support a finding of guilt on the aggravated criminal sexual assault charge. Based on its review of the presentence investigation report, the trial court noted that Geronimo-Ocampo's former wife was concerned about his alcohol consumption. Even though the trial court did not observe anything in the surveillance video indicating that Geronimo-Ocampo was intoxicated the night of the incident and no other evidence supported a finding that he had been drinking, the trial court stated its belief that there may have been a connection between what happened that night and alcohol consumption. The trial court recommended Geronimo-Ocampo do some "soul searching" about whether his drinking contributed to the incidents testified to by A.H.

¶ 24 The trial court sentenced Geronimo-Ocampo to 30 months of sex offender probation and 120 days' imprisonment (time actually served). Geronimo-Ocampo must also register as a sex offender for the next 10 years under the Illinois Sex Offender Registration Act (730 ILCS 150/3 (West 2014)). The trial court denied Geronimo-Ocampo's motion to reconsider the sentence, as well as his motion for a new trial challenging the sufficiency of the evidence. Geronimo-Ocampo timely appealed.

¶ 25 II. Analysis

¶ 26 Geronimo-Ocampo renews his challenge to the sufficiency of the evidence here claiming that the State's evidence against him rested on A.H.'s incredible testimony that he sexually abused her.

¶ 27 When reviewing a claim that the evidence was insufficient, the appropriate inquiry is whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the same essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1999); *People v. Gray*, 2017 IL 120958, ¶ 35. In other words, a reviewing court will reverse a conviction only if the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Newton*, 2018 IL 122958, ¶ 24; *Gray*, 2017 IL 120958, ¶ 35. In assessing the sufficiency of the evidence, we will not retry the defendant and all reasonable inferences must be drawn in favor of the State. *Newton*, 2018 IL 122958, ¶ 26. The trier of fact judges the credibility of witnesses and resolves conflicts or inconsistencies in the evidence. *Gray*, 2017 IL 120958, ¶ 35; *In re Jonathon C.B.,* 2011 IL 107750, ¶ 59. But although the trier of fact's decision to accept a witness's testimony is entitled to deference, it is neither conclusive nor binding on review. *Gray*, 2017 IL 120958, ¶ 35. And a court's acceptance of the truth of certain testimony does not guarantee it was reasonable to do so. *People v. Cunningham,* 212 Ill. 2d 274, 280 (2004).

¶ 28 To convict an individual of criminal sexual abuse, the State must prove beyond a reasonable doubt that he or she committed an act of sexual conduct by the use of force or threat of force. 720 ILCS 5/11-1.50(a)(1) (West 2014). Sexual conduct is defined 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 2014). Stated differently, a criminal sexual abuse conviction requires proof of an act of sexual conduct.

¶ 29 Geronimo-Ocampo cites *People v. Allman*, 180 Ill. App. 3d 396, 401 (1989), for the proposition

that this court has a duty to give trial evidence particularly close scrutiny in cases involving sexual offenses. Our cases used to require some level of corroboration or otherwise "clear and convincing" testimony from the complaining witness to uphold a conviction for a sex offense on appeal. *Id.* This heightened standard no longer applies to review of convictions for sex offenses in Illinois. See *People v. Schott*, 145 Ill. 2d 188, 202 (1991) (citing *People v. Collins*, 106 Ill. 2d 237 (1985)) (finding traditional reasonable doubt standard applicable to an "appellant's claim of evidentiary sufficiency in sex offense cases."). We reject Geronimo-Ocampos's reliance on cases that implicitly condone this outdated standard. Nevertheless, employing the traditional reasonable doubt standard of review, we find the State failed to meet its burden to prove Geronimo-Ocampo guilty beyond a reasonable doubt.

¶ 30 As applied here, the State bore the burden of proving beyond a reasonable doubt that Geronimo-Ocampo touched A.H.'s vagina by the use of force or threat of force for his sexual gratification or arousal. Identification of Geronimo-Ocampo as A.H.'s alleged attacker is not at issue given her consistent identification of him as the perpetrator—in the surveillance videos, in the photo array, and in court.[3] Likewise, the element of force or threat of force is not at issue, *i.e.*, Geronimo-Ocampo does not claim the evidence is insufficient to show that if he engaged in the conduct charged, it would entail the use of force. So the only contested element is whether Geronimo-Ocampo, in fact, engaged in the conduct, that is, whether he touched A.H. in a sexual manner. To prove its case, the State's evidence of the sexual conduct rested entirely on A.H.'s testimony—there was no physical evidence, Geronimo-Ocampo did not testify, and there were no eyewitnesses to the alleged sexual act.

¶ 31 After "carefully examining the record evidence" (*People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)), we find multiple bases to discount A.H.'s testimony. Specifically, A.H.'s description of the incident itself is vague, inconsistent, and lacking in important detail. Even though A.H. had the

[3]Although Geronimo-Ocampo noted that A.H. initially had difficulty identifying Geronimo-Ocampo in court because she was not wearing her glasses, he does not separately raise any identification issues on appeal.

opportunity to describe the abuse in her own words on direct examination, details relating to the alleged sexual abuse were mostly elicited in response to leading questions and on cross-examination. In her direct testimony regarding the first encounter by Geronimo-Ocampo, A.H. omitted completely any reference to sexual contact, instead describing Geronimo-Ocampo trying to pull her shorts to the side before she was able to push him off her. In her testimony, A.H. repeatedly denied that Geronimo-Ocampo touched her sexually when he pushed her against the fence, insisting that although he tried, he was unsuccessful. But A.H. told the police that during the first incident, as he held her against the fence, Geronimo-Ocampo kissed her neck, grabbed her breasts, exposed his penis, and rubbed it against her. On cross-examination, A.H. admitted telling the police those details, but claimed she "forgot" to mention them during her testimony. We find it doubtful that a victim of a sexual attack would "forget" to mention at trial such conduct by her attacker. Moreover, according to A.H., after the first encounter, she began to "walk" west on Division. It is also highly doubtful that a young woman—out late at night in an unfamiliar part of a city she had just moved to—would "walk" away from someone who had just propositioned her and then attempted to sexually attack her. Likewise, A.H.'s testimony regarding the manner in which Geronimo-Ocampo touched her was vague and inconsistent. She variously testified that Geronimo-Ocampo touched her "on," "on top of," "at," or "by" her vagina, her "vagina area," or her "vagina hole;" that he touched her "with his hands," "with one hand," or with his "fingers," and that he "tried to" or "did" insert his fingers in her vagina.

¶ 32 Under normal circumstances, we would make allowances for a lack of precision in the testimony of a victim who was 14 years old at the time of the attack and 16 years old at the time of trial. And if there was nothing else to call A.H.'s credibility into question, we would likely affirm because the testimony of a single witness in a sex offense case, if credible, is sufficient to sustain a conviction. *People v. Delgado*, 376 Ill. App. 3d 307, 311 (2007) (citing *People v. Smith*, 185 Ill. 2d 532, 541 (1999)). But the record discloses numerous other important reasons why the evidence in this case

was insufficient to sustain the State's burden of proof beyond a reasonable doubt.

¶ 33 First, we must consider A.H.'s sexual abuse allegations against the backdrop of her testimony that she had been drinking "a little," it took her about 3 hours to get to the bus stop near the gas station because she got "lost on the bus," and she purchased ginger ale and chips at the gas station because her "stomach hurt." We also cannot overlook A.H.'s testimony initially claiming to have called the police herself, but when confronted, she changed her story claiming that she told Diaz to call the police. In any event, when A.H. was unable to contact any family members, it was Diaz who called the police. All of these circumstances affect A.H.'s credibility.

¶ 34 Second, A.H. testified that when the police arrived at the scene, the officers warned her about lying and questioned whether the encounter involved an ex-boyfriend. As we would not expect in a case involving a young woman's claim of a sexual attack by a stranger, the responding officers questioned A.H.'s veracity immediately. Likewise, we know that the trial judge—as the trier of fact—harbored serious doubts regarding A.H.'s credibility because he reversed his prior finding of guilt on the sexual assault charge, explaining that A.H.'s testimony regarding penetration lacked specificity and was insufficient to support a conviction. Thus, the trial court did not believe A.H.'s testimony on an essential element of criminal sexual assault. Consequently, both contemporaneously with the alleged assault and during trial, those in a position to evaluate A.H.'s credibility found reason to doubt it.

¶ 35 Apart from these factors circumstantially casting doubt on A.H.'s credibility, the record also raises doubts about the entirety of A.H.'s version of events.

¶ 36 Geronimo-Ocampo's presence at the gas station as well as A.H.'s and Diaz's testimony regarding the man calling to A.H. from the dark SUV certainly support the inference that Geronimo-Ocampo solicited A.H.. But beyond that, there is nothing to support the inference that he sexually abused her.

¶ 37 The lack of any outcry from A.H. during or immediately after the attack is troubling. As shown

in a photograph of the scene admitted during trial, the chain link fence where A.H. said Geronimo-Ocampo first attacked her was in front of and literally feet from the front steps of what appears to be a two-flat residence. Yet, A.H. did not scream or call out for help.

¶ 38 Furthermore, because we know that, in fact, A.H. encountered Diaz in front of Diaz's residence at 2547 West Division and the attack occurred west of the Citgo gas station at 2805 West Division, it follows that A.H., even crediting her testimony that she ran west after the second attack, necessarily had to run east past the gas station and convenience store at some point before she ran into Diaz. As noted, the security camera footage from the store shows that, despite the late hour, the store was busy with several people coming in and going out. Logic and reason dictate that a victim of a late-night sexual attack—particularly a young woman in an unfamiliar part of town—would run to the nearest safe place, *i.e.*, the busy, well-lit convenience store where she had just been and where she could have sought help. But A.H. did not.

¶ 39 When A.H. did encounter Diaz, she said nothing to her about being attacked despite the fact that, according to both A.H. and Diaz, her attacker was at that point calling to her from his SUV. We would normally expect a victim to cry out at that point, particularly since her attacker was still nearby. But A.H. said nothing. And even after Diaz decided to call police—not because she believed A.H. had just been the victim of a crime, but because she did not know what else to do—and while she waited with A.H. for the police to arrive, there is no evidence that A.H. said anything to Diaz about the attack. The total lack of any contemporaneous outcry from A.H. seriously undermines the believability of her version of events.

¶ 40 This is not a case in which a victim of sexual abuse is disbelieved because she failed to report an attack due to "fear of the offender or to shame, guilt, and embarrassment." *People v. Summers*, 353 Ill. App. 3d 367, 372 (2004) (citing *People v. Duplessis*, 248 Ill. App. 3d 195, 199 (1993)). We

recognize that the majority victims of sexual abuse do not report the crime at all. See Rachel E. Morgan & Grace Kena, Bureau of Justice Statistics Bulletin, *Criminal Victimization, 2016: Revised*, at 7 (Oct. 2018), https://www.bjs.gov/content/pub/pdf/cv16re.pdf (in 2016, only 23.2% of rape and sexual assault victims reported the crime). A.H. *did* report the attack to police who responded to Diaz's call, so there was no appreciable delay in reporting the crime. What calls A.H.'s version of events into question is her failure to seek help when help was nearby and her failure to tell Diaz—who she ran into totally by chance—anything about what led her to, as Diaz put it, "jump into my arms."

¶ 41 Equally concerning is the fact that A.H.'s testimony about the site of the attacks and where she ran into Diaz cannot be reconciled with Diaz's testimony. A.H. repeatedly testified and the security camera footage shows that when she left the gas station, she walked west on Division. A.H. also testified that she stayed on the same side of the street as the gas station, *i.e.*, the south side. In order to follow A.H., Geronimo-Ocampo would have had to drive west on Division from the gas station, which would place him on the north side of the street. Accordingly, since he approached A.H. on foot and from behind on the south side of the street, Geronimo-Ocampo either parked his SUV heading west on Division or he turned left onto a side street. After the first encounter, A.H. continued to "walk" west on Division and, by her account, she was attacked the second time further west of the chain link fence. According to her testimony, when A.H. was able to push Geronimo-Ocampo off her the second time, she ran west where she ran into Diaz. But we know from Diaz that Diaz exited a westbound bus on Division across the street from her house at 2547 West Division, several blocks east of where A.H. claims she ran into her. And although it is undisputed that A.H. did run into Diaz, it is impossible to reconcile A.H.'s positive testimony regarding the direction she ran after the second attack ("I ran west down Division the same way I was walking") with the fact that A.H. encountered Diaz several blocks east of that location. Further, the record contains no explanation of how A.H. got from one point to

another. Again, under normal circumstances, we would place this discrepancy in the "mistake" category, but given our other concerns described above, it is a factor we cannot overlook.

¶ 42 This discrepancy further highlights the unlikelihood that Geronimo-Ocampo was able to sexually attack A.H. west of the gas station, return to his SUV, drive east, and call to A.H. from the location where Diaz placed him: behind the westbound bus on Division across from her home. Whether the SUV was parked heading west on Division or on a side street before the attack, Geronimo-Ocampo would necessarily have had to turn the vehicle around so that he could drive east in the direction A.H. was running, pass her as she ran on the south side of the street, make a U-turn on Division, and call out to her as he drove west behind the bus. The improbability of this scenario further underscores our conclusion that the evidence was insufficient to sustain the State's burden.

¶ 43 We are guided by the well-established principle of law that the finder of fact judges the credibility of testifying witnesses, but there is nothing in the law mandating this court to "rubber stamp" credibility determinations, particularly in instances such as this case, where the finder of fact reversed a critical aspect of the initial credibility determination after conducting an in-depth review of the victim's testimony. See *People v. Brown*, 2013 IL 114196, ¶ 48 (although the fact-finder's credibility determinations are entitled to great weight, such determinations are not conclusive). In any event, the trial court believed that A.H. was not sexually assaulted, but sexually abused. Although a finding of guilt beyond a reasonable doubt may rest solely on a complainant's testimony, the testimony must be positive and credible (*People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009); *People v. Jones*, 81 Ill. App. 3d 798, 802 (1980)), adjectives we cannot readily apply to A.H.'s version of events. The State's ability to prove Geronimo-Ocampo guilty beyond a reasonable doubt was undermined by A.H.'s refusal of a medical examination, her failure to point out her attacker (despite his proximity) to a stranger willing to help, her inability to testify clearly or consistently about the details of the attack, and

her complete omission at trial of highly relevant details she relayed to police shortly after the attack. A.H.'s testimony was fraught with too many inconsistencies that, when considered cumulatively and in conjunction with the other circumstances discussed above, prevent us from finding that her testimony was sufficient to sustain Geronimo-Ocampo's conviction.

¶ 44 We agree with Geronimo-Ocampo that the State's evidence was insufficient to prove beyond a reasonable doubt that he sexually abused A.H. See *People v. Coulson*, 13 Ill. 2d 290, 296 (1958); *People v. Melecio*, 2017 IL App (1st) 141434, ¶ 80; *People v. Jones*, 81 Ill. App. 3d 798, 802 (1980) (it is the insufficiency of the State's evidence that creates a reasonable doubt of a defendant's guilt). After viewing the evidence in the light most favorable to the State, we find the evidence submitted by the State relating to the sexual abuse charge so unreasonable, improbable, unsatisfactory, and contrary to universal human experience that we are not satisfied beyond a reasonable doubt of Geronimo-Ocampo's guilt. See *Coulson*, 13 Ill. 2d 290, 296 (rejecting the trial court's credibility determination because the witness's testimony that defendants permitted him to go inside his house alone based on his promise not to call the police "taxes the gullibility of the credulous"); *People v. Dawson*, 22 Ill. 2d 260, 264 (1961) (this court may reverse the finder of fact's credibility determinations if the complainant's testimony is contrary to the laws of nature or universal human experience); *People v. Shaw*, 2015 IL App (1st) 123157, ¶ 30 (reversing the trial court's credibility determination finding the victim's account that the defendant had a gun implausible and subject to numerous impeachments); *People v. Herman*, 407 Ill. App. 3d 688 (2011) (rejecting the trial court's credibility determination finding that the inconsistencies in the witness's testimony seriously undermined the truthfulness of her allegation that the sexual encounter was not consensual).

¶ 45 Because the State's evidence was insufficient to prove Geronimo-Ocampo guilty of criminal sexual abuse beyond a reasonable doubt and there is nothing in the record to indicate that any additional evidence will be available to the State upon a new trial, we reverse his conviction without

remand. *Dawson*, 22 Ill. 2d at 266. Having found the evidence insufficient to support his conviction of criminal sexual abuse, we need not address Geronimo-Ocampo's remaining issues.

¶ 46 Reversed.

¶ 47 Justice Hyman, dissenting:

¶ 48 In my view, the inconsistencies in A.H.'s testimony that are more objective, particularly about the direction she walked, are neither significant enough to her testimony nor sufficient enough to undermine Geronimo-Ocampo's conviction. Reading the facts in the light most favorable to the State, I see no reason to set aside the trial court's judgment, and respectfully dissent.

¶ 49 Sufficiency of the Evidence

¶ 50 It is difficult to prescribe a checklist of appropriate or expected responses from a victim of sexual abuse. The majority focuses on several aspects of A.H.'s testimony that it finds surprising because they do not comport with "[l]ogic and reason." In my view, logic and reason is a lot to ask of a 14-year-old girl responding to a traumatic sexual encounter. Unlike the majority, I am not ready to discount that testimony because A.H. (i) had some wine (¶ 31) and (ii) made no immediate outcry (¶¶ 35, 37).

¶ 51 I begin with the majority's assertion that the trial court "reversed a critical aspect of the initial credibility determination" about A.H.'s testimony because it reduced the class of Geronimo-Ocampo's offense from aggravated criminal sexual assault to simple criminal sexual abuse. (*Supra*, ¶ 43). I find nothing in this record to support the conclusion that the trial court's decision to reduce the degree of the offense had anything to do with A.H.'s credibility. The difference between contact (sexual abuse) and penetration (sexual assault) often does not depend on credibility determinations. *Cf. People v. Oliver*, 38 Ill. App. 3d 166, 170 (1976) (finding, without questioning credibility, victim's testimony that defendant's penis made contact with her "butt" was not sufficiently specific to prove required element of contact with her anus). We are confronted with a similar scenario. A.H. repeatedly testified that

Geronimo-Ocampo made contact with her "vagina area" and that he was "trying to go put his fingers in there" or "force his fingers in there," but was unsuccessful. The trial court recited in its ruling that the only time A.H. testified to successful penetration was in response to the court's own leading question. Reviewing the totality of the evidence, the trial court reduced Geronimo-Ocampo's offense of conviction from sexual assault to sexual abuse. But, to say that the court's decision was based on a reversal of its credibility determination seems to me not supported by the record.

¶ 52 I read the trial court as having found A.H.'s testimony to be credible, even if imperfect, and we are to defer to those credibility findings unless they are unreasonable. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Closer examination of A.H.'s testimony comes up with either minor or non-existent discrepancies.

¶ 53 Regarding A.H.'s testimony that she had a "little wine," I fail to see why this matters at all. A.H. testified that she drank a "little" wine three hours before arriving at the gas station. The video from the gas station, which shows A.H. inside and then walking away, does not provide us with any visual cues suggesting that A.H. might be intoxicated (*e.g.*, swaying or stumbling). Additionally, we have direct testimony from Detective Burns that A.H. did not smell of alcohol, did not slur or stutter her words, and did not show any other signs of intoxication immediately after the offense.

¶ 54 Similarly, the lack of an immediate outcry has no evidential value. On this score, the majority rightly rejects Geronimo-Ocampo's invitation to revive the old standard of review requiring either corroboration or otherwise clear and convincing evidence to sustain a conviction for a sexual offense. (*Supra*, ¶ 29) (rejecting citation to *People v. Allman*, 180 Ill. App. 3d 396, 401 (1989)). But, of similarly ancient vintage is the requirement for victims of violent crime to make an immediate outcry, lest they be disbelieved later. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 954-55 (2004). We would not so quickly question the testimony of a robbery victim who ran home

to secure his or her immediate physical safety, and reported the crime the next day; why should we hold victims of sexual attacks to a more onerous standard? See *People v. Cole*, 193 Ill. App. 3d 990, 1000 (Steigmann, J. concurring).

¶ 55 The majority, while recognizing the low reporting rates for victims of sexual offenses, *supra* at ¶ 40, nonetheless looks to A.H.'s lack of immediate outcry as reason to disbelieve her. Significantly, our modern cases have held, "a delay in reporting incidents of sexual abuse may be reasonable where the victim's silence can be attributed to fear of the offender or to shame, guilt, and embarrassment." *Summers*, 353 Ill. App. 3d at 372. Based on my review of the record, A.H.'s lack of an immediate outcry can be explained. When A.H. first encountered Diaz, she was teary-eyed and out of breath. A.H. testified that the attack made her feel "scared" and "frightened" and that even by the time the officers arrived, she was "still in shock." Diaz explained that, while A.H. did not verbally respond when asked if she was okay, A.H. did "walk[ ] forward and like jump[ ] into [Diaz's] arms practically." Diaz called the police after watching A.H. attempt to call her mother and grandmother and personally observing Geronimo-Ocampo in his SUV across the street.

¶ 56 I do not fault a scared 14-year-old, still in shock from an invasive sexual attack, for failing to articulate to a complete stranger what just happened to her. Geronimo-Ocampo, whose identity as the man in the SUV is not in dispute, was across the street. A.H. had no way to know how he would respond if he saw her reporting him to somebody; indeed he was brazen enough to continue cat-calling her in front of other people. In that context it would be difficult for anyone, let alone a 14-year-old, to describe a sexual attack to someone they trusted, let alone a stranger. I draw no negative inference from A.H.'s failure to make an immediate outcry.

¶ 57 That the majority and I engage in a reasonable disagreement about inferences to draw from this evidence demonstrates why we leave these types of determinations to the trier of fact. The trial judge was able to hear A.H. testify and evaluate her demeanor. It was not unreasonable for the trial judge to

decline to draw a negative inference about A.H.'s credibility from the lack of an immediate outcry.

¶ 58 Next, ordinarily, as the majority admits, A.H.'s testimony about the site of the attacks and where she ran into Diaz "place this discrepancy in the 'mistake' category***." I do not consider this "mistake" dispositive. I also disagree that this "mistake" has any probative value bearing on A.H.'s credibility more generally.

¶ 59 The majority describes it as "impossible to reconcile A.H.'s positive testimony regarding the direction she ran after the second attack ('I ran west down Division the same way I was walking')" with A.H.'s encounter with Diaz several blocks east of that location. The majority goes on to describe the "improbability" of the scenario in which Geronimo-Ocampo followed A.H. east on Division and then turned around to become positioned behind the westbound bus. Accepting this "improbability" as evidence supporting a reasonable inference of solicitation should also serve as corroborative of A.H.'s testimony about the sexual abuse. It seems to me that one would have to accept both impressions or neither.

¶ 60 The record leaves beyond dispute: (i) A.H. walked west after leaving the gas station, (ii) she went west again after the attack, and (iii) she ran into Diaz about three blocks east of the gas station. There is no description of the route she took from the site of the attack to where she found Diaz. We do not know whether she turned around and went straight back east on Division, and so we do not know whether she had the opportunity to run into the gas station as the majority suggests she should have. (*Supra* at ¶ 38). We do not know whether she ended up on other streets, perhaps taking a more circuitous path to Diaz's house. Importantly, the parties were conspicuously uninterested in finding out more about how A.H. got to 2547 West Division. Defense counsel never cross-examined A.H. about where she ran after the attack and never argued that her eventual arrival in the 2500 block of Division Street diminished her credibility. I certainly do not mean to suggest that it was Geronimo-Ocampo's burden to disprove any aspect of A.H.'s narrative, see *People v. Jeffries*, 164 Ill. 2d 104, 114 (1995)

(violation of due process to require defendant to disprove element of offense), only that we might expect more of an issue to have been made of this aspect of A.H.'s testimony given that the majority finds it troubling to the extent of being dispositive.

¶ 61 I believe that A.H. did not explain the exact path of her flight from Geronimo-Ocampo for one simple reason: she was never asked about it. The majority does not suggest that such a course of conduct is impossible, only that it seems odd or unlikely. Even if we would not have arrived at the same conclusions nothing about the trial judge's handling of this evidence was unreasonable.

¶ 62 As it concludes, the majority cites a series of cases in which Illinois courts have reversed convictions based on the insufficiency of the evidence, in particular because the trial court's credibility finding was unreasonable. (*Supra* at ¶ 44). Of those cases, only *People v. Herman*, 407 Ill. App. 3d 688 (2011), involve**s a** sex offense. In *Herman*, in addition to inconsistencies in the complainant's testimony that were "not minor," the complainant had admitted to being high on crack cocaine *during* the time the offense was alleged to have been committed. 407 Ill. App. 3d at 705, 707. The majority dismisses most of its own concerns with A.H.'s testimony as either an excusable "lack of precision" or falling within "the 'mistake' category." (*Supra* at ¶¶ 29-30, 38). That alone distinguishes this case from cases like *Herman*, where impairment of the claimant was demonstrated and she gave testimony that was materially contradictory. Viewing the evidence in a light most favorable to the State and with proper deference to the trial judge as the finder of fact, I cannot say the court's conclusions about A.H.'s credibility and the sufficiency of the evidence were unreasonable.

¶ 63 The majority does not have to reach the other issues in Geronimo-Ocampo's brief because it reverses outright on the basis of evidentiary insufficiency. Because I would affirm, having found the evidence sufficient to prove Geronimo-Ocampo's guilt beyond a reasonable doubt, I write to explain my disposition of the other issues.

¶ 64 Reliance on Facts Outside the Record

¶ 65 Geronimo-Ocampo argues that the trial court improperly relied on facts about his struggles with alcohol to find him guilty, despite no evidence of those struggles appearing in the record. He acknowledges the information about his alcohol use that appears in his pre-sentence investigation report (PSI), which is not itself in the record, but argues that the trial court's comments about his alcohol use at sentencing are evidence of what was in the court's mind when it entered its guilty finding. The State responds that no error occurred because the court based its findings on the record (the PSI) and the findings related only to its sentencing judgment. The State also argues that the issue has been forfeited and that, because Geronimo-Ocampo did not argue plain error, no basis exists on which to excuse the forfeiture. As a final alternative, the State argues that neither prong of plain error is satisfied.

¶ 66 I would find that Geronimo-Ocampo has forfeited his claim that the trial court improperly relied on facts not in evidence to find him guilty. To preserve an issue for review, a defendant must object to the alleged error when it occurs and raise the issue in a post-trial (or post-sentencing) motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The State says, while Geronimo-Ocampo included this argument in his post-trial motion, he did not object at the time the purported error was made. On my review of the record the State's characterization is too generous. The motion to which the State cites, Geronimo-Ocampo's motion for a new trial, does not mention the trial judge's comments at sentencing. And, that motion could not have mentioned the sentencing comments seeing as it was filed almost two months before sentencing. Geronimo-Ocampo's motion to reduce his sentence similarly does not mention the trial court's comments about alcohol consumption. And, as the State correctly recounts, there was no objection at the time the trial court admonished Geronimo-Ocampo about the struggles with drinking that the PSI revealed.

¶ 67 The State correctly argues that Geronimo-Ocampo did not argue plain error in his opening brief,

but that failure would not ordinarily prohibit our review. *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010) (proper to raise plain error for first time in reply brief). That said, Geronimo-Ocampo did not file a reply brief and did not address the State's forfeiture claim at oral argument and has thus forfeited his opportunity to argue plain error. See Ill. S. Ct. Rule 341(h)(7) (eff. May 25, 2018). Because the issue is forfeited by Geronimo-Ocampo's failure to argue it in the trial court, and because appellate counsel has not given us any reason to excuse his forfeiture, I would affirm without addressing the merits.

¶ 68 Burden Shifting

¶ 69 Geronimo-Ocampo's final claim suffers a similar fate. He argues that the trial court improperly shifted the burden of proof from the State to him by asking defense counsel: "How do you account for the fact that both [Geronimo-Ocampo] and [A.H] are present in the same exact location at the same time?" The State responds that the trial court's question, taken in context, does not reveal an attempt to shift the burden and that the record supports the presumption that trial judges act in accordance with the law. See *People v. Howery*, 178 Ill. 2d 1, 32 (1997) (trial court presumed to know that law and apply it properly absent "affirmative evidence to the contrary"). As with Geronimo-Ocampo's argument about the trial court's sentencing comments, the State argues that the issue has been forfeited and that Geronimo-Ocampo has made no plain error argument to attempt to save it from forfeiture.

¶ 70 I agree with the State. As before, nothing in the record indicates that defense counsel raised this claim before the trial court. As before, appellate counsel did not file a reply brief and did not respond at oral argument to the State's claims of forfeiture. As to this issue, I would honor Geronimo-Ocampo's forfeiture and affirm without addressing the merits of his claim.

¶ 71 I would affirm the trial court's judgment in all respects.