2019 IL App (2d) 170139-U
No. 2-17-0139
Order filed May 6, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARIO MORALES, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 14-CF-15 Honorable Michael W. Feetterer, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of certain sex offenses, as the trial court was entitled to credit the victim's testimony over defendant's; (2) defendant's convictions of sex offenses for penetration and fondling did not violate the one-act, one-crime rule, as those were two separate acts

¶ 2 Defendant, Mario Morales, appeals his convictions of criminal sexual assault (720 ILCS 5/11-1.20(a)(3) (West 2010)), based on defendant's act of vaginal penetration against the victim, R.V., and aggravated criminal sexual abuse (*id.* § 11-1.60(d) (West 2010), based on defendant's act of fondling R.V.'s breasts. He contends that the evidence was insufficient to prove him

guilty beyond a reasonable doubt and that his conviction of aggravated criminal sexual abuse should be vacated under the one-act-one-crime rule. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted in January 2014 on one count of criminal sexual assault, which alleged that, between December 1, 2011, and December 31, 2011, defendant engaged in an act of sexual penetration of R.V., a family member who was under 18 years of age. Defendant was also indicted on two counts of aggravated criminal sexual abuse, the first alleging that, during the same time frame, defendant engaged in an act of sexual penetration of R.V. and the second alleging that defendant fondled R.V.'s breasts, when R.V. was between 13 and 17 years of age and defendant was at least 5 years older. In late 2016, a bench trial was held.

¶ 5 At the time of trial, R.V. was 20, living in Wisconsin with her husband, Oscar, and a mother of two boys. Her first son was born when she was 16. R.V. previously lived in a two-bedroom trailer home with her mother, Catalina; her three brothers, A.M., V.M., and Y.M.; and defendant, who was her stepfather. Defendant had been in R.V.'s life since she was a baby. Catalina and defendant also had a daughter, M.M., who was born after R.V. moved out. At the time of trial, defendant was 39 years old.

¶ 6 R.V. testified that, when she was in high school, she did not have a good relationship with Catalina. Catalina did not allow R.V. to go out with friends or with her boyfriend, Jose, and she often skipped school or sneaked out of the house. According to R.V., she and her brothers A.M. and V.M. arrived home from school between 3 and 3:15 p.m. R.V. was told to stay home, clean the house, cook, and watch her brothers until Catalina arrived home from work. Catalina worked from 7 a.m. until 4:30 p.m., and defendant worked seasonally from April to November at

a nursery, worked for a factory on weekends, and cleared snow in the winter. According to R.V., defendant arrived home from work around 4 p.m., and Catalina arrived home after 5 p.m.

¶ 7 R.V. initially had a good relationship with defendant. However, their relationship began to change when R.V. was 12 and in middle school. R.V. said that she wanted to spend time with defendant, but when she played with him, he began to touch her inappropriately. When she was 13 or 14, defendant asked R.V. how much she wanted him to be her first sexual experience and offered her $1000 to be her first. R.V. told him no.

¶ 8 In December 2011, R.V. tried to run away with Jose to Mexico, but got only to Texas before being returned to Illinois. After returning, R.V. did not miss school until her senior year, and she did not sneak out of the house again. In November 2011, R.V. had learned that she was pregnant. To avoid telling Catalina that Jose gave her the money to go to Mexico, R.V. told her that she sold a necklace and two rings. R.V. testified that defendant found the jewelry in a drawer and threatened to tell Catalina about it if R.V. did not do what he told her to do. Defendant then told R.V. to have sex with him. R.V. first had sex with defendant in December 2011. R.V. stated that Y.M. was behind the closed door of the bathroom playing with water in the bathtub when the first incident occurred. Her other brothers were playing outside.

¶ 9 R.V. testified that sexual encounters between her and defendant happened more than 10 times until a month before she delivered her first child, and they occurred in the trailer home and in a car. The encounters in the trailer home took place when Catalina was at work, with the doors closed and locked, while the boys were playing outside. R.V. specifically testified about an encounter in which defendant got on top of R.V. and removed her bottom clothing. His shirt remained on, but he pulled his pants down. Defendant put his penis inside R.V.'s vagina. In addition, he touched her breasts with his hand both over and under her clothing. R.V. repeated

that this happened over 10 times, both in the home and in the car. Defendant used condoms, and R.V. asked him why he would use a condom when she could not get pregnant again. Defendant also gave R.V. money after the sexual encounters. The encounters stopped in June or July of 2012, and R.V. did not tell Catalina about them.

¶ 10 After learning that she was pregnant, R.V. attended school more regularly and started attending a counseling group at church. R.V. did not tell her group counselor or her school counselor about the abuse and did not tell anyone about it until early 2013, when she told Oscar, two friends, and a counselor.

¶ 11 R.V.'s first son was born in August 2012. She originally named him after defendant because her mother suggested the name for all that defendant had done for R.V. After R.V.'s son was born, defendant watched him during the winter while R.V. attended school. R.V. began dating Oscar in September 2012 and, when R.V. became pregnant with Oscar's baby, Catalina decided that R.V. should move out. In May 2013, R.V. moved to Wisconsin with Oscar. After she moved out, R.V. changed her first son's name because Catalina could no longer control her and she did not want him to have defendant's name.

¶ 12 A county sheriff's detective, Ed Maldonado, testified that he was notified about the abuse by the Department of Children and Family Services (DCFS) on October 30, 2013. When Maldonado spoke with Catalina at her home and informed her about the investigation, she appeared indifferent. When R.V. and her son arrived shortly after and Maldonado identified himself, R.V. began to cry uncontrollably. R.V. said that she was worried about her brothers, indicating that a crime occurred. Maldonado was under the impression that R.V. lived at the residence, but she had moved out five months before. While Maldonado was present, defendant arrived, and Maldonado informed him that R.V. alleged that defendant had sex with her.

Maldonado testified that defendant did not deny the allegations and reacted indifferently, stating, "if I say yes or no, you're still going to arrest me." Maldonado advised defendant that he could not stay at the residence due to a DCFS safety plan. Defendant cooperated by collecting some belongings and leaving the residence. Maldonado advised Detective Verle Leard of the abuse.

¶ 13 On November 4, 2013, Leard went to R.V.'s high school to speak with her, but she was not present. He was informed that her mother called her in sick, but he did not verify the information. Leard met with Catalina, who denied any knowledge of R.V.'s daily activities after she moved out and denied calling the school about R.V.'s absences. Catalina was calm during the meeting and indicated that she was unaware of the reported abuse. On November 5, 2013, Leard interviewed R.V., who told him about the abuse. Leard then spoke again to Catalina, who appeared upset. Leard photographed the trailer and attempted to speak to defendant. Those attempts included at least six phone calls that went straight to voice mail and a visit to the nursery where defendant worked, but defendant was not there.

¶ 14 Catalina testified that defendant worked at the nursery until 5:30 p.m. She did not recall telling a detective that defendant was usually home by 3 p.m. She also did not recall if defendant worked at the nursery in December 2011. She said that the children were not allowed to play outside when it was cold. Catalina testified that she found in a closet the jewelry that R.V. claimed to have sold. When Maldonado investigated the abuse allegations and defendant left the home, Catalina called Oscar and heard him and R.V. laughing. However, she did not tell the police about the laughter. Catalina did not know where defendant went, but he was gone for three months. Catalina remained married to defendant when he returned, but she had no contact with R.V. She said that A.M. and V.M. loved defendant and did not want defendant to get in

trouble. Catalina described R.V.'s courtroom tears as similar to the way she would cry when Catalina would not let her go out.

¶ 15 A.M. and V.M. testified that they arrived home from school at 2:50 p.m., which was 10 to 20 minutes before R.V. would arrive. According to A.M., he and his brother usually watched television after school, but V.M. said they did their homework first. Although R.V. testified that her brothers played outside, A.M. and V.M. denied that they played outside in the cold. However, the boys played outside with friends until dark when the weather was nice. When they returned to the trailer to use the bathroom or get a drink, they did not find the doors locked. A.M. and V.M. testified that R.V. usually played on her phone in her bedroom.

¶ 16 R.V.'s former classmate, Maria Nova, testified that, in July 2012, R.V. had a baby shower that Nova attended. Defendant and Catalina were present and gave R.V. a car seat. Nova said that R.V. was playful, happy, and excited that defendant gave her the car seat. R.V. did not speak to Nova about defendant much, but she mentioned that defendant bought her foods that she craved during her pregnancy. R.V. once had a conversation with Nova about defendant during which she cried. Nova said that the sadness did not look genuine and claimed that she told the police that she did not believe that R.V. was genuine. However, she did not include that in her written statement to the police, and a detective testified that Nova did not tell him of her doubts. At the time of trial, Nova did not talk to R.V.

¶ 17 Defendant testified and denied the allegations. He said that he previously had a good relationship with R.V. and that she referred to him as her father. He said that he had only one argument with R.V., when the baby was six or seven months old, about R.V.'s school attendance. Catalina was the one who disciplined the children. For example, when R.V. ran away to Texas, her phone was confiscated as part of her punishment and she was not allowed to

go out. Defendant said that he generally worked at the nursery from April to December and that his work there in 2011 stopped around the end of November.

¶ 18 Defendant denied knowing about or finding the jewelry but acknowledged that he knew that R.V. had a necklace from her baptism. Defendant also denied being indifferent to investigators and said that he denied the allegations when he spoke to them. Defendant said that, when he left, he went to stay with family in Texas and was unaware of an arrest warrant. Defendant's cell phone was broken, so he did not have a phone when he left for Texas, and he did not communicate with Catalina or his children while he was there. When defendant learned that the police were looking for him, he returned to Illinois and was arrested.

¶ 19 The trial court found defendant guilty on all counts. The court found R.V. credible, noting that she took the unusual step of renaming her son because she did not want him named after defendant. The court further noted that nothing the record disclosed that the allegations were motivated by a desire to destroy her family. The court found that R.V. answered questions truthfully, consistently, and without exaggeration. In contrast, the court found that defendant's behavior showed he lacked credibility because he did not deny the allegations and disappeared from the state for three months without communicating with his family. The court recognized that defendant said that he denied the allegations to the police, but the court found Maldonado more credible. Overall, the court found R.V.'s testimony credible and defendant's testimony lacking in credibility. The court sentenced defendant to six years' incarceration for criminal sexual assault and merged the count of aggravated criminal sexual abuse that alleged penetration with that conviction. Over defendant's objection as to whether a mandatory consecutive sentence applied, the court sentenced defendant to a consecutive three-year term of incarceration for the aggravated-criminal-sexual-abuse count that alleged fondling. Defendant filed an

untimely motion for a new trial on February 9, 2017, which the court denied. Defendant then filed an untimely notice of appeal followed by an amended notice of appeal. Defendant moved for a supervisory order, and the Illinois Supreme Court ordered this court to treat the amended notice of appeal as timely.

¶ 20 II. ANALYSIS

¶ 21 Defendant first contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt. He argues that R.V. was an admitted liar who had a motive to implicate him when Catalina forced her to move out, that there were inconsistencies in the evidence, and that there was no corroborating evidence.

¶ 22 An accused commits criminal sexual assault if he commits an act of sexual penetration with a victim who is under 18 years of age and the accused is a family member. *Id.* § 11-1.20(a)(3). An accused commits aggravated criminal sexual abuse when he commits an act of sexual penetration or sexual conduct with a victim who is between 13 and 17 years of age and the accused is at least 5 years older than the victim. *Id.* § 11-1.60(d).

¶ 23 A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). On a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard applies regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 24 The trier of fact has the responsibility to assess the credibility of witnesses, weigh their testimony, and draw reasonable inferences from the evidence. *People v. Heard*, 187 Ill. 2d 36, 84 (1999). The testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant. *People v. Morehead*, 45 Ill. 2d 326, 329-30 (1970). A reviewing court will not reverse a conviction simply because the evidence is contradictory. *People v. Berland*, 74 Ill. 2d 286, 306 (1978). Nor will a court reverse simply because the defendant claims that a witness was not credible. *People v. Evans*, 209 Ill. 2d 194, 211-12 (2004); *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). We will not substitute our judgment for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000); *People v. Kotlarz*, 193 Ill. 2d 272, 298 (2000).

¶ 25 Here, defendant's attack on the sufficiency of the evidence is essentially an attack on R.V.'s credibility. However, the court heard both R.V.'s testimony and defendant's testimony. While R.V. admitted that she lied about selling her jewelry, the court found her credible, noting that she took the unusual step of renaming her son because she did not want him named after defendant. The court additionally noted that nothing the record disclosed that her allegations were motivated by a desire to destroy her family. The court specifically found that R.V. answered questions truthfully, consistently, and without exaggeration. In contrast, crediting Maldonado, the court found that defendant's testimony lacked credibility because he did not deny the allegations and disappeared from the state for three months without communicating with his family. Given the deferential rules of appellate review, we will not reassess R.V.'s credibility, and the inconsistencies in the evidence were not severe enough that we could find the evidence so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt.

¶ 26 Defendant relies primary on *People v. Schott*, 145 Ill. 2d 188 (1991), and *People v. Quintana*, 91 Ill. App. 2d 95 (1968), to argue otherwise, but those cases are distinguishable. In *Schott*, our supreme court found that the State's evidence was insufficient to convict the defendant of indecent liberties with a child when the victim, the defendant's stepdaughter, admitted that she lied to a judge when she previously accused her uncle of molesting her and had a motive to lie about the defendant because she wanted him to leave the house. *Schott*, 145 Ill. 2d at 206-07. The victim also told a DCFS employee that she made up the story about the defendant because she was angry with him. *Id*. at 207. The victim additionally was contradicted as to where, when, and how many times the alleged offense occurred, prior acts of sexual abuse, and whether she told anyone about the alleged offense. *Id*. at 207-08. The court found that the victim's testimony was so lacking in credibility that it left a reasonable doubt as to the defendant's guilt. *Id*. at 206-209.

¶ 27 In *Quintana*, a drug case, the arresting officer and sole witness against the defendant claimed to have observed the defendant throw two packages of marijuana under a parked car. *Quintana*, 91 Ill. App. 2d at 96. However, the prior relationship between the officer and the defendant involved repeated harassment on the part of the officer to "get something" on the defendant and pressure him into becoming the officer's personal informer. *Id*. at 97-98. The officer had previously stopped the defendant five times without cause and " 'shook him down.' " *Id*. at 98.

¶ 28 Here, the matters affecting R.V.'s credibility were nowhere near those seen in *Schott*. Nor did she have a motive to lie as in *Quintana*. Based on the evidence as a whole, it was reasonable for the trial court to find R.V. credible and find that defendant's testimony lacked

credibility. As such, there was sufficient evidence for the court to convict defendant of the charges.

¶ 29 Defendant next argues that his conviction of aggravated criminal sexual abuse should be vacated under the one-act-one-crime rule because the act of penetration and the act of fondling happened simultaneously as part of one act. Defendant forfeited the matter by failing to raise it in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, the parties agree that a violation of the one-act-one-crime rule affects the integrity of the judicial process, such that second-prong plain error will apply. *People v. Coats*, 2018 IL 121926, ¶ 10. But before considering plain error, we must determine whether error occurred. *Id.* ¶ 11.

¶ 30 Whether a violation of the one-act-one-crime rule has occurred is a question of law, which we review *de novo*. *Id.* ¶ 12.

> "Analysis under the one-act, one-crime doctrine involves two steps: determining (1) whether the defendant's conduct involved a single act (in which case multiple convictions are improper) or multiple acts, and, (2) if multiple acts, whether any of the offenses were lesser included offenses (in which case multiple convictions are improper)." *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 33.

Defendant does not argue that a lesser-included-offense analysis applies and instead argues only that the conduct was a single physical act.

¶ 31 The definition of an "act" is "any overt or outward manifestation which will support a different offense." *People v. King*, 66 Ill. 2d 551, 566 (1977). Under that definition, a defendant can be guilty of two offenses when an act is part of both offenses or when an act is part of one offense and the only act of the other offense. *Coats*, 2018 IL 121926, ¶ 15.

¶ 32 Defendant relies primarily on *People v. Cox*, 53 Ill. 2d 101, 104 (1972). There, our supreme court held that, where two acts of indecent liberties were based upon a single transaction, involving a single victim and occurring simultaneously, only one conviction could be imposed. However, the court later departed from such a strict interpretation and held that multiple convictions from a single transaction are permissible. *King*, 66 Ill. 2d at 565.

¶ 33 In *King*, the court held that there are "no constitutional limitations against multiple convictions and concurrent sentences[1] for different offenses arising from multiple acts which are incidental to or motivated by some greater criminal objective." *Id.*; see also *People v. Segara*, 126 Ill. 2d 70, 77 (1988) (stating that a defendant who commits more than one criminal act in an episode or transaction may be prosecuted for more than one offense unless the charges involve precisely the same physical act). Further, since *Cox*, the legislature has enacted provisions that define "sexual conduct" and "sexual penetration" as separate and distinct actions. 720 ILCS 5/11-0.1 (West 2010). Thus, we do not find *Cox* controlling and the question is whether defendant committed more than one act in the same transaction when he committed both an act of penetration and an act of fondling.

[1] While *King* spoke of concurrent sentences in cases involving multiple acts, the sentencing statute was later amended to mandate consecutive sentences in certain circumstances, including those present in this case. 730 ILCS 5/5-8-4(d)(2) (West 2010) (referring to section 12-13 of the Criminal Code of 1961, which was renumbered as section 11-1.20 by Pub. Act 96-1551, art. 2, § 5 (eff. July 1, 2011)). Defendant does not argue that, if his multiple convictions were proper, his consecutive sentences were prohibited.

¶ 34 Defendant asks that we apply a six-factor test to determine that his conduct consisted of a single act: the existence of an intervening act or event; the time interval between successive parts of defendant's conduct; the identity of the victim; the similarity of the acts performed; whether the conduct occurred at the same location; and prosecutorial intent as reflected in the charging instrument. *People v. Rodriguez*, 169 Ill. 2d 183, 188 (1996); see also *People v. Sienkiewicz*, 208 Ill. 2d 1, 7 (2003) (applying the test in regard to double jeopardy). However, our supreme court has cautioned the appellate court not to rely too heavily on those factors. *Rodriguez*, 169 Ill. 2d at 188. The definition of an "act" remains simply what the court stated in *King*: " 'any overt or outward manifestation which will support a different offense.' " *Id.* (quoting *King*, 66 Ill. 2d at 566).

¶ 35 Here, R.V. testified specifically to acts that occurred in close proximity to one another in that defendant penetrated her vagina and also fondled her breast. However, she also testified that the acts occurred on at least 10 occasions, in multiple locations. The charging instrument also specifically set forth two different acts. But most important, each alleged act was an overt or outward manifestation that supported a different offense. Penetration and fondling are two separate acts. *People v. Hestand*, 362 Ill. App. 3d 272, 278 (2005); see also *People v. Grimes*, 215 Ill. App. 3d 182, 185 (1991) (multiple distinct acts of fondling during the same session of abuse will support multiple convictions). The act of penetration supported the sexual assault charge, while the act of fondling supported the sexual abuse charge, each of which had differing elements. "It is only when precisely the *same* physical act is involved that only one conviction can be entered." (Emphasis in original.) *Grimes*, 215 Ill. App. 3d at 185. Accordingly, the two distinct acts here of penetration and fondling can support two separate convictions, making the one-act-one-crime rule inapplicable.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, the judgment of the circuit court of McHenry County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 38 Affirmed.