2014 IL App (1st) 123242

FIRST DIVISION
December 29, 2014

No. 1-12-3242

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRIAN GARCIA, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 08 CR 19657 Honorable James M. Obbish, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶1 ***Held:*** Defendant's conviction for predatory criminal sexual assault of a child is affirmed. Defendant failed to show that he was prejudiced by the State's allegedly defective indictment. Trial counsel did not provide ineffective assistance by failing to file a motion to dismiss the indictment where the statute of limitations had not expired and the State could have re-indicted defendant. The evidence was sufficient to establish that defendant's victim was under thirteen when first incident of sexual assault took place.

¶2 Following a bench trial, defendant Brian Garcia was convicted of one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2002)) and sentenced to twelve years' imprisonment. On appeal, defendant argues that (1) count one of his indictment

was facially defective because "it was filed after the statute of limitations had expired"; (2) trial counsel provided ineffective assistance by failing to file a motion to dismiss the indictment on statute of limitations grounds; and (3) the State did not prove beyond a reasonable doubt that defendant's victim was under thirteen years of age when defendant committed the charged offense. We affirm.

¶3 BACKGROUND

¶4 On October 17, 2008, a grand jury returned a multi-count indictment against defendant. Count one charged defendant with predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2002). Count two charged defendant with the same offense as count one, but indicated that the State would seek an extended term sentence. The remainder of the indictment charged defendant with: four counts of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2002)); one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2002)); and three counts of criminal sexual abuse (720 ILCS 5/12-15(a)(1) (West 2002)). Before trial, the State entered a *nolle prosequi* on one charge of criminal sexual assault and the aggravated sexual assault charge. Following a bench trial, the trial court found defendant guilty on count one and not guilty on all other counts.

¶5 Count one of the indictment alleged that:

> "[B]etween January 1, 2001 and December 31, 2003, at and within the County of Cook
>
> Brian Garcia
>
> Committed the offense of predatory criminal sexual assault in that he, being seventeen years of age or over intentionally or knowingly committed an act of sexual penetration upon [A.K.], to

wit: an intrusion in that Brian Garcia inserted his finger into [A.K.'s] vagina, and [A.K.] was under thirteen years of age when the act was committed ***."

¶6 At trial, A.K. testified that she was born on April 18, 1991. When she was approximately twelve years old, A.K. lived in Oak Lawn, Illinois, with her mother, father, and sisters H.S. and B.S. When A.K. was twelve, she was in the sixth grade. While A.K. lived in Oak Lawn, her grandmother and defendant, who was A.K.'s paternal uncle, came to live with her family. A.K. testified that one day while defendant was staying at her family's home, she felt defendant rubbing her leg as she fell asleep on a loveseat in her family's living room. Defendant moved his hand up A.K.'s leg until he reached her crotch area, at which point he moved her underwear aside with his hand and inserted his finger into A.K.'s vagina and moved it in and out. This went on for a few minutes, until defendant heard a noise in the kitchen and stopped.

¶7 On cross-examination, A.K. testified that she was in the sixth grade at the time of the first incident and that she was "either 11 or 12" at the time.

¶8 A.K. next testified regarding a second incident involving defendant. At the time of the second incident, A.K. was still living at the same residence in Oak Lawn, and defendant and A.K.'s grandmother had moved to an apartment in Chicago. Scott Garcia, another one of A.K.'s uncles, lived in an apartment in the same building as defendant and A.K.'s grandmother. When A.K. was thirteen, she went to defendant's apartment with H.S. and defendant's cousin. When they arrived at defendant's apartment, they said that they wanted to go upstairs to visit a baby in Scott Garcia's apartment. Defendant said that they would "make too much noise" and said only H.S. and his cousin could go. H.S. and defendant's cousin left, leaving A.K. alone with defendant in his room. Defendant asked A.K. to help him get dressed and pulled his wheelchair

towards him, which caused the door to the room to close.[1] Defendant then put his hand inside A.K.'s shirt and pulled her towards him. Defendant then put his hand down A.K.'s pants and inserted his finger into A.K.'s vagina. Defendant stopped when he heard his cousin and H.S. coming back to his apartment.

¶9 On cross-examination, A.K. testified that "maybe a couple months had passed" between the first and second incident. Trial counsel asked A.K. whether she could "say for certainty how old" she was when the second incident occurred. A.K. answered that she "might have just turned either 12 or 13 ***." A.K. then testified that "[i]t would have been the summer after that. Because this happened in the winter, it would have happened in the summer." A.K. also stated that she "would have been going into the 7th grade." Trial counsel then asked A.K. "[s]o you could have been 13 then?" A.K. answered "[y]es."

¶10 A.K. next testified regarding a third incident involving defendant which occurred when A.K. was thirteen. At the time of the third incident, A.K. was living with her maternal grandmother in Oak Lawn, Illinois. A.K. went to visit her father, who then dropped her off at defendant's house. While at defendant's house, A.K. fell asleep on a couch. Defendant woke A.K. and told her to get up. After A.K. got up, defendant lifted A.K.'s shirt and bra and began to suck and kiss her breast for a couple of minutes until defendant heard a noise coming from A.K.'s grandmother's room.

¶11 On cross-examination, A.K. testified that the third incident took place "a couple of months" after the second incident and that she was 13 at the time.

¶12 Stacy K., A.K.'s mother, testified that A.K. was born on April 18, 1991. From 2002 until 2005, Stacy K. and A.K. lived in Oak Lawn, Illinois. On cross-examination, Stacy K. testified

[1] Defendant sustained a gunshot injury in 1995 which rendered him paraplegic.

that when the family first moved to Oak Lawn in 2002, A.K. was ten years old and in the fifth or sixth grade.

¶13 Detective Joan Burke of the Chicago police department testified that she was assigned to investigate A.K.'s sexual assault. On November 8, 2005, Detective Burke interviewed A.K. Detective Burke stated that A.K. mentioned two incidents involving defendant, but that A.K. may have described a third incident "that didn't occur in our jurisdiction." Detective Burke responded "that would seem correct" when asked by the State's Attorney whether "[A.K.] told you that the last incident occurred around December of 2002?"

¶14 The parties stipulated that Dr. Emily Sifferman would have testified that on November 21, 2005, she examined A.K. while working at the Chicago Children's Advocacy Center. During the examination, Dr. Sifferman interviewed A.K., and during the interview A.K. stated that defendant put his hand down her pants and "his hand went inside her" around "Christmastime when she was in the 6th or 7th grade."

¶15 Detective Charles Hollendoner of the Chicago police department testified that he was assigned to be lead detective on A.K.'s case in August 2008 after Detective Burke resigned in 2006. On September 16, 2008, Detective Hollendoner interviewed A.K.

¶16 On cross-examination, trial counsel asked Detective Hollendoner about what A.K. said to him during the September 16, 2008 interview:

> "Q. [Mr. Schmiege]: Did she also tell you, she made a statement about an incident that occurred on the couch, where he put his hand in her vagina, right?
>
> A. [Detective Hollendoner]: His hand or finger.
>
> ***

> Q. And she also told you that that happened in December, around Christmastime, in 2002?
>
> A. I believe that was referring to the couch incident, but I'm not positive. But she did say an incident occurred around Christmas."

Detective Hollendoner then stated that he prepared a report following the meeting which stated that an incident occurred around "December, Christmastime 2002."

¶17 After the state rested, defendant moved for a directed verdict, arguing that A.K. testified that two of the three incidents occurred when she was thirteen years old. The court denied the motion. After the close of evidence and after hearing closing arguments, the court found defendant guilty on count one and not guilty on all other counts.

¶18 Defendant filed a motion for new trial and acquittal attacking the sufficiency of the evidence and a motion in arrest of judgment alleging, for the first time, that defendant's indictment was facially defective because it alleged conduct that occurred outside of the applicable limitations period. The court denied defendant's motions. This appeal followed.

¶19 ANALYSIS

¶20 Defendant raises three points on appeal. First, he contends that his indictment was facially defective because it alleged conduct which occurred outside the general three-year statute of limitations for felony prosecutions and did not allege that any special limitations period or extension applied. Second, defendant claims that trial counsel provided ineffective assistance by failing to file a motion to dismiss the indictment on statute of limitations grounds. Third, defendant argues that the State did not prove beyond a reasonable doubt that A.K. was under thirteen years of age when the sexual assaults occurred.

¶21 The State argues in response that the extended statute of limitations applicable to defendant's crime had not yet begun to run and that defendant was not prejudiced by the State's failure to explicitly allege the special statute of limitations. With respect to defendant's ineffective assistance allegation, the State posits that defendant suffered no prejudice by trial counsel's failure to file a motion to dismiss the indictment on statute of limitations grounds because, given that the statute of limitations had not yet run, the State would have re-indicted defendant if a motion to dismiss the indictment had been granted. Finally, with respect to defendant's challenge to the sufficiency of the evidence, the State argues that there was sufficient evidence that A.K. was under thirteen years of age when the first incident occurred and that it is therefore irrelevant if she was older than thirteen when the other incidents occurred.

¶22 We first consider defendant's argument regarding the validity of his indictment. A felony prosecution must be brought within three years after the offense was committed. 720 ILCS 5/3-5(b) (West 2002). However, an "extended limitations" period applies in certain cases of sexual assault. Specifically, "when the victim is under 18 years of age at the time of the offense, a prosecution for *** predatory criminal sexual assault of a child *** may be commenced within 10 years after the child victim attains 18 years of age." 720 ILCS 5/3-6(j) (West 2002).

¶23 When the State seeks to avail itself of an extended limitations period, "the facts upon which [the] extension of the limitations period is sought are material allegations to the criminal charge which must not only be proved but must be pleaded as well." *People v. Coleman*, 245 Ill. App. 3d 592, 596 (1993). However, that rule does not apply in every case. To the contrary, "the State has the burden of pleading and proving any element extending *** the limitation period *if* the defendant challenges the timeliness of the charges in a *pretrial motion to dismiss*." (Emphasis added.) *People v. Gray*, 396 Ill. App. 3d 216, 226 (2009).

¶24 When an indictment is attacked prior to trial, the State must strictly comply with the pleading requirements set forth in the Code of Criminal Procedure. *People v. Rowell*, 229 Ill. 2d 82, 93 (2008). When an indictment attacked in a pretrial motion is not in strict compliance with the pleading requirements, "the proper remedy is dismissal." *Id.* By contrast, when a defendant attacks his indictment for the first time in a posttrial motion, the defendant must show that the defect in the indictment prejudiced his ability to prepare a defense. *Id.*

¶25 Defendant challenged the sufficiency of his indictment for the first time in a posttrial motion. Accordingly, defendant must show that he was prejudiced by the allegedly defective indictment. Defendant has failed to articulate how the allegedly defective indictment prejudiced his ability to put forth a defense. We have thoroughly reviewed the record and find that trial counsel credibly (albeit unsuccessfully) argued that (1) defendant was incapable of committing the charged acts due to his physical limitations (he is a paraplegic constrained to a wheelchair) and (2) the State did not prove that A.K. was under thirteen years of age when the sexual assaults took place. Given that trial counsel was able to put forth two defensive theories at trial, notwithstanding the alleged defects in the indictment, we conclude that defendant did not suffer any prejudice as a result of the allegedly defective indictment.

¶26 Moreover, because defendant did not file a pretrial motion to dismiss the indictment, the State was *not* required to plead and prove the elements necessary to extend the statute of limitations under section 5-3(j). See *Gray*, 396 Ill. App. 3d at 224-26; see also *People v. Wasson*, 211 Ill. App. 3d 264, 274-75 (1991). Accordingly, the fact that the indictment did not explicitly allege that an extended limitations period applied is not fatal to the State's case. Indeed, in light of *Gray* and defendant's failure to file a pretrial motion to dismiss on statute of limitations

grounds, the fact that the indictment did not explicitly allege an extended limitations period is irrelevant.

¶27 Defendant's reliance on *People v. Macon*, 396 Ill. App. 3d 451 (2009) is misplaced. In *Macon*, the defendant was indicted on April 20, 2006, for criminal sexual assault based on an incident which took place on May 20, 2002. The defendant filed a pretrial motion to dismiss the indictment arguing that the statute of limitations had run. The trial court denied the motion. We reversed. Because the offense that the defendant was charged with did not allow for any extension of the general three year felony limitations period, we concluded that the statute of limitations for the charged offense had expired on May 20, 2005, eleven months before defendant was indictment. *Id.* at 454, 457. Accordingly, we found that defendant's indictment was facially invalid. *Id.* at 457.

¶28 *Macon* is distinguishable from the present case. First, in *Macon*, the defendant filed a pretrial motion to dismiss. Here, defendant challenged his indictment for the first time in a posttrial motion. Second, in *Macon*, the three year statute of limitations had already expired and no exception applied. Here, an extended limitation period did apply, namely section 5/3-6(j), and pursuant to that section, the statute of limitations for count one had not even began to run when defendant was indicted.

¶29 We likewise find unpersuasive the numerous civil cases cited by defendant. See, *e.g.*, *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393 (2009); *Phillips v. Elrod*, 135 Ill. App. 3d 70 (1985). None of these cases applied section 5/3-6(j) and therefore have no bearing on the present case. See *Doe A*, 234 Ill. 2d at 395; *Elrod*, 135 Ill. App. 3d at 74.

¶30 Defendant next argues that trial counsel provided ineffective assistance of counsel by failing to file a motion to dismiss the indictment on statute of limitations grounds. Criminal

defendants have a constitutional right to the effective assistance of counsel. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, a criminal defendant must show that: (1) trial counsel's performance was objectively deficient; and (2) defendant was prejudiced, meaning "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687-88, 694; *People v. Stewart*, 141 Ill. 2d 107, 118 (1990).

¶31 It is manifestly apparent that defendant suffered no prejudice by trial counsel's "failure" to file a motion to dismiss on statute of limitations grounds. Assuming *arguendo* that trial counsel had filed a pretrial motion to dismiss the indictment based on the statute of limitations and assuming that the trial court had granted the motion, "[t]he remedy for the State's failure to sufficiently plead and/or prove the circumstances [justifying an extension of the limitations period] is the dismissal of the charging document, not an acquittal." *Gray*, 396 Ill. App. 3d at 224. A.K. was born on April 18, 1991. Accordingly, she did not turn 18 until April 18, 2009. Thus, when defendant was indicted on October 17, 2008, the extended limitations period set forth in section 5/3-6(j) had not yet begun to run. Therefore, had defendant's indictment been dismissed on statute of limitations grounds, the State could have amended the indictment or re-filed the charges. *Id.*; see *People v. Cray*, 209 Ill. App. 3d 60, 65 (1991). Accordingly, defendant cannot show that he was prejudiced by trial counsel's failure to file a pretrial motion to dismiss the indictment. Defendant's ineffective assistance of counsel claim accordingly fails.

¶32 Defendant next argues that the State failed to prove him guilty beyond a reasonable doubt because it did not prove that "the complainant was 'under thirteen years of age' when the act was allegedly committed." "The due process clause of the fourteenth amendment to the United

States Constitution requires that a person may not be convicted in state court 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' " *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction [is] *** whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318 (1979)). In making that determination, we are bound to consider the evidence in the light most favorable to the State. *Id.* A court entertaining a sufficiency of the evidence challenge "will not retry the defendant." *Id.* Instead, the factual determinations and credibility assessments made by the fact finder—here, the trial court—are entitled to "great weight" because the fact finder, and not the reviewing court, had the opportunity to hear the witnesses and observe their demeanor in court. *Id.* at 114-15. "Testimony may be found insufficient *** only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280. Accordingly, a reviewing court may reverse a conviction on the grounds that the evidence was not sufficient to prove the defendant guilty beyond a reasonable doubt only when "the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *Wheeler*, 226 Ill. 2d at 115.

¶33 Defendant was found guilty on count one, which charged him with predatory criminal sexual assault of a child. The elements of predatory criminal sexual assault of a child, as relevant to this case, are set forth in section 5/12-14.1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-14.1(a)(1) (West 2002)) (Code), which states:

> "The accused commits predatory criminal sexual assault of a child if:

> (1) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed ***."

It is clear based on the text of section 5/12-14.1(a)(1) that age is an element of predatory criminal sexual assault of a child which the State must prove beyond a reasonable doubt. See *People v. Milka*, 211 Ill. 2d 150, 183-84 (2004).

¶34 With respect to the first incident, A.K. testified that she was either eleven or twelve years old and that she was in the sixth grade when the incident took place. Additionally, A.K. testified that the first incident took place during wintertime. Detective Burke, in response to a question regarding whether A.K. told her that an incident occurred around December 2002, stated "that would seem correct." The parties also introduced stipulated testimony from Dr. Sifferman stating that she interviewed A.K. on November 21, 2005, and that during the interview A.K. stated that defendant "put his hand inside her" during "Christmastime" when A.K. was in the sixth or seventh grade. Detective Hollendoner, in response to a question regarding whether an incident occurred "in December, around Christmastime, in 2002," stated "I believe she was referring to the couch incident, but I'm not positive. But she did say an incident occurred around Christmas."

¶35 Based on the foregoing testimony, a reasonable trier of fact could have found that the first incident occurred in December 2002. Although A.K. did not testify with exacting precision, she did testify that she was either eleven or twelve when the first incident occurred and that it was winter when it happened. A.K.'s testimony was corroborated by Detectives Burke and Hollendoner, who both confirmed that during their respective interviews, A.K. stated that an incident occurred around Christmas in December 2002. The oldest A.K. could have been at the

end of December 2002 was eleven years, eight months and thirteen days, which clearly falls within the statutory requirement that the victim be "under 13 years of age when the act was committed." 720 ILCS 5/12-14.1(a)(1) (West 2002).

¶36 Defendant's citation to *Vega v. State*, 236 P. 3d 632 (Nev. 2010) does not change our analysis. Indeed, to the extent that *Vega*, a case from Nevada, is relevant to the present case, it actually undermines defendant's argument. In *Vega*, the defendant was convicted of three counts of sexual assault with a minor under the age of fourteen. *Vega*, 236 P.3d at 636. On appeal, the defendant argued that the evidence was insufficient to prove that the victim was under fourteen when the sexual assaults took place and that his three convictions for sexual assault with a minor under the age of fourteen should be set aside. *Id.* at 639. The Nevada Supreme Court upheld two of the defendant's convictions, holding that the victim's testimony about her age at the time the assaults took place based on life events such as her grade in school and the timing of a suicide attempt was sufficient to enable a jury to find beyond a reasonable doubt that the victim was under fourteen when two of the assaults took place, and thus upheld two of defendant's convictions. *Id.* at 640. With respect to the third conviction stemming from a third assault, the victim testified she was "probably 14 years old and in the ninth grade" when the assault occurred. The Court held that this testimony was uncertain and therefore did not eliminate reasonable doubt that the victim was under 14 years old when the offense took place. *Id.* at 640-41. The Court therefore reversed the defendant's third conviction. *Id.* at 641.

¶37 *Vega* is readily distinguishable from the present case. First, in *Vega* two of defendant's convictions for sexual assault with a minor were upheld where the victim testified about her age using age markers such as her grade level and the timing of significant events such as a suicide attempt. *Id.* at 640. Thus, to the extent that both the victim in *Vega* and A.K. gave equivocal

testimony regarding their ages at the time the defendant's conduct occurred, *Vega* undermines defendant's argument. Second, with respect to the first incident, A.K. testified that she was eleven or twelve years old when the incident occurred. *Vega* therefore does not advance defendant's argument.

¶38 We thus conclude that a reasonable trier of fact could have found beyond a reasonable doubt that A.K. was under thirteen when the first incident took place. Accordingly, we need not consider whether a trier of fact could have found that A.K. was under thirteen when the second and third incidents occurred. Based on the foregoing, we reject defendant's sufficiency of the evidence challenge.

¶39 CONCLUSION

¶40 For these reasons, we reject defendant's arguments and affirm his conviction.

¶41 Affirmed.