2017 IL App (1st) 150234-U

Second Division
July 11, 2017

No. 1-15-0234

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 4507
	)	
WAYNE SMITH,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for aggravated criminal sexual assault affirmed where his choking of the victim and threatening to shoot her were sufficient to prove the aggravating factor, *i.e.*, threatening and endangering the victim.

¶ 2 Following a bench trial, defendant Wayne Smith was convicted of three counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(3) (West 2010)) and was sentenced to three consecutive terms of 15 years' imprisonment. On appeal, Smith argues there was insufficient evidence to convict him of aggravated criminal sexual assault beyond a reasonable

doubt because the State failed to prove the aggravating factor, *i.e.*, that he "acted in such a manner as to threaten or endanger the life of the victim" where he threatened to shoot T.K.—not kill her—without actually possessing a gun and he did not otherwise commit an overt act endangering her life. We affirm.

¶ 3 Prior to trial, the State filed a motion to introduce evidence of other crimes to show Smith's motive, his intent, and the absence of consent. The trial court granted the State's motion, permitting the State to bring in evidence of allegations in a separate case that Smith sexually assaulted a different woman, N.B.

¶ 4 At trial, T.K. testified that, in February, 2011, she began exchanging messages with Smith through social media and by phone. T.K. agreed to meet Smith at her mother's home, where she lived. Smith came over on February 27, 2011, and met T.K.'s family members and talked with T.K. for a couple of hours. Smith and T.K. left to eat but returned to T.K.'s home. A couple of hours later, Smith called his friend to come pick the two up.

¶ 5 A man and a woman, both unknown to T.K., picked her and Smith up and drove to a bowling alley, where the group stayed for three or four hours. The four then ate at McDonald's, bought vodka, and drove to Smith's mother's home. T.K. met Smith's mother, Isabella Smith, and then the group went to the kitchen to talk and drink. T.K. drank a Long Island iced tea, which was her only alcoholic drink that day. Smith drank about a bottle and a half of vodka over the course of the day.

¶ 6 After an hour, the four left and drove to buy marijuana. His friends dropped Smith and T.K. off at his mother's home afterward, but did not come in. Ms. Smith was in her bedroom.

Smith and T.K. went to his bedroom, where she smoked marijuana and he drank. T.K. smoked half of a blunt of marijuana, but she was not drunk or high. Smith put on a movie.

¶ 7 Smith sat down next to T.K. on the end of his bed, kissing her neck and attempting to kiss her mouth. Smith grabbed her throat, choked her, and pushed her backward onto the bed, all while still attempting to kiss her. T.K. indicated for the court how Smith choked her and testified that he applied pressure when he did so and she could not breathe. Scared, she tried to push him off, but Smith reminded her that "he had a gun and wasn't afraid to shoot [her]." T.K. believed him because, though she had never seen Smith with a gun, he told her earlier that he always carried one. She "froze" and "just [lay] there" while Smith took off her underwear and put his mouth on her vagina. Smith told T.K. to "suck it" and she placed her mouth on his penis.

¶ 8 T.K. was still lying on the bed when Smith got on top of her and inserted his penis into her vagina. She "just [lay] there and cried." He slapped her face, telling her that he loved her, and that "nobody will hurt [her] except for him." Smith made T.K. place her mouth on his penis a second time. She told him that she was going to vomit, to which he responded that he did not care. Smith then placed his penis in T.K.'s rectum, causing her to cry from the pain.

¶ 9 In an attempt to get away, T.K. told Smith that she had to use the bathroom. Smith refused to allow T.K. to leave the room. Smith made T.K. place her mouth on his penis a third time. After Smith was finished and appeared to be drifting to sleep, T.K. grabbed her pants, shirt, and phone, unlocked the door to Smith's bedroom, and ran. Smith woke up when T.K. unlocked the door. Thinking Smith would chase her, she ran to his mother's bedroom and woke her up. T.K. told her that Smith had raped and beaten her. Smith was standing outside but did not enter. T.K. dressed, called a friend for a ride, and left the apartment. T.K. ran outside and flagged down

a police car. The officer took T.K. back to Ms. Smith's home, where she identified Smith, now standing outside, as the man who raped her.

¶ 10 T.K. was then taken to Roseland Hospital where she was examined, a sexual assault kit was prepared, and her clothing was retained. In the course of her examination, it was discovered that T.K.'s rectum was bleeding.

¶ 11 It was stipulated that:

- Robert Stanton, a friend of T.K.'s, would testify that at approximately 3:15 a.m. on February 28, 2011, he received a call from T.K., who was upset and crying. She told him that she had been raped and needed a ride home because Smith had threatened to kill her. When Stanton arrived at the location, he did not speak to T.K. because the police were already there;
- Chicago police lieutenant Robert Forgue would testify that, between 3:00 and 3:30 a.m. on February 28, 2011, he saw T.K. running half naked down the street. She waved him down, got into his squad car, and said she had been raped. Forgue drove T.K. back to Smith's mother's home and she identified Smith as the man who had raped her; and
- Oral, vaginal, and anal swabs and head and pubic hair combings were taken from T.K. Abrasions to T.K.'s rectum and left labia were noted by the emergency room doctor. A buccal swab was taken from Smith. The sexual assault kit was examined by forensic scientists who found no evidence of semen on the swabs but noted blood-like stains on the anal swabs. One negroid hair fragment was discovered in T.K.'s hair combings, but it was not suitable for comparison. Scientific testing yielded nothing further of evidentiary value.

¶ 12 Evidence technician Abdallah Abuzanat was the assigned to T.K.'s case. He took photos of Smith's mother's apartment, Smith's bedroom, and collected other evidence, including underwear T.K. had left in Smith's bedroom. At the hospital, Abuzanat photographed T.K. and collected the jeans she had been been wearing.

¶ 13 N.B. testified that, in October 2009, her friend met Smith while searching for a car online. N.B., Smith, and N.B.'s friend had a three-way conversation. N.B. later met Smith at his mother's home. The following day, Smith called N.B. and they eventually ended up at N.B.'s home, where she lived alone. They had consensual sex, which N.B. found rough and painful. Smith stayed the night at N.B.'s

¶ 14 The next day, Smith texted N.B. and asked to see her again that evening. N.B. agreed, but only if there would be no drinking or sex. Smith and N.B. did not have sex that evening, but at one point, as they were talking, Smith suddenly pulled N.B.'s hair forcefully. She told him to stop, but he did it again harder. Angry and scared, she retrieved a kitchen knife and told Smith to leave. Smith did not leave but went to the living room.

¶ 15 N.B. did not remember sleeping but remembered getting ready for work. As she got her things together, Smith came back into her bedroom. They talked again until, at one point, N.B. called Smith "crazy" and he became a "whole other person." He stated, "I got a motherf***ing pistol and it has a silencer." Smith had his hand in his pocket as if he had a gun. He asked, "[Y]ou ever been f***ed by a pistol before[?]" Smith told N.B. to undress and left, ostensibly to put his pistol away. N.B. considered running, but thought Smith would shoot her before she could get away. Smith returned and told her to take her shorts off and lie face down on her bed.

Crying, she asked, "[W]hy are you doing this[?]" Smith responded, "I don't ask for pussy, I take it."

¶ 16 Smith penetrated N.B. vaginally and anally. N.B. cried throughout the experience and Smith repeatedly told her to "shut the f**k up." When he was finished, Smith pulled up his pants to leave. He looked at N.B., laughed, and left. She locked the door, showered, and went to work. On N.B's way to work, Smith called her. She accused him of attacking her, which he denied. He told her, "Call me when you miss me." She hung up. N.B. later reported the rape and was examined at the University of Chicago Hospital where a rape kit was prepared.

¶ 17 Isabella Smith testified on behalf of her son that, in February 2011, she lived with Smith in a two-bedroom apartment in Chicago. On February 27, 2011, Smith returned to the apartment with a man, the man's girlfriend, and a woman, later identified as T.K. The four talked in the kitchen. Everyone drank except for the man's pregnant girlfriend. Initially, T.K. did not drink any alcohol and stated she was more of a marijuana smoker, but Ms. Smith prepared her a Long Island iced tea. At one point, all four left the apartment for approximately 20 minutes to get marijuana and only Smith and T.K. returned.

¶ 18 T.K. and Smith went into Smith's room. She heard "moaning and groaning" and knew T.K. and the Smith were having sex. Ms. Smith later went to make sure the apartment was locked. Smith's door was slightly open and Ms. Smith saw him and T.K. sleeping. Ms. Smith was in bed when T.K. entered her room naked, jumped into her bed and told her that Smith had raped and beaten her. Ms. Smith saw no bruising or redness on T.K.'s body. T.K. told Ms. Smith to call a cab, then T.K. called someone for a ride, but they did not answer. Smith stood outside the room and asked what was going on. T.K. dressed and left the apartment.

¶ 19 Smith testified on his own behalf. Smith's account of his and T.K.'s activities that day was similar to T.K.'s. Their accounts diverged as to what happened when they returned to his mother's home around 11:30 p.m.

¶ 20 According to Smith, he and T.K. went to his bedroom and started a movie. T.K. took off her pants and shirt and asked Smith for a shirt to wear. T.K. smoked an entire blunt of marijuana while Smith drank. They started kissing halfway through the movie and had vaginal intercourse. Smith did not hit or slap T.K. during sex and she did not ask him to stop. They "had sex; a lot of different positions, a lot of different ways." Afterward, they lay in bed together and Smith began falling asleep.

¶ 21 T.K. suddenly jumped out of Smith's bed and ran out of the room, so he followed her. His bedroom door was ajar and had no lock. T.K. was in his mother's room yelling, "[Y]our son raped me." Smith called the police while T.K. was putting on her clothes and talking with someone on her phone. He returned to his room, dressed, and came out to find the front door open. Smith was still on the line with the police.

¶ 22 Smith denied ever slapping, hitting or threatening T.K. with a gun. Smith claimed he did not own a gun and there were no guns in his mother's apartment. He told T.K. earlier that day that he carried a gun only because he knew she had brothers and her home was located in a gang-infested area. On cross-examination, Smith admitted that he had been drinking vodka from 12 p.m. until 11:30 p.m., but claimed he was not drunk.

¶ 23 It was stipulated that Chicago police officer Anita Williams would testify that, in the early morning hours of February 28, 2011, she responded to a call and that, upon arrival, she spoke with T.K. T.K. stated that she had wanted to spend the night with Smith that night. She

had asked Smith for something to wear, took off her clothing, and was lying next to him. T.K. did not inform Williams that Smith told her that he carried a gun. Williams did not observe any visible injuries to T.K.

¶ 24 The trial court found Smith guilty of three counts of aggravated criminal sexual assault (720 ILCS 5/19-6(a)(3) (West 2010)) based on three acts of sexual penetration (anal, vaginal, and oral) and sentenced him to three consecutive terms of 15 years' imprisonment. Smith timely appealed.

¶ 25 On appeal, Smith challenges all three counts, contending there was insufficient evidence to prove him guilty beyond a reasonable doubt of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(3) (West 2010)). Specifically, he argues that the State failed to prove the aggravating factor, *i.e.*, that Smith "acted in such a manner as to threaten or endanger the life of [T.K.], to wit: threatened to shoot [T.K.]," because the verbal threat to shoot T.K. alone was not life-threatening and because the aggravating factor "requires overt acts and not mere verbal threats." Smith asks that we reduce his three aggravated criminal assault convictions to criminal sexual assault convictions and remand for resentencing. The State responds that Smith's threat to shoot T.K., when combined with the evidence he choked her during the assault, was sufficient evidence for a trier of fact to find him guilty of aggravated criminal sexual assault. We agree with the State.

¶ 26 As a preliminary matter, Smith argues in his reply brief that, by not raising it at trial, the State forfeited its argument on appeal that the act of choking and the verbal threat to shoot T.K. were considered *together* to prove the aggravating factor. Smith specifically notes that each was

used in isolation to support separate charges in the indictments at trial and, further, the trial court only found Smith guilty of the "threatened to shoot" counts.

¶ 27 "It is an accepted principle of law that an issue not presented to or considered by the trial court cannot be raised by the appellant for the first time on review." *People v. McAdrian*, 52 Ill. 2d 250, 253 (1972). This principle applies to the State as well as the defendant in a criminal case. *People v. Holloway*, 86 Ill. 2d 78, 91 (1981). Further, our supreme court "has consistently held that due process requires that an indictment or information must apprise the defendant of the precise offense charged with sufficient specificity to enable him to prepare his defense and allow the pleading of the judgment as a bar to future prosecution arising out of the same conduct." *People v. Gilmore*, 63 Ill. 2d 23, 28-29 (1976); see also *People v. Crespo*, 203 Ill. 2d 335 (2001) (holding that in order for multiple convictions to be sustained, a defendant must be on notice that the State intends to treat his conduct as multiple acts).

¶ 28 Smith argues that the State's theory of the case on appeal—that the aggravating factor of "threaten[ing] to shoot [T.K.]" may be supported by evidence he choked T.K.—is different than the theory the State advanced at trial. Smith argues that the State's reliance on the choking allegation, which was contained in the charges of which he was not convicted, is a change in the State's theory of the case and should therefore be barred.

¶ 29 This argument is belied by the record, which shows the State's theory of the case has not changed from trial to appeal. The State charged Smith by indictment with, *inter alia*, 20 counts of aggravated criminal sexual assault based on one of two possible aggravating factors: 10 of those counts alleged that "acted in such a manner as to threaten or endanger the life of [T.K.], to wit: threatened to shoot [T.K.]" while the remainder alleged he "threaten[ed] or endanger[ed] the

life of [T.K.], to wit: choked [T.K.]." When rendering its verdict, the trial court found Smith guilty of three counts of aggravated sexual assault, stating "[t]hese are all the threatening to shoot."

¶ 30 While we recognize that the State listed "chok[ing]" and "threaten[ing] to shoot" separately to support separate charges, that alone does not mean that those actions cannot be used in tandem as proof of an aggravating factor under the statute. The record reflects that, at trial, the prosecution never compartmentalized the acts of choking and threatening to shoot as Smith suggests. Accordingly, we conclude that the State is not barred from arguing that Smith's act of choking was evidence of the aggravating factor in his conviction, *i.e.*, that he "acted in such a manner as to threaten or endanger the life of [T.K.], to wit: threatened to shoot [T.K.]"

¶ 31 Smith next argues that there was insufficient evidence to prove him guilty beyond a reasonable doubt of committing the aggravating factor—that Smith "acted in such a manner as to threaten or endanger [T.K.'s] life"—because his threat to shoot, without possessing a gun, was merely a "threat of force" and because the there was no evidence he committed an overt act.

¶ 32 We review a challenge to the sufficiency of the evidence on an element of the charged offense in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Amigon*, 239 Ill. 2d 71, 77 (2010).

¶ 33 A defendant commits aggravated criminal sexual assault if he commits criminal sexual assault, and "during *** the commission of the offense," the defendant "act[s] in such a manner as to threaten or endanger the life of the victim." 720 ILCS 5/12-14(a)(3) (West 2010). "If the circumstance alleged by the State to be a threat or endangerment of the victim did not exist

during the commission of the offense, it cannot, as a matter of law, be used to elevate the crime from criminal sexual assault to aggravated criminal sexual assault." *People v. Giraud*, 2012 IL 113116, ¶ 11. In this case, Smith challenges only the sufficiency of the evidence in regard to the aggravating factor: whether he threatened or endangered the life of the T.K. during the sexual assault.

¶ 34 Smith first argues that there was insufficient evidence that he threatened or endangered T.K.'s life because "the threat did not exist at the time of the offense," *i.e.*, he did not actually have a gun when he threatened to shoot T.K and the verbal threat alone "was at most a threat of force." The State responds that the aggravating factor was established by evidence Smith choked T.K. and then threatened to shoot her.

¶ 35 T.K. testified that Smith was kissing her neck and attempting to kiss her mouth when he placed his hands on her neck. She showed the court how Smith choked her and stated he applied pressure, preventing her from breathing. She initially resisted, but "froze" after Smith stated "he had a gun and wasn't afraid to shoot [her]." He told her earlier that he always carried a gun, so she believed him. Viewing the evidence in the light most favorable to the State, we find there was sufficient evidence to establish that Smith threatened or endangered T.K.'s life.

¶ 36 Smith relies on *Giraud*, 2012 IL 113116, to support his argument that there was insufficient evidence that he actually threatened or endangered T.K.'s life because there was no evidence he actually had a gun when he threatened to shoot her. In *Giraud*, a jury found the defendant guilty of aggravated criminal sexual assault where he had human immunodeficiency virus (HIV) and raped his teenage daughter. *Id.* ¶ 1. The alleged aggravating factor in that case was that defendant threatened or endangered the life of the victim by exposing her to the risk of

contracting HIV. *Id.* ¶ 6. The *Giraud* court held that, because the danger posed to the victim's life—possibly contracting life-threatening HIV—would occur in the future, if at all, it did not endanger the victim's life during the assault. *Id.* ¶¶ 33-39.

¶ 37 The facts here are distinguishable. Smith's conduct in threatening to shoot T.K. and choking her did not pose possible harm in the future. Rather, the verbal threat and the act of choking threatened and endangered T.K.'s life during the assault. When a defendant threatens to shoot a victim in the course of a sexual assault, as is the case here, the threat need not be supported by evidence the defendant actually had a gun to find the victim's life was threatened or endangered. See, *e.g.*, *People v. Everhart*, 405 Ill. App. 3d 687 (2010) (affirming defendant's aggravated criminal sexual assault conviction where the defendant threatened to shoot the victim and was later found in possession of a lighter resembling a gun).

¶ 38 Smith's argument that the there was insufficient evidence that he threatened or endangered T.K.'s life because his verbal threat to shoot her "was at most a threat of force" ignores the evidence Smith also choked her, cutting off her ability to breathe. In *Giraud*, the court held that the word "threat" in the context of the statutory phrase "threaten or endanger the life of the victim or any other person" may be communicated by either "word or deed." *Giraud*, 2012 IL 113116, ¶ 15:

> "We note, however, that a threat, by its very nature, must be communicated to the object of the threat. See, *e.g.,* 720 ILCS 5/12–12(d)(1) (West 2006) (defining the statutory term '[f]orce or threat of force' to mean 'the use of force or violence, or the threat of force or violence, including but not limited to *** when the accused threatens to use force or violence on the victim or on any other person, and the

> victim under the circumstances reasonably believed that the accused had the ability to execute that threat')." *Id.* ¶ 14.

¶ 39 While Smith did not expressly use the word "kill" in his verbal threat, there was sufficient evidence for the jury to find that he communicated a threat to kill T.K. by the act of choking her and verbally threatening to shoot her. The evidence of the verbal threat and physical act—when combined—was sufficient for a jury to find Smith communicated a threat to T.K.'s life.

¶ 40 Smith also argues that his threat to shoot T.K., unaccompanied by a life-threatening "overt act," was not enough to constitute the aggravating element.

¶ 41 Smith is correct that a verbal threat alone is not sufficient to prove the aggravating factor of "threaten[ing] or endanger[ing] the life of the victim or any other person." *People v. Everhart*, 405 Ill. App. 3d at 705 (affirming defendant's conviction where he verbally threatened to shoot her and then put what felt like a gun to her head). The State must show that it was the "overt acts by the defendant, and not verbal threats, which endanger[ed] or threaten[ed] a victim's life, and that the life-threatening acts *** occur[red] during the commission of the offense." *People v. Singleton*, 217 Ill. App. 3d 675, 687.

¶ 42 While Smith cites *Singleton* and analogizes the actions of the defendant in that case to his own, we find the two cases distinguishable. The court in *Singleton* found pushing the victim on the bed "cannot" be viewed as a life-threatening act. *Id.* The same cannot be said about Smith's conduct in choking T.K. to the point of impeding a her breathing. Accordingly, we find the evidence was sufficient for a rational trier of fact to find that Smith committed a life-threatening overt act during the assault.

¶ 43 After viewing all of the evidence presented in the light most favorable to the State, we find that a rational trier of fact could have concluded that Smith acted in such a manner as to threaten or endanger T.K.'s life to support Smith's aggravated criminal sexual assault convictions.

¶ 44 Affirmed.