2018 IL App (1st) 152612-U

No. 1-15-2612

Order filed March 15, 2018

Fourth Division

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. 13 CR 5488
	)	
ANTOINE SAWYER,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Burke and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for aggravated criminal sexual assault affirmed over his contention that the State failed to prove beyond a reasonable doubt that defendant used "force or threat of force."

¶ 2 Following a bench trial, defendant Antoine Sawyer was convicted of aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(4) (West 2012)), criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2012)), and aggravated kidnapping (720 ILCS 5/10-2(a)(2), (a)(3) (West 2012)). The court merged the convictions and sentenced defendant to 78 months' imprisonment

on the aggravated criminal sexual assault count. On appeal, defendant contends his conviction for aggravated criminal sexual assault should be reversed as the State failed to prove the requisite element of "force or threat of force." We affirm.

¶ 3 Defendant was charged with unlawful restraint, four counts of aggravated kidnapping, and three counts of aggravated criminal sexual assault. Four of the seven counts were premised on defendant's possession of a firearm during the offenses. The case proceeded to a bench trial.

¶ 4 A.J., the victim, testified that, on February 9, 2013, she went to a party and left around 2 a.m. She took public transit home and was walking near 74th and Halsted Street when a man, identified in court as defendant, approached her. A.J. recognized the man as "Tony" from the neighborhood. She knew his sister but did not know him personally. A.J. crossed the street diagonally to avoid defendant. She heard him ask from behind her: "do you want to eat my dick?" There was no one else was on the street. A.J., who was on her phone, responded "you're not talking to me like that," told her friend she would call him back, and hung up her phone to be aware of her surroundings. She continued walking and heard defendant say "you're going to suck [my] dick." A.J. started to turn around and "curse him out." When she turned around, defendant had a silver gun pointed to her face and was standing an arm's length away. A.J. observed "the little circle part of the gun where the bullet come out of."

¶ 5 Defendant told A.J. "you are going to suck my dick," to which A.J. responded "please don't hurt me." Defendant directed A.J. through an alley, past three or four houses, down into the basement-level stairwell of an apartment building. A.J. went with defendant because he had a gun and she was afraid. She continued asking him not to hurt her. Defendant cocked the gun and placed it against her head, telling her, "you have five seconds to suck my dick or you're going to

die." The gun felt cold and heavy against A.J.'s head. She did not want to put her mouth on defendant's penis but did because she was "scared" and "didn't want to die." A.J. asked to use a condom. Defendant told her to "suck it raw." She tried to bite defendant's penis so he would have her stop, but this did not work. After 15 to 20 minutes, defendant ejaculated in A.J.'s mouth. She spit out the fluid and asked defendant not to hurt her. Defendant took her phone, "tampered with it," gave it back, and left.

¶ 6 A.J. stayed for a minute or two then ran to the alley, called 911 from her cell phone, and told the operator what happened. An audio recording of the phone call was played in court. A.J. acknowledged she told the dispatcher she was on her way home from a friend's house rather than from a party, because she did not want to say she was coming from a party.

¶ 7 After calling 911, A.J. flagged down a police car at 74th and Green Street. The police officer took her to St. Bernard's Hospital, where staff performed a rape kit and took a swab from A.J.'s mouth. On February 13, 2013, A.J. showed detectives where the assault happened, told them she knew where defendant's mother and sister lived, and brought the detectives to their house. A.J. identified defendant in a photo array and, a few days later, in a lineup. She prepared a handwritten statement with an assistant state's attorney.

¶ 8 On cross-examination, A.J. acknowledged the party she had attended was on the West Side, even though she told the 911 dispatcher she was coming from a friend's home on South Emerald Street. A.J. testified that she told the officer who picked her up that defendant told her "you were sucking dick for money, bitch, you are going to suck my dick for free, bitch." She did not include that in her handwritten statement. She never told the detectives that she requested defendant use a condom, that the gun was physically touching her head, or that she tried to bite

defendant. A.J. acknowledged she refused to have an HIV test and blood drawn for an STD check, leave her clothes at the hospital for evidence, and meet an advocate at the hospital. She explained that she did not decline an HIV test; rather, she refused to allow a blood draw and requested only the rape kit be performed. A.J. did not want the STD test because she was checked every six months. She did not leave her clothes because she had nothing to change into and refused the advocate because she did not know what an advocate was and only wanted to talk to her mother.

¶ 9 Chicago police detective Carolyn Okon testified that, when she brought A.J. out to retrace her steps, A.J. identified a stairwell in the 7300 block of South Peoria as the location of the assault and a house on West 72nd Street where defendant lived. Using police resources, Okon determined defendant's name and generated a photo array, in which A.J. "very quickly" identified defendant as the man who sexually assaulted her.

¶ 10 On cross-examination, Okon testified A.J. may have told her that defendant said "you are out here sucking dick for money, bitch, you are going to suck my dick for free, bitch," but this was not reflected in Okon's notes or report. A.J. told Okon that defendant's gun was cocked before she went into the alley. She never told Okon that defendant threatened "you have five seconds to suck my dick or you're going to die." A.J. told Okon that she recognized defendant when she first turned around, and never told Okon about her request to use a condom.

¶ 11 Chicago police detective Russell Sutherland testified he was assigned to A.J.'s case on February 19, 2013. On that day, the Fugitive Apprehension Unit arrested defendant. The next day he placed defendant in a lineup and A.J. picked him out in a few seconds. Sutherland testified that A.J. "basically said the same thing to [him] that she had said to Detective Okon in

her statement." On cross-examination, Sutherland acknowledged A.J. never mentioned the gun physically touched her head, or that she asked defendant to wear a condom and bit him. He also testified that he never asked A.J. whether the gun touched her head, she requested a condom, or she tried to bite defendant to prevent the assault.

¶ 12 The court denied defendant's motion for a directed finding, and the defense rested. In closing, defense counsel argued A.J. was not believable as her testimony was inconsistent and impeached.

¶ 13 Stating it was "not satisfied regarding the firearm," the trial court found defendant not guilty of the four counts premised on defendant's use of a firearm. It found defendant guilty of the remaining charges: two counts of aggravated kidnapping and two counts of aggravated criminal sexual assault. The charges underlying the aggravated criminal sexual assault convictions alleged defendant knowingly committed an act of sexual penetration on A.J. by contact between his penis and her mouth, "by the use of force or threat of force," and (count I) acted in such a manner as to threaten or endanger the life of A.J. when he threatened to kill her (720 ILCS 5/11-1.30(a)(3) (West 2012)) and (count II) perpetrated the criminal sexual assault during the course of the commission of another felony, aggravated kidnapping (720 ILCS 5/11-1.30(a)(4) (West 2012)).

¶ 14 The court extensively recited the evidence, noting A.J. observed what she thought was a gun pointed at her face and performed the act of sexual penetration "clearly if she is believed, by force or threat of force." The court found A.J. was credible and "forthright," stating "I listened carefully to her testimony and I believe her." It discussed the impeachment of her testimony and found it did not affect her credibility, finding "I don't conclude she was lying. I conclude quite

the opposite." The trial court concluded that A.J.'s testimony, taken with that of the detectives regarding how they ascertained "who the offender was," was sufficient beyond a reasonable doubt to prove defendant was "the person who performed an act of sexual penetration upon [A.J.] by the use of force."

¶ 15 On defendant's posttrial motion for a new trial, the court reduced the aggravated criminal sexual assault conviction premised on defendant's acting in such a manner as to threaten or endanger A.J.'s life (count I) to the lesser included offense of criminal sexual assault through the use of force or threat of force.[1] It denied the rest of the motion, stating A.J.'s testimony "impressed me [to] no end," and sustained the other convictions. The court merged those convictions and sentenced defendant to 78 months in prison on the aggravated criminal sexual assault conviction.

¶ 16 Defendant now appeals, arguing that his conviction for aggravated criminal sexual assault should be reversed because the State failed to prove the essential element of force beyond a reasonable doubt. Defendant contends that, because the trial court found there was no firearm used, the State failed to establish there was a use of force or threat of force as it relied on A.J.'s testimony regarding defendant's possession of a firearm to prove this element of the offense. We do not find defendant's argument persuasive.

[1] In count I, defendant was charged with aggravated criminal sexual assault for committing criminal sexual assault (sexual penetration "by the use of force or threat of force" (720 ILCS 5/11-1.20(a)(1) (West 2012)) plus the aggravating factor that he acted in such a manner as to threaten or endanger the life of A.J. when he threatened to kill her. 720 ILCS 5/11-1.30(a)(3) (West 2012). The court stated it had used defendant's threat to kill A.J. if she did not perform the sexual act within five seconds to support the "force or threat of force" element of criminal sexual assault and could not use the same threat to then elevate the criminal sexual assault to aggravated criminal sexual assault. It therefore reduced the conviction to criminal sexual assault. 720 ILCS 5/11-1.20(a)(1) (West 2012).

¶ 17 Where a criminal conviction is challenged based on sufficiency of the evidence, a reviewing court, considering all the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime. *People v. Brown*, 2013 IL 114196, ¶ 48. In reviewing a trial court's decision, we must give proper deference to the trier of fact who observed the witnesses testify, because it was in the "superior position to assess the credibility of witness, resolve inconsistencies, determine the weight to assign to the testimony and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24. Accordingly, a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. *People v. Cooper*, 194 Ill. 2d 419, 430-31 (2000). A criminal conviction will only be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007).

¶ 18 To prove a defendant guilty of aggravated criminal sexual assault, the State must prove the defendant guilty of criminal sexual assault plus show an aggravating factor. 720 ILCS 5/11-1.30(a) (West 2012). As charged here, the State had to prove defendant committed criminal sexual assault by an act of sexual penetration between his penis and A.J.'s mouth using "force or threat of force" (720 ILCS 5/11-1.20(a)(1) (West 2012)) plus that this occurred during the commission of another felony, specifically, aggravated kidnapping. 720 ILCS 5/11-1.30(a)(4) (West 2012). Defendant does not challenge the court's findings that he committed sexual penetration during the commission of another felony. He challenges only the court's finding that he used "force or threat of force."

¶ 19 The Criminal Code of 2012 defines "force or threat of force" as follows:

> " 'Force or threat of force' means the use of force or violence or the threat of force or violence, including, but not limited to, the following situations:
>
> (1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believes that the accused has the ability to execute that threat; or
>
> (2) when the accused overcomes the victim by use of superior strength or size, physical restraint, or physical confinement." 720 ILCS 5/11-0.1 (West 2012).

"There is no definite standard setting forth the amount of force necessary to establish criminal sexual assault by the 'use of force,' and each case must be considered on its own facts." *People v. Mpulamasaka*, 2016 IL App (2d) 130703, ¶ 74. The requisite force necessary to sustain a conviction for aggravated criminal sexual assault can be established by evidence that the defendant used physical compulsion, or a threat of physical compulsion, which caused the victim to submit to the sexual penetration against her will. *People v. Denbo*, 372 Ill. App. 3d 994, 1005 (2007). The issue of force or threat of force is decided based on the evidence and the credibility of the witnesses, a question best left to the trier of fact who heard the evidence and observed the demeanor of the witnesses. *People v. Barbour*, 106 Ill. App. 3d 993, 998-99 (1982).

¶ 20 The evidence was sufficient to prove defendant used the threat of force to commit an act of sexual penetration. A.J. testified that, when she turned to confront defendant for saying that "she was going to suck [his] dick," he pointed a silver gun at her from an arm's length away. Because she thought defendant had a gun, A.J. was afraid and went with defendant and did what he told her to do, continuously pleading that he not hurt her. In the basement stairwell, the victim

testified that the defendant cocked the cold and heavy gun and placed it against her head, telling her: "you have five seconds to suck my dick or you're going to die." A.J. testified that she did not want to put her mouth on defendant's penis but did because she was "scared" and "didn't want to die." Defendant finally left after he ejaculated in A.J.'s mouth. Considering the facts in the light most favorable to the State, as we must on appeal (*Brown*, 2013 IL 114196, ¶ 48), we find that a reasonable trier of fact could have found defendant used force or threat of force to commit an act of sexual penetration against A.J. where he threatened to kill her while pressing a cold, heavy, silver object that the victim thought was a gun against her head. *People v. Le,* 346 Ill. App. 3d 41, 50 (2004) (a criminal sexual assault conviction can be sustained on the victim's testimony alone).

¶ 21 Nevertheless, defendant asserts that, because A.J. did not testify that she was struck or physically injured by defendant, the only evidence of defendant's "force or threat of force" was A.J.'s testimony that her assailant had a firearm and threatened to kill her. He contends that, because the court found the presence of a firearm was not proven and because, pursuant to *People v. Singleton*, 217 Ill. App. 3d 675 (1991), defendant's verbal threat to kill A.J. was insufficient to prove force or threat of force, the State failed to prove this essential element of the offense. We find this argument unpersuasive.

¶ 22 The term "firearm," as used in the Criminal Code of 2012, has a very specific definition. The term "has the meaning ascribed to it in Section 1.1 of the Firearm Owners Identification Card Act" (430 ILCS 65/1.1 (West 2012)) (720 ILCS 5/2–7.5 (West 2012)), where a firearm is defined as: "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas," and specifically

excludes any pneumatic, spring, paint ball or BB gun and assorted other devices. 430 ILCS 65/1.1 (West 2012). The trial court's finding that the evidence was insufficient to prove defendant was holding a firearm, *i.e.*, an object meeting the definition of "firearm," does not mean that the evidence was insufficient to show that defendant did not threaten A.J. with physical violence, or with some other object that A.J. thought was a gun.

¶ 23 The fact that the evidence did not demonstrate to the court's satisfaction that the object met the statutory definition of "firearm" does not somehow negate A.J.'s testimony that defendant, while holding a heavy, cold, silver object to her head, threatened to kill her unless she performed the sex act. The issue of force in the context of criminal sexual assault is generally considered a factual issue to be decided by the trier of fact. *People v. Fosdick,* 166 Ill. App. 3d 491, 499 (1988). Further, issues of consent and force or threat of force are matters of evidence and the credibility of the witnesses, which are also questions best left to the trier of fact who heard the evidence and observed the demeanor of the witnesses. *Barbour,* 106 Ill. App. 3d at 998. Here, the trial court found that A.J. performed the sex act "clearly if she is to be believed, by force or threat of force." It believed her, finding her testimony "forthright," "clear and convincing," and "genuinely compelling," and found that the defendant "performed an act of sexual penetration upon [A.J.] by the use of force." We do not overturn a court's factual and credibility determinations and find that the State's evidence was not so unreasonable, improbable, or unsatisfactory as to raise a reasonable doubt of defendant's guilt.

¶ 24 Citing *People v. Singleton*, 217 Ill. App. 3d 675, 687 (1991), defendant argues that mere verbal threat, such as a threat to kill, does not satisfy the State's burden to prove force or threat of force in the context of aggravated criminal sexual assault. In *Singleton*, the evidence at trial

showed the defendant had a pattern of domestic violence against his wife and his children such that the victim believed the defendant would harm her when he pushed her onto a bed and threatened to kill her if she did not comply with the sex act. *Singleton*, 217 Ill. App. 3d at 687. The reviewing court found that "none of [the defendant's prior violent] acts occurred at the time of the defendant's sexual penetration of the [victim]" and the defendant's act of pushing the victim onto the bed was not a life-threatening act. *Singleton*, 217 Ill. App. 3d at 687. The court held that "it must be overt acts by the defendant, and not verbal threats, which endanger or threaten a victim's life, and that the acts must occur during the commission of the offense." *Singleton*, 217 Ill. App. 3d at 687. *Singleton* is distinguishable from the case at bar.

¶ 25 First, the evidence here was sufficient to establish that defendant did commit an overt act that threatened A.J.'s life during commission of the sex act when he pressed the heavy object to her head and threatened to kill her. Second, *Singleton* did not concern the sufficiency of the evidence to prove the "force or threat of force" element of criminal sexual assault that is at issue here. Rather, the court was considering the sufficiency of the evidence to prove the aggravating factor stated in section 11-1.30(a)(3) of the aggravated criminal sexual assault statute, which required the State to prove that, during the criminal sexual assault, the offender " '*acts* in a manner that threatens or endangers the life of the victim or any other person.' " (Emphasis added.) *Singleton*, 217 Ill. App. 3d at 686-87 (quoting Ill. Rev. Stat. 1987, ch. 38, par. 12-14(a)(3), now codified as 720 ILCS 5/11-1.30(a)(3) (West 2012)). Given that the word "acts" requires some overt physical action by the offender during the sexual penetration, the court found his verbal threats insufficient to establish the aggravating element. *Singleton*, 217 Ill. App. 3d at 687. Here, defendant was convicted under an entirely different section of the aggravated

criminal sexual assault statute, section 11-1.30(a)(4), which requires that the criminal sexual assault was committed "during the course of committing or attempting to commit any other felony." 720 ILCS 5/11-1.30(a)(4) (2012). Thus, the question of whether defendant committed an overt act that threatened A.J.'s life is not at issue and *Singleton* has no application to the case at bar. In addition, in *Singleton*, the victim was his daughter.

¶ 26 Viewing the evidence in a light most favorable to the State, we find that any rational trier of fact could have found defendant guilty of aggravated criminal sexual assault beyond a reasonable doubt where the evidence supports a finding that he committed an act of sexual penetration using force or threat of force.[2]

¶ 27 For the foregoing reasons, we affirm the ruling of the trial court.

¶ 28 Affirmed.

[2] As noted previously, defendant does not challenge the sufficiency of the evidence regarding the aggravating factor of the offense, that it occurred during the course of committing another felony. See 720 ILCS 5/11-1.30(a)(4) (West 2012).