2022 IL App (4th) 220279-U

NO. 4-22-0279

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 14, 2022
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Ogle County
EDUARDO M. VEGA JR.,	)	No. 16CF163
Defendant-Appellant.	)	
	)	Honorable
	)	John C. Redington,
	)	Judge Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Turner and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the defendant's convictions of aggravated criminal sexual abuse where the trial court did not abuse its discretion in denying the defendant's motion to continue trial and the State proved the defendant guilty beyond a reasonable doubt.

¶ 2 Defendant, Eduardo M. Vega Jr., appeals his convictions of three counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2016)) following a bench trial. He contends that the trial court erred in denying his motion to continue the trial and that he was not found guilty beyond a reasonable doubt. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We include facts pertinent to the issues raised on appeal. We will supplement the facts as necessary in our analysis section. On November 23, 2016, the Ogle County state's attorney charged defendant in an amended information with four counts of predatory criminal

sexual assault of a child (counts I, II, IV, VI) (720 ILCS 5/11-1.40(a)(1) (West 2016)) and three counts of aggravated criminal sexual abuse (counts III, V, VII) (720 ILCS 5/11-1.60(c)(1)(i) (West 2016)). The alleged victim, B.H., was defendant's minor stepdaughter. The counts charging predatory criminal sexual assault of a child alleged that, on certain dates between 2012 and 2016, defendant "put his finger in the vagina of B.H." The counts charging aggravated criminal sexual abuse alleged that, on certain dates between 2012 and 2016, defendant "put his hands on the breasts of B.H." In September 2016, when B.H. was nine years old, she told a friend that defendant had been touching her inappropriately. After that revelation, B.H. was interviewed by her school counselor and a forensic interviewer.

¶ 5 A. Defendant's Motion to Bar B.H.'s Testimony

¶ 6 On August 11, 2021, defendant waived a jury trial. The matter was set for a bench trial on September 27, 2021. On September 22, 2021, the State disclosed to defendant that an "Officer Sester" conducted a recorded interview with B.H. on August 5, 2021. The State also disclosed one DVD recording of that interview. On September 24, 2021, defendant filed a motion to bar B.H.'s trial testimony, alleging the State's discovery response was late, in that it was tendered only five days before trial. Defendant also alleged the disclosure was incomplete. According to defendant, Officer Sester's report indicated there were two DVDs of the August 5, 2021, interview, and only one DVD, in which the interview was "cut[ ] off," was transmitted to defense counsel. Defendant further alleged the statements B.H. made to Sester were inconsistent with her prior statements. Defense counsel argued he would need additional time to prepare for trial if B.H.'s testimony was not barred. Defense counsel also indicated that Sester, who was now a necessary defense witness, would not be available on the upcoming trial date.

¶ 7 On the morning of trial, the court heard and denied defendant's motion to bar B.H.'s testimony. The court also denied defendant's motion to continue the trial. Instead, over defendant's objection, the court barred the State from introducing in its case in chief Sester's August 5, 2021, interview with B.H. Over defendant's objection, the court also allowed defense counsel to use Sester's interview to impeach B.H. and to perfect impeachment with either Sester's report or Sester's recorded interview.

¶ 8 B. The Evidence at Trial

¶ 9 1. *B.H.*

¶ 10 B.H. testified for the State on direct examination as follows. She was currently 14 years old and a freshman in high school. Her mother was Samantha H., and she had three half-brothers. Samantha had been married to defendant from when B.H. was in preschool to fourth grade. The family at first lived in a trailer, then with B.H.'s grandmother, and then in their current house in Rochelle. When B.H. was in first grade, defendant would touch her chest over and under her clothes with his hands. Defendant also touched her vagina both over and under her clothes, either with his hand or by rubbing against her. This happened whenever she was alone with defendant. When B.H. was in third grade, defendant rubbed or groped her chest area and her vagina both over and under her clothes. B.H. recalled that when she was five years old, she was taken to the hospital because she had blood in her underwear. She was bleeding after defendant put either his hand or his penis in her vagina.

¶ 11 On cross-examination, B.H. testified she was interviewed at Shining Star Children's Advocacy Center (Shining Star). The record shows B.H. was nine years old when the Shining Star interview occurred. During that interview, B.H. referred to her vagina as her "bottom," and she told the interviewer that defendant never touched her "bottom." B.H.

acknowledged that she told the Shining Star interviewer that she did not like defendant, he was "mean" to her mother, and he was much nicer to his own children than he was to B.H. When the Shining Star interview occurred, defendant had taken away B.H.'s cell phone, and B.H. knew her allegations of abuse would get defendant into trouble. Recently, B.H. told Sester that things happened when she was 10 years old, but that was impossible because B.H. had not seen defendant since she was nine. B.H. explained: "I believe I was not sure of my age because it has been so long." B.H. then agreed, under further questioning, that her statement that things happened when she was 10 was not true.

¶ 12 On redirect examination, B.H. testified she was afraid of defendant when she was interviewed at Shining Star. B.H. testified defendant "touched her vagina" "from preschool to third grade." On recross examination, B.H. acknowledged she denied during the Shining Star interview that defendant had ever touched her "bottom."

¶ 13 2. *Catherine Gort*

¶ 14 Catherine Gort testified on direct examination by the State as follows. On September 9, 2016, she was working as a counselor at Tilton school in Rochelle. Gort's principal asked Gort to speak with B.H. in response to an email the principal had received. Gort asked B.H. if she was "safe." B.H. said her stepfather was touching her in the "swimsuit area of her body." Gort taught students body safety classes in which Gort used that terminology. Using her sleeve as an example, Gort asked B.H. whether the touching was "on top or underneath." B.H. said it was "underneath." Gort then notified the Illinois Department of Children & Family Services.

¶ 15 On cross-examination, Gort testified she did not remember B.H. telling her that her mother and defendant did not have a good relationship and that they "[fought] a lot."

¶ 16 3. *Samantha H.*

¶ 17 Samantha H. testified on direct examination by the State as follows. She is B.H.'s mother. Samantha had previously been married to defendant, who was 41 years old at the time of trial. In approximately 2012, Samantha took B.H. to the local hospital. On cross-examination, Samantha testified that B.H. was not given any prescriptions or a special diet after that hospital visit. Samantha testified that she had no personal knowledge that defendant had molested B.H.

¶ 18 4. *Traci Mueller*

¶ 19 Traci Mueller testified on direct examination in the State's case in chief as follows. She was a forensic interviewer with Shining Star for 14 years, and she mentored new forensic interviewers throughout the state. At the time of trial, Mueller was employed in another field. Mueller interviewed B.H. at Shining Star on September 9, 2016, when B.H. was nine years old. That interview was recorded. After Mueller laid the foundation for the video recording of her interview with B.H., she testified on cross-examination as follows. After her interview with B.H., Mueller met with the authorities and Samantha H. Mueller had no independent recollection of what was said at that meeting. During the interview with B.H., B.H. denied that defendant had ever touched B.H.'s "bottom." B.H. also told Mueller that B.H. knew her allegations could get defendant in trouble. The recording of Mueller's interview with B.H. was then played in open court.

¶ 20 After the video was played, the parties stipulated that Sester's report of his August 5, 2021, interview with B.H. would be admitted into evidence. Defense counsel renewed his objection that Sester was not present to be cross-examined. Sester's report contained the following information. On August 5, 2021, Sester met with Samantha H., who told him B.H. had given Shining Star "new information," and Shining Star and the state's attorney both

recommended that B.H. speak with the police again. Sester then interviewed B.H. outside Samantha H.'s presence. B.H. advised Sester she wanted to speak with him about "information she had not previously mentioned." According to Sester's report, B.H. said she originally just told the police she was "[m]olested." B.H. now told Sester that defendant "actually raped" her on two different occasions. According to B.H., the first time was when she was five years old, and they were living in a trailer. B.H. did not remember details, but she remembered her mother asking her about blood in her underwear. B.H. stated the second rape occurred when she was 10 years old, and they were at defendant's mother's house. B.H. told Sester defendant put her on his bed, removed her pants and underwear, and began raping her. B.H. said it hurt, and defendant stopped for a while but then continued raping her. B.H. complained again that it hurt, and defendant stopped, but then he raped her again. Sester's report indicated he downloaded the interview onto two DVDs, placed them into evidence, and forwarded his report to the state's attorney.

¶ 21 The State then rested. After the court denied defendant's motion for a directed finding, defendant declined to testify or present evidence. Following closing arguments, the court found defendant not guilty of counts I, II, IV, and VI, which charged predatory criminal sexual assault of a child. The court found defendant guilty of the three remaining counts, which charged aggravated criminal sexual abuse. The court denied defendant's posttrial motion and sentenced him to three concurrent terms of four years' incarceration.

¶ 22 This timely appeal followed.

¶ 23 II. ANALYSIS

¶ 24 Defendant first contends the trial court abused its discretion when it denied his motion to continue the trial. Defendant argues that the court "prevented the defense from

adequately preparing for and presenting [his] defense," as defense counsel had not been provided an "operational" copy of a DVD containing Sester's interview with B.H. and Sester was a "material" defense witness. Defendant also contends the court "disabled" the defense by limiting how defense counsel could impeach B.H.'s trial testimony.

¶ 25 A motion for a continuance is addressed to the trial court's discretion and is considered in light of the diligence shown on the part of the movant. *People v. Pruden*, 110 Ill. App. 3d 250, 258 (1982). The grant or denial of a continuance is determined under the facts and circumstances surrounding the request, and a conviction will be reversed where the refusal to grant a continuance embarrassed the defendant, impeded preparation of his defense, or prejudiced his rights. *Pruden*, 110 Ill. App. 3d at 258. We will not disturb the trial court's decision absent an abuse of discretion. *Pruden*, 110 Ill. App. 3d at 258.

¶ 26 Section 114-4(b)(3) of the Illinois Code of Criminal Procedure (725 ILCS 5/114-4(b)(3) (West 2020)) provides that a defendant's motion for a continuance made more than 30 days after arraignment "may" be granted where "[a] material witness is unavailable and the defense will be prejudiced by the absence of his testimony." However, the unavailability of a witness is not a ground for a continuance if the State stipulates that the witness's testimony would be as alleged by the defense. 725 ILCS 5/114-4(b)(3) (West 2020).

¶ 27 Here, the chronology of events is useful. On August 5, 2021, Sester interviewed B.H. and generated a written report and two DVDs containing the contents of that interview. Sester's report indicated he forwarded his report to the state's attorney. On August 11, 2021, defendant executed a jury waiver. On September 22, 2021—five days before trial was scheduled to begin—the State disclosed Sester's report and one DVD. According to defense counsel, that DVD was defective and did not present the entire interview with B.H. Sester's written report

indicated (1) B.H. initiated the contact with Sester to report two incidents of rape she had never previously reported and (2) the Sester interview occurred at the state's attorney's and Shining Star's suggestion. On September 24, 2021, defendant filed a motion seeking to sanction the State for its late and incomplete disclosure. Alternatively, defendant moved to continue the trial because Sester was not available and, "due to this newly disclosed information," was a necessary defense witness. The State did not oppose the request for a continuance.

¶ 28 The court heard defendant's motion on the morning of trial. Defense counsel argued that the matter had been continued "*ad nauseum*" since 2019 on the State's motions. Defense counsel also noted that, after counsel filed the motion to bar and for a continuance, the State produced a DVD of B.H.'s complete August 5 interview with Sester. Defense counsel represented that the State had answered ready for trial on August 11, 2021, without disclosing B.H. had given another interview to the police. Defense counsel argued that an appropriate sanction would be to bar B.H.'s testimony because her August 5 interview was "new, it's contradictory [with B.H.'s prior statements], [and] it is something we had no time to prepare with." Defense counsel argued defendant might not have waived a jury trial had the defense known about B.H.'s new allegations.

¶ 29 The trial court asked defense counsel why barring B.H. from testifying to the new, uncharged allegations would not solve "your problem." Counsel responded that the new allegations were "exculpatory." Counsel continued:

> "[I]t's something we're going to need to cross-examine [B.H.] on and I'm going to need to have Officer Sester here because *** I can ask [him] 'Well, you asked this specific question and this was her specific answer, correct?' "

The court then asked counsel why he could not impeach B.H. with the video instead of Sester's testimony. Counsel replied that the video's quality was not good. "You can't understand what [B.H. is] saying, realistically." The court then asked the State if it would stipulate to Sester's report for impeachment purposes. The State indicated it would. The State also responded it did not know about the Sester interview until after the State answered ready for trial on August 11, 2021. The prosecutor represented that the State was not charging defendant with any new crimes based on the Sester interview, so barring B.H.'s entire testimony was not warranted.

¶ 30 The trial court then ruled it would bar B.H. from testifying only to the August 5 allegations and that the defense could use either the video or Sester's report to impeach B.H. Defense counsel again stated that the August 5 interview was "exculpatory" and the defense should have been advised of that in a timely manner. Defense counsel stated that because the State facilitated the August 5 interview with Sester, the prosecution could have disclosed that immediately, which would have affected whether defendant waived a jury trial. The court stated: "I'm going to stand on my ruling at this point."

¶ 31 During defense counsel's cross-examination of B.H., he asked B.H. about her allegations, made to Sester, that defendant was "continuing to do these things" when she was 10 years old. B.H. admitted to defense counsel it was impossible that defendant did "these things" when she was 10 because she had not seen him since she was 9. B.H. qualified that answer, however, by saying, "I believe I was not sure of my age because it has been so long." B.H. agreed, though, in answer to counsel's next question, that it was not true that defendant did the things she alleged when she was 10 years old. In closing argument, defense counsel argued that what B.H. told Sester were "more things that weren't true."

¶ 32 Defendant relies on *People v. Walker*, 232 Ill. 2d 113 (2009). In *Walker*, our supreme court held that the trial court abused its discretion in denying the defendant's motion for a continuance where the court "completely abdicated its responsibility to conduct an informed deliberation of defense counsel's motion." *Walker*, 232 Ill. 2d at 129. In *Walker*, defendant's assistant public defender requested a continuance of the defendant's bench trial because she had misdiaried it and was on trial in another case until the previous evening, with no time to prepare for the defendant's trial. *Walker*, 232 Ill. 2d at 117. When defense counsel told the court she was unprepared for trial, the court replied, " 'It is irrelevant.' " *Walker*, 232 Ill. 2d at 117. Counsel then explained she was not the attorney originally assigned to the defendant's case. *Walker*, 232 Ill. 2d at 118. To this, the court responded, " 'I know, but it is a dirty shame.' " *Walker*, 232 Ill. 2d at 118. Defense counsel then waived opening statement, conducted cross-examinations consisting of only four or five innocuous questions of the State's witnesses, presented one stipulation as an entire defense, and made a cursory closing argument. *Walker*, 232 Ill. 2d at 118-22. Our supreme court noted that the trial court "completely failed to exercise discretion in ruling on defense counsel's request for a continuance." *Walker*, 232 Ill. 2d at 126.

¶ 33 *Walker* is distinguishable. Here, defense counsel conducted a vigorous, and mostly successful, defense. He succeeded in obtaining not guilty verdicts on the counts charging predatory criminal sexual assault of a child. In cross-examining B.H., defense counsel elicited B.H.'s concession that what she told Sester happened when she was 10 years old would have been impossible because she did not see defendant after she was 9. Defense counsel used that concession to bolster his argument that B.H. lacked credibility. Sester was not needed to complete impeachment, because B.H. admitted the impossibility of events occurring when she was 10 years old.

¶ 34 Defendant argues the trial court did not specifically consider the factors that courts "usually" consider in determining whether to grant a defense motion for a continuance, including defendant's diligence; the right to a speedy, fair, and impartial trial; and the interests of justice. Defendant asserts that each of those factors weighed in his favor. However, in the absence of specific evidence demonstrating prejudice, we will not conclude the denial of a continuance is an abuse of discretion. *People v. Flemming*, 47 Ill. App. 3d 755, 762-63 (1977). Here, as noted, defense counsel successfully cross-examined B.H. using the information contained in Sester's interview. The court acquitted defendant of the majority of the counts charged in the amended information. Defendant does not argue what more defense counsel could have done had a continuance been granted and if Sester had been present to testify. Accordingly, under these facts, we cannot say the court abused its discretion in denying the continuance.

¶ 35 Defendant next argues he was not proved guilty beyond a reasonable doubt of aggravated criminal sexual abuse. Defendant asserts the evidence was "vague, improbable, unsatisfactory, insufficient, and far too contradictory" to support a conviction.

¶ 36 When presented with a challenge to the sufficiency of the evidence, it is not this court's function to retry the defendant. *People v. Thomann*, 197 Ill. App. 3d 488, 498 (1990). We will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it leaves a reasonable doubt of the defendant's guilt. *Thomann*, 197 Ill. App. 3d at 498. We view all evidence in the light most favorable to the prosecution. *Thomann*, 197 Ill. App. 3d at 498. The relevant question is whether, after viewing the evidence in such a fashion, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443. U.S. 307, 319 (1979).

¶ 37 Section 11-1.60(c)(1) of the Illinois Criminal Code of 2012 (720 ILCS 5/11-1.60(c)(1)(i) (West 2020)) provides that a person commits aggravated criminal sexual abuse if that person is over 17 years of age and commits an act of sexual conduct with a victim who is under 13 years of age. "Sexual conduct" includes any "knowing touching or fondling by the victim or the accused, either directly or through clothing, of the *** breast of the victim." 720 ILCS 5/11-0.1 (West 2020).

¶ 38 Defendant argues there is no physical evidence to corroborate B.H.'s testimony. Defendant asserts that his conviction rested on B.H.'s testimony and the video of the Shining Star interview. Regarding the Shining Star interview, defendant argues that B.H. did not give details as to times, places, and seasons when the touching incidents occurred. Defendant also argues that, in the Sester interview, B.H. essentially "recanted" her earlier "touching" allegations and alleged rape instead. Regarding B.H.'s in-court testimony, defendant argues that it was "vague, inconsistent [with the Shining Star interview], and improbable." Further, defendant argues the State failed to prove that defendant's conduct was for the purpose of defendant's sexual arousal or gratification. The State argues that B.H.'s trial testimony was clear and not vague, the "minor" inconsistencies between B.H.'s trial testimony and the Shining Star interview were due to her tender age and the passage of time between the interview and trial, and the State is not obligated to present physical corroboration. The State also argues that, as defendant was an adult when the touching occurred, the trier of fact can infer that it was for his sexual gratification and arousal. In his reply brief, defendant agrees with this last proposition.

¶ 39 At trial, B.H. related three incidents of abuse. Instead of dates, B.H. testified to what grade she was in when the incidents occurred. She testified that when she was in first grade, defendant "molested" her inside his mother's house, either in the living room or the basement.

B.H. testified that defendant "would come over to me and kiss me" and he would "touch my chest over my clothes and under my shirt." She then testified he also touched her vagina with either his hand or his penis. B.H. testified defendant "was still molesting me" in third grade. This occurred at her current house in Rochelle, either in the living room, B.H.'s bedroom, or her mother's bedroom. B.H. testified that, if she and defendant were alone watching television or "laying together," he would touch her with his hands or his penis over or under her clothes. B.H. related an incident when she was five years old and had blood in her underwear. She testified defendant put "either his hand or his penis in my vagina." (This incident was not charged in the amended information.)

¶ 40 At the beginning of the Shining Star interview, B.H. said she did not remember when defendant started touching her. B.H. said she did not remember the first time he touched her or how old she was when it first happened. B.H. described an incident of touching that occurred at defendant's mother's house during the summer after B.H. completed third grade (which would have been close to the date of the Shining Star interview). B.H. related that defendant was on the computer and then came over to her and touched her on the top part of her "swimsuit" area, and he "tried" to touch her bottom with his bottom. B.H. then said she could not think of any other touching incidents.

¶ 41 According to Sester's 2021 report, which was introduced by stipulation, B.H. said she had "further information" she had not previously mentioned. B.H. told Sester she originally just told the police she was molested, but defendant had actually raped her twice. B.H. then gave Sester the details of the rapes.

¶ 42 It is well settled that the testimony of a single witness, if positive, and the witness is credible, is sufficient to convict. *People v. Myles*, 2020 IL App (4th) 180652, ¶ 47. It is the

function of the trier of fact to determine the credibility of the witnesses. *Myles*, 2020 IL App (4th) 180652, ¶ 47. Here, the allegations B.H. made to Sester in 2021 did not contradict or recant her earlier allegations of touching. B.H. told Sester she wanted to speak to him about information she had not previously disclosed. So, the rape allegations, while new, did not gainsay B.H.'s earlier allegations of touching. Regarding the alleged vagueness of B.H.'s interview with Shining Star and any discrepancies between B.H.'s trial testimony and the Shining Star interview, B.H. was nine years old when she was at Shining Star. She was 14 when she testified at trial. Mueller, who interviewed B.H. at Shining Star, did not attempt to pin down specific dates when the incidents of touching occurred. B.H. testified she was afraid of defendant when she gave the Shining Star interview. As the court noted in *People v. Denis*, 2018 IL App (1st) 151892, ¶ 46, a child's delay in reporting abuse "may be explained by the fact that victims are often threatened not to tell anyone about the abuse." At trial, rather than use specific dates, B.H. related the incidents to what grade she was in and where she lived when those incidents happened. We determine B.H.'s trial testimony was sufficiently coherent for a rational trier of fact to find her credible. The allegations of the amended information were that defendant touched B.H.'s breasts. There would be no physical evidence, such as medical reports, to corroborate such touching. Having viewed the evidence in the light most favorable to the prosecution, as we must, we hold that any rational trier of fact could have found the elements of aggravated criminal sexual abuse beyond a reasonable doubt.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm the trial court's judgment.

¶ 45 Affirmed.