



# In the Missouri Court of Appeals Eastern District

## DIVISION III

STATE OF MISSOURI,	)	No. ED98908
	)	
Respondent,	)	Appeal from the Circuit Court of the City of St. Louis
	)	
vs.	)	
	)	Honorable Timothy J. Wilson
SYLVESTER PORTER,	)	
	)	
Appellant.	)	FILED: October 15, 2013

## Introduction

Sylvester Porter (“Porter”) appeals from the judgment of the trial court following his conviction by a jury of two counts of statutory sodomy in the first degree. Porter argues on appeal that the trial court erred in denying his motion for judgment of acquittal because insufficient evidence exists to support his conviction. Porter also contends that the trial court erred in allowing the jury to have unrestricted access to the videotaped forensic interview of the victim during its deliberations. Finding no error, we affirm the judgment of the trial court.

## Factual and Procedural History

Viewed in the light most favorable to the verdict, the evidence at trial established the following: In October 2010, A.L. rented a room for herself and her three-year-old daughter, K.W., in a rooming house managed by Porter. Porter maintained a room in the rooming house

and was there on a daily basis. On October 31, 2010, B.Y., K.W.'s grandmother, was babysitting K.W. at the rooming house. While watching K.W., B.Y. fell asleep. When she woke up, B.Y. found K.W. lying on the bed in Porter's room with Porter's head between her legs. B.Y. took K.W. out of Porter's room and asked her what happened. K.W. told B.Y. that Porter was sniffing around her private area. Later that day, K.W. told A.L. that Porter touched her vagina.

Approximately two weeks later, K.W. was interviewed by a forensic interviewer at the Child Advocacy Center (CAC). K.W. told the interviewer that Porter put his hand in her private part and touched her private part with his tongue. K.W. also told the interviewer that Porter put his private part on her face near her eye.

The State of Missouri ("State") charged Porter with statutory sodomy in the first degree for touching K.W.'s vagina with his hand (Count I) and touching K.W.'s vagina with his tongue (Count II). The State also charged Porter with child molestation in the first degree for touching K.W.'s head with his penis (Count III). Porter pleaded not guilty to all counts.

The trial court held a three-day jury trial from July 9 to July 11, 2012. Porter filed motions for judgment of acquittal at the close of the State's evidence and at the close of all the evidence. The trial court denied both motions, and the case was submitted to the jury. Shortly after it commenced deliberations, the jury requested all exhibits presented at trial, including State's Exhibit 1, the videotaped CAC interview. The trial court sent the requested exhibits to the deliberation room.

The jury found Porter guilty on all three counts. On August 23, 2012, the trial court granted Porter's motion for judgment of acquittal as to Count III and denied it as to Counts I and

II. Porter was sentenced to two concurrent terms of twenty-five years in the Missouri Department of Corrections on Counts I and II. This appeal follows.

#### Points on Appeal

In his first point, Porter argues the trial court erred in denying his motion for judgment of acquittal because K.W.'s inconsistent and uncorroborated testimony was insufficient to support his conviction on Count I. In his second point, Porter argues the trial court erred in denying his motion for judgment of acquittal because K.W.'s out-of-court prior inconsistent statement was insufficient, without corroboration, to support his conviction on Count II. In his third point, Porter argues the trial court erred in providing the deliberating jury unrestricted access to State's Ex. 1, the videotaped CAC interview of K.W.

#### Standard of Review

In examining the sufficiency of evidence, we are limited to a determination of whether there is sufficient evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. State v. Chaney, 967 S.W.2d 47, 52 (Mo. banc 1998) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). The appellate court may not act as a "super juror" with veto power. Id. Rather, the reviewing court gives great deference to the trier of fact and accepts as true all of the evidence favorable to the State, including favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. Id. We will affirm the trial court's judgment if, upon viewing the evidence and inferences in favor of the verdict, there is sufficient evidence from which a reasonable jury could have found the defendant guilty on each element of the charge beyond a reasonable doubt. Id.

## Discussion

### **I. K.W.’s testimony was sufficient to sustain Porter’s conviction on Count I.**

In his first point, Porter argues the trial court erred in denying his motion for judgment of acquittal on Count I because the evidence of guilt was insufficient to support his conviction for first-degree sodomy. “A person commits the crime of statutory sodomy in the first degree if he has deviate sexual intercourse with another person who is less than fourteen years old.” Section 566.062.<sup>1</sup> Deviate sexual intercourse is defined as:

any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim.

### Id.

Porter asserts that K.W.’s testimony regarding whether Porter touched her genitals with his hand was so contradictory and inconsistent that it cannot constitute substantive, probative evidence of the hand-to-genital touching element of first-degree statutory sodomy. Specifically, Porter points to following exchange between defense counsel and K.W. on cross-examination:

Q: Okay. And your grandma knows J-Money,<sup>2</sup> right?

A: (Nods head.)

Q: Can I get a yes or a no?

A: Yeah.

Q: Yes. And your mom knows J-Money, right?

A: Yeah.

Q: Okay. And your grandma told you to say these things, right?

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<sup>1</sup> All statutory references are to RSMo. Cum. Supp. (2010).

<sup>2</sup> “J-Money” is a nickname used by Porter, and the name K.W. uses to refer to him.

A: (Nods head.)

Q: You're shaking your head. She did?

A: Yeah.

Porter also directs the Court to the following exchange between the prosecutor and K.W. on redirect examination:

Q: KW, can you say whether J-Money really touched you?

A: Huh-huh.

Q: Did he really touch you or not?

A: Not.

Q: He didn't touch you?

A: (Shakes head.)

Q: Or he did touch you?

A: He did.

Q: He did.

A: (Nods head.)

Porter contends this testimony is contradictory in that K.W. testified first that Porter did touch her, then that he did not touch her, and further stated that her grandma told her to say these things. Porter argues that because K.W.'s testimony was contradictory, corroborating evidence of the charged crime was necessary to sustain his conviction. We disagree.

Generally, the testimony of a sexual offense victim alone is sufficient to sustain a conviction, even if uncorroborated. State v. Peters, 186 S.W.3d 774, 778 (Mo. App. W.D. 2006). Porter asks this Court to apply the "often asserted but seldom supported" exception to that general rule known as the corroboration rule. State v. Shinn, 2013 WL 3969617, \*5 (Mo. App.

W.D. July 26, 2013). The corroboration rule mandates corroboration when “the victim’s testimony is so contradictory and in conflict with physical facts, surrounding circumstances and common experience, that its validity is thereby rendered doubtful.” State v. Silvey, 894 S.W.2d 662, 673 (Mo. banc 1995) (quoting State v. Harris, 620 S.W.2d 349, 353 (Mo. banc 1981)). The corroboration rule is limited to contradictions in the victim’s trial testimony and does not apply to inconsistencies with the victim’s out-of-court statements or with the testimony of other witnesses. Peters, 186 S.W.3d at 778; State v. Nelson, 818 S.W.2d 285, 289 (Mo. App. E.D. 1991). Moreover, this Court has previously recognized that “[u]nless there are gross inconsistencies and contradictions which bear on a proof essential to the case, a resolution of conflicts in the evidence and the determination of the credibility of the witnesses are matters for the jury to determine.” Nelson, 818 S.W.2d at 289 (internal citations and quotations omitted).

Our review of the record reveals that K.W.’s trial testimony was not so contradictory or inconsistent as to deprive it of all probative force. See Silvey, 894 S.W.2d at 673. At the time of trial, K.W. was only five years old and was asked to recall events that occurred when she was merely three years old. Although K.W.’s testimony contained some slight inconsistencies, her testimony was not so in conflict with physical facts, surrounding circumstances, and common experience that this Court is “clouded with doubt” as to its validity. See Nelson, 818 S.W.2d at 289; State v. Koonce, 731 S.W.2d 431, 440 (Mo. App. E.D. 1987). As noted by our Supreme Court, “inconsistent or contradictory statements by a young child relating a sexual experience does not, in itself, deprive the testimony of all probative force.” Silvey, 894 S.W.2d at 673. Any contradictions or inconsistencies in K.W.’s testimony were properly weighed by the jury in their determination of her credibility. See Id.

Accordingly, K.W.'s testimony was sufficient to sustain Porter's conviction on Count I without corroboration. Point denied.

**II. K.W.'s statements to the forensic interviewer were sufficient to sustain Porter's conviction on Count II.**

In his second point, Porter argues the trial court erred in denying his motion for judgment of acquittal on Count II, first-degree sodomy for touching K.W.'s vagina with his tongue, because the evidence of guilt was insufficient to support his conviction. Porter asserts the only evidence the State presented on Count II was K.W.'s out-of-court statement to the forensic interviewer that Porter touched her private part with his tongue. Porter contends K.W.'s unsworn, out-of-court statement contradicts her in-court testimony that Porter only touched her vagina with his hand:

Q: [Prosecutor] What did J-Money do to you?

A: [K.W] Touch my private part.

\* \* \*

Q: Do you know what he touched it with?

A: His hand.

Q: His hand. Do you know if he touched your private part with any other part of his body?

A: No.

Q: You don't know or he did not?

A: He did not.

Porter argues that because K.W.'s trial testimony contradicts her out-of-court statement to the forensic interviewer, her out-of-court statement is insufficient, without corroboration, to support his conviction on Count II.

Porter relies on State v. Pierce, 906 S.W.2d 729 (Mo. App. W.D. 1995), for the proposition that an alleged sexual assault victim’s prior inconsistent statement, without corroborating evidence, cannot constitute sufficient evidence to support a conviction. In Pierce, the defendant was charged with statutory rape after the alleged victim told a Division of Family Services (“DFS”) worker that she had sexual intercourse with the defendant. Id. at 733. The fourteen-year-old alleged victim recanted her accusation at the first preliminary hearing, at her deposition, and at the second preliminary hearing. Id. At trial, the alleged victim testified that she lied to the DFS worker about having intercourse with the defendant because she felt that was what the DFS worker wanted to hear. Id.

The Western District applied the corroboration rule as set out in Silvey and concluded that corroboration was required in that case because the alleged victim’s testimony was inherently conflicting, there was no physical evidence to support the conviction, and “the surrounding circumstances and common experience [did] not support the allegation of sexual intercourse.” Id. at 734-35. Because the alleged victim’s out-of-court testimony was not sufficiently corroborated, the court reversed the defendant’s conviction. Id. at 734.

The Western District has since clarified that “[t]he rule set forth in Pierce is an exception to the rule that a prior inconsistent statement can serve as the sole basis for a finding of guilt,” and that the exception should be limited to the “unique factual situation” presented in that case. State v. Johnson, 262 S.W.3d 257, 259 (Mo. App. W.D. 2008) (internal quotations and citations omitted).

The facts of this case are readily distinguishable from Pierce. Unlike the alleged victim in Pierce who repeatedly recanted her accusation against the defendant, here, K.W. never recanted her statements regarding the tongue-to-vagina sodomy. Further, K.W. never confessed



that her previous statements were false. Rather, there was some inconsistency between K.W.'s statements to the forensic interviewer and her statements at trial describing the sodomy. Because the facts of this case are not parallel to the "unique factual situation" in Pierce, the narrow exception created in Pierce does not apply. See Johnson, 262 S.W.3d at 259; State v. Hayes, 169 S.W.3d 613, 622-24 (Mo. App. S.D. 2005) (distinguishing Pierce on grounds that victim did not recant but only made inconsistent statements at trial compared to her videotaped CAC interview).

K.W.'s out-of-court statements to the forensic interviewer were admitted pursuant to Section 491.075 following a hearing where the trial court determined the statements contained sufficient indicia of reliability to qualify for admission under the statute. As such, the statements could properly be considered by the jury as substantive evidence that Porter touched K.W.'s vagina with his tongue. Section 491.075. The jury had the opportunity to observe both the videotaped forensic interview of K.W. and K.W.'s live trial testimony. Any inconsistency between the two went to K.W.'s credibility, which was an issue for the jury, not for the court. See Nelson, 818 S.W.2d at 290. Because Porter does not allege that any of K.W.'s *trial testimony* concerning Count II contained inconsistencies or contradictions, the corroboration rule does not apply. See State v. Benwire, 98 S.W.3d 618, 626 n.2 (Mo. App. W.D. 2003).

Accordingly, K.W.'s statements to the forensic interviewer were sufficient to sustain Porter's conviction on Count II. Point denied.

**III. The trial court did not err in allowing the deliberating jury unrestricted access to K.W.'s videotaped forensic interview.**

In his third point, Porter asserts that the trial court erred in allowing the jury unrestricted access to the videotaped CAC interview of K.W. during its deliberations. Porter contends the trial court should have controlled the jury's exposure to the videotape rather than have allowed

the jury to play and replay the videotape as it desired. Porter argues that allowing the jury to listen to the CAC interview as often as it desired created a presumption that those statements were to be given more weight in the jury's deliberations than the other evidence presented at trial.

Shortly after the jury began its deliberations, the jury sent a note to the trial court requesting "all defense and state exhibits[,] videos, lab reports, etc." The legal file contains a record of the jury's request and the trial court's response: "Here are the items requested." However, there is nothing in the record reflecting whether the parties were made aware of the request or whether either party objected to sending the exhibits to the jury. Because the record does not indicate what occurred with respect to the jury's request for exhibits, we are unable to determine whether Porter objected to the trial court's decision to give the jury unrestricted access to the videotape.<sup>3</sup> "Parties seeking to reverse the trial court on appeal have the obligation to make a record demonstrating the error." State v. Naucke, 829 S.W.2d 445, 460 (Mo. banc 1992). In the absence of any record indicating what occurred at the trial court with respect to this claim of error, we are obligated to affirm the trial court. See id. Point denied.

#### Conclusion

Finding no error, we affirm the judgment of the trial court.

  
Kurt S. Odenwald, Judge

Mary K. Hoff, P.J., Concur  
Angela T. Quigless J., Concur

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<sup>3</sup> We note the record clearly indicates that in closing argument, defense counsel twice asked the jury to request the CAC videotape during its deliberations. Therefore, Porter expected the jury to view the videotape, and, accordingly, could have raised the issue of controlling the jury's access to it during the post-verdict chamber conference where other evidentiary issues were discussed.