2011 IL App (1st) 092612-U

SIXTH DIVISION
Order filed September 30, 2011
Modified upon denial of rehearing November 23, 2011

No. 1-09-2612

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 14860
	)	
PIERRE JORDAN,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justice Rochford concurred in the judgment.
Justice Hall dissented.

O R D E R

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty beyond a reasonable doubt; the trial court's refusal to instruct the jury on the defense of consent did not deprive him of a fair trial; and the prosecutor's remarks during closing arguments were harmless. The trial court's judgment was affirmed.

¶ 2 Following a jury trial, defendant Pierre Jordan was convicted of two counts of aggravated criminal sexual assault and sentenced to 19 and 6 years' imprisonment, to be served consecutively. On appeal, defendant contests the sufficiency of the evidence, asserting that the

complaining witness was not credible. Defendant also contends that the trial court's refusal to instruct the jury on the defense of consent deprived him of his rights to present a defense and to a fair trial. He finally maintains that the prosecutor's remarks during closing argument deprived him of a fair trial. We affirm.

¶ 3 At trial, J.H. testified that on February 16, 2008, she called a telephone chat line dating service and spoke to a man, later identified as defendant, who called himself "Mike." They exchanged their personal phone numbers, and, the following day, she again spoke to him on the phone. J.H. invited defendant to her apartment at 3136 West Fillmore Street in Chicago that same day to watch a movie. Defendant arrived at about 6 p.m., and they talked and had an alcoholic beverage. J.H. and defendant went into the guest bedroom to watch the movie. While they sat on the bed watching the movie, defendant started touching her back. J.H. "jumped" and told defendant not to touch her back because she was not comfortable. Defendant stopped, but then licked behind J.H.'s ear. She again "jumped" and told defendant she was not comfortable with what he was doing and wanted to continue to watch the movie. Defendant told J.H. that he was going to leave, and went to get his jacket.

¶ 4 Defendant returned to the bedroom, asked J.H. why she was "acting like that," and hit her with his fist underneath her right eye. Defendant tried to pin her down on the bed, and, when J.H. tried to fight back, defendant displayed a box cutter and told J.H. that if she did what he said he would not hurt her. J.H. stopped fighting, defendant told her that he wanted "some head," and she performed oral sex on him. Defendant then told J.H. to take off her clothes and lie down on the bed, which she did. Defendant penetrated J.H.'s vagina with his penis and ejaculated. During the incident, defendant told her that he was not raping her and that they were just having sex. He also took her phone and threw it, which caused it to break in half.

¶ 5 After cleaning themselves off in the bathroom, defendant took J.H. back to the guest bedroom where he again forced her to perform oral sex on him. J.H. testified that they were both standing while she performed oral sex on him, but she was "ben[t] over a little." As defendant was getting ready to leave, he told her that he was going to take her phone, which was broken, because he knew she would call the police. When defendant actually left, however, he did not take the phone with him, but warned J.H. that if she called the police he was going to make things worse. J.H. went to her neighbor's apartment and called the police. J.H. told her neighbor, Tonya Houston, that she had been raped. After the police arrived, J.H. brought them to her apartment and spoke to them. The police then took her to the hospital where she was examined.

¶ 6 Officer Michael Lachance testified that on February 17, 2008, he was dispatched to 3136 West Fillmore Street. When he arrived, he spoke with J.H., who was "in shock" and had "a swelling and a bruise underneath her right eye." J.H. told Lachance that she met a man that evening who she had previously talked to via a telephone dating service. She took Lachance into her spare bedroom where she pointed out a phone which she said was thrown and broken. Lachance never touched the phone. Lachance stated that there was a second cell phone inside the apartment which J.H. stated did not work. Lachance never attempted to operate that phone. While J.H. and Lachance were talking, an evidence technician came in and recovered a cell phone, a red towel from the bathroom, and several glasses. J.H. did not appear intoxicated to Lachance, and she described the offender as having multiple tattoos, including the names of relatives that died in a fire. After the conversation, Lachance and his partner drove J.H. to the hospital.

¶ 7 Detective Peter Maderer testified that he responded to the scene of the crime on February 17, 2008. Maderer observed that J.H. was visibly upset and appeared to be in a state of shock.

J.H. told Maderer that after she performed oral sex on the offender, he "rolled her over" and penetrated her from behind. Maderer assumed that she meant that the offender penetrated her both vaginally and anally, as his report reflects. Detective Maderer also indicated that J.H. never mentioned to him that the offender forced her to perform oral sex on him a second time. J.H. took Maderer to the bedroom where she alleged the assault occurred and showed him a broken cell phone. The assistant State's Attorney showed Maderer "Exhibit No. 12," and Maderer identified it as the cell phone recovered at the scene. He further indicated that it was in substantially the same condition as when he saw it in her apartment. When Maderer asked J.H. if there was any information by which he could track down the offender, she told him that the offender called her cell phone, but because her phone was broken she would have to get her cell phone records to obtain the number. J.H. subsequently obtained her phone records and gave Maderer the number. Maderer determined that the phone number belonged to Roxanne Jordan, found the address associated with that number, and learned that defendant lived at that same address. On June 28, 2008, Maderer compiled a photo array containing a picture of defendant and showed the photo array to J.H., who positively identified defendant as the offender.

¶ 8 On July 8, 2008, defendant was placed into custody, and Detective Maderer advised him of his *Miranda* rights. Defendant told Maderer that he was at a department store on the date in question, did not know the victim, and denied being in the area of the incident. Although defendant gave Maderer his telephone number, which matched the one police were investigating, he denied calling J.H. on the phone. Maderer asked defendant if he would be willing to provide a DNA sample through a buccal swab, but he declined. J.H. viewed a physical lineup that same day and positively identified defendant as the offender.

¶ 9 Dr. Joyce Libuano Chaput testified that she was a physician and treated J.H., who had an abrasion under her right eye, during the early morning hours of February 18, 2008. Chaput

indicated that J.H.'s injury to her eye could have been caused by a punch. Chaput conducted a vaginal exam of J.H., and concluded that there was no trauma to the area, which was not unusual for a woman who had four children unless there was some major trauma or force caused by a large object. Chaput observed that while she was treating J.H. for nearly three hours, J.H. was very quiet, subdued, and maintained only limited eye contact with Chaput. J.H. told Chaput that a man met her at her apartment and wanted to have sex. J.H. stated that she did not want to have sex with him, but then he punched her in the face and pinned her down. As she struggled to get away, the man pulled out a knife, and then forced her to have oral and vaginal sex with him twice. Chaput also indicated that J.H. admitted to using alcohol on the night in question. Chaput completed a sexual assault kit with regard to J.H.

¶ 10 Investigator Edward Tansey testified that on November 6, 2008, pursuant to a court order, he performed a buccal swab on defendant.

¶ 11 Michael Mathews, a forensic scientist, testified that he ultimately analyzed the criminal sexual assault kit, identified semen in the vaginal swab and preserved it for DNA testing. Brian Schoon, a forensic scientist, testified that he analyzed the vaginal swabs taken from J.H. and compared them to a buccal swab taken from defendant. Schoon determined, within a reasonable degree of scientific certainty, that the vaginal swabs matched the DNA profile of defendant.

¶ 12 Before the defense presented its case, a conference was held regarding whether a consent instruction would be given to the jury. The State argued that there was not a scintilla of evidence that there was consent to any act of sexual penetration. The evidence showed that J.H.'s meeting with defendant was consensual, but the act of sex was conducted through force. Defense counsel argued that J.H. was impeached regarding the events of that evening, including the order the sex acts occurred and where she met the offender. Defense counsel further argued J.H. lacked credibility and there was enough evidence calling her story into question to have the jury get a

consent instruction. Defense counsel also informed the court that Tonya Houston's testimony would show that J.H. was not a credible witness. The court ruled that there was not a scintilla of evidence that J.H. consented to sex. The court ruled that unless it heard more testimony that would indicate consent, *i.e.*, testimony from defendant, it would not allow a jury instruction on consent.

¶ 13 Tonya Houston testified for the defense that she lived in the unit below J.H. Houston did not like J.H. and stated that she is known in the community as a compulsive liar. On February 17, 2008, J.H. was home and Houston heard nothing unusual upstairs. At about 10:30 p.m., J.H. knocked on Houston's door, Houston let her inside, and J.H. asked to use the phone. Houston thought that J.H. had been drinking. While Houston was in the process of giving her the phone, J.H. told her that she had been raped. Houston was shocked and dialed 9-1-1. When Houston asked J.H. if she knew who did this to her, J.H. responded negatively. She also told Houston that she met the man who raped her at McDonald's and she invited him to her house for drinks. Subsequently, the police arrived and then left with J.H. to go to her apartment.

¶ 14 A few days later, Houston spoke with J.H. who told her that the man who raped her was the brother of her ex-boyfriend. Subsequent to this conversation with J.H., a detective came to Houston's residence. Houston told him that she did not hear or see anything, despite the fact that J.H. had told her that a man she met at McDonald's had raped her, and that another possible offender was J.H.'s ex-boyfriend's brother. Houston further indicated that shortly before she testified, some members of the State's Attorneys Office asked to speak with her in the hallway. At that time, she agreed to speak with them, and, when they began talking, defendant's father approached the group and told her, "[y]ou're supposed to be testifying for my son. You're not supposed to be talking to them." Shortly after this occurred, the conversation between Houston and the members of the State's Attorneys Office ceased.

¶ 15 In rebuttal, the State called Officer Lachance who testified that he had a conversation with Tonya Houston, and that she told him that J.H. knocked loudly on her back door and yelled "[l]et me in. I was just raped." Detective Peter Maderer testified in rebuttal similarly to Lachance.

¶ 16 During closing and rebuttal argument, the State highlighted defendant's refusal to allow Detective Maderer to perform a buccal swab on him, and indicated that it was not until a court order forced him to take the buccal swab that it was administered. Following evidence and argument, the court instructed the jurors on the law, but did not give an instruction regarding consent. The jury found defendant guilty of aggravated criminal sexual assault. In sentencing defendant to an aggregate term of 25 years' imprisonment, the court noted that his sentence included a mandatory 10-year enhancement for aggravated criminal sexual assault while displaying a non-firearm weapon.

¶ 17 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt. He specifically maintains that J.H. provided inconsistent accounts of the incident, changed her story, and had a reputation for being a liar.

¶ 18 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This standard recognizes the responsibility of the trier of fact to resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A reviewing court will not set aside a criminal conviction unless the evidence is so unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. *People v.*

Hall, 194 Ill. 2d 305, 330 (2000).

¶ 19 As relevant to this appeal, a defendant is convicted of aggravated criminal sexual assault when he commits criminal sexual assault, *i.e.*, commits an act of penetration by the use of force or threat of force, and the defendant displayed or threatened to use a dangerous weapon other than a firearm. 720 ILCS 5/12-14(a)(1) (West 2008).

¶ 20 Here, we find defendant was proven guilty beyond a reasonable doubt of aggravated criminal sexual assault. The evidence, when viewed in the light most favorable to the State, showed that defendant punched J.H., tried to pin her down on the bed, and, when J.H. tried to fight back, defendant displayed a box cutter. J.H. was forced to perform oral sex on defendant and then he had sex with her and ejaculated. After going to the bathroom, defendant forced J.H. to perform oral sex on him a second time. J.H. subsequently identified defendant in a photo array and in a line-up as the offender in question. A sexual assault kit was completed on J.H. and a buccal swab was performed on defendant. After forensic scientist Brian Schoon analyzed the vaginal swabs and compared them to the buccal swab, he determined, within a reasonable degree of scientific certainty, that the vaginal swabs matched the DNA profile of defendant. J.H.'s testimony regarding the sexual assault was corroborated by police who testified that J.H. appeared shocked and had a bruise to her right eye. The police also testified that they obtained defendant's phone number from J.H. Her testimony was also corroborated by Dr. Chaput who testified that J.H. had a bruised right eye and J.H. told her that she struggled with defendant, defendant pulled out a knife, and forced her to have sex with him. Finally, defendant's denial that he knew J.H. also supported her story.

¶ 21 Defendant maintains, however, that J.H.'s testimony was substantially impeached through inconsistencies, contradictions, and J.H.'s reputation as a liar. Defendant specifically cites to Houston's testimony that J.H. was inconsistent with her descriptions of the offender. He also

highlights the fact that although J.H. claimed defendant forced her to have oral sex, vaginal sex, and then oral sex again, she described a different order of events and sex acts to Detective Maderer and Dr. Chaput. Defendant also claims that J.H. gave inconsistent descriptions of the offender regarding the tattoos on his body, and further argues that photographs taken of the guest bedroom do not show signs of a struggle, and her testimony regarding what happened to her phone was unreliable.

¶ 22 Defendant's position is unpersuasive because a complainant's testimony can support a conviction for a sex offense even if it is impeached and imperfect where the minor inconsistencies or discrepancies "do not detract from the reasonableness of her story as a whole." *People v. Soler*, 228 Ill. App. 3d 183, 200 (1992), citing *People v. Douglas*, 183 Ill. App. 3d 241, 251 (1989) (superceded by statute on unrelated issue); *People v. Findlay*, 177 Ill. App. 3d 903, 911 (1988); *People v. Henne*, 165 Ill. App. 3d 315, 323-24 (1988). In the present case, the inconsistencies do not call into question the validity of J.H.'s testimony and are minor. See *People v. Myles*, 257 Ill. App. 3d 872, 884 (1994) (minor inconsistencies in a witness' testimony do not, of themselves, create a reasonable doubt).

¶ 23 Defendant next contends that the trial court's refusal to instruct the jury on the defense of consent deprived him of his rights to present a defense and to a fair trial by jury.

¶ 24 The parties disagree on the standard of review to be applied. The State argues that an abuse of discretion standard is appropriate, and defendant asserts that the trial court's ruling should be reviewed *de novo*, citing *People v. Parker*, 223 Ill. 2d 494 (2006) for support. *Parker* held that "the issue of whether the jury instructions accurately conveyed to the jury the applicable law is reviewed *de novo*." *Parker*, 223 Ill. 2d at 501. Unlike this case, however, *Parker* was concerned with the correctness of a jury instruction that was actually given. Here, no jury instruction regarding consent was given and we thus agree with the State that a trial

court's refusal to issue a specific jury instruction is reviewed under an abuse of discretion standard. See *People v. Couch*, 387 Ill. App. 3d 437, 444 (2008), citing *People v. Douglas*, 362 Ill. App. 3d 65, 76 (2005) (rejecting the argument that this court's review of a trial court's refusal to issue a jury instruction is *de novo*).

¶ 25 A defendant has a right to the benefit of any defense revealed by the evidence, and very slight evidence of a given theory of a case will warrant an instruction. *People v. Barnwell*, 285 Ill. App. 3d 981, 990 (1996). Here, the trial court found there was not even a "scintilla" of evidence to warrant the giving of a consent instruction. Defendant, however, claims he developed his theory that his undisputed sexual encounter with J.H. was consensual by impeaching J.H., demonstrating inconsistencies in her accounts, and illustrating her reputation for being a liar.

¶ 26 The cases of *Barnwell*, *People v. Brown*, 214 Ill App. 3d 836 (1991), and *People v. Wheeler*, 200 Ill. App. 3d 301 (1990), are instructive here. In *Barnwell* and *Brown*, this court held that the trial courts properly refused jury instructions on the issue of consent, stating that merely because rape victims consent to accompany the defendants to a particular location, *i.e.*, a hotel, does not mean that a jury could infer that they consented to the sexual acts. *Barnwell*, 285 Ill. App. 3d at 991; *Brown*, 214 Ill App. 3d at 846-47. In *Wheeler*, this court held that the trial court properly refused to tender a consent instruction where the defendant denied that anal intercourse ever occurred, and the victim denied consenting to it, because any inferences arising from the circumstances related by the parties were too remote to constitute the "very slight" evidence necessary to require the consent instruction. *Wheeler*, 200 Ill. App. 3d at 308.

¶ 27 In this case, similarly to *Barnwell* and *Brown*, the evidence is uncontradicted that defendant subjected J.H. to those sexual acts after threatening her with a box cutter in her residence. Furthermore, similarly to *Wheeler*, there was not even "very slight" evidence of

consent where J.H. testified that she did not consent to any sexual acts, and police testified that defendant stated that he was at a department store on the date in question, did not know the victim, and denied being in the area of the incident. Therefore, the trial court properly refused the consent instruction.

¶ 28 In reaching this conclusion, we reject defendant's contention that the trial court denied him a jury instruction on consent solely because he did not testify. In support of his argument, defendant cites *Tipton* where the reviewing court stated, without citing to authority, that the defendant should have received a consent instruction, despite defendant's decision not to testify, because the weapon allegedly used by the defendant to force the victim to have sexual contact with him was never found. *People v. Tipton*, 222 Ill. App. 3d 657, 663-64 (1991). Defendant maintains that, similarly to *Tipton*, the box cutter allegedly used to force J.H. to have sex with him was never found. Despite defendant's contentions to the contrary, however, *Tipton* is factually distinguishable from the case at bar. In *Tipton*, the court reversed the defendant's conviction due to the prosecution's comments on the defendant's failure to testify. Without determining whether it was reversible error not to instruct the jury on consent, the court held that under the circumstances in this case the absence of a weapon raised the issue of consent. The facts, however, showed that the alleged sexual assault occurred in a prison cell between two male prisoners and the cell was searched and no weapon was found. Here, however, the missing box cutter could have been disposed of in any number of ways considering the aggravated criminal sexual assault occurred months before defendant was arrested. More importantly, this court has previously held that a missing weapon does not constitute the slightest evidence necessary for a consent instruction. See *Barnwell*, 285 Ill. App. 3d at 991 (finding "the fact that no gun was found when the defendant was apprehended following the rape does not constitute the slight evidence necessary to require a consent instruction").

¶ 29 Moreover, although we agree with defendant that the trial court stated that defendant would have to testify in order to receive a consent defense, defendant takes the court's comment out of context. The court only made this statement after the State rested its case-in-chief. The court found that the State's evidence, and the potential testimony of Houston, did not show any evidence of J.H.'s consent to the sexual acts. Therefore, when taken in context, the court instructed defense counsel that defendant's testimony that a consensual sex act occurred would be necessary in order to obtain a jury instruction on consent given the evidence presented. In addition, as shown above, any inconsistencies in J.H.'s testimony were minor and did not show even slight evidence of consent.

¶ 30 We also find unpersuasive defendant's argument that jury instructions regarding consent were necessary because there was no other legal basis on which to acquit him. Defendant's contention is inaccurate because if the jury disbelieved J.H.'s testimony regarding the use of force because of challenges to her testimony, it would have necessarily found that the elements of the offense presented were not proven beyond a reasonable doubt. See *People v. Mims*, 403 Ill. App. 3d 884, 894-95 (2010) (rejecting the argument that a jury instruction on consent was the only means to acquit the defendant).

¶ 31 Defendant finally contends that the prosecutor's repeated remarks during closing argument deprived him of a fair trial. He specifically alleges that the prosecutor repeatedly told the jury to infer his guilt based on his decision to decline to provide a DNA sample, thus penalizing him for utilizing his constitutional right to privacy.

¶ 32 This court recently stated in *People v. Hammonds*, No. 1-08-0194, slip op. at 52 (May 6, 2011), that the appropriate standard of review for closing remarks is not clear. See *Hammonds*, No. 1-08-0194, slip op. at 52-54 (discussing the conflict between our supreme court's decisions

in *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (applying a *de novo* standard) and *People v. Blue*, 189 Ill. 2d 99, 128, 132 (2000) (applying an abuse of discretion standard), and the resulting division between appellate courts as to the proper standard of review). In *Hammonds*, this court declined to resolve the issue of the appropriate standard of review because its holding would be the same under either standard. *Hammonds*, No. 1-08-0194, slip op. at 54. The same is true in this case because our holding would be the same under either standard.

¶ 33 As a general rule, the State is afforded "wide latitude" in delivering closing arguments. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). We will consider the closing argument as a whole and will not focus solely on select words or phrases. *Perry*, 224 Ill. 2d at 347. Moreover, a reviewing court will not reverse a jury's verdict based on improper closing arguments unless the comments were of such magnitude that they resulted in substantial prejudice to defendant and constituted a material factor in his conviction. *People v. Gonzalez*, 388 Ill. App. 3d 566, 587 (2008).

¶ 34 The arguments complained of here are as follows:

> "[ASSISTANT STATE'S ATTORNEY]: What else did [defendant] do? I almost forgot about this in that whole circumstantial evidence thing. When he met with Detective Maderer, Detective Maderer asked him, well, you never knew her, so let's go ahead and get a buccal, scrape on the inside of your mouth.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
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> [ASSISTANT STATE'S ATTORNEY]: In fact, it wasn't until a court order by a judge was signed-

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[ASSISTANT STATE'S ATTORNEY]: -that a buccal swab was attained by the defendant."

¶ 35 Later, during rebuttal, the State reiterated:

"[ASSISTANT STATE'S ATTORNEY]: *** I don't know her. I never talked to her on the phone. I've never been to the west side. I've never been to her apartment. I didn't have sex with her. I've only had sex with two people between January and July, when you're speaking to me. Really? Okay. And then, no, can't have my buccal swab.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[ASSISTANT STATE'S ATTORNEY]: Why? He didn't do anything wrong, right? I mean, why not? Just give it to them, this will clear everything up."

¶ 36 Even assuming that the prosecutor's remarks were improper, we find, at most, the error was harmless. A constitutional error does not automatically require reversal of a conviction (*People v. Slywka*, 365 Ill. App. 3d 34, 50 (2006)), and, in determining whether a constitutional error is harmless, the test to be applied is whether it appears beyond a reasonable doubt that the error did not contribute to the verdict obtained (*People v. Patterson*, 217 Ill. 2d 407, 428 (2005)). Here, any error in the challenged arguments did not contribute to the jury's verdict. The evidence of defendant's guilt was overwhelming based on all the testimony and the DNA evidence. Moreover, the jurors were informed that they should not consider the arguments as

evidence and that their verdict should be based solely on the evidence presented at trial. See *People v. Garcia*, 231 Ill. App. 3d 460, 469 (1992) (stating that a jury instruction regarding the fact that arguments are not evidence tends to cure any prejudice from improper remarks).

¶ 37 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 38 Affirmed.

¶ 39 JUSTICE HALL dissenting.

¶ 40 The trial court's refusal to instruct the jury on the issue of consent and the prosecutor's reference in closing argument to the defendant's refusal to submit to a DNA test were error. These errors require that the defendant receive a new trial.

¶ 41 As the majority acknowledges, very slight evidence of a given theory of a case will warrant the giving of an instruction. A defendant need not present any evidence where the evidence presented by the State raises the issue of the affirmative defense. *People v. Uptain*, 352 Ill. App. 3d 643, 646 (2004) (citing *People v. Jones*, 175 Ill. 2d 126, 132 (1997). Unless the trial court can determine, as a matter of law, that there is no affirmative defense, the issue should be determined by the jury with the proper instruction as to the affirmative defense. *Uptain*, 352 Ill. App. 3d at 646.

¶ 42 The majority finds the trial court's refusal to instruct the jury on consent proper on the basis of J.R.'s testimony that she did not consent to any sexual acts and the evidence that the defendant denied knowing the victim and claimed to have an alibi, as well as the "uncontradicted" evidence that the defendant threatened J.R. with a box cutter. However, the reviewing court's role is not to weigh the evidence but to determine if some evidence supports the affirmative defense. *Uptain*, 352 Ill. App. 3d at 647. In this case, the box cutter was never found, a witness testified that J.R. was a compulsive liar, J.R. related differing versions of the attack and claimed that another individual attacked her. This evidence raised questions as to J.R.'s credibility, in particular, her denial that she consented to the sexual encounter with the defendant. Clearly there was "some evidence" supporting the defendant's affirmative defense of consent. Therefore, the trial court erred when it refused to instruct the jury on the affirmative defense of consent.

¶ 43 With respect to the prosecutor's reference to the defendant's refusal to give a DNA sample, the majority concludes that, based on the testimony and the DNA evidence, the error did not contribute to the jury's verdict. The majority's analysis ignores the persuasive power of DNA evidence on a jury.

¶ 44 The defense in this case was consent. Therefore, it was unnecessary for the defendant to contest the DNA evidence. Nonetheless, the prosecutor chose to emphasize the defendant's refusal to give a DNA sample. The prosecutor's reference to the defendant's refusal to give the sample, which would clear him if he was in fact innocent, could very well have led the jury to infer that the defendant was guilty simply because of his refusal, without considering the other evidence in the case which challenged J.R.'s version of the attack. For that reason, I conclude that the prosecutor's improper argument did contribute to the defendant's conviction.

¶ 45 Based on these errors, I would reverse the defendant's conviction and sentence and remand for a new trial. Therefore, I respectfully dissent.