

¶ 4

I. BACKGROUND

¶ 5

A. Evidence in the Bench Trial

¶ 6

1. *A.J.'s Testimony*

¶ 7

In the bench trial, A.J., age 16, testified that in December 2007, she and defendant, age 17, were coworkers at a Kmart store. They were merely friends at that time, not close friends. He seemed to her to be a flirtatious kidder. If A.J. or another girl walked past him in the store, he would remark, "Oh, look at her walk past." She regarded him, initially, as "just the playful type," a "nice" enough person, with whom she got along just fine.

¶ 8

Defense counsel, John L. Wright, Jr., asked A.J.:

"Q. Did you ever make any comments about [defendant]?"

A. Not that I remember.

Q. But it's possible if you don't remember?

A. No, I just don't remember. If you're going to ask me next, what did he say next, and I can't tell you. I don't remember.

Q. Okay. Did you ever make any sexual comments to Andrew?

A. No. This is like a three-year-old case. I don't remember much."

¶ 9

On December 26, 2007, A.J. and defendant happened to be on break at the same time. A.J. was sitting at a table in a café inside the store, having a snack and talking with her friend, Alexis, on her cell phone. Defendant came over, uninvited, and stood at A.J.'s table for a few minutes, listening to the conversation that she was having with Alexis on the speaker phone and

joining in. A.J. never made any remarks of a sexual nature to him.

¶ 10 When the break ended, A.J. went to the break room, to put away her personal belongings, and defendant followed her there. Then A.J. left the break room and walked down a hallway, toward the women's restroom, with defendant still tagging along. According to A.J., defendant then grabbed her by the arm and pulled her past the women's restroom and into the men's restroom.

¶ 11 At first, A.J. thought that defendant was "just playing," because he was the playful type. She told him, "Stop," and "Let me go, I'm going to get in trouble, I'm not a boy." But he did not stop and he did not let her go. Instead, he pushed her into a stall and "kind of over a toilet." The door of the stall did not close, because he was standing in the doorway of the stall, blocking the door from closing. He "started kissing on [her], and he unzipped [her] shirt and started feeling on [her], stuck his hands down [her] pants, and up [her]." A.J. did not kiss him back. She kept telling him, "[N]o, stop," as he kissed her neck and breasts. But he did not stop. She screamed when he put his hand inside her vagina. (At this point in her testimony, A.J. broke down in tears, and it was necessary to take a recess.) "[D]oes it hurt[?]" defendant asked her. "[Y]es, please stop,[]" she replied. He made as if to penetrate her vagina with the other hand, but he desisted when someone else entered the restroom, presumably a customer. Defendant "just hurried up and left." The stall door swung shut, and A.J. used the toilet. She did not scream again. Nor did she ask the unknown male for help. Instead, when she heard the man enter another stall, she emerged from her stall, left the men's restroom, and reported the incident to her supervisor, Tonya.

¶ 12 Wright asked A.J.:

"Q. And did you scream once, or more than once?"

A. (No answer.)

Q. Can you describe the volume of your scream?

A. No, I don't remember. I just remember screaming and he said, does that hurt, and I said, yes, stop."

¶ 13 Also, Wright asked A.J. if, "on occasion," she had talked with defendant on the phone. She answered no. She denied ever talking with defendant on the phone. She further denied that defendant called her, while she was alone in the stall in the men's restroom, "to see if [she] had gotten out of the bathroom okay."

¶ 14 *2. Dean Kitterman's Testimony*

¶ 15 Dean Kitterman, the assistant manager at Kmart, testified he was paged to the service desk around 7:30 or 8 p.m. on December 26, 2007. He found A.J. at the service desk, and she was "crying" and "quiet" and had "her head *** down." Kitterman and A.J. went to the café and "just sat" together for a while. After A.J. "calmed down," Dean asked her what was wrong. After speaking with A.J., he summoned defendant to the human resources office.

¶ 16 *3. Defendant's Testimony*

¶ 17 Defendant testified that on December 26, 2007, A.J. invited him to join her in the café when they went on break. He told her, " [']I'll think about it.['] " He had intended to walk to McDonald's, but he changed his mind because it was snowing. So, he took A.J. up on her offer. He bought a soda and sat down with her in the café.

¶ 18 After A.J. finished her phone conversation with Alexis, she and defendant talked for a while. He requested to look at her cell phone, and she handed it to him. As he was looking at the photographs in her phone, she told him "that wasn't where the good stuff was." She retrieved her

phone and showed him some videos. In one video, A.J. was "showing her body[] and touching her breast," and in another video, she was "in the middle of intercourse" with a boy who, she told defendant, had since gone to jail.

¶ 19 When their break ended, defendant and A.J. stopped by the break room and then proceeded to the restrooms. As they were walking down the hallway, on their way to the restrooms, defendant suggested that A.J. accompany him into the men's restroom. She "giggled" and replied, " [']I can't go into the boy's bathroom.['] " She never actually said she did not want to accompany him into the men's restroom; she just said she did not want to get in trouble. Defendant reassured her that she would not get in trouble, whereupon she followed him into the men's restroom. He denied grabbing her by the arm and dragging her into the restroom. Instead, they were "kind of holding hands." He merely "touch[ed] her arm" when she walked with him into the restroom.

¶ 20 Defendant testified that he and A.J. went into a stall and began kissing and fondling each other. He insisted that she never complained or told him to stop when he kissed her on the neck and breasts. When he was "fingering her," however, she told him she was "uncomfortable" because his arm was pressing against her abdomen and she "had to pee." He denied that she screamed, or complained he was hurting her, when he put his fingers in her vagina. He admitted, though, that he had told the police she said, " ['O]uch,['] " when he put his fingers in her vagina. "Ouch" was merely a paraphrase of what she had said, he explained.

¶ 21 As defendant and A.J. were making out in the stall, someone entered the men's restroom. Defendant came out of the stall to see who it was. It was a customer. Because it would have looked "silly" to return to the stall, defendant left the men's restroom. He waited around the corner and called A.J. on her phone, to ask her if she thought she could exit the men's restroom

without being seen. She did not answer the first time he called. She answered his second call and let him know that she had gotten out of the men's restroom without being seen. Afterward, she laughed and joked with defendant about the stunt he had pulled, leaving her in the men's restroom all by herself. He never saw her crying or distraught at any time that evening. As far as he knew, she had no reason to cry.

¶ 22 The prosecutor asked defendant:

"Q. Did you have a crush on [A.J.] at that time?

A. I did not have a crush like I wanted to date her, no.

Q. So, why did you want to make out with her in the bathroom?

A. Over the past years, and in high school, you don't really have to have a crush [*sic*] on somebody to just mess around with somebody."

¶ 23 *4. Michael Burns's Testimony*

¶ 24 A Bloomington police detective, Michael Burns, testified that on December 26, 2007, he examined A.J.'s cell phone and found no videos on it or anything that was obscene. He admitted, however, that he did not look at each and every photograph on her cell phone. A.J. assured him she had removed no photographs or videos from her phone. She told him that defendant used her phone to make a call while they were on break.

¶ 25 B. Defense Counsel's Closing Argument

¶ 26 In his closing argument, Wright maintained that A.J. was not credible because her actions, as she recounted them, did not make logical sense—particularly her actions in screaming and

then, immediately afterward, using the men's toilet and trying to be quiet and inconspicuous in the stall when someone arrived who, potentially, could help or protect her. Wright argued:

"She says she screamed at one point. I attempted to find out, I guess, what the scream amounted to, and she wasn't really able to characterize that.

She also testified that within seconds of her screaming, another third person entered the bathroom. And that person was never aware that she was in the bathroom. So, after this assault occurred, Mr. Kisner left the bathroom. He didn't want to get in trouble being in the bathroom with a girl, and [A.J.] may have continued to maintain her secrecy in the stall. She didn't ask for help, or indicate there was anything wrong. Rather, what she proceeded to do was to use the bathroom facility herself, and then after she was assured that the other individual would not see her, she then left the bathroom. It does not seem consistent to scream, and then to make no sound when there's someone available to assist. It doesn't make sense that she screamed within seconds of someone entering the bathroom, and that third party apparently was unaware that she had screamed. If she had testified that it had been several minutes, that would be understandable, but if that individual entered within seconds, you would expect them to have been alerted by a scream if there had, in fact, been a scream."

¶ 27

C. The Trial Court's Rationale for the Guilty Judgment

¶ 28

After hearing the evidence, Judge Reynard stated:

"Thank you to both counsel. The universe of evidence in this case is, by its nature, difficult because it contemplates a credibility match between one witness on each side.

Make no mistake, the Court finds that their testimonies are not reconcilable to any extent. There are details, of course, that the parties are in agreement, but on the key fact-based elements of the evidence, they are in irreconcilable conflict. It is the Court's responsibility to assess the believability of the witnesses. And with respect to Ms. J***'s testimony, notwithstanding counsel's –defense counsel's arguments that she was unable to recall very much, I would–my finding is that she recalled a great amount of detail. There were certain details that she did not recall. And in fact, in one respect, her memory apparently lapsed because there was some indication that he had handled her phone at some point prior to going back to the break room from the café. It is interesting that we don't know what that indication was to assess the extent of contact with the phone. It would have, to go into that would contemplate hearsay from the officer, and I suspect the attorneys have steered away from any hearsay difficulties in the record. But beyond that particular lapse of memory, it has been a long time, and that lapse of memory is not

a terribly significant lapse.

Given the quantity of detail that she remembered in terms of the sequence of events, the details with regard to being pulled by the arm, thinking that he was playing, she recalled what she was thinking at that time, telling him to stop when he was pulling her into the bathroom, how he began to kiss her and put his hands on her, and putting his hand in her vagina, screaming, asking if it hurt, someone coming in, her feelings of betrayal, how he was nice and playful before, but this went too far. I understand the take that defense counsel is making of this went too far, but I see her testimony in that regard as being simply what it purported to be. It is not a reference to the sexual conduct going too far. The sexual conduct to which she alleging [*sic*] consented, but, in fact, the entire notion of being pulled into the bathroom. At some point when she realized he was seriously pulling her into the bathroom, that went too far, and she resisted everything thereafter, according to her testimony. And given her demeanor she was indeed tearful, and emotional understandable discomfort. All of those aspects of her demeanor authenticate the testimony that she has given. And it's not at all insignificant that it's apparent that, with the exception of that one inconsistency in memory that wasn't specified very particularly, she apparently made no other inconsistent statements, which someone who is being truthful is

almost inevitably going to be rendering some inconsistent statement.

In contrast, the defendant was on the stand by reference of his demeanor on the one hand nervous, and minimizing, but also flat and unemotional, and resistive in the Court's view to some of the questions. For example; he was asked if he pulled her by the arm into the bathroom, and he denied doing so. And when he was confronted with whether he told the police he pulled her by the arm into the bathroom, he initially denied again pulling her into the bathroom; and ultimately, I think, he both denied telling the police such a statement, and then waffled a bit, saying something of the sort might have been said. He denied she said, ouch, at any time.

Then he was confronted with what was apparently a second inconsistency in that denial, because he was asked, did he admit to telling the officer that she said, ouch. And I believe he indicated that he might have told the officer that. He did not ever put his hand down the back of her pants, but much more freely, this is the third time through the drill on cross-examination, and he's getting used to it, admitted telling he did put his hand in the back of her pants.

On the key issues, there doesn't appear to be any corroboration of the defendant's testimony regarding force and consent. And yet, there are obvious corroborations to the testimony of Ms. J[.] on these issues. I know it was argued that it was inconsistent to scream, and

then not ask from [*sic*] help from a customer in the bathroom, and I know that's the argument, but I don't buy it. Perhaps it would be more perfect in a universe of circumstances to immediately tell the first person, even though it's a stranger, in the men's bathroom that she was just assaulted. But that's unrealistic. That's not inconsistent, and what proves it is that she immediately went to somebody that she did know, and made this prompt complaint. With respect to which we would have heard whether or not she made any inconsistent statements in the rendering of that complaint, because apparently a written statement exists, and she testified that she gave a written statement concerning these details that she rendered in her testimony.

My finding is the testimony of Ms. J[.] is entirely credible, and it is corroborated by other testimony and circumstances in the case. My finding that the defendant's testimony is not credible on the elemental issues with respect to which there is dispute in this case. I find that the defendant did force himself—force his sexual attentions on Ms. J[.], and all of the elements of the counts one and two have been proved beyond a reasonable doubt. Defendant is found guilty of counts one and two, criminal sexual assault and criminal sexual abuse."

¶ 29 D. The *Pro Se* Allegations of Ineffective Assistance of Counsel

¶ 30 On March 10, 2010, defendant filed a *pro se* motion for a new trial, in which he

alleged that the "public defender did not do everything to help [him] with the case." Specifically, the motion alleged as follows:

"A[.]J[.]'s testimony stated that we had never talked on the phone. Also that I did not call her after I left the bathroom. I told John Wright that there are phone records that will prove that we had talked. A[.]J[.] also testified that we did not know each other very well and that we had only talked a couple of times at work just as friends. I told him that a girl from work, Ashleigh Meginess, had talked to A[.]J[.] and she said that we were talking more then [sic] just friend[s]. When I told him these things he told me that they would not help. Then in court with both of these things it would have showed that A[.]J[.]'s testimony was false."

¶ 31 On March 15, 2010, the trial court made the following docket entry: "Defendant's *pro se* Motion for Retrial stricken per Circuit Rule. If motion not adopted by Defendant's counsel, Krankel inquiry to be conducted prior to sentence hearing."

¶ 32 E. The Sex-Offender Evaluation and Risk-Assessment

¶ 33 Heather A. Heinrich, a mental-health supervisor at BroMenn Medical Group, prepared a sex-offender evaluation and risk-assessment, filed on February 10, 2010. Heinrich wrote:

"When asked about his sex offense, Mr. Kisner stated that the offense occurred at Kmart, where he was working. He indicated that [A.J.] (age 16) was training him on the cash registers. According to Mr. Kisner, [A.J.] had 'grabbed my but' [sic] and said, 'I want to rape

you,' to him. He said that [A.J.] was 'touchy, feely, and flirty' toward him and that they began to text message each other. Mr. Kisner stated that [A.J.] kissed him one time when they were in the stock area getting Old Spice spray and that she was 'touchy feely with me' another day in the toy section. Mr. Kisner noted that he 'never wanted to have a relationship' with [A.J.]"

¶ 34 F. The Hearing on the *Pro Se* Motion for a New Trial

¶ 35 On March 30, 2010, the trial court held a hearing on defendant's *pro se* motion for a new trial. At the beginning of the hearing, Wright told the court:

"MR. WRIGHT: *** Mr. Kisner had filed a communication, a document, with the Court that he referred to as a Motion for a Retrial. The Court sent copies to counsel, and I have reviewed that with Mr. Kisner.

Quite frankly, Judge, the issue in the Motion for Retrial that I think might have some merit relates to the telephone records concerning whether or not Miss J[.] had a telephone communication with Mr. Kisner immediately after the incident in the bathroom.

My recollection and my notes are incomplete concerning Miss [J.]'s testimony concerning whether there was a telephone communication, but I think there was a denial of that.

Mr. Kisner indicates that his best memory is that he did call her and ask her if she got out of the bathroom.

Telephone records would address that issue, your Honor, so I guess on that basis I would be adopting the Motion for a New Trial, that aspect of Mr. Kisner's communication.

The balance of the communication, I think, relates to whether or not there was effective assistance of counsel, and, frankly, Judge, I'm not able to address those issues, if that is indeed how they are to be construed."

¶ 36 The trial court then questioned defendant: "[Y]ou've indicated that McGinnis [*sic*] would have said that [A.J.] and you were more than just friends at work. Is that basically what you're saying." Defendant answered yes.

¶ 37 The trial court then asked Wright if he had "any factual response" to defendant's allegation that he had told Wright about "McGinnis." Wright answered: "I do not have any recollection of Miss McGinnis having been given to me as an individual that could be any type of witness. I don't have any recollection of that."

¶ 38 Wright added:

"Judge, I guess the other issue is whether the telephone records should have been subpoenaed for trial.

Again, I'm not quite sure how that—I think that might go to the representation of counsel, but it also goes to, I think, the motion that I think might have some merit."

¶ 39 The trial court then inquired of the prosecutor: "[D]oes the State have any position with respect to the—what we're going to refer to as a Motion for Retrial filed March 10, 2010,

previously stricken but reinstated because of its adoption to the extent that Mr. Wright has adopted it?" The prosecutor, Jennifer McCoskey, responded: "The State's position is that I really—while that may have some small effect on her credibility, I suppose the fact of a phone conversation does not make what happened to her any less of a crime."

¶ 40 Judge Reynard concluded:

"Well, at this point the Court is of the belief that the proffered evidence concerning phone communication is not completely irrelevant, but it's essentially immaterial. It might guide the trier of fact to a slightly different calculation of the believability of the witnesses, but not to the extent that the entirety of the victim's testimony would be disbelieved. It is as likely as not a reflection upon the imperfections of memory as it would be on the credibility of the testimony.

With respect to what another witness could have offered, I'll take at face value the proffer by Mr. Kisner that the witness would have testified that we, referring to the Defendant and Ashley, were talking more than just friends, a very subjective judgment, and one that is not necessarily inconsistent with the victim's testimony that she didn't have a close relationship with the Defendant and, frankly, is indications [*sic*] that he didn't want such a close relationship with the victim and that that relationship did not exist.

The other differences between the proffered perspective of the

relationship provided by Miss J[.] is very subjective and imprecise and really does not guide the trier of fact meaningfully in altering the essential belief that the victim in this case was highly believable and the Defendant was not.

With that in mind, the Motion for Retrial, such as it was adopted by defense counsel, is denied."

¶ 41 Immediately after the hearing on the *pro se* motion for a new trial (on March 30, 2010), the trial court held a sentencing hearing, in which, after hearing arguments and considering the presentence investigation report, the court sentenced defendant to six years' imprisonment for count I, criminal sexual assault, and 24 months' probation for count II, criminal sexual abuse.

¶ 42 On April 27, 2010, defendant filed a motion to reduce the sentence, which the trial court denied on June 1, 2010.

¶ 43 Defendant filed his appeal on June 29, 2010.

¶ 44 II. ANALYSIS

¶ 45 A. Not Calling Ashley Meginnes as a Witness

¶ 46 If, after being convicted in a trial, the defendant complains to the trial court that he or she received ineffective assistance of counsel, the court is not automatically required to appoint new counsel. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Instead, the court should "first examine the factual basis of the defendant's claim." *Id.* at 77-78. The court can do so by asking questions of defense counsel, the defendant, or both of them; by reviewing the record; and by relying on its own knowledge of defense counsel's performance in the case. *Id.* at 78-79. "If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint

new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *Id.* at 78.

¶ 47 Defendant argues that the trial court should have appointed new counsel in this case because his "allegations show[ed] possible neglect of the case." *Moore*, 207 Ill. 2d at 78. Specifically, he alleged that Wright had neglected the case in two ways: (1) by failing to call Ashley Meginnes as a witness at trial, to establish that defendant and A.J. were, contrary to A.J.'s testimony, more than just friends; (2) by failing to subpoena and present as evidence A.J.'s cell phone records, which, according to defendant, would have established, again contrary to A.J.'s testimony, that A.J. had spoken with defendant on the telephone. If it had been proved that A.J. testified falsely on these two points, perhaps, defendant reasons, the trier of fact would have been less inclined to believe her when she testified that the sexual contact between herself and defendant in the men's restroom was against her will.

¶ 48 Calling Meginnes, however, would not have made defendant appear more credible than A.J., because if, as defendant represents, Meginnes would have testified that A.J. and defendant were "more than friends" (implying that they were intimate friends or lovers), her testimony would have contradicted defendant's testimony. Defendant testified he never had any desire to date A.J., and he denied having a crush on her. According to him, when she asked him to spend his break with her in the café, he coldly replied, " I'll think about it." Declining to call a witness who would contradict his client was not neglect on Wright's part.

¶ 49 B. Not Subpoenaing and Presenting A.J.'s Phone Records

¶ 50 According to defendant, the phone records would have impeached A.J.: they would have damaged her credibility by proving that, contrary to her testimony, she did indeed speak with

defendant on the telephone. "Generally," however, "the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel." *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). Only if the decision regarding impeachment was "objectively unreasonable" can it be characterized as neglectful. *Id.* at 327.

¶ 51 Admittedly, since this case came down to a credibility contest between A.J. and defendant, it would have been reasonable to impeach A.J. by proving that, contrary to her testimony, she did talk with defendant on the phone. It does not follow, though, that it was "objectively unreasonable," or outside the "wide range of reasonable professional assistance" (*Strickland v. Washington*, 466 U.S. 668, 689 (1984)), to forego impeachment on this collateral point. A.J. emphatically told Wright she could not remember everything after the passage of three years. In his professional judgment, Wright could have deemed it unlikely that the trier of fact would disbelieve A.J.'s testimony about the memorable events in the men's restroom just because she was inaccurate in her representation that defendant never spoke with her on the telephone.

¶ 52 In sum, because defendant's allegations of ineffective assistance either lacked merit or pertained to trial strategy, we find no manifest error in the trial court's decision not to appoint new counsel. See *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008).

¶ 53 III. CONCLUSION

¶ 54 For the foregoing reasons, we affirm the trial court's judgment. We award the State \$50 in costs against defendant.

¶ 55 Affirmed.