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2012 IL App (3d) 100723-U

Order filed August 23, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-10-0723
)	Circuit No. 08-CF-1087
)	
SCOTT A. RODRIGUEZ,)	Honorable
)	Amy M. Bertani-Tomczak,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Defendant did not show that trial counsel was ineffective for failing to tender a jury instruction and investigate the victim's social networking Web site. (2) The trial court did not err in considering the victim's age as an aggravating factor at sentencing.
- ¶ 2 Following a jury trial, defendant, Scott A. Rodriguez, was convicted of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)) and sentenced to 36 months of probation and 60 days in jail. Defendant appeals, arguing that: (1) trial counsel was ineffective

for failing to tender a mandatory jury instruction defining reasonable belief; (2) trial counsel was ineffective for failing to investigate the victim's social networking Web site for photographs soon after the incident; and (3) the trial court erred when it considered the age of the victim, a factor inherent in the offense, as an aggravating factor at sentencing. We affirm.

¶ 3

FACTS

¶ 4 On May 29, 2008, defendant was charged by indictment with criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)). The charge for aggravated criminal sexual abuse alleged that on May 10, 2008, defendant had sex with K.F., a minor, who was at least 13 but under 17 years of age, and defendant was at least 5 years older than K.F. Defendant pled not guilty and asserted the affirmative defense that he reasonably believed K.F. to be 17 years of age or older. See 720 ILCS 5/12-17(b) (West 2008).

¶ 5 On May 11, 2010, the cause proceeded to a jury trial. The evidence tended to establish that on the night of May 10, 2008, K.F. was 14 years old, but only nine days shy of her fifteenth birthday. K.F. was about 95 pounds and 5 feet 2 inches tall. K.F. was wearing eyeliner, a tank top with a sweatshirt over her top, and jeans. Defendant was 20 years old.

¶ 6 K.F. went to M.M.'s house. M.M. and K.F. were friends at the time of the incident, but not at the time of trial. K.F. and M.M. went to Walgreens in Lemont. M.M. called her friend Donald Murphy to pick her and K.F. up at the Walgreens parking lot to "hang out."

¶ 7 After Murphy received the phone call, defendant offered to drive Murphy to pick up M.M. and K.F. Defendant and Murphy arrived at Walgreens at approximately 8 p.m. K.F. had never met defendant or Murphy previously, and M.M. had never met defendant. When they got

into defendant's vehicle, defendant, Murphy, and K.F. smoked marijuana. On the way to Murphy's house in Joliet, defendant stopped at the liquor store to buy a bottle of liquor and beer. At approximately 9 p.m., they arrived at Murphy's house and went into the back bedroom where they drank alcohol. Murphy's mother was at the house, but in a different room.

¶ 8 About 45 minutes later, M.M. and Murphy left the bedroom, and defendant and K.F. were alone on the bed. Thereafter, K.F. and defendant had sexual intercourse; however, it was disputed whether it was consensual. After having sexual intercourse, K.F. had two lacerations to her vaginal wall, and was unable to control the bleeding. The evidence was conflicting as to whether the lacerations were caused by consensual sex. After trying to control the bleeding, K.F. called a friend to pick her up at Murphy's house. When K.F.'s friend arrived, she called the police, and K.F. was subsequently taken to the hospital.

¶ 9 M.M. testified that at some point at Murphy's house, she told Murphy that she and K.F. were 18 years old. M.M. did not know if defendant was present during this conversation. K.F. testified that she never told defendant her age. Although defendant did not testify at trial, a videotaped interview of defendant after the incident was played for the jury. Defendant stated that he did not know how old K.F. and M.M. were, but he would have guessed they were "17, 16 or 17 years old." After more discussion, defendant again stated he thought they were "16 or 17 years old."

¶ 10 At the close of the evidence, the court gave Illinois Pattern Jury Instructions, Criminal, No. 11.61 (4th ed. 2010) (hereinafter, IPI Criminal 4th No. 11.61), which defined aggravated criminal sexual abuse. The court also gave IPI Criminal 4th No. 11.62A, which stated the elements of aggravated criminal sexual abuse. This instruction included the fourth proposition,

which stated that the State must prove beyond a reasonable doubt that defendant did not reasonably believe K.F. to be 17 years of age or older. The committee note states that where the affirmative defense of reasonable belief is raised, "[a]lso give Instructions 4.13 and 11.64." IPI Criminal 4th No. 11.62A. The court also gave IPI Criminal 4th No. 11.64, which stated that it is a defense to aggravated criminal sexual abuse that defendant reasonably believed K.F. to be 17 years of age. The jury was not instructed on the definition of reasonable belief pursuant to IPI Criminal 4th No. 4.13.

¶ 11 During deliberations, the jury requested to see the pictures admitted at trial and the videotaped interview of defendant. The video was played in court, and the jury was given the photographs, which included two pictures of K.F. in the hospital on the night of the incident. The jury found defendant not guilty of criminal sexual assault, but guilty of aggravated criminal sexual abuse.

¶ 12 On August 17, 2010, defendant filed a motion for a new trial, arguing, *inter alia*, that K.F. intentionally misled the jury and committed perjury in that she misrepresented herself by her appearance, and portrayed herself to be much younger than she was. Attached to the motion were numerous photographs from K.F.'s MySpace page that defendant's mother obtained a few days prior to filing the motion. The photographs depicted K.F. with a tongue ring, smoking cigarettes, and kissing males. The trial court denied the motion.

¶ 13 At sentencing, the trial court stated that it had considered the evidence presented at sentencing and at trial, and it had weighed the factors in mitigation and aggravation. The court noted that although defendant did have a criminal record, this was his first felony. The court sentenced defendant to 36 months' probation and 60 days in jail. In imposing the jail sentence,

the court again noted defendant's criminal record, and that K.F. was 14 years old and defendant was 21 at the time.¹

¶ 14 Defendant filed a motion to reconsider sentence, arguing that the trial court erred when it considered K.F.'s age as an aggravating factor at sentencing. At the hearing on defendant's motion to reconsider, the court stated that even taking the difference in age out of consideration, the sentence would be the same. The court noted that defendant provided alcohol, brought the girls to a town in which they were not familiar, and did not offer them a ride home, even when K.F.'s medical condition occurred. The court denied defendant's motion. Defendant appeals.

¶ 15 ANALYSIS

¶ 16 I. Ineffective Assistance of Trial Counsel

¶ 17 On appeal, defendant first argues that his trial counsel was ineffective because counsel failed to: (1) tender a mandatory jury instruction defining reasonable belief; and (2) investigate K.F.'s social networking Web site for photographs soon after the incident.

¶ 18 To prevail on a claim of ineffective assistance of trial counsel, defendant must establish that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Manning*, 241 Ill. 2d 319 (2011). Defendant must overcome a strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence. *Id.*

¶ 19 A. Failure to Tender Jury Instruction

¹ Defendant was actually 20 years old at the time of the incident.

¶ 20 Defendant argues that counsel was ineffective for failing to tender IPI Criminal 4th No. 4.13. IPI Criminal 4th No. 4.13 defines reasonable belief to mean "that the person concerned, acting as a reasonable person, believes that the described facts exist." Despite the committee note in IPI Criminal 4th No. 11.62A recommending its use, trial counsel failed to tender IPI Criminal 4th No. 4.13 to the jury. Where defense counsel argues an affirmative defense, but then fails to ensure that the jury is properly instructed on that defense, that failure cannot be called trial strategy. *People v. Gonzalez*, 385 Ill. App. 3d 15 (2008). Accordingly, we find that defendant has shown trial counsel acted unreasonably when it failed to tender IPI Criminal 4th No. 4.13. See *Manning*, 241 Ill. 2d 319.

¶ 21 However, even with counsel's deficient performance, defendant has not shown he was prejudiced by counsel's failure to request the subject jury instruction. Defendants cannot show prejudice merely by speculating that the results would have been different if counsel had performed differently. *People v. Love*, 285 Ill. App. 3d 784 (1996). Here, the jury was fully instructed on defendant's affirmative defense and the State's burden of proof, with the exception of the definition of reasonable belief. Unlike *Gonzalez*, the jury in this case was fully informed of the State's burden to disprove defendant's affirmative defense. See *Gonzalez*, 385 Ill. App. 3d 15. Moreover, although a plain error case, the court in *People v. Underwood*, 72 Ill. 2d 124 (1978), held that the failure to instruct the jury on IPI Criminal 4th No. 4.13 was not so fundamentally tied to the instruction of self-defense as to result in an unfair trial. In this regard, we note that the phrase "reasonable belief," like the term "reasonable doubt," is somewhat self-defining, and the failure to provide further instruction as to its meaning is a less egregious error than in certain other instances. See *People v. Speight*, 153 Ill. 2d 365 (1992).

¶ 22 Additionally, it was undisputed that defendant told the police after the incident he thought K.F. was 16 or 17 years of age. To sustain a defense of reasonable belief, the evidence had to show that defendant reasonably believed that K.F. was 17 years of age or older. See 720 ILCS 5/12-17(b) (West 2008). Defendant's own admission cast significant doubt on this claim. Therefore, even though counsel failed to tender a jury instruction defining reasonable belief, defendant was unable to show there was a reasonable probability the result of the trial would have been different had the instruction been tendered. See *Manning*, 241 Ill. 2d 319.

¶ 23 B. Failure to Investigate

¶ 24 Defendant next argues that counsel was ineffective for failing to investigate K.F.'s social networking Web site close in time to the incident to support the theory that defendant reasonably believed K.F. to be 17 years of age. Whether trial counsel was ineffective for failing to investigate is generally determined by the value of the evidence that was not presented and the closeness of the evidence that was presented. *People v. Makiel*, 358 Ill. App. 3d 102 (2005). Failure to conduct an investigation and develop a defense has been found to be ineffective assistance. *People v. Coleman*, 267 Ill. App. 3d 895 (1994).

¶ 25 In the instant case, we do not find that counsel acted unreasonably by failing to investigate K.F.'s social networking Web site. Defendant suggests that the photographs on K.F.'s MySpace account, which were obtained after trial, showed K.F. as a female who at different times appeared to be at least 17 years old. We note that the trial in this case occurred almost two years to the day after the occurrence. The photographs were taken off the Internet three months after the trial, when the victim was 17 years old. Despite defendant's argument, there was no evidence presented that the photographs were on K.F.'s account prior to the incident or that

defendant viewed these photographs. Additionally, the jury was presented with a photograph of K.F. from the night of the incident. Evidence is relevant where it tends to make the existence of a material fact more or less probable than it would be without the evidence. *People v. Nelson*, 235 Ill. 2d 386 (2009). Therefore, photographs of K.F. taken before or after the incident would not have been relevant to the issue of whether defendant reasonably believed K.F. was 17 years old or older on the night of the incident. See *Id.* We note that many of the photographs were dated two years or more after the incident.

¶ 26 Furthermore, as stated above, even if counsel's performance was unreasonable, defendant has not shown prejudice, because defendant told the police he thought K.F. was 16 or 17 years old. Therefore, even if additional photographs of K.F. had been shown to the jury, defendant is unable to show there is a reasonable probability the result of the trial would have been different. See *Manning*, 241 Ill. 2d 319.

¶ 27 II. Inherent Factor at Sentencing

¶ 28 Finally, defendant argues that the cause should be remanded for a new sentencing hearing because the trial court erred when it considered K.F.'s age, a factor inherent in the offense, as an aggravating factor at sentencing.

¶ 29 Although a trial court has broad discretion when imposing a sentence, it may not consider a factor implicit in the offense as an aggravating factor in sentencing. *People v. Ellis*, 401 Ill. App. 3d 727 (2010). A trial court may consider the nature and circumstances of the offense, including the nature and extent of each element of the offense committed by defendant. *People v. Phelps*, 211 Ill. 2d 1 (2004); *People v. Wyatt*, 186 Ill. App. 3d 772 (1989). However, even if the trial court relied on an improper factor in aggravation, it will not necessarily require remand

where it can be determined from the record that the weight placed upon the improper factor was insignificant and did not lead to a greater sentence. *People v. Beals*, 162 Ill. 2d 497 (1994).

¶ 30 In the instant case, we find that the trial court properly considered K.F.'s age, because the court may consider the nature and circumstances of the offense, such as the victim's extreme youth. See *Wyatt*, 186 Ill. App. 3d 772.

¶ 31 For example, the court could consider that the victim was 14 and not 16. However, even if we were to find that it was improper for the trial court to consider K.F.'s age in aggravation, we can determine that any weight the court placed on K.F.'s age did not lead to a greater sentence for defendant. See *Beals*, 162 Ill. 2d 497. In addition to considering K.F.'s age, the court also considered defendant's prior criminal activity, which is a proper aggravating factor. See 730 ILCS 5/5-5-3.2(a) (West 2008). Moreover, at the hearing on defendant's motion to reconsider, the court stated that taking the difference in age out of consideration, defendant's sentence would be the same, because defendant provided alcohol, brought the girls to a town in which they were not familiar, and did not offer them a ride home, even when K.F.'s medical condition occurred. Consequently, we find that the court's consideration of K.F.'s age did not constitute an abuse of discretion warranting vacating defendant's sentence. See *Beals*, 162 Ill. 2d 497.

¶ 32

CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 34 Affirmed.