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2013 IL App (3d) 110453-U

Order filed March 27, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS, ) Appeal from the Circuit Court  
 ) of the 21st Judicial Circuit,  
Plaintiff-Appellee, ) Kankakee County, Illinois,  
 )  
v. ) Appeal No. 3-11-0453  
 ) Circuit No. 08-CF-579  
CHRISTOPHER J. BRZA, )  
 ) Honorable  
Defendant-Appellant. ) Kathy Bradshaw-Elliott,  
 ) Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Carter and Schmidt concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Defense counsel was ineffective for failing to present readily available evidence and request jury instructions on an affirmative defense.
- ¶ 2 Defendant, Christopher J. Brza, was convicted of attempted aggravated criminal sexual abuse (720 ILCS 5/8-4, 12-16(d) (West 2008)) and sentenced to probation. Defendant appeals, arguing that his trial counsel provided ineffective assistance by failing to: (1) request jury instructions on the affirmative defense that he reasonably believed the victim was 17 years of age or older; and (2)

present readily available evidence in support of the affirmative defense. We reverse and remand.

¶ 3

### FACTS

¶ 4 On September 10, 2008, the complainant, A.D., gave a videotaped interview to police discussing a sexual encounter between her and defendant one day earlier. Thereafter, the State charged defendant with five counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)). It was alleged that defendant engaged in sexual activity with A.D. when she was at least 13 but less than 17 years old, and defendant was at least 5 years older than her. The cause proceeded to a jury trial.

¶ 5 During his opening statements, defense counsel told the jury that it would find that the sex was consensual but that A.D. had lied about her age. Counsel stressed that at the time of the incident, A.D. was two days short of her 17th birthday and she was associating with a 22-year-old. He indicated that the evidence would establish not only that A.D. lied about her age but that she appeared to be at least 17 years old.

¶ 6 During trial, A.D. testified that she was 19 years old and that she had engaged in sexual intercourse with defendant on September 9, 2008, two days before her 17th birthday. She had met defendant while purchasing a phone from an AT&T store where defendant worked. She had gone to the store with two friends, one of whom was 22 years old. After A.D. and defendant had met, they exchanged many text messages. She claimed that at this point, defendant knew she was 16 years old. Eventually, defendant invited A.D. to his house, and she accepted the invitation. When she arrived at defendant's house, defendant joined her in the car, and they began kissing. Defendant also placed a finger and his tongue into A.D.'s vagina. Defendant and A.D. went into his house, where they engaged in sexual intercourse. A.D. said the encounter was consensual.

¶ 7 During the testimony of Detective Robert Mason, the State played a videotaped interview of defendant a day after the incident occurred. During the interview, defendant told the officers that he was 33 years old. He admitted that he knew A.D.; however, he denied engaging in sexual activities with her. He stated that after meeting her at the AT&T store, she arrived at his house one night and asked him to "hang out" with her in her car. He said that he did not want to do that, so they went into his house. Defendant claimed that at this point, A.D. had informed him that she was 19 years old. While in the house, defendant and A.D. talked. Eventually, he found out that she was 16 years old and, upon learning this, he asked her to leave.

¶ 8 While cross-examining Mason, defense counsel asked if the detective had a photo of A.D. at the time of the incident so that the jury could see what she looked like. Mason stated that he did not have a photo. Outside the presence of the jury, defense counsel complained that the videotaped interview of A.D., or a snapshot thereof, was not presented as evidence and that the State was attempting to keep A.D.'s appearance at the time of the incident hidden from the jury.

¶ 9 After presenting its evidence, the State informed the court that it planned to request an attempt instruction for one of the counts of aggravated criminal sexual abuse. The court stated that it would give the instruction.

¶ 10 During closing arguments, defense counsel discussed defendant's belief that A.D. was at least 17 years old. Counsel reminded the jury that defendant had informed the police that A.D. told him she was 19 years old. He stated that she was driving her own car and she was associating with a friend who was 22 years old. Counsel asked the jury to consider why the State had failed to provide a picture of A.D. He suggested it was because she did not look underage. Counsel then said, "is it so hard to believe that [the victim] fudged her age? Because if she did, he's not guilty."

¶ 11 Despite counsel's arguments, he did not request an instruction on the affirmative defense that defendant reasonably believed that the victim was at least 17 years old. The jury acquitted defendant of all four counts of aggravated criminal sexual abuse, but found him guilty of attempted aggravated criminal sexual abuse. The trial court sentenced defendant to probation. Defendant appeals.

¶ 12

#### ANALYSIS

¶ 13 Defendant argues that trial counsel provided ineffective assistance by failing to: (1) request jury instructions on the affirmative defense that he reasonably believed the victim was 17 years of age or older; and (2) present readily available evidence in support of the affirmative defense. To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's representation 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. *People v. Albanese*, 104 Ill. 2d 504 (1984). In order to establish the first prong, the defendant must show that counsel's performance was so inadequate that counsel was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 241 Ill. 2d 319 (2011). In doing so, the defendant must overcome a strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *Id.* This presumption may be overcome where no reasonably effective criminal defense attorney would engage in similar conduct. *People v. Fletcher*, 335 Ill. App. 3d 447 (2002).

¶ 14 In this case, we conclude that by failing to present evidence of the victim's appearance and to request an affirmative defense instruction, counsel's performance fell below an objective standard of reasonableness. A defendant's reasonable belief that the complainant was 17 years old or older operates as an affirmative defense to aggravated criminal sexual abuse. See 720 ILCS 5/12-17(b)

(West 2008)); *People v. Jones*, 175 Ill. 2d 126 (1997). Here, it appears that counsel could have used the video to support his claim that the victim looked as though she was at least 17 years old at the time of the incident. Counsel did ask a State witness if he had a picture of the victim at the time of the incident, and later complained that the State did not present a snapshot of the videotaped interview. However, at no point did counsel attempt to place a portion of the video or a photograph thereof into evidence, even though it was within his power. We believe that counsel's failure to present her appearance amounted to deficient performance. See *People v. York*, 312 Ill. App. 3d 434 (2000).

¶ 15 Further, we find that counsel was deficient when he failed to request a jury instruction on the affirmative defense of reasonable belief. See Illinois Pattern Jury Instructions, Criminal, No. 11.64 (4th ed. 2000). During trial, counsel argued in both his opening and closing arguments that the victim appeared to be at least 17 years old when the sexual encounter occurred. As we have noted, there was visual evidence supporting that theory. Thus, by failing to ask for an affirmative defense instruction, counsel's performance was deficient.

¶ 16 We also find that defendant has shown a reasonable probability that the result of the proceeding would have been different absent counsel's deficient performance. The victim here was two days short of her 17th birthday at the time of the incident. Had counsel presented the aforementioned visual evidence, as bolstered by a reasonable belief instruction, we believe that there is at least a reasonable probability that the jury would have found that defendant was not guilty. Therefore, we find that defendant was prejudiced by counsel's deficient performance.

¶ 17 Based on the foregoing, we conclude that counsel was ineffective. Therefore, we reverse defendant's conviction and remand the cause for a new trial.

¶ 18

## CONCLUSION

¶ 19 The judgment of the circuit court of Kankakee County is reversed, and the cause is remanded for further proceedings.

¶ 20 Reversed and remanded.