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2014 IL App (3d) 120459-U

Order filed January 9, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 10th Judicial Circuit,
Plaintiff-Appellee,) Peoria County, Illinois,
)
v.) Appeal No. 3-12-0459
) Circuit No. 11-CF-183
CORTEZ DIXON,)
) Honorable
Defendant-Appellant.) Timothy M. Lucas,
) Judge, Presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err when it failed to *sua sponte* issue a jury instruction regarding the medical exception to predatory criminal sexual assault, and counsel was not ineffective for failing to request the instruction. (2) Defendant's \$200 DNA analysis fee is vacated.

¶ 2 Defendant, Cortez Dixon, was convicted of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) and two counts of aggravated battery of a child (720 ILCS 5/12-4.3(a), (a-5) (West 2010)). He was sentenced to 26 years in prison. Defendant appeals, arguing that:

(1) the trial court erred by not *sua sponte* issuing a jury instruction on the medical exception to predatory criminal sexual assault of a child; (2) trial counsel was ineffective for failing to request the above jury instruction; and (3) his \$200 deoxyribonucleic acid (DNA) analysis fee should be vacated.

We vacate the DNA analysis fee and otherwise affirm.

¶ 3

FACTS

¶ 4 Defendant was charged with predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) and two counts of aggravated battery of a child (720 ILCS 5/12-4.3(a), (a-5) (West 2010)). The cause proceeded to a jury trial, where the State attempted to prove that defendant committed an act of sexual penetration and caused great bodily harm to his 13-day-old daughter by forcibly inserting his fingers into her anus.

¶ 5 At trial, the State presented the testimony of Dr. Channing Petrak. Petrak testified that she was an expert in the field of pediatrics and that she had examined the victim on February 20, 2011. As part of her examination, Petrak reviewed the medical records of the victim. The records indicated that the victim was in good health and had no reported history of illness or constipation following her discharge from the hospital after birth. During a physical examination of the victim, Petrak discovered that the anus was abnormal. Specifically, Petrak noted that there was a complete lack of anal tone, a significant amount of swelling, redness, purple bruises, and deep lacerations.

¶ 6 A day after the initial examination, Petrak again examined the victim. She noticed that there had been some healing and that the anal tone and the bruising had improved slightly; however, the lacerations remained. At this point, Petrak noticed a bruise along the infant's jaw line. The injury was consistent with an adult holding their hand over the victim's mouth and pressing firmly with a thumb or fingers. Although Petrak did not note it during her original examination, Petrak stated that

it was noticed that day by a pediatric resident. Because the victim was a nonmobile infant, Petrak stated that the bruise on the victim's jaw was highly suspicious for abuse.

¶ 7 Based on her examinations of the victim, Petrak concluded that the injuries to the victim's anus were caused by a penetrating trauma. She noted that the injuries were not likely caused by someone slightly inserting a finger to relieve constipation. Such a procedure should not cause such significant injury unless performed with significant force. Petrak further stated that the insertion of a finger to aid in the relief of constipation does not normally result in any bruising or tearing. Petrak testified that she had never seen such injuries caused by a parent incorrectly performing the procedure.

¶ 8 The victim's mother, V.M., also testified. She stated that she had changed the victim's diaper on February 19, 2011, the night before the examination by Petrak, and the victim's buttocks region looked normal. That evening, V.M. was with defendant at the home of her friend, Kayla Linville. At one point, V.M. took a shower and left the victim and defendant alone in the living room. By the time she got out of the bathroom, approximately 40 minutes later, she noticed that defendant had taken the victim to the bedroom and had closed the door. Soon after, defendant asked to engage in anal sex with V.M.; however, she declined. V.M. did consent to oral sex, but stopped because the position was hurting her. After attempting coitus, defendant informed V.M. that he had something to show her. He took her into the kitchen and showed her a bloody diaper in the trash can. The next morning, V.M. noticed that the victim's anus was big and that she could "see inside it." She had never seen the victim's anus look like that before. After making the discovery, V.M. took the victim to the hospital. V.M. confirmed that the victim had never been constipated.

¶ 9 Kayla Linville, a friend of V.M.'s, testified that V.M., defendant, and the victim stayed at her

house the night of February 19, 2011. Linville admitted that she originally told police that defendant was not at the house; however, she later called the detective and informed her that defendant had been there that night. She originally withheld the information because V.M. had requested she do so. At one point during the night, Linville noticed defendant had taken the victim into the bedroom and closed the door. While they were in the bedroom, she heard the victim crying very loudly and then abruptly stopping. The next day, Linville found a "very bloody diaper" in her trash can.

¶ 10 Police Detective Ruth Sandoval testified that she interviewed defendant as part of an investigation into the matter. Defendant admitted to taking the infant into the bedroom; however, he denied seeing anything wrong with the victim's anus when he changed her diaper. Sandoval informed defendant that the infant had a medical condition caused by trauma or injury. Defendant again stated that he had not seen anything wrong with the victim. Sandoval then showed defendant photos of the injury. At this point, she noticed a change in defendant, and he admitted that he had observed something; however, he denied seeing the bloody diaper.

¶ 11 As detectives continued to interrogate defendant, he informed them that the injury must have been caused by V.M. He stated, "if [V.M.]'s saying that I did it, then I'm gonna say that she did it." At some point, defendant admitted he had seen a problem with the victim's anus, and informed the detectives that he was ready to tell them something. Defendant then stated that he had "put one finger up her butt" but only up to the second knuckle. He stated that he did not hurt her, and that she was constipated and he was trying to help her. Eventually, defendant acknowledged that he had seen the bloody diaper.

¶ 12 Sandoval informed defendant that his story did not match the injury to the victim. She again showed defendant a photo of the injuries and noted how his small fingers could not have caused the

injury by simply being inserted in a gentle manner. At this point, defendant informed Sandoval that he had inserted two fingers into the victim's anus. Again, he stated that he was doing it in an attempt to relieve her of constipation. Defendant stated that he had used a few different fingers and combinations to relieve the infant's constipation. Sandoval asked if he had learned this procedure from his family. Defendant said that he had not, but he thought it would work because his experience with anal sex led him to an understanding that "if you hit a girl in the right spot that she will shit and stuff comes out."

¶ 13 During argument, defense counsel contended that defendant inserted his fingers in an attempt to relieve the victim's constipation. However, defense counsel did not request an instruction to the jury explaining the medical exception to predatory criminal sexual assault. Therefore, no such instruction was issued. At the conclusion of the trial, the jury found defendant guilty of all three counts. The trial court sentenced him to 26 years in prison. Defendant was also ordered to pay a \$200 DNA analysis fee. Defendant appeals.

¶ 14

ANALYSIS

¶ 15

I

¶ 16 Defendant first argues that the trial court erred when it did not *sua sponte* issue a jury instruction regarding the medical exception to predatory criminal sexual assault. See 720 ILCS 5/12-18 (West 2010) (setting forth exception to criminal liability for medical procedures performed by parent or medical personnel). Initially, we note that defendant failed to raise the issue at trial or in a posttrial motion; therefore, the issue was forfeited. Ill. S. Ct. R. 615(a). However, defendant argues that an exception to the forfeiture rule found in Illinois Supreme Court Rule 451(c) (eff. July 1, 2006) allows review in this case. Rule 451(c) states that substantial defects in jury

instructions are not waived by the failure to make a timely objection. *Id.* Courts have found that this exception only allows for the correction of grave errors. See *People v. Huckstead*, 91 Ill. 2d 536 (1982).

¶ 17 We find that grave error did not occur here. It is the burden of the party who desires a specific instruction to present it to the court and request that it be given to the jury. *People v. Turner*, 128 Ill. 2d 540 (1989). A court is only required to offer a jury instruction *sua sponte* where a fair trial requires the court to do so. *Id.* Specifically, a court is only required to tender an instruction *sua sponte* if it relates to: (1) the elements of the crime charged; (2) the presumption of innocence; or (3) the burden of proof. *People v. Franklin*, 135 Ill. 2d 78 (1990). An instruction relating to a possible defense does not implicate any of the above categories. Therefore, we find that the trial court did not err when it failed to tender an instruction relating to the medical exception to predatory criminal sexual assault. Because there was no error, we do not find that the exception found in Rule 451(c) applies. Thus, the issue has been forfeited.

¶ 18

II

¶ 19 Next, defendant argues that his trial counsel was ineffective for failing to request a jury instruction regarding the medical exception to predatory criminal sexual assault. 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). Defendant must satisfy both prongs in order to prevail on a claim of ineffective assistance of counsel; however, if the claim can be disposed of on the ground that defendant did not suffer prejudice, a court need not determine whether counsel's performance was

deficient. *Id.*

¶ 20 Here, we do not believe that defendant has established a reasonable probability that the result of the proceeding would have been different had counsel requested a jury instruction regarding the medical exception. Defendant's own version of events was unreliable. Defendant changed his story a number of times, slowly admitting to knowledge of the injuries and touching the area, until he finally settled on a theory that he inserted two fingers in the victim's anus in an attempt to relieve constipation. In contrast to defendant's story, the evidence of guilty was clear and unequivocal. The victim's mother testified that the infant was never constipated. The doctor who examined the victim, an expert in pediatrics, stated that the insertion of a finger to relieve constipation should not cause the extreme injuries discovered on the victim. The doctor also testified that she had never seen such injuries caused by a parent incorrectly performing a procedure. V.M. and Linville provided additional testimony suggesting that defendant's contact with the victim was not medical in nature. We conclude that there is not a reasonable probability that the result of the proceeding would have been different had counsel requested a jury instruction regarding the medical exception to predatory criminal sexual assault.

¶ 21

III

¶ 22 Finally, defendant contends that the \$200 DNA analysis fee assessed against him at sentencing should be vacated. Section 5-4-3 of the Unified Code of Corrections mandates that all individuals convicted of an offense that is classified as a felony under Illinois law after January 1, 1998, submit to the taking, analyzing, and indexing of their DNA, and the payment of an analysis fee. 730 ILCS 5/5-4-3(a), (j) (West 2010). However, a defendant is only required to submit to and pay for the DNA assessment when he is not currently registered in the DNA database. *People v.*

Marshall, 242 Ill. 2d 285 (2011). Here, defendant has provided a record from the Illinois State Police Forensic Services which states that, pursuant to a prior conviction, defendant's DNA was received on April 30, 2009, and a profile was obtained for the DNA database. We take judicial notice of that record. See *People v. Jimerson*, 404 Ill. App. 3d 621 (2010). Because defendant's DNA was previously registered, we vacate the DNA analysis fee assessed against him at sentencing.

¶ 23

CONCLUSION

¶ 24 The judgment of the circuit court of Peoria County is affirmed in part and vacated in part.

¶ 25 Affirmed in part and vacated in part.