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2016 IL App (3d) 130343-U

Order filed January 13, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0343
)	Circuit No. 10-CF-2113
BRIAN D. PEPPERS,)	Honorable
Defendant-Appellant.)	Sarah F. Jones, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice O'Brien and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* After the trial court ordered a new trial, defense counsel was ineffective for stipulating to the court's decision on a motion *in limine* decided prior to the first trial.

¶ 2 Defendant, Brian D. Peppers, was charged with two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2010)). The charges alleged that defendant was more than five years older than 15-year-old T.T. and he placed his penis and fingers inside T.T.'s vagina.

¶ 4 Prior to trial, the State filed a motion *in limine* to bar testimony about T.T.'s prior sexual history. Defendant argued that T.T.'s sexual history was relevant to his defense theory—that he reasonably believed defendant was at least 17 years of age—and relevant to show bias on the part of a State's witness. The court granted the State's motion. A jury found defendant guilty on both counts.

¶ 5 Defendant filed a motion for a new trial, arguing that a State's witness's prior inconsistent statements were not disclosed to defendant. The court granted the motion, and the cause proceeded to a bench trial. After a bench trial, the court found defendant guilty on both counts and sentenced him to concurrent sentences of 5½ years' imprisonment.

¶ 6 Defendant appeals, arguing that trial counsel was ineffective for failing to move, before the second trial, to introduce evidence of T.T.'s prior sexual history. In addition, defendant argues that the cause should be remanded for recalculation of fines and fees.

¶ 7 On September 16, 2015, this Court entered an order pursuant to Illinois Supreme Court Rule 23 (eff. July 1, 2011) affirming defendant's conviction. In the order, this court rejected defendant's argument that defense counsel provided ineffective assistance of trial counsel by failing to impeach the State's witness, Nicholas Ferreira, with evidence of Ferreira's past sexual history with T.T. In reaching that conclusion, this court found defense counsel performed deficiently but the error did not prejudice defendant because the testimony of witnesses other than Ferreira sufficiently supported the jury's finding. Defendant filed a petition for rehearing arguing that he established prejudice because the other witnesses' testimony was unreliable and contradicted by the record. We reverse and remand for further proceedings.

¶ 8

FACTS

¶ 9 Prior to defendant's first trial, the State filed a motion *in limine*, seeking to bar admission of any testimony addressing T.T.'s sexual activity with anyone other than defendant. The motion argued that any such testimony was prohibited by section 115-7 of the Illinois Code of Criminal Procedure of 1963 (rape shield statute) (725 ILCS 5/115-7 (West 2010)). Defendant argued that T.T.'s alleged sexual history with the State's witness, Nicholas Ferreira, was admissible under the exception to section 115-7(a) for testimony that was "constitutionally required to be admitted." 725 ILCS 5/115-7(a) (West 2010). Defendant argued that the sexual relationship between T.T. and Ferreira supported defendant's theory of the case and was necessary to adequately confront Ferreira.

¶ 10 According to defendant, Ferreira's testimony was potentially biased because the sexual relationship between T.T. and Ferreira was criminal, but Ferreira had not been charged with a crime. Ferreira was therefore subject to impeachment. Furthermore, the sexual relationship between Ferreira and T.T. showed that Ferreira was more likely to fabricate testimony to protect someone with whom he shared an intimate relationship. In addition, defendant's awareness of the sexual history between T.T. and Ferreira bolstered defendant's defense theory that defendant reasonably believed T.T. to be 17 years of age. That is, defendant would have reasonably believed that any sexual relationship between Ferreira and another person was legal, and therefore that T.T. must have been at least 17 years of age. The court denied the motion. The cause proceeded to a jury trial.

¶ 11 Nicholas Ferreira, a 20 year old at the time of the incident, testified that he had known defendant for a few years. On the night of February 27, 2010, Ferreira, his brother Anthony, Ryan Allen, defendant, T.T., and T.T.'s female friend, A.Q., were socializing and drinking alcohol at Ferreira's parents' house while his parents slept. Ferreira discovered defendant and

T.T. having sex in the bathroom. He told them to relocate to the basement, which they did. Later, Ferreira went to the basement to get a drink and saw defendant and T.T. again having sex on a couch. Later that night, T.T. joined Ferreira and another friend while they sat in Ferreira's car. T.T. was upset and told Ferreira that defendant had raped her. When Ferreira went back inside the house, defendant seemed aggravated. Earlier that day, Ferreira told defendant that T.T. was 16 years of age.¹

¶ 12 After Ferreira's testimony, defendant moved for a mistrial. He argued that the State's pretrial discovery suggested that Ferreira had told defendant about T.T.'s age months before February 27, 2010, and not earlier that day. Defendant argued that he wanted to impeach Ferreira based upon his potentially inconsistent statements but could not because the only witnesses to Ferreira's pretrial statements were the two State's Attorneys conducting the trial. The court denied the motion.

¶ 13 T.T. testified that on the night of February 27, 2010, she was using the bathroom at Ferreira's parents' house when defendant entered, pushed her against the wall, stripped her of her clothes and inserted his fingers and penis into her vagina. He stopped when Ferreira entered the bathroom. T.T. exited the bathroom and tried to call a friend to come get her. Defendant grabbed T.T. and took her to the basement, where he again had vaginal sex with her on a couch. Afterward, he said he was sorry. The following day, T.T. had a rape kit conducted. T.T. testified that she was 15 years of age on February 27, 2010. She had previously met defendant in November 2009, when she was in a car with both defendant and Ferreira. At that time, both she and Ferreira told defendant that she was 15 years of age.

¹Ferreira was apparently mistaken, as T.T. was 15 years of age on February 27, 2010.

¶ 14 J. Nicholas Miller testified that, after defendant was charged in the present case, defendant told Miller that he had been charged with having sex with a 15-year old. Defendant said he planned to beat the charges by testifying that he thought T.T. was at least 17 years of age. Defendant told Miller that at the time of the alleged crimes, he knew T.T. was actually 15 years of age. Defendant explained that he was in a car when Ferreira told him T.T.'s age, but defendant planned to testify that music playing in the car was too loud for him to hear what Ferreira said. Miller remembered defendant saying that he and T.T. had sex on a washer and dryer.

¶ 15 During Miller's testimony, the State's questioning revealed that Miller and defendant were in the custody of the Will County sheriff's department when the conversation occurred, in violation of the court's pretrial order, which barred the State from mentioning that defendant and Miller met while in custody. Defendant moved for a mistrial. The court denied that motion, electing instead to admonish the jury not to consider defendant's presence in custody. Miller testified that he did not receive consideration from the State in exchange for his testimony.

¶ 16 Defendant testified that at around 9 p.m. on February 27, 2010, he and Ferreira went to the store to buy alcohol. After the purchase, defendant went home but then went to Ferreira's house around 11 p.m. Later that evening, he had consensual sex with T.T. in the bathroom and on a couch in the basement. At that time, he did not know T.T.'s age but believed that she was at least 17 years of age. Defendant also acknowledged that he had a previous felony conviction for which he was sentenced to the department of corrections from August 12, 2009, to January 8, 2010.

¶ 17 The jury found defendant guilty on both counts. Defendant filed a motion for a new trial, arguing, in part, that a new trial was necessary because Ferreira testified that he told defendant

T.T.'s age on February 27, 2010, rather than three months earlier, as the State's pretrial discovery suggested. The court granted a new trial on that basis and barred the same State's Attorneys from prosecuting the new trial.

¶ 18 The cause proceeded to a second trial. Prior to the bench trial, the court asked defense counsel if he had any motions to argue. Counsel responded that he had "none other than my understanding there [were] motions already argued prior, and I believe all those arguments and the rulings would stand." The parties stipulated that the witnesses' testimony and exhibits from the first trial would be admitted at the new trial, except that T.T. and Ferreira would testify anew.

¶ 19 T.T. testified that in November 2009, she met defendant and told him that she was 15 years of age. She did not tell him her age on the night of February 27, 2010. She testified consistently with her earlier testimony as to the events of February 27, 2010.

¶ 20 Ferreira testified consistently with his previous testimony. He again testified that on February 27, 2010, prior to the sexual encounter between defendant and T.T., Ferreira told defendant that T.T. was 16 years old. Ferreira did not remember telling defendant about T.T.'s age any time prior to February 27, 2010. According, to Ferreira, at the time of the incident, Ryan was 18 years old, Anthony was 19 years old, and both T.T. and A.Q. were 16 years old.

¶ 21 The court found defendant guilty on both counts and sentenced him to concurrent sentences of 5½ years' imprisonment, in addition to various costs, including a \$10 preliminary hearing fee; a \$50 appeal fee; a \$10 mental illness fee; and a \$100 Violent Crimes Victims Assistance Fund fine.

¶ 22 ANALYSIS

¶ 23 On rehearing, defendant argues that trial counsel provided ineffective assistance by failing to argue, prior to the second trial, that he should be allowed to introduce evidence of

T.T.'s prior sexual history with the State's witness, Ferreira. Upon review, we find defense counsel performed deficiently by stipulating to the trial court's previous ruling which prohibited the defense from introducing such evidence. We further find that there is a reasonable probability that the result of the proceeding would have been different absent defense counsel's stipulation.

¶ 24 To succeed on a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was deficient, in that it fell below an objective standard of reasonableness; and (2) absent counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

¶ 25 Before examining the first *Strickland* prong, we must first look to the substantive law involving the rape shield statute. A defendant has a constitutional right to introduce the sexual history evidence under the confrontation clauses of the United States and Illinois constitutions. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. The right of confrontation grants a defendant the ability to attack the credibility of the witnesses against him. *Davis v. Alaska*, 415 U.S. 308, 318 (1974). A statute—such as the rape shield statute—cannot shelter a witness from a defendant's constitutional right to establish a witness's motive, prejudice, or bias. 725 ILCS 5/115-7 (West 2010); *People v. Sandoval*, 135 Ill. 2d 159, 175 (1990). Further, "[i]n some instances, due process requires the admission of evidence of the victim's sexual history where that evidence is relevant to a critical aspect of the defense." *People v. Anthony Roy W.*, 324 Ill. App. 3d 181, 186 (2001).

¶ 26 In the present case, counsel should have attempted to introduce evidence of the sexual relationship between T.T. and Ferreira to establish that a State's witness (Ferreira) harbored a

potential bias. Ferreira's relationship with T.T. would have been a criminal act based on their ages. Defendant therefore had a reasonable ground for cross-examining Ferreira about the possible connection between his testimony and the lack of criminal charges brought against him. See *People v. Triplett*, 108 Ill. 2d 463 (1985). Furthermore, the sexual relationship between Ferreira and T.T. showed that Ferreira would be more likely to fabricate testimony to protect someone with whom he shared an intimate relationship. Last, defendant's awareness of the sexual relationship supports the defense theory that defendant reasonably believed that any sexual relationship between Ferreira and another person was legal and, therefore, T.T. must have been at least 17 years of age.

¶ 27 We conclude that defense counsel's performance fell below an objective standard of reasonableness when he failed to argue that defendant should be allowed to cross-examine Ferreira regarding his relationship with T.T. In coming to this conclusion, we acknowledge counsel generally would not be deemed ineffective for failing to repeat an already denied objection. *People v. Holmes*, 397 Ill. App. 3d 737, 745 (2010). However, the question of whether a trial court should have allowed certain evidence is an objective one. *People v. Harris*, 182 Ill. 2d 114, 146 (1998). Put another way, the question is whether the trial court *should* have allowed the evidence; not whether this particular trial court *would* have allowed the evidence. *Id.* For the reasons discussed above, we hold the nature of the relationship between Ferreira and T.T. should have been allowed into evidence as it is highly relevant to "a critical aspect of the defense" (*Anthony Roy W.*, 324 Ill. App. 3d at 186) and the credibility of a key State's witness, Ferreira (*Sandoval*, 135 Ill. 2d at 175). In light of this holding, we conclude that the evidence at issue should not be barred by the rape shield statute.

¶ 28 Having found defense counsel performed deficiently, we turn to examine the second *Strickland* prong and consider whether defense counsel's deficient performance prejudiced defendant. To establish prejudice, a defendant must show a reasonable probability that the result of the proceedings would have been different. See *People v. Evans*, 186 Ill. 2d 83, 93 (1999).

¶ 29 Defendant admitted to having sex with T.T. on February 27, 2010, but claimed the act was consensual. He expressly denied ever being told T.T.'s age and argued he reasonably believed that T.T. was 17 years old. The reasonableness of this belief is supported by the fact that T.T. and defendant were both present at a late night party when the incident occurred. Although her friend left earlier to go home, T.T. stayed behind and had been drinking alcohol with the others. Further, the relevant evidence establishing defendant's knowledge of the sexual relationship between T.T. and Ferreira would also lend support to defendant's belief that T.T. was 17 years old, had the evidence been introduced at trial.

¶ 30 The evidence contradicting the reasonableness of defendant's belief depended on the testimony of T.T., Ferreira, and Miller. Upon careful review of the witnesses' testimony, we find Ferreira's testimony was the only direct evidence contradicting defendant's claim that he believed T.T. was at least 17 years old at the time of the incident. For this reason, defense counsel's failure to attempt to introduce evidence of the sexual relationship between T.T. and Ferreira prejudiced defendant.

¶ 31 T.T. testified that she did not tell defendant she was only 15 years old at the time of the incident but insisted that she and Ferreira had told defendant she was 15 years of age sometime in November or December 2009 and definitely before the New Year 2010. However, T.T.'s testimony on this issue is unreliable for two reasons. First, defendant's un rebutted testimony established that he was incarcerated at that time and was not released until January 8, 2010. In

other words, the events could not have transpired as T.T. described. Second, neither Ferreira nor defendant recalled the conversation ever happening.

¶ 32 Nicholas Miller, a jailhouse snitch, testified defendant had acknowledged to him that he had known T.T. was not 17 years old because he had been told by a mutual friend, presumably Ferreira, in a car that T.T. was only 15 years of age. As a jailhouse snitch, Miller's testimony should be viewed with great caution. *People v. Mertz*, 218 Ill. 2d 1, 60 (2005). Further, Miller's testimony is suspect because Ferreira believed T.T. was 16 not 15 years old, and Miller was adamant that defendant told him the act was done on a washer or dryer, but defendant and all other witnesses agreed it occurred on a couch. Here, Miller's testimony is directly contradicted by other witnesses.

¶ 33 Ferreira recalled telling defendant on the night of the incident that T.T. was 16 years old. Notably, however, he did not recall the conversation T.T. described in her testimony that she and Ferreira told defendant her age sometime in November or December 2009. Thus, Ferreira's testimony that he told defendant T.T.'s age on the day of the incident is the only direct evidence offered at trial to establish defendant was explicitly told T.T.'s age before the incident.

¶ 34 However, defendant was unable to attack the credibility of Ferreira's testimony because the true nature of the relationship between Ferreira and T.T. had been barred when defense counsel stipulated to the trial court's ruling in the first trial. "On a new trial of a case, an action should be tried *de novo* as though there had been no previous trial." *People v. Boose*, 85 Ill. App. 3d 457, 460 (1980). Thus, the trial court would not have been bound to its ruling in the first trial. Moreover, we have already held that this evidence should have been allowed at trial as it is relevant to the question at hand—whether defendant reasonably believed T.T. was at least 17 years old.

¶ 35 Had the true nature of the relationship between Ferreira and T.T. been disclosed at trial, the trier of fact may have afforded his testimony little weight. With the reliability and credibility of Ferreira in doubt, and with the inconsistencies in the testimony of T.T. and Miller, it is reasonably likely that an objective, fact finder would conclude that defendant had never been told T.T.'s age prior to the charged conduct. *Id.* Further, defendant's knowledge of the sexual relationship between T.T. and Ferreira would have supported the defense theory that defendant reasonably believed T.T. was at least 17 years old. Accordingly, we find there is a reasonable probability that the result of the proceeding would have been different had defense counsel introduced evidence of Ferreira's past sexual history with T.T.

¶ 36 Since we have reversed this matter on other grounds, we need not address the issue of the correct calculation of fines and fees.

¶ 37 CONCLUSION

¶ 38 The judgment of the circuit court of Will County is reversed and remanded for further proceedings.

¶ 39 Reversed and remanded.