2017 IL App (2d) 141054-U
No. 2-14-1054
Order filed March 24, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. HECTOR A. PICASO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 12-CF-2565 Honorable James K. Booras, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed defendant's convictions on counts II, III, IV, and V of the indictment where the State's evidence of the defendant's use of force was insufficient to sustain the convictions; the appellate court held that the evidence on counts I and VI of the indictment was sufficient to sustain the convictions; however, those convictions were reversed, and those counts were remanded for a new trial, where defense counsel was ineffective for failing to tender a jury instruction defining "force."

¶ 2 Defendant, Hector A. Picaso, was convicted after a jury trial of two counts of criminal sexual assault (720 ILCS 5/11-1.2(a)(1) (West 2012)) and four counts of criminal sexual abuse (720 ILCS 5/11-1.50(a)(1) (West 2012)). He was given consecutive seven-year prison sentences

on the criminal sexual assault convictions, and he was sentenced to four years' imprisonment on each of the criminal sexual abuse convictions, to run concurrently with one another and with the criminal sexual assault convictions. Defendant appeals. For the following reasons, we reverse the convictions of criminal sexual abuse that relate to counts II, III, IV, and V of the indictment. We also reverse the convictions that relate to counts I and VI of the indictment, but we remand those counts for a new trial. The basis for our reversal on counts II-V is that the State failed to prove that defendant used force in committing in the offenses. The basis for the reversal and remand for a new trial on counts I and VI is that defense counsel was ineffective for failing to tender Illinois Pattern Jury Instructions, Criminal, No. 11.65C (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 11.65C), defining "force."

¶ 3 I. BACKGROUND

¶ 4 Lambs Farm in Lake County, Illinois, houses persons with disabilities in single-family-style homes and in an apartment building known as "Stone." In return, the residents, who are called "participants," work either in the pet store, the bakery, or cleaning the facilities. The goal is independence for the participants.

¶ 5 Beginning in approximately March 2012, the complainant, S.D., was a participant. The record shows that S.D. has Down Syndrome. She was assigned to a cleaning crew. Defendant, age 60, was her supervisor. He was hired in February 2012 as a cleaning crew leader. As a result of allegations that S.D. made against defendant, the Lake County grand jury returned an eight-count indictment on September 26, 2012. The State *nolle pross*ed counts VII and VIII at trial.

¶ 6 The six remaining counts alleged as follows. Count I alleged that between February 2, 2012, and May 24, 2012, defendant committed the offense of criminal sexual assault by

committing an act of sexual penetration with S.D., in that he knowingly, by the use of force, made contact with the sex organ of S.D. with his mouth. Count II alleged that between February 2, 2012, and May 24, 2012, defendant committed the offense of criminal sexual assault by committing an act of sexual penetration with S.D., in that he knowingly, by the use of force, made contact with the sex organ of S.D. with his mouth. Count III alleged that between February 2, 2012, and May 24, 2012, defendant committed the offense of criminal sexual abuse in that he, by the use of force, knowingly touched the sex organ of S.D. through clothing with his hand for the purpose of his sexual gratification. Count IV alleged that between February 2, 2012, and May 24, 2012, defendant committed the offense of criminal sexual abuse in that he, by the use of force, knowingly caused S.D. to touch his sex organ through his clothing with her hand for the purpose of his sexual gratification. Count V alleged that between February 2, 2012, and May 24, 2012, defendant committed the offense of criminal sexual abuse in that he, by the use of force, knowingly touched the sex organ of S.D. directly with his hand for the purpose of his sexual gratification. Count VI alleged that between February 2, 2012, and May 24, 2012, defendant committed the offense of criminal sexual abuse in that he, by the use of force, knowingly touched the breast of S.D. with his mouth for the purpose of his sexual gratification.

¶ 7 At the time of trial in June 2014, S.D. was 37 years of age. She testified that she had difficulty sequencing events. Nevertheless, she testified that the following incidents occurred chronologically, although she did not know the dates, or in what month or season they took place.

¶ 8 The first incident (counts III and IV) occurred on a Monday morning when she was dusting a staircase in Stone. The other crew members were in other parts of the building. Tired, she sat down on a step, and defendant approached her. She was afraid that she would be

reprimanded for sitting down on the job, but defendant assured her that she should sit down to rest, and he sat next to her. Defendant then "grabbed" her hand and placed it between his legs over his pants. He told her not to say anything. She was "scared." Then, defendant "lifted up" S.D.'s hand, and he touched her over her clothes on her vagina with his hand. He kept his hand moving there while he again instructed her not to say anything. She was scared and did not say "a word." S.D. did not know how the incident ended, but she got up and walked away. Defendant went to check on the rest of the crew. S.D. testified that she did not tell anyone what defendant did, because she was afraid that she would be evicted from Lambs Farm.

¶ 9 The second incident (count V) also occurred in Stone. S.D. did not know whether it was the same day. She was alone, vacuuming upstairs, when defendant touched her "inside" her pants. She was having her period, and there was blood on his hand when he removed it. She was scared, and she was afraid of what defendant might do if she said anything. S.D. testified that defendant "shrugged it off" and left her, and she "went back to work."

¶ 10 S.D. testified that the third incident (counts I and VI) occurred in her house. She was cleaning a bathroom, when defendant surprised her and locked the door. The door locked from the inside, and S.D. knew how to unlock it. The bathroom was a normal-size residential bathroom. It had a sink, a toilet, a tub, and a shower. Defendant pulled down her pants and licked her vagina. Defendant said, "Does this make you feel good? Did you like it?" Then, she testified, he "jacked" her up against the wall and licked her nipple. Then he unlocked the door and left. S.D. pulled up her pants, "fixed" her bra, smoothed down her shirt, and went back to work. She was too scared to say or do anything either during the incident and after, because she "did not know what he would have done" if she told anyone. S.D. was also afraid of being terminated from Lambs Farm.

¶ 11 S.D. testified that the fourth incident (count II) also occurred in her house. She testified that only female house parents and vocational managers were allowed in her room, but defendant wanted to see it. S.D. refused. She stood "by the door frame, holding it, I was standing right there, not to let him in [*sic*]." She testified that he "pushed past her," although she thought that he did not touch her. "And then," she testified, "he had me laying [*sic*] down and [my] pants down and [he] licked my vagina." She was too scared to say anything. When defendant was done, he left the room, and S.D. went back to work.

¶ 12 S.D. related two more near-encounters with defendant. She testified that she saw defendant in possession of the keys to the sprinkler control room in Stone. He said, "[S.D.], come in here." Defendant began to unlock the door, and S.D. ran away from him. She testified that she was afraid that "he was going to rape me and that's why I ran from him." The last time S.D. saw defendant was on a Friday at one of the houses. She testified that defendant was in a bathroom. He called out to her that she had forgotten something, so she went inside the bathroom. However, when defendant started to lock the door, she "ran out."

¶ 13 On cross-examination, S.D. testified that on those occasions when defendant told her not to say anything, he whispered it. She testified that he did not threaten her, and he was not violent with her. According to S.D., she told someone about what defendant did to her approximately three months later. On redirect examination, S.D. testified that she did not invite defendant's advances and that she did not want him to molest her. Then, on re-cross examination, S.D. testified that she did not struggle with defendant during any of the incidents and that nothing stopped her from running away from him during any of the incidents.

¶ 14 Marlene Garcia, a vocational manager at Lambs Farm, testified that S.D. told her about the incidents in August 2012. Jose Martinez, the director of quality assurance at Lambs Farm,

testified that defendant quit work on May 22, 2012. Lenny Halcom was defendant's supervisor, and, according to Martinez, defendant put his keys down and told Martinez, "Let Mr. Halcom know I'm done." According to Martinez, defendant was agitated, and he was acting like something was wrong. Defendant did not complain about anything specific. Martinez testified that defendant said, "Tell Lenny I'm done. I can't do this anymore." Martinez then went out to "chat" with defendant, but defendant had already departed.

¶ 15 Following the court's denial of his motion for a directed verdict, defendant testified on his own behalf. At the time of trial, he was 62 years old. He worked at Lambs Farm from February 6, 2012, to May 22, 2012. Defendant testified that he left Lambs Farm because he was told to clean a filthy bathroom, which was not his job. Contrary to Martinez's testimony, defendant testified that he told Lenny Halcom directly why he was quitting. Defendant admitted that he did not punch out, but "just quit." Defendant denied S.D.'s allegations. According to defendant, it was S.D. who gave him unwanted hugs and initiated too-close contact. Defendant denied even knowing where the sprinkler control room in Stone was. Defendant testified that he was a diabetic and was unable to have sex because of the disease and the effects of his medication.

¶ 16 Juan Aleman also testified for defendant. He and defendant attended the same church and had known each other for 15 years. During those years, Aleman had heard people discuss defendant's good reputation for honesty and truth-telling. Defendant rested following Aleman's testimony. The State did not present rebuttal.

¶ 17 In the State's closing argument, the prosecutor began by calling defendant a predator. He then stated: "[S.D.] was the easiest prey for him." The prosecutor argued that defendant "cut [S.D.] from the herd," and that "he hunted her down." The prosecutor described S.D. as "the

quiet little lamb boy [*sic*] in the slaughter," and then again, later in his argument, called her "prey." In discussing S.D.'s credibility, the prosecutor stated that she "does not have the capacity to lie."

¶ 18 The prosecutor repeatedly gave his own definitions of "force" to the jury. He told the jury that defendant "overcame [S.D.'s] will by force." The prosecutor stated: "[S.D.] did not want this to happen. Yet, it still happened. That is forceful." The prosecutor added: "He imposed his will upon hers. That is force. Don't confuse force with violence." The prosecutor admonished the jury also not to confuse "force" with the Marines storming a beach. He also advised the jury that force was not "superior size or superior strength." The prosecutor stated: "Force can also be a supervisor of a Down Syndrome girl taking advantage of the situation." The prosecutor further argued that "doing what [defendant] wants as opposed to what [S.D.] wants *** that is forceful." The prosecutor argued that defendant placing his tongue on S.D.'s vagina was "forceful," and again stated that defendant imposing "his will upon her will" is force. "He pulled her pants down. That right there is force." "The simple act of coming up and pulling a person's pants down *** that simple act alone is forceful." After explaining the issues instructions to the jury, the prosecutor stated that defendant imposing his will on S.D. was force and that "the simple act of putting his hand down her pants, that in and of itself is forceful."

¶ 19 Defense counsel's closing argument centered on the reasons why he believed that the evidence showed that S.D. was not credible. He also argued that S.D. exaggerated and lied with the connivance of the prosecutors. He did not address the State's "force" arguments.

¶ 20 The court instructed the jury on the issues and the definitions of criminal sexual assault and criminal sexual abuse, but neither the State nor the defense tendered IPI Criminal 4th No. 11.65C, encompassing the statutory definition of "force."

¶ 21 After the jury began deliberating, it requested that the court define "beyond a reasonable doubt." The court responded that the jury had "the evidence and the law necessary" for it to decide the case. The jury then returned guilty verdicts on all counts. Defendant argued in his posttrial motion that the court erred in not giving IPI Criminal 4th No. 11.65C. The court ruled that defendant forfeited the issue by not tendering the instruction, and it denied the posttrial motion. As indicated above, defendant was sentenced to consecutive seven-year prison sentences on the criminal sexual assault convictions and to concurrent four-year prison sentences on each of the criminal sexual abuse convictions. Defendant filed a timely appeal.

¶ 22 II. ANALYSIS

¶ 23 A. Evidence of Use of Force

¶ 24 Defendant first contends that his convictions must be reversed, because the State failed to prove that he used force in committing them. The State charged the use of force as an element in each count of the indictment. To sustain a conviction, the State must prove every element of an offense beyond a reasonable doubt. *People v. Steele*, 2014 IL App (1st) 121452, ¶ 20. When a defendant challenges the sufficiency of the evidence, the reviewing court must determine whether, viewing all of the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). We will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the defendant's guilt. *People v. Mpulamasaka*, 2016 IL App (2d) 130703, ¶ 71. While we must allow reasonable inferences in the State's favor, we cannot allow unreasonable or speculative inferences. *Mpulamasaka*, 2016 IL App (2d) 130703, ¶ 71.

¶ 25 In Illinois, "force or threat of force" means "the use of force or violence, or the threat of force or violence, including but not limited to the following situations: (1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat; or (2) when the accused has overcome the victim by the use of superior strength or size, physical restraint or physical confinement." 720 ILCS 5/11-0.1 (West 2012). There is no definite standard setting forth the amount of force that is necessary to establish the use of force; each case must be considered on its own facts. *People v. Vasquez*, 233 Ill. App. 3d 517, 527 (1992). "Force" requires more than the force that is inherent in the sexual act itself, and it implies physical compulsion by which the victim has no choice but to submit to the act. *People v. Denbo*, 372 Ill. App. 3d 994, 1005 (2007).

¶ 26 Here, S.D. related four separate incidents. In the first, defendant sat next to her on a staircase. While S.D. testified that defendant "grabbed" her hand, she testified on cross-examination that he was not violent and did not threaten her. Defendant did not restrain her, because she got up and walked away from him. In the second incident, defendant placed his hand inside her pants while she was vacuuming, and then he "shrugged it off" and walked away. In the fourth incident, S.D. blocked the doorway to her room to keep defendant from entering. He "pushed past" her, but he did so without touching her. Then, she testified, defendant had her lying down and her pants were down. She did not testify that he used any force other than that inherent in the offense. For instance, she did not testify that his weight on top of her prevented her from escaping, as was the case in *People v. Alexander*, 2014 IL App (1st) 112207, ¶ 54 (the defendant used his weight to continue the act of penetration while the victim unsuccessfully tried to stop him). S.D. testified that she did not consent to these encounters and that she was afraid of

what defendant might do if she told anyone, but she denied that he threatened her. There was no evidence of physical compulsion. Nor did S.D. attempt to flee or resist. See *People v. Warren*, 113 Ill. App. 3d 1, 5 (1983) (element of force not proved where the complainant did not attempt to flee or resist the defendant's sexual advances). Significantly, the State did not introduce evidence of S.D.'s size and weight relative to defendant's. Therefore, we cannot speculate that defendant's superior strength and size overpowered S.D. In *People v. Walker*, 154 Ill. App. 3d 616, 625 (1987), similar infirmities in the State's evidence warranted a reversal of the defendant's convictions of sexual assault, where the defendant made no verbal threats and the complainant did not flee.

¶ 27 The State argues that defendant's acts, perpetrated upon one with S.D.'s disability, proved the element of force. However, the State did not introduce evidence of the extent of S.D.'s disability or its effect on her ability to understand and communicate what was happening to her. Reading the cold record, it appears that she could not grasp temporal relationships. Otherwise, she demonstrated good awareness of her surroundings and her relationship to the people around her. For example, S.D. knew the difference between what defendant did to her and what worse might have happened had she not fled when he went to unlock the door to the sprinkler control room. She generally expressed herself without much difficulty. Furthermore, her disability might reflect on her ability to consent, but the State charged that the acts were committed by the use of force, rather than that they were committed upon a victim who lacked the ability to consent.

¶ 28 The State had the option to charge that defendant committed the sexual acts knowing that S.D. was unable to understand the nature of the act or was unable to give knowing consent. See 720 ILCS 5/11-1.20(a)(2) (West 2012); 720 ILCS 5/11-1.50(a)(2) (West 2012). Yet, the State

chose not to so charge. In reading S.D.'s testimony, it is obvious that she did understand the nature of the acts and was able to withhold her consent. S.D. testified that she did not want defendant's advances. She also testified that she knew the difference between touching and rape. At oral argument, the defense pointed out that the State could have charged defendant with sexual misconduct with a person with a disability under section 11-9.5 of the Criminal Code of 2012 (720 ILCS 5/11-9.5 (West 2012)). Be that as it may, the State charged that defendant used force, and force involves physical compulsion. *Denbo*, 372 Ill. App. 3d at 1005. The determination of which charges to bring is committed to the State's Attorney's discretion, and our only role is to decide whether the State presented sufficient evidence to establish beyond a reasonable doubt the elements of the offenses it did charge. *People v. Swartwout*, 311 Ill. App. 3d 250, 260 (2000). Accordingly, we reverse defendant's convictions on counts II, III, IV, and V.

¶ 29 The third incident, which occurred in the locked bathroom, encompassed counts I and VI. The evidence showed that the bathroom was of normal residential size, with the usual fixtures. Defendant caught S.D. by surprise when he entered and locked the door. At that point, the evidence showed that he physically confined her. In a normal residential bathroom, a victim would have nowhere to escape. Defendant "jacked" her up against the wall, which connotes that he physically held or pinned her against the wall, while he licked her breast. The statute defines force to include overcoming the victim by the use of physical restraint or confinement. *People v. Satterfield*, 195 Ill. App. 3d 1087, 1097 (1990). In *Satterfield*, the defendant's conviction of criminal sexual abuse was affirmed where the victim was seated in the passenger seat of a car, her mother was in the driver's seat, and the defendant held her with one arm while he poked her breast with his other hand. *Satterfield*, 195 Ill. App. 3d at 1091-92. There was nowhere that the

victim could move to avoid the defendant's advances. *Satterfield*, 195 Ill. App. 3d at 1097. While the bathroom in the instant case would have been more spacious than a car, the principle is the same. A locked bathroom is a confined space. Accordingly, we hold that the State proved counts I and VI beyond a reasonable doubt.

¶ 30 B. Ineffective Assistance of Counsel

¶ 31 We agree with defendant's contention that he is entitled to a new trial on counts I and VI, where the jury was not instructed on the definition of force. IPI Criminal 4th No. 11.65C states:

> "The term 'force or threat of force' means the use of force or violence or the threat of force or violence [including but not limited to [(when the accused threatens to use force or violence [(on the victim) (on any other person)] and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat) (when the accused has overcome the victim by use of [(superior strength) (superior size) (physical restraint) (physical confinement)])]."

¶ 32 Defendant argues that his trial counsel had no strategic reason not to tender IPI Criminal 4th No. 11.65C, and that his failure to do so rendered ineffective assistance of counsel. To determine whether a defendant was denied effective assistance of counsel, we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance resulted in prejudice to the defendant. *Strickland*, 466 U.S. at 687; *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). To establish deficient performance, the defendant must show that his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219 (2004). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the

result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome, in that counsel's deficient performance rendered the trial result unreliable *or the proceeding unfair*. *People v. Watson*, 2012 IL App (2d) 091328, ¶ 23. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24. Where, as here, the claim of ineffective assistance of counsel was not raised in the trial court, our review is *de novo*. *Lofton*, 2015 IL App (2d) 130135, ¶ 24.

¶ 33 There is a strong presumption that trial counsel's conduct was reasonable and that the challenged action or inaction was the product of trial strategy. *Lofton*, 2015 IL App (2d) 130135, ¶ 24. An exception to the presumption arises when counsel's chosen trial strategy is so unsound that he entirely fails to conduct any meaningful adversarial testing. *People v. Fountain*, 2016 IL App (1st) 131474, ¶ 45.

¶ 34 The function of jury instructions is to convey to the jury the law applicable to the evidence that was presented. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Defense counsel's choice of jury instructions is considered a tactical decision. *People v. Bobo*, 375 Ill. App. 3d 966, 977 (2007). Mistakes in strategy or tactics do not, alone, constitute ineffective assistance of counsel. *Bobo*, 375 Ill. App. 3d at 977. However, defense counsel's failure to request a particular instruction can be grounds for finding ineffective assistance if the instruction was so critical to the defense that its omission denied the defendant a fair trial. *People v. Falco*, 2014 IL App (1st) 111797, ¶ 16.

¶ 35 Defendant argues that his trial counsel had no sound strategic reason not to request IPI Criminal 4th No. 11.65C, especially because counsel included its omission as error in the posttrial motion. We note that defense counsel's strategy in cross-examining S.D. was to

establish defendant's lack of force in his encounters with S.D. As discussed above, the State failed to prove the element of force in counts II through V, and the evidence of force with respect to counts I and VI was that defendant physically confined S.D. when he locked the bathroom door and "jacked" her against the wall. The evidence of physical confinement was somewhat equivocal, because S.D. acknowledged that she could have unlocked the door. Thus, IPI Criminal 4th No. 11.65C was absolutely critical to the defense. The error in not requesting the instruction was especially serious in light of the State's closing argument that could have misled the jury into believing that force was proved by psychological coercion as well as the acts themselves, and that physical compulsion was not necessary.

¶ 36 S.D.'s testimony that defendant committed the sexual acts was clear enough that the jury could have believed that those acts occurred. However, the evidence of defendant's use of force in committing the acts was nonexistent, except for counts I and VI. Even as to those counts, the evidence of force was close. Yet, defense counsel's closing argument advanced only the untenable theory that S.D. exaggerated and lied in connivance with the prosecutors. Defense counsel completely ignored the State's failure to prove the element of force. Nor did counsel correct the prosecutor's repeated incorrect definitions of force. Abandoning the strategy that the State failed to prove the element of force deprived defendant of a meaningful defense. Counsel's performance falls below an objective standard of reasonableness where counsel does not probe inherent weaknesses in the State's evidence. *Watson*, 2012 IL App (2d) 091328, ¶ 32 (defense counsel's failure to challenge the State's inconclusive DNA evidence was ineffective assistance). Accordingly, we hold that counsel's failure to request IPI Criminal 4th No. 11.65C satisfies the first *Strickland* prong.

¶ 37 We also conclude that defendant was prejudiced. The prosecution argued to the jury that force was proved where defendant was in a position of authority over S.D., and where S.D. did not want defendant's advances. The prosecution also incorrectly told the jury that physical compulsion was not needed and that the force inherent in the acts was sufficient. Defense counsel did not object to these erroneous definitions of force, nor did counsel offer the instruction that would have correctly defined that element for the jury. After it began deliberating, the jury requested the definition of "reasonable doubt." This suggests that instructing the jury on the correct definition of force might have resulted in a different outcome. Accordingly, we reverse defendant's convictions on counts I and VI and remand for a new trial on those counts.

¶ 38 III. The Prosecution's Closing Argument

¶ 39 Defendant finally argues that the prosecution's closing argument deprived him of a fair trial. Because we reverse defendant's convictions and remand for a new trial on counts I and VI, we do not reach this argument. However, we feel compelled to comment on the name-calling, because there will be a retrial, and because name-calling in an effort to prejudice the jury is unacceptable and improper. See *Mpulamasaka*, 2016 IL App (2d) 130703, ¶ 109 (prosecutor repeatedly calling the defendant a predator was improper and prejudicial).

¶ 40 Here, the prosecutor called defendant a "predator" and referred to S.D. as "prey" at least twice. The only purpose in arguing that defendant "cut" S.D. from "the herd," and that defendant "hunted [S.D.] down" was to inflame the jury's passions. Likewise, the prosecutor's mangled reference to a lamb being led to the slaughter was an appeal to the jury's sympathy for S.D.'s disability and her status as a participant at Lambs Farm. It is improper to use a victim's disability to confuse the legal issues. *Mpulamasaka*, 2016 IL App (2d) 130703, ¶ 107. The

prosecutor also told the jury, without any evidence to support the statement, that S.D. was incapable of lying. As we made clear in *Mpulamasaka*, such improper comments can cause reversal in a close case.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we reverse defendant's convictions on counts II, III, IV, and V. We also reverse defendant's convictions on counts I and VI, but we remand those counts for a new trial.

¶ 43 Reversed and remanded.