2013 IL App (2d) 120248-U
No. 2-12-0248
Order filed August 6, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-380
JOHN A. REED,	)	Honorable Joseph P. Condon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in refusing defendant's lesser-included-offense jury instruction. Order to submit DNA sample and pay DNA fee is vacated.

¶ 2 Following a jury trial, defendant John A. Reed was convicted of 10 counts of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2010)) and four counts of child pornography (720 ILCS 5/11-20.1(a)(1)(i), (ii) (West 2010)). Defendant was sentenced to 55 years in prison and ordered to submit a DNA sample (730 ILCS 5/5-4-3 (2010)) and pay the associated costs. Defendant appeals, arguing that the trial court erred by denying his request to instruct the jury on the lesser-included offense of aggravated criminal sexual abuse and that the court's order for him to submit a DNA sample and pay

the associated fees must be vacated. For the following reasons, we: (1) affirm the ruling of the trial court regarding the jury instruction; and (2) vacate the order requiring defendant to submit a DNA sample and pay associated costs.

¶ 3 I. BACKGROUND

¶ 4 A. Charges

¶ 5 Defendant was indicted on 16 counts, including 12 counts of criminal sexual assault against victim A.R. (born August 29, 1994), a family member under age 18. Specifically, those charges were:

I: January 17, 2010, criminal sexual assault, penis in vagina;

II: January 17, 2010, child pornography;

III: January 24, 2010, criminal sexual assault, mouth on vagina;

IV: January 24, 2010, criminal sexual assault, fingers in vagina;

V: January 24, 2010, criminal sexual assault, penis in vagina;

VI: January 24, 2010, child pornography;

VII: February 18, 2010, criminal sexual assault, penis in mouth;

VIII: February 18, 2010, criminal sexual assault, mouth on vagina;

IX: February 18, 2010, criminal sexual assault, penis in vagina;

X: February 18, 2010, child pornography;

XI: March 9, 2010, criminal sexual assault, mouth on vagina;

XII: March 9, 2010, criminal sexual assault, penis in vagina;

XIII: March 9, 2010, criminal sexual assault, penis in mouth;

XIV: March 9, 2010, child pornography;

XV: Sometime between June 1, to August 31, 2010, criminal sexual assault, penis in vagina;

XVI: August 12, 2010, criminal sexual assault, dildo into defendant's anus.

¶ 6 In addition, the State charged defendant with four counts of child pornography.

¶ 7 B. Trial

¶ 8 At trial, A.R. identified defendant as her uncle. According to A.R., defendant's first contact of a sexual nature with her occurred when she was 12 years old. Defendant and A.R. were riding a four-wheeler at defendant's home and he put his hands down her pants. The first time defendant had sexual intercourse with A.R. was when she was 15 years old. The incident occurred at defendant's girlfriend's home. A.R. testified that, from then on, she and defendant had sex "a lot," and "whenever he got the chance." Defendant often gave money to A.R. and bought her things before and after sex, including alcohol and sex toys.

¶ 9 Defendant began taking photos of A.R. and filmed her "a lot" using a video camera or his phone. Some of the incidents occurred at defendant's residence and some at a Super 8 motel, where defendant took A.R. four or five times. During her testimony, A.R. identified several nude pictures of her that were taken by defendant. Between June and the end of August 2010, A.R. engaged in a "threesome" with defendant and his friend, Marc Phillips. Defendant told Phillips that A.R. was 18 years old and that her name was Megan. Defendant and Phillips had sexual intercourse with A.R., and Phillips verified this event in his testimony.

¶ 10 On August 12, 2010, defendant took A.R. and his girlfriend at the time, Shannon Lisle, to the Safari Room at the Super 8 motel. The manager of the Super 8 motel, Danny Chaudhari, testified to defendant's purchasing of the room based on the motel's computer check-in records. The Safari Room was jungle-themed and contained a hot tub and a large bed. Defendant brought alcohol and

sex toys and also gave A.R. pills that were intended to make her sexually aroused. While in the hotel room, A.R. and defendant engaged in oral sex, and, then, at defendant's request, A.R. used a sex toy to perform anal sex on him. Shannon Lisle's testimony confirmed the occurrence of these events at the Super 8 motel.

¶ 11 Police obtained several videos from defendant's laptop computer and video camera as evidence of defendant's possession of child pornography and of his commission of criminal sexual assault on A.R. The police obtained the laptop and camera from A.R. and her mother, Holly Vollmer. Specifically, Detective Jeff Parsons identified a laptop that Holly brought to the Woodstock police department on September 21, 2010, and recounted her stating that the computer contained images showing her daughter nude and with defendant. Holly also confirmed that defendant was her brother.[1] Parsons obtained a search warrant to search the contents of the computer and sent it to the forensic lab for analysis. Computer forensic examiner Amy Maskiewicz testified that she recovered four different videos and several photographs from the computer's hard drive. Time stamps in the videos indicated that they were created on January 17, 2010, January 24, 2010, February 18, 2010, and March 9, 2010. The content retrieved showed A.R. nude and also revealed multiple instances of defendant having sexual intercourse with A.R. Defendant was arrested.

¶ 12 Lisle testified that, after defendant's arrest, she had several conversations with him. During those conversations, defendant admitted that: (1) he had sex with A.R.; (2) he knew A.R. was his

[1] Defendant did not dispute that Holly gave Parsons the laptop and told him that it contained nude images of defendant and A.R. Further, Holly verified in her trial testimony that defendant is her brother and A.R. is her daughter.

niece; (3) he knew A.R. was a minor; and (4) he enjoyed it. However, after telling her that he enjoyed it, defendant told Lisle that, on more than one occasion, he was forced to have sex with A.R.

¶ 13 Defendant presented an affirmative defense of compulsion at trial. Defendant testified that, sometime in the fall of 2009, he returned to his home and witnessed one of his friends, Timothy Abed, receiving oral sex from a 14- or 15-year-old girl. Defendant testified that he had a short conversation with Abed and the girl, but that he did not tell them what he saw.

¶ 14 Defendant testified that, a few days later, Abed and two men came to his front door. Before they knocked, a fourth man came up behind defendant and put a gun to his head. Defendant said the man with the gun was 6'7", about 300 pounds, and had red hair. The red-haired man grabbed defendant's three-year-old son, and then defendant was slammed to the ground. The men pointed guns to the heads of defendant and his son, and Abed told defendant to take nude pictures of A.R. for him. In response, defendant drove to A.R.'s house, picked her up, and drove her to a parking lot, where she took nude photos of herself. Defendant then returned home and gave his phone to the men. They approved of the pictures and left.

¶ 15 A day or two later, Abed and the red-haired man came to defendant's house again. The red-haired man again restrained defendant, pointed a gun at his head, and held a gun on defendant's son. Abed told defendant to record himself having sex with A.R. Accordingly, defendant took A.R. to his house, where he recorded the two of them having intercourse. Defendant returned home, made a disc of the recording, and gave the disc to Abed. Defendant unsuccessfully attempted to erase the file from his computer. Defendant admitted at trial that he and A.R. engaged in intercourse. Defendant did *not* deny penetration. Indeed, he testified:

"STATE: For all of these charges, everything that you've been charged with as far as putting your fingers in [A.R.], putting your mouth on her vagina, putting your penis in her vagina, having her put a strap-on on and have sex with you, all of those allegations happened, is that your testimony?

DEFENDANT: Yes."

Further, defendant testified that "[A.R.] told the truth about us having sex."

¶ 16 Defendant did not report the threats to the police because "any time [he] went to the police, they've always thrown [him] in jail." Defendant said he continued to make videos so that he could protect himself, A.R., his son, and other family members from Abed. Defendant never told A.R. that he was forced to make videos of them having intercourse. He testified that he did not remember having sexual contact with A.R. when she was 12 years old.

¶ 17 Defendant further stated that he was under duress in the videos and was not enjoying himself. He told Lisle that he enjoyed the physical part of having intercourse with his niece, but hated the mental part of it. The videos also depicted defendant expressing his fantasies of having sexual intercourse with multiple other partners, some of them being other family members and minors. However, defendant stated that the fantasies he was describing in the videos were Abed's fantasies and not his own. Defendant said he looked like he was enjoying himself in the videos because Abed wanted him to.

¶ 18 C. Jury Instructions

¶ 19 The court granted defendant's request to instruct the jury on compulsion. However, defendant also requested that the jury be instructed on the lesser-included offense of aggravated criminal sexual abuse, which prohibits acts of sexual conduct with a family member under age 18.

720 ILCS 5/12-16(b) (West 2010). The State, in its objection to defendant's request for a lesser-included instruction, conceded that aggravated criminal sexual abuse is a lesser-included offense of criminal sexual assault. However, it objected to the instruction on the bases that: (1) here, no jury could rationally find defendant guilty of the lesser offense, aggravated criminal sexual abuse, but acquit him of the greater offense, criminal sexual assault; and (2) giving the instruction would result in defendant's assertion of inconsistent defenses. Specifically, the jury would be instructed on the affirmative defense of compulsion, wherein defendant admitted to penetration. By defendant's raising the affirmative defense of compulsion, the State argued, there was no longer a disputed factual element that distinguished the greater offense of criminal sexual assault from the lesser offense of aggravated criminal sexual abuse. Therefore, the State argued, defendant was not entitled to a jury instruction on the lesser offense.

¶ 20 The court, without explanation, refused defendant's request that the jury be instructed on the lesser-included offense of aggravated criminal sexual abuse.

¶ 21 D. Verdict

¶ 22 The jury found defendant guilty on 10 of the 12 charged counts of criminal sexual assault and on all 4 counts of child pornography. The two counts that resulted in not-guilty verdicts were counts VII (February 18, 2010, penis in mouth) and XV (between June 1, and August 31, 2010, penis in vagina).

¶ 23 Defendant moved for new trial, arguing, in part, that the court erred by refusing to instruct the jury on the lesser-included offense of aggravated criminal sexual abuse. The trial court denied the motion and sentenced defendant to five years on each of the child pornography counts, concurrent with each other but consecutive to consecutive five-year sentences for each count of

criminal sexual assault, for a total of 55 years. Defendant was also ordered to submit a DNA sample and to pay the associated costs. On March 21, 2012, the trial court denied defendant's motion to reconsider the sentence. This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 A. Jury Instruction

¶ 26 On appeal, defendant argues that aggravated criminal sexual abuse constitutes a lesser-included offense of criminal sexual assault. Accordingly, he reasons that a properly-instructed jury could have found him guilty of the lesser offense and acquitted him of the greater charges. As evidence supporting this contention, defendant cites the fact that the jury here returned not-guilty verdicts on counts VII and XV of the indictment. Defendant reasons that, since the jury found him not guilty on two of the counts of criminal sexual abuse, it could have, had it been properly instructed, found him guilty of a lesser offense with regard to the other counts. Defendant admits to engaging in acts of sexual penetration with A.R., but asserts that he did so under compulsion and that this defense should not preclude him from arguing that he is guilty only of lesser-included offenses. Therefore, defendant argues, the trial court erred in refusing the lesser-included instruction.

¶ 27 The State agrees that aggravated criminal sexual abuse is a lesser-included offense of criminal sexual assault. However, the State disagrees with defendant's contention that, here, a properly-instructed jury could rationally have found him guilty of the lesser-included offense and acquitted him of the greater charges. The State argues that defendant effectively admitted his guilt on the criminal sexual assault charges through his testimony and by advancing the affirmative defense of compulsion. Therefore, it argues, defendant was precluded from receiving jury instructions on lesser-included offenses. Further, the State disagrees that the jury's finding—that

two counts of sexual penetration were not supported by sufficient evidence to find defendant guilty as to those specific acts—demonstrates that the jury could rationally have found defendant guilty of lesser-included offenses on the remaining 10 counts. The State emphasizes that this is especially true where testimonial, photographic, and video evidence proved beyond a reasonable doubt that defendant committed specific acts of sexual penetration with A.R. Consequently, the State maintains, the court did not err by refusing to give the lesser-included jury instruction tendered by defendant.

¶ 28 A reviewing court will generally review jury instructions only for an abuse of discretion. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 33. An abuse of discretion will be found where no reasonable person could agree with the position of the lower court (*id.*) or if the jury instructions given are unclear, mislead the jury, or are not justified by the evidence and the law (*People v. Lovejoy*, 235 Ill. 2d 97, 150 (2009)). For the following reasons, we reject defendant's argument and affirm the trial court's ruling.

¶ 29 The principle is well established that a defendant may be entitled to have the jury instructed on a less serious offense than is included in the one charged. *People v. Bryant*, 113 Ill. 2d 497, 502 (1986). An included offense is established by proof of the same or less than all of the facts, or a less culpable mental state (or both), than that which is required to establish the commission of the offense. *People v. Landwer*, 166 Ill. 2d 475, 486 (1995). The trial court has the discretion to decide whether an instruction is to be given, and if there is evidence supporting the lesser-included offense instruction, it is an abuse of discretion for the trial court to refuse it. *People v. Rebecca*, 2012 IL App (2d) 091259, ¶ 60. Very slight evidence upon a given theory of a case will justify a court's giving a jury instruction on the applicable law. *People v. Jones*, 175 Ill. 2d 126, 132 (1997). However, the

identification of a lesser-included offense does not automatically give rise to a correlative right to have the jury instructed on it. *Id.* Indeed, the trial court does not abuse its discretion in refusing a lesser-included-offense instruction where there is no evidence, even slight evidence, to support a jury rationally finding defendant guilty only of the lesser offense. *Rebecca*, 2012 IL App (2d) 091259 at ¶ 61. An instruction on a lesser offense may be precluded by evidence negating the possibility of a finding of guilt on the lesser offense than the one charged. *People v. Allgood*, 242 Ill. App. 3d 1082, 1088 (1993). It is error to instruct the jury on the lesser-included offense when there is no evidence to support such an instruction. *Id.*

¶ 30 To determine whether a particular offense is included in a charged offense, the proper approach is to examine the charging instrument and the evidence presented at trial. *Landwer*, 166 Ill. 2d at 486. First, the court must determine whether the charging instrument contains a "broad foundation" or "main outline" of the lesser offense. *Id.* Second, the court must examine the evidence presented at trial to determine whether a jury could rationally find the defendant guilty of the lesser offense, but acquit on the greater offense. *Id.* Here, the State concedes that aggravated criminal sexual abuse is a lesser-included offense of criminal sexual assault. Thus, the issue in this case is centered on the second part of the lesser-included offense instruction analysis, which is whether the evidence presented at trial could have allowed the jury rationally to find defendant guilty of the lesser offenses, but to acquit on the greater offenses charged.

¶ 31 We address first, however, defendant's argument that his compulsion defense does not preclude his request for a lesser-included instruction. In support of its argument that defendant is not, based upon his defense, entitled to a lesser-included instruction, the State relies on *Landwer*. There, our supreme court considered whether a defendant who had raised the affirmative defense of

entrapment was entitled to have the jury instructed regarding solicitation to commit aggravated battery as a lesser-included-offense of solicitation to commit murder. The court answered that question in the negative. *Landwer*, 166 Ill. 2d at 486. In making its decision, the court reiterated the well-established principle that, in order to rely on an affirmative defense like entrapment, a defendant must admit to committing all elements of the charged offense. *Id*. Once a defendant raises the affirmative defense of entrapment, the sole remaining disputed factual inquiry necessary to establish the commission of the offense becomes whether the defendant was entrapped. *Id*. The court further reasoned that, after the entrapment defense was raised, a jury could not rationally find the defendant guilty of the lesser offense but acquit him of the greater offense, because there was no disputed factual element that distinguished the greater offense from the lesser offense. *Id*. at 486.

¶ 32 While the State's analogy to entrapment cases is not without merit, Illinois courts have been inconsistent in determining whether a defendant is entitled to a lesser-included offense instruction in light of other affirmative defenses, and we found no case (and the parties presented none) in our jurisdiction involving specifically the defense of compulsion. See *People v. Lockett*, 82 Ill. 2d 546, 550 (1980) (where the court ruled that an affirmative defense based on self-defense did not preclude a voluntary manslaughter instruction in a murder prosecution); but see *People v. Abernathy*, 189 Ill. App. 3d 292, 315 (1989) (when a defendant raises the defense of accident or misadventure in a murder prosecution, an instruction on the lesser-included offense of involuntary manslaughter should be refused).

¶ 33 Other jurisdictions have addressed whether a compulsion defense precludes lesser-included instructions. In *State v. Davis*, 883 P.2d 735, 750 (Kan. 1994), for instance, the defendant argued that his compulsion defense to the charge of aggravated robbery did not preclude an instruction on

the lesser-included offense of robbery. The Kansas supreme court found that the trial court properly rejected the defendant's argument, stating that there was no duty for the court to instruct the jury on the lesser offense because the evidence clearly showed either that the greater offense had occurred or, based on the compulsion defense, no offense had occurred. See also *State v. Whitaker*, 872 P.2d 278, 287 (Kan. 1994) (where defendant was charged with aggravated burglary and kidnaping and asserted a compulsion defense, no requirement to instruct the jury on the lesser offense of robbery because either the greater offense occurred or, based on the defense, no offense occurred). The court in *State v. White*, 988 N.E.2d 595, 632 (Ohio 2013), took this analysis one step further, ruling that instructing on an affirmative defense, where it would be a complete defense to the elements of the crime charged, precludes a defendant from obtaining an instruction on lesser-included offenses. Furthermore, federal courts have stated that a defendant who presents an exculpatory defense is not entitled to a lesser-included instruction. See *e.g.*, *U.S. v. Hill*, 196 F.3d 806, 808 (7th Cir. 1999).

¶ 34 Ultimately, however, we need not decide here whether defendant's compulsion defense itself precluded the lesser-included instruction. Again, a defendant is entitled to a lesser-included instruction only if the evidence would permit the jury to find the defendant guilty of the lesser offense and acquit him of the greater offense. *Rebecca*, 2012 IL App (2d) 091259 at ¶ 60. This evidentiary requirement is usually satisfied by the presentation of conflicting testimony on the element that distinguishes the greater offense from the lesser offense. *Id.* If the evidence clearly shows that the greater offense occurred, however, then the defendant is not entitled to such an instruction. *Id.* *Allgood* is instructive on this point. In that case, the defendant was charged with aggravated criminal sexual assault and requested an instruction on criminal sexual assault, a lesser-included offense. The court upheld the denial of the request, noting that photographs and

uncontroverted testimony from several witnesses established that the defendant was guilty of the greater-charged offenses. The evidence rationally precluded the possibility of finding the defendant guilty of the lesser offense. *Allgood*, 242 Ill. App. 3d at 1088.

¶ 35 Here, the distinguishing element between the lesser and greater offenses is whether defendant's acts constituted "penetration" or merely "sexual conduct." The trial court and the jury had the opportunity to examine photographic and video evidence of defendant committing sexual acts with A.R. to determine whether the acts, as specifically described in the State's charges against defendant, occurred. Critically, during his testimony, defendant did *not* deny penetration. In fact, he *agreed* with the State that the acts as described in the charges occurred. Thus, there was no dispute over whether defendant's acts constituted "penetration" or "sexual conduct," and the jury was able to make definite findings from the evidence. Accordingly, the evidence establishes that the trial court did not abuse its discretion in refusing to instruct the jury on the lesser-included offense of aggravated criminal sexual abuse.

¶ 36 Defendant further argues that the trial court erred by refusing the proposed instructions without any sort of explanation. Defendant does not cite to any authority to support this argument, and, as such, it is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). In sum, the trial court did not abuse its discretion in refusing defendant's proposed lesser-included-offense instruction.

¶ 37 B. DNA Sample

¶ 38 On appeal, defendant argues that the trial court's order for him to submit a DNA sample and pay the associated costs should be vacated. The State confesses error and agrees that this order should be vacated.

¶ 39 The appropriateness of a trial court's imposition of fees raises a question of statutory interpretation that is reviewed *de novo*. *People v. Anthony*, 408 Ill. App. 3d 799, 806 (2011). Although defendant did not raise this issue at trial, the State acknowledges that the issue of whether a sentence is authorized by statute is not subject to forfeiture and may be raised for the first time on appeal. *People v. Woodard*, 175 Ill. 2d 435, 457 (1997).

¶ 40 The court stated in *People v. Marshall*, 242 Ill. 2d 285, 302-03 (2011) that a DNA analysis fee can be assessed against an individual only once. The record here shows that, in 2006, defendant had submitted a swab sample for DNA analysis to the Illinois State Police DNA Indexing Laboratory following an arrest for disorderly conduct. Because defendant's failure to raise this issue at trial is not subject to forfeiture and since his DNA profile is currently stored in the DNA database maintained by the Illinois State Police, defendant is not required to submit an additional DNA sample. As such, the trial court's order for defendant to submit the sample and pay the $200 DNA analysis fee is vacated.

¶ 41 III. CONCLUSION

¶ 42 For the aforementioned reasons, the judgment of the circuit court of McHenry County is affirmed in part and vacated in part.

¶ 43 Affirmed in part and vacated in part.