2013 IL App (4th) 110137-UB

NO. 4-11-0137

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 26, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
JAMES MICHAEL TIPSORD,	)	No. 10CF116
Defendant-Appellant.	)	
	)	Honorable
	)	Charles G. Reynard,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Steigmann and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction is reversed because the State introduced insufficient evidence to support a conviction of criminal sexual assault.

¶ 2 In February 2010, a grand jury indicted defendant, James Michael Tipsord, for criminal sexual assault based on defendant knowingly committing an act of sexual penetration upon B.T. by placing his finger in B.T.'s vagina when B.T. was unable to give knowing consent (720 ILCS 5/12-13(a)(2) (West 2010)). In July 2010, the State filed a motion *in limine* to admit evidence of defendant's gang affiliation. Following a hearing that month, the trial court granted the State's motion in part.

¶ 3 In September 2010, defendant's jury trial commenced. During *voir dire* questioning, in front of all but four members of the venire, one of the potential jurors indicated he worked in the jail and thus saw defendant on an almost daily basis. Another potential juror

later stated he also worked in the jail and also knew defendant. Defense counsel asked the trial court to strike the venire based on the potential jurors' statements. The court denied defense counsel's request and offered to give a limiting instruction.

¶ 4 Following a two-day trial, the jury found defendant guilty of criminal sexual assault. Defense counsel later filed a posttrial motion alleging, among other things, (1) the State failed to prove defendant guilty beyond a reasonable doubt, (2) the trial court erred in allowing testimony regarding defendant's gang affiliation, and (3) the court erred when it refused to dismiss the venire. In October 2010, defendant filed a *pro se* document entitled "MOTION TO: RECONSIDER VERDICT," asserting defense counsel was ineffective and the State's evidence was insufficient to prove defendant guilty. Prior to defendant's sentencing hearing in December 2010, the trial court struck defendant's *pro se* motion and denied defense counsel's posttrial motion. Thereafter, the court sentenced defendant to 12 years in prison. This appeal followed.

¶ 5 On appeal, defendant argues (1) the State failed to present any evidence establishing defendant knew B.T. was unable to give knowing consent to digital penetration as required by section 12-13(a)(2) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12-13(a)(2) (West 2010)); (2) the trial court improperly admitted gang-related evidence because the prejudicial effect of the evidence substantially outweighed its probative value; (3) the trial court abused its discretion when it refused to dismiss the venire after two potential jurors told all but four members of the venire that defendant was in jail; and (4) the trial court failed to conduct any inquiry into defendant's allegations of ineffective assistance of counsel. On August 21, 2012, this court affirmed defendant's conviction but remanded the case for a *Krankel* hearing (see *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984)). *People v. Tipsord*, 2012 IL App (4th)

110137-U) (unpublished order under Supreme Court Rule 23). On May 29, 2013, the Supreme Court of Illinois issued a supervisory order directing this court to vacate its judgment and reconsider in light of its decision in *People v. Lloyd*, 2013 IL 113510, 987 N.E.2d 386. *People v. Tipsord*, No. 114967 (ILL. May 29, 2013), 992 N.E.2d 2 (nonprecedential supervisory order on denial of leave to appeal). For the reasons that follow, we reverse defendant's conviction.

¶ 6 I. BACKGROUND

¶ 7 In February 2010, a grand jury indicted defendant for criminal sexual assault for knowingly committing an act of sexual penetration upon B.T. by placing his finger in the vagina of B.T. when B.T. was unable to give knowing consent (720 ILCS 5/12-13(a)(2) (West 2010)). The case proceeded to jury trial in September 2010 and the following evidence was presented.

¶ 8 In April 2009, on the Friday after B.T.'s fourteenth birthday, B.T.'s father gave her permission to spend the night at the home of H.G., defendant's stepdaughter. B.T.'s father was a race car driver and was at the racetrack that night. B.T. met H.G. in the neighborhood when she was approximately seven or eight years old and regularly spent the night at H.G.'s home. B.T. testified she had known defendant for at least five years.

¶ 9 B.T. and H.G. began "hanging out right after school." Around 6 or 7 p.m., they returned to H.G.'s home to babysit H.G.'s sister, stepbrother, and another little girl. Defendant and defendant's wife, Michelle, went out that night with another couple, Chris and Heather. H.G.'s grandmother, Phyllis G., was home but spent most of the night in her bedroom.

¶ 10 B.T. testified she and H.G. spent the evening playing with the little girls outside, cooking them dinner, and watching television. Later, B.T. and H.G. made a pallet for the girls and laid them down in the living room to sleep. H.G.'s stepbrother fell asleep in either a corner

of the living room or in the bedroom. Defendant and Chris returned home around midnight, and Chris took the little girls home. B.T. knew defendant was intoxicated because she could smell alcohol on defendant's breath and she had been around defendant on other occasions when he was intoxicated. Defendant started smelling B.T.'s hair, telling her that her "hair smelled like [her] mom's." B.T. testified her mother and defendant knew each other from the neighborhood. H.G. asked defendant why he kept smelling B.T.'s hair and told him to stop.

¶ 11 Defendant sat down on the floor in front of the couch and began rubbing B.T.'s legs, first starting low but then moving his hand higher. B.T. was wearing basketball shorts. H.G. had fallen asleep on the other side of the couch. B.T. told defendant to stop and told him she was scared. She also tried to wake H.G. by kicking at her. Defendant then exposed his penis to B.T. B.T. pulled a blanket over herself and turned away from defendant. At some point before exposing his penis, defendant left to change clothes and use the bathroom. While he was gone, B.T. sent her father a text message that said "hey," but her father did not respond.

¶ 12 Michelle returned home approximately half an hour to an hour later. She woke H.G., and H.G. and B.T. went into the back bedroom to sleep. B.T. described the room as containing both a queen-size bed and a recliner. The bed was pushed against the wall, and the recliner was located at the foot of the bed such that it could recline backward over the bed.

¶ 13 B.T. lay on the bed against the wall and H.G. lay next to B.T. H.G.'s grandmother was already lying on the outside edge of the bed. After awhile, defendant came into the room and sat in the recliner. H.G. and H.G.'s grandmother were both asleep. Defendant removed one of B.T.'s socks and began sucking on her toe. B.T. told him to stop, and defendant did. Thereafter, he began rubbing B.T.'s legs again. He then stuck his hands "down [her] underwear,"

touched her vagina, and "put a finger inside of [her]." B.T. said H.G. was "sleeping so hard" during all of this that she was "grinding her teeth the whole time."

¶ 14 B.T. testified she did not immediately tell anybody what happened because she "was too scared." She explained, earlier that day H.G. spoke to defendant about H.G.'s ex-boyfriend's claim he was a G.D. (Gangster Disciple). Defendant told H.G. her ex-boyfriend was not a G.D. because he (the boyfriend) did not know who the leaders were. Defendant claimed he knew the leaders. He also told B.T. and H.G. some of the gang symbols and showed B.T. and H.G. one of the symbols he had tattooed on his chest. Defense counsel did not object to B.T.'s testimony about defendant's gang involvement.

¶ 15 The following Wednesday, B.T. attended youth group with her friend S.B. S.B. testified B.T. was"really quiet" and "in tears," which was unusual behavior for B.T. After S.B. asked her multiple times what was wrong, B.T. finally told S.B. about the incident. S.B. said after telling her the story, B.T. became sick. B.T. told S.B. not to tell anybody, and S.B. never disclosed the incident to anyone.

¶ 16 After later making statements to her counselor about the incident, B.T. went to the Children's Advocacy Center in February 2010 to give a recorded interview about what had happened. Officer Michael Burns then interviewed defendant. Burns testified at the time of his interview, defendant was under arrest. During defendant's interview, Burns could smell alcohol on defendant's breath. The trial court admitted into evidence People's exhibit No. 1, a video recording of Burns' interview with defendant, and played it for the jury. Defendant said he consumed two beers before the interview but stated he felt clear about things. Defendant asked Officer Burns whether he was under arrest, and Burns answered affirmatively, telling defendant

he was not free to go. Defendant told Burns he previously dated B.T.'s mother for about a year. During that time, B.T.'s mother lived with defendant and B.T. lived with her father but would come over on the weekends. Defendant asserted he could not remember anything from the evening but could not imagine B.T.'s story being true. If anything happened, defendant stated, he was too drunk to remember it.

¶ 17 Defendant stated he used to be affiliated with a gang but was not anymore. He denied ever telling B.T. or H.G. he was in a gang. He said the girls had noticed his tattoos and H.G. had looked up their meaning on the Internet.

¶ 18 H.G. testified she had known B.T. for five years and she and B.T. often took turns spending the night at each other's houses. She remembered B.T. staying at her house the Friday after B.T.'s birthday. That night, she and B.T. babysat H.G.'s cousin and sisters while H.G.'s parents went out. Around 10 p.m., H.G. fell asleep on the couch. B.T. woke H.G. at one point, and H.G. saw defendant sitting on the floor by B.T.'s head, moving her hair and telling B.T. "she smelled like her mom." H.G. told defendant to leave B.T. alone, and H.G. went back to sleep. H.G. did not remember sleeping in the back bedroom or anywhere else that night. She also did not remember seeing B.T. the next morning and did not see B.T. crying or upset on the night of the incident.

¶ 19 Michelle Tipsord, H.G.'s mother, testified she remembered going out drinking on the night of the incident, but she could not remember the details of that night. She said she and defendant often went out on Friday nights and both usually consumed alcohol. After hearing in the summer of 2009 that an incident occurred between defendant and B.T., Tipsord questioned defendant. Defendant denied anything had happened. Tipsord said she trusted B.T. and B.T. had

babysat Tipsord's children before. B.T. and H.G. had been friends for "six, seven years, maybe longer" and often stayed over at each other's homes. Tipsord testified H.G. is "sometimes" a heavy sleeper, and H.G.'s grandmother is "pretty much" a heavy sleeper.

¶ 20 Phyllis G. testified she lived with defendant and Tipsord, and B.T. visited their home "every once in awhile," sometimes staying overnight. When B.T. spent the night, she and H.G. either slept in the front room on the couch or in the back room with Phyllis G. and the other grandchildren. She said B.T. and H.G. sometimes fought, and sometimes got along well. Phyllis G. said she was a heavy sleeper and H.G. could also be a heavy sleeper.

¶ 21 Gary T. testified his daughter, B.T., told him in the summer of 2009 she did not want to go back to H.G.'s home. B.T. never told him why, and he never really asked, figuring "it was something to do with her and [H.G.]." At a later date, B.T. told Gary T. defendant had tried to touch her, but she did not give any details of the touching.

¶ 22 On this evidence, the jury found defendant guilty of criminal sexual assault. Later that month, defense counsel filed a posttrial motion, arguing (1) the State failed to prove defendant guilty beyond a reasonable doubt, (2) the trial court erred in allowing testimony regarding defendant's gang affiliation, and (3) the court erred when it refused to dismiss the venire.

¶ 23 In October 2010, defendant filed a *pro se* "MOTION TO: RECONSIDER VERDICT," alleging he received ineffective assistance of counsel and the State had presented insufficient evidence of his guilt. In December 2010, the parties appeared for defendant's sentencing hearing. The trial court asked defense counsel whether he took into consideration the contents of defendant's *pro se* motion when counsel filed his posttrial motion. Defense counsel

answered, "to the extent that I believe they are appropriate, I believe *** his post[ ]trial motions are primarily addressed by Paragraphs 3, 6, and 7 of the Post[ ]Trial Motion having to do with sufficiency of the evidence." The trial court then struck defendant's *pro se* motion, telling defendant when he was represented by an attorney he was not able to file motions as if he were his own attorney. When defendant asked to address the court, the court responded, "No. You're represented by counsel. You can ask [counsel] to speak on your behalf, but you don't speak on your behalf." Shortly thereafter, the trial court denied defense counsel's posttrial motion and sentenced defendant to 12 years in prison. This appeal followed.

¶ 24 As noted above, our supreme court has directed us to reconsider our previous decision affirming defendant's conviction in this case in light of *People v. Lloyd*, 2013 IL 113510, 987 N.E.2d 386. Because *Lloyd* requires us to do so, we reverse defendant's conviction. In light of the outcome, our decision here does not address the issues concerning evidence of gang affiliation, the trial court's refusal to dismiss the jury venire, or the court's alleged error in failing to conduct an appropriate *Krankel* inquiry.

¶ 25 II. ANALYSIS

¶ 26 Defendant argues his conviction must be vacated because the State failed to present any evidence establishing defendant knew B.T. was unable to giving knowing consent to digital penetration as required by section 12-13(a)(2) of the Criminal Code (720 ILCS 5/12-13(a)(2) (West 2010)). Specifically, defendant argues the State's reliance on B.T.'s age alone was insufficient to establish B.T. could not knowingly consent to defendant's advances under section 12-13(a)(2) because section 12-13(a)(2) applies only to victims who are (1) mentally impaired or (2) rendered temporarily unable to give knowing consent.

¶ 27 A person commits criminal sexual assault under section 12-13(a)(2) of the Criminal Code if he "commits an act of sexual penetration" and he "knew that the victim was unable to understand the nature of the act or was unable to give knowing consent[.]" 720 ILCS 5/12-13(a)(2) (West 2010)). We had stated previously in *People v. Lloyd*, 2011 IL App (4th) 100094, 961 N.E.2d 344, *rev'd*, 2013 IL 113510, 987 N.E.2d 386, the mere fact a victim is under the age of consent is insufficient to prove a defendant " 'knew that the victim was unable to understand the nature of the act or was unable to give knowing consent.' " *Lloyd,* 2011 IL App (4th) 100094, ¶ 34, 961 N.E.2d 344. Rather, the focus of the analysis under section 12-13(a) is "on what defendant *knew*." (Emphasis added.) *Id.* " 'The State must present sufficient evidence from which an inference of knowledge can be made, and any inference must be based on established facts and not pyramided on intervening inferences.' " *Id.* (quoting *People v. Weiss*, 263 Ill. App. 3d 725, 731, 635 N.E.2d 635, 639 (1994)).

¶ 28 In *Lloyd*, this court considered the Fifth District's decision in *People v. Whitten*, 269 Ill. App. 3d 1037, 1042, 647 N.E.2d 1062, 1066 (1995), where the court stated section 12-13(a)(2) sets forth two different ways to commit the crime: (1) knowingly having sexual relations with someone who is unable to understand the act, or (2) knowingly having sexual relations with someone who, *for any reason*, is unable to give knowing consent. *Lloyd*, 2011 IL App (4th) 100094 ¶ 29, 961 N.E.2d 344. We noted the Illinois legislature's age-based criminal statutes show the age of consent in Illinois is generally 17 and sometimes 18. *Lloyd*, 2011 IL App (4th) 100094, ¶ 31, 961 N.E.2d 344. Because section 12-13(a)(2) does not contain any limiting language, this court concluded the legislature did not intend to exclude the inability to consent based on age as a means of showing defendant committed criminal sexual assault.

Lloyd, 2011 IL App (4th) 100094, ¶ 33, 961 N.E.2d 344.

¶ 29 As previously noted, our supreme court rejected our analysis in *Lloyd*. Noting this was a case of statutory construction and the *de novo* standard of review applied, the supreme court examined the statutory framework defining sex offenses in Illinois. *Lloyd*, 2013 IL 113510 at ¶ 26, 987 N.E.2d 386. Basically, the sex offense statutes vary based on the age of the victim, the age of the accused, and the type of sexual contact that must be proved. *Id.* ¶ 28. To meet its burden under section 12-13(a)(2), the supreme court held the State is required to show the defendant knew some fact prevented the victim's ability to understand the act or give knowing consent to it, other than evidence defendant knew of the victim's young age. *Id.* ¶ 40. This burden can be met by showing a defendant knew the victim was severely mentally disabled, intoxicated, asleep, or unconscious at the time of the act. *Id.*

¶ 30 Consequently, under the statutory section the State chose to prosecute defendant, section 12-13(a)(2) of the Criminal Code (720 ILCS 5/12-13(a)(2) (West 2010)), there must be evidence *other than* B.T.'s age and defendant's knowledge of that age to sustain a conviction. We turn then to a consideration of whether the evidence was sufficient to support defendant's conviction under the facts of this case.

¶ 31 As the supreme court noted in *Lloyd*,

> "When considering a challenge to the sufficiency of the evidence in a criminal case, our function is not to retry the defendant. [Citation.] Rather, our inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense

> beyond a reasonable doubt. [Citation.] This means that we must allow all reasonable inferences from the record in favor of the prosecution. [Citation.] 'We will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.' [Citation.]"
>
> *Lloyd*, 2013 IL 113510, ¶ 42, 987 N.E.2d 386.

¶ 32 In this case, the State's evidence established B.T. turned 14 the week before defendant assaulted her. In addition, the evidence in this case showed defendant knew B.T.'s approximate age. Specifically, the testimony at trial established B.T. had been friends with H.G., defendant's stepdaughter, for approximately six or seven years, and B.T. frequently spent time at H.G. and defendant's home. B.T. testified she had known defendant for at least five years. She and defendant lived in the same neighborhood. Defendant stated he dated B.T.'s mother for about a year, during which time B.T. would come over to visit on the weekends. The State introduced no other evidence to show B.T. was unable to understand the act or give knowing consent to it. Accordingly, the jury's verdict cannot stand.

¶ 33 As in *Lloyd*, the State presented sufficient evidence from which a rational trier of fact could have concluded defendant committed aggravated criminal sexual abuse, a Class 2 felony punishable by not less than three nor more than seven years in prison. See 720 ILCS 5/12-16(d), (g) (West 2008); 730 ILCS 5/5-8-1(a)(5) (West 2008). Unfortunately, the State chose not to charge him with that offense and, instead, decided to pursue only a criminal sexual assault charge, which subjects a defendant to enhanced sentencing provisions. The first conviction is a Class 1 felony punishable by not less than four nor more than 15 years in prison. 720 ILCS 5/12-

13(a)(2), (b)(1) (West 2008); 730 ILCS 5/5-8-1(a)(4) (West 2008). A second or subsequent conviction is a Class X felony with a 30-to-60 year prison sentence. 730 ILCS 5/12-13(b)(2) to (b)(5) (West 2008). In evaluating defendant's challenge to the sufficiency of the evidence under the circumstances in this case, we can only consider the evidence regarding the actual charges the State chose to bring against him, and not the fact he may be guilty of the uncharged offense of aggravated criminal sexual abuse. In contrast to aggravated criminal sexual abuse, defendant's conviction for criminal sexual assault did not require, *inter alia*, a showing he was at least five years older than the victim. Therefore, the jury's verdict in this case did not include a finding that all of the elements of aggravated criminal sexual abuse had been proved beyond a reasonable doubt. We cannot substitute a conviction where the verdict on an uncharged offense would require a finding of guilt on an additional element not encompassed by any of the elements of the offense considered by the jury "no matter how inescapable the findings to support that verdict might be." *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081-82 (1993) ("to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee"). See *People v. Lloyd*, 2013 IL 113510, ¶ 45, 987 N.E.2d 386.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we reverse defendant's conviction of criminal sexual assault.

¶ 36 Reversed.