2016 IL App (4th) 140701-U

NO. 4-14-0701

FILED
December 22, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
GAROLD HOLLOWAY,	)	No. 12CF273
Defendant-Appellant.	)	
	)	Honorable
	)	James R. Coryell,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed and remanded for a new trial, finding the trial court erred in tendering a nonpattern jury instruction.

¶ 2 In May 2014, a jury found defendant, Garold Holloway, guilty of two counts of criminal sexual assault. In June 2014, the trial court sentenced defendant to consecutive terms of 15 years in prison on each count.

¶ 3 On appeal, defendant argues (1) the trial court erred in tendering a nonpattern jury instruction on the legal age of consent and (2) his cause should be remanded for an inquiry under *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). We reverse and remand for a new trial.

¶ 4 I. BACKGROUND

¶ 5 In March 2012, the State charged defendant by information with two counts of

criminal sexual assault (720 ILCS 5/11-1.20(a) (West 2012)), alleging defendant, by the use of force, knowingly committed an act of sexual penetration with A.M. by placing his sex organ in her sex organ (count I) and placing his finger in her sex organ (count II). Defendant pleaded not guilty.

¶ 6 In May 2014, defendant's jury trial commenced. A.M. testified she was born in May 1998. In February 2012, she was 13 years old and friends with S.S. She stated defendant picked up her and S.S. from S.S.'s house for a planned shopping trip. They made a stop at defendant's residence, and all three went inside. A.M. and S.S. were in a bedroom when defendant asked if they wanted food. While defendant prepared noodles, A.M. sat on the bed and S.S. sat in a chair. A.M. testified defendant brought food into the bedroom and then "he got in the bed and got behind [her]." Defendant "grabbed [her] from behind" by her waist. A.M. called out to S.S., but S.S. did not look at her, as she was looking down at her phone. A.M. tried to pull away from defendant. Defendant held on to A.M. and then pulled her pants and underwear down near her ankles. While her back was to his front, defendant started touching A.M. in her "private" with his fingers. He then put his penis inside her vagina. Once it was over, A.M. stated she ran to the bathroom and started crying. Later, defendant and A.M. went to a gas station. On the way, A.M. sent text messages to her aunt. A.M.'s aunt eventually picked her up at the gas station and took her to the hospital.

¶ 7 On cross-examination, A.M. testified S.S. was approximately three to five feet away from her while they were in the bedroom. She stated she never hit defendant or told him no during the assault.

¶ 8 A.M.'s aunt testified she and a friend went to pick up A.M. at the gas station. She contacted the police and then took A.M. to the hospital. A sexual-assault kit was collected from

A.M. and transferred to the police.

¶ 9 Rhonda Carter, a forensic scientist with the Illinois State Police, testified her analysis determined the presence of semen on the vaginal swab from A.M.'s sexual-assault kit. Cory Formea, also a forensic scientist with the Illinois State Police, testified he analyzed the evidence and found deoxyribonucleic acid from A.M., defendant, and a third, small mixture that could not be attributed to either individual.

¶ 10 In the defense case, S.S. testified she was 14 years old. On February 10, 2012, she went with her close friend, A.M., to the home of defendant, S.S.'s godfather. Once they entered, they went to defendant's room. Defendant offered to make some noodles and left the room. S.S. sat in a chair and A.M. was approximately three or four feet away on the bed. S.S. played games on defendant's phone. S.S. stated A.M. was lying down under the covers. After defendant brought in the noodles, S.S. stated she did not remember what happened, but she stated A.M. was texting her to look up.

¶ 11 On cross-examination, S.S. admitted she told police defendant scooted close to A.M. on the bed. She told the police defendant and A.M. were under the covers and she could not tell what they were doing. She told police defendant was touching A.M. S.S. told police she received a text message from A.M. telling her to "get him off of me because he is touching me." S.S. responded with a text message, telling A.M. to "get up." A.M. replied with a text message and stated, "I am trying but he keeps pulling on me." S.S. told the police she could see defendant's body moving back and forth under the covers. She told the police A.M. had a look of shock on her face and got out from under the covers with her pants undone. Once in the bathroom, A.M. told her defendant raped her. S.S. testified her memory was better close to the time of the incident than it was at the time of the trial.

¶ 12 Defendant testified he was 53 years old. He stated he had met A.M. 5 to 10 times when she was at S.S.'s house. On their way to go shopping, defendant stopped at his house to get some money. S.S. stated she wanted some noodles, and defendant made some for her. Defendant stated A.M. was lying on the bed under the covers and S.S. was sitting in a chair at the foot of the bed playing games on his phone. A.M. sat up to eat her noodles. Defendant then got on the bed, lying on his stomach, and reached up toward the headboard to retrieve some money. A.M. stated she was not hungry, set down the noodles, and scooted back up against him. Defendant stated he moved onto his side to give her room but she "scooted back up against [him] again." Defendant thought A.M. was "coming onto [him]," so he reached around for her buckle. Thinking better of it, considering his goddaughter was in the room, defendant pulled his hand back. He testified A.M. turned over on her back and "wiggled her pants down." Defendant engaged in sexual intercourse with A.M., thinking he would "just do a quickie with her." Defendant stated A.M. had told him she was "grown" and claimed she "initiated" the contact and had "seduced" him. When asked how old he thought A.M. was, he testified "at least 17, age of consent."

¶ 13 In the State's rebuttal, Decatur police detective Troy Phares testified he interviewed S.S. approximately 10 days after the incident. S.S. told Detective Phares that A.M. texted her during the incident stating, "No. Get him off of me. Call someone." S.S. also told him she was using defendant's phone and it locked, rendering her unable to use it anymore.

¶ 14 In instructing the jury, the trial court indicated the State had to prove (1) defendant committed an act of sexual penetration upon A.M., (2) the act was committed by the use of force or threat of force, and (3) A.M. did not consent to the act of sexual penetration. See Illinois Pattern Jury Instructions, Criminal, No. 11.55 (4th ed. 2000). At defendant's request, the

court further instructed the jury that consent was a defense to the charges. Illinois Pattern Jury Instructions, Criminal, No. 11.63 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 11.63).

¶ 15 The State had also requested a nonpattern jury instruction defining the legal age of consent based on *People v. Hollins*, 2012 IL 112754, ¶ 17, 971 N.E.2d 504. Over defense counsel's objection, the trial court gave the requested instruction as: "In Illinois, the legal age to give consent to engage in sexual acts is 17."

¶ 16 Following closing arguments, the jury found defendant guilty on both counts. In June 2014, defendant filed a motion for a new trial. Therein, defendant alleged the State failed to prove him guilty beyond a reasonable doubt and the trial court erred in giving a non-IPI jury instruction that 17 years of age was the age of consent.

¶ 17 In June 2014, the trial court denied defendant's posttrial motion. Thereafter, the court sentenced defendant to consecutive terms of 15 years in prison on each count. In July 2014, defendant filed a motion to reconsider his sentence. In August 2014, the court denied the motion. This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Defendant argues his case should be remanded for a new trial, claiming the trial court committed reversible error in tendering a nonpattern jury instruction that (1) was misleading, confusing, and unnecessary; and (2) deprived him of his right to a trial and to present a defense because the instruction negated an element of the offense. We agree.

¶ 20 "The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Bannister*, 232 Ill. 2d 52, 81, 902 N.E.2d 571, 589 (2008). While the trial court should use IPI instructions when applicable, if no instruction exists for the

subject, the court should provide an instruction that is "simple, brief, impartial, and free from argument." Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013). The proper use of nonpattern instructions depends on whether an ordinary juror would understand them. *Bannister*, 232 Ill. 2d at 81, 902 N.E.2d at 589. The court's decision to use a nonpattern jury instruction is reviewed under an abuse-of-discretion standard. *People v. Hudson*, 222 Ill. 2d 392, 400, 856 N.E.2d 1078, 1082 (2006). However, "the issue of whether the jury instructions accurately conveyed to the jury the applicable law is reviewed *de novo*." *People v. Parker*, 223 Ill. 2d 494, 501, 861 N.E.2d 936, 939 (2006).

¶ 21 In this case, the State charged defendant with two counts of criminal sexual assault (720 ILCS 5/11-1.20(a) (West 2012)), alleging he, by the use of force, knowingly committed acts of sexual penetration with A.M. The relevant instruction to the jury obligated the State to prove (1) defendant committed an act of sexual penetration upon A.M., (2) the act was committed by the use of force, and (3) A.M. did not consent to the act of sexual penetration. Illinois Pattern Jury Instructions, Criminal, No. 11.56 (4th ed. 2000). The trial court instructed the jury that "[i]t is a defense to the charge of criminal sexual assault that [A.M.] consented." IPI Criminal 4th No. 11.63. The court also instructed the jury on the definition of consent (Illinois Pattern Jury Instructions, Criminal, No. 11.63A (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 11.63A), as follows:

> "The word 'consent' means a freely given agreement to the act of sexual penetration in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the defendant shall not constitute consent."

¶ 22 At the jury instruction conference, the State sought a nonpattern instruction defining the legal age of consent, as stated in *Hollins*, 2012 IL 112754, ¶ 17, 971 N.E.2d 504. The prosecutor stated as follows:

> "Now, we're in a position where the defendant has essentially testified that [A.M.] consented, if not initiated and aggressed upon him. And so I know the jury will be evaluating evidence about that and what they're going to make of that. But I think when it comes to instructing the jury on a consent defense, first of all, I'm not sure that it is applicable to an assault charge as opposed to an abuse charge. And secondly, I think since the age of consent is 17, if we're going to instruct them about a consent defense, they also need to be instructed about that so they can understand, legally, it just doesn't apply in this case."

¶ 23 Defense counsel objected, arguing age was not at issue in this case. The trial court stated defense counsel offered evidence on the issue of consent and created confusion "that may need to be cleared up." The court also noted defendant himself testified that 17 was the age of consent. The court allowed the State's nonpattern instruction, which stated, "In Illinois, the legal age to give consent to engage in sexual acts is 17."

¶ 24 Now on appeal, defendant argues the jury received contradictory instructions that it had to find A.M. did not consent to sexual penetration and also that she could not consent to sexual conduct because of her age. *Cf. People v. Lloyd*, 2013 IL 113510, ¶ 40, 987 N.E.2d 386 (holding the victim's age could not be used to prove another element of the offense of criminal sexual assault). We find the nonpattern instruction utilized in this case was improper. The

relevant IPI instruction on the definition of consent provided an accurate statement of the law. The nonpattern instruction defined legal consent, which was not an element of the charged offense. The only issue the jury had to decide was whether factual consent existed. The age of A.M. was not an element of criminal sexual assault, and the nonpattern instruction contradicted IPI Criminal 4th Nos. 11.63 and 11.63A. The nonpattern instruction given here was misleading, as it informed the jury that A.M.'s age and ability to legally consent prevented it from determining whether she factually consented to the sexual conduct. As IPI Criminal 4th No. 11.63A provided a clear and accurate statement of the law defining consent, the trial court erred in granting the State's request for the nonpattern instruction. Accordingly, defendant's conviction must be reversed and the cause remanded for a new trial.

¶ 25 Because we are reversing defendant's conviction, we need not address his second issue regarding the *Krankel* inquiry. Moreover, as we are remanding for a new trial and we find the record contains sufficient evidence for the jury to have found defendant guilty of the offense of criminal sexual assault beyond a reasonable doubt, no double jeopardy violation will occur upon retrial. See *In re R.A.B.*, 197 Ill. 2d 358, 369, 757 N.E.2d 887, 894 (2001). This conclusion does not imply a determination of defendant's guilt or innocence that would be binding on retrial. See *R.A.B.*, 197 Ill. 2d at 369, 757 N.E.2d at 894.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we reverse the trial court's judgment and remand for a new trial.

¶ 28 Reversed and remanded for a new trial.