

No. 1-15-1296

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County, Illinois.
)	
v.)	No. 09 CR 14344
)	
KEITH NICKS,)	Honorable
)	Joan M. O'Brien,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not abuse discretion in declining to give non-Illinois Pattern Jury Instructions on the definition of gravestones and markers, cemetery, and cemetery authority, where terms were in common usage. Defendant was not entitled to affirmative defense instruction for his crimes arising under the Cemetery Protection Act (765 ILCS 835/1 *et seq.* (West 2014)).

¶ 2 Following a 2015 jury trial, defendant Keith Nicks was convicted of removal of ten or more gravestones, desecration of human remains, and removal of remains of a deceased human from a burial ground, and sentenced to six years of imprisonment. Keith purports to raise several challenges to his conviction and sentence, but because he has omitted the portions of the record

necessary to evaluate all but one of these challenges, we consider only his argument that the trial court erroneously declined to instruct the jury on the definition of gravestones, grave markers, cemetery, and cemetery authority. Finding no error in the instructions, we affirm.

¶ 3

BACKGROUND

¶ 4

The incidents giving rise to this prosecution occurred during Keith's employment as foreman of Burr Oak Cemetery located in Alsip, Illinois. In the spring and summer of 2009, authorities became aware of disinterred human remains present at the cemetery. These remains were found in man-made dirt piles along with casket wood and hardware. Keith was charged with crimes including removal of gravestones and desecration and removal of human remains. Others charged included Carolyn Towns, director of cemetery operations, and cemetery employees Maurice Dailey and Terrence Nicks (Keith's brother). Beginning in January 2015, Keith and Terrence were tried simultaneously before separate juries.

¶ 5

At trial, cemetery employees Willie Esper, Jr. and Fredrick Stanbeck testified at length about their observations of the practices at Burr Oak. Esper was responsible for general maintenance, setting up graves, and preparing for burials, while Stanbeck was a groundsman. As part of Esper's responsibilities, he was present during the digging of graves. Esper testified that Dailey operated the backhoe to dig a grave while Terrence acted as a spotter. Approximately 10 to 20 times between January 2009 and June 2009, Esper saw Dailey encounter a concrete liner (in which the coffins were placed) during his digging. On those occasions, Dailey and Terrence informed Keith that the grave was occupied, and Keith replied "[t]ake that [sh#t] from out of there and take it to the back with the rest of the garbage." Dailey recommenced digging, and Esper often saw bones among the concrete that was unearthed. Esper also saw Keith stand in

freshly dug graves and pound encroaching concrete liners from neighboring plots with a sledgehammer.

¶ 6 Stanbeck observed similar activity on approximately 15 occasions. Specifically, he testified that Keith supervised Dailey and Terrance digging up graves with human remains and said "[f#ck] it, Miss Towns done sold this grave; we got to get it done." In addition, Stanbeck testified that in October 2007, while he was mowing the grass by the dumping ground in the back of the cemetery, he came across a human skull and other remains. When he informed Keith of his discovery, Keith said he "told the dumb [motherfu#kers] to clean that up."

¶ 7 Esper and Stanbeck also testified about the practice of double stacking, which occurred when the cemetery sold an occupied gravesite. To create a double-stacked grave, Dailey dug with his backhoe until he hit the concrete liner encasing the coffin while Terrence spotted and Keith supervised. The liner was removed, covered with a tarp, and set aside. Dailey then dug deeper, and the liner containing the coffin was reinterred and covered with dirt. The grave thus appeared unoccupied for the next burial. When this work was occurring, Keith ordered Esper and Stanbeck to surround the area with dump trucks and backhoes so as to block the view of passers-by.

¶ 8 Keith's statement to then-assistant state's attorney John Mahoney following his arrest confirmed some of Esper and Stanbeck's testimony. In the statement, Keith stated that when he was first hired in April 2004, he wanted to improve the poor condition of the cemetery, but later "became involved with a bad situation." Keith explained that when digging a grave, cemetery workers often encountered a wooden coffin, a concrete liner, or bones. The backhoe operator scooped the remains out of the grave and deposited them in a dump truck. The truck driver, in turn, drove the remains to the northern end of the cemetery and buried them. Prior to becoming

foreman, Keith "knew this happened" approximately 200 times, and after he became foreman, it occurred 50 times in his presence and 100 times altogether. On some occasions, instead of digging up and removing the existing coffin, Keith ordered Dailey and Terrence to stack another coffin on top of it, although Keith avoided double-stacking strangers.

¶ 9 At trial, Keith denied making this statement to ASA Mahoney, and further denied that he ordered anyone to continue digging if they encountered a liner or human remains, or that he participated in double stacking graves. Keith also denied intentionally defacing or vandalizing a gravestone or grave marker. Rather, he testified that if a headstone obstructed the digging of a new grave, he removed it and returned it to its rightful place immediately after digging the new plot.

¶ 10 At least 13 witnesses who had buried relatives at Burr Oak testified that they noticed their loved ones' headstones were missing in the summer and fall of 2009. Among those 13, several also testified that it appeared their long-buried relatives' graves had been freshly dug, as the grass had been removed and only dirt lay atop the gravesite.

¶ 11 Roman Szabelski, a certified Catholic cemetary and a licensed cemetery manager testified regarding best practices in grave digging and burials. According to Szabelski, if one encounters a casket or remains while digging a grave, he should immediately stop and go to the cemetery office to determine why the grave space is not clear. Further, if portions of a casket or bones are inadvertently disinterred during the digging process, they should immediately be reinterred and cemetery authorities should be notified. Under no circumstances should an encroaching liner be pounded or pulverized.

¶ 12 Szabelski also testified as to the maintenance of gravestones, stating that when gravestones are damaged during the normal upkeep of the cemetery, cemetery officials should

work with families to repair them. He further testified that during his tenure as the court-appointed receiver for Burr Oak between July 2009 and September 2009, he saw "a large number" of markers in the yard in the back of the cemetery. This surprised him, because gravestones or markers are normally only removed if the family defaults on their installment payments or if there is an error in the name or dates on the marker. When he asked the cemetery office why the markers had been removed, he did not receive a response.

¶ 13 On cross-examination, Keith elicited testimony from Szabelski regarding the Cemetery Protection Act (765 ILCS 835/1 *et seq.* (West 2014)) (the Act), which addresses vandalism, desecration of graves, heirship, and unavoidable breakage of cemetery property. Szabelski testified that the Act does not penalize unintentional damage to gravestones or concrete liners.

¶ 14 Following the close of the State's case, the parties held a jury instruction conference, during which Keith presented the court with non-Illinois Pattern Jury Instructions (IPI) defining "gravestone" "grave marker," "cemetery," and "cemetery authority." The court declined to provide definitions of a gravestone, grave marker, or cemetery, explaining that they were commonly used terms and that defining them might lead to confusion. With regard to "cemetery authority," the court held that this term was only relevant if Keith was entitled to the affirmative defense instruction that he acted with proper legal authority. See 765 ILCS 835/1(c) (West 2014). Having found that Keith was not entitled to an instruction on this affirmative defense, the court declined to define "cemetery authority."

¶ 15 The jury found Keith guilty of removal of 10 or more gravestones or markers, desecration of human remains, and removal of remains of a deceased human being from a burial ground, and the court sentenced him to six years of imprisonment.

¶ 16 ANALYSIS

¶ 17 The sole issue on appeal¹ relates to the trial court's decision not to tender several of Keith's proposed non-IPI instructions, which we review for an abuse of discretion. See *People v. Green*, 2016 IL App (1st) 134011, ¶ 30. A trial court abuses its discretion if the instructions "are not clear enough to avoid misleading the jury." *In re Timothy H.*, 301 Ill. App. 3d 1008, 1015 (1998).

¶ 18 Initially, Keith argues that the court should have given his proposed instructions defining gravestones, grave markers and cemetery. With regard to gravestones and grave markers, the IPI instruction, which tracks the language of the Act (765 ILCS 1(b-5) (West 2014)), implicitly defines the terms and suggests that they are synonymous. Specifically, IPI 11.84 states

"To sustain the charge of cemetery vandalism-removal of gravestone . . . the State must prove the following propositions:

First: That the defendant . . . without proper legal authority willfully and knowingly defaced or vandalized or injured or removed a *gravestone or other memorial or monument or marker commemorating a deceased person ***.*"

Illinois Pattern Jury Instructions, Criminal, No. 11.84 (4th ed. 2000). (Emphasis added.)

Because the law does not distinguish between gravestones or grave markers – they both "commemorat[e] a deceased person" – providing a separate definition of each would not have aided the jury's understanding. See *People v. Brown*, 2015 IL App (1st) 131522, ¶ 42 ("Jury instructions should not be misleading or confusing.").

¹ In our order of March 18, 2016, we found Keith's challenges to (i) the denial of his request for a Bill of Particulars, (ii) the trial court's rulings on his motions *in limine*, the admission of a video, his motion for a directed verdict, and his motion for judgment notwithstanding the verdict, and (iii) the sentence imposed, were forfeited due to Keith's omissions of the portions of the record, including transcripts of the hearings during which the court's rulings were made, necessary to review those issues.

¶ 19 To the extent Keith argues that the jury was confused not between a gravestone and a grave marker, but between gravestones and markers and "lot or section markers" that denote future gravesites, we disagree. The jury was specifically instructed that the offense of removal of gravestones referred only to those stones and markers that "commemorat[ed] a deceased person," and not markers where new graves were being plotted. In addition, there was little evidence to suggest that lot or section markers had been removed, while testimony from at least 13 individuals confirmed that gravestones were missing from their relatives' burial sites, which refutes Keith's claim that there was potential for confusion among the sets of terms.

¶ 20 Nor do we believe the court abused its discretion in declining to define cemetery. Not only is the term in common usage, but there was no dispute at trial that Burr Oak was a cemetery within the meaning of the Act. See *People v. Hicks*, 2015 IL App (1st) 120035, ¶ 54 ("[W]hen words used in an instruction have a commonly understood meaning * * * it is not necessary to define them for the jury by the use of additional instructions. This is especially true when the Illinois Pattern Jury Instructions do not suggest that such an additional definition is necessary." (quoting *People v. Bradley*, 192 Ill. App. 3d 387, 393 (1989))).

¶ 21 Keith's final challenge to the jury instructions concerns the court's decision not to define cemetery authority or offer Keith's suggested non-IPI instruction that "it is a defense against the charges that defendant acted with proper legal authority." We review the issue of whether the evidence is sufficient to support an instruction *de novo*. *People v. Washington*, 2012 IL 110283, ¶ 56.

¶ 22 It is undisputed that the Act includes an affirmative defense, which reads:
"The provisions of this Section shall not apply to the removal or unavoidable breakage or injury by a cemetery authority of anything placed in or upon any

portion of its cemetery in violation of any of the rules and regulations of the cemetery authority, nor to the removal of anything placed in the cemetery by or with the consent of the cemetery authority that in the judgment of the cemetery authority has become wrecked, unsightly or dilapidated."

765 ILCS 835/1(c) (West 2014).

And while "slight evidence" in support of a defendant's theory of the case is sufficient to justify the giving of an instruction (*People v. Couch*, 387 Ill. App. 3d 437, 443-44 (2008)), here, there was *no* evidence in support of this defense. Specifically, Keith did not adduce evidence at trial that the human remains and gravestones he removed and desecrated were placed in Burr Oak "in violation of any of the rules and regulations of the cemetery authority." Nor was there evidence that Keith, with the consent of the cemetery authority, removed and desecrated human remains and gravestones that were "wrecked, unsightly, or dilapidated."

¶ 23 To the contrary, Keith denied removing or desecrating remains and gravestones altogether. This provided an independent basis for the court to decline to give the affirmative defense instruction, as "[t]he legal effect of an affirmative defense is to admit that the acts occurred, but to deny responsibility." *People v. Brant*, 394 Ill. App. 3d 663, 671 (2009) (quoting *People v. Podhrasky*, 197 Ill. App. 3d 349, 352 (1990)). In other words, before a defendant may rely on an affirmative defense, he must first admit that he committed the act. See, e.g., *People v. Salas*, 2011 IL App (1st) 091880, ¶ 87 (finding defendant not entitled to self-defense instruction where he denied shooting and killing victim and failed to present evidence that he believe deadly force was necessary to prevent imminent death or great bodily harm). Here, because Keith failed to admit that he engaged in the charged conduct, he was not entitled to an instruction that he

acted with proper legal authority. See *People v. Mohr*, 228 Ill. 2d 53, 65 (2008) ("Instructions that are not supported by either the evidence or the law should not be given.")

¶ 24

CONCLUSION

¶ 25

Accordingly, the judgment of the trial court is affirmed.

¶ 26

Affirmed.