2016 IL App (2d) 140557-U
No. 2-14-0557
Order filed June 13, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JUAN M. GARCIA-GUERRERO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 11-CF-2806 Honorable James K. Booras, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred when it failed to answer the jury's question concerning an element of the offense; one of defendant's convictions for predatory criminal sexual assault was reversed, the other was affirmed and the imposition of the public defender fee was vacated.

¶ 2 A jury found defendant, Juan M. Garcia-Guerrero, guilty of two counts of predatory criminal sexual assault of a child (PCSA) (720 ILCS 5/12-14.1(a)(1) (West 2010) (now 720 ILCS 5/11-1.40 (West 2012)) based on his sexual penetration of the mouth and anus of the victim, his girlfriend's youngest daughter, K.H. (The jury also acquitted defendant of one count of PCSA based on sexual penetration of the victim's vagina.) At the time of the offenses, K.H.

was six years old and defendant was 41. For his two PCSA convictions, the trial court sentenced defendant to 28 years' imprisonment and, as part of the sentence, assessed defendant a $750 public defender fee under 730 ILCS 5/115-3.1(a) (West 2010). Defendant appeals and raises two issues.

¶ 3 Defendant's first contention concerns his conviction for PCSA based on sexual penetration of the victim's anus. Accordingly, we focus our discussion on the law and the evidence with respect to that charge only. Relevant here, the jury was instructed that "sexual penetration" is defined as "any contact, however slight" between the sex organ of a person over the age of 17 and the anus of a child under the age of 13. Illinois Pattern Jury Instructions, Criminal, No. 11.65E (4th ed. 2000); 720 ILCS 5/12-12(f) (West 2010) (now 720 ILCS 5/11-0.1 (West 2012)). Generally, evidence that the defendant's sex organ only touched an area near the complainant's anus, such as the victim's buttocks, is insufficient to establish sexual penetration of the anus. *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 41; *People v. Kennebrew*, 2014 IL App (2d) 121169, n. 3; *People v. Atherton*, 406 Ill. App. 3d 598, 609 (2010); *People v. Oliver*, 38 Ill. App. 3d 166, 170 (1976).

¶ 4 At defendant's trial, K.H., who was 8 years old when she testified, described several incidents involving the sexual penetration of her mouth and vagina by defendant. With respect to the sexual penetration of her anus, K.H. described an incident where defendant threw her down naked onto the floor. While K.H. was on her stomach, defendant "tried to open [her] butt check [*sic*]." K.H. testified about that incident as follows:

> "Q. And when he opened your butt cheeks, did he try to put anything in between your butt checks [*sic*]?
>
> A. Yes.
>
> Q. What did he try to put in between your butt checks [*sic*]?

A. His private where he go [*sic*] to pee-pee.

Q. And how do you know that he was putting his private in between your butt cheeks?

A. Cause he was growing more deeper, but I did not let him.

Q. What did you do to stop from going deeper?

A. I squished them.

Q. How could you tell that he was trying to go deeper?

A. Because he was trying to open them.

Q. The private that he pee-pees with at that time, there was no clothes on?

A. No."

Asked whether defendant's "private" touched her "private that [she] pee-pee[d] with without clothes on," K.H. answered, "No."

¶ 5 Lieutenant Gilbert Rivera of the Round Lake Beach police department testified that he interviewed K.H. at the police station in August 2011. The interview was conducted in Spanish and videotaped. The police transcribed the interview in English and Rivera testified that the transcript was an accurate translation. Both the recording and the transcript were admitted into evidence and the recording was played for the jury. During the interview, Rivera showed K.H. two sets of drawings and had her mark them as she answered certain questions. The first set of drawings represented the male body front and back, and the second set represented the female body front and back. In response to Rivera's questions, K.H. drew a circle around the vaginal area of the drawing on the front of female body and a green circle around the buttocks on the drawing on the back area of the female body. During the interview, K.H. referred to *both* of these areas as "*pompis*," which means "buttocks" in Spanish, according to Rivera. Thus, K.H.

described her vaginal area as her "front butt" and her buttocks as her "butt in back," again according to Rivera.

¶ 6 A few hours after Rivera interviewed K.H., the police located defendant and brought him in for questioning. Defendant signed a waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and Rivera interviewed him. Rivera told defendant about K.H.'s allegations. Defendant acknowledged that there had been some inappropriate sexual behavior with K.H., but insisted that it had been instigated by K.H. With respect to the offense at issue, Rivera that K.H. "backed into his penis with her buttocks." Defendant told Rivera that, one time, he touched her buttocks with his penis as she backed into him. Rivera asked defendant whether his penis had ever touched her vagina. At first, defendant said no; but when Rivera told defendant that K.H. had alleged that he had put his penis into her vagina, defendant then said that "perhaps he did touch her vagina while touching her buttocks from the rear." Defendant wrote out a substantively identical statement in Spanish.

¶ 7 The State rested and defendant's motion to direct the verdict was denied. Defendant then testified that in August 2011 "something happened" between him and K.H. that was sexual; he again portrayed K.H. as a curious instigator, but denied having committed the charged offenses. Defendant testified that he did not recall speaking to the police and that he did not recall giving the police a handwritten statement (though he acknowledged the handwriting on the statement was his).

¶ 8 The parties rested. In closing argument, the prosecutor argued that K.H.'s statement that she had to squeeze her butt cheeks so that defendant could not penetrate her proved the sexual penetration of K.H.'s anus because "[defendant] overcame her with obviously 40-year-old force to insert his penis between her butt cheeks. And obviously a child of that age, the anatomy of that

area of the body is such that it doesn't take much to penetrate and then—and to have her—his penis touch the anus." The prosecutor further stated:

> "You also heard testimony from Detective Rivera that at some point during this incident [K.H.] somehow backs into him with her butt, and he indicated that his penis touched the opening part of her vagina.
>
> Now that's significant *** regarding his penis touching her anus. When a six-year-old is with her buttocks or her back to the defendant, he's not somehow from behind her able to actually have his penis touch her *** vagina. [I]t shows that [his] penis had to have touched some part of the anus, however slight—that's the language [in the jury instruction], contact, however slight—with the anus if it's going to not only go through the butt cheeks, but then also to the point where it touches the opening of the vagina.
>
> So that clearly establishes that the defendant—the defendant's penis touched [K.H.]'s anus and also that it touched her vagina."

¶ 9 The defense argued that K.H. had said that defendant's touched "her butt" or "*pompis*" but never said that he penetrated her anus; that she "never said the word 'in' " and "never talked about her anus or where she goes 'poo-poo.' " "Those are six-year-old words," the defense asserted, and it faulted the State and Lieutenant Rivera for not asking K.H. what *she* meant by the word "*pompis*" and specifically whether, to her, it also meant her anus. Further, contrary to the State's assertion, the defense argued that defendant's admission his penis made contact with K.H.'s vagina as she lay prone did *not* necessarily mean that his penis also made contact with her anus.

¶ 10 During deliberations, the jury sent the judge a note which read, "For the purpose of this trial is the 'anus' equivalent to 'butt cheeks' or '*pompis*'?" The judge heard from both sides regarding a response. The prosecutor urged the judge to instruct the jurors that they had all the law and evidence they needed; that it was up to the jurors to decide what " 'butt cheeks' " or "

‘*pompis*’ ” “might refer to.” The defense argued that that was equivocation, because there was a critical difference between the statutory term “anus” and the words “ ‘butt cheeks’ ” and “ ‘*pompis*’ ” as K.H. (apparently) used those terms. The defense argued that the judge should answer “no”, instruct the jurors on the distinction between the anus and the buttocks, and explain that the latter does not support a PCSA conviction. The trial court judge stated that he believed this was a matter of “common sense” and wrote back to the jury, “ ‘You have the evidence and the law necessary for you to decide the case.’ ” Shortly after, the jury convicted defendant of the first and third PCSA counts (penis-to-mouth and penis-to-anus) and acquitted him of the second PCSA count (penis-to-vagina). Defendant raised the instruction issue in his posttrial motion, which the trial court denied.

¶ 11 On appeal, defendant argues that the trial court abused its discretion when it refused to answer the jury’s question; that the jury expressed confusion on a critical question of law—the meaning of the word “anus,” an element of the offense—and that the court’s failure to answer that question undermines any confidence in the jury’s verdict on that specific charge. We agree.

¶ 12 To sustain the PCSA charge in question, the State had to prove beyond a reasonable doubt that defendant’s penis made contact, however slight, with K.H.’s anus. The PCSA statute does not define “anus”; the pertinent jury instructions also use the term “anus” but do not define it. The State argues that the word “anus” is a commonly understood term and so the jury did not need a definition supplied to them, but there is ample precedent for requiring the trial court to instruct the jury on the definition of a key statutory term, even when the term is one in common usage. See, *e.g.*, *People v. Falls*, 387 Ill. App. 3d 533, 538 (2008) (definition of “physical resistance”); *People v. Landwer*, 279 Ill. App. 3d 306, 314-15 (1996) (definition of “originated” (for entrapment)); *People v. Oden*, 261 Ill. App. 3d 41, 47 (1994) (definition of “possession”);

People v. Lovelace, 251 Ill. App. 3d 607, 618-19 (1993) (definition of "knowingly").

¶ 13 The rule for answering jury questions is straightforward: "Generally, a trial court must provide instruction when the jury has posed an explicit question or asked for clarification on a point of law arising from facts showing doubt or confusion. *People v. Millsap*, 189 Ill. 2d 155, 160 (2000), citing *People v. Childs*, 159 Ill. 2d 217, 228-29 (1994)." *People v. Averett*, 237 Ill. 2d 1, 24 (2010). The need to do so is especially clear where, as here, the term is contained in a jury instruction and is an element of the offense; the jury's question thus implicates a matter of law. See, *e.g.*, *Landwer*, 279 Ill. App. 3d at 314-15. Accordingly, the issue is not whether the term in question is ubiquitous, but whether the jury was confused about its legal significance despite its ubiquity.

¶ 14 The jury's question shows that it was confused and that it perhaps believed there was some special imprimatur to the term "anus" in the instructions that may have also included the victim's buttocks—else, the jury would not have asked the question in the first place. Although the jury's question did not *directly* request a definition of the term "anus," and the phrasing of its question might give the impression that it was asking for the trial court to express its opinion on the evidence, at bottom, the jury's question requested an answer (or at least, a partial answer) to a question of law: What is the definition of a term used in the instruction defining an offense for which defendant was on trial? And that question in this case has a clear answer: The anus is a part of the body separate and distinct from the buttocks. The terms are *not* equivalent because a conviction for an offense that requires contact with the anus cannot be based merely on contact with the buttocks. See *Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 41; *Kennebrew*, 2014 IL App (2d) 121169, n. 3; *Atherton*, 406 Ill. App. 3d at 609; *Oliver*, 38 Ill. App. 3d at 170. The trial court should have answered the jury's question in this case, and its failure to do so was an abuse of

discretion.

¶ 15 The difficulty, particularly in cases like this one, is that children are linguistically immature. Words like "anus," "penis," "vagina," and to a lesser extent "mouth" are not part of the everyday vocabulary of most young children. They use words such as "poo-poo" and "thing." As one observer stated, "It is hardly reasonable to expect the average seven-year-old to calmly recite, 'The accused penetrated my vagina with his penis,' and if the child did use such words, most adults would suspect coaching." John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 Pac. L.J. 801, 824 (1987). The difficulty here was that neither the State during K.H.'s testimony, nor Rivera during K.H.'s interview, clarified with K.H. what *she* meant by the terms "butt cheeks" or "*pompis*." Perhaps K.H. used those terms as inclusive of both her buttocks *and* her anus, and were that the case, K.H.'s testimony alone could have provided a reasonable basis to find defendant guilty of PCSA (penis-to-anus). See generally *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009); *People v. Hillier*, 392 Ill. App. 3d 66, 69 (2009). We note that the State also argued to the jury that defendant's admission that his penis touched K.H.'s vagina from behind further meant that his "penis *had to have touched* some part of [K.H.'s] anus, however slight" (emphasis added)—but without knowing more that is not necessarily true. At any rate, on this evidence, absent an explanation from K.H. as to what she meant when she said "butt cheeks" or "*pompis*," a reasonable trier of fact could not be certain whether the State proved the sexual penetration of K.H.'s anus as charged, which is what due process requires. See *In re Winship*, 397 U.S. 358, 364 (1970) (due process requires proof of every element of an offense).

Given the closeness of the evidence concerning the sexual penetration of K.H.'s anus by defendant, the trial court's failure to properly answer the jury's question was prejudicial to a

degree that renders the jury's verdict on that count unsustainable. See *Childs*, 159 Ill. 2d at 228-29. Therefore, defendant's conviction on count III of the indictment, PCSA (penis to anus) is reversed. Because there was sufficient evidence to indicate defendant may have committed that offense specifically, we decline to reduce defendant's conviction to the lesser-included offense of aggravated criminal sexual abuse (see generally *People v. Knaff*, 196 Ill. 2d 460, 478 (2001)), and hold that a retrial on the PCSA (penis to anus) charge would not constitute double jeopardy (*People v. Lerma*, 2016 IL 118496, ¶ 35).

¶ 16 Defendant's second contention is that the court's assessment of the $750 public defender-reimbursement fee must be vacated. The State confesses error, and we accept the concession. The statute that authorizes this fee, 725 ILCS 5/113-3.1(a), requires, first, that the trial court give the defendant notice that it is considering imposing the fee and then, within 90 days after imposing the judgment, conduct a hearing at which the defendant is allowed to present evidence as to his ability to pay and any other relevant circumstances. See *People v. Love*, 177 Ill. 2d 550, 563 (1997). The only reference in the record to either the notice or a hearing is a printed order that states, "Having determined all issues in this case, including defendant's financial ability to pay, this court has assessed and ordered" various fees and fines listed, including $750 to reimburse the public defender. The sheet is unsigned. We agree with defendant and the State that the trial court did not follow the required procedures for imposing the fee and the assessment is vacated.

¶ 17 In sum, defendant's conviction on count I, PCSA (penis to mouth), is affirmed and the imposition of the public defender fee is vacated. Defendant's conviction on count III, PCSA (penis to anus), is reversed and the cause is remanded to the trial court for further proceedings.

¶ 18 Affirmed in part and vacated in part; reversed in part and remanded.