2026 IL App (1st) 241506-U

No. 1-24-1506

Order filed October 7, 2026

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 21 CR 6430
	)	
DEVIN HEMPHILL,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Rochford and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Trial counsel was ineffective for failing to object to a defective jury instruction regarding an element of the offense. Reversed and remanded.

¶ 2 Following trial, a jury convicted defendant Devin Hemphill of three counts of predatory criminal sexual assault of a child under the age of 13 (PCSA), and two counts of aggravated sexual abuse of a minor under the age of 13 (ASAM). Hemphill was sentenced to an aggregate 25 years in prison. He contends on appeal that the trial court instructed the jury with the incorrect definition

of "sexual penetration" for the first PCSA count. Because Hemphill's counsel rendered ineffective assistance, we reverse and remand for a new trial on that count.[1]

¶ 3 We recount the necessary facts to resolve this appeal—namely, the PCSA charge, the corresponding jury instructions, and the State's closing arguments.

¶ 4 The State charged Hemphill with three counts of PCSA (720 ILCS 5/11-1.40(a)(1) (West 2020)), and two counts of ASAM (720 ILCS 5/11-1.60(c)(1)(i) (West 2020)). Count I, at issue here, alleged that Hemphill was age 17 or older and "knowingly committed an act of sexual penetration upon D.S., to wit: an intrusion in that [he] inserted his finger in D.S.'s sex organ," and that D.S. was under age 13.

¶ 5 At trial, D.S. testified that Hemphill sexually assaulted her on the morning of March 1, 2021, as she slept on their living room sofa. D.S. stated that Hemphill rubbed his penis against her buttocks over her pajama pants, touched her breasts underneath her clothing, lowered her pants to her ankles, inserted his finger into her vagina, licked her vagina, and repeatedly tried to force his penis into her vagina. Afterward, D.S. informed multiple family members. D.S.'s sister testified that D.S. reported that Hemphill "was behind her grinding her, touching her breasts and then he turned her over. He tried to insert his penis inside of her vagina and then he leaned down, licked her vagina, and stuck his finger in her." D.S.'s aunt testified that D.S. reported that Hemphill had "touched her improperly *** in her personal area."

¶ 6 In a recorded forensic interview, D.S. reported that Hemphill penetrated her vagina digitally and with his penis, licked her vagina, touched her bare breasts underneath her clothing,

[1]In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

and rubbed his penis against her buttocks through her clothing. DNA analysis of swabs collected from D.S.'s pelvic area after the incident indicated that Hemphill was "54 quintillion times" more likely have contributed to the sample than an unknown, unrelated individual.

¶ 7 During an instruction conference, the court addressed the legal definition of sexual penetration under Illinois Pattern Jury Instructions, Criminal, No. 11.65(E) (approved Dec. 8, 2011). Defense counsel stated, "no objection." After some discussion, the court read the proposed instruction: "'Sexual penetration' means any contact, however slight, between the sex organ of one person and an object, the sex organ, or mouth of another person." Defense counsel stated, "I don't have any objection to that."

¶ 8 The court noted that, per a committee note in the instruction citing *People v. Scott*, 271 Ill. App. 3d 907 (1994), "an individual's finger can be considered an 'object' within the statutory definition of penetration." The State requested that the jury receive the *Scott* instruction.

¶ 9 After a recess, the court noted that it reviewed *Scott* and found "no question" as to "penetration by use of the finger." The State asserted that I.P.I. No. 11.65(E) contained two disjunctive paragraphs, and the court read aloud the full instruction:

> "The term 'sexual penetration' means any contact, however slight, between the sex organ or anus of one person and an object, the sex organ or mouth or anus of another, or intrusion, however slight, to any part of the body of one person, any animal, object, or sex organ, or anus of another person, including, but not limited to cunnilingus, fellatio, or anal penetration. The evidence of the emission of semen is not required to prove sexual penetration."

¶ 10 The State offered the following instruction: "[T]he term 'sexual penetration' means any contact, however slight, between the sex organ of one person and an object, the sex organ or mouth of another[] person. An individual's finger can be considered an 'object' under the statutory definition of sexual penetration."

¶ 11 The court asked defense counsel whether "an individual's finger can be considered an 'object.' " Counsel agreed "that is the law." He stated that his "only basis for objecting" was that the committee notes, not the actual pattern instruction, contained the language. In overruling counsel's objection, the court stated that "a finger is considered an object" per *Scott*, and "the law tells [the jury] what an object could be."

¶ 12 In closing argument, the State argued that, to meet its burden, it needed to prove that (1) Hemphill knowingly committed an act of sexual penetration upon D.S., (2) Hemphill was age 17 or older, and (3) D.S. was under age 13 at the time of the offense. The State added:

> " '[S]exual penetration' means any contact, however slight, between the sex organ of one person and an object, the sex or organ on mouth of another person. And an individual's finger can be considered an object within the statutory definition of sexual penetration."

The State recalled that "there was some back and forth on whether [Hemphill] attempted to penetrate her, or if he actually did penetrate her," but informed the jury that "[i]t doesn't matter" because the law only required "[c]ontact, however slight."

¶ 13 Defense counsel did not address the elements of PCSA in his closing argument, nor did he argue that a finger is not an object under the statutory definition of sexual penetration. See *People v. Maggette*, 195 Ill. 2d 336, 350 (2001) (a finger is not an "object" as to the contact clause of the statutory definition of sexual penetration).

¶ 14 In tendering the jury instructions, the court stated, in pertinent part, "[t]he term 'sexual penetration,' means any contact, however slight, between the sex organ of one person and an object, the sex organ or mouth of another person. An individual's finger can be considered an 'object' within the statutory definition of sexual penetration."

¶ 15 After deliberation, the jury found Hemphill guilty of all counts.

¶ 16 In June 2024, Hemphill filed a motion for new trial asserting, *inter alia*, that the State failed to prove his guilt beyond a reasonable doubt. The motion did not address the jury instruction or counsel's performance. The court denied the motion for a new trial and imposed a 25-year sentence. Hemphill did not file a motion to reconsider sentence.

¶ 17 We initially dismissed Hemphill's appeal on jurisdictional grounds where the record lacked a timely-filed notice of appeal. We withdrew our dismissal order after he petitioned for rehearing and supplemented the record with proof of a timely filing. We now turn to the merits of his appeal.

¶ 18 Hemphill argues on appeal that, as to count I, the trial court provided the jury with an erroneous definition of "sexual penetration" that addressed contact, not intrusion, and qualified a finger as an "object." Hemphill concedes that he failed to preserve the issue, and seeks review for plain error or ineffective assistance.

¶ 19 We review *de novo* whether the jury instruction accurately conveyed the applicable law to the jury. *People v. Hartfield*, 2022 IL 126729, ¶ 51. "We must determine whether the instructions, taken as a whole, fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *Id.*

¶ 20 The State charged Hemphill with PCSA (720 ILCS 5/11-1.40(a)(1) (West 2020)) for knowingly committing "an act of sexual penetration upon D.S., to wit: an intrusion in that [he]

inserted his finger in D.S.'s sex organ," where Hemphill was age 17 or older, and D.S. was under age 13. Under the PCSA statute, a person age 17 or older commits predatory criminal sexual assault if that person either (1) "commits an act of contact, however slight, between the sex organ or anus of one person and the part of the body of another for the purpose of sexual gratification or arousal of the victim or the accused," or (2) commits "an act of sexual penetration," where the victim is under age 13 in either instance. *Id.*

¶ 21 "Sexual penetration" is defined as:

> "any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person including, but not limited to, cunnilingus, fellatio, or anal penetration. Evidence of emission of semen is not required to prove sexual penetration." *Id.* § 11-0.1.

For the purposes of the contact clause of the definition, the term "object" does not include body parts. *Maggette*, 195 Ill. 2d at 350.

¶ 22 Because the State charged Hemphill with PCSA based on intrusion between Hemphill's finger and D.S.'s vagina, and because a finger is not an object under the contact clause, Hemphill may only be found guilty under the intrusion clause. See *People v. Rigg*, 2024 IL App (2d) 230136-U, ¶ 76. At trial, however, the State did not advance the theory of intrusion or instruct the jury on the intrusion clause. Instead, the State advised the jury on the contact clause, admitted the evidence showed "back and forth" as to "penetration," and stated the law only required "contact, however slight." Contrary to the Illinois Supreme Court's ruling, the State further advised the jury that "an individual's finger can be considered an object within the statutory definition of sexual

penetration." *Maggette*, 195 Ill. 2d at 350. This was error. *People v. Ramirez*, 2026 IL App (1st) 241580, ¶ 15 (finding this "recurring error" intolerable); *Rigg*, 2024 IL App (2d) 230136-U, ¶ 81.

¶ 23 The doctrine of invited error provides that "[a] party cannot complain of error which that party induced the court to make or to which that party consented." *People v. Lawrence*, 2018 IL App (1st) 161267, ¶ 52; *People v. Hughes*, 2015 IL 117242, ¶ 33. Defense counsel explicitly stated to the trial court that he did not object to the use of the contact clause in jury instruction. See *People v. Cox*, 2017 IL App (1st) 151536, ¶¶ 72-75 (doctrine of invited error barred defendant's hearsay challenge on appeal where counsel had stated "no objection" to its admission at trial). Moreover, defense counsel agreed that the erroneous instruction classifying a finger as an object was "the law." "We cannot find that the trial court committed any error when the defense invited the action complained of." *Lawrence*, 2018 IL App (1st) 161267, ¶ 54 (collecting cases) (noting that plain error analysis pertains to procedural default, "not affirmative acquiescence" or invited error).

¶ 24 We are not persuaded by Hemphill's assertion that counsel "ultimately objected" to the erroneous instruction and this dispelled the invited error. Counsel's "only basis for objecting" was that the pattern instruction lacked the proposed instruction, not that the proposed instruction was erroneous. Accordingly, his invited error stands.

¶ 25 We may review Hemphill's claim for ineffective assistance. *Id.* ¶ 55. Our state and federal constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *People v. Hale*, 2013 IL 113140, ¶ 15. To prevail on his ineffective assistance claim, Hemphill must show that his counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that,

but for counsel's errors, the outcome would have been different. *People v. Peterson*, 2017 IL 120331, ¶ 79. We may dismiss the claim if Hemphill fails to satisfy either requirement. *Id.*

¶ 26 Jurors can only fill their constitutional role when properly instructed on the elements of the offense. *Ramirez*, 2016 IL App (1st) 241580, ¶ 15. This court found that the same erroneous instruction, coupled with counsel's acquiescence and the State's closing argument restating the error, rendered the trials "fundamentally unfair" in *Ramirez* and *Rigg*. *Id.* ¶¶ 25-26 (collecting cases); *Rigg*, 2024 IL App (2d) 230136-U, ¶ 81 (counsel rendered ineffective assistance when it failed to object to the improper instruction).

¶ 27 As to the first *Strickland* prong, as explained, the jury received inappropriate instruction (1) on contact, not intrusion, and (2) that a finger was an object under the definition of sexual penetration. See *Maggette*, 195 Ill. 2d at 350; *Rigg*, 2024 IL App (2d) 230136-U, ¶ 76. Moreover, defense counsel's explicit assent to this faulty instruction relieved the State of proving that Hemphill's finger penetrated D.S.'s vagina. Instead, it required that the State only prove "contact, however slight," between Hemphill's finger and D.S.'s vagina and lowered the State's requirement to secure a conviction. Such action fails to meet the objective standard of reasonable performance.

¶ 28 As to the second *Strickland* prong, a defendant may demonstrate prejudice by showing that counsel's deficient performance rendered the proceedings fundamentally unfair or rendered the result of the trial unreliable. *Ramirez*, 2026 IL App (1st) 241580, ¶ 24. We presume the existence of prejudice "when the jury instructions contain an error regarding an essential element of the offense." *Id.* Stated differently, fundamental fairness requires that the jury receive correct instructions so that it can reach a fair decision. *Id.* D.S. testified that Hemphill's finger penetrated her vagina, and the State argued penetration under the statute's contact clause. Yet, where a finger

is not an object for purposes of the contact clause, no jury could logically conclude that the State met its burden as to digital penetration. Such an error deprives the jury of its constitutional function. *Id.* (citing *People v. Jenkins*, 69 Ill. 2d 61, 66 (1977)).

¶ 29 Hemphill does not argue that double jeopardy precludes retrial. U.S. Const. amend. V; Ill. Const. art. 1, § 10. The double jeopardy clause does not preclude retrial "when a conviction has been set aside because of an error in the proceedings leading to the conviction." *People v. Morales*, 2025 IL App (1st) 231317, ¶ 36. Moreover, the evidence submitted is sufficient to sustain a conviction, and thus Hemphill may be retried. *People v. Cox*, 2023 IL App (1st) 170761, ¶¶ 59, 64.

¶ 30 Hemphill was entitled to a fair trial. Accordingly, we reverse the judgment of the circuit court and remand for a new trial on the charge of PCSA for count I.

¶ 31 Reversed and remanded with directions.