192 A.D.3d 1140
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,
v.
John KING, appellant.

2016–08053
|
(Ind. No. 2516/13)
|
Argued—February 25, 2021
|
March 31, 2021

Synopsis

Background: Defendant was convicted in the Supreme Court, Kings County, Ira H. Margulis, J., of rape in the first degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

defendant had right to be present during the trial court's in camera interview with complainant to determine whether her psychiatric history was relevant;

the People failed to provide notice to defendant of intent to offer into evidence a statement defendant made to law enforcement;

defendant's statement to law enforcement was inadmissible to show intent, motive, or lack of mistake; and

defendant's right to confrontation was not violated by testimony from the State's criminalist.

Reversed and remitted.

Procedural Posture(s): Appellate Review.

Attorneys and Law Firms

***108** Joel B. Rudin, New York, N.Y. (Jacob Loup of counsel), for appellant.

Melinda Katz, District Attorney, Kew Gardens, N.Y. (Johnnette Traill, Joseph N. Ferdenzi, and Roni C. Piplani of counsel), for respondent.

REINALDO E. RIVERA, J.P., FRANCESCA E. CONNOLLY, VALERIE BRATHWAITE NELSON, LINDA CHRISTOPHER, JJ.

***109** DECISION & ORDER

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Ira H. Margulis, J.), rendered July 6, 2016, convicting him of rape in the first degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is reversed, on the law, and the matter is remitted to the Supreme Court, Queens County, for a new trial.

On June 10, 2004, the police received a call on the 911 emergency number reporting that the complainant, then 12 years old, had been raped. She was taken to Jamaica Hospital, where a doctor, who collected evidence for a rape kit, found no signs of trauma or injury. Then, while still in the hospital, the complainant recanted, telling the police that, inter alia, she had fabricated the story so as to not get into trouble. The case was closed on the same day that the complainant reported the rape. In 2013, the investigation was re-opened based on a new investigative lead, and the complainant agreed to cooperate with law enforcement. Thereafter, the defendant was charged with, among other things, first-degree statutory rape.

At trial, after the complainant testified during cross-examination that she had suffered from and been treated for depression and bipolar disorder, the Supreme Court interviewed the complainant in camera, without the defendant present, to determine if her psychiatric history was material to the jury's assessment of her credibility. The court determined that the complainant's testimony with respect to her psychiatric history was irrelevant, struck her testimony on the subject, instructed the jury to disregard said testimony, and gave the defense counsel an exception. The defense counsel moved for a mistrial, which the court denied.

"Criminal defendants have a statutory and constitutional right to be present at all material stages of trial" (*People v. Spotford,* 85 N.Y.2d 593, 596, 627 N.Y.S.2d 295, 650 N.E.2d 1296; *see* U.S. Const 6th, 14th Amends; NY Const, art I, § 6;

CPL 260.20; *Kentucky v. Stincer,* 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631; *People v. Turaine,* 78 N.Y.2d 871, 872, 573 N.Y.S.2d 64, 577 N.E.2d 55). Even where a "defendant is not actually confronting witnesses or evidence against him [or her], he [or she] has a due process right 'to be present in his [or her] own person whenever his [or her] presence has a relation, reasonably substantial, to the fullness of his [or her] opportunity to defend against the charge' " (*Kentucky v. Stincer,* 482 U.S. at 745, 107 S.Ct. 2658, quoting *Snyder v. Massachusetts,* 291 U.S. 97, 105–106, 54 S.Ct. 330, 78 L.Ed. 674, *overruled in part Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653; *see People v. Dokes,* 79 N.Y.2d 656, 659, 584 N.Y.S.2d 761, 595 N.E.2d 836). Further, "[p]roceedings where testimony is received are material stages of the trial because defendant's presence is necessary so that he or she may confront adverse witnesses and advise counsel of any inconsistencies, errors or falsehoods in their testimony" (*People v. Turaine,* 78 N.Y.2d at 872, 573 N.Y.S.2d 64, 577 N.E.2d 55). However, where the defendant's presence would be "useless, or the benefit but a shadow" (***110** *Kentucky v. Stincer,* 482 U.S. at 745, 107 S.Ct. 2658 [internal quotation marks omitted]), due process does not require his or her presence. "Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his [or her] presence would contribute to the fairness of the procedure" (*id.*).

The right of an accused to confront the witnesses against him or her through cross-examination is a fundamental right of constitutional dimension (*see* U.S. Const, 6th, 14th Amends; NY Const, art I, § 6; *Davis v. Alaska,* 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347; *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934; *Pointer v. Texas,* 380 U.S. 400, 406–407, 85 S.Ct. 1065, 13 L.Ed.2d 923; *People v. Kennedy,* 177 A.D.3d 628, 631, 113 N.Y.S.3d 122). The right of cross-examination is an essential safeguard of fact-finding accuracy and "the principal means by which the believability of a witness and the truth of his testimony are tested" (*Davis v. Alaska,* 415 U.S. at 316, 94 S.Ct. 1105).

Where a primary prosecution witness is shown to suffer from a psychiatric condition, the defense is entitled to show that the witness's capacity to perceive and recall events was impaired by that condition (*see People v. Rensing,* 14 N.Y.2d 210, 250 N.Y.S.2d 401, 199 N.E.2d 489; *People v. Baranek,* 287 A.D.2d 74, 78, 733 N.Y.S.2d 704; *People v. Knowell,* 127 A.D.2d 794, 795, 512 N.Y.S.2d 190; *United States v. Lindstrom,* 698 F.2d 1154 [11th Cir.]).

In this case, the defendant's absence during the Supreme Court's in camera interview with the complainant to determine if her psychiatric history was relevant had a substantial effect on his ability to defend the charges against him, and thus, the interview constituted a material stage of the trial for which the defendant should have been present (*see People v. McCune,* 98 A.D.3d 631, 949 N.Y.S.2d 747). Where, as here, the "defendant was absent during a material part of his trial, harmless error analysis is not appropriate," and a new trial is required (*People v. Mehmedi,* 69 N.Y.2d 759, 760, 513 N.Y.S.2d 100, 505 N.E.2d 610; *see People v. Crimmins,* 36 N.Y.2d 230, 238, 367 N.Y.S.2d 213, 326 N.E.2d 787; *People v. McCune,* 98 A.D.3d at 633, 949 N.Y.S.2d 747; *People v. Chichester,* 197 A.D.2d 699, 700, 602 N.Y.S.2d 932; *People v. Boyd,* 166 A.D.2d 659, 561 N.Y.S.2d 257). Moreover, while the scope of cross-examination generally rests within the trial court's discretion (*see Martin v. Alabama 84 Truck Rental,* 47 N.Y.2d 721, 417 N.Y.S.2d 56, 390 N.E.2d 774; *People v. Schwartzman,* 24 N.Y.2d 241, 299 N.Y.S.2d 817, 247 N.E.2d 642; *People v. Roussopoulos,* 261 A.D.2d 559, 688 N.Y.S.2d 902), here, the court improvidently exercised its discretion in striking the complainant's testimony adduced during cross-examination with respect to her psychiatric history.

Further, the Supreme Court erred in allowing the People to introduce into evidence a statement the defendant made to law enforcement on the ground that the People failed to provide notice of that statement in accordance with CPL 710.30 (*see People v. Lopez,* 84 N.Y.2d 425, 428, 618 N.Y.S.2d 879, 643 N.E.2d 501). Preclusion of the statement was required, without regard to whether the defendant was prejudiced by the lack of notice (*see id.* at 428, 618 N.Y.S.2d 879, 643 N.E.2d 501). Moreover, the court erred in admitting the statement into evidence and allowing the People to use it, pursuant to *People v. Molineux,* 168 N.Y. 264, 61 N.E. 286, to ***111** show intent, motive, or lack of mistake. As the only charge before the jury was statutory rape, the defendant's intent, motive, or lack of mistake were not at issue in this case.

However, contrary to the defendant's contention, his right to confrontation (*see* U.S. Const Sixth Amend) was not violated by the testimony of a criminalist employed by the Office of the Chief Medical Examiner of the City of New York. The criminalist's testimony as to her review and analysis of the case files indicated that she independently analyzed the raw data, reviewed the tests, and arrived at her own conclusions (*see People v. Tsintzelis,* 35 N.Y.3d 925, 926, 124 N.Y.S.3d

1, 146 N.E.3d 1160; *People v. John,* 27 N.Y.3d 294, 315, 33 N.Y.S.3d 88, 52 N.E.3d 1114; *People v. Lebron,* 171 A.D.3d 1092, 1093, 98 N.Y.S.3d 321; *People v. Pascall,* 164 A.D.3d 1265, 1266, 82 N.Y.S.3d 577). Thus the criminalist was not functioning merely as "a conduit for the conclusions of others" (*People v. Austin,* 30 N.Y.3d 98, 105, 64 N.Y.S.3d 650, 86 N.E.3d 542 [internal quotation marks omitted]; *see People v. Kinard,* 187 A.D.3d 936, 130 N.Y.S.3d 700). Moreover, she compared a DNA profile from a buccal swab with the DNA profile generated from evidence in the rape kit and concluded there was a match (*see People v. Kinard,* 187 A.D.3d 936, 130 N.Y.S.3d 700).

Additionally, the Supreme Court's determination permitting the criminalist to testify regarding her opinion that there was a single semen donor in this case was a provident exercise of discretion, as the testimony was based on her expertise and independent analysis of the evidence, and would be helpful to the jurors (*see generally People v. Taylor,* 75 N.Y.2d 277, 288, 552 N.Y.S.2d 883, 552 N.E.2d 131).

In light of the foregoing, we need not address the defendant's remaining contentions.

RIVERA, J.P., CONNOLLY, BRATHWAITE NELSON and CHRISTOPHER, JJ., concur.

All Citations

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