2020 VT 78

No. 2019-402

State of Vermont — Supreme Court

v. — On Appeal from Superior Court, Bennington Unit, Criminal Division

Robert J. Billington — May Term, 2020

John W. Valente, J.

Alexander N. Burke, Bennington County Deputy State's Attorney, Bennington, for Plaintiff-Appellant.

Matthew Valerio, Defender General, and Dawn Matthews, Appellate Defender, Montpelier, for Defendant-Appellee.

PRESENT: Reiber, C.J., Robinson, Eaton and Carroll, JJ., and Pearson, Supr. J. (Ret.), Specially Assigned

¶ 1. **CARROLL, J.** The State appeals the trial court's finding that there was no probable cause to support the charge that defendant committed aggravated sexual assault under 13 V.S.A. § 3253(a)(9) by fraudulently misrepresenting his HIV status. The State contends that fraud undermines consent to engage in sexual activity and, therefore, defendant's lie about his HIV status vitiated the victim's consent and created probable cause for aggravated sexual assault. The defendant argues that the trial court was correct in finding no probable cause for aggravated sexual assault. We affirm.

I. Facts

¶ 2. The affidavit of probable cause alleges the following. Defendant had three separate sexual encounters with the complainant. Complainant was not interested in engaging in sexual intercourse when she met defendant because she had recently separated from her boyfriend. Complainant "caved," however, and consented to having sex with defendant due to his persistence. When defendant "got a condom and put it on," complainant grew "suspicious" because "most men these days don't use a condom when they know the female is 'fixed.' " Complainant accordingly asked defendant if he had a sexually transmitted disease (STD). Defendant denied having an STD. Complainant proceeded to have sex with defendant.

¶ 3. The next day, defendant once again "pursued having sex" with complainant. Although complainant was more willing to engage in sexual intercourse, she remained "uncomfortable" because she had recently broken up with her boyfriend and "she felt like she was cheating." Defendant and complainant had sex using a condom. Defendant did not disclose his HIV status before or during the interaction.

¶ 4. Defendant again expressed a desire to have sex with complainant the following day. Complainant said she did not want to have sex with defendant and refused to perform oral sex when defendant asked her to. Complainant agreed, however, to let defendant masturbate on her. As defendant masturbated, he continued his effort to have sex with complainant, an effort which complainant continuously rejected. Defendant eventually forced his penis into and ejaculated inside of complainant's mouth against her will.

¶ 5. In the following days, complainant heard rumors that defendant was HIV positive. When complainant confronted defendant soon after, defendant denied having HIV. After

complainant "begged him to tell her" whether he had HIV, defendant admitted that he was HIV positive.

¶ 6. Based on the above allegations, the State charged defendant with aggravated sexual assault pursuant to 13 V.S.A. § 3253(a)(9) on the theory that defendant's lie about his HIV status vitiated the complainant's consent during each of their encounters, resulting in repeated nonconsensual acts.[1] Defendant moved, pursuant to Vermont Rule of Criminal Procedure 5(i), to review the initial probable-cause finding. The trial court withdrew its initial finding of probable cause and dismissed the charge with prejudice because it concluded that the Legislature did not intend to criminalize the nondisclosure of HIV status. The court explained that aggravated assault under § 3253(a)(9) is predicated on a lack of consent. It noted that the "statute is silent as to whether lying about a positive STD serostatus prior to a sexual act vitiates consent," and, therefore, concluded that the statute is ambiguous. The court considered the statutory scheme and found that it indicated a clear legislative intent not to criminalize nondisclosure of one's HIV status before sex. The court explained that in 13 V.S.A. § 3254, the legislature outlined instances in which a party cannot consent, none of which include fraudulent misrepresentation by another party. Furthermore, unlike other states, Vermont has not enacted a law that criminalizes nondisclosure of HIV status. Finally, the court noted that there is no authority in Vermont case law applying the informed-consent doctrine to the crime of sexual assault. The State appealed.

¶ 7. On appeal, the State argues that fraud vitiates consent. By fraudulently misrepresenting his HIV status, the State contends, defendant undermined the complainant's

[1] The State originally charged defendant with sexual assault pursuant to 13 V.S.A. § 3252(a)(1) and lewd and lascivious conduct under 13 V.S.A. § 2601 based upon the allegation of forcible oral contact. A trial on these two counts resulted in a hung jury. The next day, the State added the charge at issue here. The first two charges remain pending.

consent, thus creating probable cause for aggravated sexual assault under § 3253(a)(9). The State argues that by using the word "voluntary" in the definition of consent, the Legislature intended to protect people from undesired sexual acts, including sexual acts induced by fraud that expose victims to HIV. Additionally, the State argues that in the civil context, this Court has held that deceit undermines consent. Furthermore, the State notes that other jurisdictions have specifically held that consent is not valid when a person does not disclose his or her HIV status.

¶ 8. Defendant argues there is no probable cause to believe that he committed aggravated sexual assault because the Legislature has not specified by statute that fraud undermines consent. As a result, defendant argues that the common law is still in effect. And at common law, defendant asserts, lying about one's HIV status would not undermine consent. Finally, defendant argues that under the State's interpretation, the aggravated sexual assault statute would be void for vagueness because it would not provide defendants with sufficient notice that lying to induce sex could constitute a felonious act.

II. Merits

¶ 9. This case turns on whether—given the allegations in the affidavit supporting the charge—there was probable cause to conclude that defendant committed aggravated sexual assault under 13 V.S.A. § 3253(a)(9). "The standard for a determination of probable cause is whether there is probable cause to believe that an offense has been committed and that the defendant has committed it." State v. Bresland, 2012 VT 75, ¶ 4, 192 Vt. 644, 57 A.3d 727 (mem.). Section 3253(a)(9) states that a person commits aggravated sexual assault if "the victim is subjected to repeated nonconsensual sexual acts as part of the actor's common scheme and plan." The State contends there is probable cause to believe that defendant committed aggravated sexual assault because his sexual acts with the complainant were nonconsensual. Although the complainant

initially consented to having sex with defendant, the State contends that defendant's fraudulent misrepresentations about his HIV status invalidated complainant's consent. The specific question on appeal is whether under the sexual assault statutory scheme, fraud—namely, lying about one's HIV status—undermines consent. This is a question of law that we review de novo. State v. Eldredge, 2006 VT 80, ¶ 7, 180 Vt. 278, 910 A.2d 816 ("Whether a trial court properly interprets a statute is a question of law which we review de novo.").

¶ 10. Our main objective in interpreting statutes is to determine and enforce the Legislature's intent. State v. Berard, 2019 VT 65, ¶ 12, __ Vt. __, 220 A.3d 759. In order to discern legislative intent, we first look to the plain language of the statute. Id. If a statute's plain language clearly indicates the Legislature's intent, "we implement the statute according to that plain language." Id. (quotation omitted). If, as in this case, a statute's plain language is ambiguous, "we ascertain legislative intent through consideration of the entire statute, including its subject matter, effects and consequences, as well as the reason and spirit of the law." Id. (quotation omitted).

¶ 11. We hold that the trial court was correct in concluding that there was no probable cause to believe that defendant committed aggravated sexual assault under § 3253(a)(9).[2] We agree that the statute is ambiguous and conclude that there is no indication, considering the sexual-assault statutory scheme as a whole, that the Legislature intended for fraud to vitiate consent. Furthermore, because the Legislature has not been clear as to whether fraud undermines consent, the State's interpretation of § 3253(a)(9) would implicate due process concerns.

[2] Because the State has not argued that the trial court erred by dismissing the charge with prejudice, we do not consider whether the trial court's mode of dismissal was proper. See V.R.Cr.P 5(i) (providing that judicial officer shall review finding of probable cause upon request from defendant); V.R.Cr.P. 5(c) ("If the judicial officer does not find probable cause, the judicial officer shall dismiss the information without prejudice . . . .").

¶ 12. We begin with the plain text of the statute. Section 3253(a)(9) prohibits "nonconsensual sexual acts." Although the statutory scheme does not define the term "nonconsensual," it does define "the nominal form of its opposite," the word "consent." State v. Deyo, 2006 VT 120, ¶ 15, 181 Vt. 89, 915 A.2d 249. Consent is defined as "words or actions by a person indicating a voluntary agreement to engage in a sexual act." 13 V.S.A. § 3251(3). "[S]exual act" is, in turn, defined as

> conduct between persons consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any intrusion, however slight, by any part of a person's body or any object into the genital or anal opening of another.

Id. § 3251(1).

¶ 13. As an initial matter, we note that § 3251(3) is concerned with consent, not informed consent. A person gives consent to another to engage in an act. Consent, Black's Law Dictionary (11th ed. 2019) ("A voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose . . . ."). Informed consent, however, refers to whether the person gave consent "with full knowledge of the risks involved and the alternatives." Informed Consent, Black's Law Dictionary (11th ed. 2019). As we have explained in the medical-malpractice context, a patient can consent to surgery, but that consent may not be informed if the patient "receives inadequate disclosures of the alternatives and foreseeable risks and benefits of the alternatives." Christman v. Davis, 2005 VT 119, ¶ 7, 179 Vt. 99, 889 A.2d 746 (interpreting 12 V.S.A. § 1909); 12 V.S.A. § 1909(a)(1) (defining "lack of informed consent" as "the failure of the person providing the professional treatment or diagnosis to disclose to the patient . . . alternatives . . . and the reasonably foreseeable risks and benefits").

¶ 14. Section 3251(3) of Title 13 defines consent by reference to the sexual act, not the consequences of the sexual act. This is significant for our understanding of consent as defined in § 3251(3). Consent is not undermined because a person did not have an adequate understanding of the risks involved in engaging in the sexual act. Unlike in the medical-malpractice context, the Legislature indicated that the only inquiry in § 3251(3) is whether there was consent to the sexual act, which is different from whether a person had knowledge of the risk of consenting. By defining consent only in relation to the sexual act, § 3251(3) does not contemplate consideration of consent in relation to the consequences of that act.

¶ 15. While § 3251(3) defines consent, § 3254(2) outlines four instances where "a person shall be deemed to have acted without the consent of the other person." These four instances include when a person knows that the other person is (a) "mentally incapable of understanding the nature of the sexual act," (b) "physically [in]capable of resisting, or declining consent to[] the sexual act," (c) "unaware that a sexual act . . . is being committed," and (d) "mentally incapable of resisting, or declining consent to[] the sexual act . . . due to a mental condition or a psychiatric or developmental disability as defined in 14 V.S.A. § 3061." In Deyo, we held that the Legislature did not intend for § 3254 to exhaustively define nonconsent. 2006 VT 120, ¶ 24. For this reason, we must consider the sexual assault scheme as a whole to determine whether the Legislature intended that fraud be included in this non exhaustive list.

¶ 16. In Deyo, the defendant—convicted on one count of aggravated sexual assault based on repeated nonconsensual acts with a minor—argued that the trial court incorrectly instructed the jury that if the victim was under the age of sixteen, the act was nonconsensual as a matter of law. Id. ¶¶ 2, 11-12. The defendant contended that § 3254 comprehensively defined nonconsent and did not indicate that minors were unable to consent. Id. ¶ 24. We rejected this reading of § 3254,

explaining that even though a minor's inability to consent is not listed in § 3254, the statutory scheme articulated the general rule that a minor under the age of sixteen is incapable of consenting to a sexual act. Id. ¶¶ 23-24.

¶ 17. We must consider the entire statutory scheme in applying the holding in Deyo to this case to determine whether fraud undermines consent. Section 3254(2) does not include consent obtained through fraud in the list of instances in which persons are deemed not to have consented. Although not dispositive, we note that in similar statutes outlining situations where persons are deemed not to have consented, other states have specifically identified consent obtained through fraud. See, e.g., Ala. Code § 13A-2-7(c)(4) (defining "[i]neffective consent" to include consent "induced by force, duress or deception"); Colo. Rev. Stat. Ann. § 18-1-505(3)(d) (explaining that "assent does not constitute consent if" the consent "is induced by force, duress, or deception"); Mont. Code Ann. § 45-2-211(2)(C) (providing that "[c]onsent is ineffective" if "induced by force, duress, or deception"). While this is compelling evidence that fraud does not vitiate consent, Deyo requires us to continue our inquiry by searching Vermont's statutory scheme for evidence as to whether the Legislature intended for fraud to undermine consent.

¶ 18. The sexual assault statutory scheme never explicitly mentions fraud or its relation to consent. The State argues that the purpose, reason, and spirit behind the sexual assault scheme indicate that fraud undermines consent. While we sometimes look to a statute's purpose in determining the Legislature's intent, the purpose and spirit of the sexual assault scheme do not provide sufficient evidence that the Legislature intended for fraud to undermine consent when the Legislature specifically defined consent and outlined four situations in § 3254(2) where consent is ineffective without mentioning fraud. In contrast to Deyo, the State presents a theory of nonconsent that is unsupported by § 3251(3), § 3254(2), and the broader statutory scheme. As

such, there is no indication that the Legislature intended for fraud to undermine consent in the sexual assault scheme.

¶ 19. Furthermore, because the Legislature has not specified that fraud undermines consent, the State's interpretation of consent under the sexual assault scheme creates due process concerns. "Due process requires that criminal statutes define proscribed conduct with sufficient specificity as to provide fair warning to potential offenders . . . ." State v. Dann, 167 Vt. 119, 128, 702 A.2d 105, 111 (1997). There are several "related manifestations of the fair warning requirement." United States v. Lanier, 520 U.S. 259, 266 (1997). First, the void-for-vagueness doctrine "requires that penal statutes define a criminal offense with sufficient certainty so as to inform a person of ordinary intelligence of conduct which is proscribed." State v. Cantrell, 151 Vt. 130, 133, 558 A.2d 639, 641 (1989). Second, "as a sort of junior version of the vagueness doctrine," Lanier, 520 U.S. at 266 (quotation omitted), the rule of lenity "requires that any doubts created by ambiguous legislation be resolved in favor of the defendant and construed against the state." State v. Hurley, 2015 VT 46, ¶ 17, 198 Vt. 552, 117 A.3d 433 (quotation omitted).

¶ 20. In this case, the State's interpretation of § 3253(a)(9) implicates void-for-vagueness concerns. "The void-for-vagueness doctrine stresses two aspects: (1) fair warning to potential offenders that their conduct is proscribed; and (2) sufficiently precise standards to avoid arbitrary and discriminatory enforcement." State v. Purvis, 146 Vt. 441, 442, 505 A.2d 1205, 1206-07 (1985). "Given that First Amendment interests are not at issue here, the statute must be examined in the factual context presented by the particular case." State v. Mobbs, 169 Vt. 645, __, 740 A.2d 1288, 1291 (1999) (mem.).

¶ 21. First, as outlined above, neither the definition of consent, the four situations outlined in § 3254(2) where consent is deemed ineffective, nor any part of the sexual assault

scheme indicate that fraud undermines consent. The State acknowledges that this Court has never held that fraud undermines consent in the criminal context. Cf. Rutherford v. Best, 139 Vt. 56, 61-62, 421 A.2d 1303, 1307 (1980) (holding that term was not vague because it was given "judicial gloss" in prior decision). Nothing in the sexual assault scheme or any of our prior decisions would give a person of ordinary intelligence notice that fraud would vitiate consent.

¶ 22. Second, the State's interpretation of § 3253(a)(9) lacks "sufficiently precise standards to avoid arbitrary and discriminatory enforcement." Purvis, 146 Vt. at 442, 505 A.2d at 1206-07. The State's theory is that defendant's fraudulent misrepresentation about his HIV status vitiated complainant's consent. Under this interpretation, any misrepresentation, no matter how small or insignificant, made before sex could potentially result in criminal charges under § 3253(a)(9). Despite the broad implications of its interpretation, the State "fails to draw reasonably clear lines between the kinds" of misrepresentations and lies that vitiate consent and those that do not. Smith v. Goguen, 415 U.S. 566, 574 (1974). We decline to interpret the statute in a way that would give prosecutors extraordinary discretion to determine what amounts to criminal behavior in "such a standardless sweep." Id. at 575. These vagueness considerations provide another reason not to adopt the State's theory that fraud undermines consent under the sexual assault scheme. In re M.C., 2018 VT 139, ¶ 9, 209 Vt. 219, 204 A.3d 1123 ("We construe statutes to avoid constitutional difficulties, if possible . . . ." (quotation omitted)).

¶ 23. It is the role of the Legislature to define crimes. State v. Breed, 2015 VT 43, ¶ 16, 198 Vt. 574, 117 A.3d 829 (explaining that "legislative bodies are empowered to define crimes and fix punishments"). As noted above, supra, ¶ 17, other jurisdictions across the country have expressly indicated that fraud or deception undermine consent. The Legislature is free to follow suit and outline sufficient standards that would address the due process concerns outlined above.

But the Legislature has not indicated that fraud undermines consent, and we will not engage in the legislative function of redefining consent under "the guise of judicial interpretation." F. W. Woolworth Co. v. Comm'r of Taxes of State, 133 Vt. 93, 99, 328 A.2d 402, 406 (1974).

Affirmed.

FOR THE COURT:

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Associate Justice