
Filed August 31, 2010

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2010

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the Tenth Judicial Circuit
)	Tazewell County, Illinois
Plaintiff-Appellee,)	
)	No. 07-CF-661
v.)	
)	
CHAD M. LANE,)	Honorable
)	Richard D. McCoy
Defendant-Appellant.)	Judge, Presiding.

JUSTICE LYTTON delivered the opinion of the court:

Defendant, Chad M. Lane, was tried in absentia for predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2006)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2006)). The jury found defendant guilty of all charges, and the trial court sentenced him to 30 years' imprisonment. Defendant filed a motion to reconsider, which the trial court denied. On appeal, defendant argues that (1) he should not have been tried in absentia, (2) the trial court did not properly instruct the jurors as required by Supreme Court Rule 431(b) (177 Ill. 2d R. 431(b)), and (3) the evidence was insufficient to prove him guilty of predatory criminal sexual assault. We reverse and remand, holding that the trial court erred in trying defendant in absentia.

The State filed a four-count information against defendant. Count I alleged that defendant committed predatory criminal sexual assault against his step-daughter, S.M., by placing his finger in her vagina. Counts II through IV alleged that defendant committed aggravated criminal sexual assault against S.M. by kissing her neck and stomach and having her touch his penis with her hand.

On November 8, 2007, defendant was arrested. A court order from that date indicates that defendant was "called into open court" and "informed of the charge(s), right to counsel, right to bail and is furnished a copy of the Information." The order also indicates that defendant was advised "as to trial in absentia pursuant to 725 ILCS 5/113-4(e)." The order does not indicate that defendant entered a plea at that time. Defendant's arraignment was scheduled for a later date.

On December 31, 2007, defendant was arraigned. The written order from that date indicates that defendant was advised "as to trial in absentia." The order also indicates that "Defendant enters a plea of Not Guilty to the charge(s) and demands Jury Trial." The transcript from this hearing date shows that defendant requested a jury trial but does not show that the trial court admonished defendant regarding trial in absentia.

Defendant's jury trial was set for July 21, 2008. On that date, defendant failed to appear and was tried in absentia. Andrea Lane testified that she is defendant's wife. She has four children

with defendant and one child, S.M., from a previous marriage. On November 3, 2007, S.M., who was 10 years old, was visiting for the weekend. At approximately 10 p.m., Andrea fell asleep on the living room couch. When she woke up at about 11 p.m., she went upstairs and found defendant and S.M. in her son's room. S.M. was lying on the bed with her feet dangling off. Defendant was on his knees in between S.M.'s legs. S.M.'s nightshirt was pulled up to her neck, and defendant was kissing her stomach. When defendant saw her, he left the room. After defendant left, Andrea asked S.M. if defendant was "fucking" with her. S.M. said "yes." Andrea then went downstairs and talked to defendant. Defendant said that S.M. started it, and he did not want her to feel rejected. The next morning, Andrea talked to S.M. about what happened. At first, S.M. said that defendant was just kissing her but eventually said that defendant had his hand in her pants.

S.M. testified that she last saw defendant in the fall of 2007. After the other children went to bed, she, her mom and defendant were in the living room. Her mom fell asleep on the couch. Defendant was sitting on a chair and asked S.M. to sit on his lap. When she refused, he made her. While she was sitting on his lap, defendant put his hand inside her underwear and touched her "private" "in inappropriate ways." She said that he moved his hand, but she did not feel his hand go inside of her. She denied that it hurt but said it felt "very uncomfortable." Then he made

her touch his "private part" under his clothes. After that, he picked her up and took her upstairs to her brother's room. He put her on the bed and pulled up her shirt and started kissing her stomach and neck. He stopped when her mom came in the room.

Jennifer Norman, a forensic interviewer for the Children's Advocacy Center, interviewed S.M. on November 6, 2007. That interview was recorded, and the DVD was played for the jury. During the interview, S.M. said that a few days earlier she was at her mom's house. After her mom fell asleep, defendant starting sucking and kissing on her stomach and neck. He also touched her private area under her underwear. She said defendant touched her private "inside" with "his hand" and "his fingers." She said it hurt. He also made her touch his private area.

Eric Goeken of the Tazewell County sheriff's office testified that he interviewed defendant on November 6, 2007. That interview was recorded, and the DVD was played for the jury. During the interview, defendant claimed that on November 3, 2007, he was drunk and fell asleep. When he woke up, S.M. was sitting on his lap "doing things she shouldn't have been doing *** to me and herself." He walked upstairs with S.M. and asked her if she was okay with what she had been doing. She said "yes." S.M. went into her brother's room and laid down sideways on the bed. Andrea walked in the room when he was finishing his "conversation" with S.M. At the end of the interview defendant asked, "What is an adult supposed to

do when a 10-year-old touches him? *** Is there a right response for that?"

Defendant's biological daughter, S.L., testified that she last saw defendant four years earlier, when she was nine years old. She visited him at his house for one month during the summer. Near the end of that month, she was sitting on the couch near defendant. Defendant told her to scoot over next to him. He put his arm around her and then moved his hand toward her breast area and touched her over her clothes. He placed his other hand on her knee and then moved it to her crotch area and touched her over her clothes. He continued to touch her for about 20 to 30 minutes.

On July 22, 2008, the jury found defendant guilty of all charges. On August 25, 2008, defendant filed a posttrial motion. The trial court denied the motion and sentenced defendant in absentia to 25 years' imprisonment on the predatory criminal sexual assault conviction and 5 years on the remaining convictions, to be served concurrently with each other but consecutive to the predatory criminal sexual assault conviction. Defendant was apprehended in early October 2008.

On October 20, 2008, defendant filed a motion to reconsider his sentence and appeared in court for the first time following his trial and sentencing. On that date, the court expressed concern about whether the motion to reconsider the sentence was timely because it was filed more than 30 days after his sentence. The

prosecutor stated that the statute did not specifically address when a posttrial motion must be filed following a trial and sentencing in absentia. She opined that it was "up to the Court's interpretation." The court suggested scheduling a hearing on defendant's motion, but defense counsel stated that he had no additional argument and would rely on his written motion. The State argued that the sentence the trial court imposed on defendant was "appropriate." The trial court denied the motion.

ANALYSIS

I

The State argues that we should dismiss defendant's appeal because defendant's motion to reconsider his sentence was untimely.

"A trial court loses jurisdiction to vacate or modify its judgment 30 days after entry of judgment unless a timely postjudgment motion is filed." People v. Minniti, 373 Ill. App. 3d 55, 65, 867 N.E.2d 1237, 1246 (2007). "However, under the revestment doctrine, litigants may revest a court that has general jurisdiction over the matter with both personal and subject matter jurisdiction over the particular cause after the 30-day period following final judgment." Minniti, 373 Ill. App. 3d at 65, 867 N.E.2d at 1246. "Revestment applies when the parties (1) actively participate without objection (2) in further proceedings that are inconsistent with the merits of the prior judgment." Minniti, 373 Ill. App. 3d at 65, 867 N.E.2d at 1246.

In People v. Gargani, 371 Ill. App. 3d 729, 863 N.E.2d 762 (2007), the defendant was found guilty and sentenced in absentia. He filed a motion to reconsider his sentence more than 30 days after the judgment. The State did not object to the defendant's motion but argued at the hearing on the motion that the defendant's sentence was proper. The court held that "the State's active participation in the proceedings revested the trial court with jurisdiction." Gargani, 371 Ill. App. 3d at 732, 863 N.E.2d at 766.

Similarly, in this case, defendant's motion to reconsider his sentence was untimely. However, at the hearing on the motion, the State did not object. When the court expressed concern that the motion was untimely, the prosecutor stated that it was "up to the Court's interpretation." The prosecutor then went on to address the merits of defendant's motion, arguing that defendant's sentence was proper. By arguing against the substance of defendant's motion to reconsider his sentence, the State revested the trial court with jurisdiction. See Gargani, 371 Ill. App. 3d at 732, 863 N.E.2d at 766. Thus, we have jurisdiction over this appeal.

II

_____Defendant's first claim of error is that the trial court improperly tried him in absentia.

The right to be present at trial is of constitutional dimension. People v. Phillips, 394 Ill. App. 3d 808, 810, 917

N.E.2d 110, 112 (2009). In Illinois, defendants have a statutory right to be admonished as to possible consequences of failing to appear in court when required. Phillips, 394 Ill. App. 3d at 810, 917 N.E.2d at 112. Section 113-4(e) of the Code of Criminal Procedure of 1963 (Code) provides in relevant part:

"If a defendant pleads not guilty, the court shall advise him at that time or at any later court date on which he is present that if he *** is released on bond and fails to appear in court when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could proceed in his absence." 725 ILCS 5/113-4(e) (West 2006).

The plain language of section 113-4(e) requires that admonitions be given when a defendant enters a not guilty plea or at any later court date after the plea when the defendant is present. 725 ILCS 5/113-4(e) (West 2006).

A defendant may be tried in absentia if he (1) is properly admonished pursuant to section 113-4(e), (2) has notice of his trial date, and (3) voluntarily fails to appear, offering no explanation for his absence. People v. Johnston, 160 Ill. App. 3d 536, 540, 513 N.E.2d 528, 531 (1987). A defendant may not be tried in absentia if the trial court has not complied with section 113-4(e). Phillips, 394 Ill. App. 3d at 810, 917 N.E.2d at 112.

The supreme court has held that section 113-4(e) admonitions are particularly appropriate and most effective at arraignment because that is "the proceeding where the defendant is called to the bar, is advised of the charges against him, and is required to answer the accusation contained in the indictment." People v. Garner, 147 Ill. 2d 467, 480, 590 N.E.2d 470, 476 (1992). "[A] defendant's plea can only be entered after he has been fully advised by the court of his rights and the consequences of his plea." Garner, 147 Ill. 2d at 480, 590 N.E.2d at 476. A defendant's plea determines whether he proceeds to trial. Garner, 147 Ill. 2d at 480, 590 N.E.2d at 476.

Also, a court will "presume that the common-law record is correct." People v. Martinez, 361 Ill. App. 3d 424, 427, 837 N.E.2d 479, 481 (2005). When a conflict exists between the common-law record and the report of proceedings, a court must give the report of proceedings precedence. Martinez, 361 Ill. App. 3d at 427, 837 N.E.2d at 481.

Here, defendant was not given his in absentia admonishments at the time he entered his not guilty plea or any court hearing thereafter.

The first written order contained in the common-law record is from November 8, 2007, the date of defendant's arrest. The November 8 order indicates that the trial court gave defendant section 113-4(e) admonishments but does not indicate that defendant

entered a plea on that date. This hearing was not transcribed. In the absence of any evidence to the contrary, we must presume that the written order showing that no plea was entered is correct. See Martinez, 361 Ill. App. 3d at 427, 837 N.E.2d at 481. Therefore, the court's in absentia admonishments on that date did not comply with the section 113-4(e) requirement that a plea must be entered when the admonishments are given.

Defendant next appeared in court at his arraignment on December 31, 2007. The December 31 order indicates that defendant pled not guilty and the court gave him his section 113-4(e) admonishments. The report of proceedings from that hearing, however, shows no section 113-4(e) admonishments. Because of the differences between the report of proceedings and common-law record, the report of proceedings must control. See Martinez, 361 Ill. App. 3d at 427, 837 N.E.2d at 481. The transcript establishes that the trial court did not provide defendant with section 113-4(e) admonishments on December 31, 2007. Section 113-4(e) admonishments are a prerequisite to trial in absentia. See Johnston, 160 Ill. App. 3d at 540, 513 N.E.2d at 531. Although the trial court could have admonished defendant about trial in absentia at a court hearing subsequent to his arraignment, there is no evidence in the record that it did so. Since the trial court did not provide admonishments in compliance with the statute, it erred in conducting defendant's trial in absentia. See Phillips, 394

Ill. App. 3d at 810, 917 N.E.2d at 112. Thus, we must reverse defendant's conviction and remand this matter for a new trial. See People v. Green, 190 Ill. App. 3d 271, 275, 546 N.E.2d 648 650 (1989).

III

Since this case must be remanded for a new trial, we find it unnecessary to address defendant's remaining contentions of error on appeal. However, to prevent the risk of exposing defendant to double jeopardy, we must consider whether the State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt of predatory criminal sexual assault and aggravated criminal sexual abuse. See People v. Macon, 396 Ill. App. 3d 451, 458, 920 N.E.2d 1224, 1230 (2009). Based on our review of the record in the light most favorable to the State, we find the evidence presented at trial was sufficient for the jury to conclude that defendant was guilty beyond a reasonable doubt of the crimes with which he was charged.

CONCLUSION

The order of the circuit court of Tazewell County is reversed and the cause is remanded.

Reversed and remanded.

WRIGHT, J., concurs.

JUSTICE McDADE, specially concurring:

The majority has found that defendant, Chad M. Lane, was

improperly tried *in absentia* because the admonishments were not given to him contemporaneously with or after he entered his plea of not guilty. Because the State has waived the potential issues of waiver and forfeiture it is unnecessary for us to undertake a plain error analysis. Even were we to do so, defendant would prevail because a trial *in absentia* is inherently unfair. *People v. Watson*, 109 Ill. App. 3d 880, 884, 441 N.E.2d 152, 154 (1982). There is, thus, plain error when a defendant is improperly tried *in absentia*. I, therefore, concur in the result reached by the majority.

I write separately to express my belief that defendant should also prevail on his challenge to the trial court's noncompliance with Supreme Court Rule 431(b).

Defendant contends that the present matter must be "remanded for a new trial because the trial court failed to strictly comply with Supreme Court Rule 431(b)." Specifically, defendant alleges that the trial court failed to advise prospective jurors of the fourth *Zehr* principle. He also alleges that the trial court's manner of addressing the first three *Zehr* principles was insufficient in that the court did not specifically question whether the venire understood those principles. Where an issue concerns compliance with a supreme court rule, the standard of review is *de novo*. *People v. Garner*, 347 Ill. App. 3d 578, 583, 808 N.E.2d 10, 14 (2004).

Supreme Court Rule 431(b) was passed to ensure compliance with the supreme court's decision in *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984). *Zehr* held that it was reversible error where the trial court refused to ask questions proffered by the defendant concerning the presumption of innocence and the State's burden to prove the defendant guilty beyond a reasonable doubt, and the subject matter of those questions was not otherwise included during *voir dire*. *Zehr*, 103 Ill. 2d at 476-78, 469 N.E.2d at 1063-64. Initially, the rule provided that the court shall ask potential jurors whether they understand and accept certain principles if the defendant requests that the court do so. The rule was amended in 2007, deleting the phrase "If requested by the defendant," from the beginning of the paragraph. Effective May 1, 2007, Rule 431(b) provides:

"The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4)

that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431, eff. May 1, 2007.

Here, prior to trial, the trial court addressed counsel for both parties, stating:

"Now, next question. We can pick a jury in one of two ways. The way I have been doing it for the last eight years, eight or nine years, is the Bruce Black method of just talking to all prospective jurors at once. If we do that, we are going to have to make up a seating chart that fits for this room, and then you will be given a seating chart with 50 people's -- 54, for some reason, with 54 names on it, and we can talk to everybody at once, or we can do it the more traditional method and put 12 people in the jury box and talk to the first four and go through panels of four. Do you care?"

Counsel for both parties informed the trial court that talking to all potential jurors at once was acceptable.

After all the potential jurors were brought into the courtroom, the trial court addressed them as a group on various matters including introduction of parties and attorneys, reading the bill of indictment, and reading the list of witnesses. The court then stated:

“Our criminal justice system has some fundamental principles that apply. You have all heard them before. They are as follows. The Defendant is presumed innocent. The State’s got the burden of proof. The State must prove the Defendant guilty beyond a reasonable doubt. The Defendant does not have to prove his innocence.

Is there anybody in the room who has a quarrel with those fundamental principles of our criminal justice system? Stated somewhat differently, is there anybody in the room who cannot promise to follow the law as instructed by me at the conclusion of the case in deliberating on the verdict in this case?

Is there anybody in the room who can think of any reason why he or she should not serve on this particular jury?”

Several jurors subsequently raised their hands, and the trial court made inquires as to each of them.

Defendant calls our attention to the fact that the trial court failed to specifically inform “that defendant’s failure to testify cannot be held against him.” See Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431, eff. May 1, 2007. At the outset, I note that defendant neither objected at the time of *voir dire* nor raised the issue in his posttrial motion. We should accept defendant’s request, however, and review for plain error. See *Herron*, 215 Ill. 2d at 178-79, 830 N.E.2d at 475.

Initially, the State concedes that the trial court failed to ask the fourth *Zehr* principle, however, it argues that this error can be excused because defendant failed to provide a bystanders report. The State also argues that the error is harmless because the jury was given a specific instruction stating that “[t]he fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict.” Finally, the State contends that the error does not constitute plain error because the evidence is not closely balanced and the trial court’s failure to give the fourth *Zehr* principle did not deprive defendant of a fair trial.

I have previously taken the position that a violation of the current Rule 431(b) satisfies the second prong of the plain error test and consequently requires reversal and a new trial. See *People v. Alexander*, 396 Ill. App. 3d 563, 580, 919 N.E.2d 1016, 1030 (2009) (McDade, dissenting). The same analytical framework—that is, analysis under the second prong—was followed by five panels of the First District (*People v. Anderson*, 389 Ill. App. 3d 1, 904 N.E.2d 1113 (2009); *People v. Graham*, 393 Ill. App. 3d 268, 913 N.E.2d 99 (2009); *People v. Wilmington*, 394 Ill. App. 3d 567, 915 N.E.2d 882 (2009); *People v. Arredondo*, 394 Ill. App. 3d 944, 916 N.E.2d 1263 (2009); *People v. Madrid*, 395 Ill. App. 3d 38, 916 N.E.2d 1273 (2009)) and one panel of the Second District (*People v. Blair*, 395 Ill. App. 3d 465, 917 N.E.2d 43 (2009)). The appellate panels in these cases all found that the second prong of the plain error test had been satisfied, reversed the defendant’s conviction, and ordered a new trial.

The majority in *Alexander*, however, found that there is no significant difference between the previous version of Rule 431(b) and the current version. *Alexander*, 396 Ill. App. 3d at 576, 919 N.E.2d at 1027. The majority concluded therefore that the supreme court’s ruling in *People v. Glasper*, 234 Ill. 2d 173, 917 N.E.2d 401 (2009)—which held that the trial court’s failure to comply

with the previous version of Rule 431(b) was not a structural error and, thus, automatic reversal was not required – applied to a violation of the current rule. *Alexander*, 396 Ill. App. 3d at 576, 919 N.E.2d at 1027. Ultimately, the majority held plain error had not occurred. *Alexander*, 396 Ill. App. 3d at 577, 919 N.E.2d at 1028. Another panel of this court also found that a violation of the current Rule 431(b) did not result in plain error. See *People v. Russell*, 395 Ill. App. 3d 926, 943, 921 N.E.2d 1, 15 (2009).

I adhere to my dissent in *Alexander* and my position that a violation of the current Rule 431(b) satisfies the second prong of the plain error test and consequently requires reversal and a new trial. See *Alexander*, 396 Ill. App. 3d at 580, 919 N.E.2d at 1030. (McDade, dissenting). However, both *Alexander* and *Russell* are distinguishable and a different result is warranted here. Unlike the present case, the potential jurors in *Alexander* and *Russell* were informed of all four *Zehr* principles. The issues in both those cases, instead, involved whether the trial courts' failure to ensure that the potential jurors understood those stated principles constituted plain error. In the present case, however, the trial court simply did not inform the trial court that defendant's failure to testify cannot be held against him.

The First District's holding in *Anderson* is instructional. In *Anderson*, the court held that the trial court had committed plain error by failing to comply with Rule 431(b). In that case, the trial court informed the first panel of prospective jurors of only three of the four *Zehr* principles. The court considered the language of Rule 431(b) and found that the language to impose a mandatory duty upon the trial courts to inform potential jurors of the rule's principles. *Anderson*, 389 Ill. App. 3d at 9, 904 N.E.2d 1120-21. The court concluded that the trial court's failure to strictly comply

with the requirements of Rule 431(b) rendered defendant's trial fundamentally unfair and, thus, reversed his conviction. *Anderson*, 389 Ill. App. 3d at 9, 904 N.E.2d at 1120-21.

Similarly, we should find that the trial court's failure to comply with Rule 431(b) in the instant case constitutes plain error and, thus, requires reversal of defendant's conviction and a new trial.

Because I agree with the majority's conclusion that the evidence presented by the State was sufficient to allow a reasonable jury to find defendant guilty of predatory criminal sexual assault beyond a reasonable doubt, I concur with the decision that double jeopardy does not bar his retrial.