

No. 1-09-1340

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 08 CR 18436
)	
FUZZELL CANNADY,)	
)	Honorable
Defendant-Appellant.)	Evelyn B. Clay,
)	Judge Presiding.
)	

JUSTICE MURPHY delivered the judgment of the court.
Quinn, P.J., and Steele, J., concurred in the judgment.

ORDER

HELD: Defendant's procedural default of his claim that the trial court failed to question prospective jurors in compliance with Supreme Court Rule 431(b) is not excused under the first prong of the plain-error doctrine where the evidence of his guilt was not closely balanced. Defense counsel was not constitutionally ineffective for adopting codefendant's cross-examination of four state witnesses where the matters brought out during that cross-examination were consistent with defendant's admission that he had beaten the victim.

Following a jury trial, defendant Fuzzell Cannady was found guilty of two counts of

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aggravated criminal sexual assault and sentenced to consecutive terms of 12 years' imprisonment. On appeal, defendant contends that the trial court failed to question prospective jurors in compliance with Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)) and that defense counsel was ineffective for insisting that the jury be present for the cross-examination of four state witnesses by codefendant's counsel. For the reasons that follow, we affirm.

BACKGROUND

Defendant and codefendant Cheryl Larson were charged with multiple counts of aggravated sexual assault and numerous other crimes in connection with the August 2008 assault of Nicole Stock. Prior to trial, Larson filed a motion to sever her trial from defendant's because their defenses were antagonistic. Larson's counsel stated that he believed defendant was going to assert a consent defense and that Larson's defense would be that defendant "did it." The trial court granted the motion to sever, and defendant and Larson were tried simultaneously before separate juries.

At trial, the State called Nicole Stock as its first witness, and counsel for both defendants requested that both juries be present for her direct and cross-examination. Stock testified that she met defendant in 2006, subsequently entered into a romantic relationship with him, and moved from Michigan to Chicago in early 2008 to be with him. Stock lived with defendant's aunt before moving into a women's shelter, and defendant lived with Larson. In August 2008, while Stock visited her family in Michigan, Larson accused her of cheating on defendant with his friend Dre. Stock spoke with defendant about Larson's allegations over the phone a number of

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times and decided to return to Chicago to work things out with him.

About 5 p.m. on August 26, 2008, Stock, defendant, and Larson arrived at Larson's apartment after going to the store. Larson's children, Cierra and Jaffari, were in the apartment as well. That night, Stock, defendant, and Larson watched movies, drank, and smoked marijuana and crack cocaine in Larson's bedroom. About 11 p.m., defendant asked Stock if she was having sex with Dre, and Stock responded that she was not. Defendant threw Stock on the floor, choked her, and told her to admit that she had cheated on him. Defendant continued to accuse Stock of cheating on him as he slapped her across the face and hit her with his belt. Larson told Stock to admit that she had cheated on defendant and said that she had proof that Stock was cheating on him. Eventually, defendant held his belt across Stock's throat and held her down with it until she passed out.

After Stock woke up, defendant grabbed her by the hair, forced her into the bathroom, and asked her if she had slept with Dre. Stock responded that she had not, and defendant hit her across the legs with a broom and a mop numerous times and told her to confess that she had cheated on him. Defendant then kicked Stock in the chin, and she fell back and hit her head on the bathtub and wall and blacked out. When Stock woke up, she realized that she was on the bedroom floor and that defendant and Larson were having sex. After they finished, defendant grabbed Stock, put her face down on the bed, and anally raped her for two to five minutes while she screamed for help. Defendant then turned Stock onto her back and vaginally raped her for another two to five minutes.

After defendant and Larson fell asleep, Stock exited the apartment and tried to get help

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from Larson's neighbors. As Stock did so, Yolanda Miller answered her apartment door, let Stock inside, and called the police. Stock was then taken by an ambulance to Mount Sinai Hospital, where a sexual assault kit was administered to her.

On cross-examination by defense counsel, Stock stated that defendant had spoken with her about Dre before she left for Michigan in August 2008 and that prior to the incident, she had occasionally stayed with defendant at Larson's apartment and had been involved in a few three-way sexual encounters with them. Stock also stated that Larson's children were present in the bedroom while the three of them watched a movie on the night of the incident and that although the windows were open on the night of the incident and she cried out for help, nobody came to the door. Stock acknowledged that she did not immediately tell the ambulance driver, Miller, or the police that she had been raped. On cross-examination by Larson's counsel, Stock stated that defendant, and not Larson, beat her.

On redirect examination, Stock testified that Larson had asked her children to leave the bedroom after defendant began hitting her and that she first informed someone that she had been raped when she provided the medical personnel at the hospital with a summary of what had happened to her. Stock explained that due to the trauma she suffered, she was unsure about the precise sequence of events on the night of the incident, but that "[she] knew that [she] had been raped and [she] knew that [she] had been hit." Stock also explained that she did not tell Miller or the police officers that she had been raped because she was primarily concerned with getting out of the apartment building and receiving medical help for her injuries at that time.

Yolanda Miller testified that defendant, Larson, and Larson's children lived together in

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her apartment building at 1215 South Sawyer Avenue and that about 5 p.m. on August 26, 2008, she saw Stock, defendant, and Larson enter the building as she was leaving. The next morning, Miller heard a knock on her door, opened it, and saw Stock running down the hall and knocking on doors. Stock had a black eye, her face was extremely swollen, and she was heavily bruised. Stock was frightened and scared, and Miller pulled her into her apartment, took her into her bedroom, and called the police.

On cross-examination by defense counsel, Miller stated that Stock did not tell her that she had been raped. On cross-examination by Larson's counsel, Miller stated that Stock told her that defendant had beaten her and that she was afraid he was coming behind her, but never mentioned that she had been beaten by Larson or that she was afraid of her.

Chicago police officer Anthony Givens testified that about 10:30 a.m. on August 27, 2008, he responded to a battery call at 1215 South Sawyer Avenue and met Stock in a woman's bedroom. Stock was hysterical and afraid, and she had major bruising and swelling, redness to her face and arms, and scratches on her arms. Stock informed Officer Givens that the offender, defendant, was asleep in Apartment 306. Officer Givens went to that apartment and knocked on the door, and Larson opened the door. Officer Givens asked Larson if defendant was inside, and she took him to the bedroom, where he was sleeping. Officer Givens woke up defendant, told him to put his clothes on, and placed him under arrest.

On cross-examination by Larson's counsel, Officer Givens stated that Stock only told him about one offender, and did not mention Larson or that she was sexually assaulted, when he first spoke with her. On cross-examination by defense counsel, Officer Givens stated that Stock did

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not tell him that she had been raped. On redirect examination, Officer Givens testified that Stock told him that she had been raped when he spoke with her at the hospital. Defense counsel then informed the jury that defendant wished to adopt the cross-examination conducted by Larson's counsel of Stock, Miller, and Officer Givens.

Dr. Michelle Holevar, the trauma director of the surgical intensive care unit at Mount Sinai Hospital, testified that about 12:10 p.m. on August 27, 2008, she examined Stock in the trauma bay of the emergency room at Mount Sinai. Dr. Holevar received Stock's medical history, which indicated that in the six hours prior to being brought into the emergency room, she had been locked in a room and beaten with various objects and had lost consciousness after being thrown against a wall and strangled. Stock was emotionally distraught and in a lot of pain, and Dr. Holevar observed that she had swelling and bruising throughout her entire body except for her lower legs and feet. Dr. Wydell, an emergency medicine physician, administered a sexual assault kit to Stock and discovered that she had bruising around her vagina. Dr. Holevar opined within a reasonable degree of medical certainty that the injuries she observed on Stock were consistent with her history of being raped and beaten.

On cross-examination by Larson's counsel, Dr. Holevar stated that Stock did not say that she had been raped during her initial interview, and first mentioned that she had been raped after she was being treated for the beating. Dr. Holevar also stated that Stock never indicated to her that Larson caused her injuries or participated in the sexual assault. On cross-examination by defense counsel, Dr. Holevar stated that Stock first mentioned that she had been raped about 1 p.m. Defense counsel also informed the jury that defendant was adopting the cross-examination

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of Dr. Holevar conducted by Larson's counsel. On redirect examination, Dr. Holevar testified that Stock told hospital personnel that she had not wanted to say anything about the rape because "he said he would hurt me" and that Stock was coherent when she spoke with her at the hospital.

Chicago police evidence technician Richard Samanas testified that about 4 p.m. on August 27, 2008, he collected a criminal sexual assault kit from Mount Sinai Hospital and transported it to the crime lab. Forensic scientist Meredith Misker testified that she received the criminal sexual assault kit on September 25, 2008, analyzed the vaginal and rectal swabs contained therein, and discovered that semen was present on both swabs. The parties stipulated that, if called, Cook County investigator Edward Tansey would testify that he obtained buccal swabs from defendant and Larson and transported them to the Illinois State Police crime lab. Forensic scientist Lisa Kell testified that she performed DNA analysis on the vaginal and rectal swabs taken from Stock and the buccal swabs taken from defendant and Larson and discovered DNA profiles that matched those of defendant and Stock on the vaginal swab and a DNA profile that matched that of defendant on the sperm fraction of the rectal swab. Numerous photographs of Stock's injuries were also entered into evidence.

Cierra Larson, the daughter of codefendant Larson, testified for the defense that about 8 p.m. on August 26, 2008, she came home with her brother Jaffari, and defendant, her mother, and Stock were eating and drinking in the apartment. They all went into the bedroom to watch a DVD, and Cierra could tell that Stock and defendant were arguing from their body language. At some point, Stock sat up and said "look[,] I did it. I am ready for my ass whipping." Stock then hit defendant across the head and the chest, and Cierra and Jaffari went to their bedroom, where

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Cierra fell asleep.

Defendant testified that he moved in with Larson in June 2008 and that Stock moved in with Larson as well. About a week after he did so, defendant began engaging in group sex with Stock and Larson and was engaging in anal sex with Stock three or four times a month. On the evening of August 26, 2008, defendant watched a movie with Stock, Larson, and Larson's children in Larson's bedroom, and the windows were open because it was hot outside. Stock, Larson, and defendant were drinking, Larson and Stock were smoking marijuana, and Stock was smoking crack cocaine as well.

An argument developed regarding Stock cheating on defendant with someone he knew, and Stock admitted that she had cheated on him and struck him in his face and chest. Larson's two children left the room, and Larson said they might as well get the fight over with. Defendant hit Stock in the face with his left hand and proceeded to hit her around her body and legs with a belt. Defendant beat Stock from about 10:30 p.m. to 11 or 11:15 p.m. and admitted to causing the injuries that were depicted in the photographs of her. Afterward, defendant had oral and vaginal sex with Larson, and Stock eventually became involved as well. Defendant had anal and vaginal sex with Stock, and she did not cry or tell him to stop as he did. On cross-examination, defendant stated that he held a belt to Stock's neck while he beat her, but did not choke her, and that after the beating, her face was red, but not swollen.

Based on this evidence, the jury found defendant guilty of two counts of criminal sexual assault, and he was sentenced to consecutive terms of 12 years' imprisonment.

ANALYSIS

I. Rule 431(b)

Defendant first contends that the trial court erred by failing to comply with Supreme Court Rule 431(b) because it did not afford the potential jurors an opportunity to indicate whether they accepted and understood the four principles set forth therein. The State asserts that defendant has forfeited review of this issue by failing to object at trial or raise the issue in a posttrial motion, and defendant responds that we should review this issue under the plain-error doctrine.

Although an error is generally not preserved for review unless the defendant objects at trial and includes the error in a written posttrial motion, the plain-error rule bypasses normal forfeiture principles and permits reviewing courts to consider unpreserved error in certain circumstances. *People v. Averett*, 237 Ill. 2d 1, 18 (2010). A reviewing court may consider unpreserved error under the plain-error doctrine when the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in conducting plain-error review is to determine whether error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009).

Pursuant to Rule 431(b), a trial court is required to ask each potential juror, individually or in a group, whether that juror "understands and accepts" each of the following principles:

"(1) that the defendant is presumed innocent of the charge(s) against him

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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." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

The language of Rule 431(b) is clear and unambiguous and mandates a specific question and response process in which the trial court must ask each potential juror, either individually or in a group, whether he or she understands and accepts each of the principles set forth in the rule and provide each prospective juror with an opportunity to respond to those questions. *People v. Thompson*, 238 Ill. 2d 598, 607 (2010).

The record shows that the trial court did not ask the potential jurors whether they "understood and accepted" each of the four principles set forth in the rule. The court asked if anyone had "a problem" with either of the first two principles, if anyone would "hold it against the [defendant]" if he did not testify or call witnesses on his own behalf, and if anyone thought he had a responsibility to prove his innocence. Rule 431(b) requires the trial court to ask the potential jurors specific questions as to whether they both understand and accept each of the four principles set forth therein, and we therefore conclude that the court did not comply with that rule in this case. *Id.*

Defendant asserts that the trial court's error constituted plain error in this case because the evidence was closely balanced. Under the first prong of the plain-error doctrine, a reviewing court may consider unpreserved error when the evidence is so closely balanced that the error

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alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error. *Piatkowski*, 225 Ill. 2d at 565.

Defendant maintains that the evidence was closely balanced in this case because some evidence supported his theory of consent where Stock testified that she was “delusional” after the beating and “confused” on the night of the incident, Stock did not initially claim to have been raped, and Larson’s apartment door was unlocked and her bedroom windows open throughout the incident. In addition, defendant claims that there was little medical evidence suggesting non-consensual sex and that the evidence showed that Stock had willingly engaged in anal sex with him numerous times prior to the incident.

A person commits aggravated criminal sexual assault if he commits criminal sexual assault, which is an act of sexual penetration by the use or threat of force (720 ILCS 5/12-13(a)(1) (West 2008)), and causes bodily harm to the victim. 720 ILCS 5/12-14(a)(2) (West 2008). The victim’s consent, which is defined as “a freely given agreement to the act of sexual penetration or sexual conduct in question,” is a defense to aggravated criminal sexual assault. 720 ILCS 5/12-17(a) (West 2008).

The record shows that Stock testified that defendant beat her on the night of the incident and caused her bodily harm. That testimony was corroborated by the testimony of Miller, Officer Givens, and Dr. Holevar regarding Stock’s condition following the incident, the photographs taken of Stock shortly after the incident, and defendant’s testimony that he beat Stock and caused the injuries documented in the photographs. Stock and defendant both testified that he had vaginal and anal sex with her following the beating, and Kell testified that defendant’s DNA

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profile matched those taken from Stock's vaginal and rectal swabs. In addition, Dr. Holevar testified that Stock's injuries were consistent with those of someone who had been beaten and raped.

Thus, although Stock testified that she was "delusional" after the beating and "confused" on the night of the incident, her testimony was corroborated by that of other witnesses, including defendant, and the forensic and photographic evidence. While Stock did not immediately inform those who had come to her aid that she had been raped, a delay in reporting incidents of sexual abuse may be reasonable in some circumstances (*People v. Duplessis*, 248 Ill. App. 3d 195, 199 (1993)), and Stock explained that she did not immediately report the rape because she was primarily concerned about leaving Larson's apartment building and getting medical attention for her numerous injuries at that time. In addition, to the extent defendant cites the facts that the doors were unlocked and the windows were open in Larson's apartment to imply that Stock did not resist him or attempt to flee, we note that consent cannot be implied by the failure of a sexual assault victim to attempt to escape or cry out where she is restrained by fear or where doing so would endanger her life (720 ILCS 5/12-17(a) (West 2008); *People v. Gramc*, 181 Ill. App. 3d 729, 735 (1989)) and that Stock was reasonably afraid of defendant after he had severely beaten her. Furthermore, Dr. Holevar testified that Stock's injuries were consistent with those of someone who had been beaten and raped, and there was overwhelming evidence that he severely beat Stock before engaging in vaginal and anal sex with her.

We thus conclude that the evidence of defendant's guilt was not so closely balanced that the trial court's failure to strictly comply with Supreme Court Rule 431(b) threatened to tip the

scales of justice against him, and we therefore also conclude that the first prong of the plain-error doctrine does not provide a basis for excusing his procedural default of this issue in this case.

II. Ineffective Assistance of Counsel

Defendant further contends that defense counsel was ineffective for adopting the cross-examination of Stock, Miller, Officer Givens, and Dr. Holevar conducted by Larson's counsel and exposing the jury to that cross-examination. To prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). In order to establish counsel's deficient performance, the defendant must overcome the strong presumption that the challenged action might have been the product of sound trial strategy. *People v. Simms*, 192 Ill. 2d 349, 361 (2000). To establish prejudice, the defendant must prove there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 362. A failure to make the requisite showing of either deficient performance or sufficient prejudice defeats a defendant's claim of ineffective assistance of counsel. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994).

Defendant asserts that he and Larson had antagonistic defenses and that counsel's decision to allow Larson's counsel to cross-examine Stock, Miller, Officer Givens, and Dr. Holevar in front of the jury was objectively unreasonable because it undermined the severance of their trials and prejudiced him. He also asserts that there is a reasonable probability that, but for counsel's deficient performance, the jury would have returned a different verdict because the

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evidence was closely balanced. Defendant maintains that he was prejudiced by the following portions of the cross-examinations of those witnesses: (1) where Stock stated that defendant, and not Larson, beat her; (2) where Stock stated that Larson and defendant were having sex when she woke up after having passed out during the beating; (3) where Miller stated that Stock told her that defendant had beaten her and that she was afraid of him, but did not say that Larson had beaten her or that she was afraid of Larson; (4) where Officer Givens stated that Stock told him about only one offender and did not mention Larson; and (5) where Dr. Holevar stated that Stock never indicated that Larson caused her injuries or participated in the sexual assault.

The record shows that defendant admitted to beating and injuring Stock, but asserted that he was not guilty of aggravated criminal sexual assault because she had consented to having sex with him after he had beaten her. Thus, the statements made by Stock, Miller, Officer Givens, and Dr. Holevar during their cross-examinations by Larson's counsel consistent with defendant's admission that he, and not Larson, beat Stock did not prejudice him. In addition, the fact that defendant and Larson were having sex when Stock woke up after having passed out during the beating is not relevant to the question of whether Stock consented to having sex with defendant after he had beaten her. To the extent defendant was prejudiced by Dr. Holevar's statement that Larson had not participated in the "sexual assault" of Stock, that prejudice is insufficient to create a reasonable probability that, but for counsel's allegedly deficient performance, the result of the trial would have been different where, as stated earlier, the evidence of defendant's guilt was not closely balanced. We therefore determine that defendant has not made a sufficient showing of prejudice to satisfy the second prong of the *Strickland* test and conclude that counsel

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was not constitutionally ineffective.

Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirmed.