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2011 IL App (3d) 090891-U

Order filed July 21, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Marshall County, Illinois,
	)	
v.	)	Appeal No. 3-09-0891
	)	Circuit No. 08-CF-03
	)	
ROBERT E. STEVENSON,	)	Honorable
	)	Kevin R. Galley,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Presiding Justice Carter and Justice Schmidt concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The defendant's conviction for aggravated criminal sexual abuse was upheld on appeal because the State met its burden of proving that the defendant's asserted belief that the victim was at least 17 years old was not reasonable.

¶ 2 After a bench trial, the defendant, Robert E. Stevenson, was convicted of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008) and sentenced to seven years in prison. The defendant appealed, contending that: (1) the State failed to

rebut his affirmative defense that he reasonably believed the victim, J.S., was at least 17 years old; (2) his trial counsel rendered ineffective assistance of counsel for failing to object to hearsay testimony; (3) the trial court erred in finding that the defendant's conduct caused or threatened serious harm; and (4) the defendant was entitled to an additional day of sentencing credit. We grant the additional day of sentencing credit and otherwise affirm.

¶ 3

### FACTS

¶ 4

The defendant was charged with one count of aggravated criminal sexual abuse for allegedly committing an act of sexual penetration with J.S., who was under the age of 17 but at least 13 years old, while the defendant was at least five years older than J.S. The defendant waived a jury trial. At the bench trial, it was not contested that sexual intercourse occurred between the defendant and J.S. late at night on January 6, 2008. It was also not contested that J.S. was 16 years old and the defendant was 29 years old on that date. However, the defendant asserted the affirmative defense that he reasonably believed that J.S. was 17 years of age or older.

¶ 5

The evidence presented at trial established that the defendant met J.S. on January 6, 2008, when the defendant, his brother, Tim Stevenson, and his friend, Mike Smith, purchased food at the Burger King where J.S. was working. Jason Stefanich, the manager of the Burger King, testified that he saw the three men talking to the cashiers earlier in the evening. He saw them return later, around 10 p.m. By that time, J.S. was no longer working, but she was still in the area. Stefanich testified that one of the three men, but not the defendant, came back into the store and talked with J.S.'s coworker. Stefanich

testified that he called the man over and told him that J.S. and her coworker were only 16 years old.

¶ 6 J.S. testified that when the three men first came into Burger King, they began talking to her and her coworker. They asked for both of the girls' cell phone numbers. While the coworker gave an old number, J.S. gave them her current number. Tim left two voice messages on J.S.'s phone, asking what the girls were going to do that night. J.S. testified that she returned the calls, and told Tim that they were going barhopping and they were both 21 years old. J.S. testified that when she got off work, she went outside and the three men were outside in a truck. J.S. got in the truck, and Tim put some kind of alcohol in J.S.'s fruit punch. J.S. testified that Tim got out of the truck and went inside to see if J.S.'s coworker wanted to join them. According to J.S., when Tim came back out, he said that the manager told him that J.S. and her coworker were only 16. She testified that Tim "was going on how he wasn't going to do anything with me because I was only 16." J.S. testified that she was mad and she got out of the truck to go inside. Smith stopped her, and the defendant told her that "it didn't matter how old [she] was and that [she] could just go with them anyway."

¶ 7 J.S. got back in the truck and left with the three men. J.S. testified that they drove to the defendant's mother's house and changed cars. J.S. testified that the three men did not drink while she was in the truck, but they had been drinking all day. At one point, they left Smith sleeping in one of the cars while they drove around. Eventually, they took her to an apartment, and the defendant gave her two drinks made with Kool-Aid and vodka. J.S. testified that she and the defendant had sexual intercourse. J.S. said that she

was "really drunk" and even fell into the bathtub at the apartment. Sometime in the early morning, the defendant left J.S. at the apartment, and J.S.'s stepfather picked her up around 5:30 a.m.

¶ 8 The trial court denied the defendant's motion for a directed verdict, finding that there was sufficient evidence that the defendant had notice that J.S. was not 17 years old. Tim testified for the defense. Tim testified that when he returned to the Burger King, Stefanich told him that J.S. and her coworker were not old enough to drink. Tim went back out to the truck and told the defendant and Smith that the girls were not 21, so they would not be going to the bars. Tim testified that J.S. was not present when he made that comment. According to Tim, he questioned J.S.'s statement that she was going to the bars, and J.S. told him that she was 19 years old. Tim testified that it did not matter that J.S. was not old enough to go to the bars because they had plenty of alcohol and their plan was to drink. Tim testified that he was drunk on the night in question. Smith also testified that when Tim returned to the truck after going back in the Burger King, Tim stated that J.S. was not old enough to drink. Smith testified that J.S. was present for that comment, and that the defendant then asked J.S. if she was at least 18 years old. Smith testified that J.S. responded that she was 19 years old. Smith had started drinking alcohol when the men first went to the Burger King in the early evening.

¶ 9 The defendant testified, admitting that he had sexual intercourse with J.S. at the apartment on the night in question. He testified consistently with Tim and Smith, however, that Tim told them in the truck that J.S. was too young to get into a bar. He testified that he asked J.S. if she was at least 18 years old, because, he testified, 18 was

legal to have sex with. According to the defendant, J.S. said that she was 19 years old. The defendant testified that he had already had a lot to drink when J.S. left the Burger King with the three men.

¶ 10 The trial court found the defendant guilty of aggravated criminal sexual abuse. The trial court specifically found that while Tim's testimony was not credible, the testimony of Stefanich and J.S. was credible. The trial court concluded that the defendant did not act reasonably in concluding that J.S. was 17 years of age or older. The defendant's motion for a new trial was denied. The trial court sentenced the defendant to seven years' imprisonment. The trial court found, in aggravation, that the defendant's conduct, involving alcohol and sex, caused or threatened serious harm. Also, it found that a prison sentence was necessary to deter others. The trial court also ordered the defendant to pay fines and costs, and awarded the defendant 160 days of sentence credit. The defendant appealed.

¶ 11 ANALYSIS

¶ 12 The defendant contends that there was not sufficient evidence to disprove, beyond a reasonable doubt, that he reasonably believed that J.S. was at least 17 years old. The State responds that it was the province of the trial court, as the trier of fact, to determine the credibility of witnesses, and there was sufficient evidence to support the trial court's finding that any such belief by the defendant was not reasonable.

¶ 13 The defendant was convicted of aggravated criminal sexual abuse under section 12–16(d) of the Criminal Code of 1961 (Code). That section provides that:

¶ 14 "The accused commits aggravated criminal sexual abuse if he or she commits

an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was at least 5 years older than the victim." 720 ILCS 5/12–16(d) (West 2008).

¶ 15 Section 12–17(b) of the Code provides that it shall be a defense to a charge under Section 12–16(d) of the Code that the accused reasonably believed the victim to be 17 years of age or over. 720 ILCS 5/12–17(b) (West 2008).

¶ 16 Once a defendant raises the affirmative defense under section 12–17(b) of the Code, the State has the burden of proving, beyond a reasonable doubt, that the defendant's belief was not reasonable. 720 ILCS 5/3–2(b) (West 2008); *People v. Jones*, 175 Ill. 2d 126 (1997). When a defendant challenges the sufficiency of the evidence, this court will review the evidence presented at trial, in the light most favorable to the prosecution, and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237 (1985). The role of the reviewing court is not to retry the defendant; it remains the responsibility of the trier of fact to determine the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Milka*, 211 Ill. 2d 150 (2004).

¶ 17 J.S. testified that she originally told Tim that she was 21 years old. Stefanich testified that he told Tim that J.S. was 16 years old. J.S. testified that Tim immediately came out of the Burger King and told the defendant and Smith that J.S. was only 16 years old. The defendant testified that J.S. told him that she was 19 years old. The trial court specifically found that Tim was not a credible witness and that Stefanich and J.S. were

both credible witnesses. Considering the evidence in the light most favorable to the prosecution, we find that the State met its burden of proving that the defendant's alleged belief that J.S. was at least 17 years old was not reasonable.

¶ 18 In a related argument, the defendant contends that his defense counsel was ineffective for failing to object, on hearsay grounds, to J.S.'s testimony that she heard Tim tell the defendant Stefanich's comment that J.S. was only 16 years old. The State argues that neither statement - the statement by Stefanich nor the statement by Tim - was hearsay because neither was offered to prove J.S.'s age. J.S.'s age was proven by her own trial testimony. Rather, the statements were offered to prove that the defendant had knowledge or was put on notice whether the statement was true.

¶ 19 To establish a claim for ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 20 Hearsay is an out-of-court statement offered at trial to prove the truth of the matter asserted. *People v. Shoultz*, 289 Ill. App. 3d 392 (1997). An out-of-court statement that is offered for some purpose other than to establish the truth of the matter asserted in the statement is not hearsay and is admissible. *Shoultz*, 289 Ill. App. 3d 392. A statement that is offered for the purpose of showing that the listener was placed on notice or had knowledge is not hearsay. *Shoultz*, 289 Ill. App. 3d 392; *People v. Clark*, 47 Ill. App. 3d 624 (1977).

¶ 21 In this case, the statement made by Stefanich, and repeated by Tim, that J.S. was only 16 years old was not offered for its truth, that J.S. was 16 years old, but solely to

show that the defendant had notice to question J.S.'s age. In fact, the defendant acknowledges that the statement was not offered to prove that J.S. was 16 years old. The testimony was not hearsay and was properly admitted. Since the testimony was not hearsay, defense counsel was not ineffective for failing to object.

¶ 22 The defendant next contends that the trial court abused its discretion in finding, as an aggravating sentencing factor pursuant to section 5–5–3.2 of the Unified Code of Corrections (730 ILCS 5/5–5–3.2 (West 2008)), that the defendant caused or threatened serious harm to J.S. The defendant acknowledges that he did not file a motion to reconsider sentence, so he has not properly preserved the issue for appeal. However, the defendant urges this court to review the issue for plain error. Alternatively, the defendant argues that his defense counsel was ineffective for failing to raise the issue in a posttrial motion. The State argues that the record supported the trial court's finding that the defendant's conduct caused or threatened serious harm to J.S.

¶ 23 For an issue to be preserved for appeal, the error must be raised in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176 (1988) (both a trial objection and a written posttrial motion raising the issue are necessary to preserve an issue for review). The plain error rule is an exception, allowing courts to reach a forfeited error when either the evidence is close, regardless of the seriousness of the error, or when the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167 (2005).

¶ 24 Although a trial court has broad discretion when imposing a sentence, it may not consider a factor implicit in the offense as an aggravating factor in sentencing. *People v. Phelps*, 211 Ill.2d 1 (2004). However, a sentence imposed by a trial court will not be

reversed unless it is clearly evident that the sentence was improperly imposed. *People v. Ward*, 113 Ill.2d 516 (1986). In determining whether the sentence was properly imposed, a reviewing court looks to the record as a whole and should not focus on a few words or statements of the trial court. *Ward*, 113 Ill.2d 516.

¶ 25 Whether a defendant's conduct caused or threatened serious harm is a statutory aggravating factor that a trial court may consider in imposing sentence. 730 ILCS 5/5-5-3.2(a)(1) (West 2008). In this case, the trial court heard testimony that all three men, including the defendant, had been drinking on the day in question. Tim testified that he was drunk, and the defendant testified that he had already had a lot to drink when J.S. left the Burger King with them. The three men then proceeded to drive around town, and supplying alcohol to a minor, to the point where J.S. was "really drunk." The defendant had sexual intercourse with J.S., and then proceeded to leave her in a stranger's home until her stepfather picked her up at 5:30 a.m. We find that the trial court did not abuse its discretion in finding that the defendant's conduct threatened serious harm, harm that was not inherent in the sex offense.

¶ 26 Since there was no error at all, there can be no plain error. *People v. Johnson*, 218 Ill. 2d 125 (2005). Likewise, since there was no error, defense counsel's failure to file a motion to reconsider sentence based on the same argument did not amount to deficient performance.

¶ 27 Finally, the State is in agreement that the defendant is entitled to one additional day of sentence credit pursuant to former section 5/5-8-7(b) of the Unified Code of Corrections (730 ILCS 5/5-8-7(b) (West 2008)).

## CONCLUSION

¶ 28           The defendant is awarded one additional day of sentence credit. In all other respects, the judgment of the circuit court of Marshall County is affirmed.

¶ 29           Affirmed.