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2012 IL App (3d) 110031-U

Order filed December 18, 2012

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-11-0031
)	Circuit No. 06-CF-1414
RICARDO GONZALEZ,)	
Defendant-Appellant.)	Honorable James E. Shadid, Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice McDade concurred in part and dissented in part with the judgment.

ORDER

¶ 1 *Held:* The evidence presented at defendant's jury trial was closely balanced so as to warrant plain-error review of a forfeited error that occurred in the trial court's admonishment and instruction of the jury and to require a reversal of defendant's conviction and a remand for a new trial. Other errors that were alleged by defendant on appeal either did not occur, were not proven, or did not need to be addressed.

¶ 2 After a jury trial, defendant, Ricardo Gonzalez, was convicted of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)) and sentenced to 14 years' imprisonment.¹

¹ Defendant was also found guilty of aggravated criminal sexual abuse (720 ILCS 5/12-

Defendant appeals, arguing that the trial court erred in: (1) failing to properly admonish and instruct the jury in *voir dire* and at trial; (2) admitting the hearsay statements of the child victim; and (3) sentencing defendant to 14 years' imprisonment. Defendant also argues that his speedy-trial rights were violated, that the State's closing argument at trial was improper, and that he was denied effective assistance of counsel. Based upon the jury admonishment and instruction error, we reverse defendant's conviction and remand this case for a new trial.

¶ 3

FACTS

¶ 4 Defendant was accused of committing a sexual offense against his 10-year-old daughter in October 2006. Shortly after the incident occurred, he was arrested and charged with two counts of aggravated criminal sexual abuse. Defendant posted bond and was released from custody but did not file a written speedy-trial demand.

¶ 5 In June 2007, pursuant to a plea agreement, defendant attempted to plead guilty to one count of aggravated criminal sexual abuse in exchange for a sentence of probation. Although the trial court received a factual basis and tentatively accepted the plea, the plea was continued until August 2007, to allow defendant to obtain a sex-offender evaluation. In July 2007, however, defendant filed a motion to withdraw his guilty plea. The trial court allowed the motion.

¶ 6 In January 2010, the State brought additional charges against defendant for predatory criminal sexual assault of a child and criminal sexual assault. All four of the charges (the two initial charges and the two later-added charges) were based upon the same incident. The case proceeded to a jury trial in February 2010. That trial resulted in a hung jury, and a mistrial was declared.

¶ 7 A second jury trial was held in August 2010. The State only went forward on the charges of

16(b) (West 2006)). However, no conviction or sentence was entered on that charge.

predatory criminal sexual assault and aggravated criminal sexual abuse. The two remaining charges were dismissed. During *voir dire*, as the State acknowledges on appeal, the trial court did not properly instruct the jurors as required by Illinois Supreme Court Rule 431(b) (eff. May 1, 2007).

¶ 8 The evidence presented at the second trial, relevant to the issues raised in this appeal, can be summarized as follows. The victim, C.G., testified that on the date in question, she and her younger brother spent the night at defendant's house. While she was in bed and her brother was sleeping next to her, defendant came into the room and laid down beside her. Defendant pulled down his own underwear and C.G.'s stockings and underwear and put "his private part inside of [her] private part." After about three minutes of defendant rubbing his private part against her, C.G. shoved defendant away from her. Defendant apologized, and they went back to bed. The next morning, defendant again apologized to C.G. Although defendant's wife was present in the home, C.G. did not tell her what had occurred because she was scared. C.G. also did not tell other relatives that she saw that weekend when she was with defendant and his wife. When C.G. went home later that weekend, she told her mother about the incident. She also gave a statement to police.

¶ 9 Shortly after the incident occurred, C.G. was examined by Nancy Auer, a nurse practitioner who specialized in child sexual abuse. Auer testified that based upon her examination, she believed C.G. had indications of recent trauma to her inner-vaginal area that was consistent with sexual penetration. Auer explained the reasons for that belief to the jury. A lab report showed that blood had been found on swabs taken of C.G.'s inner-vaginal area, which Auer stated also confirmed her opinion that sexual penetration had occurred. Auer re-examined C.G. a few weeks later and the indications of recent trauma had healed and were no longer present.

¶ 10 Pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS

5/115-10 (West 2010)), the trial court allowed C.G.'s mother and the investigating police officer to testify regarding C.G.'s hearsay statements about the incident. A section 115-10 hearing had been previously held and the trial court had determined that the statements were admissible if C.G. testified. See 725 ILCS 5/115-10(b)(1) (West 2010).

¶ 11 The investigating officer also testified about the incriminating statements defendant gave to police when defendant was interviewed after the incident. Defendant told police that he fell asleep next to C.G., that he woke up when C.G. pushed him, that his penis was between C.G.'s legs, and that he did not think that either he or C.G. had their underwear off at the time. Defendant also made some reference to the police to the effect that when the incident occurred, he thought he was in bed with his wife.

¶ 12 Defendant testified in his own behalf that he did not commit a sexual offense against C.G. Defendant stated that he laid down in the bed with C.G. and his son that night and fell asleep. Defendant woke up when C.G. pushed him on the chest and said, "Dad." Defendant jumped back, realizing that he had an erection and that his hand was on C.G.'s waist or buttocks. Defendant told C.G. that he was sorry and stated that he did not mean to do anything to her. C.G. told defendant that it was okay. C.G. went to the bathroom, returned, kissed defendant on the cheek, and went back to bed. C.G. seemed a little upset the next morning, so defendant again apologized to her. Defendant testified that he and C.G. did not have their underwear off when the incident occurred and that his penis did not touch C.G.'s vagina or any part of her body. After further questioning, however, defendant testified that his penis was probably between C.G.'s legs. Defendant also acknowledged that he had made prior statements, either to police or in court, which were somewhat inconsistent with his trial testimony.

¶ 13 Dr. Lanny Wilson, a board certified obstetrician-gynecologist, testified for the defense. Wilson reviewed the examination records and Auer's prior testimony and opined at trial that C.G. had not been the victim of sexual penetration or sexual abuse. Wilson explained the reasons for his opinion to the jury and told the jury why he disagreed with Auer's opinion.

¶ 14 During closing arguments, the State argued that it had proven its case beyond a reasonable doubt. Among other things, the prosecutor stated to the jury that C.G. had testified about the sexual penetration and that nurse Auer's examination and the lab report confirmed that it had occurred. Defense counsel did not object to those comments. During jury instructions, although the jury was given Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 1.02), it was not given Illinois Pattern Jury Instructions, Criminal, No. 11.66 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 11.66). Neither party had tendered or requested that instruction.

¶ 15 After deliberations, the jury found defendant guilty of predatory criminal sexual assault of a child and of aggravated criminal sexual abuse. Defendant filed a motion for new trial, which was subsequently denied. A presentence investigation report (PSI) was ordered and the case proceeded to sentencing. The PSI showed that defendant was 36 years old, a military veteran, and had stable employment. Defendant had no prior criminal history and was a low risk to re-offend. Following a sentencing hearing, defendant was sentenced to 14 years' imprisonment for predatory criminal sexual assault. No conviction or sentence was imposed for aggravated criminal sexual abuse, which was determined to be a lesser-included offense. Defendant appealed.

¶ 16 ANALYSIS

¶ 17 Defendant raises numerous issues on appeal. We have decided to address first the issue relating to the admonishment and instruction of the jury because it is dispositive in this case and

requires that defendant's conviction be reversed and that the case be remanded for a new trial. As to that issue, defendant argues that the trial court erred in failing to properly admonish the jurors in *voir dire* as required by Rule 431(b) and by failing to properly instruct the jury at trial pursuant to IPI Criminal 4th No. 11.66 regarding the jury's consideration of C.G.'s hearsay statements. Defendant acknowledges that the issue was not properly preserved for appellate review but asks that we reach the merits of that issue, nevertheless, under the plain-error doctrine because the evidence in this case was closely balanced. The State admits that the jury admonishment and instruction error occurred but contests whether the evidence was closely balanced so as to warrant the application of the plain-error doctrine.

¶ 18 The plain-error doctrine is a very limited and narrow exception to the procedural-default rule that allows a reviewing court to consider unpreserved error if either one of the following two circumstances is present: (1) a clear or obvious error occurred and the evidence in the case was 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 (2) a clear or obvious error occurred and the error was 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. Walker*, 232 Ill. 2d 113, 124 (2009); *People v. Herron*, 215 Ill. 2d 167, 177-87 (2005); Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999); R. 451(c) (eff. July 1, 2006). Under either prong of the plain-error doctrine, the burden of persuasion is on the defendant. *Walker*, 232 Ill. 2d at 124. If the defendant fails to satisfy that burden, the procedural default of the issue must be honored. *Walker*, 232 Ill. 2d at 124.

¶ 19 After having thoroughly reviewed the record in the instant case, we find that the evidence presented at defendant's trial was closely balanced. To support its claim that a sex offense had

occurred, the State presented the testimony of the victim and her outcry witnesses, the testimony of the investigating officer regarding defendant's incriminating statements, and the testimony of its expert witness, who examined the victim and opined that sexual penetration had taken place. To counter that allegation, the defense presented the testimony of defendant and its own expert witness, who opined that C.G. had not been a victim of sexual penetration or sexual abuse. The main question before the jury in determining guilt was one of credibility. Under similar circumstances, our supreme court has found that the evidence in the case before it was closely balanced. See, e.g., *People v. Naylor* 229 Ill. 2d 584, 606-09 (2008) (the supreme court found that the evidence was closely balanced in a drug case in which the trier of fact was presented with two different but credible version of events with no extrinsic evidence to corroborate or contradict either version so that the trier of fact's primary determination was one of credibility); *People v. Steidl*, 177 Ill. 2d 239, 256 (1997) (the supreme court found that the evidence was closely balanced in a murder case in which no physical evidence linked the defendant to the crime scene and the defendant presented an alibi so that the jury's decision rested upon its judgment of the credibility of the witnesses that came before it). Because the evidence was closely balanced in this case, the jury admonishment and instruction error described above may be reached despite defendant's forfeiture of that error. See *Walker*, 232 Ill. 2d at 124; *Herron*, 215 Ill. 2d at 177-87; Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999); R. 451(c) (eff. July 1, 2006). Furthermore, since there is no question that the error occurred, we must reverse defendant's conviction and remand this case for a new trial. See *Naylor*, 229 Ill. 2d at 605-06 (when errors occur in a closely balanced case, the reviewing court will err on the side of fairness so as to avoid convicting an innocent person).²

² Arguably, there is some indication in the more recent decisions of our supreme court

¶ 20 We will, however, briefly address some of the other issues that were raised in this appeal because they may recur upon retrial. Although the issue of forfeiture is present in some or all of the other issues, we will not discuss it further since we have already determined that the evidence was closely balanced. In sum, we find that none of the other issues have merit based upon the analysis that follows.

¶ 21 As the first of the other issues, defendant claims that his speedy trial rights were violated because he was not charged with predatory criminal sexual assault of a child until more than 160 days after he was released from custody on bond. However, as the State correctly points out, defendant did not file a written speedy trial demand in this case. Thus, defendant's speedy trial rights were never invoked. See 725 ILCS 5/103-5(b) (West 2010); *People v. Hall*, 2011 IL App (2d)

that it may be starting to view the first prong of plain error as more than just a determination of whether an error occurred and whether the evidence was closely balanced. See *People v. White*, 2011 IL 109689, ¶¶ 133-34, 139-44, 148; *People v. Adams*, 2012 IL 111168, ¶¶ 22-23. These rulings may indicate that a more contextual approach is warranted under the first prong of plain error and that it should be determined based upon the totality of the circumstances whether the particular error in question actually or likely tipped the scales of justice against the defendant. However, without more of a definitive statement from the supreme court in that regard, we will adhere to its prior established precedent on this issue as set forth in *People v. Herron*. See *People v. Vesey*, 2011 IL App (3d) 090570, ¶¶ 18-20. Furthermore, under a totality of circumstances contextual approach in the instant case, considering the evidence presented, it would appear that the error in question actually or likely tipped the scale of justice against defendant and, thus, would warrant reversal of the conviction.

100262, ¶¶ 20-21. While defendant cites *People v. Williams*, 204 Ill. 2d 191 (2003), and *People v. Hunter*, 2012 IL App (1st) 092681, *pet. for leave to appeal allowed*, No. 114100 (May 30, 2012), in support of his argument to the contrary, neither of those cases dealt with a situation, such as the one in the present case, where the defendant was out on bond and failed to file the required written demand for speedy trial. See *Williams*, 204 Ill. 2d at 197-201; *Hunter*, 2012 IL (1st) 092681, ¶ 5-6.

¶ 22 Second, defendant claims that the trial court erred in admitting C.G.'s hearsay statements about the incident to her mother and police. Defendant asserts that the statements should not have been admitted because: (1) they were barred by the rule against prior consistent statements; (2) they exceeded the scope of section 115-10 since C.G. had no difficulty testifying at trial about the incident and was able to testify clearly and without hesitation; and (3) their prejudicial effect substantially outweighed their probative value since the statements were cumulative and repetitive and could have caused the jury to fail to consider the crucial inconsistencies in the various statements that C.G. had made. As the State correctly points out, however, section 115-10 specifically provides for the admission of the victim's prior consistent statements. See 725 ILCS 5/115-10(a) (West 2010); *People v. Bowen*, 183 Ill. 2d 103, 115 (1998). In addition, we do not believe that section 115-10 limits admission of those statements only to situations where the victim has difficulty testifying. See 725 ILCS 5/115-10 (West 2010). Nor do we find that the statements in this case were unduly prejudicial. See *People v. Byron*, 269 Ill. App. 3d 449, 453 (1995) (outcry statements made by child victim of sex offense to mother, sister, and police were not unnecessarily duplicative, prejudicial, or cumulative). Thus, we conclude that the trial court did not commit an abuse of discretion in admitting the statements. See *Byron*, 269 Ill. App. 3d at 453.

¶ 23 Third, defendant argues that he was denied a fair trial when the prosecutor repeatedly told

the jury in closing argument that (1) defendant had confessed to the police that his penis had touched C.G.'s vagina; and (2) the State crime lab had confirmed that penetration had occurred. According to defendant, neither statement was based upon the evidence presented or upon a reasonable inference to be drawn from that evidence. We agree, however, with the State that the comments were nothing more than a reasonable interpretation of the evidence. In reaching that conclusion, we note that the jury was properly instructed that closing arguments were not evidence. Accordingly, we reject defendant's argument on this issue.

¶ 24 Fourth, defendant argues that the trial court erred in sentencing him to 14 years' imprisonment. Defendant asserts that the fact that the trial court had previously tentatively accepted a plea agreement in this case with a sentence of probation clearly indicates that the much greater sentence imposed after defendant withdrew his plea was to punish defendant for exercising his right to trial. In making that argument, defendant asserts further that the trial court's determination could not have been influenced by anything that was presented at trial or at sentencing because the trial court was made aware of the factual situation at the time of the plea and because it was established at sentencing that defendant had no criminal history, a good employment record, a low likelihood to reoffend, and was a military veteran. The State argues that the trial court's sentencing determination was proper. The State asserts that a significantly greater sentence was warranted because: (1) defendant was found guilty of a much more serious offense; (2) the trial court heard a much greater factual rendition at trial regarding what had occurred; and (3) the trial court found at sentencing that several of the factors in aggravation were present. In addition, the State notes that the trial court made no mention at sentencing about defendant's prior withdrawal of his guilty plea and that there was no indication that the trial court considered the withdrawal of the prior plea in

sentencing defendant.

¶ 25 We agree with the State. There is no indication in the record in the present case that the trial court imposed a harsher sentence upon defendant because of his demand for trial. Nor can we assume that trial court did so based solely upon the fact that defendant received a greater sentence than he would have received had he not withdrawn his guilty plea. See *People v. Carroll*, 260 Ill. App. 3d 319, 348-49 (1992) ("the mere fact that the defendant was given a greater sentence than that offered during plea bargaining does not, in and of itself, support an inference that the greater sentence was imposed as a punishment for demanding trial"). In our opinion, the imposition of the harsher sentence was not an abuse of discretion based upon the significant increase in the charge for which defendant was found guilty, the entirety of the evidence presented at trial, the determinations made by the trial court at sentencing, and the fact that the trial court specifically found C.G. to be credible, a finding which implied that the trial court found that defendant was not telling the truth when he testified and when he proclaimed his innocence. Under the circumstances of the present appeal, there was nothing improper about defendant's sentence. See *People v. Morgan*, 59 Ill. 2d 276, 279-82 (1974) (sentence of 10 to 20 years' imprisonment imposed after trial was proper even though defendants had been offered minimum sentence of two years' imprisonment prior to trial); *People v. Peddicord*, 85 Ill. App. 3d 414, 420-22 (1980) (sentence of eight years' imprisonment imposed after trial was proper even though the defendant had been offered sentence of two years' probation prior to trial); *People v. Ward*, 113 Ill. 2d 516, 532 (1986) (the trial court could consider whether the defendant's protestation of innocence was truthful in considering the relevant factors at sentencing bearing upon the defendant's character and potential for rehabilitation). However, we would encourage the trial court to specifically address this issue at a future sentencing hearing, if

defendant is found guilty after a retrial.

¶ 26 Finally, as we have already determined that a new trial is warranted, we need not rule upon defendant's claim of ineffective assistance of counsel.

¶ 27 For the foregoing reasons, defendant's conviction is reversed and the case is remanded for a new trial.

¶ 28 Reversed and remanded.

¶ 29 JUSTICE McDADE, concurred in part and dissented in part.

¶ 30 I do not agree with the majority's conclusion that defendant is entitled to a new trial.

¶ 31 The majority reverses defendant's conviction on the basis that the jury admonishment and instructional error constituted plain error. Specifically, the majority finds defendant is entitled to relief under the closely-balanced prong of the plain error doctrine. I respectfully dissent.

¶ 32 The evidence is not closely-balanced. C.G. testified that she was sleeping in bed with her brother, when defendant got into the bed, pulled down both his underwear and C.G.'s underwear. Defendant then "put his private part inside of my private part."

¶ 33 C.G. was corroborated by the expert testimony of the certified nurse who physically examined her. The nurse opined that the combination of circumferential redness around C.G.'s hymen and the blood found by the crime lab establishes to a reasonable degree of medical certainty that C.G. suffered "trauma" caused by penetration during sexual abuse or sexual assault. Defendant's expert never examined C.G. and was not generally familiar with injuries sustained as a result of sexual abuse or sexual assault. On rebuttal the nurse, who stated she had examined over 1300 children in sex abuse cases, refuted each of the defense expert's theories on how the redness appeared around C.G.'s hymen.

¶ 34 C.G.'s mother testified to what C.G. told her occurred on the night in question. Specifically, C.G. had reported that defendant put his "pee pee" on hers. C.G.'s recollection of the events that transpired on the night in question has been consistent.

¶ 35 While the majority is correct in stating that the "main question before the jury *** was one of credibility" (*supra* ¶ 19), the majority ignores the fact that C.G.'s testimony was consistent and was corroborated by both expert testimony and physical evidence (blood and circumferential redness of the hymen); whereas defendant's testimony, was riddled with inconsistencies and actually, at certain times, bolstered C.G.'s testimony.³

¶ 36 At trial, defendant acknowledged that he slept in the bed with C.G. and her brother on the night in question. He went to bed wearing only his underwear. When defendant awoke he had an erection and was face to face with C.G. While defendant denied having any skin-on-skin contact with C.G., he acknowledged some form of unintentional improper contact.

¶ 37 On cross-examination, defendant acknowledged that he had stated, during a 2007 hearing, that he did not know if C.G.'s underwear was off. At trial, however, defendant was sure C.G.'s underwear was on. At the hearing, defendant responded "I don't think so" when asked if his penis touched C.G.'s vaginal area. At trial, however, defendant answered "no" to the same question. At the hearing, when asked if his penis was touching her, defendant stated that it "[p]robably was between her legs, yes." At trial, when asked if his penis was between C.G.'s legs, defendant responded it "[c]ould have been up against her legs. It was very quick, but I think it was against her

³ I acknowledge that defendant also presented expert testimony. I stress again, however, that this testimony was expressly rebutted by the State's expert. Moreover, defendant's expert did not physically examine C.G. and was not familiar with sexual abuse injuries.

legs.” When confronted with his testimony at the hearing, defendant did acknowledge that his penis was “probably” between C.G.’s legs, but that it was “very quick.”

The above evidence leads to an inescapable conclusion that defendant had committed the offense of predatory criminal sexual assault of a child.

¶ 38 The plain error doctrine is to be invoked only in exceptional circumstances. *People v. Easley*, 148 Ill. 2d 281, 323 (1992). This case does not present us with anything close to an “exceptional circumstance.”

¶ 39 The holding in *People v. Jahn*, 246 Ill. App. 3d 689 (1993) supports my conclusion. In *Jahn*, the defendant was charged with aggravated criminal sexual abuse in that he intentionally touched the vaginal area of the child-complainant. The State’s evidence at trial was limited to the complainant’s testimony and the testimony of other individuals, including the complainant’s therapist, who did not observe any wrongdoing, but offered consistency to the complainant’s testimony. Specifically, the trial court allowed the complainant’s therapist to testify that the complainant told the therapist that the sexual incidents had occurred over a two- or three-year period. The defendant testified that he never touched the complainant’s vaginal area.

¶ 40 On appeal, the appellate court held that the issue regarding the admissibility of the therapist’s statements was waived and did not constitute plain error. *Jahn*, 246 Ill. App. 3d at 705. The court reasoned that the admission of the statements did not constitute plain error because the evidence was not closely balanced. *Jahn*, 246 Ill. App. 3d at 705-06. Specifically, the court stated: “[T]he evidence was not closely balanced. In view of the competent testimony of the victim regarding the elements of the offense and the other corroborating testimony, the evidence of defendant’s prior misconduct with *** [the complainant] did not amount to plain error. *Jahn*, 246 Ill. App. 3d at 706.

¶ 41 Like *Jahn*, the instant case presents us with competent testimony of a complainant and a defendant's denial of the charged offense. However, unlike *Jahn*, it also presents us with expert testimony and physical evidence that directly corroborates the complainant's testimony. Thus, we are presented with an even stronger case that the evidence is not closely balanced.

¶ 42 For the foregoing reasons, I would affirm defendant's conviction and sentence.⁴

⁴ I concur with the majority's findings as to the remaining independent issues.