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2013 IL App (3d) 110160-U

Order filed January 15, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF
ILLINOIS,

Plaintiff-Appellee,

v.

ANDREW ALEXANDER,

Defendant-Appellant.

) Appeal from the Circuit Court
) of the 12th Judicial Circuit,
) Will County, Illinois,
)
) Appeal No. 3-11-0160
) Circuit No. 08-CF-1010
)
) Honorable
) Sarah F. Jones, Gerald R. Kinney, Stephen
) D. White,
) Judges, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The State's violation of a mandatory discovery rule was not plain error. (2) Defendant also failed to establish plain error with regard to his claim of prosecutorial misconduct.

¶ 2 Defendant, Andrew Alexander, was charged with two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)). The jury was unable to return a verdict after defendant's first trial. Following his second trial, however, defendant was convicted of the charges. Defendant appeals, arguing that the State: (1) violated a mandatory rule of discovery by

failing to disclose a witness's testimony regarding a statement made by defendant; and (2) engaged in prosecutorial misconduct by allowing a witness to testify differently than another witness had testified at defendant's first trial. We affirm.

¶ 3

FACTS

¶ 4 On May 15, 2008, the State charged defendant with two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)). The charges were the result of a relationship defendant, who was 33 years old, had established with the 14-year-old victim. The cause proceeded to a jury trial where the State presented, among other evidence, the testimony of Orland Park police detective Larry Davids. Davids testified that he and Detective Stephen Sutherland interviewed defendant at the Orland Square Mall. During the interview, the detectives asked defendant how old he thought the victim was when they engaged in sexual activity and he replied "16 or 17." Defendant also told the detectives that he spoke with the victim after the activity had occurred and she informed him that she was 14. At the conclusion of the first trial, the jury was unable to agree on a verdict, and the court declared a mistrial. Thereafter, the cause proceeded to a second trial.

¶ 5 At the second trial, the State presented much of the same evidence as it had in the first trial. The victim testified that she met defendant at the Orland Square Mall. The first time they met, the victim gave defendant her telephone number and told him that she was in high school. The victim also told defendant to view her Internet profile. The profile incorrectly stated that the victim was 18 years old. Thereafter, defendant and the victim talked on the phone and discussed the possibility of getting together to perform sexual acts on each other. During their first telephone conversation, the victim told defendant that she was 14 years old and a freshman in

high school. A few days after the conversation, the victim met defendant at the mall and got into his car. While in the car, defendant and the victim began to kiss. Defendant fondled the victim's breasts and placed three fingers in her vagina. Two days later, defendant met up with the victim again. This time the victim performed oral sex on defendant, and they engaged in anal intercourse.

¶ 6 After the sexual encounters occurred, the Orland Park police department investigated the relationship. During the investigation, defendant was interviewed by Lisa Mateck, an assistant State's Attorney from Cook County. Defendant admitted to the sexual contact in the car and told Mateck that the victim informed him that she was 16 years old prior to the contact. He also admitted that at some point, the victim stated that she was 15 years old and then that she was 14 years old. At the conclusion of the interview, defendant agreed to allow Mateck to reduce his statement to writing. The statement, which defendant signed, included defendant's comments regarding the victim's age.

¶ 7 Defendant was also interviewed by Detective Davids and Detective Sutherland. During the first trial, Davids had testified with regard to the interview; however, the State chose to present the testimony of Sutherland during the second trial. Sutherland testified that the officers began to investigate defendant after learning of a possible sexual assault on a 14-year-old victim. When the detectives interviewed defendant, he stated that he thought the victim was "15 or 16" years old prior to the sexual contact. Upon cross-examination, Sutherland admitted that Davids made a report after the interview that stated defendant claimed he thought the victim was 16 or 17 years old. However, Sutherland testified that, to the best of his knowledge, defendant had said 15 or 16, and that his saying that was an important factor in the officers' decision to continue

their investigation.

¶ 8 Defendant testified in his own defense. He did not deny engaging in sexual activity with the victim; however, he stated that he was under the impression that she was 18 years old.

Defendant stated that he believed that due to the victim's appearance, her Internet profile, and statements she had made.

¶ 9 At the conclusion of the second trial, the jury found defendant guilty of both counts of aggravated criminal sexual abuse. In doing so, it found that defendant did not reasonably believe that the victim was 17 years of age or older. Defendant appeals.

¶ 10 ANALYSIS

¶ 11 I. Discovery Violation

¶ 12 Defendant first argues that the State violated a mandatory rule of discovery by failing to disclose Sutherland's testimony regarding the statement made by defendant that he thought the victim was 15 or 16 years old. Initially, we note that defendant failed to object to Sutherland's testimony or raise the issue in a posttrial motion. Therefore, the issue cannot be considered unless the plain-error doctrine applies. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). The plain-error doctrine bypasses forfeiture principles and allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Adams*, 2012 IL 111168. For a reviewing court to consider unpreserved error under the plain-error doctrine when the evidence is close, the defendant must prove that the error was prejudicial, *i.e.*, that the error alone severely threatened to tip the scales of justice against him. *Id.* However, before we can determine whether either prong of the plain-error test applies, we must first determine whether an error

actually occurred. *People v. Cosby*, 231 Ill. 2d 262 (2008).

¶ 13 Pursuant to Illinois Supreme Court Rule 412(a)(ii) (eff. Mar. 1, 2001), the State shall, upon a written motion of defense counsel, disclose any oral statements made by the accused and a list of witnesses to the making and acknowledgment of such statements. In this case, the State did not present the defense with information pertaining to Sutherland's testimony regarding defendant's statement that he thought the victim was 15 or 16 years old. Therefore, we find that the State did violate a mandatory rule of discovery.

¶ 14 Having found that a violation occurred, the next step is to determine whether the plain-error doctrine allows review of the issue. To this end, defendant only argues that the evidence was close and that Sutherland's testimony tipped the scales in favor of the State. Defendant has failed to argue that the error was serious enough to qualify under the second prong of the plain-error test and, therefore, we only need to decide whether the violation falls under the first prong. See *People v. Hillier*, 237 Ill. 2d 539 (2010).

¶ 15 In this case, defendant was charged with knowingly committing two counts of sexual penetration of the victim when she was at least 13 years of age but under the age of 17. 720 ILCS 5/12-16(d) (West 2008)). Because defendant admitted to the sexual penetration, the only question for the jury was whether defendant reasonably believed that the victim was 17 or older. Based on our review of the record, we find that the evidence clearly established that defendant did not have a reasonable belief that the victim was at least 17 years old.

¶ 16 Sutherland's testimony was not the only evidence the State offered to establish that defendant did not have such a reasonable belief. First, the victim was 14 years old, and she testified that she informed defendant as such during their first telephone conversation. That

conversation occurred prior to any sexual activity. Second, defendant's own statement to Mateck, where he stated that the victim informed him that she was 16 years old prior to their sexual contact, further established that defendant did not reasonably believe the victim was 17 years old or older. Only defendant's self-serving testimony and an incorrect Internet profile supported his contention that he thought the victim was at least 17 years old. Sutherland was cross-examined with his partner's report. That report and testimony from the first trial established that defendant told police he thought the victim was "16 or 17." That interpretation is of little help to defendant. If he said he thought she was 16 or 17, that statement would negate any argument that he reasonably believed she was 17 or older. Based on our review of the record, we conclude that, even in the absence of Sutherland's testimony, the State presented sufficient evidence showing defendant lacked a reasonable belief that the victim was at least 17 years old. Therefore, Sutherland's testimony was cumulative and did not tip the scales in favor of the State.

¶ 17 Defendant further argues that we must find that the evidence was closely balanced because the jury in defendant's first trial failed to return a guilty verdict. We agree that *People v. Stechly*, 225 Ill. 2d 246 (2007), states that a prior jury's inability to return a guilty verdict is an indicator that the evidence was close. However, as the court there made clear, the inability to return a guilty verdict is only an indicator, and it does not conclusively show that the case was closely balanced. Where, as here, the evidence itself establishes that the case was not closely balanced, the jury's inability to return a verdict is irrelevant.

¶ 18 Having found that the evidence was not close and Sutherland's testimony did not tip the scales in favor of the State, we find that defendant has failed to meet his burden for plain-error review. Therefore, we find that this issue is forfeited.

¶ 19

II. Prosecutorial Misconduct

¶ 20 Defendant next argues that the State engaged in prosecutorial misconduct by allowing Sutherland to testify differently than Davids had testified at defendant's first trial. Again, we note that defendant failed to object to the testimony during trial or raise the issue in a posttrial motion. As a result, we can only consider it if the plain-error doctrine applies. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). However, we further note that defendant failed to argue for plain-error review in his original brief or his reply brief. It is the defendant's burden to establish plain error; therefore, it follows that a defendant who fails to argue for plain error cannot meet his burden of persuasion. *Hillier*, 237 Ill. 2d 539. Defendant failed to preserve the issue and has failed to argue for plain-error review; we find that he has forfeited review of this issue.

¶ 21

CONCLUSION

¶ 22 The judgement of the circuit court of Will County is affirmed.

¶ 23 Affirmed.