2015 IL App (3d) 130064B-U

Order filed November 9, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellee,	)	Henry County, Illinois.
	)	
v.	)	Appeal No. 3-13-0064
	)	Circuit No. 12-CF-22
	)	
LIRIDON GASHI,	)	Honorable
	)	Ted J. Hamer
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice McDade and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 Defendant Liridon Gashi was convicted of two counts of aggravated criminal sexual abuse following a jury trial. The trial court sentenced defendant to 24 months of conditional discharge. On appeal, the majority reversed defendant's conviction, finding that the trial court committed reversible error by telling jurors that they could decide for themselves what "reasonable doubt" means. *People v. Gashi*, 2015 IL App (3d) 130064. In the exercise of its supervisory authority, our supreme court has directed us to vacate our judgment and reconsider

the matter in light of its decision in *People v. Downs*, 2015 IL 117934, to determine if a different result is warranted. We now affirm defendant's conviction.

¶ 2 FACTS

¶ 3 In January 2012, the State charged defendant, a 24-year-old, with six counts of aggravated criminal sexual abuse. 720 ILCS 5/12-16(d) (West 2010). Counts I, III and V of the information alleged that defendant inserted his finger into the vagina of M.G.S., a 16-year-old, between November 2011 and December 2011. Counts II, IV, and VI alleged that defendant fondled M.G.S.'s breasts during the same time period. Defendant pled not guilty. The case proceeded to a jury trial.

¶ 4 During *voir dire*, the trial judge stated that defendant was presumed innocent, and then asked the potential jurors, "Is there anybody that disagrees with that?" After noting that no one raised a hand, the judge continued: "Before Mr. Gashi can be convicted – in other words, found guilty – the State of Illinois through [the prosecutor], must prove him guilty beyond a reasonable doubt. Is there anybody that has any difficulty with that?" When no one raised a hand, the judge continued:

> "Beyond a reasonable doubt is the highest standard of proof. It's the same burden in every courtroom throughout the United States. And I'll also tell you this: At the end of the case, you're going to get jury instructions on the law, but you will not get a definition of beyond a reasonable doubt. That is for you to determine.
>
> Mr. Gashi is not required to offer any evidence on his behalf. In other words, he does not have to testify. He does not have to have [his attorney] ask

questions. He does not have to call any witnesses on his behalf. Is there anybody that has difficulty with that?

Let the record reflect that no one raised their hand.

Mr. Gashi also does not have to testify in this case, and you are not to hold that against him in arriving at your verdict if he does not testify. In other words, you can't say, well, he didn't testify, he must be guilty because he didn't testify. That's not the way it works. You are not to hold that against him in any way. Is there anybody that has any difficulty with that?

Let the record reflect that no one raised their hand."

¶ 5 After the jury was selected but before the trial began, the trial judge stated: "As I said earlier today, you will decide what reasonable doubt is. There's not going to be a jury instruction that explains it to you. It is what it is, beyond a reasonable doubt."

¶ 6 Defendant's trial then began with the testimony of M.G.S., who testified that she worked with defendant at Parkway Grill in 2011, when she was 16 years old. He was a cook, and she was a waitress. She and defendant began texting each other in September "and started a physical relationship [in] late October, early November" of 2011. In one of her texts, she told defendant that she was 16 years old. She and defendant talked once about their relationship being illegal because of her age. M.G.S. could not recall the specifics of that conversation.

¶ 7 M.G.S. and defendant kissed approximately five or six times in the back hallway and just outside the back door of Parkway Grill from late October to early November. In mid-November 2011, defendant began touching her breasts and vagina under her clothing. She estimated that defendant touched her breasts and vagina approximately 5 to 15 times between mid-November to

mid-December 2011. He inserted his finger in her vagina five to eight times during that time period. These activities took place at Parkway Grill and defendant's apartment.

¶ 8 In December 2011, Jan Stohl, the mother of one of M.G.S.'s friends, found out what defendant was doing and confronted M.G.S., defendant and the owner of Parkway Grill. After that, M.G.S. told her mother what defendant had been doing. Her mother took her to the police station to file a police report. The last time defendant touched M.G.S. was approximately a week before she went to the police station.

¶ 9 M.G.S. testified that her relationship with defendant was secret by "[d]esign." She and defendant never went out in public together. In Illinois, people tell M.G.S. that they think she looks older than she is. In Missouri, where M.G.S. now lives, people tell her that she looks younger than she is.

¶ 10 Jan Stohl testified that she has known M.G.S. since she was "about six months old." Stohl's daughter and M.G.S. were friends. In mid-December 2011, Stohl learned that M.G.S. was having an improper relationship with defendant, so she went to Parkway Grill and spoke to the owner of the restaurant, defendant and M.G.S. Stohl asked defendant if he knew his relationship with M.G.S. was illegal. Defendant responded, "yes," and said he understood. When Stohl asked defendant if he knew he could go to jail for what he did to M.G.S, defendant answered, "yes," he did know that but said "I'm not going to jail." According to Stohl, defendant also apologized and said he "knew that it was wrong."

¶ 11 Stohl testified that her conversation at Parkway Grill lasted approximately 15 to 20 minutes. During that time, she repeatedly stated that defendant's actions were wrong and illegal. She also repeatedly asked defendant if he knew that his actions were wrong and illegal. Every time she asked defendant that question, he said that he knew it was illegal and that he was sorry.

She admitted that she was talking quickly at the beginning of the conversation but slowed down as she became calmer. Defendant seemed to understand what she was saying during the entire conversation.

¶ 12 Steve Whittington, a police officer for the City of Geneseo, testified that he and another officer, Tim Wise, interviewed defendant at the police station on January 18, 2012. A DVD of that interview was played for the jury. In that interview, defendant stated he is from Kosovo and has lived in the United States for three years. He learned English while living in Kosovo. Defendant said that he had known M.G.S. for five to seven months. He admitted kissing her a few times in his car and his apartment. He also admitted that he touched her breasts and inserted his finger in her vagina one time at his apartment. When Officer Whittington asked defendant if he knew how old M.G.S. was, he said, "After we did that, then I knew exactly how old she is." He never considered M.G.S. to be his girlfriend but said that he would want to be M.G.S.'s boyfriend "[i]f she's over 18."

¶ 13 After the State presented its witnesses, defendant moved for a directed verdict, which the trial court denied. Defendant then testified that he did not find out that M.G.S. was 16 years old until January 18, 2012, when he went to the police station, and Officer Whittington told him. He denied ever texting M.G.S. about his age or anything else. He testified that it was "not possible" for him to know that M.G.S. was 16 years old because "she looks more mature than her age." He thought M.G.S. was between 17 1/2 and 18 years old because she was a waitress, and he believed that waitresses had to be 18 or older.

¶ 14 Defendant testified that when Stahl confronted him at Parkway Grill, she was talking fast, and he had difficulty understanding everything she was saying. He testified that he did not know what "jail" meant until the day he went to the police station. He testified that "[e]verything that

happened with [M.G.S.] happened only twice." He testified that he touched M.G.S.'s breasts over her shirt once to push her away when she tried to kiss him. After that, he put his hand under M.G.S.'s shirt and bra and touched her breasts one time in his apartment. He testified that he touched her vagina only over her pants. He admitted that he told the officers that he inserted his finger in M.G.S.'s vagina but said he thought that meant he touched "her vagina even though my hand was on the – on the pants."

¶ 15 After defendant's testimony, the jury was excused until the following day. The next morning, the jury was given instructions and heard closing arguments. By early that afternoon, the jury had reached a verdict. The jury found defendant guilty of two counts of aggravated criminal sexual abuse (counts I and II of the information). 720 ILCS 5/12-16(d) (West 2010). The trial court sentenced defendant to 24 months of conditional discharge.

¶ 16 I

¶ 17 Defendant first argues that the trial judge committed reversible error by telling jurors that they could "decide" and "determine" the meaning of "reasonable doubt" for themselves.

¶ 18 Defendant did not object or raise this issue in a posttrial motion; therefore, any claimed error must be the subject of plain-error analysis. See *People v. Wilmington*, 2013 IL 112938, ¶ 31. The plain-error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Id*.

¶ 19 The first step of plain-error analysis is to consider whether an error occurred. See *id*. It is well settled that courts in this state should refrain from attempting to define "reasonable

doubt." *People v. Speight*, 153 Ill. 2d 365, 374 (1992); *People v. Flynn*, 378 Ill. 351, 356 (1941); *People v. Johnson*, 317 Ill. 430, 436 (1925). This is because the concept of "reasonable doubt" is self-explanatory; it "needs no explanation." *People v. Garcia*, 103 Ill. App. 3d 779, 784 (1981); *Flynn*, 378 Ill. at 356; *Johnson*, 317 Ill. at 436. "There is no better definition of reasonable doubt than the words themselves." *People v. Jenkins*, 89 Ill. App. 3d 395, 398 (1980). Providing a definition of reasonable doubt is more likely to confuse a jury than clarify its meaning. *Johnson*, 317 Ill. at 436.

¶ 20 While appellate courts have found it impermissible for a trial judge to tell jurors that they can decide for themselves what reasonable doubt means (see *People v. Downs*, 2014 IL App (2d) 121156, ¶ 28; *People v. Franklin*, 2012 IL App (3d) 100618, ¶ 28; *People v. Turman*, 2011 IL App (1st) 091019, ¶ 25), our supreme court recently ruled that a trial court instructing jurors to define reasonable doubt for themselves does "not violate the admonition against defining the term [reasonable doubt]." See *People v. Downs*, 2015 IL 117934, ¶ 20.

¶ 21 In *Downs*, the jury sent the trial judge a note during deliberations and asked, " 'What is your definition of reasonable doubt, 80%, 70%, 60%?' " *Downs*, 2015 IL 117934, ¶ 6. The court responded, " 'We cannot give you a definition[;] it is your duty to define.' " *Id.* ¶ 7. The supreme court ruled that the trial court's response to the jury "was unquestionably correct." *Id.* ¶ 24. The court stated: "There was no error in this response." *Id.*

¶ 22 Here, the trial judge told potential jurors during *voir dire* that it was for them to determine what reasonable doubt is. Later, after the jury was chosen but before trial began, the judge reiterated that the jurors "decide what reasonable doubt is." According to our supreme court, these statements did not constitute error. See *id.* Because the trial court properly instructed the jury regarding reasonable doubt, no plain error occurred.

¶ 23 II

¶ 24 Defendant also argues that the trial court committed reversible error by failing to ask prospective jurors whether they understood all of the principles set forth set forth in Illinois Supreme Court Rule 431(b).

¶ 25 Defendant did not object or raise this issue in a posttrial motion; therefore, any claimed error must be the subject of plain-error analysis. See ~~*People v.*~~ *Wilmington*, 2013 IL 112938, ¶ 31. Whether the trial court violated Rule 431(b) is a question of law we review *de novo*. *People v. Belknap*, 2014 IL 117094, ¶ 41.

¶ 26 Rule 431(b) provides:

> "(b) 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 if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 27 "[T]he language of Rule 431(b) is clear and unambiguous ***." *People v. Belknap*, 2014 IL 117094, ¶ 45. It requires trial courts to ask prospective jurors whether they both understand and accept the four principles set forth in the rule. *Id.* ¶ 46. "The failure to do so constitutes error." *Id.* ¶ 45 (citing *People v. Thompson*, 238 Ill. 2d 598, 607 (2010)).

¶ 28 Here, the trial court asked potential jurors if any of them "disagreed with" the first principle and had "difficulty with" the remaining three principles. Asking potential jurors if they have "difficulty with" a principle encompasses both understanding and acceptance because a person who does not understand or accept a principle would have "difficulty with" it. *People v. Ware*, 407 Ill. App. 3d 315, 356 (2011). Asking venire members if they "disagree with" a principle may be tantamount to asking whether they accept it; however, it does not satisfy Rule 431(b)'s requirement that the court also inquire whether potential jurors understand the principle. *Belknap,* 2014 IL 117094, ¶ 46; *Wilmington*, 2013 IL 112938, ¶ 32. In this case, the trial court failed to ask the jurors whether they understood the first principle. Thus, the court committed error. See *id*.

¶ 29 Now we must determine if the error necessitates reversal pursuant to the plain-error rule. Rule 431(b) errors are not structural errors under the second prong of the plain-error analysis. See *Belknap,* 2014 IL 117094, ¶ 47; *Wilmington*, 2013 IL 112938, ¶ 33. Thus, defendant is entitled to reversal only if he satisfies the first prong of the plain-error doctrine: that the evidence is so closely balanced that the error alone threatened to tip the scales of justice against him. See *Wilmington*, 2013 IL 112938, ¶ 34. In reviewing a claim under the first prong of the plain-error doctrine, the reviewing court "must make a commonsense assessment of the evidence within the context of the circumstances of the individual case." *Belknap*, 2014 IL 117094, ¶ 52.

¶ 30 A person "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 2010). "It shall be a defense under *** subsection (d) of Section 12-16 of this Code that

the accused reasonably believed the person to be 17 years of age or over." 720 ILCS 5/12-17 (West 2010).

¶ 31 Here, both M.G.S. and defendant consistently testified that defendant touched M.G.S.'s breasts. M.G.S. also testified that defendant inserted his finger in her vagina. While defendant testified at trial that he only touched M.G.S.'s vagina outside of her clothes, during his interview with Whittington and Wise, he admitted inserting his finger in her vagina. Thus, the evidence that defendant committed acts of sexual penetration and sexual conduct against M.G.S. was not closely balanced.

¶ 32 The evidence that defendant did not reasonably believe M.G.S. was 17 years of age or older was also not closely balanced. Defendant testified at trial and told Whittington and Wise that he did not know M.G.S. was under 17 years old when he touched her and only learned that she was 16 years old when the officers told him. However, M.G.S. testified that she told defendant her age before their relationship became "physical." She further testified that she and defendant talked about the illegality of their relationship, which is why they kept it a secret. Further, Stohl testified that defendant acknowledged that his relationship with M.G.S. was illegal and could cause him to go to jail.

¶ 33 Because the evidence in this case was not closely balanced, defendant is not entitled to reversal under either prong of the plain-error doctrine because of the trial court's failure to strictly comply with the Rule 431(b) requirements. See *Wilmington*, 2013 IL 112938, ¶ 34.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Henry County is affirmed.

¶ 36 Affirmed.