2015 IL App (3d) 130097-U

Order filed November 4, 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 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0097
v.	)	Circuit No. 09-CF-702
MICHAEL T. VINSON,	)	
	)	Honorable Kevin Lyons,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Lytton concurred in the judgment and order.
Justice Wright dissented.

ORDER

¶ 1 *Held*: The trial court's use of erroneous jury instructions fail a plain-error analysis. Therefore, defendant's claims, including the ineffective assistance of counsel claim, cannot succeed. The trial court's ruling is affirmed.

¶ 2 A jury convicted defendant of indecent solicitation of a child (720 ILCS 5/11-6(a) (West 2008)). The trial court sentenced defendant to four years' imprisonment. Defendant appeals, arguing he is entitled to a new trial because: (1) the trial court used erroneous jury instructions

that were: (a) outdated; and (b) omitted necessary bracketed language or, alternatively; (2) his trial counsel was ineffective for failing to object to these erroneous jury instructions. We affirm.

¶ 3 BACKGROUND

¶ 4 In July 2009, the State charged defendant with indecent solicitation of a child (720 ILCS 5/11-6(a) (West 2008)). The State's charge stemmed from an incident that occurred between defendant and a minor, A.S., sometime in March 2009. Defendant allegedly exposed his penis to A.S. and asked her to play with it.

¶ 5 At trial, Detective Randall Schweigert of the Peoria police department testified he investigated a report of defendant exposing himself to A.S. The detective stated that he interviewed the defendant (at the time a 31-year-old) after he came to the police station in June 2009. Detective Schweigert testified that defendant initially denied exposing himself to A.S. or speaking to A.S. about his genitalia. After Detective Schweigert shared A.S.'s allegations with defendant, however, he said defendant admitted to exposing himself to A.S. and asking her if she wanted to play with his penis. Detective Schweigert said defendant then agreed to provide him with a videotaped statement. The videotape was published to the jury.

¶ 6 In the videotape, defendant said that in March 2009 he resided with A.S. and A.S.'s family. Defendant was standing by the couch in the front room of their home on the day of the incident. He claimed the zipper on his shorts was broken; he was not wearing underwear and his penis was exposed. Defendant said he called A.S. into a room from another room where A.S. was playing with her siblings. He said when A.S. entered the room he asked her if she "wanted to touch it." ("It" being defendant's penis hanging out of his shorts.) According to defendant, A.S. said, "No," and left the room. There were no other witnesses to the incident.

¶ 7 Defendant also told the detective he was "joking around" when he asked A.S. to touch his penis. During the videotaped interview, defendant acknowledged he should not have been joking around with A.S. in this manner because he knew she was 14 years old. Defendant told Detective Schweigert he "wouldn't have let it go that far," and would not have permitted A.S. to actually touch his penis if she had said yes to his inquiry.

¶ 8 A.S. testified that no other adults besides the defendant were home when the incident occurred. A.S. also said she was summoned into a room by defendant where she saw that defendant "had his thing out and he asked me to play with it and I said no and ran to my room." A.S. clarified that "his thing" was defendant's penis. A.S. testified that these events took place when she was 14 years old. A.S. said she was scared and did not immediately tell anyone about the incident, but she did eventually tell her mother.

¶ 9 During cross-examination, A.S. confirmed this was an isolated incident between her and defendant. However, A.S. testified that a couple of days after the incident, defendant told her not to say anything about what happened or he would kill her. A.S. said she later told her mother about the incident while defendant was not in the house.

¶ 10 Defendant testified at trial that he was living in A.S.'s house from late fall of 2008 through April of 2009. Defendant said he knew A.S. was 14 years old at that time. Defendant stated he met with police after receiving a phone call from an officer. On the day of the interview, defendant said he had not taken his normal doses of medication for "borderline bipolar, schizophrenia, ADD, ADHD, [and] antisocial disorder." Defendant said he originally told the police officer that his zipper was broken, he was wearing underwear and his penis was not exposed during the incident. Defendant testified that he also did not ask A.S. if she wanted to touch his penis. Defendant testified that he felt, however, the officer did not want to hear his

side of the story and continued asking him questions about A.S.'s allegations. Defendant said the officer "wanted me to pretty much admit to the fact that I did."

¶ 11 Defendant denied that his recorded statement was the truth. He claimed the officer was "badgering" him and he felt "pressured" to say what the officer wanted to hear. Defendant testified that because he was not on his medication at the time of the interview, he thought that if he told the officer what he wanted to hear (*i.e.*, he confessed to the crime) he would be able to leave.

¶ 12 During the jury instructions conference, defendant did not object to any of the State's use of Illinois Pattern Jury Instructions, Criminal (4th ed. 2000) (IPI Criminal). State's Instruction No. 9 provided:

> "You have before you evidence that the defendant made statements relating to the offense charged in the indictment. It is for you to determine what weight should be given to the statements. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made. *** IPI Criminal No. 3.06-3.07."

State's Instruction No. 10 instructed the jury on the definition for indecent solicitation of a child, as follows:

> "A person of the age of 17 years or older commits the offense of Indecent Solicitation of a Child when he solicits a child under the age of 17 but at least 13 years of age to do any act which if done would be aggravated criminal sexual abuse. *** IPI

Criminal No. 9.01 Amended." [1]

Finally, State's Instruction No. 12, the issues instruction for indecent solicitation of a child, instructed the jury:

> "To sustain the charge of Indecent Solicitation of a Child, the State must prove the following propositions:
>
> First Proposition: That the defendant solicited a child under the age of 17 but at least 13 years of age to do any act which if done would be aggravated criminal sexual abuse; and
>
> Second Proposition: That the defendant was then 17 years of age or older.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.
>
> *** IPI Criminal No. 9.02 Amended."

We note before proceeding further, IPI Criminal Nos. 9.01 and 9.02 did not correctly state the law at the time of defendant's trial. *People v. Rexroad*, 2013 IL App 110981, ¶ 20 (noting Illinois Pattern Jury Instructions were amended effective January 18, 2013).

[1]The prosecutor amended the original language in the IPI Criminal Nos. 9.01 and 9.02 from "under 13" to "under the age of 17 but at least 13 years of age", the current language in the statute for the offense of aggravated criminal sexual abuse.

¶ 13 The jury found defendant guilty of indecent solicitation of a child. Defendant filed a motion for a new trial, which did not challenge the jury instructions. Without ruling on defendant's motion for a new trial, the trial court conducted defendant's sentencing hearing. The court sentenced defendant to four years' imprisonment with credit for time served. The court eventually denied defendant's motion to reconsider his sentence. Defendant timely filed his first notice of appeal. In response, this court entered a summary order dismissing the appeal for lack of jurisdiction and remanding the case to the trial court to resolve defendant's motion for a new trial.

¶ 14 After remand, the trial court denied defendant's motion for a new trial. This appeal followed.

¶ 15 ANALYSIS

¶ 16 It is undisputed that defendant did not object to any of the State's proposed jury instructions. On appeal, the State argues defendant forfeited all jury instruction issues by not objecting at trial. Defendant contends the State's use of outdated Illinois Pattern Jury Instructions and a jury instruction, which omitted bracketed language, constitutes plain error. The defendant's forfeited errors do not survive an analysis under the plain-error doctrine.

¶ 17 As the State highlights, other courts have considered identical instructional errors based on the same outdated jury instructions for the offense of indecent solicitation of a child. Each has determined that the omission of the intent element of the offense in the jury instructions does not constitute plain error, in part, because in those cases the evidence against the defendants was overwhelming. See *People v. Carter*, 405 Ill. App. 3d 246 (2010); *People v. Rexroad*, 2013 IL App (4th) 110981. We likewise find evidence of defendant's guilt overwhelming and, therefore, find these cases persuasive.

¶ 18 This court applies a *de novo* standard of review to determine whether jury instructions accurately conveyed the applicable law regarding the charged offense. See *People v. Parker*, 223 Ill. 2d 494, 501 (2006). Generally, when a defendant does not object to a jury instruction, or offer an alternative instruction at trial and raises the issue in a posttrial motion, defendant forfeits review of the issue on appeal. *People v. Herron*, 215 Ill. 2d 167, 175 (2005); *People v. Enoch*, 122 Ill. 2d 176, 185-86 (1988). However, the plain-error doctrine provides a limited exception to the forfeiture rule. Ill. S. Ct. R. 451(c) (eff. July 1, 2006); Ill. S. Ct. R. 615(a) (eff. Sept. 5, 1967); see *Herron*, 215 Ill. 2d at 175.

¶ 19 The plain-error doctrine allows a reviewing court to consider unpreserved clear or obvious errors if: (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 is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Walker*, 232 Ill. 2d 113, 124 (2009); *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); *Herron*, 215 Ill. 2d at 186–87. " 'The purpose of Rule 451(c) is to permit correction of grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed.' " *People v. Rexroad*, 2013 IL App 110981, ¶ 19 (quoting *People v. Sargent*, 239 Ill.2d 166, 188-89 (2010).

¶ 20 I. State's Instruction No. 9

¶ 21 From the outset, we note that defense counsel's argument regarding the State's instruction No. 9—modeled after IPI Criminal No. 3.06-3.07—lacks merit. The trial court properly instructed the jury based on the evidence presented at trial. Under Illinois Supreme Court Rule 451(f) (eff. Apr. 8, 2013), the trial court can amend jury instructions so long as the amendments are appropriate. Ill. S. Ct. R. 451(f) (eff. Feb. 10, 2006). Defense counsel insists

the bracketed language "whether the defendant made the statements, and if so" should have remained in the instruction submitted to the jury and its removal violated his right to a fair trial. This simply is not so.

¶ 22 On the contrary, removing this language from the instruction renders the instruction accurate. It is undisputable that defendant made the statement. Defendant made the statement on video and that video was published to the jury. Instructing the jury thereafter to contemplate whether defendant made the statement at all would be inconsistent with the evidence presented at trial and confusing to the jury. The jury needed only to deliberate over which was more credible, defendant's statement and the evidence supporting it, or his retraction of the statement. The removal of the bracketed language from the instruction was not only appropriate, but necessary. With no error, there can be no plain error.

¶ 23 II. State's Instruction Nos. 10 and 12

¶ 24 When defendant was charged with indecent solicitation of a child, section 11-6(a) of the Criminal Code of 1961 stated:

> "A person of the age of 17 years and upwards commits the offense of indecent solicitation of a child if the person, with the intent that the offense of aggravated criminal sexual assault *** be committed, knowingly solicits a child or one whom he or she believes to be a child to perform an act of sexual penetration or sexual conduct as defined in Section 12-12 of this Code." 720 ILCS 5/11-6(a) (West 2008).

The applicable statute required the State to prove defendant knowingly acted with the intent that the offense of aggravated criminal sexual abuse be committed. Prior to July 22, 1999, section

11-6(a) did not require the State to prove defendant intended that the child and adult would consummate a solicited sexual act. 720 ILCS 5/11-6(a) (West 1998). The 1999 amendment added two mental states as elements to the offense: (1) that defendant intended to commit one of the sex offenses identified in the statute—in this case aggravated criminal sexual assault—and; (2) the defendant knew or believed the victim was under 17 years of age. See *People v. Rexroad*, 2013 IL App 110981, ¶ 21 (citing *People v. Carter*, 405 Ill. App. 3d at 252).

¶ 25 The prosecution tendered outdated Illinois Pattern Jury Instructions reciting the law based on the 1998 version of the statute, which omitted the specific intent elements of the offense. These were errors. The errors, however, do not constitute plain error under either prong of plain-error analysis.

¶ 26 A. First Prong Plain Error

¶ 27 The evidence in this case was not closely balanced and therefore fails the first prong of plain-error analysis. Reviewing courts "must undertake a commonsense analysis of all the evidence in context when reviewing a claim under the first prong of the plain error doctrine." *People v. Belknap*, 2014 IL 117094, ¶ 50. A contest of witness credibility does not automatically equate to a trial with closely balanced evidence. *People v. Naylor*, 229 Ill. 2d 584, 609 (2008). Indeed, our supreme court has declared such logic "unreasonable." *Id.*

¶ 28 In this case, defendant admitted to a police officer that he asked someone whom he knew to be under 17 if she wanted to play with his penis while it was exposed to her, and they were alone in a room in a house with no other adults. He then voluntarily confessed to doing this in a videotaped statement, where he attempted to explain the incident away by claiming he was only joking with the child. This explanation might have a scintilla of believability had defendant not had his penis exposed when he made the statement. The videotaped statement was shown to the

jury. After which, the victim corroborated the defendant's original statement with her own testimony. At trial, defendant claimed his original statement was completely false. Defendant alleged he was coerced into making the statements by some vague pressure applied by the police that led him to believe his confession to a crime he did not actually commit would allow him to go home at the conclusion of the interview.

¶ 29 The evidence at trial, viewed in this context, render defendant's explanation of events "though not logically impossible, [ ] highly improbable." *People v. Adams*, 2012 IL 111168, ¶ 22. Viewed from a commonsense perspective under the totality of the circumstances, we find the evidence was not closely balanced in this case.

¶ 30 " 'Because intent is a state of mind, it can rarely be proved by direct evidence' but can be shown by surrounding circumstances. *People v. Williams*, 165 Ill. 2d 51, 64 (1995)." *People v. Carter*, 405 Ill. App. 3d 246, 253 (2010). The evidence of defendant's intent in this case is overwhelming. As noted previously, a commonsense evaluation of all the evidence is required to decide if the evidence is closely balanced. *People v. Belknap*, 2014 IL 117094, ¶ 50. Here, the evidence established that defendant exposed his penis to the 14-year-old victim and asked her to play with it at a time when defendant and the victim were in a house with no other adults. No reasonable jury would accept defendant's claim that he was joking, especially after he testified that he lied to police when confessing.

¶ 31 B. Second Prong Plain Error

¶ 32 Defendant's claims further fail under the second prong of plain-error analysis. The instructions did not deny defendant the right to a fair trial or affect the integrity of the judicial process. Like the defendant in *Rexroad*, the defendant's defense in this case was unaffected by the jury instructions at issue. *People v. Rexroad*, 2013 IL App (4th) 110981, ¶ 24.

¶ 33 The plain-error doctrine is a narrow and limited exception to the procedural default of forfeiture. *People v. Naylor*, 229 Ill. 2d at 593. The second prong of plain error has been equated by the supreme court with structural error. *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009). Structural errors are "systemic error[s] which serve[] to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *People v. Thompson*, 238 Ill.2d 598, 613-14 (2010) (quoting *People v. Glasper*, 234 Ill. 2d at 197-98).

¶ 34 None of the errors asserted by the defendant fit into the category of cases deemed to be structural by the Illinois Supreme Court. See *People v. Thompson*, 238 Ill. 2d at 608-09 (limiting structural errors to a narrow class of cases involving the following: complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction).

¶ 35 When overwhelming evidence convinces a jury of the victim's version of events, the defendant's formation of the intent to commit the sexual act alleged and knowledge of the victim's age are not disputed issues essential to the determination of defendant's guilt or innocence. *People v. Carter*, 405 Ill. App. 3d at 254. Defendant's claims of error do not rise to the level of plain error.

¶ 36 In fact, the errors in this case did not affect the defense put forward by defendant. At trial, defendant denied both exposing his penis and asking the victim to play with it. He did not put on a defense that he made the statements in jest and had no intent to commit the act. It seems reasonable to assume that by the time of trial, defendant and defense counsel rightly concluded that no jury was going to accept the fact that the defendant, home alone with a juvenile, was simply joking when he asked the victim to touch his exposed penis. That left defendant with only the age-old defense of, "Who are you going to believe, me or your lying eyes (and ears)?"

The instruction errors did not deny defendant a fair trial. See *People v. Rexroad*, 2013 IL App (4th) 110981, ¶ 24.

¶ 37 III. Ineffective Assistance of Counsel

¶ 38 Alternatively, defendant claims he received ineffective assistance of trial counsel when his attorney failed to object to the State's jury instructions. Under *Strickland*, a defendant must establish that his lawyer furnished objectively deficient assistance and that deficient assistance prejudiced the outcome of the case. *Strickland v. Washington*, 466 U.S. 687-89, (1984); *People v. Albanese*, 104 Ill.2d 504, 525-27 (1984). As discussed previously, the erroneous jury instructions challenged by defendant on appeal did not influence the jury's determination of defendant's guilt. Thus, the defendant suffered no prejudice as a result and cannot successfully argue his counsel's failure to object to the instruction denied him effective assistance of counsel.

¶ 39 The dissent concludes that defendant received ineffective assistance of trial counsel by virtue of the fact that the former State's Attorney heard and denied defendant's motion for a new trial. This issue was not raised by defendant on appeal but, rather, raised *sua sponte* by the dissent. Both the United States and Illinois Supreme Courts have held that it is generally error for reviewing courts to raise issues *sua sponte* for the purpose of reversing a trial court. *People v. Givens*, 237 Ill. 2d 311 (2010); *Greenlaw v. United States*, 554 U.S. 237 (2008). "[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do ***. [Citation.]" (Internal quotation marks omitted.) *People v. Givens*, 237 Ill. 2d at 324 (quoting *Greenlaw v. United States*, 554 U.S. 237, 244). There is nothing in the record to indicate that Judge Lyons had any personal involvement in defendant's case while he was the State's Attorney of Peoria County.

See *People v. Del Vecchio*, 129 Ill. 2d 265 (1989). Unless Judge Lyons actually acted as counsel for the State in defendant's case, there is no *per se* disqualification. *Id.* at 277. We have no idea what, if any, previous involvement Judge Lyons had with the prosecution of defendant's case. The dissent in this case is based upon conjecture based upon speculation. This is precisely why both the United States and Illinois Supreme Courts have warned courts of review not to raise issues *sua sponte*.

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 42 Affirmed.

¶ 43 JUSTICE WRIGHT, dissenting.

¶ 44 The State concedes the trial court did not properly instruct the jury according to the applicable version of the statute. See 720 ILCS 5/11-6(a) (West 2009). Yet, the State argues defendant has forfeited this instructional error and contends plain error is not present in this record. I respectfully disagree with the State's argument and offer this dissent.

¶ 45 Prior to July 22, 1999, indecent solicitation of a child, based on a violation of section 11-6(a), *did not* require the State to prove defendant had the specific intent to complete the solicited sex act. 720 ILCS 5/11-6(a) (West 1998). However, this defendant was not accused of committing an act of indecent solicitation of a child before July 22, 1999. In the case at bar, the State's Attorney initiated a prosecution of defendant for indecent solicitation of a child based on an undisputed conversation that took place in 2009, ten years after a legislative enactment significantly modified the elements of that offense. See Pub. Act 91-226, § 5 (eff. July 22, 1999) (amending 720 ILCS 5/11-6(a) (West 1998)).

¶ 46 Here, it is undisputed that defendant asked the minor a lewd question at a time when his penis could be viewed by the minor due to an opening in his pants. It is also undisputed that the minor responded to the question with a swift, negative, reply before she promptly left the room. By all accounts, physical contact did not take place and defendant did not follow the minor out of the room or repeat his query on any other occasion.

¶ 47 Although the details of the conversation are not at issue, the State's entire case hinged on whether the jury was persuaded that defendant actually intended to allow the minor to touch his penis. Yet, the jury did not receive proper instruction on this contested issue.

¶ 48 Based on the unique facts of this case, a properly instructed jury could have found that defendant's words and actions did not prove, beyond a reasonable doubt, that defendant had considered what he would do if the minor said "yes." While the majority's conclusion is reasonable based on the evidence, the majority's finding of fact is not the only reasonable conclusion supported by the State's evidence. For this reason, I believe the evidence of intent was closely balanced and plain error occurred due to the improper instructions this jury received.

¶ 49 Next, I also believe defendant received ineffective assistance of trial counsel because defense counsel clearly failed to recognize the State's jury instructions omitted a contested element of the offense and failed to bring the matter to the court's attention before deliberations. In addition, I point out an issue not addressed by the parties. I note the record also clearly reveals that Judge Lyons decided the merits of a motion for new trial filed in the very same criminal proceeding his office initiated when Lyons was State's Attorney in 2009 and resulted in a conviction in 2010 before Lyons term as State's Attorney concluded.

¶ 50 Although the majority politely voices valid concerns over my separate offering, I feel it is important to point out these facts of record for two reasons. First, the appearance of impropriety

is a serious issue. Rule 63 of the Judicial Canons provides guidance for the court and counsel in these situations. Second, the defense attorney who argued the motion for new trial in 2013 was also the same defense attorney who represented this defendant during a criminal trial conducted by a staff attorney from State's Attorney Lyons' office in 2010. This fact suggests to me that defense counsel may have been asleep at the helm during the bench trial. Thus, for my peace of mind, I would also include directions on remand for the new trial to be conducted by a judge other than Judge Lyons.

¶ 51 Therefore, unlike my respected colleagues, I would reverse defendant's conviction for indecent solicitation of a child and remand this matter for a new trial with proper jury instructions.