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2015 IL App (3d) 130900-U

Order filed September 15, 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,)	
v.)	Appeal No. 3-13-0900
SCOTT C. HARRIGAN,)	Circuit No. 11-CF-535
Defendant-Appellant.)	Honorable Stephen A. Kouri, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant waived claim that the trial court abused its discretion by allowing the jurors to view a videotaped interview of the victim during deliberations. Further, the trial court did not abuse its discretion by allowing the jury's request to review transcripts of the victim's in-court testimony. Lastly, defendant failed to establish a claim of ineffective assistance of counsel.
- ¶ 2 A jury convicted defendant, Scott C. Harrigan, of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1 (West 2010)) and aggravated criminal sexual abuse (720 ILCS 5/12-16 (West 2010)). Defendant appeals, contending the trial court abused its discretion by allowing

the jury's requests to review both a videotaped interview of the victim and transcripts of the victim's in-court testimony during deliberations. Alternatively, defendant argues defense counsel was ineffective by failing to object to the jury's requests. We affirm.

¶ 3

FACTS

¶ 4

The superseding indictment alleged that during a six-month period, defendant (who was over the age of 17) had committed acts of sexual penetration and sexual conduct for purposes of sexual gratification or arousal of defendant or the victim, with H.T., who was under the age of 13. Defendant is the uncle of the seven-year-old victim, H.T.

¶ 5

After hearings on the party's pretrial motions *in limine*, the matter proceeded to a three day trial. In defense counsel's opening statement, he asked the jurors to "[p]ay attention to everything that these witnesses say because at the end of the day, this case boils down to two statements from two witnesses." Defense counsel later explained, "[n]ow, the evidence that will be presented by way of testimony of both, of [H.T.] and by her videotaped statement will suggest that of the occurrences that happened, and there's going to be some variation, there are going to be some discrepancies, and I suggest to you those discrepancies are a big deal in these type of cases ***."

¶ 6

At trial, H.T.'s mother, Serena T., testified for the State. Serena's husband, David T., was defendant's brother-in-law. David's sister, Porsha Harrigan, was married to defendant. Serena, David, and their children had lived with defendant on two occasions for a six-month period. After moving out for the second time, H.T. continued to visit defendant's home nearly every weekend. H.T. enjoyed visiting defendant's home because she was fond of the two infant children living with defendant.

¶ 7 On one occasion, H.T. asked Serena if she could visit defendant's home. Sometime during the ride there, H.T. began crying. When Serena asked H.T. why she was upset, H.T. told her she did not want to say because she was afraid she would get into trouble. H.T. then told Serena, "[defendant] licks me down there." Serena asked what H.T. meant when she said "down there" and H.T. replied, "[m]y pee pee," indicating her vagina. H.T. explained to Serena that defendant had touched her inappropriately "a couple times." At this point, Serena returned home to speak with David. Serena informed David and his mother of H.T.'s allegations. Serena left for work and David and his mother called the police.

¶ 8 H.T. was also called as a witness at trial. H.T. testified that she enjoyed visiting defendant's home to play with his infant children. H.T. recalled visiting defendant's home often, but could not recall the exact number of times. On occasion, H.T. spent the night at defendant's home. When H.T. stayed overnight, defendant's wife, Porsha, would not be home because she worked overnight shifts.

¶ 9 H.T. was asked if defendant ever did anything to her when she spent the night at defendant's home. At first, H.T. did not verbally respond. The State attempted to elicit a response several more times, but H.T. was unable to verbalize an answer. After a brief recess, H.T. was again asked if defendant ever did anything to her when she stayed overnight. Initially, H.T. did not respond, but then answered that defendant "[l]icked my pee pee." Using a doll, H.T. identified the area of her body where defendant licked her. According to H.T., defendant did this to her more than once.

¶ 10 H.T. explained that she initially did not tell anybody what had happened with defendant because she was embarrassed. However, one day, Serena was driving H.T. to stay over at defendant's home and H.T. became upset. H.T. told Serena what defendant had done to her.

H.T. indicated that she spoke with a police officer the same night. A week later, H.T. spoke with a detective who videotaped her explanation of the allegations she had made against defendant.

¶ 11 On cross-examination, H.T. stated that when she first told Serena, she indicated that defendant had inappropriately touched her twice. H.T. acknowledged that when she was interviewed by the detective, she indicated defendant had touched her inappropriately 10 times.

¶ 12 Next, the videotaped interview H.T. described in her testimony was admitted into evidence and played for the jury. During the interview, H.T. told a detective that most of the times when she stayed overnight with defendant he would try to lick her. H.T. also stated that defendant licked her on 10 occasions.

¶ 13 Defendant's stepdaughter, K.B., also testified at trial as a propensity witness. K.B. first learned of H.T.'s allegations in a telephone call with her grandmother. K.B.'s grandmother asked if defendant had ever done similar acts to K.B. K.B. told her grandmother that defendant had not done anything to her. Later, K.B. told her grandmother in person that defendant "put his fingers inside" of her vagina when she was around seven years old. K.B. never told her family about this because she was afraid something would happen to her family.

¶ 14 On the third day of trial, defendant testified on his own behalf. Defendant stated that there were times when David and Serena's children would stay at his home. Occasionally, the children would spend the night. Defendant denied ever touching H.T. or K.B. inappropriately.

¶ 15 The matter then proceeded to closing arguments. In closing, defense counsel argued, "[n]ow, the fact of the matter is this case boils down to the testimony of two witnesses, and while the State would suggest that the slight differences in testimony versus videotaped statement and so on are not significant, I suggest to you absolutely the opposite, that they are the crux of this case." Defense counsel continued:

"Now, [H.T.] came in here, and I will not suggest that it's not a difficult thing for a child to take the stand, okay. We all know that. As a defense attorney, it's not easy to cross-examine them. But the fact of the matter is, she took the stand, she testified, and it's important to consider that when the ultimate question of what happened came up, she couldn't answer that. And I know the State will suggest that, well, that's because she was just nervous and this is a tough venue to be in. Sure. It is. But consider the fact that six days after this occurred when she was in a room with the detective who she had never met, a detective who she had only met by his testimony moments before who did an introductory talk with her went back, she had no problem whatsoever telling him what happened. In fact, her demeanor on that occasion was relaxed, she was very open, and she was able to say exactly what she was alleging occurred.

The allegations which [H.T.] made that day and this assertion that just because she's seven, the fact that she confused two times with 10, I would suggest that's a big deal. How many times this happened, the specifics of the allegations are exceptionally important to this case."

¶ 16 Defense counsel went on to note the discrepancy in the timing of the offenses as described by H.T. and the number of times H.T. alleged the offenses occurred. Defense counsel mentioned H.T.'s videotaped interview and told the jury he believed it would "have the opportunity to view it if you wish." Defense counsel also stated:

"[H.T.] told you that prior to her testimony, she had been talked to and prepared for this, to testify, and I asked if it happened more than once, and she said that it happened quite a few times. This is where we get new allegations

popping up. This is where we get concrete, adding things in. These are issues. These are things that you should weigh in your deliberations in determining whether or not her testimony was credible."

¶ 17 After both parties finished closing arguments, the jury retired to deliberate. While deliberating, the jury sent a note to the trial court asking to view H.T.'s videotaped interview. The trial court read the jury's note to the parties outside the presence of the jury. Defense counsel told the trial court that he "would suggest [the jury] be entitled to [see]" the video. The State did not object to the request. The trial court explained the protocol it followed when letting the jury watch the videotaped evidence during deliberations. After both parties agreed they were comfortable with the procedure, the trial court allowed the jury's request.

¶ 18 Before viewing the videotape, the jury asked the court a second question, which prompted the following discussion outside the presence of the jury:

"THE COURT: *** Another question. 'Can we obtain a copy of the transcripts from [H.T.'s] testimony? If not possible, *** can it be read out loud to us?'

[THE STATE]: We have the ability to play it.

* * *

[DEFENSE COUNSEL]: *** They have to rely on their collective memories, Judge. I never heard of—

[THE STATE]: I have not seen it done either, but I am not frequently in a position to have the technology to just play it.

THE COURT: Well, we're not going to play it, but I frequently do this. I looked at the court reporter. I also had it read back, but when I have done that, I asked them is there a portion of the testimony that you can pinpoint but I don't like doing that. I would rather give them the transcript if that's going to be possible. Why don't we sort of punt on that for the time being. There is some case law on this, and it's just not automatic that you say no. I think the better practice and the trend is if you are able to do it, to give them what they are asking for, so but in the meantime, we're going to bring them out and have them listen to this 29 minutes or so."

¶ 19 Next, the trial court called the jury back into the courtroom to watch the videotape of H.T.'s interview. Before playing the videotape, the trial court told the jury that it was attempting to accommodate the jury's request for transcripts. The jury watched the videotape then returned back to the jury deliberation room.

¶ 20 Outside the jury's presence, the trial court informed the parties that its court reporter had finished compiling copies of the transcripts from H.T.'s in-court testimony. Defense counsel declined when the trial court offered a copy of the transcripts for review. Neither party objected when the trial court informed the parties that it would have the court reporter prepare copies of the transcripts for the jury to review. The court provided the jury with the transcript of H.T.'s trial testimony.

¶ 21 Before bringing out the jury for the final time, the trial court asked the parties if there were any matters that needed to be brought to the court's attention. Both parties declined. The jury was called back into the courtroom, where it returned a guilty verdict on both counts. The

trial court entered a judgment on predatory criminal sexual assault of a child (720 ILCS 5/12-14.1 (West 2010)) and continued the matter for sentencing.

¶ 22 Defendant filed a timely motion for new trial. The motion did not challenge the propriety of allowing the jury to review the videotaped interview or the transcripts. The trial court denied the motion.

¶ 23 The trial court sentenced defendant to 12 years' imprisonment for predatory criminal sexual assault of a child (720 ILCS 5/12-14.1 (West 2010)) and vacated the second count of aggravated criminal sexual abuse (720 ILCS 5/12-16 (West 2010)). Defendant filed a timely motion to reconsider sentence. The trial court denied the motion and defendant filed a notice of appeal.

¶ 24 ANALYSIS

¶ 25 On appeal, defendant contends the trial court abused its discretion by allowing the jury's requests to watch H.T.'s videotaped interview and review transcripts of H.T.'s in-court testimony during deliberations. Defendant acknowledges he failed to preserve these issues but requests that we review the errors under the plain error doctrine. Alternatively, defendant argues trial counsel was ineffective by failing to object to the jury's requests.

¶ 26 We find defendant waived any claim of error as to the jury's first request (videotape) and further find the trial court did not abuse its discretion by granting the jury's second request (transcripts). Therefore, we decline to consider defendant's claim under plain error. We further find that defendant's claim of ineffective assistance of counsel fails because he was not prejudiced by defense counsel's failure to object to the jury's requests.

¶ 27 I. H.T.'s Videotaped Interview

¶ 28 "In determining whether to grant or refuse a request by the jury to rehear a piece of evidence, the trial court must determine whether review of the evidence would be helpful or harmful to the jury's deliberations." *People v. Alvarado*, 2013 IL App (3d) 120467, ¶ 15. A trial court's decision to permit review of evidence during jury deliberations is reviewed for an abuse of discretion. *People v. Pierce*, 56 Ill. 2d 361, 364 (1974). This is based on the recognition that the trial court generally is in a better position to assess the jury's request and determine whether receiving the testimony would be helpful or harmful to the jury's deliberations. *Id.*

¶ 29 As to the jury's review of the videotaped interview, defendant waived any claim of error. Waiver is the intentional relinquishment of a known right. *People v. Blair*, 215 Ill. 2d 427, 444 n.2 (2005). Not only did defense counsel suggest in his closing argument that the jury would have the opportunity to see the videotape during deliberations, defense counsel also argued that the jury was entitled to see the videotape when the trial court ruled on the jury's request. Under these facts, it is clear that defendant expressly and knowingly waived any claim of error regarding the jury's request to review H.T.'s interview. Defendant cannot acquiesce in the trial court's ruling to allow the jury to review the videotaped interview then raise the trial court's action as error on appeal. See *People v. Dunlap*, 2013 IL App (4th) 110892, ¶ 12. Therefore, we do not review defendant's claim for plain error because plain error does not apply to waived arguments. See *People v. Bowens*, 407 Ill. App. 3d 1094, 1101 (2011).

¶ 30 II. Transcripts of H.T.'s In-Court Testimony

¶ 31 We also find that the trial court did not abuse its discretion when it permitted the jury to review the transcripts from H.T.'s in-court testimony. As defendant acknowledges, the outcome of the instant case was largely dependent on the testimony of H.T. Consequently, the jury's decision as to H.T.'s credibility was a critical factor in the outcome of this case. Defense counsel

made this point clear by repeatedly, in both opening and closing statements, inviting the jury to consider the discrepancies in H.T.'s statements in the videotaped interview and in-court testimony. Further, any potential harm posed by replaying H.T.'s videotaped interview was eliminated by a review of the transcripts. Reviewing the transcripts assisted the jury in comparing H.T.'s in-court and out-of-court statements. This, in turn, assisted the jury in carefully considering the critical issue of H.T.'s credibility. Therefore, we conclude the trial court exercised its discretion when it allowed the jury to review the transcripts of H.T.'s in-court testimony. In light of our conclusion that the trial did not err, we need not further consider defendant's suggestion that the trial court's action constituted plain error. See *Bowens*, 407 Ill. App. 3d at 1101.

¶ 32 In coming to this conclusion, we expressly reject defendant's contention that the trial court failed to consider how helpful or harmful the jury's request would be, the timing of the jury's request, the complexity of the case, and the complexity of the evidence when it allowed the jury's request to review the transcripts of H.T.'s testimony. See *People v. Shaw*, 258 Ill. App. 3d 119, 122-23 (1994). Defendant argues that these factors weigh in favor of denying the jury's request.

¶ 33 First, we have already found the transcripts were helpful in assisting the jury in considering the critical issue of H.T.'s credibility. More importantly, the transcripts eliminated any potential harm the video posed, as the transcripts highlighted inconsistencies in H.T.'s in-court and out-of-court statements. With respect to the remaining factors cited by defendant, we find the factors favor granting the jury's request. The trial was short and the subject matter of the requested materials was simple. Thus, the transcripts would not serve to confuse the jury during their deliberations. As to the timing of the jury's request, providing the jury with copies of H.T.'s

transcripts immediately after the jury rewatched H.T.'s interview allowed the jury to compare H.T.'s statements while the video was fresh in the jury's memory.

¶ 34 III. Ineffective Assistance of Counsel

¶ 35 Defendant's final claim on appeal is that he was denied effective assistance of counsel when his trial attorney failed to object to the jury's requests to replay H.T.'s videotaped interview and review transcripts of H.T.'s in-court testimony during deliberations.

¶ 36 To prevail on a claim of ineffective assistance, a defendant must establish that counsel's performance was deficient and that he was so prejudiced as a result of that deficiency that he did not have a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court deciding a claim of ineffective assistance of counsel may advance directly to the second prong of the *Strickland* test and, if it finds that defendant was not prejudiced, may rule on the constitutional claim without addressing the question of whether counsel rendered effective assistance. *People v. Pitsonbarger*, 142 Ill. 2d 353, 397 (1990). Under the second *Strickland* prong, defendant must show a reasonable probability that the result would have been different but for defense counsel's deficient performance. *People v. Houston*, 226 Ill. 2d 135, 149 (2007).

¶ 37 Here, defendant's claim of ineffective assistance of counsel fails because he cannot show that the outcome would have been any different had the jury been denied the opportunity to review the videotape and transcripts. Defendant contends that the videotape and transcripts favored the State, were cumulative, and therefore prejudicial. However, as detailed above, any *potential* prejudice was eliminated by allowing the jury to read the transcripts after they watched the video. Further, the transcripts and video were equally beneficial to both parties theory of the case. Accordingly, we find defendant failed to show that he was prejudiced by defense counsel's failure to object to the jury's requests.

¶ 38 Likewise, going back to the first prong, failure to object was reasonable in light of defense counsel's obvious and reasonable strategy to challenge the victim's credibility by highlighting discrepancies in her testimony.

¶ 39 CONCLUSION

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

¶ 41 Affirmed.