2015 IL App (3d) 150006-U

Order filed May 12, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

In re D.R.J.,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
a Minor	)	Peoria County, Illinois,
	)	
(The People of the State of Illinois,	)	
	)	
Petitioner-Appellee,	)	Appeal No. 3-15-0006
	)	Circuit No. 14-JD-336
v.	)	
	)	
D.R.J.,	)	Honorable
	)	Albert L. Purham,
Respondent-Appellant).	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Respondent was not entitled to plain error review of his adjudication of delinquency where the State failed to serve respondent's noncustodial parent.

¶ 2 Respondent, D.R.J., appeals from his delinquency adjudication, arguing that his statutory and due process rights to parental notice were violated where his father was not served with the petition for adjudication of delinquency. Because we find respondent forfeited the issue and is

not entitled to plain error review, we affirm.

¶ 3 FACTS

¶ 4 The State filed a petition alleging that respondent was a delinquent minor in that he had committed the offense of robbery (720 ILCS 5/18-1(a) (West 2012)) by knowingly taking money from Thomas Gaylord by use of force. The petition included the address where respondent resided with his mother. The petition initially indicated that respondent's father was unknown, but subsequently his father's name and work address were written in by hand. On the day the petition was filed, respondent's mother and his guardian *ad litem* appeared in court with respondent at the detention hearing. Respondent advised the trial court that his father worked at a local retirement home and paid child support. Respondent also stated that he did not see his father often.

¶ 5 The record reveals that service of summons on respondent's father was unsuccessfully attempted one time at 11:43 a.m. on a weekday at respondent's father's residence. The record does not indicate that a summons was ever mailed to respondent's father. Respondent's father never appeared in court.

¶ 6 The matter proceeded to an adjudicatory hearing. Respondent's mother was present and respondent was represented by counsel. Gaylord testified that on July 31, 2014, he was employed as a landscaper. He met a woman, S.O., at a credit union and discussed the possibility of S.O. and her boyfriend working for Gaylord. Later that day, S.O. called Gaylord and asked when she and her boyfriend could meet him. Gaylord replied that he was still working and would call them later that evening.

¶ 7 A few hours later, Gaylord called S.O. and arranged to meet her and her boyfriend at a park. When Gaylord arrived at the park at approximately 8 or 9 p.m., it was dark. Gaylord saw

S.O. at the park with another girl who said her name was P.D. S.O. asked Gaylord to come into a house and he refused. She then tried to get into his truck, and he told her that he would talk to her outside. Gaylord exited his truck and began talking to the two girls at a picnic table.

¶ 8 S.O. asked Gaylord to step to the side and said she had some questions for him. Gaylord stepped approximately 15 to 20 feet away from the picnic table. He was facing S.O. and saw a male individual 10 to 15 feet away, who appeared to be approximately 20 years old. The individual was running toward Gaylord. Gaylord assumed the individual was S.O.'s boyfriend and he was running up to Gaylord to talk to him. Gaylord looked at the individual's face and body to assess whether he was dressed appropriately and could do landscaping work. Gaylord viewed the individual's face for approximately 5 to 10 seconds. Gaylord could not remember the color of the individual's clothes, but stated that he was wearing a t-shirt and pants. Gaylord could not remember if the individual had dreadlocks in his hair.

¶ 9 The individual ran up to Gaylord and punched him in the jaw. Two other male individuals jumped on Gaylord and started punching him. Gaylord fell to the ground and was beaten by at least three individuals for approximately 30 seconds. Gaylord got up and tried to run to his truck, but was only able to run 5 to 10 feet before he was tackled again. The three individuals punched Gaylord and kicked him. Gaylord got up and was tackled three more times. After the third time, one of the individuals beating him said, "He's a feisty motherfucker. Just kill him." Gaylord lay down on the ground and covered his head with his hands. A girl came up to Gaylord and took his keys out of his pocket while the three male individuals continued to beat him. The girl ran over to Gaylord's truck and later threw something on the ground.

¶ 10 The male individuals eventually stopped beating Gaylord, so he got up and went over to the area where he saw the girl throw something. He felt around and found that it was his keys.

He looked up and saw a group of six to seven people running. He went over to his truck to call 911, but found that his cell phone was gone. Additionally, a bank envelope containing $600 was missing from his truck. Initially, Gaylord tried to chase the individuals who had robbed him.

¶ 11 After a few minutes, Gaylord pulled up to a liquor store and one of the employees called 911. Police officers and an ambulance arrived. The ambulance transported Gaylord to a hospital where Gaylord was told that part of his ear was detached and cartilage was hanging out of his ear. Additionally, he had over 50 cuts inside his mouth, his eyes were black and blue, he had 12 knots on the front of his face and 15 knots in his scalp, he had a knot on his neck the size of a tennis ball, his chest and back were bruised, he had blood clots in his shoulder and legs, and he had lower back problems for the next two weeks.

¶ 12 Gaylord spoke with a police officer when he was in the ambulance and again at the hospital. He told the officer that the individual who ran up to him appeared to be 18 to 24 years old but he could not describe him. The individual looked "average" to Gaylord in that he was average in build and size. Gaylord could not recall anything distinctive about the individual, so he did not know how to describe him to the police. Gaylord stated that he was not good at describing people but could recognize someone if he saw him. Gaylord told the officer that the only one he could identify was S.O. because he knew her name and knew where she did her banking. He stated that he would have been able to identify the other girl with S.O. if he saw her picture.

¶ 13 Gaylord identified respondent in court as the man who ran up to him and struck him the first time. Gaylord said he had no doubt and was "[o]ne hundred percent" sure.

¶ 14 After Gaylord's testimony, the State rested. Gaylord was recalled as a defense witness and testified that, after the incident, several of Gaylord's friends went on Facebook to try to find

Gaylord's assailants. Gaylord was able to identify respondent as the individual who initially punched him based on a photograph from Facebook.

¶ 15 Monique O. testified that she was 19 years old, was respondent's girlfriend, and was pregnant with respondent's child. On July 31, 2014, Monique and respondent woke up at respondent's house and then went to Monique's aunt's house for approximately one hour. Later, at approximately 2 p.m., they went to Monique's house and stayed there all night. The next day, Monique and respondent went to Monique's aunt's house at 6 a.m. to babysit her children for three days.

¶ 16 On cross-examination, the State introduced a photograph from Facebook. Monique testified that she was in the photograph, as well as (1) S.O., Monique's cousin; (2) respondent; (3) B.O., Monique's brother; (4) P.D., who Monique did not know; and (5) Monique's cousin. The photograph was taken on August 1, 2014, and posted on B.O.'s Facebook page the same day. The individuals in the photograph, including Monique, were holding a lot of money. Monique was holding $100 that her aunt gave her on August 1 for babysitting. Monique was not sure where everyone obtained their money but stated that several of the individuals in the photograph had jobs or received money from their parents. Monique said the purpose of the photograph was "[m]aybe because we all had money."

¶ 17 Respondent testified that he was seventeen years old. On July 31, 2014, respondent and Monique woke up at his house and then went to Monique's aunt's house. They left Monique's aunt's house and went to Monique's house. They stayed at Monique's house until the next morning. Respondent did not leave Monique's house that evening and did not go to the park where the incident occurred. On August 1, respondent and Monique went to Monique's aunt's house at approximately 6 a.m. to babysit her children. Respondent and Monique stayed at her

aunt's house with the children all day on August 1, and no one else came over.

¶ 18 Respondent stated that the photograph that B.O. posted to Facebook on August 1 was taken on July 31 at respondent's aunt's house. Respondent was not holding any money in the photograph. Respondent did not know where everybody else in the photograph got their money but stated that some of them had jobs. S.O. was standing next to respondent in the photograph.

¶ 19 The trial court found respondent guilty of robbery. The court found Gaylord to be a "highly credible" witness. The court noted that Gaylord identified respondent as his assailant with certainty and without hesitation. The court found it to be an "unusual set of circumstances" that respondent was in a picture that was posted the day after the robbery with S.O., Monique, and several others who were holding money and that Gaylord identified respondent as being the person who initially punched him.

¶ 20 At the dispositional hearing, respondent was committed to the Department of Juvenile Justice for an indeterminate period of time, not to exceed his twenty-first birthday.

¶ 21 ANALYSIS

¶ 22 On appeal, respondent argues that the adjudicatory and dispositional orders entered in his case should be vacated because his statutory and due process rights to parental notice were violated when the State failed to serve his father with notice of the delinquency proceedings. Respondent concedes that he forfeited the issue by not objecting to lack of service on his father at the adjudicatory hearing and asks that we review the issue for plain error.

¶ 23 "The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The first step in plain error review is to determine whether a clear or obvious error occurred. *In re M.W.*, 232 Ill. 2d 408, 431 (2009). If a clear or obvious error

occurred, a reviewing court will grant relief 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 is '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.' " *Id.* (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). In plain error analysis, respondent carries the burden of persuasion. *M.W.*, 232 Ill. 2d at 431.

¶ 24 Initially, we find that a clear and obvious error occurred in this case. Section 5-525(1)(a) of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-525(1)(a) (West 2012)), requires that, in delinquency proceedings, the clerk of the court issue a summons and a copy of the delinquency petition to the parents of the minor. The Act provides an exception to the service requirement where "a parent *** does not reside with the minor, does not make regular child support payments ***, and has not communicated with the minor on a regular basis." 705 ILCS 405/5-525(1)(a)(ii) (West 2012). In the present case, respondent advised the court that his father paid child support. Consequently, the State was required to serve respondent's father with notice under the Act.

¶ 25 The State's one attempt at serving respondent's father in person was unsuccessful. Section 5-525(2)(a) of the Act (705 ILCS 405/5-525(2)(a) (West 2012)) provides that if the State is unable to serve a party with summons in person or at his residence, the State is required to serve the party by certified mail. The record reveals that the State had both the home and work addresses for respondent's father but does not indicate that service was ever attempted on respondent's father by certified mail. Because the State was required to serve respondent's father with notice of the proceedings, the State violated the provisions of the Act and respondent's due process rights when it failed to do so. See 705 ILCS 405/5-525(2)(a) (West 2012), *In re Marcus*

W., 389 Ill. App. 3d 1113, 1123 (2009) ("A minor's due-process rights are violated when proper notice is not given to a parent or guardian with a known address."). Thus, a clear and obvious error occurred when the State failed to serve respondent's father.

¶ 26 I. Evidence was not Closely Balanced

¶ 27 Although an error occurred in this case, respondent is not entitled to relief because he cannot satisfy either prong of plain error analysis. First, the evidence in this case was not "so closely balanced that the error alone threatened to tip the scales of justice" against respondent so as to warrant review under the first prong of plain error analysis. *Piatkowski*, 225 Ill. 2d at 565.

¶ 28 In the instant case, Gaylord identified respondent as one of his assailants. Gaylord testified that when he saw respondent running toward him, he was examining respondent's face and body to determine if respondent looked presentable and able to do landscaping work. Gaylord viewed respondent's face for 5 to 10 seconds. When he first saw respondent, Gaylord was not distracted by the fear of an attack or experiencing a stressful situation, as Gaylord believed that respondent was running up to him to talk.

¶ 29 Respondent challenges Gaylord's identification on the grounds that it was dark at the time that Gaylord saw the first assailant running toward him, Gaylord had a short period of time to view his assailant, and Gaylord could not describe his assailant's clothing or hairstyle. Additionally, Gaylord was unable to describe his attackers to the police and identified respondent as his assailant only when he found a picture of respondent on Facebook.

¶ 30 At the outset, we note that the trial court found Gaylord's testimony to be "highly credible." We defer to the trial court's witness credibility determinations. *In re R.T.*, 313 Ill. App. 3d 422, 428-29 (2000). Moreover, we note the evidence in the instant case showed Gaylord viewed his assailant for several seconds with a high degree of attention. Although

approximately four months passed between the attack and the adjudicatory hearing, Gaylord said he was "[o]ne hundred percent" sure respondent was his attacker. While Gaylord was not able to give a detailed description of his assailant to police, he explained that he was not good at describing people but could recognize people when he saw them.

¶ 31 Gaylord's identification testimony was bolstered by the Facebook photograph, posted the day after the attack. The photograph establishes a connection between respondent and S.O., who arranged to meet Gaylord in the park on the night of the attack. The trial court found Monique's and respondent's explanation that the people in the photograph were holding money from their jobs to be "unusual." Respondent and Monique gave inconsistent explanations as to when the photograph was taken.

¶ 32 In conclusion, the trial court found Gaylord "highly credible" and believed his testimony over respondent's and Monique's. Additionally, the Facebook photograph, posted the day after the attack, established a connection between respondent and S.O., who apparently orchestrated the attack. Under these circumstances, respondent has failed to establish the evidence presented at trial was closely balance. Thus, respondent is not entitled to relief under the first prong of plain error analysis.

¶ 33 In reaching our conclusion, we note, as did the court in *M.W.*, 232 Ill. 2d at 438-39, that the type of error that occurred here—the State's failure to serve respondent's father with summons—did not affect the evidence presented at the adjudicatory hearing and thus did not affect the balance of the evidence. In *M.W.*, 232 Ill. 2d at 430-31, the respondent claimed that her due process rights were violated when the State failed to serve her father with an amended delinquency petition. The *M.W.* court reviewed the respondent's claim for plain error. *Id.* at 431. After finding that the evidence was not closely balanced, the court further noted that the error did

not affect the evidence presented at the hearing. *Id.* at 438-39.

¶ 34 II. Error not so Serious that it Affected the Fairness of the Proceedings

¶ 35 Respondent is also not entitled to relief under the second prong of plain error analysis because the State's error in failing to serve respondent's father was not " 'so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.' " *Piatkowski*, 225 Ill. 2d at 565 (quoting *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). Our supreme court has equated the second prong of plain error with structural error. *Thompson*, 238 Ill. 2d at 613. A structural error is "a systemic error that serves to erode the integrity of the judicial process and undermine the fairness of a trial." *People v. Washington*, 2012 IL 110283, ¶ 59. The category of structural errors is very limited and has been found to include "the complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of the right of self-representation at trial, denial of a public trial, and defective reasonable doubt instructions." *Id.* The State's failure to serve summons on respondent's father does not fall within or rise to the level of the categories of structural error previously recognized by Illinois courts.

¶ 36 Thus, the State's failure to serve respondent's father does not rise to the level of structural error under the second prong of plain error review. Consequently, we find respondent forfeited the issue when he did not raise it in the trial court.

¶ 37 CONCLUSION

¶ 38 The judgment of the circuit court of Peoria County is affirmed.

¶ 39 Affirmed.