2015 IL App (5th) 120265-U

NO. 5-12-0265

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Washington County.
	)	
v.	)	No. 11-CF-49
	)	
DONALD EDWARD TAYLOR,	)	Honorable
	)	Dennis G. Hatch,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Cates and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's failure to instruct the jury pursuant to Illinois Pattern Jury Instruction 11.66 rose to the level of plain error, and, because the evidence was closely balanced, fundamental fairness required the jury be properly instructed.

¶ 2 This is a direct appeal from the judgment of the trial court. No issue is raised challenging the charging instrument. Defendant, Donald Edward Taylor, was charged with predatory criminal sexual assault by information filed on August 22, 2011. On January 24, 2012, defendant was found guilty after a jury trial was held. On February 28, 2012, defendant's posttrial motion was denied and he was sentenced to life imprisonment in the Department of Corrections. The trial court denied defendant's motion to reconsider

his sentence on June 12, 2012, and defendant timely filed a notice of appeal on June 19, 2012.

¶ 3 Defendant raises four issues on appeal. Defendant's first issue alleges his conviction should be reversed because there was a hearsay statement made during trial that was essential to the State's case, yet the jury was never instructed about the proper consideration of the hearsay statement as required by statute pursuant to section 115-10(c) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10(c) (West 2010)). The State asserts any complaint regarding the trial court's failure to instruct the jury pursuant to section 115-10(c) was forfeited, and the absence of such admonishment did not rise to the level of plain error.

¶ 4 The second issue defendant raises alleges his counsel was ineffective for failing to request the required jury instruction on hearsay despite recognizing the importance of the hearsay statement to the State's case. Defendant also alleges his counsel was ineffective for failing to request an instruction on the lesser-included offense of aggravated criminal sexual abuse despite recognizing the minimal evidence of anal penetration. The State asserts defendant was not denied effective assistance of counsel as a result of counsel's failure to tender the jury instruction or request an instruction on the lesser-included offense of aggravated criminal sexual abuse.

¶ 5 The third issue defendant raises alleges he was denied a fair trial because the trial court permitted the State to use four convictions that took place over 20 years prior to the current charge as propensity evidence despite substantial differences from the current charge. The State asserts the trial court did not abuse its discretion in admitting

propensity evidence pursuant to section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2010)).

¶ 6 The fourth issue defendant raises alleges he was denied a fair trial as a result of the prosecutor: (i) pursuing a theme intended to inflame the jurors' emotions; (ii) using improper tactics to undermine defendant's credibility; (iii) shifting the burden to the accused to prove he is no longer a predator; and (iv) vouching for the complainant's credibility. The State asserts defendant was not denied a fair trial due to prosecutorial misconduct, and defendant has failed to show plain error sufficient to overcome his procedural default of all claims of prosecutorial error.

¶ 7 BACKGROUND

¶ 8 On August 22, 2011, defendant was charged by information with predatory criminal sexual assault of a child under 13 years of age. The charge was a single count of anal penetration committed on his son, S.T., sometime before July 2011. A jury found defendant guilty on January 24, 2012, and defendant was subsequently sentenced to a mandatory term of life imprisonment on February 28, 2012.

¶ 9 Mr. Tom Haar, an impact worker for the Illinois Department of Children and Family Services (DCFS), indicated that DCFS contacted defendant in 2008 because S.T., who was four or five years old at the time, was sexually acting out at school. DCFS learned that defendant had prior sex offense convictions from 1989 and recommended he begin treatment in order to continue living with his children.

¶ 10 Defendant subsequently enrolled in treatment classes at the Community Resource Center, and DCFS monitored defendant's household until April 2009, at which time

DCFS indicated it was satisfied with defendant's cooperation with the treatment provider. DCFS then closed the case without recommending referral to an investigator.

¶ 11 In March 2011, DCFS contacted defendant concerning a report that he had slept in the same bed as his children. As a result, defendant and his family agreed to abide by a safety plan supervised by DCFS. The plan provided that defendant would have his own bedroom and would not be alone with his children or sleep in the same bed with them. As part of DCFS's safety plan, Haar visited either S.T. or defendant's household on a weekly basis. Defendant's children, S.T. and his sister, attended classes with Sexual Assault and Family Emergencies (SAFE) to learn about the difference between good and bad touches.

¶ 12 At a home visit on June 27, 2011, S.T. told Haar there was a thunderstorm and that defendant had watched a movie and slept with him in his bed because S.T. was afraid. Haar later confirmed there was a thunderstorm on the night in question, and reported the incident to DCFS's investigative unit.

¶ 13 Betty Barnhart of DCFS testified that the report of defendant sleeping in S.T.'s bed with S.T. was received on June 29, 2011. Defendant met with DCFS the following day and explained that he fell asleep while watching a movie with S.T. and left as soon as he awoke. DCFS then arranged for S.T. to be interviewed at the child advocacy center in Mount Vernon known as the Amy Center.

¶ 14 On July 1, 2011, Vicky Joseph, an employee of the Amy Center, conducted a forensic interview of S.T. which was shown to the jury in its entirety over defendant's

objection. The video of the interview played for the jury showed a seven-year-old boy revealing details about his contacts with defendant.

¶ 15 S.T. initially indicated that he had not been touched in inappropriate areas. Joseph then questioned whether anyone had told S.T. to not say something during the interview. Repeatedly throughout the interview S.T. became concerned whether Joseph would tell anyone about their conversation, and indicated defendant had advised him to not tell anyone what they were doing.

¶ 16 Joseph next directed the questioning to defendant's household and asked S.T. to describe the household's sleeping arrangements. S.T. told Joseph that he slept in his parents' bedroom sometimes because they have air conditioning and his room is hot. S.T. admitted defendant got into bed with him during scary storms when S.T. asked him to.

¶ 17 Joseph then asked S.T. whether defendant had touched him where he did not want to be touched. S.T. told Joseph that defendant touched his "butt" and "wiener." S.T. first indicated he and defendant had clothes on during these incidents, but later indicated defendant had his clothes off sometimes while S.T. kept his clothes on and was touched above his clothes. S.T. again confirmed that Joseph would keep their conversation confidential and then indicated he and defendant touched each other's penises.

¶ 18 S.T. was then given anatomical dolls and asked to show what happened. S.T. was told he could do whatever he wanted with the dolls, after which S.T. indicated with the "dad" doll that defendant had put his penis in S.T.'s anus. This was the first time S.T. indicated defendant had touched him beneath his clothes. S.T. also indicated defendant put his penis in S.T.'s mouth and put S.T.'s penis in his mouth, which occurred at least 10

times. S.T. described how defendant would fondle himself in a physical act. S.T. lastly indicated he made sexual contact with his sister with his own hand and "wiener," and that he made unsuccessful attempts to put his own penis in his sister's anus.

¶ 19 At trial, there was no physical evidence of abuse presented. Defendant denied all charges and testified on his own behalf. Detective Bradac, a detective with the Washington County sheriff's department, testified that he interviewed defendant and defendant denied ever penetrating S.T.

¶ 20 At trial, S.T. was asked the difference between the truth and a lie, and he responded, "Bad touch is front quarters and back quarters." S.T. later defined bad touch as "front quarters and back quarters" and as "penis" and "butt." Concerning the abuse defendant inflicted on him, S.T. testified as follows during the jury trial:

"Q. [Attorney for State] What did he do to you, S.T.?

A. He sticks his butt in my penis.

Q. Do you have that backwards?

A. What?

Q. What did he do to you? Say that again.

A. He sticked his butt in my penis.

Q. He had you stick your penis in his butt?

A. Hu-huh.

Q. Do you have that backwards? He stuck his penis in your butt?

* * *

A. Yes.

* * *

Q. What else did he do?

A. He licked my penis."

¶ 21 Defense counsel moved for a directed verdict at the close of the State's case and at the close of all evidence. Both were denied. Defendant was found guilty and the jury was polled. On February 28, 2012, defendant's posttrial motion was denied and he was sentenced to a mandatory term of life imprisonment based on his prior convictions. On June 12, 2012, defendant's motion to reconsider his sentence was denied. Defendant's notice of appeal was timely filed on June 19, 2012.

¶ 22 ANALYSIS

¶ 23 Defendant first alleges the trial court erred in permitting S.T.'s hearsay statements from the forensic interview that were essential to the State's case because the jury was never instructed concerning proper consideration of the hearsay statements as required by section 115-10(c) of the Code (725 ILCS 5/115-10(c) (West 2010)). The State alleges any complaint regarding the trial court's failure to instruct the jury pursuant to section 115-10(c) was forfeited by defendant and the absence of such admonishment did not rise to the level of plain error. For the following reasons, we agree with defendant.

¶ 24 Defendant indicates the State relied on S.T.'s hearsay statements pursuant to a statutory exception to hearsay to prove an essential element of defendant's charge. Hearsay statements are generally inadmissible because there is no opportunity to cross-examine the declarant. *People v. Dunmore*, 389 Ill. App. 3d 1095, 1106, 906 N.E.2d 1233, 1244 (2009). However, the rule does have exceptions. Through section 115-10 of

the Code, hearsay statements from minor declarants in sexual abuse cases are allowed to be introduced to offset the problems associated with young children who may be unable to testify adequately about what has happened. 725 ILCS 5/115-10 (West 2010); *People v. Mitchell*, 155 Ill. 2d 344, 351-52, 614 N.E.2d 1213, 1216 (1993).

¶ 25 Specifically, section 115-10 of the Code permits the State to introduce the following testimony in a prosecution for a physical or sexual act perpetrated upon or against a child under 13 years of age:

> "testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim." 725 ILCS 5/115-10(a)(2) (West 2006).

¶ 26 This testimony may only be admitted into evidence if "(1) [t]he court finds in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient safeguards of reliability; (2) the child testifies at the proceeding, or the child is unavailable and there is other corroborating evidence; and (3) the statement was made either before the victim turned 13 years of age or within three months of the offense. 725 ILCS 5/115-10(b) (West 2006)." (Internal quotation marks omitted.) *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 47, 995 N.E.2d 446.

¶ 27 Section 115-10 further provides that the trial court must give specific instruction to the jury if the trial court admits a hearsay statement pursuant to this exception. The jury

must be specifically instructed concerning how to weigh hearsay statements admitted under section 115-10:

> "If a statement is admitted pursuant to this [s]ection, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, or the intellectual capabilities of the moderately, severely, or profoundly intellectually disabled person, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." 725 ILCS 5/115-10(c) (West 2010).

¶ 28 Section 115-10 is incorporated as Illinois Pattern Jury Instructions, Criminal, No. 11.66 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 11.66). IPI Criminal 4th No. 11.66 was constructed to implement the above statutory requirement, and it states:

> "You have before you evidence that ____ made statements concerning the offenses charged in this case. It is for you to determine whether the statements were made, and, if so, what weight should be given to the statements. In making that determination, you should consider the age and maturity of ____, the nature of the statements, and the circumstances under which the statements were made."

Marcos, 2013 IL App (1st) 111040, ¶ 50, 995 N.E.2d 446.

¶ 29 In the instant case, the trial court permitted S.T.'s hearsay statements to be introduced pursuant to the hearsay exception of section 115-10. The State concedes there is no debate that having permitted the State to introduce the interview of S.T., the trial court was required to instruct the jury pursuant to section 115-10(c) about how it was to

consider the statements of S.T. in the recorded interview. However, the State argues any complaint regarding the trial court's failure to instruct the jury under section 115-10(c) was forfeited, and the absence of such admonishment did not rise to the level of plain error because the evidence in the case was not closely balanced. We disagree.

¶ 30 The State points out that a defendant generally waives any error contained in jury instructions if he fails to object or proffer alternative instructions at trial, and issues not properly raised in a defendant's posttrial motion will not be considered on appeal. *People v. Reddick*, 123 Ill. 2d 184, 198, 526 N.E.2d 141, 147 (1988). However, Illinois Supreme Court Rule 451(c) provides that "substantial defects [in jury instructions in criminal cases] are not waived by failure to make timely objections thereto if the interests of justice require." Ill. S. Ct. R. 451(c) (eff. July 1, 2006); *People v. Hopp*, 209 Ill. 2d 1, 7, 805 N.E.2d 1190, 1194 (2004). The exception to the waiver rule for substantial defects under Rule 451(c) "applies when there is a grave error or when the case is so factually close that fundamental fairness requires that the jury be properly instructed." *Hopp*, 209 Ill. 2d at 7, 805 N.E.2d at 1194.

¶ 31 Rule 451(c) is coextensive with the "plain error" clause of Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967), which provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." *People v. Piatkowski*, 225 Ill. 2d 551, 564, 870 N.E.2d 403, 410 (2007). We construe these rules "identically." *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 473 (2005).

¶ 32 The State and defendant agree that a plain error analysis is appropriate in the case at bar. Under the plain error analysis, we must first determine whether error occurred at all. If error is found, we must then determine whether the error was reversible and consider whether either of the two prongs of the plain error doctrine has been satisfied.

¶ 33 Reversible error occurs when: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that 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. *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-11. The burden of persuasion rests with the defendant under both prongs.

¶ 34 In the instant case, there is no dispute that the jury should have been instructed pursuant to IPI Criminal 4th No. 11.66 and that sending the case to the jury without such instruction was a clear and obvious error. Therefore, the question we must consider is whether either prong of the plain error analysis has been satisfied so that we may overlook this procedural default and consider the error on this appeal. *People v. Sargent*, 239 Ill. 2d 166, 190, 940 N.E.2d 1045, 1059 (2010).

¶ 35 We now turn to the first prong of the plain error doctrine and consider whether the evidence in this case was closely balanced. If the evidence was closely balanced, the failure to properly instruct the jury concerning S.T.'s hearsay statements constitutes reversible error. For the reasons below, we find that the evidence was closely balanced

on defendant's count of predatory criminal sexual assault, and, therefore, the trial court's failure to instruct the jury pursuant to IPI Criminal 4th No. 11.66 was reversible error.

¶ 36 In the case at bar, defendant outright denied S.T.'s claims that he sexually assaulted S.T. There was no physical evidence, no impulsive outcry, and no admission made by defendant. Both the State and the defense presented witnesses who contradicted the other party's version of the events. Defendant's conviction was therefore dependent on whom the jury found more credible, defendant or S.T.

¶ 37 The evidence against defendant was not overwhelming in this case considering it rested solely on S.T.'s testimony that was unsupported by any corroborating evidence. The mandatory jury instruction the trial court failed to deliver would have directed the jury to consider the age and maturity of S.T. as well as the circumstances of S.T.'s out-of-court statement in determining its weight and credibility. Hence, the omitted jury instruction was crucial to the jury's duty to consider the credibility of S.T.'s statements, and the trial court's failure to deliver that instruction deprived defendant of his right to have the jury advised that it should assess the credibility of S.T.'s hearsay statements with caution. Accordingly, we find the evidence in this case was closely balanced and the trial court's failure to deliver the mandatory jury instruction constitutes reversible error.

¶ 38 The State cites to *People v. Marcos*, 2013 IL App (1st) 111040, 995 N.E.2d 446, to support its position that the evidence in this case was not closely balanced. However, *Marcos* is distinguishable from the case at bar. *Marcos* involved a defendant who was convicted of three counts of predatory criminal sexual assault against an eight-year-old

and appealed. One of the issues the defendant raised on appeal was whether the trial court erred by failing to instruct the jury pursuant to IPI Criminal 4th No. 11.66.

¶ 39 In reaching its finding, the court in *Marcos* analyzed the supreme court's holding in *People v. Sargent,* 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010). The court in *Sargent* held that the trial court's failure to deliver IPI Criminal 4th No. 11.66, while required by statute, did not rise to the level of plain error because the evidence in that particular case was not closely balanced, finding the evidence of predatory criminal sexual assault against the defendant was overwhelming.

¶ 40 After considering *Sargent*'s holding, the court in *Marcos* determined the evidence was not closely balanced in its case, finding the defendant's sexual assaults against the eight-year-old victim were proven by: (1) the victim's testimony at trial; (2) the victim's hearsay outcry statements to her mother and a social worker; (3) the defendant's admission to the victim's mother; and (4) the defendant's statement to police. *Marcos*, 2013 IL App (1st) 111040, ¶ 73, 995 N.E.2d 446. The court concluded the defendant's admission coupled with the victim's hearsay outcry statement created overwhelming evidence of the defendant's guilt, and, as such, the evidence was not closely balanced.

¶ 41 We distinguish the instant case from *Marcos* and *Sargent*. Unlike the finding in *Marcos* and *Sargent* of overwhelming evidence against the defendant for predatory criminal sexual assault, there is not overwhelming evidence against defendant in the instant case. There is no physical evidence supporting defendant's guilt, and S.T. has made no outcry hearsay statement nor has defendant made an admission that would support defendant's guilt. In fact, defendant outright denied the allegations of sexual

assault at trial. Hence, the State's proof in the instant case rests solely on the hearsay statements and testimony of the victim, S.T.

¶ 42 CONCLUSION

¶ 43 Because the evidence was closely balanced in the instant case, the omission of the cautionary instruction failed to properly instruct the jury and the resulting conviction may have been a result of error. We find that the failure to instruct the jury pursuant to I.P.I. Criminal 4th No. 11.66 was plain error that requires a new trial. In light of our finding that the evidence was closely balanced and the trial court's failure to instruct the jury was plain error that requires a new trial, we need not reach any of the other issues raised by defendant.

¶ 44 For the foregoing reasons, the judgment of the circuit court of Washington County is reversed and the cause remanded.

¶ 45 Reversed and remanded.