2016 IL App (2d) 140184-U
No. 2-14-0184
Order filed March 30, 2016



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>WILLIAM VAZQUEZ,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Du Page County.<br><br><br><br>No. 05-CM-6830<br><br>Honorable Jane H. Mitton, Judge, Presiding |

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held*: Defendant showed first-prong plain error in the trial court's admission of other-crimes evidence: the case was close, as the State's evidence was not strong, and the voluminous other-crimes evidence (including other instances of the crime charged) could not be justified by any alleged need to provide context or a continuing narrative; the error was compounded by the lack of a limiting instruction; as defendant had served his sentence, and as the State offered no interest to justify a retrial, we reverse his conviction outright.

¶ 2 Defendant, William Vazquez, appeals from his conviction of contributing to the delinquency of a child (720 ILCS 130/2a (West 2004)). He argues that his jury trial exhibited plain error in the form of the State's presentation of inadmissible other-crimes evidence

combined with jury instructions that failed to limit the use of that evidence. Specifically, he asserts that the State introduced evidence tending to show several uncharged instances of defendant's contributing to the delinquency of B.P., the victim here, but proffered jury instructions that allowed the jurors to use the evidence of the uncharged offenses as substantive evidence of guilt. He further asks that, following the precedent of *People v. Campbell*, 224 Ill. 2d 80, 87-88 (2006), we reverse his conviction outright, something that we declined to do when we vacated his two convictions that resulted from his original trial (*People v. Vazquez*, 2011 IL App (2d) 091155, ¶¶ 17-21). We hold that plain error occurred; the combination of evidence that placed significant emphasis on uncharged offenses and jury instructions that failed to put any limitation on the uses of the other-crimes evidence resulted in a trial that did not comport with basic due-process standards. As defendant requests, we decline to remand the matter for a possible third trial; we conclude that the State has failed to set out its interest in a second retrial. We therefore reverse.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by complaint with two misdemeanors: contributing to the delinquency of a child (720 ILCS 130/2a (West 2004)) and harboring a runaway (720 ILCS 5/10-6(a) (West 2004)). The specifics of the first count were as follows: "Defendant knowingly caused [B.P.], a child under the age of 18 years, to become a delinquent child in that he allowed him access to his residence ***, while [B.P.] was truant from school, has had [*sic*] access to a Dodge Ram *** and has provided alcohol to while at the residence for the child."

¶ 5 The first time this case was before this court, a jury had convicted defendant of both of the charged offenses. Defendant argued that the trial court failed to admonish him properly before permitting him to conduct his own defense and that his convictions therefore had to be

vacated. The State agreed. The parties disagreed as to whether the rule in *Campbell* made remand unnecessary. *Campbell* held that, where a traffic defendant was not properly admonished of his right to counsel, and given that "defendant ha[d] already discharged his sentence, *** a new trial therefore would be neither equitable nor productive." *Campbell*, 224 Ill. 2d at 87. The parties agreed that defendant had already fully served his sentence but disagreed whether the rule in *Campbell* required the outright reversal of his convictions. The State "implie[d] that the circumstances in *Campbell* [were] distinguishable because of the disparity in the seriousness of the *** offenses, pointing to the fact that the defendant in *Campbell* was convicted [merely] of driving with a suspended license." *Vazquez*, 2011 IL App (2d) 091155, ¶ 16. We agreed with the State, concluding that *Campbell* was distinguishable in that a traffic offense is *malum prohibitum*, whereas the offenses at issue were *malum in se*, and we remanded with leave to retry defendant. *Vazquez*, 2011 IL App (2d) 091155, ¶¶ 17-21.

¶ 6 On remand, defendant again informed the court of his intention to proceed *pro se*. The court admonished him of the possible penalties, telling him that he faced as much as a year in jail. Defendant remonstrated, asserting that this court's mandate precluded further punishment. That issue was not resolved until defendant's sentencing.

¶ 7 The State's opening statement at the second trial included a narrative of defendant's association with B.P. Defendant encountered B.P., then 15 years old, at a train station while B.P. was commuting to a summer job. Defendant offered B.P. a job painting his apartment. A few months later, defendant again encountered B.P. at the station and offered him a painting job. The second time, B.P. accepted. When B.P. had been painting for "a while," defendant asked him if he "smoke[d] weed." After that, B.P. began to spend more time at defendant's apartment. Defendant gave B.P. access to marijuana and alcohol, allowed B.P. to drive his truck, and gave

B.P. a cell phone. B.P.'s school attendance dropped and he started using drugs and alcohol regularly. On November 19, 2005, B.P.'s father, Gregory P., filed a runaway report with the police. Two days later, defendant petitioned to be B.P.'s guardian. The day after, the police came to the apartment to arrest defendant for the current charges.

¶ 8 Defendant, who was *pro se*, gave an opening statement portraying his association with B.P. as having arisen from repeated meetings at the train station. B.P. had a practice of asking for cigarettes, and defendant sometimes gave them to him. As they had more conversations, defendant came to think that B.P. lacked parental care. Defendant also told B.P. where he lived, which was near the station. He learned that B.P.'s parents had divorced and that he had lived with his mother in Arizona until she was arrested. B.P. also described mistreatment by his father. Defendant, who often worked nights, gave B.P. a key to his apartment to allow him to use facilities if he needed them. He believed that B.P. stayed with his father when in school and with friends at other times. In mid-November 2005, B.P. ran away from his father and called defendant. Defendant told him to go home, but B.P. said that he was afraid of physical abuse. Defendant then raised the possibility of seeking guardianship, and he proceeded to file a petition supported by documents that B.P. had signed.

¶ 9 B.P. was the State's first witness. In the summer of 2005, he was taking a train every day from Cicero, where he lived with his father, to Bensenville, where he had a job at a water park. Defendant approached B.P. as B.P. was in Bensenville going home and asked B.P. if he would like to work for defendant doing odd jobs. B.P. said that he might be interested, defendant gave him a phone number, but B.P. did not call. They met again on the train "a few months later"; this was in late August, shortly before school was due to start. Defendant again said that he could use someone to do some work for him and again gave him a phone number. B.P. called it

a few days later and he and defendant discussed his doing some indoor painting and pet care for defendant. B.P. started working for defendant after school; defendant would pick him up at school. B.P. worked for defendant for several months, never telling his father. One day, defendant asked B.P. if he smoked, which B.P. took to mean marijuana. B.P. said that he did not. Defendant offered him both cigarettes and marijuana, and he started smoking both. They would smoke together. Initially, defendant bought the marijuana, but, after a while, defendant had B.P. go out to buy marijuana every Saturday. At some point, B.P. started sleeping at defendant's apartment. Because of the change in residence, he changed schools, but continued at first to go to school every day. However, he dropped out after a few months.

¶ 10 On October 23, 2005, the police came to defendant's apartment on a noise complaint. B.P. and his friends were drinking alcohol supplied by defendant. The police arrested B.P. in that incident. Defendant took B.P. to court and represented to the judge that he was B.P.'s guardian. Defendant also allowed B.P. to drive his vehicle every day. On November 14, 2005, B.P. was involved in an accident while driving it. Defendant had told him that, if he ever was stopped, he should tell the police that he had taken defendant's keys while defendant was sleeping.

¶ 11 On November 21, 2005, B.P. went with defendant to court in support of defendant's guardianship petition. B.P. had executed an affidavit at defendant's request, but defendant had written it out without consulting B.P., and parts of it were false. Defendant promised him money, drugs, and a car. The State went through the affidavit point by point, asking him which parts were true and which were false. At the guardianship proceeding, B.P. swore that all these things were true.

¶ 12 Defendant gave B.P. a cell phone to use. He took it to school where it was confiscated. Defendant came to the school and represented himself as B.P.'s father to get the phone back.

¶ 13 Defendant never told B.P. that he could not stay more than one night, never suggested that B.P. should call his father to explain where he was, and never himself called B.P.'s father.

¶ 14 Defendant did not object to any of the State's questions to B.P. Defendant cross-examined B.P. briefly and largely ineffectually. On redirect, B.P. testified that defendant had a one-bedroom apartment and allowed B.P. to sleep in the bedroom, while he slept in the living room.

¶ 15 Gregory P., B.P.'s father, was the State's second witness. He testified that he had not given B.P. permission to have a cell phone. On November 19, 2005, he received a message from B.P.'s high school to come retrieve his son's confiscated cell phone. When he got to the school, he learned that "[B.P.]'s father" had already come to collect the phone. At that point, he had not seen B.P. for a few days. B.P. had been home on November 17, but was missing on the 18th. On the 19th, Gregory reported B.P. to the police as a runaway. On November 22, Gregory received a letter from the Bensenville police informing him that his son had been involved in a vehicle accident. Gregory did not allow B.P. access to any vehicle. At that point, he had not had any direct or indirect word from B.P. since the phone incident. He contacted the police and learned that the vehicle involved was defendant's. This contact led to the police locating B.P. at defendant's apartment. This was the first that Gregory had heard of defendant. Before November 2005, B.P. had never smoked cigarettes or marijuana and had never drunk alcohol in his presence.

¶ 16 The State's third witness was Officer Richard J. La Porte of the Bensenville police. He responded to the scene of the accident, in which B.P., in defendant's vehicle, rear-ended another

vehicle. Defendant arrived on the scene and identified himself as B.P.'s uncle. La Porte also spoke to Gregory when Gregory came to the station because of the letter. Gregory told him "that his son recently was missing school, I believe he stated approximately about eight days that he had missed recently." On learning that B.P. had been reported missing, La Porte went to defendant's apartment. Defendant said that B.P. would be there later, but B.P. came into the room smoking a cigarette. La Porte took B.P. to the police station. There, B.P. told La Porte that defendant was "posing as his uncle, but on two occasions [he] posed as his father, one being the time that he had to come pick up the cell phone at his school, the other was a court date where he previously had a citation for *** consumption of alcohol as a minor."

¶ 17 Defendant testified—or, for the most part, tried to testify—on his own behalf; he had great difficulty with the format of testifying without anyone to question him. He denied being the source of the alcohol at B.P.'s party. He stated that B.P. had told the truth when he originally said that he did not have permission to take defendant's vehicle. B.P. took the keys while defendant was asleep. In the months that B.P. had stayed with him, he tried to impress on him the importance of going to school. He said that he was in regular contact with B.P.'s teachers and that he worked to make sure that B.P. did his homework. He explained, "I had a choice, either become his legal guardian *** or allow[] him to become a street urchin, or child, or whatever."

¶ 18 Under cross-examination, he denied buying drugs or alcohol for B.P. He was aware that B.P. was smoking marijuana, but he had never bought it for B.P. or seen him smoke it.

¶ 19 On redirect, defendant stated that he started paying attention to B.P. at the train station because when they spoke he learned that B.P. was going without food or a place to shower. While B.P. was staying with him, he had him do chores and gave him an allowance.

¶ 20 The State in closing first described the elements of count II, harboring a runaway. Concerning the first count, contributing to the delinquency of a child, the State defined "delinquent" as "any minor who prior to his 17th birthday has violated or attempted to violate any federal, state or municipal ordinance." This was a direct quotation from the jury instructions. The State argued that such a violation "happened multiple times while [B.P.] was under the supervision of the defendant." "He got tickets for drinking. He got arrested for driving without a driver's license with the defendant's permission in the defendant's vehicle. So we know that he committed multiple delinquent acts *** while he was with the defendant. And the defendant encouraged that behavior. He bought him beer. He bought him marijuana. He bought him cigarettes."

¶ 21 The jury instructions for contributing to the delinquency of a child did not state what offenses defendant was alleged to have encouraged B.P. to commit and did not define any of the offenses that he might have committed. They followed the definitions that the State used in its closing argument.

¶ 22 The jury found defendant not guilty of harboring a runaway and guilty of contributing to the delinquency of a child. Defendant filed a largely generic motion for a new trial that did not raise evidentiary issues. The court denied this motion.

¶ 23 The court imposed a sentence of 300 days in jail, but, disagreeing with the State, allowed credit for the 88 days defendant served before the previous appeal. It did note a new violation of an order of protection and a battery. However, its explanation of the sentence focused on defendant's "truly reprehensible" conduct. Defendant moved for reconsideration of his sentence and the court reduced his jail time to 248 days. Defendant filed a notice of appeal.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant argues that his trial exhibited plain error. Specifically, he argues that the State improperly introduced evidence that tended to show several uncharged instances of contributing to the delinquency of a child and, further, that the jury instructions allowed the jurors to use the evidence of the uncharged offenses as substantive evidence of guilt. Defendant concedes that he failed to object to the admission of the evidence or to propose alternative jury instructions, but argues that, because the error was clear and the evidence closely balanced, his claims are reviewable as first-prong plain error. He further argues that, under the rule in *Campbell*, because he fully served the sentence imposed after each trial, and because the State already has had one opportunity to retry him, the remedy here should be outright reversal of his conviction.

¶ 26 The State responds that the other-crimes evidence was admissible as providing the context of the charged offenses. In particular, it argues that it used that evidence properly to show the development of the relationship between defendant and B.P. Further, it denies that the evidence was closely balanced. The State does not address defendant's argument that, if error occurred, the proper remedy here is outright reversal.

¶ 27 We agree with defendant that first-prong plain error occurred here. Although we agree that much or most of the other-crimes evidence was inadmissible, our plain-error analysis will focus on the failure of the jury instructions to guide the jury in the use of that evidence. Plain error is error that is clear or obvious. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). We might deem the evidence error, taken alone, to be clear error, but the explanation of the error does have nuances. By contrast, the error in the jury instructions was stark and unmistakable.

¶ 28 Generally, "[t]o preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion." *People v. Thompson*, 238 Ill. 2d 598, 611

(2010). Beyond that, a defendant forfeits ordinary review of a claim of error in the jury instructions if he or she either fails to object to the instruction at issue or fails to offer an alternative instruction. *People v. Herron*, 215 Ill. 2d 167, 175 (2005). However, plain-error review allows a court to consider otherwise forfeited claims of error. *Thompson*, 238 Ill. 2d at 613. Specifically, it may do so under two conditions:

> "(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.

Defendant argues that the first condition was met, and we agree.

¶ 29 We first consider the admissibility of the other-crimes evidence. We conclude that the evidence pushed past the boundaries of relevant exceptions and was presented in a pattern encouraging its improper use. We then address the jury instructions, concluding that they were inadequate and clearly insufficient to allow the jury to understand what evidence was other-crimes evidence and what evidence was direct evidence of the charged offenses. Finally, we conclude that outright reversal is proper here. Here, as in *Campbell*, the State has failed to explain its interest in retrial.

¶ 30 The State here presented other-crimes evidence that fell under the prohibition against using such evidence to show the defendant's character. The rules of evidence provide that "[e]vidence of other crimes, wrongs, or acts [('other-crimes evidence')] is not admissible to prove the character of a person in order to show action in conformity therewith." Ill. R. Evid.

404(b) (eff. Jan. 1, 2011). Such evidence *is*, however, admissible for purposes other than showing a defendant's character. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). A statutory exception for the use of such evidence in the prosecution of certain sex crimes also exists. See 725 ILCS 5/115-7.3 (West 2014). The State asserts that its other-crimes evidence "went to the context of the relationship between defendant and B.P." and, further, fell into the exception for other crimes that are part of the "continuing narrative of the event giving rise to the offense or [are] intertwined with the event charged." For reasons that we next address, we do not agree. To summarize, the evidence was not part of a continuing narrative—a linked causal chain—as is necessary for the continuing-narrative exception to apply. Further, no general exception exists for evidence that explains the context of a relationship.

¶ 31 The evidence here was not part of a "continuing narrative," as that phrase is used to describe a permissible use of other-crimes evidence. The exception is one that allows evidence of a tightly linked chain of events. For instance, when a charged battery was part of an ongoing confrontation that started with an earlier battery by the same defendant, the rule against other-crimes evidence did not require the State to omit evidence of the earlier battery. *People v. Thompson*, 359 Ill. App. 3d 947, 950-51 (2005). Here, the State argues that the ongoing narrative includes the circumstance that "[d]efendant tempted B.P. with various vices from the moment he first saw him ***. Defendant's actions formed a significant part of the facts that led to B.P. staying at Defendant's apartment while truant from school, driving [d]efendant's vehicle and drinking alcohol at [d]efendant's apartment." This was not a narrative of something like a chain reaction of events. Instead, as the State admits, it was mere "context." It added color, but in no way was necessary for a coherent narrative.

¶ 32 We further do not agree that creating an overall narrative of *a relationship*, as the State suggests it intended, is a proper basis for admission of this other-crimes evidence. To create a general other-crimes exception to allow portrayal of a relationship narrative would create an exception with potential to swallow the rule, as a person's character and the nature of his or her relationships are rarely easily separable. Moreover, where the State is most likely to need evidence of the nature of a relationship, a recognized exception already exists. Courts permit other-crimes evidence "to explain aspects of the crime that would otherwise be implausible or inexplicable." *People v. Slater*, 393 Ill. App. 3d 977, 992-93 (2009). This, for instance, allows evidence of a defendant's ties as a member of a street gang to explain a crime motivated by gang rivalries. *People v. Cavazos*, 2015 IL App (2d) 120444, ¶¶ 76-77. That, however, is not why the State wanted to use the evidence at issue here. Nothing was inexplicable or even surprising about a teenage boy being willing to use alcohol, skip school, or drive—license or no. Rather, the State here explains that it was showing defendant's overall tendency to be a corrupting influence *on B.P.* That cuts very close to the precise prohibition of Rule 404(b)—showing a defendant's character as evidence of propensity to commit the offense.

¶ 33 Here, we should note that, although the State elicited evidence of multiple uncharged crimes of defendant's—more than could be counted without deliberate effort—the instances he raises in this appeal are instances of potential contribution to the delinquency of a child. Defendant particularly asks us to address the evidence that he encouraged B.P.'s use of cigarettes and marijuana, and, indeed, sent B.P. to a dealer to buy marijuana. The introduction of these particular acts invited the jury to confuse this evidence of context with direct evidence of the offense.

¶ 34 Once the State put on other-crimes evidence of the kind just discussed, it became imperative that the jury receive instructions that limited the use of that evidence. We agree with defendant that the instructions as they stood did nothing to prevent the jury from using the other-crimes evidence as substantive proof of guilt. The instructions defining "contributing to the delinquency of a child" simply paraphrased the statute defining that offense and the statute defining a delinquent child. The jury was thus instructed that the State had the burden to show only that defendant caused, aided, or encouraged B.P. to violate a law or ordinance. Therefore, the jury could have understood that it could find defendant guilty if it found that defendant had caused or encouraged B.P. to violate *any* law or ordinance. Indeed, the instructions did not make clear that the jury needed to agree on *which* law or ordinance defendant caused or encouraged B.P. to violate. Thus, we cannot be certain that the jury deliberated on the charged offense or, indeed, that all the jurors agreed on the specific offense of which defendant was guilty. This kind of defect throws the essential fairness of the trial into question.

¶ 35 The State argues that defendant needed to request limiting instructions and forfeited any claim of error by failing to do so. We reject this argument by way of a first-prong plain-error analysis. However, the technical analysis aside, we note that some care by either the State or the court could have avoided this outcome. The whole of the burden of ensuring a fair trial does not fall on a defendant. "Part of conducting a fundamentally fair trial is ensuring that the jury instructions enable the jury to make a fair determination of the case," and the court may need to mandate such instructions despite the defendant's failure to request them. *People v. Hsiu Yan Chai*, 2014 IL App (2d) 121234, ¶¶ 46-47. Moreover, nothing in our adversarial process compels the State to take advantage of every error made by an unrepresented or poorly

represented defendant. Indeed, neither the State nor the court may abjure the duty to provide a fair trial. *People v. McLain*, 226 Ill. App. 3d 892, 901 (1992).

¶ 36 We agree that, under the rules of evidence, defendant would have ordinarily been the one to request instructions limiting the use of the other-crimes evidence. The rules state that it is only "upon request" that the court must give instructions that "restrict the evidence to its proper purpose or scope." Ill. R. Evid. 105 (eff. Jan. 1, 2011). However, "substantial defects [in criminal jury instructions] are not waived by failure to make timely objections thereto if the interests of justice require." Ill S. Ct. R. 451(c) (eff. Apr. 8, 2013). This rule allows a reviewing court to correct "grave errors"—that is, errors that fall into either of the two plain-error categories. *People v. Valadovinos*, 2014 IL App (1st) 130076, ¶ 25.

¶ 37 Defendant argues that the evidence was closely balanced so that we may find first-prong plain error. We agree. The evidence of the charged offense was not overwhelming. The State had only B.P.'s testimony that he had taken defendant's vehicle with defendant's permission. Similarly, only B.P. testified that defendant had supplied alcohol; defendant denied this. It is hard to find any clear evidence that defendant encouraged B.P.'s truancy; defendant testified that he had tried to keep B.P. in school. Notable too is that B.P. admitted being willing to perjure himself at another's request, albeit as a younger person, and that B.P.'s father had reason to want to discredit defendant, who had accused him of child abuse. The State's argument that the evidence is overwhelming focuses on the evidence that B.P. committed the relevant offenses, which is indeed very strong. The weakness was in the evidence that defendant caused, aided, or encouraged B.P. to take the vehicle, use alcohol, or be truant. On those points, the jury had primarily B.P.'s already impeached testimony, or his father's likely biased testimony, against defendant's. That evidence is not overwhelming.

¶ 38 The final question is the proper remedy here. In defendant's first appeal, the State argued strongly that, because defendant's convictions were of *malum-in-se* offenses, it had an interest in attempting to preserve the convictions through retrial. We agreed, holding that retrial "would be both equitable and productive." *Vazquez*, 2011 IL App (2d) 091155, ¶ 17. Now after a second unacceptable trial, the State does not reassert its interest; indeed, it makes no argument at all, and certainly does not address the equities of holding defendant to trial a third time. Under these particular circumstances, we will not remand a second time.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we reverse defendant's conviction.

¶ 41 Reversed.