2016 IL App (2d) 150129-U
No. 2-15-0129
Order filed November 18, 2016



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Kane County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 13-CF-41 |
| SERGIO TINAJERO, | ) | Honorable Susan Clancy Boles, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

**ORDER**

¶ 1 *Held*: (1) Without the evidence at issue or an official account of the relevant hearing, we could not say that defendant preserved the issue of the admissibility of the evidence or that the trial court abused its discretion by excluding it; (2) defense counsel was not ineffective for failing to object to the trial court's answer to the jury's question about whether each charge pertained to a separate instance: the pattern instruction on the point was sufficiently clear and, in any event, defendant was not prejudiced given the evidence that he committed multiple acts sufficient to sustain his multiple convictions; indeed, by failing to argue prejudice in his original brief, defendant forfeited his claim.

¶ 2 Defendant, Sergio Tinajero, appeals his convictions of four counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) and six counts of aggravated

criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)). He contends that the trial court erred in granting the State's motion *in limine* to exclude evidence that the Department of Children and Family Services (DCFS) initially investigated the allegations and found them unfounded. He also argues that his counsel was ineffective for failing to object to the trial court's answer to a question from the jury. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted in January 2013 in connection with allegations of sexual abuse of his niece D.P., who was nine years old at the time. In regard to predatory criminal sexual assault of a child, two counts alleged that defendant engaged in an act of sexual penetration in that he licked D.P.'s sex organ and two counts alleged that he placed his penis into D.P.'s sex organ. In regard to aggravated criminal sexual abuse, two counts alleged that defendant committed an act of sexual conduct with D.P. when he placed his hand on her sex organ, two counts alleged that he placed his mouth on her breasts, and two counts alleged that he placed her hand on his penis. In December 2014, a jury trial was held.

¶ 5 A pretrial conference was set for August 21, 2014. That same day, the State filed a written motion *in limine* to exclude evidence that DCFS investigated the allegations and found them unfounded. The State argued that the finding was not relevant and that a report of the finding contained hearsay. Also on August 21, 2014, the court in a written order stated that, after the hearing on the motions *in limine*, it granted a motion to compel discovery. The case was then continued with a pretrial conference set for November 20, 2014. On that date, the court entered a written order determining that evidence of the DCFS finding was irrelevant and granting the State's motion to bar the evidence. The report is not in the record. There also is no transcript or substitute for a transcript of the pretrial hearings.

¶ 6 Before jury selection, the potential jurors were instructed that there were 10 counts against defendant. At trial, there was evidence that D.P. first reported the sexual abuse after a social worker overheard her tell another student at school about being licked. She then told the social worker that defendant licked her and touched her private parts. The social worker reported the matter to DCFS. Timothy Martin, a criminal investigator with the State's Attorney's office, interviewed D.P. During the interview, she stated that defendant licked her and touched her with his hand more than once, including on her breast and vaginal areas. She also stated that he touched her vaginal area with his penis more than once while holding her and moving her hips back and forth. She said that he also made her touch his penis with her hand more than once, causing something to come out of it. D.P. indicated that the incidents took place on multiple occasions. There was evidence that, during the time of the alleged abuse, D.P. had trouble eating, but that she began eating normally again after the abuse was discovered and she was no longer allowed to go to defendant's home.

¶ 7 Martin also interviewed defendant, who told him that he did not remember doing any of the things that D.P. alleged. When asked if D.P. was telling the truth, he repeated that he did not remember any of the alleged events happening.

¶ 8 D.P. testified that, when she visited defendant's home, he touched her with both his tongue and hand more than one time and did so in both the kitchen and living room. When asked to circle the spots on an anatomical female drawing to show where he touched her in the living room, D.P. circled the breast and vaginal areas; she then circled those areas again when asked where defendant touched her in the kitchen. She stated that he used both his tongue and hand to touch both spots on her body in both the kitchen and living room.

¶ 9 D.P. next was asked to circle spots on an anatomical drawing of a man to show the parts that defendant used to touch her. D.P. circled the hand, mouth, and penis. She marked the hand and vaginal area on the female drawing to show where defendant touched her with his penis. She said that defendant touched her more than one time.

¶ 10 The jury was given Illinois Pattern Jury Instructions, Criminal No. 26.01 (4th ed. 2000) which stated in part:

> "The defendant is charged with the offenses of predatory criminal sexual assault of a child and aggravated criminal sexual abuse. You will receive twenty forms of verdict. As to each charge, you will be provided with both a 'not guilty' and 'guilty' form of verdict. From these two verdict forms with regard to a particular charge, you should select the one verdict form that reflects your verdict on that charge and sign it as I have stated. Do not write on the other verdict form on that charge. Sign only one verdict form on that charge."

¶ 11 The verdict forms differentiated among the charges by putting the specific allegations in parentheses stating "(hand-penis)," "(licked-sex organ)," "(penis-sex organ)," (mouth-breast)," or "(hand-sex organ)." During deliberations, the jury sent a question inquiring if multiple counts were the same as incidents. Defense counsel initially stated a proposed response that the jury was "to consider each multiple count as being supported by a specific sort of facts that may amount—that may or may not amount to an incident." The court proposed responding that "the law you are to follow is contained in these instructions. Please refer to the instructions and continue your deliberations." Defense counsel then stated, "[t]hat is the safest course of action" and deferred to the court's response, which was then given to the jury.

¶ 12 The jury found defendant guilty on all counts. Defendant moved for a new trial, arguing in part that the court erred in granting the State's motion to exclude evidence of the DCFS finding that the case was unfounded. The court entered a written order denying the motion, for the reasons stated on the record. There is no transcript or substitute for a transcript of that hearing in the record. Defendant was sentenced to seven years' incarceration on each conviction of predatory criminal sexual assault of a child, with all terms to be served consecutively. He was sentenced to three years on each conviction of aggravated criminal sexual abuse, with two terms to be served consecutively and the remaining served concurrently. He appeals.

¶ 13 II. ANALYSIS

¶ 14 Defendant first contends that the trial court erred in granting the State's motion to exclude the DCFS finding that the allegations were unfounded. He argues that the report was relevant. The State argues that defendant forfeited this argument by failing to object to its motion to exclude. The State also notes that the DCFS report is not in the record. Aside from the absence of the report in the record, there also is no transcript or substitute for a transcript of the hearing on the matter.

¶ 15 As a general rule, a trial court's ruling on a motion *in limine* regarding the introduction or exclusion of evidence is reviewed for an abuse of discretion. *People v. Kirchner*, 194 Ill. 2d 502, 539 (2000). "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In the absence of a complete record, especially when an abuse-of-discretion standard applies, we must

presume that the trial court acted properly. See *id*. at 392 (without transcript of hearing on motion, "there is no basis for holding that the trial court abused discretion in denying the motion").

¶ 16 Here, not only is the report not in the record, there also is no transcript of the hearing on the matter. Thus, we are unable to determine whether defendant opposed the State's motion so as to preserve the matter for appellate review. We are further unable to assess the relevancy of the report or the trial court's reasoning. Accordingly, in the absence of a sufficient record, we presume that the trial court acted properly in excluding it.

¶ 17 Defendant next argues that his counsel was ineffective for failing to object to the trial court's response to the jury question concerning multiple counts and for failing to propose an adequate alternate instruction.

¶ 18 In determining whether a defendant was denied effective assistance of counsel, we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance resulted in prejudice to the defendant. *Id*. at 687; *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). To establish deficient performance, the defendant must show that his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219 (2004). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 219-20. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 19 "The function of jury instructions is to convey to the jury the law that applies to the evidence presented." *People v. Herron*, 215 Ill. 2d 167, 187 (2005). "Jury instructions should not be misleading or confusing (see *People v. Bush*, 157 Ill. 2d 248, 254 (1993)), but their correctness depends upon not whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them." *Id*. at 187-88. "[T]he decision to give or refuse a non-[Illinois Pattern Jury Instruction] is a matter within the sound discretion of the trial court." *People v. Thomas*, 175 Ill. App. 3d 521, 528 (1988).

¶ 20 "A trial court may exercise its discretion and properly decline to answer a jury's inquiries where the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or would potentially mislead the jury, when the jury's inquiry involves a question of fact, or if the giving of an answer would cause the court to express an opinion which would likely direct a verdict one way or another." *People v. Childs*, 159 Ill. 2d 217, 228 (1994). "However, jurors are entitled to have their inquiries answered. Thus, the general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion." *Id*. at 228-29.

¶ 21 Here, the jury was given the proper pattern instruction for cases involving multiple counts. The instruction made clear that the 10 counts pertained to separate acts requiring separate verdicts, even where they described similar conduct. Defendant on appeal has not pointed to an appropriate alternate instruction that would have made the matter clearer. In any event, even if defense counsel's failure to object to the court's response or press for an alternate instruction could be deemed deficient, defendant has not shown prejudice. The evidence against defendant was overwhelming, and it was clear that D.P. reported multiple acts that supported a

finding of guilt on all 10 counts. Although defendant points to the lack of specific dates, times, and locations, the record clearly shows the multiple acts.

¶ 22 Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016), provides that parties forfeit any points not argued on appeal. Specifically, points not argued in the appellant's brief are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 23. Our supreme court " 'has repeatedly held an appellant's failure to argue a point in the opening brief results in forfeiture under Supreme Court Rule 341(h)(7).' " *People v. Polk*, 2014 IL App (1st) 122017, ¶ 49 (quoting *BAC Home Loans Servicing, LP*, 2014 IL 116311, ¶ 23). A "reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository into which the appealing party may dump the burden of argument and research." *People v. Hood*, 210 Ill. App. 3d 743, 746 (1991). We note that defendant made no effort to argue prejudice in his appellant's brief and did so only in his reply brief. Accordingly, defendant forfeited his claim of ineffective assistance of counsel.

¶ 23 III. CONCLUSION

Defendant has not shown that the trial court erred in granting the State's motion *in limine* to exclude evidence, nor has he shown ineffective assistance of counsel. Accordingly, the judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 24 Affirmed.