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2016 IL App (3d) 140118-U

Order filed November 30, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0118
v.	)	Circuit No. 11-CF-1198
	)	
TORLANDO McDONALD,	)	Honorable
	)	Stephen A. Kouri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice O'Brien concurred in the judgment.
Justice Holdridge dissented.

ORDER

¶ 1 *Held*: The trial court's failure to instruct the jury in accordance with section 115-10(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10(c) (West 2010)), and the court's error constituted plain error and denied defendant his right to a fair trial.

¶ 2 Defendant, Torlando McDonald, appeals from his convictions and sentence for predatory criminal sexual assault of a child and aggravated criminal sexual abuse. Defendant argues the trial court's failure to instruct the jury on how to weigh the victim's hearsay statements in

accordance with section 115-10(c) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10(c) (West 2010)) denied him a fair trial. We reverse and remand for a new trial.

¶ 3 FACTS

¶ 4 The State charged defendant by indictment with predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)) based on events that occurred between February and March 2011 involving defendant and a 12-year-old female victim.

¶ 5 Pursuant to section 115-10(c) of the Code (725 ILCS 5/115-10(c) (West 2010)), the State moved to admit multiple, but separate hearsay statements the victim provided to Shundra Parker, Officer Craig Williams, and Detective Craig Johnson describing sexual acts initiated by defendant. The trial court held an evidentiary hearing on the State's motion. During this hearing, the State presented the testimony of all three witnesses who had separate conversations with the victim before defendant's arrest. The court also reviewed and considered the videotaped interview between the victim and Officer Johnson. Following the hearing, the trial court allowed the State to introduce the testimony of Parker, Officer Williams, and Officer Johnson, and to introduce the videotaped interview of the victim under the standard and guidelines set forth in section 115-10(c) of the Code.

¶ 6 At trial, Parker testified that she worked at the Center for the Prevention of Abuse in Peoria and ran a program called Helping All Relationships to Be Safe (HARTS). In 2011, Parker taught the HARTS program at victim's school. The victim was a student assigned to the program. The program involved weekly sessions with 8-10 girls, including the victim. The sessions involved self-esteem issues, abuse, friendships, and grades.

¶ 7 On March 17, 2011, the victim approached Parker in the middle of a HARTS lesson and asked to speak with her. Parker asked the victim to wait until the end of the session. During a private conversation after the session, the victim told Parker that defendant had been touching the victim and licking her vagina. Parker was unsure how many times the victim said defendant performed the sex acts, but thought that it was around five times. The victim told Parker that defendant had attempted sexual intercourse with the victim, but "it [would not] go in." Parker described the victim as frightened and emotional when describing defendant's acts. Following this private conversation, Parker contacted the victim's mother and requested her to come to the school. When the mother arrived, the victim repeated her statement to her mother.

¶ 8 Officer Williams testified that on March 17, 2011, he responded to a call at 2731 West Seibold in Peoria around 3 p.m. and spoke to the victim and her mother outside of their home. Defendant was not present during this conversation. The victim told Williams that defendant had engaged in sexual contact with her. She explained defendant would take her to a bedroom upstairs in the home, pull her pants and underwear down, and lick her vagina. The victim indicated to Williams that this happened 5-15 times, and the most recent event had occurred two days earlier. The victim told Williams that defendant tried to have sexual intercourse with her, but "it [did not] work." The victim stated that on March 15, 2011, when the victim told defendant she was going to tell her mother what had happened, defendant gave her a kiss on the mouth and told her good-bye.

¶ 9 Detective Johnson testified that he videotaped an interview with the victim the next day at the Peoria County child advocacy center. The State published the video recording of the interview before the jury. In the interview, the victim said she told Parker that she had been molested by defendant for five weeks. Defendant often gave her $4 or $5, or bought her clothes

and candy. The victim also told Johnson during the videotaped interview that around February 25, 2011, defendant came into the kitchen, kissed her on the lips, touched her vagina, and continued to walk past her.

¶ 10 Another time, on February 28, 2011, the victim was upstairs playing in a bedroom when defendant entered the bedroom, kissed her on the lips, pulled down her pants, pushed her onto the bed, and asked her if she ever had anybody do this to her before. The victim told defendant no. When defendant began to lick her vagina, she closed her legs, but defendant opened them again. After a few minutes, the victim told defendant that someone was calling for her, left the room, and went downstairs.

¶ 11 Johnson asked the victim if defendant touched her anywhere else. In response, the victim stated defendant would squeeze her chest and touch her vagina. In addition, defendant would put his hand in her shirt and touch her chest when he licked her vagina. On one occasion, defendant tried to get her to touch his penis, he unzipped his pants so that she could see it, but put it away when she turned around.

¶ 12 The victim also told Johnson during the videotaped interview that on March 4 or 5, 2011, defendant showed her a video recording of an adult female performing oral sex upon defendant. The video was on defendant's cell phone. Defendant explained to the victim that many women perform similar sexual acts. The victim told defendant she was not one of those women and went downstairs.

¶ 13 The victim explained to Johnson that defendant licked her vagina on four or five occasions, and it lasted four to five minutes each time. When the victim tried to stand up, defendant would pull her back down until she would invent an excuse to leave. According to the victim, she did not touch defendant's penis or perform oral sex on him. She also stated that

defendant never touched her with his penis. Defendant tried to have sexual intercourse with her once by asking her why she was a virgin, taking his shirt off, and beginning to unbuckle his pants, but the victim stated that she jumped off the bed and ran downstairs. Defendant did not attempt to engage in sexual intercourse with her again.

¶ 14 Near the end of the victim's interview with Johnson, she stated that the day before she spoke with Parker and Williams, she told defendant that she planned on telling her mother what had happened. Defendant kissed her on the cheek and asked her why she would do that to him. He told her it was all her fault. Defendant asked her not to tell anyone because he had several children and would go to jail. Defendant asked her to wait a year so that he could make $30,000.

¶ 15 In his trial testimony, Johnson stated that he arrested defendant on December 17, 2011, and seized two cell phones from defendant at that time. One cell phone contained a video of defendant receiving oral sex from an adult female. Three still photos captured from the video were shown to the jury. One image showed defendant's face, another picture showed the face of an adult female, and the third showed that woman performing oral sex on defendant.

¶ 16 The victim also testified during the jury trial. She testified that she was 12 years old in February and March of 2011 and lived in a two-story house in Peoria, Illinois with her mother, stepfather, brothers, and an aunt. The victim had known defendant her entire life and explained that he would stay at the home a few days, leave, and then return again. Defendant would give the victim $4 or $5, candy, and clothes during that time period.

¶ 17 On February 25, 2011, the victim returned home from school and was standing near the refrigerator in the kitchen. At that time, defendant walked passed her, touched her vagina, and walked away. Defendant did not touch her inappropriately again that day.

¶ 18 On another evening in February, the victim was alone upstairs in a bedroom playing with toys while everyone else was downstairs. Defendant entered the room and shut the door behind him. He pulled down the victim's pants, opened her legs, and began performing oral sex. She recalled the incident did not last long, because she made an excuse to leave the room by pretending that her mother had called her name. According to the victim's trial testimony, defendant performed the same act four or five more times on other occasions in the upstairs level of the home.

¶ 19 During her trial testimony, the victim explained in early March defendant asked her to perform oral sex on him. When she refused, defendant told her that all the girls do it and showed her a video of a woman performing oral sex on defendant. According to the victim, she tried to look away, told defendant that she did not do that, and went downstairs. The State showed the victim screen captures from the video at trial and she identified the screen shots as pictures from the video defendant showed to her. On cross-examination, the victim acknowledged that defendant occasionally allowed her to use his cell phone to download music for defendant.

¶ 20 A few days later, on approximately March 8 or 10, defendant unzipped his pants in front of the victim while they were together in the victim's bedroom. The victim saw defendant's penis, but then looked away. When the victim told defendant she would not give him oral sex, defendant told her she was scared and would be "lame" when she grew older.

¶ 21 The victim told defendant that she planned to tell her mother what had been going on because she did not like what defendant was doing to her. In response, defendant asked her, "[w]hy would you do this to me? I'm your cousin." Defendant also told the victim to think about her little cousins (defendant's children) who would be without their father if he went to jail. Defendant asked her to give him about a year to try and make $30,000 and leave town.

¶ 22 On March 17, 2011, the victim approached Parker, the instructor of her HARTS program at school, and asked her in the middle of the lesson if they could speak. Parker asked the class to leave the room and the victim told Parker that defendant had been assaulting her. Parker was the first person the victim told regarding her allegations. Parker called the victim's mother to come to the school and then the victim repeated her allegations.

¶ 23 During the defense's case-in-chief, Lakendra Green, defendant's fiancée, testified that she first started dating defendant in November 2010. A week after Green met defendant, defendant moved in with Green and no longer stayed at the home where the victim lived.

¶ 24 Around January 2011, Green invited the victim over to Green's house for a movie night The victim asked Green for a pair of eyeglasses that were located on the counter. When Green said no, the victim said she knew how to get what she wanted when people told her no.

¶ 25 The defense rested and the trial court held a jury instruction conference. Neither party requested an instruction in compliance with section 115-10(c) of the Code. The State tendered instructions on the definition and elements of aggravated criminal sexual abuse. The trial court instructed the jury:

> "In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his age, his memory, his manner while testifying, any interest, bias or prejudice he may have and the reasonableness of his testimony considered in the light of all the evidence in the case."

The trial court also instructed the jury:

> "The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind may be considered by you only for the limited purpose of

deciding the weight to be given the testimony you heard from the witness in this courtroom. It is for you to determine what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made."

¶ 26 In addition, the State tendered verdict forms to the court which erroneously listed the charge as aggravated criminal sexual "assault." The court provided these verdict forms to the jury without noticing or correcting the undetected scrivener's error. The jury returned a guilty verdict for both counts (predatory criminal sexual assault and aggravated criminal sexual abuse). The trial court denied defendant's motion for a new trial.

¶ 27 Following a sentencing hearing, the trial court sentenced defendant to 25 years' imprisonment. The trial court denied defendant's motion to reconsider his sentence.

¶ 28 ANALYSIS

¶ 29 On appeal, defendant argues the trial court's failure to instruct the jury in accordance with section 115-10(c) denied him a fair trial. Defendant acknowledges that he did not preserve the error for review because he failed to tender the instruction to the court. Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994). Nevertheless, defendant argues that the court's error rises to the level of plain error.

¶ 30 A reviewing court is allowed to consider an unpreserved error under the plain error doctrine 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." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

Before considering whether the evidence is closely balanced, we must first determine whether a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 31 Here, the court admitted three separate out-of-court statements the victim made to Parker, Officer Williams, and Detective Johnson pursuant to section 115-10(a) of the Code. 725 ILCS 5/115-10(a) (West 2010). In addition, the court allowed the victim's videotaped statement to Detective Johnson to be published to the jury.

¶ 32 Section 115-10(a) creates a statutory exception to the hearsay rule. The statute permits hearsay statements of a child under the age of 13 to be admitted at trial in a prosecution for a sexual act committed against the child. 725 ILCS 5/115-10(a) (West 2010). The statute makes admissible:

> "(1) testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another; and
>
> (2) 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)(1), (2) (West 2010).

¶ 33 When hearsay statements are admitted pursuant to this section, the trial 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, *** the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." (Emphasis added.) 725 ILCS 5/115-10(c) (West 2010).

The corresponding Illinois Pattern Jury Instructions, Criminal, No. 11.66 provides for the following instruction:

> "You have before you evidence that [child declarant] made [(a statement) (statements)] concerning [(an)(the)] offense[s] charged in this case. It is for you to determine [whether the statement[s] [(was) (were)] made, and, if so,] what weight should be given to the statement[s]. In making that determination, you should consider the age and maturity of [child declarant], the nature of the statement[s], [and] the circumstances under which [(a) (the)] statement[s] [(was) (were)] made[, and [any other relevant factor regarding the weight and credibility of the statement]." Illinois Pattern Jury Instructions, Criminal, No. 11.66 (4th ed. 2000) (hereinafter, IPI Criminal No. 11.66 (2000)).

¶ 34 Here, neither party nor the court seemed aware that this instruction is mandated by statute when the trier of fact is a jury. Nonetheless, in this case, the statute mandates the court "shall" provide this instruction. Under these circumstances, a criminal trial judge should not treat the process of correctly instructing the jury as a spectator sport. The statute compels this instruction once the trial court allows the State to introduce the out-of-court statements of the victim that would otherwise constitute inadmissible hearsay but for the statutory exception.

¶ 35 Since the instruction omitted by the court is statutorily required, the trial court's failure to provide IPI Criminal No. 11.66 (2000), constitutes a clear and obvious error. The dissent does not take issue with this conclusion. However, the dissent disagrees with our conclusion that the evidence in this case was closely balanced, as defendant now asserts to give rise to a plain error analysis.

¶ 36 When evaluating whether the evidence is closely balanced in any case, "a reviewing court must undertake a commonsense analysis of all the evidence in context" when considering whether the evidence is closely balanced. *People v. Belknap*, 2014 IL 117094, ¶ 50. In this case, the victim complained about sexual misconduct two days after the last sexual act occurred. However, the State's investigation did not result in the collection of any independent physical evidence supporting the victim's complaints about the sexual contact that took place in her upstairs bedroom. Although the State presented images captured from defendant's cell phone that corroborated the victim's statement to Detective Johnson, this video evidence did not document any physical contact between defendant and the victim.

¶ 37 Moreover, the victim spoke to three individuals prior to trial and testified during the trial. Thus, the jury received four versions of events as reported by the victim. Each version contained slight variations, which could be attributable to the circumstances surrounding each statement provided by the victim. First, the victim interrupted her instructor during a class with her peers on March 17. In the conversation that followed the dismissal of all the other students, the victim told Parker that defendant had been licking her vagina. Parker recalled the victim said defendant performed the sexual acts on her about five times, but Parker was not sure of this number. The victim also told Parker that defendant attempted to have sexual intercourse with the victim but "it [would not] go in."

¶ 38 When the victim spoke to Officer Williams later on the same day, she stated defendant tried to have sexual intercourse with her but "it [did not] work." She explained to Officer Williams that defendant licked her vagina about 5-15 times, with the last incident taking place two days earlier. The victim added that on March 15, 2011, defendant simply gave her a kiss on

the mouth and told her good-bye when she told defendant she was going to tell her mother what was happening to her.

¶ 39 During the videotaped interview with Detective Johnson, the victim spoke to Johnson about the failed physical attempt at sexual intercourse. She told Johnson that defendant tried to have intercourse with her once by asking her why she was a virgin. After defendant removed his his shirt started to unbuckle his pants, the proposed intercourse did not take place because the victim said she jumped off the bed and ran downstairs. She told Johnson that defendant never touched her with his penis. In contrast, the victim told Parker, her HARTS teacher, defendant did not have intercourse with her because "it [would not] go in" and told Williams there was no intercourse because "it [did not] work."

¶ 40 Near the end of the victim's interview with Johnson, she stated that the day before the victim spoke with Parker and Williams, she told defendant that she planned on telling her mother about what had happened. Defendant kissed her on the cheek and asked her why she would do that to him. Yet, when she spoke to Officer Williams, the victim said defendant kissed her on the lips and said good-bye.

¶ 41 The young victim was the only eyewitness to the crime but her three out-of-court statements were partially contradictory even though they were provided within a short period of time. Her trial testimony that occurred much later varied as well.

¶ 42 Applying a commonsense standard, we therefore conclude the evidence in this case was closely balanced because the complaining witness contradicted herself with respect to significant details. See *People v. Naylor*, 229 Ill. 2d 584, 608-09 (2008) (finding evidence closely balanced where credibility between two contradictory witnesses was the only basis upon which defendant's guilt or innocence could be decided); *People v. Mitchell*, 155 Ill. 2d 344, 354 (1993)

(finding the failure to provide the jury with the required jury instruction under section 115-10(c) denied defendant a fair trial where the evidence was closely balanced).

¶ 43 We reject the State's reliance on *People v. Sargent*, 239 Ill. 2d 166 (2010) to support its argument that the jury instruction error was harmless because the trial court provided the jury with the general credibility instruction under Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000) in addition to an instruction on how to assess a witness's prior inconsistent statements. We find *Sargent* distinguishable, as it was determined under the second prong of the plain error doctrine**.**

¶ 44 In *Sargent*, similar to the instant case, the trial court failed to provide the jury instruction in accordance with section 115-10(c) of the Code, but did provide the jury instruction regarding assessing witness credibility. *Sargent*, 239 Ill. 2d at 192. The supreme court found the evidence against defendant overwhelming under the first prong of the plain error doctrine because defendant's confession and the victims' statements overwhelmingly established defendant's guilt. *Id*. at 190. The supreme court ultimately rejected defendant's claim under the second prong of the plain error doctrine by noting that the general jury instruction provided to the jury could have been understood to also apply to the minor's hearsay statements, thus, curing the failure to tender the section 115-10(c) instruction. *Id*. at 191.

¶ 45 In this case, the evidence against this defendant cannot rationally be described as overwhelming. We distinguish *Sargent* on this basis, and respectfully note the dissent does not describe the evidence against this defendant as overwhelming.

¶ 46 Again, we stress that had this jury received the instruction at issue, the jury would have been instructed to consider the various circumstances of the first report to the first listener, a teacher. After the dramatic response resulting from the school setting, the jury should have been

allowed to determine whether the second and third statements to a police officer and a detective resulted from a truthful report or fear from providing an untruthful complaint during a class at school addressing similar issues.

¶ 47 Consequently, we conclude the omission of this important jury instruction in this case may have caused the jury to fail to appreciate the duty to consider the circumstances surrounding the first three versions of the crime or crimes the victim provided in an out-of-court setting. In light of this, the failure to provide the critical instruction deprived defendant of his right to have the jury informed that it should assess victim's credibility with some degree of caution regarding the circumstances of the reports.

¶ 48 Consequently, even though the jury received an instruction on general credibility and the victim's inconsistent statements, those instructions are insufficient to cure the omission of the required section 115-10(c) jury instruction.[1] Accordingly, we find the omission of the required instruction denied defendant his right to a fair trial.

¶ 49 CONCLUSION

¶ 50 The judgment of the circuit court of Peoria County is reversed and remanded for further proceedings.

¶ 51 Reversed and remanded.

¶ 52 JUSTICE HOLDRIDGE, dissenting.

¶ 53 I respectfully dissent. In plain error review, the burden of persuasion rests with the defendant. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). As the majority recognizes, "a reviewing court must undertake a commonsense analysis of all the evidence in context" to determine whether the evidence is closely balanced. *People v. Belknap*, 2014 IL 117094, ¶ 50.

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[1]Because the section 115-10(c) error alone warrants reversal for a new trial, we need not address defendant's other claims of error on appeal.

¶ 54 Applying this standard, I would find that the evidence in this case was not closely balanced. The victim provided detailed testimony in court that the defendant sexually assaulted her on several specific occasions. That evidence was corroborated by certain properly admitted out-of-court statements. The defendant did not testify, and no defense witness testified that the defendant was innocent of the charges. No defense witness directly contradicted the victim's account of the crimes. The only "impeachment" evidence that the defendant presented was the defendant's fiancée's testimony that the victim once said that she knew how to get what she wanted when people told her no. Although there were certain inconsistencies between the victim's hearsay statements and her in-court testimony (see *supra* ¶¶ 37-41), these statements were consistent in almost all material respects and the inconsistencies were insufficient to render the victim's testimony incredible. Thus, in my view, a commonsense, qualitative appraisal of the evidence presented in this case confirms that the evidence was not closely balanced.

¶ 55 The cases cited by the majority do not suggest otherwise. In *People v. Naylor*, 229 Ill. 2d 584 (2008), the defendant credibly testified that he was innocent of the charges, directly contradicting the testimony of the State's occurrence witnesses. *Id.* at 590, 608. Thus, the trial court in *Naylor* "was faced with two different versions of events, both of which were credible." *Id.* at 608. As noted above, that was not the case here.[2] In *People v. Mitchell*, 155 Ill. 2d 344, 354 (1993), unlike this case, there were "serious contradictions" in the minor victim's trial testimony.

¶ 56 Moreover, in my view, the general jury instruction that the trial court gave on witness credibility (Illinois Pattern Jury Instruction, Criminal, No. 1.02 (4th ed. 2000)), together with the court's instruction regarding the assessment of inconsistent prior statement by a witness, cured

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[2]It is worth noting that, even in cases involving conflicting witness testimony, the evidence is not closely balanced for plain error purposes if one party's evidence is demonstrably more credible or qualitatively stronger than the opposing party's evidence. *People v. White*, 2011 IL 109689, ¶ 139; *People v. Sebby*, 2015 IL App (3d) 130214, ¶ 42.

any prejudice that the defendant might otherwise have suffered by the omission of the required instruction under section 115-10(c) of the Code. See generally *People v. Sargent*, 239 Ill. 2d 166, 192-94 (2010).

¶ 57 For all these reasons, I disagree with the majority's conclusion that the trial court's failure to give the section 115-10(c) instruction constituted reversible plain error. I have considered the defendant's other arguments for reversal and I find them to be without merit. I would therefore affirm the defendant's conviction.