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2016 IL App (3d) 140160-U

Order filed April 18, 2016

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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,	)	
v.	)	Appeal No. 3-14-0160
	)	Circuit No. 13-CF-262
TERRY A. JONES,	)	Honorable
Defendant-Appellant.	)	Kim L. Kelley, Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justices Holdridge and McDade concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The trial court erred in reading an incorrect prior offense to the jury, but it immediately corrected this error with a curative instruction. (2) The court also erred when it did not admonish potential jurors in compliance with Rule 431(b), but this error was not plain error.

¶ 2 A jury found defendant, Terry A. Jones, guilty of predatory criminal sexual assault of a child, criminal sexual assault, and aggravated criminal sexual abuse. The court imposed a mandatory natural life sentence on the predatory criminal sexual assault charge and did not impose sentences on the remaining charges. On appeal, defendant argues that reversal is

warranted because the court: (1) injected prejudicial other-crimes evidence into the case; and (2) did not admonish potential jurors in compliance with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). We affirm.

¶ 3

### FACTS

¶ 4

The State charged defendant by indictment with predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)), criminal sexual assault (720 ILCS 5/11-1.20(a)(3) (West 2012)), and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(b) (West 2012)). Before trial, the State filed a motion *in limine* to use defendant's 1996 conviction for criminal sexual assault as propensity (725 ILCS 5/115-7.3 (West 2012)) and impeachment evidence. The factual basis set forth a single incident in which defendant assaulted 12-year-old A.R. After a hearing, the court granted the State's motion, and the case proceeded to jury selection.

¶ 5

During jury selection, the court asked members of the venire if they understood the presumption of innocence, the State's burden of proof, and defendant's right to not present evidence on his behalf. See Ill. S. Ct. R. 431(b) (eff. July 1, 2012). At times, the court conflated some of the Rule 431(b) principles as it asked potential jurors whether he or she accepted the propositions. The court did not ask any of the venire persons whether he or she understood and accepted the principle that if defendant does not testify, it cannot be held against him.

¶ 6

At trial, the State called the victim, T.J., to testify. T.J. testified that defendant was her father and Priscilla Jones was her mother. Growing up, T.J. had a close relationship with defendant. When she was 10 years old, T.J. asked defendant for a cell phone. Defendant initially told T.J. to focus on basketball and school. Later in the day, defendant asked T.J. how badly she wanted the cell phone. T.J. said she wanted the phone, and defendant directed T.J. to

the basement. There, defendant touched T.J.'s chest and genitals, forced T.J. to touch his penis, and perform oral sex. Afterwards, defendant gave T.J. a cell phone.

¶ 7 T.J. described other incidents where defendant made her perform oral sex, engage in shared oral sex positions, and one incidence of attempted sexual penetration. Defendant also took T.J. to two purity balls and gave her a purity ring. T.J. thought she did not deserve to wear the ring, and she attempted to talk to defendant about the incidents. Defendant told T.J. that if she discussed the incidents with any other individual, she would be forced to grow up without a father. Defendant also told T.J. that she was the reason for defendant's poor relationship with Priscilla.

¶ 8 When T.J. and her family moved into a new house, defendant's sexual abuse ended. At that time, Priscilla noticed that T.J. acted differently and did not want to talk. T.J. testified that defendant's sexual abuse caused her to become depressed and withdrawn. Around this time, Veronica, T.J.'s older sister, called. T.J. told Veronica about defendant's sexual abuse, and later that night, T.J. awoke to find Veronica watching her sleep. The next morning, Veronica went somewhere with Priscilla and, when they returned, Priscilla kicked defendant out of the house.

¶ 9 A few weeks later, T.J. told a school counselor about defendant's sexual abuse. That afternoon, Priscilla picked T.J. up from school and asked if she had talked to anyone. T.J. said she spoke to the school counselor, and Priscilla indicated that she could lose her job because of T.J.'s allegations. Later, when T.J. spoke to the Department of Children and Family Services (DCFS) investigator, she said that she had fabricated the allegations against defendant. The investigator did not pursue the investigation. At trial, T.J. explained that she lied to the DCFS investigator because she wanted to protect Priscilla's job, she cared about defendant as her father, and she felt responsible for the situation.

¶ 10 T.J. testified she next saw defendant in January 2013 at a family funeral. Defendant attempted to take a picture with the family, but Priscilla would not allow it. T.J. testified that she did not have a close connection with her mother, Priscilla, and as a result, she did not tell Priscilla about defendant's sexual abuse. However, after the incident at the funeral, T.J. told Priscilla the entire story of defendant's sexual abuse. Afterwards, Priscilla called the police.

¶ 11 On cross-examination, T.J. testified that defendant took her cell phone away after he read an inappropriate social media conversation that T.J. had with her cousin. T.J. was not upset because defendant often took her cell phone away as a form of punishment. T.J. also said that Priscilla and defendant were going through a divorce, and that Priscilla was planning to retire from her position in 2013.

¶ 12 After T.J.'s testimony, the State tendered a certified copy of defendant's 1996 conviction. The court instructed the jury that the State:

"tendered evidence of a prior conviction for purposes of propensity \*\*\* of the [d]efendant to commit a sexual offense and is an element of Count 1 and Count 2 of the Bill of Indictment.

That is from case number 96-CF-455. The Court is taking judicial notice of it. It's from its own records, and that was a one-count Information charging predatory criminal sexual assault of a child in that it's alleged on or about December 1, 1995, to December 31, 1995, in Peoria County, [defendant] committed that offense, in that he was 17 years of age or older, knowingly committed an act of sexual penetration with [A.R.], who was under 13 years of age when that act was committed."

The State interjected that the court needed to only read count V of the five-count indictment. The court then instructed the jury to "please disregard [its] reading of that count," and it read count V, which alleged:

"criminal sexual assault, in that on or about December 13th through December 31, 1995, in Peoria County, State of Illinois, [defendant] committed the offense of criminal sexual assault, in that he knowingly committed an act of sexual penetration with [A.R.], who was under 13 years of age when the act was committed, by the use of force or threat of force.

And to that count and that count only, the [d]efendant tendered a plea of guilty on December 10th, 1996, and a conviction for that count and that count only was entered by the Court on the same date."

Afterwards, the court asked the jurors:

"[i]s there any confusion, though, of any members of the jury based upon my misreading of the first one? Disregard and only the fifth count. Any question?"

None of the jurors posed a question, and the court directed the State to call its next witness.

¶ 13 T.J.'s mother, Priscilla, testified next. Priscilla said that she was a Peoria police sergeant, and she was married to defendant. Priscilla and defendant had three children, including T.J. Priscilla said that defendant had a prior sexual assault conviction that resulted in his imprisonment from 1996 to 2000. In 2001, defendant moved back in with Priscilla and his family. As a result of defendant's return, the Peoria police chief told Priscilla that if she continued her relationship with defendant, and anything else happened, Priscilla would lose her

job. Priscilla said her marriage was very stressful, and defendant spent most of his time in the basement and slept on the couch.

¶ 14 Priscilla said that T.J. was a happy talkative child who loved being with her father. When T.J. was 10 or 11 years old, defendant bought T.J. a cell phone. Priscilla told defendant that T.J. was too young to have a cell phone and an argument ensued. After defendant gave T.J. the cell phone, he repeatedly took it away from her as a form of punishment. Priscilla recalled that defendant also bought T.J. a computer without first discussing the purchase.

¶ 15 In 2012, Priscilla noticed that T.J.'s personality had changed. T.J. denied that anything was wrong, and Priscilla asked Veronica to talk to T.J. One night in March 2012, Veronica showed up unexpectedly. The following morning, Veronica and Priscilla went to move a few items to the family's new house, and when they returned, Priscilla directed Veronica to take T.J. out of the house. Priscilla confronted defendant and said T.J. "had told me that you touched her." Defendant said, "[w]hat do you want me to do?" Priscilla told defendant to get out of the house.

¶ 16 After Priscilla kicked defendant out of the house, she asked T.J. if she wanted defendant "to go to jail?" In response, T.J. asked if the incident would be in the newspaper. Priscilla told T.J. that the incident would be in the newspaper. Priscilla did not report T.J.'s allegations to the police because she was ashamed and embarrassed. Priscilla explained that, at the time she learned of T.J.'s allegations, she was about to become the first African American lieutenant on the Peoria police department. Priscilla feared that if she reported the allegations to the police she would lose her job because she nearly lost her job as a result of defendant's 1996 conviction.

¶ 17 Several days after Priscilla kicked defendant out of the house, she received a telephone call from a DCFS investigator. The investigator told Priscilla that T.J. had reported the sexual

abuse allegations to her school counselor. Priscilla was upset that T.J. had talked to the school counselor, and she later received a telephone call from a DCFS investigator. Priscilla told the investigator that she would be shocked if T.J.'s allegations were true. Later, T.J. told the DCFS investigator that the allegations were untrue. After the DCFS interview, Priscilla told defendant that T.J. had lied to the DCFS investigator, and she told defendant to call the DCFS investigator. On cross-examination, Priscilla explained that she had lied to the DCFS investigator, but her trial testimony was truthful.

¶ 18 In October 2012, Priscilla filed for divorce. In 2013, defendant sought a portion of Priscilla's pension in the divorce proceedings. Priscilla thought defendant did not deserve the money in light of his sexual abuse; however, Priscilla later realized that she could not legally prevent defendant from claiming part of her pension.

¶ 19 In January 2013, after Priscilla and T.J. saw defendant at a family funeral, T.J. told Priscilla about all of the incidents of defendant's sexual abuse. Priscilla realized that her employment concerns no longer mattered and called the police.

¶ 20 The State next called T.J.'s sister, Veronica, to testify. At the start of her testimony, the State cautioned Veronica not to discuss the content of T.J.'s statements during their telephone conversation. In March 2012, Veronica spoke with T.J. on the telephone. Veronica recalled that T.J. sounded distraught, and T.J. cried on the telephone. Veronica was very worried about T.J., and she immediately drove from her house in Columbus, Ohio to Peoria. Veronica said that the drive normally took six hours, but she made it to Peoria in approximately four hours. Veronica then watched over T.J. while she slept. In the morning, Veronica told Priscilla about her conversation with T.J.

¶ 21 At the conclusion of the State's case-in-chief, defense counsel objected to the court's reading of the wrong count of defendant's prior indictment. Counsel said that she did not make a contemporaneous objection because the court had caught the error before she had an opportunity to object. The court overruled the objection noting that it had immediately taken corrective action.

¶ 22 The defense called DCFS investigator, Daniel Patten, as its first witness. In April 2012, Patten investigated an allegation of sexual abuse regarding T.J. Patten met with T.J. and Priscilla. During Patten's interview, T.J. recanted the sexual abuse allegations, and Patten did not pursue a further investigation.

¶ 23 The defense next called defendant to testify. Defendant said that he was T.J.'s father, and he was married to Priscilla. Defendant said that Priscilla constantly accused him of "different things" and their marriage "never worked." Defendant admitted that he had a prior conviction for criminal sexual assault and served four years in prison for the conviction, but defendant denied inappropriately touching T.J.

¶ 24 In February 2012, after defendant noticed that T.J. was having inappropriate conversations with her cousin on her cell phone, defendant showed the messages to Priscilla. T.J. denied sending the messages, and Priscilla became angry and yelled at T.J. After this incident, T.J. rarely talked to defendant, and she refused to speak to Priscilla.

¶ 25 In the spring of 2012, defendant's relationship with Priscilla had further deteriorated, and defendant decided not to move with Priscilla and the family into their new home. Defendant also thought that the negativity in his marriage had adversely affected T.J., as she was having difficulty in school.

¶ 26 When the family moved into the new house without defendant, Priscilla confronted defendant with T.J.'s allegations of sexual abuse. Defendant said that Priscilla had made many prior accusations, and he initially thought that she was joking. Defendant told Priscilla that he did not recall inappropriately touching T.J. and he asked if he should call the police. Priscilla said no and that she wanted to end her relationship with defendant. Defendant did not hear about T.J.'s allegations again until they arose in connection with Priscilla's attempt to prevent defendant from seeking a portion of her pension in the 2013 divorce proceedings.

¶ 27 Defendant further testified that T.J. confronted him with the sexual abuse while he drove her to school. Defendant responded "[i]f I did, then I do apologize," because he did not recall any such incident.

¶ 28 Defendant also said that, in addition to T.J., he bought cell phones for his other children. When defendant realized how expensive his cell phone plan was, he took the cell phones away from all his children. Additionally, defendant said that when he spoke with Detective Craig Johnson about the allegations, he said that he offered to call the police after he spoke with Priscilla about T.J.'s accusations.

¶ 29 On cross-examination, the State asked defendant about his response to T.J.'s accusations to which defendant said: "I mean, the thing—the thing is is that—I mean, the right thing to do, even biblically, the right thing to do is if something is brought to your attention, and I didn't—I didn't do it—."

¶ 30 In rebuttal, the State called Johnson to testify. On March 27, 2013, Johnson interviewed defendant. Johnson said that, when Priscilla confronted defendant with T.J.'s accusations, defendant did not offer to talk with Priscilla and T.J. or contact the police.

¶ 31 The court instructed the jury to consider evidence of defendant's prior criminal sexual assault for the limited purpose of determining defendant's propensity to commit sex offenses. The jury found defendant guilty of each of the charged offenses.

¶ 32 Defendant filed a motion for a new trial, arguing that the court erred by reading and admitting the wrong prior offense to the jury. The court said that it had ensured that the jury understood it was to disregard the erroneously read charge and denied the motion.

¶ 33 The court imposed a mandatory natural life sentence on the predatory criminal sexual assault charge. The court did not impose a sentence on the remaining counts. Defendant appeals.

¶ 34

## ANALYSIS

¶ 35

### I. Other-Crimes Evidence

¶ 36 Defendant argues that the court erred in admitting other-crimes evidence when it read an incorrect prior offense and emphasized that defendant had been charged with several other offenses in the same charging instrument. Upon review, we find that the court erred in admitting the incorrect prior offense evidence, but the court ultimately cured this error when it instructed the jury to disregard the erroneous offense and read the properly admitted propensity evidence.

¶ 37 Initially, defendant concedes that he failed to properly preserve the other-crime evidence issue for appellate review. As a result, defendant urges us to analyze his argument under the first prong of the plain-error rule. The plain-error rule bypasses a defendant's forfeiture and allows a reviewing court to consider an unpreserved claim of error where a defendant demonstrates that the error was prejudicial. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). To prove that an error was prejudicial under the closely balanced prong of plain-error review, a defendant must show that the evidence at trial was so closely balanced that the error severely threatened to tip

the scales of justice against him. *Id.* at 187. The first step of plain-error review is to determine whether a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65, 565 n.2 (2007).

¶ 38 Generally, evidence of a defendant's other crimes is inadmissible because it tends to:

"overpersuade [the jury] as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Michelson v. United States*, 335 U.S. 469, 476 (1948).

Section 115-7.3(a)(1) of the Code of Criminal Procedure of 1963 (Code) provides a limited statutory exception to the general bar of propensity evidence (725 ILCS 5/115-7.3 (West 2012)). In a criminal sexual assault case, evidence of a defendant's prior sex offense may be admitted to show a defendant's propensity to commit the sex offense for which he is on trial if the probative value of the evidence outweighs the undue prejudice to defendant. *Id.*; *People v. Donoho*, 204 Ill. 2d 159, 176 (2003). We review the court's admission of other-crimes evidence for an abuse of discretion. *Donoho*, 204 Ill. 2d at 186.

¶ 39 Here, instead of reading count V of the charging instrument, which contained the prior-approved criminal sexual assault offense, the court read count I which charged defendant with a prior predatory criminal sexual assault of a child offense. Upon hearing the incorrect charge, the State immediately notified the court of its misreading. The court acknowledged and corrected the error. That is, the court did what it would have done had the defendant objected. Defendant at no time argued that the error required a mistrial. So, we find ourselves in the same posture we

would have been in had defendant objected and the trial court sustained the objection. We additionally note that the evidence was not closely balanced.

¶ 40

## II. Rule 431(b)

¶ 41

Defendant argues that his conviction should be reversed and the cause remanded for a new trial because the trial court failed to question potential jurors in compliance with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Defendant acknowledges that he forfeited review of this issue but contends that it is plain error because the evidence was closely balanced.<sup>1</sup> The State argues that the court's admonition of the potential jurors complied with Rule 431(b). Upon review, we find the court's Rule 431(b) admonitions were erroneous, but this error is not reversible plain error.

¶ 42

Rule 431(b) requires the court to ask potential jurors whether they understand and accept that: (1) defendant is presumed innocent of the charges against him; (2) the State must prove defendant's guilt beyond a reasonable doubt; (3) defendant is not required to offer any evidence on his own behalf; and (4) if defendant does not testify, it cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012); *People v. Wilmington*, 2013 IL 112938, ¶ 32. Our supreme court has held that Rule 431(b) is "clear and unambiguous," and the rule "mandat[es] 'a specific question and response process' " that requires a court to ask potential jurors, individually or as a group, whether they both "understand" and "accept" the four enumerated principles. *Wilmington*, 2013 IL 112938, ¶ 32 (quoting *Thompson*, 238 Ill. 2d at 607). The supreme court has stringently applied this requirement. See *id.* (asking potential jurors if they had any disagreement with the

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<sup>1</sup>Defendant does not argue that this error is structural such that it is reversible under the second prong of the plain-error doctrine. See *People v. Thompson*, 238 Ill. 2d 598, 614 (2010).

Rule 431(b) principles was error because the court did not allow jurors to state whether they understood the principles).

¶ 43 Here, it is clear from the record that the court did not ask each of the potential jurors whether he or she understood and accepted the four Rule 431(b) principles. In particular, the court asked none of the venire persons about the fourth principle—defendant's right not to testify. The court also combined some of the remaining principles while questioning the potential jurors. Therefore, the court erred to the extent it did not employ the question and response process mandated by Rule 431(b).

¶ 44 We must next determine whether it is reversible under the closely balanced prong. Under this analysis, defendant bears the burden of demonstrating that he suffered prejudice as a result of the court's error. *Piatkowski*, 225 Ill. 2d at 566. To show prejudice, defendant must establish that the evidence was so close that the error severely threatened to tip the scales against him. *Herron*, 215 Ill. 2d at 187.

¶ 45 In this case, the evidence of defendant's guilt was overwhelming. The testimonies of T.J., Priscilla, and Veronica established that defendant had sexually abused T.J. on multiple occasions. Evidence that showed defendant's propensity to commit similar offenses was also properly admitted under section 115-7.3 of the Code. Defendant's testimony regarding T.J.'s confrontation with the sexual abuse accusations evinced defendant's consciousness of guilt. Defendant's decision to testify eliminated any possible prejudice as a result of the trial court's failure to give the 431(b)(4) admonition. Additionally, the evidence was not so close that the court's combination of several of the remaining principles severely threatened to tip the scales against defendant. We find the evidence was not closely balanced. Therefore, we find no plain error.

CONCLUSION

¶ 46

¶ 47

For the foregoing reasons, we affirm the judgment of the circuit court of Peoria County.

¶ 48

Affirmed.