2017 IL App (1st) 161127-U

No. 1-16-1127

Order filed September 1, 2017

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 22373
	)	
ANGEL ESPITIA,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** Defendant's conviction for misdemeanor battery is affirmed. His contentions that the trial court erred when it barred him from presenting evidence of prior inconsistent statements and of bias and motive of the State's witnesses was forfeited and is not reviewable as plain error.

¶ 2 Following a bench trial, defendant Angel Espitia was found guilty of misdemeanor battery and sentenced to 18 months' supervision. On appeal, he contends that the trial court erred when it barred him from presenting evidence of prior inconsistent statements by the State's

witnesses, as well as evidence of their bias and motive to testify falsely. Defendant also contends that the court erroneously barred him from presenting evidence that rebutted the victim's "outcry." We affirm.

¶ 3 Defendant was charged with one count of attempted criminal sexual assault and two counts of criminal sexual abuse involving E.N. The State filed a motion *in limine* to bar defendant from presenting the testimony of Jesus Gamboa, who owned the building where the incident occurred and employed defendant as the assistant building manager. Raul Ramirez rented an office in the building and also employed the victim, E.N. Defendant had disclosed that Gamboa would testify that Ramirez owed him rent money and that he had phone conversations with defendant and Ramirez at the time of the incident. The State argued that the testimony relating to the back rent was irrelevant, because E.N. was merely an employee of Ramirez and not a party to the lease between Ramirez and Gamboa, and because Gamboa did not witness the alleged offense. The State also argued that Gamboa should be barred from testifying about phone conversations he had with Ramirez or defendant because they were hearsay and did not fall under any exception to the rule.

¶ 4 At the hearing on the State's motion, defense counsel presented an offer of proof that Gamboa would testify that Ramirez owed him over $2,000 in past due rent, that Ramirez and E.N. had presented rent checks which were returned for insufficient funds, and that on the night of the incident, he sent defendant to collect that rent from Ramirez and E.N. Counsel claimed that this testimony reflected on the credibility of Ramirez and E.N.

¶ 5 Counsel also proffered that Gamboa would testify that, at the time of the alleged offense, Ramirez called Gamboa from his office and E.N. was at the office with him. The State argued that such testimony was inadmissible hearsay. The court stated that such testimony was

irrelevant as to whether or not the offense occurred. The court explained that counsel could impeach Ramirez with the police report, but not with testimony from Gamboa about a telephone conversation. The court concluded that based on the offer of proof, Mr. Gamboa's testimony as to his landlord tenant relationship with Ramirez was not relevant, and the testimony as to his phone conversation with Ramirez was not impeaching. The court reserved a ruling on whether Gamboa would be permitted to testify regarding defendant's character.

¶ 6 At trial, E.N. testified that about 7:30 p.m. on December 1, 2014, she was working alone in her second-floor office in Berwyn where she worked as a marketing assistant to Ramirez. At that time, no one else was "upstairs." Defendant entered the office, and E.N. stepped away from her desk to retrieve some papers. When she returned to her desk, defendant touched her breasts with his hands. He then placed his hand on her vagina on the outside of her pants and attempted to unbutton her pants. At that moment, Ramirez entered the office and asked what happened. E.N. pushed defendant away and called police. Defendant then left the office and went downstairs.

¶ 7 When the police arrived, E.N. told them what happened. On December 9, E.N. went to the police station and spoke to a detective and an assistant State's Attorney about what had happened. E.N. testified that defendant appeared to be drunk, and that she did not consent to him touching her.

¶ 8 On cross-examination, E.N. testified that she had worked for Ramirez for four years. As defendant was touching her, Ramirez was walking up the stairs and yelled something when he reached the top stair. When Ramirez entered the office, E.N.'s pants were unbuttoned. E.N. did not recall if Ramirez said anything to defendant.

¶ 9 Raul Ramirez testified that, about 7:30 p.m., he was going to his office and heard voices on the second floor. When he went upstairs, defendant was standing about three feet away from E.N. E.N. appeared nervous, was crying, and a button on her pants was unbuttoned. Ramirez entered the office, and defendant moved away from E.N. Defendant was holding a bottle of champagne, and "acting as a drunk person." His breath smelled of liquor. Defendant entered the bathroom, and then left the building "very fast."

¶ 10 On cross-examination, Ramirez denied both that defendant asked him for the rent money, and that defendant said he would be evicted if he did not pay. Ramirez dealt directly with Gamboa as the owner of the building. He had known defendant for two years and "did not have a friendship with him." When Ramirez entered the office, E.N. told him that defendant had touched her. Ramirez asked defendant what happened, and he replied "nothing" and "I'm celebrating." Ramirez then called Gamboa and told him that defendant was drunk and bothering E.N. When the police arrived, Ramirez escorted them upstairs, and E.N. told them what happened. Ramirez told the police that he did not see defendant touch E.N.

¶ 11 Counsel asked Ramirez if he told Gamboa during the phone call that he saw defendant near E.N. He also asked if Ramirez told Gamboa that E.N.'s pants were unbuttoned. The trial court sustained the State's hearsay objections to both questions. Counsel then asked Ramirez if he had signed something acknowledging that he owed $2,500 in back rent. The court sustained the State's objection to that question.

¶ 12 Berwyn police officer Matthew Pechota testified that he arrived at Ramirez's office shortly before 8 p.m. and spoke with E.N., who was crying and visibly shaking. She told police that no one else was present to observe the alleged offense. Ramirez confirmed to Pechota that he did not observe defendant touching E.N.

¶ 13 The trial court allowed defendant to call Jesus Gamboa as a character witness. Gamboa testified that he had known defendant for 35 years. Defendant acted as Gamboa's assistant and helped Gamboa with real estate showings, inspections, and collecting rent. Gamboa testified that defendant's reputation among their peers and colleagues was impeccable.

¶ 14 Defendant testified that he worked for Gamboa as a real estate broker, appraiser, and rent collector. Defendant testified over the State's objection that prior to the date of the incident, he had monthly conversations with Ramirez about his rent. Defendant had known E.N. for two years from working in the building.

¶ 15 On December 1, defendant returned to the building at 7:30 p.m. and went to his office on the second floor. He observed a light on in Ramirez's office. When Ramirez came out of the office, defendant told him that he was no longer a tenant there and was supposed to have vacated the office. Ramirez called E.N. out of the office, and she stood near Ramirez, about 10 feet away from defendant. E.N. was not upset or crying. Defendant denied that he spoke to her or touched her. The men continued talking about the rent. Ramirez called Gamboa on the phone. Defendant called Gamboa "at the same time." After talking with Gamboa, defendant left the building. When asked if he was intoxicated, defendant said no. While Ramirez was on the phone, defendant opened a bottle of champagne, and "dropped it in the sink."

¶ 16 On cross-examination, defendant testified that Ramirez and E.N. accused him of stealing, and Ramirez said that E.N. was calling the police. Defendant then called Gamboa, and when Gamboa told him to leave the building, he did. Defendant testified that he drank one beer at 5:00 p.m. and was not intoxicated.

¶ 17 The trial court found that E.N. clearly testified that defendant touched her breasts and vagina, but it did not believe his conduct rose to the level of the felony charges. Consequently,

the court found defendant not guilty of attempted criminal sexual assault and criminal sexual abuse, but instead found him guilty of battery for making contact of an insulting nature.

¶ 18 Defense counsel orally moved for a new trial without stating any issues or argument. The trial court denied the motion. The court sentenced defendant to 18 months' supervision, 100 hours of community service, and ordered him to pay $1,500 in restitution.

¶ 19 Defendant filed an untimely written motion for a new trial on March 21, 2016, and an amended motion for a new trial on April 21, 2016. The trial court struck both motions. This court allowed defendant to file a late notice of appeal.

¶ 20 On appeal, defendant contends that that the trial court erred when it barred him from presenting evidence of prior inconsistent statements made by E.N. and Ramirez, as well as of their bias and motive to testify falsely against him. He also contends that the court erroneously barred him from presenting evidence that rebutted E.N.'s "outcry" behavior of crying when the police arrived.

¶ 21 Defendant acknowledges that he forfeited these arguments because he failed to file a timely written posttrial motion. He argues, however, that his claims are reviewable under both prongs of the plain error doctrine. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Consequently, we consider defendant's contention that his claims should be reviewed as plain error. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999).

¶ 22 The plain error doctrine is a limited and narrow exception to the forfeiture rule that exists to protect defendant's rights and the reputation and integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). To obtain plain error relief, defendant must first demonstrate that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Thereafter, defendant must show either that the evidence at trial was so closely balanced that the

guilty verdict may have resulted from the error, or that the error was so substantial that it deprived him of a fair trial. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). When invoking the plain error doctrine, it is appropriate to first determine whether any error occurred at all, "because 'without error, there can be no plain error.' " *People v. Hood*, 2016 IL 118581, ¶ 18 (quoting *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007)). The burden of persuasion is on defendant, and if he fails to meet his burden, his procedural default will be honored. *Hillier*, 237 Ill. 2d at 545.

¶ 23 The admission of evidence is within the sound discretion of the trial court. On review, the court's rulings will not be disturbed absent an abuse of that discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). An abuse of discretion will be found only where the trial court's ruling is arbitrary, unreasonable or fanciful, or where no reasonable person would agree with the view adopted by the court. *Id.* This standard applies to rulings on motions *in limine*, as well as the scope of cross-examination. *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 134.

¶ 24 Defendant contends that the court erred when it barred him from presenting evidence of prior inconsistent statements made by E.N. and Ramirez. Defendant primarily focuses on three instances where the court sustained the State's hearsay objections to questions he asked Ramirez during cross-examination. Defendant claims that the testimony did not constitute hearsay because the evidence was not being presented for the truth of the matter asserted, but instead, to show inconsistencies between the trial testimony of E.N. and Ramirez, and statements they made to others.

¶ 25 In general, testimony is considered inadmissible hearsay when it is an out-of-court statement offered to establish the truth of the matter asserted. Ill. R. Evid. 801(c) (eff. Oct. 15, 2015); R. 802 (eff. Jan. 1, 2011). As an exception, the prior inconsistent statements of a

testifying witness may be admitted to impeach the credibility of that witness. See Ill. R. Evid. 607 (eff. Jan. 1, 2011); see also Ill. R. Evid. 613(b) (eff. Oct. 15, 2015).

¶ 26 Defendant first claims that the court erred when it sustained an objection to his question asking Ramirez "did you hear [E.N.] tell the police that no one else was present at the time of the incident?" Defendant claims that Ramirez's response would have been inconsistent with E.N.'s testimony concerning Ramirez's location at the time of the battery. However, the question did not ask Ramirez about his location at the time of the battery, and thus would not have elicited an inconsistent statement. In fact, Ramirez testified that he was not in the second floor office when the battery occurred. Further, defendant does not state what exact testimony of E.N. was being impeached. Defendant instead claims that E.N. was inconsistent in her testimony as to whether Ramirez was present during the actual incident. This assertion is belied by the record. E.N. consistently testified that Ramirez was not present when defendant arrived at the office and when defendant engaged in the offensive touching. Defendant has not shown that the question would have elicited an inconsistent statement, so we find no error in the trial court's decision to sustain the objection.

¶ 27 Defendant also argues that the trial court erred in sustaining objections to a series of questions posed to Ramirez as to his phone conversation with Gamboa. Specifically, counsel asked Ramirez, "[W]hen you talked to Mr. Gamboa, did you tell him that you had seen [defendant] close to [E.N.]?" When the State objected to the question on hearsay grounds, defense counsel responded that "a normal person would then complain to somebody" after seeing defendant close to E.N. Defendant argues on appeal that Ramirez's response would have contradicted his testimony on direct examination that defendant was three feet away from E.N. However, there is nothing in the record that would establish Ramirez's response to the question

would have been contradictory to his direct testimony. In fact, on cross-examination Ramirez was asked: "When you first approached [defendant] was standing very close to [E.N.], was he not?" He responded "approximately three feet."

¶ 28 In the trial court, defendant argued that counsel was attempting to impeach Ramirez by omission. We recognize that failure to speak of a matter entirely, or omission of a particular fact, may be considered an inconsistency under circumstances where a person would reasonably be expected to speak. *People v. Billups*, 318 Ill. App. 3d 948, 957 (2001). However, we find that this is not one of those circumstances. Ramirez could not reasonably be expected to call Gamboa, defendant's employer, and convey to him factual details of the battery, such as the fact that he saw defendant standing "close" to E.N. Therefore, Ramirez's purported omission of that fact to Gamboa would not produce an inconsistency with his testimony.

¶ 29 Similarly, counsel asked Ramirez on cross, "[D]id you tell Mr. Gamboa that you saw [E.N.] with her pants unbuttoned?" When the State objected, defense counsel argued that Ramirez would have been "outraged by what he saw" and would have told Gamboa. The court sustained the objection. On appeal, defendant asserts that if Ramirez did not tell Gamboa about seeing E.N.'s pants unbuttoned, the testimony would constitute impeachment by omission. Defendant is incorrect. As explained above, this is not a circumstance where Ramirez could reasonably be expected to convey factual details about the incident to Gamboa, defendant's employer.

¶ 30 Finally, defendant argues that the trial court erred in precluding Gamboa from testifying that Ramirez told him that Ramirez did not "see anything." We disagree. Ramirez testified at trial that he did not witness the actual battery. Therefore, Mr. Gamboa's testimony would not have been impeaching and was properly excluded.

¶ 31 In sum, we find that the testimony defendant sought to introduce did not constitute prior inconsistent statements. Accordingly, the trial court did not err when it barred such testimony.

¶ 32 Defendant next contends that the trial court erred when it barred him from presenting Gamboa's testimony to show that E.N. and Ramirez were biased and had a motive to testify falsely against him. Defendant asserts that Gamboa's testimony would have shown that E.N. and Ramirez owed him $2,500 in past due rent, had issued him a check written on a closed account, and were being evicted from the office building. Defendant claims that such testimony would have established a motive for them to frame him, and would have explained why E.N. was crying when the police arrived.

¶ 33 The trial court barred Gamboa's testimony as irrelevant. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). The trial court may preclude offered evidence on the basis of irrelevancy where it has little probative value due to its remoteness or uncertainty. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). " 'Evidence which is not relevant is not admissible.' " *People v. Dabbs*, 239 Ill. 2d 277, 289 (2010) (quoting Ill. R. Evid. 402 (eff. Jan. 1, 2011)). Evidence of interest, bias or motive must be positive and direct, not remote and uncertain, because it must potentially give rise to the inference that the witness has something to gain or lose by his testimony. *People v. Sims*, 192 Ill. 2d 592, 625 (2000).

¶ 34 Here, Gamboa's proffered testimony that Ramirez owed him past due rent and was being evicted from the building was not positively or directly related to E.N. and Ramirez's alleged bias and motive to falsely testify against defendant. Ramirez's business relationship with Gamboa was completely unrelated to whether defendant committed a battery against E.N.

Further, even if E.N. presented a bad check to Gamboa on behalf of Ramirez for rent, that act had no relevance to whether defendant committed the offense against her. Gamboa did not witness any of the events that occurred between defendant and E.N. Therefore, the point was remote and irrelevant. Even so, the trial court allowed counsel to ask defendant questions about collecting the past due rent that were aimed at impeaching Ramirez. The record thus shows that the trial court allowed defendant to present some evidence of the past due rent, and it properly barred Gamboa's irrelevant testimony.

¶ 35 Finally, defendant contends that the trial court erred when it barred him from presenting Gamboa's testimony to rebut the State's "outcry" evidence that E.N. was crying when the police arrived. Defendant argues that he was entitled to show an alternative reason why she was crying: the potential eviction of Ramirez from the office building and the resulting loss of her job.

¶ 36 Defendant's argument is merely speculative. E.N. was not personally being evicted from the building, and there was absolutely no evidence at trial that she was facing a potential loss of her job. In fact, she testified that she was employed at the time of trial in marketing. Again, whether Ramirez owed Gamboa past due rent, and whether Gamboa planned to evict Ramirez was irrelevant as to whether defendant committed an offense against E.N.

¶ 37 We find no error by the trial court in barring defendant from presenting Gamboa's testimony. Accordingly, the plain error doctrine does not apply, and we honor defendant's forfeiture of the issues. *Hillier*, 237 Ill. 2d at 545.

¶ 38 We affirm the judgment of the circuit court of Cook County.

¶ 39 Affirmed.