2017 IL App (2d) 150835-U
No. 2-15-0835
Order filed December 15, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 14-CF-1294
JUAN C. CUELLO-CALDERON,	)	Honorable T. Clint Hull,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Hudson and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was proved guilty of attempted criminal sexual assault beyond a reasonable doubt; any error in the State's closing argument, misstating the definition of sexual penetration, was cured by the trial court when it properly instructed the jury on that issue, and thus there was no plain error.

¶ 2 Following a jury trial, defendant, Juan Cuello-Calderon, was found guilty of attempted criminal sexual assault (720 ILCS 5/8-4(a), 5/11-1.20(a)(1) (West 2014)) and attempted aggravated criminal sexual abuse (720 ILCS 5/8-4(a), 5/11-1.60(d) (West 2014)). The trial court merged the convictions and sentenced defendant to three years' imprisonment.

¶ 3 Defendant timely appeals, claiming that (1) he was not proved guilty of attempted criminal sexual assault beyond a reasonable doubt, as the State failed to establish that he intended to penetrate the victim's vagina rather than merely make contact, and (2) he is entitled to a new trial, because the State improperly argued during closing argument that mere contact between defendant's hand and the victim's vagina constituted an act of sexual penetration.

¶ 4 In a 10-count indictment, defendant was charged with various sex offenses. As relevant here, defendant was charged with attempted criminal sexual assault and attempted aggravated criminal sexual abuse against the victim, R.G. The count charging defendant with attempted criminal sexual assault provided that defendant "performed a substantial step toward the commission of that offense, in that defendant, by the use of force, and with the intent to commit an act of sexual penetration with R.G., *** removed R.G.'s clothing." In the count charging defendant with attempted aggravated criminal sexual abuse, it was alleged that defendant "performed a substantial step toward the commission of that offense, in that said defendant, a person 17 years of age or older, with the intent to commit an act of sexual conduct with R.G., who was over 13 years of age, but under 17 years of age when the act was committed, *** forcibly removed the clothing of R.G. for the purpose of sexual gratification or arousal of the defendant."

¶ 5 Evidence presented at trial revealed that defendant and his wife, Violeta T., live with their two biological children and R.G.—Violeta's biological daughter and defendant's stepdaughter. In 2010, when R.G. was 10 years old, defendant, while roughhousing with R.G., touched R.G.'s breast. That same year, while defendant was helping R.G. with her homework, he tried to kiss R.G. on the mouth. In addition, defendant would kiss his young son on the mouth

and rub his son's penis until it was erect. Violeta stated that, when defendant would do this, he would say that his son would "father many children."

¶ 6 On the evening of July 21, 2014, defendant was watching television in the living room of the family's home while Violeta was in bed in the couple's bedroom. R.G. was watching a movie in her room on defendant's phone while her three-year-old stepbrother slept next to her. A nightlight was on in R.G.'s room.

¶ 7 Between 11 and 11:30 p.m., defendant entered R.G.'s room and asked her if she was charging his phone. R.G. said no, and explained to defendant that she did not have a charger. R.G. then tossed defendant's phone to the other side of the bed and on top of the blanket, which she was underneath. R.G. testified that defendant was not angry during this exchange.

¶ 8 Defendant then knelt on the bed and aggressively grabbed the blanket. He pulled the blanket down; grabbed the straps of R.G.'s pajamas—("a romper"); and pulled off R.G.'s pajamas, bra, and underpants "all at once." Defendant's phone remained on the bed on top of the blanket.

¶ 9 In response to the State's question, "After he got your clothes off, what else—was there anything else that he did with his body or his hands," R.G. said, "No." However, R.G. then stated that defendant "[d]id try to touch [her] on [her] body without [her] clothes on." Specifically, R.G. asserted that defendant tried to touch her "[i]n [her] vagina." When asked how she knew this, R.G. stated that "[defendant's] hand was going to [her] vagina."

¶ 10 Although R.G. was initially in shock, she eventually realized what was happening and began kicking at defendant while telling him to stop. R.G. told defendant that if he did not stop, she would scream. With this, defendant left her room.

¶ 11 Violeta heard the commotion and jumped out of bed to see what was happening. She saw defendant standing at the door to R.G.'s room. She asked defendant what he had done, and he said "nothing." Violeta asked defendant if he had gone into R.G.'s room, and defendant said no. Violeta went into R.G.'s room, locked the door behind her, and saw R.G. standing naked by the door. Violeta talked to R.G. and then exited the room to speak with defendant. Because defendant continued to deny that he had done anything, Violeta hit defendant repeatedly. At one point, while Violeta was standing in the bedroom doorway, R.G. saw defendant behind Violeta; defendant was gesturing to R.G. as if to encourage her to lie to her mother about what had happened.

¶ 12 The next day, R.G. and her mother went to the police station to talk to the police about what had occurred. When the police spoke to defendant, defendant continued to deny that anything had happened. Eventually, however, defendant advised the police that he went to R.G.'s room to retrieve his cell phone. When he did, R.G. covered herself up with a blanket. Defendant pulled the blanket off of R.G., "and then, he wasn't really sure [why], but he just ripped off her romper, clothing that she had on." Defendant told the police that "after that he didn't go any further because [R.G.] made a comment about this not being right." Defendant then "walked outside [R.G.'s room] and just kind of stood by the door."

¶ 13 Before closing arguments began, the court advised the jury that "[c]losing arguments are not evidence." Thus, the court explained that "any argument that is not based upon the facts should be disregarded."

¶ 14 During its closing argument, the State told the jury that:

> "You will receive separate instructions as to criminal sexual assault. There are different elements that the State has to prove. In those elements, the State has to prove an act or

attempt at an act of sexual penetration. The definition of sexual penetration means any contact, however slight, between the sex organ of one person or anus of one person and an object, sex organ, mouth of another person or intrusion, however slight, of any part of the body of one person, into the sex organ, anus of another person including but not limited to cunnilingus, fellatio, anal penetration. Evidence of emission of semen is not required to prove sexual penetration.

The definition of sexual penetration is different than the definition of sexual conduct. The definition of sexual penetration when you break it down is contact, however slight, between the sex organ of one person and an object of another person. So in attempting to touch [R.G.'s] vagina on July 21st, 2014, the defendant attempted *** to make sexual penetration with her by using an object, his hand, to touch her sex organ, her vagina."

¶ 15 The trial court instructed the jury, that "[a] person commits the offense of criminal sexual assault when he commits an act of sexual penetration upon the victim by the use of force or threat of force." The court then defined for the jury the term "sexual penetration." The court stated that "[t]he term 'sexual penetration' means any contact, however, slight, between the sex organ of one person or anus of one person and an object, sex organ, mouth of another person or intrusion, however slight, of any part of the body of one person, into the sex organ, anus of another person[.]" The court then instructed the jury that:

"To sustain a charge of attempt criminal sexual assault, the State must prove the following propositions:

> First Proposition: That defendant performed an act which constituted a substantial step toward the commission of the offense of criminal sexual assault; and
>
> Second Proposition: That the defendant did so with the intent to commit the offense of criminal sexual assault."

Further, the court told the jury that "[n]either opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded."

¶ 16 The jury found defendant guilty of attempted criminal sexual assault and attempted aggravated criminal sexual abuse. Defendant moved for judgment notwithstanding the verdict, contending that the State failed to prove beyond a reasonable doubt that he had the intent to commit sexual penetration. The court denied the motion, and defendant was sentenced.

¶ 17 At issue in this appeal is whether (1) defendant was proved guilty beyond a reasonable doubt of attempted criminal sexual assault and (2) the State's misstatement of the law during closing argument mandates that defendant be afforded a new trial. We consider each argument in turn.

¶ 18 The first issue we address is whether defendant was proved guilty beyond a reasonable doubt. In considering that issue, we note that we will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When reviewing a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and determining what inferences to draw, and a reviewing court ordinarily will not substitute its judgment on these matters for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 19 As noted, defendant claims that he was not proved guilty beyond a reasonable doubt of attempted criminal sexual assault. "A person commits the offense of attempt when, with the intent to commit a specific offense, he *** does any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2014). Although "substantial step" has not been precisely defined, courts have determined that a defendant need not complete the " 'last proximate act' " in order to commit an attempt, that mere preparation to commit the crime is not enough, and that "[a] substantial step should put the accused in a 'dangerous proximity to success.' " *People v. Hawkins*, 311 Ill. App. 3d 418, 423 (2000) (quoting *People v. Terrell*, 99 Ill. 2d 427, 433 (1984) and *People v. Morissette*, 225 Ill. App. 3d 1044, 1046 (1992)). The unique facts and circumstances of each case will indicate whether a substantial step was taken. Id.

¶ 20 A person commits criminal sexual assault when, as charged here, the person commits an act of "sexual penetration" and "uses force or the threat of force." 720 ILCS 5/11-1.20(a)(1) (West 2014). " 'Sexual penetration' " is defined as "any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including, but not limited to, cunnilingus, fellatio, or anal penetration." 720 ILCS 5/11-0.1 (West 2014). For purposes of this appeal, the State, to

prove defendant guilty beyond a reasonable doubt of attempted criminal sexual assault, needed to establish that defendant, while using force, took a substantial step toward putting his hand inside R.G.'s vagina. We determine that the State met this burden.

¶ 21 Specifically, the evidence revealed that defendant, who had a history of acting inappropriately with his son and R.G., went into R.G.'s room for his cell phone at some point after Violeta had gone to bed. Defendant asked R.G. if she was charging his phone, and she said no. She then tossed the phone to the side of the bed and on top of the blanket that was covering her. Instead of giving R.G. a charger or retrieving his phone, defendant knelt on the bed, aggressively pulled back the blanket covering R.G., and removed all of her clothes. Then, he reached towards R.G.'s vagina in such a way that R.G. believed that defendant was not going to merely touch her but was going to put his hand "[i]n [her] vagina." R.G. kicked at defendant and warned defendant that if he did not stop, she was going to scream. At that point, after R.G. had told him that what he was doing was not right, defendant left R.G.'s room. Violeta then came to the door, seeing defendant by the door and R.G. naked. While standing behind Violeta, defendant encouraged R.G. to lie to her mother about what had happened. Viewing this evidence in a light most favorable to the State, a rational trier of fact certainly could have found defendant guilty of attempted criminal sexual assault beyond a reasonable doubt.

¶ 22 Defendant claims that lacking in this case, and necessary to establish his guilt, is evidence that he made sexual comments to R.G.; touched R.G.'s breasts, buttocks, or genitals; removed his own clothes; had a history of committing sexual assaults; touched R.G. below the waist; or kissed or fondled her. We disagree. In determining whether a defendant was proved guilty beyond a reasonable doubt of attempted criminal sexual assault, courts focus on what steps a defendant took toward the commission of the crime, not what steps he did not take but could

have. *Hawkins*, 311 Ill. App. 3d at 427; see also *People v. Grathler*, 368 Ill. App. 3d 802, 810 (2006).

¶ 23 Defendant also argues that his conviction must be reversed, because "no evidence [established] that he intended sexual penetration as opposed to touching outside the vagina with his hand." Again, we disagree. "Intent can rarely be proved by direct evidence because it is a state of mind." *People v. Witherspoon*, 379 Ill. App. 3d 298, 307 (2008). "Instead, intent may be inferred from surrounding circumstances and thus may be proved by circumstantial evidence." *Id.* " 'Circumstantial evidence is proof of certain facts and circumstances from which [the trier of fact] may infer other connected facts which reasonably follow according to the common experience of mankind.' " *Grathler*, 368 Ill. App. 3d at 808 (quoting *Hartness v. Ruzich*, 155 Ill. App. 3d 878, 882 (1987)). " '[I]nferences as to [a] defendant's mental state are a matter particularly within the province of the jury.' " *People v. Schmidt*, 392 Ill. App. 3d 698, 702 (2009) (quoting *People v. DiVincenzo*, 183 Ill. 2d 239, 253 (1998)). " 'The sole limitation on the use of circumstantial evidence is that the inferences drawn therefrom must be reasonable.' " *Grathler*, 368 Ill. App. 3d at 808 (quoting *Ruzich*, 155 Ill. App. 3d at 883). Here, it certainly was reasonable for the jury to infer, based on R.G.'s testimony that defendant was reaching toward her to put his hand "[i]n her vagina" after ripping off her clothes, that he intended to penetrate, and not simply to make contact with, R.G.'s genitalia.

¶ 24 Last, we find unfounded defendant's reliance on *People v. Rayfield*, 171 Ill. App. 3d 297 (1988). That case predates the enactment of the criminal sexual assault laws' requirement that a defendant must act with the intent to commit "sexual penetration." See *Hawkins*, 311 Ill. App. 3d at 430. Given that, *Rayfield* is simply not persuasive here. See *id.* In sum, we find the evidence sufficient to sustain defendant's conviction beyond a reasonable doubt.

¶ 25 We turn next to defendant's contention that a misstatement in the State's closing argument rendered defendant's trial unfair. Before considering whether the State made a material misstatement of the law during closing argument sufficient to warrant granting defendant a new trial, we observe, as the parties note, that defendant has forfeited the issue. Ordinarily, an issue advanced on appeal is consider forfeited if the defendant did not object to the alleged error at trial and failed to raise that alleged error in a posttrial motion. *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 33.

¶ 26 Recognizing that he did neither, defendant asks us to review his claim under the plain-error doctrine. Under that rule, we can considered unpreserved errors if the error is clear or obvious and either (1) "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) "the 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. McDonald*, 2016 IL 118882, ¶ 48. Defendant has the burden of establishing plain error. *Id.* If that burden is not meet, the forfeiture will be honored. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Under either prong, our first step is to determine whether clear and obvious error is present. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 27 In considering whether there was error, we note that courts have reviewed allegedly improper remarks the State has made during closing arguments under both an abuse-of-discretion and a *de novo* standard or review. *People v. Johnson*, 391 Ill. App. 3d 822, 840 (2009). Resolving which standard should apply must be done in another case, as our decision is the same under either one. *Id.* That is, we find the error was not so clear or obvious that it warrants reversal.

¶ 28 A defendant is entitled to a new trial when the State makes remarks that amount to a material factor in finding the defendant guilty. *People v. Linscott*, 142 Ill. 2d 22, 28 (1991). Accordingly, we must consider whether the jury could have found the defendant not guilty had the improper remarks not been made. *Id.* In making such an assessment, we must not view the complained of remarks in isolation. *Glasper*, 234 Ill. 2d at 203. Rather, "[a] closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context." *Id.* at 204. Moreover, " '[a] misstatement of the law during closing argument does not normally constitute reversible error if the [trial] court properly instructs the jury on the law, as counsel's arguments are construed to carry less weight with the jury than do instructions from the [trial] court.' " *Id.* (quoting *People v. Buckley*, 282 Ill. App. 3d 81, 89-90 (1996)). Indeed, "[i]t is presumed on appeal that the jury followed the trial court's instructions." *People v. Delgado*, 376 Ill. App. 3d 307, 319 (2007).

¶ 29 Here, the State, after advising the jury that it would be receiving instructions from the court, properly defined sexual penetration for the jury. However, the State then misapplied the facts to the law it had given. That is, the State asserted that "defendant attempted to make sexual penetration with [R.G.] by using an object, his hand, to touch her sex organ, her vagina." In *People v. Maggette*, 195 Ill. 2d 336, 348 (2001), our supreme court determined that "neither a finger nor a hand is an object for purposes of the 'contact' clause of the statutory definition of sexual penetration." Given *Maggette*, it appears that the State misstated the law when it advised the jury that defendant's hand was an object.

¶ 30 However, the fact that the State misstated the law does not necessarily mean that defendant is entitled to relief. See *Glasper*, 234 Ill. 2d at 203. Here, although the State misstated the law, the trial court properly instructed the jury as to the applicable concept. Specifically, the

court told the jury to disregard evidence not based on the facts, and it provided the jury with the elements of the offenses. In defining criminal sexual assault, the court instructed the jury that "[t]he term 'sexual penetration' means any contact, however, slight, between the sex organ of one person or anus of one person and an object, sex organ, mouth of another person or intrusion, however slight, of any part of the body of one person, into the sex organ, anus of another person[.]" Given the court's proper instructions, we simply cannot conclude that the one comment made by the State during closing argument was sufficient to confuse the jury and cause it to ignore the clear instructions that the trial court gave. See *id*.

¶ 31 Moreover, as the State notes, sexual penetration for purposes of the criminal sexual assault statute arises not only when there is contact between the sex organ or anus of one person and an object, but also when there is any intrusion by any part of the body of one person and the sex organ of another person. 720 ILCS 5/11-0.1 (West 2014). Here, although the State may have misstated the law by equating defendant's hand with an object under the first part of the definition of sexual penetration, the evidence nevertheless revealed that defendant attempted sexual penetration under the second part of the definition.

¶ 32 In making his argument that the State's comment in closing argument warranted granting him a new trial, defendant relies on a number of cases. We find these cases distinguishable, as they involved situations where the State's closing argument was riddled with improper remarks (*People v. Wheeler*, 226 Ill. 2d 92, 129 (2007)); where the trial court failed to provide the jury with a proper instruction (*Delgado*, 376 Ill. App. 3d at 315); or where, given the closeness of the evidence, it could not be said that State's misstatement of the proper mental state did not contribute to the guilty verdict (*Buckley*, 282 Ill. App. 3d at 90). Here, any error occasioned by

the State's isolated misstatement was promptly cured by the court's instructions; and, further, the evidence in this case was not closely balanced. Thus, there was no plain error.

¶ 33 In sum, we affirm the judgment of the circuit court of Kane County. 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 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 34 Affirmed.