2017 IL App (4th) 160592-UB

NO. 4-16-0592

FILED
December 5, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
MATTHEW L. MOURNING,	)	No. 11CF166
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Turner and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The State's questioning of a witness about another witness's credibility was plain error.

¶ 2 The State charged defendant, Matthew L. Mourning, with two counts of predatory criminal sexual assault of a child, alleging that he placed his finger in the vagina of his half-sister, M.M.

¶ 3 Prior to trial, defendant filed a motion *in limine* seeking to prevent the State from introducing evidence of M.M.'s reporting of the allegations to her mother and the police. The trial court ruled that the State could introduce evidence that M.M. made the reports but not substantive evidence about the contents of the reports.

¶ 4 At the December 2013 jury trial, M.M.'s mother testified that in January 2011, M.M. made "a report" to her that "something" had happened.

¶ 5 Later at trial, during the State's cross-examination of defendant, the State asked

whether defendant thought M.M. was lying and what motivation she might have for doing so. Defendant testified that M.M. was lying but that he did not know why.

¶ 6 The jury found defendant guilty on both counts. The trial court sentenced him to eight years in prison for count I and nine years for count II, to be served consecutively. The circuit clerk later imposed various fines and fees.

¶ 7 On appeal, we remanded for the trial court to conduct an inquiry into defendant's posttrial claims of ineffective assistance of counsel. *People v. Mourning*, 2016 IL App (4th) 140270, ¶ 1, 51 N.E.3d 1122 (*Mourning I*). On remand, in August 2016, the trial court conducted a hearing and determined that defendant's claims of ineffective assistance lacked merit or pertained to trial strategy.

¶ 8 Defendant again appealed, arguing that (1) the State improperly elicited testimony from defendant about M.M.'s credibility; (2) M.M.'s mother improperly testified about M.M.'s reporting of the alleged abuse; and (3) the circuit clerk improperly imposed several fines. In April 2017, we entered an order affirming defendant's convictions and vacating certain fines. We determined that although defendant's testimony about M.M.'s credibility was error, that error was not reversible under the plain-error doctrine because the evidence was not closely balanced. 2017 IL App (4th) 160592-U (*Mourning II*).

¶ 9 In September 2017, the supreme court entered a supervisory order, directing this court to vacate our April 2017 judgment. *People v. Mourning*, No. 122306 (Sept. 27, 2017) (nonprecedential supervisory order directing vacatur of judgment and denial of petition for rehearing and reconsideration in light of *People v. Sebby*, 2017 IL 119445). The supreme court further directed us to reconsider defendant's appeal in light of the supreme court's then-recent decision in *Sebby*, 2017 IL 119445. In particular, the supreme court ordered us to consider the effect,

if any, of *Sebby* on our determination that the evidence in this case was not closely balanced for purposes of the first prong of the plain-error doctrine. See *Sebby*, 2017 IL 119445, ¶¶ 51-78.

¶ 10 After considering *Sebby*, we conclude that the evidence in this case was closely balanced. Therefore, we reverse defendant's convictions and remand for further proceedings.

¶ 11 I. BACKGROUND

¶ 12 In February 2011, the State charged defendant with two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1 (West 2010)). Both counts alleged that in the summer of 2002 defendant, who was 17 years of age or older, placed his finger in the sex organ of M.M. (born November 23, 1995), who was less than 13 years of age.

¶ 13 A. Motion *in Limine*

¶ 14 In April 2013, defendant filed a motion *in limine* seeking to prohibit the State from introducing any prior statements made by M.M. reporting the alleged offenses. The State responded that some testimony about M.M.'s reporting of the alleged offenses was necessary to explain to the jury the course of the investigation and why M.M. waited approximately six years to report. The trial court decided that the State could question witnesses about if and when M.M. reported the alleged offenses but not about the substance of her reports.

¶ 15 B. Trial

¶ 16 At the December 2013 jury trial, M.M.'s mother testified that defendant was her son and M.M.'s half-brother. Defendant lived with M.M. and their mother when M.M. was between six and nine years old. The following exchange occurred about a "report" that M.M. made to her mother in January 2011:

"[THE STATE]: I would like to turn your attention to January 26, 2011. At that time, did [M.M.] make a report to you?

[M.M.'S MOTHER]: Yes.

[THE STATE]: How old was [M.M.] when she made this report to you?

[M.M.'S MOTHER]: 15.

[THE STATE]: And when [M.M.] made this report to you, where were you and other family members located?

[M.M.'S MOTHER]: She waited for her dad to go to work and I was sitting on the love seat. She asked me to pause the television, she had something to discuss with me.

[THE STATE]: Okay. Now I can't go into at this point to what [M.M.] told you, but you were in the living room of your home?

[M.M.'S MOTHER]: Yes.

* * *

[THE STATE]: Did she tell you something then that had happened to her?

[M.M.'S MOTHER]: Yes.

[THE STATE]: Again, without going into detail about what she told you, was this the first time that you had heard of this?

[M.M.'S MOTHER]: Yes."

M.M.'s mother testified that M.M. was "very upset" and "very emotional" and that it was "hard to understand what she was saying through her tears."

¶ 17 M.M. testified that when she was between the ages of five and nine, while she and defendant were living in the same home, defendant twice placed his finger in her vagina. The first time, after she and defendant had finished swimming, he locked her in the bathroom and placed his finger inside her vagina. He told her not to talk about it and that it was "normal."

M.M. testified that she "knew that it didn't feel right, but I knew I couldn't say anything." On another occasion, defendant entered M.M.'s bedroom while she was in bed and placed his fingers in her vagina, which made M.M. feel "[s]cared and wrong." M.M. did not tell anyone about these two instances until she was 15 years old. She was inspired to report the allegations after attending a program at church called "True Love Waits."

¶ 18 Macon County Detective Kris Thompson testified that he interviewed M.M. at the Child Advocacy Center in Decatur, Illinois. During that interview, M.M. did not mention any incident with defendant that occurred in the bathroom after swimming. Instead, M.M. described two or three separate occasions when defendant placed his finger in her vagina while M.M. was in bed in her pajamas.

¶ 19 Thompson testified further that after interviewing M.M., he arrested and interrogated defendant. Defendant denied having any sexual contact with M.M. Defendant told Thompson that he was "best friends" with M.M. and that having sexual contact with her would be "gross." Thompson asked defendant whether he thought that M.M. was lying about her accusations. Defendant responded that he did not know why M.M. would lie.

¶ 20 Defendant testified that he never put M.M. to bed or made any sexual contact with her. Although their mother occasionally left defendant alone with M.M. in the evenings, he was never left alone with her overnight. On cross-examination, the following interchange occurred:

> "[THE STATE]: Do you remember when you talked to Detective Thompson saying that you knew you were not lying about what happened with [M.M.]?
>
> [DEFENDANT]: That is correct.
>
> [THE STATE]: And he asked you if you thought [M.M.] was making this up or lying, and you didn't respond?

[DEFENDANT]: That is correct.

[THE STATE]: Why?

[DEFENDANT]: Because I know that.

[THE STATE]: Why didn't you—is [M.M.] lying or making it up?

[DEFENDANT]: Yes, she is.

[THE STATE]: Why?

[DEFENDANT]: Because—I don't know—can you say that again?

[THE STATE]: Your position is that [M.M.] is lying or making up what she says about you touching her?

[DEFENDANT]: Yes, I do.

[THE STATE]: And I'm saying why would she lie about that?

[DEFENDANT]: I don't know why she would lie about that.

[THE STATE]: Can you think of any reason at all why she would lie?

[DEFENDANT]: Because maybe somebody put her up to it.

[THE STATE]: Like who—did you know that someone did?

[DEFENDANT]: No, I don't."

¶ 21 During closing argument, the State argued the following:

"When asked—when the defendant was asked why would she make it up? He said, [‘] I don't know[’]. He went on [to] say, [‘]maybe someone put her up to it.[’] That's the best he can come up with. Well, who put her up to it? He said, [‘]I don't know.[’] What this comes down to is who do you believe."

¶ 22 The trial court sentenced defendant to eight years in prison for count I and nine years for count II, to be served consecutively. The court did not impose any fines. The circuit

clerk later imposed several assessments against defendant.

¶ 23 C. First Appeal

¶ 24 On appeal, we remanded, pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), for an inquiry into defendant's posttrial claims of ineffective assistance of counsel. *Mourning I*.

¶ 25 On remand, in August 2016, the trial court conducted a *Krankel* hearing and determined that defendant's claims of ineffective assistance lacked merit or pertained to matters of trial strategy.

¶ 26 D. Second Appeal

¶ 27 In August 2016, defendant again appealed, raising the following issues: (1) the State improperly elicited testimony from defendant about M.M.'s credibility, (2) M.M.'s mother improperly testified about M.M.'s reporting of the alleged abuse, and (3) the circuit clerk improperly imposed several fines.

¶ 28 In April 2017, we entered an order affirming defendant's convictions and vacating certain fines. *Mourning II*. In particular, we concluded that although the State committed error by eliciting testimony from defendant about M.M.'s credibility, that error was not reversible under the first prong of the plain-error doctrine because the evidence in the case was not closely balanced. *Id.* ¶ 35.

¶ 29 E. The Supreme Court's Supervisory Order

¶ 30 In November 2017, the supreme court entered a supervisory order, directing us to vacate our judgment and reconsider our determination that the evidence in this case was not closely balanced in light of *Sebby*, 2017 IL 119445. *Mourning*, No. 122306 (Sept. 27, 2017) (nonprecedential supervisory order on denial of leave to appeal).

¶ 31 After considering *Sebby*, we conclude that the evidence was closely balanced, and defendant's testimony about M.M.'s credibility was plain error. We therefore reverse defendant's convictions.

¶ 32 II. ANALYSIS

¶ 33 Defendant raises the following arguments on appeal: (1) the State improperly elicited testimony from defendant about M.M.'s credibility, (2) M.M.'s mother improperly testified about M.M.'s reporting of the alleged abuse, and (3) the circuit clerk improperly imposed several fines.

¶ 34 A. Testimony About Credibility

¶ 35 Defendant argues that the State improperly elicited testimony from him about M.M.'s credibility. In this case, the State repeatedly asked defendant whether he thought M.M. was lying. When defendant responded that he thought she was, the State followed up by asking defendant why M.M. would lie.

¶ 36 Defendant failed to object to the testimony at trial. Therefore, defendant forfeited this claim, and we review it under the plain-error doctrine. *People v. Thompson*, 238 Ill. 2d 598, 611, 939 N.E.2d 403, 412 (2010). Under the plain-error doctrine, we will reverse a forfeited error if the error was clear and obvious and either (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against defendant or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 178-79, 830 N.E.2d 467, 475 (2005). We choose here to first address whether a clear and obvious error occurred.

¶ 37 1. *Was There Clear and Obvious Error?*

¶ 38 "Under Illinois law, it is generally improper to ask one witness to comment direct-

ly on the credibility of another witness." *People v. Becker*, 239 Ill. 2d 215, 236, 940 N.E.2d 1131, 1143 (2010); see also *People v. Young*, 347 Ill. App. 3d 909, 926, 807 N.E.2d 1125, 1139 (2004) (collecting cases). That is because credibility determinations are the responsibility of the trier of fact, not other witnesses. *Id.* Further, "a witness may only testify as to facts which are within his personal knowledge and recollection." *People v. Enis*, 139 Ill. 2d 264, 294-95, 564 N.E.2d 1155, 1167 (1990). A party may not "ask a witness to speculate about matters beyond his personal knowledge or to judge the veracity of other witnesses or evidence." *Id.* at 295, 564 N.E.2d at 1167.

¶ 39 In this case, the State's questioning of defendant was improper. The law is clear and well established that a witness may not testify as to the credibility of another witness. The State repeatedly asked defendant about his opinion of M.M.'s credibility by asking whether defendant thought she was lying. Defendant responded that he thought she was. The State's questions were improper and resulted in defendant's opining about M.M.'s credibility. The State then followed up by asking defendant why M.M. would lie. Defendant responded that he did not know. The State then asked defendant to speculate about a matter outside his personal knowledge by asking, "Can you think of any reason at all why she would lie?" This entire line of questioning was improper and constituted clear and obvious error.

¶ 40 2. *Was the Error Reversible Under the Plain-Error Doctrine?*

¶ 41 Defendant argues that the error was reversible under the closely balanced prong of the plain-error doctrine. In support of his assertion that the evidence was closely balanced, defendant points out that there were no independent witnesses to the alleged assaults, no physical evidence, and no incriminating statements by defendant. As a result, the outcome of the case depended on whether the jury believed M.M. Under these conditions, defendant argues that the

State's improper questioning of him concerning M.M.'s credibility was highly damaging and prejudicial.

¶ 42 a. *People v. Sebby*

¶ 43 To reverse under the closely balanced prong of the plain-error doctrine, the evidence must be "so closely balanced that the guilty verdict may have resulted from the error." *Thompson*, 238 Ill. 2d at 613, 939 N.E.2d at 413. In the recent case of *People v. Sebby*, 2017 IL 119445, the supreme court revisited and clarified the analysis courts should engage in to determine whether the evidence in a case was closely balanced. The supreme court reiterated that to establish the closely balanced prong of plain error, the defendant must show that the evidence "was so closely balanced the error alone severely threatened to tip the scales of justice." *Id.* ¶ 51. To determine whether the evidence was closely balanced, a reviewing court "must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Id.* ¶ 53. Such an inquiry involves assessing the evidence presented on each element of the charged offenses in addition to any evidence about the witnesses' credibility. *Id.*

¶ 44 The defendant in *Sebby* was charged with felony resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2010)). *Sebby*, 2017 IL 119445, ¶ 1. That charge required the State to prove, among other things, that defendant knowingly resisted a peace officer and that his violation of the statute was the proximate cause of an injury to that officer. 720 ILCS 5/31-1(a-7) (West 2010). On the resistance element, the three responding officers testified that defendant resisted. *Sebby*, 2017 IL 119445, ¶¶ 55-56. Three other witnesses, including defendant, testified that defendant did not resist and was instead being yanked around by the officers. *Id.* ¶¶ 57-58.

¶ 45 The *Sebby* court concluded that the evidence was closely balanced. *Id.* ¶ 61. The court explained the State's witnesses provided testimony that was consistent with each other, as

did the defendant's witnesses. *Id.* Neither party's version of events was "fanciful." *Id.* The court rejected the State's argument that the testimony of the defendant's witnesses was less plausible because those witnesses were relatives or friends of the defendant and might be biased. *Id.* ¶ 62. The court noted that neither party's version of events was "supported by corroborating evidence." *Id.*

¶ 46 The court also noted that, as in *People v. Naylor*, 229 Ill. 2d 584, 606-07, 893 N.E.2d 653, 667 (2008), the outcome of *Sebby* depended on a " 'contest of credibility.' " *Sebby*, 2017 IL 119445, ¶ 63 (quoting *Naylor*, 229 Ill. 2d at 606-07, 893 N.E.2d at 667). The court explained that because the outcome depended on two versions of events that were both credible, the evidence was closely balanced. *Id.*

¶ 47 b. Other Case Law

¶ 48 Cases distinguishing the "credibility contest" logic of *Sebby* and *Naylor* have involved either (1) some other evidence that supported one party's version of events or (2) a version of events that was not plausible. See, *e.g.*, *People v. Effinger*, 2016 IL App (3d) 140203, ¶ 26, 53 N.E.3d 985 (circumstantial evidence supported victim's version of events); *People v. Tademy*, 2015 IL App (3d) 120741, ¶¶ 19-20, 30 N.E.3d 1134 (no "credibility contest" between experts because lay testimony corroborated one expert's testimony); *People v. Lopez*, 2012 IL App (1st) 101395, ¶¶ 88-90, 974 N.E.2d 291 (evidence not closely balanced because circumstantial evidence supported State's witnesses' testimony and defendant's version of events "strained credulity"); *People v. Anderson*, 407 Ill. App. 3d 662, 672, 944 N.E.2d 359, 369-70 (2011) (evidence not closely balanced because defendant's version of events was implausible).

¶ 49 c. This Case

¶ 50 In this case, we conclude that the evidence was closely balanced. As in *Sebby* and

Naylor, the outcome of defendant's trial depended on whom the jury found more credible—M.M. or defendant. As in *Sebby*, both parties' versions of events were plausible. In addition, as in *Sebby*, no corroborating evidence existed to support either party's narrative. Although a contest of credibility does not *per se* result in the evidence being closely balanced (see *Naylor*, 229 Ill. 2d at 609-10, 893 N.E.2d at 669), in this case, the quality of the evidence so resembles that in *Sebby* that we conclude that the evidence was closely balanced. We therefore reverse defendant's convictions.

¶ 51 Because we reverse defendant's convictions on this issue, we decline to address defendant's remaining arguments.

¶ 52 III. CONCLUSION

¶ 53 For the foregoing reasons, we reverse defendant's convictions and remand for further proceedings. Because the evidence in this case was sufficient to prove defendant guilty beyond a reasonable doubt, retrial on remand is permitted. *People v. Lopez*, 229 Ill. 2d 322, 367, 892 N.E.2d 1047, 1073 (2008).

¶ 54 Reversed and remanded.