2014 IL App (2d) 121008-U
No. 2-12-1008
Order filed June 10, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. HERIBERTO LOPEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Boone County. No. 11-CF-184 Honorable Robert C. Tobin, Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion by allowing the State to ask a number of questions during *voir dire*. While two of the questions posed by the State are disputable, even if the trial court abused its discretion by allowing these questions, any error was not so serious that defendant was denied a fair trial under plain error. Because defendant is unable to establish prejudice, defendant cannot establish ineffective assistance; affirmed.

¶ 2 Following a jury trial, defendant, Heriberto Lopez, was convicted of five counts of criminal sexual assault and was sentenced to five consecutive terms of 10 years' imprisonment. The sole issue raised by defendant on appeal is whether the trial court abused its discretion in allowing the State to pose various questions during *voir dire*. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 18, 2011, Boone County police received information that a 16-year-old girl, named K.L., had been sexually molested by her step-father, defendant. J.L., K.L.'s brother, called the police to report the alleged abuse. J.L. told the police that his sister had gone into defendant's bedroom with the door locked, and he went up to the door and listened to what was happening inside the bedroom. He heard kissing sounds and bed noises. Upon investigation, K.L. confirmed that defendant had been molesting her since she was about 12 years' old approximately six to eight times a month and that it happened when her mother, Melissa, was at work.

¶ 5 The police arrested defendant, and he was subsequently indicted on two counts of predatory criminal sexual assault of a child against K.L., five counts of criminal sexual assault against K.L., and four counts of domestic battery against J.L., defendant's step-son. Prior to trial, the domestic battery charges against J.L. were severed.

¶ 6 At trial, K.L. testified for the State and recounted the following. Approximately two months after her sister had died, when K.L was 12 years' old, defendant touched her inappropriately. Her mother was at work and K.L. and her brothers were lying on the floor of their parents' bedroom. The boys were asleep, but K.L. could not sleep. After talking to K.L. for a while, defendant removed her shorts or pants and removed his own. K.L. testified that defendant inserted his erect penis into her vagina. K.L. stated that defendant's penis did not go all the way in, but it hurt. Defendant then dressed and went back to bed but told her not to tell anyone about what had happened. She did not call out to her brothers and she did not tell her mother about it the next day.

¶ 7 Defendant touched her inappropriately on another occasion when she was 12 years' old. Her mother was at work. K.L.'s brothers were asleep when defendant "made it pretty clear that he wanted" her to go upstairs to defendant's bedroom. K.L. told defendant that she did not want to, but he hit her in the head with his fist, so she went. Defendant was in the master bathroom with hair clippers and threatened that he would shave her head if she did not do what he wanted. He also ripped a pair of earrings out of her ears. Defendant then removed his clothes and hers, and then touched her vagina with his mouth and penis. Then defendant placed his penis in her vagina. Defendant told her not to tell anyone.

¶ 8 Defendant touched her in similar ways on other occasions when she was 12, but she did not remember how many times. On these occasions, if defendant ejaculated, it was onto a towel that he then placed in the laundry. K.L.'s mother was never home when these incidents occurred, and K.L. never told her brothers or her mother. Defendant never wore a condom during any of these occasions. She did not remember telling the police that the inappropriate conduct began with defendant kissing her breasts and touching her vagina, but intercourse did not occur for the first few weeks.

¶ 9 After K.L. turned 13, her bed was moved into the parents' bedroom, and the inappropriate touching continued. It happened about 6 to 8 times per month. On occasions when K.L. would say she did not want to do these things, defendant would hit her in the head with his fist. K.L. eventually stopped telling defendant not to do these things. On these occurrences, they were in the master bedroom with the door locked. After K.L. turned 14 and 15, similar activities continued at the same frequency as when she was 13. K.L. stated that defendant would give her hickeys and tell her to lie and say they were from her young siblings sucking on her neck.

¶ 10 When she turned 15, K.L. had her first menstruation and, hoping it would cause him to stop what he was doing, she told defendant. It did not stop, but defendant began using condoms, which he kept hidden in a sock in his dresser. The last time defendant touched her in this manner was on June 17, 2011.

¶ 11 K.L. noticed that defendant had a distinctive scar on his penis, and he told her it was from when he tried to circumcise himself when he was younger. She did not remember telling the police that there was anything unique about defendant's body.

¶ 12 J.L. testified that he saw K.L. go into defendant's bedroom with the door closed 'like every weekend." J.L. never told his mother that he saw K.L. go into the bedroom with defendant.

¶ 13 On June 17, 2011, J.L. was on the couch in the living room when he saw K.L. go into defendant's bedroom and he saw that the door was closed. He sat on the couch for a while and then began to hear noises from the bedroom. J.L. went by the bedroom door and heard "slapping noises." He was able to hear defendant asking K.L. questions, though he could not hear what the questions were. J.L. told the police that he heard defendant say "touch it," but did not know the context in which it was said. He heard K.L. respond "no." J.L. also told the police that he heard the bed rocking and heard a "kissing noise." J.L. called 911 on June 18, 2011, because he thought defendant might be sexually abusing K.L.

¶ 14 K.L.'s mother, Melissa, married defendant when K.L. was three years' old. Melissa described her relationship with defendant as "physically and verbally and mentally and emotionally abusive." After her daughter, Mallory, committed suicide in March 2008, her children no longer slept in their bedrooms. Everyone slept on the floor of the living room. Melissa also began working more hours as a nurse after Mallory's death. Melissa testified that

her relationship with defendant had deteriorated and that their sex life decreased following her daughter's death. Melissa testified that defendant never wore a condom when they had sex.

¶ 15 Melissa further testified that she sometimes saw hickeys on K.L.'s neck and she questioned K.L. about this. In addition, Melissa asked defendant if there was anything sexual going on with K.L., and he denied it. She also accused K.L. of having a sexual relationship with defendant.

¶ 16 On June 18, 2011, the police called Melissa at work to inform her that K.L. and J.L. were at the police station. On June 21, she called one of the detectives assigned to the case to inform him that she had found condoms in a sock in defendant's sock drawer. Melissa also testified that defendant has a scar on his penis, which resulted from his attempt to circumcise himself.

¶ 17 The parties stipulated to the following evidence. Officer Acomando had an arrest warrant for defendant. He went to a residence in Carpentersville, Illinois, and observed two males and a female sitting in the driveway. Officer Acomando would identify defendant in open court as one of the two males that he saw. Another officer accompanying Acomando asked the three individuals if Heriberto Lopez was there. Defendant told the officers that Heriberto Lopez was not there and that he had just left to go to a party. They asked what defendant was wearing and defendant gave a clothing description to the officers. They asked defendant and the other male for identification. Defendant told the officers that he did not have any identification on him. The other male subject gave his identification. The officers noticed that defendant became very nervous when they were contacting dispatch to see if Heriberto Lopez had any identifying scars, marks, or tattoos on his person. The officers then noticed that defendant was carrying a wallet in his pants pocket. Defendant gave the wallet to the officers and they located a driver's license

inside, which identified defendant as Heriberto Lopez. He also had an identifying scar on his nose. Defendant was taken into custody.

¶ 18 Defendant did not testify and did not present any witnesses or evidence on his behalf.

¶ 19 The jury acquitted defendant of two counts of predatory criminal sexual assault of a child but convicted him of five counts of criminal sexual assault. The court sentenced him to 5 consecutive terms of 10 years' in prison. Defendant's motion to reconsider the sentence was denied. This timely appeal follows.

¶ 20 II. ANALYSIS

¶ 21 Defendant contends that the prosecution indoctrinated the jurors during *voir dire* and denied him a fair trial. This issue was not preserved by objections at the time the questions were posed or by raising it in a posttrial motion. Defendant asserts, however, that we should overlook the forfeiture, claiming that the error is plain error and shows ineffective assistance of counsel.

¶ 22 The plain-error doctrine offers criminal defendants a narrow path to appellate review of procedurally forfeited trial error. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). As a matter of convention, a prerequisite or an initial step toward applying that doctrine is the existence of an error. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). Therefore, our analysis must begin with a determination of whether error occurred at all. If it did not, then plain error could not have occurred. *People v. Kitch*, 239 Ill. 2d 452, 465 (2011). Likewise, if there is no error, defendant's claim of ineffective assistance must fail. *People v. Rinehart*, 2012 IL 111719, ¶ 22.

¶ 23 The constitutional right to a jury trial encompasses the right to an impartial jury. *Id*. at ¶ 16. The trial court is primarily responsible for conducting *voir dire*. Under Rule 431, the trial court must permit the parties to supplement its examination of potential jurors by inquiry which the court deems proper. *Id.* There is no precise test for determining which questions to allow

and which will filter out partial jurors, so the manner and scope of the examination is within the discretion of the trial court. *Id.* An abuse of discretion occurs when the conduct of the trial court thwarts the purpose of *voir dire* examination—namely, the selection of a jury free from bias or prejudice. *People v. Williams*, 164 Ill. 2d 1, 16 (1994). "The purpose of *voir dire* is to ascertain sufficient information about prospective juror's beliefs and opinions so as to allow removal of those members of the venire whose minds are so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath." *People v. Cloutier*, 156 Ill. 2d 483, 495-96 (1993). A trial court does not abuse its discretion during *voir dire* if the questions create "a reasonable assurance that any prejudice or bias would be discovered." *People v. Dow*, 240 Ill. App. 3d 392, 397 (1992).

¶ 24 Consequently, *voir dire* questions, whether asked by the trial court or by the parties with the sanction of the court, must not be "a means of indoctrinating a jury, or impaneling a jury with a particular predisposition." *People v. Bowel*, 111 Ill. 2d 58, 64 (1986). This is not a bright-line rule but rather a continuum. *Rinehart*, 2012 IL 111719, ¶ 17. Broad questions are generally permissible. Specific questions tailored to the facts of the case and intended to serve as "preliminary final argument" are generally impermissible. *People v. Mapp*, 283 Ill. App. 3d 979, 989-90 (1996).

¶ 25 Defendant maintains that the State's entire case came down to whether or not the jury believed K.L.'s testimony that her step-father had been sexually abusing her for approximately 3 years, between the ages of 12 and 15, and that the State theorized defendant created an environment of fear and intimidation that kept K.L. from telling anyone about the incidents. To ensure a jury more likely to convict, defendant argues that the State was permitted to ask most of the potential jurors, including all of the jurors who were ultimately selected, the same series of

questions, though the wording varied slightly for each potential juror. The questions included whether:

(1) it is difficult for adults to talk about sexual activity with people they do not know;

(2) children have the same difficulty talking about sex to people they do not know;

(3) child abuse, in fact, does exist and that adults molest children;

(4) child molestation offenses more often occur in private or public;

(5) you agree that, because this is private, it narrows down the number of possible people who can see it;

(6) you would be surprised if a victim of a sex offense was reluctant to talk about it;

(7) you have a stereotypical view as to what kind of person would be a sex offender; and

(8) you believe that you could spot them just by seeing them.

¶ 26 Many of the potential jurors, but not all, were also asked: "Would you agree that, for the most part, when people tell a lie, they have a reason behind lying?" The prosecutor concluded his questions by asking each potential juror: "Do you believe it is possible for a person to love and care for a person who would usually hurt them?" Defendant contends that all of these questions went beyond what was needed to ensure an unbiased jury and crossed into previewing the State's evidence, effectively constituting a preliminary closing argument.

¶ 27 We find the *Rinehart* case instructive as to whether the particular questions asked here were proper. In *Rinehart*, the supreme court considered whether the trial court abused its discretion in allowing the prosecutor to ask 5 of the 25 potential jurors why a sexual assault victim might delay in reporting an incident where the case involved a victim who did not tell anyone of the assault for several weeks. *Rinehart.* 2012 IL 111719 ¶¶ 4-5, 15. The jurors answered that fear, shame, and embarrassment might prevent someone from coming forward. *Id.*

at ¶ 5. The defendant argued that this question did not seek to uncover bias but rather sought to preeducate potential jurors on an aspect of the alleged victim's expected testimony, and thereby bolster her credibility. *Id.* at ¶ 18.

¶ 28 In determining that this question was properly allowed, the court stated that the question sought to uncover bias about delayed reporting by someone accusing another of a sexual assault. *Id.* at ¶ 21. According to the court, such questions allowed the State to intelligently exercise its peremptory challenges to excuse those people who had preconceived ideas about the lack of credibility of someone who did not immediately report a sexual assault. *Id.* These questions were not impermissible because they were "less fact-driven, and more focused on potential jurors' preconceptions about sexual assault cases, in an effort to uncover any bias regarding delayed reporting and the credibility of a victim who informed no one about the alleged attack when it happened." *Id.* at ¶ 21. The court noted that broad questions are generally permissible. *Id.* at ¶ 17.

¶ 29 In applying the analysis of *Rinehart* to the present case, we separate the questions cited by defendant into two categories. The first category includes those broad questions which tested the jurors' preconceived notions about sexual abuse cases in general. These include the following questions: (1) whether the jurors believed that child abuse existed and that adults molest children; (2) whether the jurors had stereotypes of what kind of person would be a sex offender; (3) whether one could be spotted just by seeing them; (4) whether a sex offense would take place more in private or more in public; and (5) whether you agree that, because this is private, that narrows down the number of possible people who can see it. These were broad questions about sex offenses in general and did not contain facts specific to the case.

Additionally, these questions did not indoctrinate the jury to the State's theory or pre-argue the case.

¶ 30 The second category includes questions which could be viewed as including facts specific to the case, *i.e.*, the victim's reluctance to report the crime. This includes the queries whether adults and children would be reluctant to talk about sex with people they do not know and whether you would be surprised if a victim of a sex offense was reluctant to talk about it. While these questions could be tied to the specific facts of this case, they also can be seen as attempting to uncover bias regarding delayed reporting, which is similar to the question found acceptable in *Rinehart*. *Id*. at ¶ 21.

¶ 31 Defendant cites *People v. Boston*, 383 Ill. App. 3d 352 (2008), and *People v. Bell*, 152 Ill. App. 3d 1007 (1987). We find these cases distinguishable. In *Boston*, the defendant was charged with criminal sexual assault of his girlfriend. During *voir dire*, the State questioned all of the prospective jurors whether they believed that the government should not become involved in domestic incidents; whether they believed that a woman who obtains an order of protection against a man, and then invited that man to her home, has given implied consent to a subsequent sex act with the man, and has made herself responsible for any subsequent violence with the man; and, whether they believed that a woman consents to a sex act if she does not scream or fight while she is being assaulted. The court held that these questions were improper because they "highlighted factual details about the case and asked prospective jurors to prejudge those facts," and they concerned matters of law or instruction, which are not appropriate areas of inquiry under Rule 431(a). *Boston*, 383 Ill. App. 3d at 355.

¶ 32 In *Bell*, the defendant was charged with the murders of his parents. During *voir dire*, the State asked a majority of the potential jurors whether they believed that people have a natural

impulse to confess their wrongdoings, and whether they believed that a person could carry out a plan to murder a family member as a solution to problems in that relationship. The court held that these questions were improper "because they served primarily to indoctrinate the jurors as to the State's theory at trial and asked them to prejudge the facts of the case." *Bell*, 152 Ill. App. 3d at 1017. The State's questions were so factually tied to the State's theory of the case that they amounted to indoctrination.

¶ 33 The State's questions in the present case differ from those in *Bell* and *Boston*. Unlike the questions in those cases, the questions here did not touch on any defense, law, or instructions. The questions were less fact-driven, and more focused on potential jurors' preconceptions about sexual assault cases in an effort to uncover any bias regarding delayed reporting and the credibility of a victim who, like the victim in *Rinehart*, informed no one about the alleged attacks when they happened. Moreover, the questions were much broader in scope than the narrow factual questions posed in *Bell*. Like in *Rinehart*, in the present case, while "we agree *** that the subject could have been raised more artfully [citation], and perhaps phrased in terms of a venire member's bias and ability to put any bias aside in reaching a verdict, we cannot say that the trial court abused its discretion." *Rinehart*, 2012 IL 111719, ¶ 21.

¶ 34 The following two questions remain: (1) whether the jurors believed that it was possible for a person to love and care for someone who abused them; and (2) whether, for the most part, when people lie, they have a reason for lying. The first question could be tied to uncovering bias as to why there was no immediate reporting of the abuse, as we previously discussed. These questions did not indoctrinate the jury to the State's theory or pre-argue the case. The State did not present any evidence regarding whether it was possible for a person to love and care for

someone who abused them or whether when people lie, they have a reason for lying, and did not argue this during closing.

¶ 35 However, even if we were to find the trial court abused its discretion by permitting the State to pose the two questions, defendant has not established plain error or ineffective counsel. Under the first claim made by defendant, that the prejudice should be presumed because the right to an impartial jury is so important, we determine that defendant has not established that the alleged erroneous questions affected the jury. These questions do not constitute structural error"; *i.e.*, "a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant trial.' " *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009), quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005). "A finding that defendant was tried by a biased jury would certainly satisfy the second prong of plain-error review because it would affect his right to a fair trial and challenge the integrity of the judicial process." *People v. Thompson*, 238 Ill. 2d 598, 614 (2010). Based on the nature of the questions and the fact that the prosecutor only asked the second question of two of the empanelled jurors, we are confident that the jury remained fair and impartial. Moreover, the fact that the jury found defendant *not* guilty on two counts of predatory criminal sexual assault of a child would infer it was not overborne by the questions.

¶ 36 We further find that the evidence in this case was not closely balanced. Under the first prong of the plain error rule, there must be a clear and obvious error and the evidence must be so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *Herron*, 215 Ill. 2d at 186-87). Under the two-prong *Strickland* test for determining whether assistance of counsel has been ineffective, a defendant must show that (1) his counsel's

performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 446 U.S. 668, 687 (1984). With regard to the second prong of *Strickland*—the prejudice prong—a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome. *People v. Houston*, 226 Ill. 2d 135, 144 (2007).

¶ 37 Here, K.L. testified clearly about the abuse she suffered at the hands of defendant and her allegations were corroborated by her brother's testimony that he saw K.L. go into a bedroom with defendant and he could hear kissing and bed noises, and her mother's testimony that she discovered condoms in defendant's sock drawer. Defendant also gave a false name to the police when they attempted to arrest him after K.L. told the officers that she had been sexually abused. Attempts to avoid arrest by obstructing an investigation shows consciousness of guilt. *People v. Chaban*, 2013 IL App (1st) 112588, ¶¶ 55-56. The strength of the evidence shows that there was not a reasonable likelihood that had defense counsel objected to the prosecutor's *voir dire* questions, the result of the proceeding would have been different. Thus, the first prong of the plain error doctrine as well as the prejudice prong of *Stickland* does not apply. Where a defendant is unable to establish plain error, it is incumbent upon us to honor the procedural default. *People v. Keene*, 169 Ill. 2d 1, 17 (1995).

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, the judgment of the circuit court of Boone County is affirmed.

¶ 40 Affirmed.