2018 IL App (2d) 160320-U
No. 2-16-0320
Order filed November 6, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DEREK M. F., Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 13-CF-339 Honorable Robert P. Pilmer, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of predatory criminal sexual assault of a child, specifically that he was 17 and not 16 at the time of the offense: despite a tangential inconsistency in one witness's testimony, all the evidence, including defendant's own statement, indicated that defendant was 17; (2) defendant showed no plain error in the State's rebuttal argument, as the evidence was not close and the alleged error was not structural.

¶ 2 Following a bench trial, defendant, Derek M. F., was convicted of two counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) and sentenced to a total of 12 years' imprisonment. On appeal, defendant does not deny that he sexually assaulted the victim, M.F. Rather, he claims that the State failed to prove beyond a

reasonable doubt that he was 17 when the assault occurred, an element of predatory criminal sexual assault of a child. See *id.* Defendant also argues that the State materially misrepresented the law during rebuttal argument when it commented that M.F.'s mother's inconsistent statement concerning when she reported the assault could not be considered substantively. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Evidence presented at trial, which was held in September 2015, revealed that defendant was born on November 28, 1995. Defendant's parents were divorced when he was around seven years old, and defendant's father, B.F., remarried. B.F. and his second wife, A.F., had a child together, M.F. Defendant frequently visited B.F. and his family during vacations from school, including spring break, summer vacation, and Christmas break.

¶ 5 In 2012, defendant visited B.F. and his family during spring break. At that time, the family lived in Hampshire. Defendant also visited in July 2012, after the family had moved to Genoa. Defendant had a bedroom in the basement of the Genoa house. In the basement was a futon that was kept upstairs in the Hampshire home.

¶ 6 According to M.F., she was assaulted on the futon in the basement when she was four years old.[1] More specifically, M.F. testified that defendant licked her vagina.

¶ 7 A.F. testified that M.F. first told her about the assault on May 9, 2013. M.F. said that the incident happened in the house over Christmas break, which was the last time that defendant was at the home. A.F. told B.F., a former police officer, about the incident, never indicating that she first learned of the incident in December. B.F. contacted defendant on May 10, 2013. Texts exchanged between B.F. and defendant indicated that B.F. wanted defendant to e-mail him the details about what had happened. When B.F. confronted defendant with a claim that the "e-mail

[1] M.F., who was born on March 15, 2009, was actually only three at the time.

wasn't detail[ed]," defendant's immediate response was "that[']s all the details [I] can give it happend [*sic*] 5 months ago."

¶ 8 On May 11, 2013, A.F. and B.F. reported the incident to the police. A.F. told Officer Robert Smith that the incident happened in December 2012 but that she first learned of it on May 9, 2013, which is what Smith put in his report. After talking to Smith, A.F. gave the police a written statement, which is not included in the record on appeal. In that statement, A.F. asserted that "[a]bout five months ago during Christmas break my daughter [M.F.] told me that [defendant] put his [penis] on her [vagina]." A.F. was cross-examined extensively about this statement and the fact that, during a previous hearing in February 2015, she indicated that M.F. told her about the incident in December 2012 but that she waited five months to report it. During the previous hearing, although A.F. made some statements that could be viewed as indicating that she waited several months to report the incident, she also expressed that she was uncertain about the precise date. For example, A.F. was asked "[A]nd it's your testimony that months went by before you actually went to the police?" A.F. replied:

> "No, it wasn't that long, I don't believe. It may have been that long. It's been so long now I can't remember exact dates, but I know I was waiting for e-mails and text messages to be sent to me so I could print them out, yes."

A.F. also indicated at the previous hearing that, although M.F. had told her in December that her vaginal area was red and A.F. confirmed that it was after M.F. had taken a bath, A.F. did not believe that the redness was caused by the assault, as "it had been way too long." The day after this previous hearing, A.F. told the State that "there was some confusion as far as the dates that we talked about" at the hearing.

¶ 9 A.F. clarified at trial:

> "It happened in December. That's what I thought you guys were asking me [at the previous hearing], that it happened in December[. M.F.] didn't tell me until May."

A.F. admitted that she "wrote it wrong" in her statement, because she was "upset."

¶ 10 Defendant testified that he assaulted M.F. on the mattress in his basement bedroom in the Hampshire house. He stated that he never assaulted M.F. while the family lived in the Genoa home. He asserted that B.F. told him when B.F. confronted him in May that M.F. had been talking about the assault for months, a claim that B.F. denied at trial. Defendant also admitted that he told B.F. in May that the assault happened five months prior, but he claimed that he made that statement because it was the "easiest answer" and he was "running off of pure adrenalin."

¶ 11 During closing arguments, both parties addressed A.F.'s credibility. In rebuttal, the State asserted:

> "Again, Judge, it's clear from the testimony of [A.F.], it's clear from the testimony of [B.F.] that when this came to their attention in May 2013 they reported it to Genoa police. Impeachment by a prior inconsistent statement isn't substantive evidence. It only goes to the weight to be given to the testimony heard here in the courtroom, and [A.F.] explained, 'I found out about this in May of 2013.' "

Defense counsel never objected to these statements.

¶ 12 In finding defendant guilty, the court noted:

> "As to the testimony of [A.F.], certainly as [defendant] has pointed out, her testimony on today's date contrasts somewhat with the testimony at the earlier hearing. Nonetheless, based on the explanation the [*sic*] testimony that was given[,] I do find her credible in her testimony today in that regard as to when she first discussed or when

> [M.F.] first discussed these incidents with her and when they were first reported to the police."

¶ 13 Defendant filed a posttrial motion, arguing, among other things, that the State failed to prove beyond a reasonable doubt that he was 17 years old when he assaulted M.F. Defendant never claimed that the State misstated the law during rebuttal. The trial court denied the posttrial motion, and this timely appeal followed.

¶ 14 II. ANALYSIS

¶ 15 The first issue we address is whether defendant was proved guilty beyond a reasonable doubt. More specifically, we consider whether the State proved beyond a reasonable doubt that, when the incident occurred, defendant was 17 years old, an element of predatory criminal sexual assault of a child.

¶ 16 When examining the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The trier of fact has the responsibility of assessing a witness's credibility, weighing the testimony, and resolving inconsistencies. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will not reverse a criminal conviction as based on insufficient evidence unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the defendant's guilt. *People v. Gray*, 2017 IL 120958, ¶ 35.

¶ 17 Here, we cannot conclude that the State failed to prove beyond a reasonable doubt that defendant was 17 when he assaulted M.F. Although A.F. contradicted herself on when M.F. told her about the incident, intimating at the earlier hearing that M.F. told her in December and at trial

that she knew of the incident only in May, A.F. was steadfast in testifying about when the assault occurred. At the earlier hearing and at trial, she testified unequivocally that the incident happened in December 2012. Defendant turned 17 on November 28, 2012. Thus, when defendant assaulted M.F. a month later, he was 17. Smith confirmed that defendant was 17 when the incident happened. Smith prepared a report before A.F. gave her written statement, and in that report he indicated that A.F. told him that the assault occurred in December 2012. Although A.F. indicated in her statement that she waited to report the assault, nothing in her statement suggested that defendant assaulted M.F. sometime before December 2012. Moreover, defendant, without any prompting from B.F., told B.F. in May that the assault occurred five months earlier, which was December 2012.

¶ 18 Thus, defendant's contention that the assault happened in Hampshire, when he was 16 and before the family moved to Genoa in the spring of 2012, was contradicted by A.F., B.F., Smith, defendant, and M.F. With regard to M.F., she testified that the assault happened on a futon, she identified a picture of the futon, and defendant himself testified that that futon was not in the basement of the Hampshire home. Although defendant claimed that the incident occurred on a mattress in the basement of the Hampshire home, the trial court, as the fact finder, was entitled to reject defendant's testimony on that point. *Sutherland*, 223 Ill. 2d at 242.

¶ 19 In arguing that the State failed to prove beyond a reasonable doubt that he was 17 when he assaulted M.F., defendant appears to attack A.F.'s credibility, claiming that, because she contradicted herself on when she first learned of the assault, her testimony concerning when the incident happened should be discredited. Then, because A.F. indicated at the earlier hearing that the abuse happened "way too long" ago, defendant apparently contends that the incident must have happened when defendant was still 16.

¶ 20 The mere fact that there are inconsistencies in A.F.'s testimony does not mean that the entirety of her testimony must be ignored. See *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004). Rather, "it is for the fact finder to judge how flaws in part of the testimony affect the credibility of the whole." *Id.* "Of course, *** the fact finder's judgment in that regard must be reasonable in light of the record." *Id.* "In some cases a reviewing court may find, after considering the whole record, that flaws in testimony made it impossible for any fact finder reasonably to accept any part of it." *Id.* However, "[w]here the record is not such that the only inference reasonably drawn from flaws in the testimony is disbelief of the whole, a reviewing court should bear in mind that the fact finder had the benefit of watching the witness' demeanor." *Id.* at 284. If under those circumstances the trial court found the witness credible, the reviewing court cannot conclude that the witness was not. See *id.*

¶ 21 Here, although A.F.'s testimony at the prior hearing did contradict her trial testimony to a certain extent, she also asserted that she really was unsure about when she reported the incident in relation to when she first learned of it. The trial court was aware of this inconsistency and found it immaterial in light of the explanation A.F. had given. That is, not only did the assault happen over two years before she testified at the earlier hearing and almost three years before trial, but she asserted that she was very upset by what had happened, misstated when she reported it in her written statement, and alerted the State to her erroneous testimony at the previous hearing a day after that hearing was held. With regard to the allegation that the assault must have happened before December 2012 because A.F. asserted that she did not believe that the redness of M.F.'s vaginal area was attributable to the assault, as "it had been way too long" ago, no evidence indicated when that examination occurred in relation to the assault. Moreover, when A.F. reported the assault is, of course, not the core issue here. See *People v. Reed*, 84 Ill.

App. 3d 1030, 1037 (1980). Rather, as noted, what is material is whether defendant was 17 when he assaulted M.F. Under either of A.F.'s statements, the assault occurred in December 2012, a month after defendant turned 17. Because when A.F. reported the incident is the only inconsistency in her testimony, this is not a case where the flaws in her testimony made it impossible for the trial court to accept any part of it. See *People v. Herman*, 407 Ill. App. 3d 688, 705-07 (2011).

¶ 22 The next issue we address is whether the State misstated the law during rebuttal. In making his argument, defendant recognizes that he neither objected to the alleged improper statements at trial nor raised any issue related to those statements in his posttrial motion. Because he did not preserve the argument for appeal (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), he urges this court to consider the issue under the plain-error rule or in light of a claim that his counsel was ineffective.

¶ 23 We consider first whether we can review defendant's claim under the plain-error rule. The plain-error rule bypasses normal forfeiture principles and allows us to review unpreserved claims of error in certain circumstances. See *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Specifically, we may review an unpreserved error if a clear or obvious error occurred and (1) the evidence is so closely balanced that that error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) that 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. *Id.*

¶ 24 The defendant bears the burden of establishing plain error. *People v. Johnson*, 238 Ill. 2d 478, 485 (2010). We review *de novo* whether plain error arose. *Id.*

¶ 25 Under a plain-error analysis, courts generally first determine whether any error occurred. *Thompson*, 238 Ill. 2d at 613. We will not do so here, because even if the statements made in rebuttal misstated the law, defendant has failed to establish plain error. See *People v. White*, 2011 IL 109689, ¶ 134; *People v. Garner*, 2016 IL App (1st) 141583, ¶ 32.

¶ 26 Defendant argues that his claim is reviewable under both prongs of the plain-error rule. Under the first prong, we consider whether "the evidence is so closely balanced" that the guilty finding might have resulted from the error. *Thompson*, 238 Ill. 2d at 613. As indicated above, we cannot say that the evidence was so closely balanced here. Aside from A.F.'s testimony, B.F., Smith, and even defendant himself indicated that the assault occurred in December 2012, when defendant was 17 years old.[2]

¶ 27 Under the second prong of the plain-error rule, courts may review unpreserved "structural" errors. *Id.* at 613-14. Those are "systemic" errors that erode the integrity of the judicial process and severely undermine the fairness of a defendant's trial. *Id.* at 614. Errors that have been classified as "structural" include the total deprivation of the right to counsel or having a trial before a judge who is financially interested in a party's case. See *People v. Patterson*, 217 Ill. 2d 407, 424 (2005). Putting aside the fact that defendant's argument seeking review under the second prong of the plain-error rule consists of one nebulous sentence, the alleged error at issue here, *i.e.*, the one misstatement of the law during rebuttal, is simply not a structural error. See *People v. Johnson*, 208 Ill. 2d 53, 84-85 (2003) (recognizing that claims of prosecutorial misconduct during closing argument may amount to structural error if the closing argument contains numerous improper statements). Thus, it is not reviewable under the second prong of

[2] We consider only the evidence establishing defendant's age, as defendant does not dispute that he assaulted M.F.

the plain-error rule. See *id.*; see also *People v. Keene*, 169 Ill. 2d 1, 23 (1995) ("If the commentary has the effect of undermining the entire trial, plain error exists and reversal for a new trial is warranted.").

¶ 28 Defendant's claim that we can consider his argument in light of an allegation that his counsel was ineffective is similarly unavailing. Defendant's argument on this point consists of one sentence. He does not cite the record, and although his argument contains boilerplate law on ineffective assistance of counsel, he fails to apply that law to the facts here. Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017) requires "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Because defendant failed to do this, we determine that his claim that counsel was ineffective is forfeited. *People v. Ward*, 215 Ill. 2d 317, 331-32 (2005). In any event, for the reasons given above, we could not find a reasonable likelihood that the State's comments affected the outcome. See *People v. Kuntu*, 196 Ill. 2d 105, 133 (2001) (prejudice required for ineffectiveness).

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, the judgment of the circuit court of De Kalb County is affirmed. 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).

¶ 31 Affirmed.