2011 IL App (3d) 080769-U

Order filed August 23, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	for the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois
	)	
	)	Appeal No. 3-08-0769
v.	)	Circuit No. 06–CF–1889
	)	
DOUGLAS K. ALSUP,	)	Honorable
	)	Robert P. Livas,
Defendant-Appellant.	)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's failure to give the jury Illinois Pattern Jury Instruction 11.66 arose to the level of plain error, and because the evidence was closely balanced, threatened the fairness of defendant's trial.

¶ 2 Defendant Douglas Alsup was convicted by a jury of three counts of predatory criminal sexual assault of a child and sentenced to consecutive nine-year terms of imprisonment. This court vacated his conviction and sentence, reversed the trial court and remanded. *People v. Alsup*, No. 3-08-0769 (2010) (unpublished order under Supreme Court Rule 23). The State appealed and the Illinois Supreme Court, in its supervisory authority, directed this Court to vacate its judgment and reconsider

in light of *People v. Sargent,* 239 Ill.2d 166 (2010), to determine if a different result is warranted. *People v. Alsup*, No. 111614 (2011). Having reconsidered our prior decision in light of *Sargent*, we reach the same conclusion and thus reverse the defendant's sentence, finding that the trial court's failure to properly instruct the jury was plain error and denied Alsup a fair trial. We reverse and remand.

¶ 3 FACTS

¶ 4 In July 2006, defendant Douglas Alsup was charged with three counts of predatory criminal sexual assault of a child for incidents that occurred between January 1, 2006, and July 15, 2006. 720 ILCS 5/12-14.1(a)(1) (West 2006). The victim was C.K., who was born May 2, 1998. Count I of the indictment charged that Alsup knowingly placed an ice cube on C.K.'s vagina, count II charged that he knowingly placed his tongue on her vagina, and count III charged that he knowingly placed his finger on her vagina, at a time when he was over 17 years of age and C.K. was under 13 years of age. Alsup was arrested in June 2007.

¶ 5 In May 2008, a hearing was held pursuant to section 115-10 of the Code of Criminal Procedure (Code). 725 ILCS 5/115-10 (West 2006). Scott Cammack, a Joliet police department detective, testified that he observed the victim sensitive interview (VSI) of C.K. at the Children's Advocacy Center (CAC) from behind a one-way mirror. Cammack had observed between 50 and 100 such interviews. He did not interview C.K. prior to her interview at the CAC. C.K. was asked non-leading, yes-or-no questions, and named Alsup as the perpetrator. A stipulation was entered as to the testimony of the victim's mother, Lori Powell, which stated that around July 20, 2006, C.K. told Powell that Alsup touched her "pee pee" and licked her "private area." The trial court held that C.K.'s out-of-court statements were admissible, finding them reliable as to time, circumstances and

content per the requirements of section 115-10 of the Code. 725 ILCS 5/115-10 (West 2006).

¶ 6 A jury trial ensued in June 2008 where the following testimony was heard. Powell testified that Alsup was her brother-in-law and that he lived with her and her husband, Alsup's brother, in the spring and summer of 2006. Alsup babysat for her five children. There were often between five to 12 children at the house, including a girl named Louise who lived downstairs. C.K. was eight years old at that time. Powell and C.K. talked about the abuse one time when C.K. first disclosed it. Powell told C.K. only to tell the truth about what happened. She did not coach or tell C.K. what to say. She took C.K. to the doctor immediately after she told her about the abuse.

¶ 7 C.K. testified that she was 10 years old at the time of trial and had just finished fourth grade. She knew the difference between the truth and a lie. She identified Alsup in the courtroom as "the man who touched me." The abuse occurred two years earlier when Alsup lived with her family in their houses on Young Street and in a trailer park. No one else was in the room when Alsup touched her. He touched her with his hands and tongue on her "private spot" and on her chest. He touched her with an ice cube on her chest and in her "private area." He touched her "privates" under her clothes by sticking his hand under them. C.K. did not remember whether Alsup put the ice under her clothes or if he touched her with his tongue over or under her clothes. She did not remember if Alsup said anything. The abuse occurred in the living room on different days. C.K. remembered the CAC interview and circling her chest and "private area" on a diagram during the interview to show where Alsup touched her. She did not remember how much time had passed between the abuse and the interview but it was more than a week and less than 100 days. She did not remember when she went to the doctor. She did not tell anyone about the abuse because she was scared of Alsup. She never told her cousin Felicity Thomas that she was making up the story and she never

told her friends that she wanted to play a game on Alsup. She did not speak to Felicity's mother, Carolyn, about the abuse. She did not remember whether she talked to Felicity or Felicity's grandmother about it. No one told her what to say or that she should get Alsup in trouble. She was telling the truth.

¶ 8 Two stipulations were read into evidence. A stipulation of Detective Cammack's statements was entered into evidence which stated that he witnessed the CAC interview and that the questioning was non-suggestive. A stipulation of Claude Sadovsky, the physician who examined C.K. in July 2006, included the following statements. At his examination of C.K., she reported a sexual assault had occurred one week prior in which her vagina was rubbed and licked. C.K. had showered, eaten, changed clothes and urinated since the assault. There was no medical evidence of the assault.

¶ 9 The videotape of C.K.'s CAC interview was played for the jury. C.K. explained that she did not like Doug because he touched her "by the privates" and that he "once licked with his tongue down there." Doug once took ice from the freezer and "rubbed it down here in the middle" while they were in the kitchen. C.K. circled her vagina on a diagram to indicate where Alsup touched her with the ice. He touched her "inside and privates." C.K. said that Alsup touched her underneath her clothes by reaching through the legs of her shorts and her sleeves. He moved her underwear to touch her with the ice. When he was done he asked her if it felt good. He put his fingers and also the ice inside her "privates." The ice was cold and his fingernails hurt her. Once when she was watching television, he pulled her pants up and her underwear over and started licking her which she described as "slimy and gross." He licked her one time, put his finger inside her one or more times, and touched her "a lot." The touching happened in the living room and the ice episode happened in the kitchen. One time he put her on his lap and started "humping" with his clothes on. She felt his

"privates" which felt like bumps. He showed her his privates but she would not look. He touched her when she was seven and eight years old. Alsup drank beer and would be mean. She was scared to tell her mom because her stepfather Eddie would not believe her. She was scared Alsup would do something if she told. Alsup told her not to tell but she told a couple of times. She first told the neighbor Mary who hated Alsup. C.K. is afraid of Alsup "because he touches me," explaining that she stays up at night "because he might come in the bedroom."

¶ 10 The State rested, and the defense moved for a directed verdict which was denied. Carolyn Hill testified first for the defense. She is Felicity's mother and Alsup is her brother. Lori Powell, C.K.'s mother, was married to another brother, Eddie Powell. She is close to Alsup and visited him every couple weeks when he lived with Lori and Eddie. Her kids would go over to play with their cousins and see their uncles. Lori told her about the abuse in May 2006 and asked her to speak to C.K. who denied that anyone did anything bad to her. When Hill asked C.K. about her statements to Lori that Alsup had touched her, C.K. said it was a game she was playing with the neighbor girl. Hill did not know the girl's name. C.K. said she was not trying to get her Uncle Doug in trouble. Hill was "pretty sure" that C.K. said Alsup was mean. Although she knew of the abuse in May 2006 and that Alsup was charged in July 2006, she never told the police about her conversation with C.K. She did not know who to go to with the information and did not know whether the police or the Department of Children and Family Services (DCFS) was investigating Alsup. She met with a defense investigator in September 2007.

¶ 11 Felicity Thomas testified. She was nine years old at the time of trial, in third grade, and knew the difference between a lie and the truth. She went to C.K.'s "like every week" when Alsup was living there and was there every time he watched her cousins. When she talked to C.K. about the

abuse, Alsup was not living there any longer but was in Michigan. C.K. told her she did not like Alsup and wanted to get him in trouble by playing a game with her friend downstairs. Felicity did not know the friend's name. C.K. told her to repeat some words and tell them to her mom. Specifically, C.K. told her to "say that he - your uncle touched you in the wrong spot." Felicity talked to her mom about the abuse allegations more than once but her mom did not help her figure out what to say or how to say it.

¶ 12 Alsup testified that he was 49 years old at the time of trial. While he was living with his brother, Eddie, in the spring and early summer of 2006, he was never alone with C.K. and never touched her. He moved to Michigan in July 2006 once he had served his term of probation in Illinois so that he could be closer to his wife. He had been on probation for a 2003 conviction for possession of crack cocaine.

¶ 13 The defense rested and a jury instruction conference occurred at which neither party objected to any instruction. Neither party proffered an instruction pursuant to section 115-10(C) of the Code. 725 ILCS 5/115-10(C) (West 2006). Subsequent to closing arguments, the trial court instructed the jury, including the following instruction, which provided:

> "Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, [his age,] his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in [this] case." Ill. Pattern Jury Instructions, Criminal,

No. 1.02 (4th ed., 2000) (hereinafter IPI Criminal No. 1.02 (2000)).

¶ 14 During deliberations, the jury asked to see the stipulation of the emergency room doctor and to view the video of the CAC interview again. The stipulation was re-read to the jurors and they re-watched the video. The jury returned verdicts of guilty on all three counts. At a subsequent hearing, Alsup's motion for a new trial was denied and he was sentenced to nine-year terms of imprisonment on each count, with the sentences to run consecutively. A panel of this court reversed Alsup's conviction based on the failure to correctly instruct the jury. *People v. Alsup*, No. 3-08-0769 (2010) (unpublished order under Supreme Court Rule 23). The State's petition for leave to appeal was denied by the Illinois Supreme Court. *People v. Alsup*, No. 111614 (2011). In the exercise of its supervisory authority, the supreme court directed this court to vacate our previous order and reconsider the matter in light of *People v. Sargent,* 239 Ill. 2d 166 (2010). Our analysis and decision follows.

¶ 15 ANALYSIS

¶ 16 Alsup raises two issues on appeal. First, he challenges the evidence as insufficient to find him guilty beyond a reasonable doubt. Second, he argues that he was denied a fair trial where the jury was not instructed as required under section 115-10(C) of the Code. 725 ILCS 5/115-10(C) (West 2006).

¶ 17 We begin with Alsup's challenge to the sufficiency of the evidence. Alsup argues that C.K.'s testimony and statements were unsupported, contradictory, and failed to establish his guilt beyond a reasonable doubt. He asserts that C.K.'s trial testimony failed to prove that he committed any act of sexual penetration and, combined with the inconsistencies in her CAC interview, did not establish the elements necessary to sustain a conviction.

¶ 18 A reviewing court will not retry the defendant when considering a challenge to the sufficiency of the evidence. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). The testimony of a single witness, when it is positive and the witness is credible, is sufficient to convict. *Smith*, 185 Ill. 2d at 541. The credibility of the witnesses is for the jury to determine and its findings are entitled to deference. *Smith*, 185 Ill. 2d at 542. However, where the evidence is so unreasonable, improbable or unsatisfactory as to justify a doubt regarding the defendant's guilt, a reviewing court will reverse a conviction. *Smith*, 185 Ill. 2d at 542. When considering 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. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 19 To sustain a conviction for predatory criminal sexual assault of a child, the State must prove the accused was 17 years of age or older and committed an act of sexual penetration with a victim who was under the age of 13 years when the act was committed. 720 ILCS 5/12-14.1(a)(1) (West 2006). " 'Sexual penetration' means any contact, however slight, between the sex organ *** of one person by an object, the sex organ, [or] mouth *** of another person, or any intrusion, however slight, of any part of the body of one person *** or object into the sex organ *** of another person." 720 ILCS 5/12-12(f) (West 2006).

¶ 20 C.K.'s account of the sexual assault by Alsup was consistent in both her trial testimony and the CAC interview, and established the elements of the charged offenses. She stated that Alsup touched her chest and "private area" with his fingers, tongue and an ice cube. Her trial testimony was less detailed than her accounts at the CAC interview, which is reasonable based on the passage of time between the assaults and the trial. The assaults occurred in the late spring or early summer

of 2006, C.K. was examined by a doctor on July 20, 2006, and the CAC interview took place on July 24, 2006. The trial was held in June 2008. At the CAC interview, C.K. offered more information regarding the specifics of the assaults, such as stating that Alsup put his hand through the leg of her wide shorts and pulled her underwear aside to touch her with his tongue, fingers and the ice cube. At trial, she was unclear as to whether she was wearing shorts or pants when assaulted. Similarly, as the defense points out, C.K.'s trial testimony was less specific as to where the assaults occurred than she had been in the CAC interview. In the interview, C.K. stated the assaults happened in the living rooms of her former residences on Young Street and in a trailer park, as well as in the kitchen on Young Street. We do not consider these discrepancies of such magnitude as to place C.K.'s CAC statements or trial testimony in doubt. C.K. was clear in both instances as to the manner and body areas where Alsup touched her and that he committed acts of penetration. In the CAC interview, she stated that he put his fingers and the ice cube inside her, that the ice cube was cold and that his fingers did not hurt her but his fingernails did hurt. She also described when Alsup licked her "private area" as feeling "slimy and gross." At trial, C.K. testified that Alsup touched her "private spot" with his hands, tongue and the ice cube.

¶ 21 The defense also criticizes another minor inconsistency concerning who C.K. first told of the assaults, asserting that C.K.'s version differs from the testimony of Felicity and Hill. We do not find this criticism persuasive. At trial, C.K. clearly denied telling Felicity or anyone else she was making up the assaults and denied talking to Hill. In the CAC interview, she initially stated that she first told her mother but then said "it accidently slipped out" when she was telling her neighbor, who "hated Doug." At trial, Felicity was nine years old and offered a version of events less credible than C.K., stating that she was at C.K.'s home "every time" that Alsup babysat. Similarly, Hill testified that

she spoke to C.K. about the assaults in early May 2006 but did bring the information to either the police or a DCFS investigator. She did not tell her version of the events until September 2007, when she met with an investigator for the defense. The inconsistency was for the jury to resolve. The jury could have reasonably considered that as Alsup's sister and niece, Hill and Felicity were biased in their version of events and discounted their testimonies. In addition, a close review of the CAC interview establishes that C.K. stated she told her mother several times that Alsup "was mean" to her and that she was scared to tell her mother of the assaults because her stepfather, Alsup's brother, would not believe her. C.K.'s testimony does not conflict with that of her mother, who testified that she only spoke to C.K. about the assaults one time and told her to tell the truth about them.

¶ 22 Based on our review of the CAC interview and the trial transcripts, we determine that the jury, as trier of fact, could have found the essential elements of the crime beyond a reasonable doubt. The evidence established that Alsup was over age 17 at the time of the assaults, C.K. was under age 13, and that Alsup committed acts of penetration on C.K.'s sexual organs with his fingers, tongue and an ice cube. We hold that the evidence was sufficient to find him guilty beyond a reasonable doubt.

¶ 23 We next consider whether Alsup was denied a fair trial as a result of the trial court's failure to instruct the jury pursuant to section 115-10(C) of the Code. 725 ILCS 5/115-10(C) (West 2006). Alsup argues that because the proper instruction was not given regarding C.K.'s hearsay statements, they were not admissible and that the trial court's use of a general instruction did not cure the error. Alsup concedes that he did not offer the applicable instruction but submits that it was the State's responsibility to present the proper instruction or, in the alternative, that this court should review the issue as plain error.

¶ 24 As an exception to the hearsay rule, certain hearsay statements of a child under the age of 13 are admissible in a prosecution for a sexual act committed against the child. 725 ILCS 5/115-10(a) (West 2006). Admissible statements include testimony by the victim of an out-of-court statement that she complained to another about the act and statements describing any complaint of such act which is an element of the offense. 725 ILCS 5/115-10(a)(1), (2) (West 2006). Section 115-10(C) provides that when a statement is admitted under the section:

> "[T]he court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, *** the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." 725 ILCS 5/115-10(C) (West 2006).

¶ 25 Illinois Pattern Jury Instruction (IPI) 11.66 tracks the language of section 115-10(C) and states:

> "You have before you evidence that [child declarant] made *[(a statement) (statements)]* concerning *[(an) (the)]* offense[s] charged in this case. It is for you to determine [whether the statement[s] *[(was) (were)]* made, and, if so,] what weight should be given to the statement[s]. In making that determination, you should consider the age and maturity of [child declarant], the nature of the statement[s], [and] the circumstances under which *[(a) (the)]* statement[s] *[(was) (were)]* made[, and [any other relevant factor

regarding the weight and credibility of the statement]]." Illinois Pattern Jury Instructions, Criminal, No. 11.66 (4th ed. Supp. 2008) (hereinafter IPI Criminal No. 11.66 (Supp. 2008)).

¶ 26 We first address the forfeiture issue. The State contends that Alsup has waived this issue by failing to proffer the instruction at trial or raise its omission in a posttrial motion. Generally, a defendant waives any jury instruction error by not proffering the instruction at trial and raising the issue in a posttrial motion. *People v. Reddick*, 123 Ill. 2d 184, 198 (1988). However, Supreme Court Rule 451(c) provides that substantial defects in jury instructions are not waived, although not properly preserved, if the interests of justice require. Ill. S. Ct. R. 451(C) (eff. July 1, 2006); *People v. Alexander*, 396 Ill. App. 3d 563, 571 (2009). The Supreme Court Rule 451(C) "exception applies 'when there is a grave error or when the case is so factually close that fundamental fairness requires that the jury be properly instructed.' " *Alexander*, 396 Ill. App. 3d at 571, 919 N.E.2d at 1023 (quoting *People v. Hopp*, 209 Ill. 2d 1, 7 (2004)).

¶ 27 Rule 451(C) is coextensive with Supreme Court Rule 615(a) and the rules are construed identically. Ill. S. Ct. R. 615(a) (eff. Aug. 7, 1999); *People v. Carter*, 389 Ill. App. 3d 175, 180 (2009) (quoting *People v. Herron*, 215 Ill. 2d 167, 175 (2005)). Rule 615(a) provides that plain errors affecting substantial rights may be noticed on review although not brought to the attention of the trial court. *Carter*, 389 Ill. App. 3d at 180 (citing Ill. S. Ct. R. 615(a) (eff. Aug. 7, 1999)). Under the plain error rule, issues not properly preserved may be considered on appeal (1) where the evidence is closely balanced such that a guilty verdict may have resulted from the error and not the evidence, or (2) where the alleged error is so substantial that it affected the fundamental fairness of the proceeding and denied the defendant a fair trial. *Herron*, 215 Ill. 2d at 186-87. A jury instruction

error amounts to plain error "only when it 'creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.' " *Herron*, 215 Ill. 2d at 193 (quoting *Hopp*, 209 Ill. 2d at 8). Where a defendant establishes that an error occurred and that the evidence was closely balanced, a jury instruction "error is actually prejudicial." *Herron*, 215 Ill. 2d at 193.

¶ 28 Because it is statutorily required, the trial court's failure to give IPI 11.66 was error. We must determine whether that omission rises to the level of plain error. Alsup asserts that the error is reviewable under both prongs of the plain error analysis. He argues that the evidence was closely balanced, substantially consisting of C.K.'s statements, which he characterizes as inconsistent and contradictory, and his denial. He further argues that the error was serious, affecting the jury's ability to evaluate the weight to be given to C.K.'s hearsay statements. According to Alsup, failure to instruct the jury regarding its assessment of the credibility of C.K.'s statements resulted in the jury improperly convicting him because it did not understand the applicable law.

¶ 29 We agree that the evidence was closely balanced and that plain error review is appropriate. The evidence presented at trial by the State consisted primarily of C.K.'s statements at the CAC and at trial that Alsup assaulted her. Alsup denied that he assaulted C.K. There was no physical evidence establishing that a sexual assault occurred. There were no eyewitnesses presented to corroborate or refute either C.K.'s claims or Alsup's denials. Both the State and the defense offered witnesses who contradicted the other party's version of events. The outcome of the case rested essentially on the jury's determination of the credibility of the witnesses, particularly C.K. and Alsup. The instruction which Alsup complains was improperly omitted concerned the determination of C.K.'s credibility and how the jury should assess it. Because the jury was not instructed pursuant

to IPI 11.66, Alsup was deprived of his right to have the jury informed that it should assess the credibility of C.K.'s hearsay statements with caution. In our view, this error created a serious risk that the jurors improperly convicted Alsup because they did not understand the applicable law regarding their assessment of C.K.'s out-of-court statements such that the fairness of Alsup's trial was severely threatened.

¶ 30 We acknowledge that the jury was given IPI 1.02, a general instruction on witness credibility and that the trial court included in the instruction that the jury should consider the witnesses' age when assessing credibility. In *People v. Sargent*, 239 Ill. 2d 166, 192 (2010), as in the instant case, the trial court did not give IPI 11.66 tracking the language of section 115-10(C), but did instruct the jury regarding assessing witness credibility pursuant to IPI 1.02. The *Sargent* court rejected the defendant's claim that the general jury instruction could not be understood to also apply to hearsay statements. *Sargent*, 239 Ill. 2d at 194. We find *Sargent* distinguished in that the State presented overwhelming evidence establishing the defendant's guilt. *Sargent*, 239 Ill. 2d at 190. Here, where the evidence was closely balanced, the omission of the cautionary instruction failed to adequately instruct the jury and the resulting conviction may have been a result of the error. That the jury was instructed pursuant to IPI 1.02 could not cure the omission. We find that the failure to instruct the jury pursuant to IPI 11.66 was plain error and requires a new trial.

¶ 31 For the foregoing reasons, the judgment of the circuit court of Will County is reversed and the cause remanded.

¶ 32 Reversed and remanded.