2012 IL App (3d) 100221-U

Order filed April 19, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the Circuit Court of the 14h Judicial Circuit, Rock Island County, Illinois
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0221
v.	)	Circuit No. 06-CF-893
	)	
	)	
JOSEPH C. HORTON,	)	Honorable Raymond J. Conklin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Schmidt and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Viewing the evidence in the light most favorable to the prosecution, sufficient evidence was presented to find the defendant guilty beyond a reasonable doubt of three counts of criminal sexual assault; (2) The defendant was not denied due process by the prosecution's reference to evidence excluded by the trial court's order *in limine*; and (3) The trial court properly investigated the defendant's *pro se* posttrial claim of ineffective assistance of counsel.

¶ 2 The defendant, Joseph C. Horton, was convicted, following a bench trial, on three

counts of criminal sexual assault and sentenced to three consecutive terms of four years' imprisonment. On appeal, the defendant makes the following contentions: (1) the evidence was insufficient to support his convictions; (2) prosecutorial misconduct by referring in closing argument to evidence previously ruled inadmissible denied him a fair trial; and (3) the trial court failed to appoint new counsel to independently advance his *pro se* posttrial claim of ineffective assistance of counsel. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 FACTS

¶ 4 In September 2006, the defendant was arrested and charged with three counts of criminal sexual assault for allegedly performing sex acts on each of his three children. The allegations came to light during a joint investigation by the Illinois Department of Children and Family Services (DCFS) and the Hillsdale, Illinois, police department. The joint investigation was initiated following a report that the defendant's youngest son, M.T.H., had committed an act of sexual assault upon Z.H., his 4-year-old cousin. Z.H. was the son of the defendant's sister, Patricia Horton (Patti), who lived in the same trailer park in Hillsdale as the defendant and his children.

¶ 5 During an interview with DCFS investigator Mark Muench, M.T.H., who was 12 years old at the time, admitted that he had sexually assaulted other young children in addition to Z.H.. When asked how he had learned such behavior, M.T.H. related that his "Uncle Davey" had touched him in the same manner. Uncle Davey was the defendant's brother, Albert Horton, Jr., who was a convicted sex offender. During that same

interview, M.T.H. also told Muench that his father, the defendant, had engaged in sex acts with him on a number of occasions, and that it had started when he was in kindergarten.

¶ 6 Following the interview of M.T.H., investigators interviewed K.R.H., the defendant's step-daughter. K.R.H. corroborated M.T.H.'s statements. Based upon these two interviews, the defendant was arrested and charged with three counts of criminal sexual assault.

¶ 7 The following day, Muench and Sergeant Jim Ringberg interviewed each of the defendant's three children. Each gave similar reports of sexual assaults, and each reported that the assaults had been going on for a long time.

¶ 8 The State filed a motion *in limine* seeking to admit as substantive evidence the statements made by the three children to the investigators. 720 ILCS 5/115-10(b) (West 2008). The court denied the motion, finding that the statute was inapplicable to two of the children (K.R.H. and J.C.H.) because each was older that 13 years of age at the time the statements were made and also finding that the statements made by M.T.H. were unreliable because the statements were made at a time M.T.H. was being questioned regarding crimes he allegedly committed.

¶ 9 The matter was tried to a jury, but a mistrial was declared. The defendant then obtained new counsel. The matter subsequently proceeded to a bench trial before a different judge in December 2009.

¶ 10 M.T.H. was 15 years old when he testified at trial. He testified that he was caught performing oral sex on his 4-year-old cousin, Z.H., shortly after his twelfth birthday. He testified that he learned this sexual activity from his father, the defendant. He described

several sex acts that the defendant performed upon him, beginning when M.T.H. was approximately 6 years old, or "probably" in the first grade. He testified that he did not tell Muench that the abuse started when he was eight or nine. He also testified that he did not remember telling Muench that, at first, his father had rubbed against him "accidentally."

¶ 11 M.T.H. also testified that the sexual acts with the defendant would happen when his mother and grandfather were not at home. The other children were present, but they were either in another room or were following the defendant's instructions to look out the window to see if anyone was coming.

¶ 12 M.T.H. also testified that when he was approximately 7 years old, his "Uncle Davey" also started to sexually abuse him. This was approximately a year after the defendant began his assaults on M.T.H.. M.T.H. testified that the abuse by "Uncle Davey" happened twice a month and lasted from the time M.T.H. was in second grade though the sixth grade. The defense subsequently sought to impeach M.T.H.'s testimony with Muench's interview notes, which reported that "Davey started touching [M.T.H.] in kindergarten, continued until the middle of the third grade; [M.T.H.] told Davey to stop, he did, it never happened again." M.T.H. also testified that, other than the sexual abuse, the defendant was a good parent who drove him and his siblings to school and their after-school activities.

¶ 13 On cross-examination, M.T.H. admitted that he was interviewed in chambers by the judge during his parents' divorce proceedings, but he did not disclose any of the alleged abuse by the defendant to the judge. M.T.H. also admitted that he told the judge

in the divorce proceedings that he wanted to live with the defendant, not with his mother. M.T.H. also admitted that, although he had spoken to counselors and social workers during the period of time he was allegedly being abused by the defendant, he never revealed the abuse. Similarly, he admitted that he never told his mother, his grandmother, or his grandfather about the alleged abuse by the defendant.

¶ 14 J.C.H. testified that he was the defendant's son and was born in 1992. He was 17 years old when he testified. He testified that the defendant had touched and rubbed J.C.H.'s penis beginning when J.C.H. was "two or three" years old. He also testified that the defendant performed oral sex on him. He was subsequently impeached with his testimony from the jury trial where he testified that the abuse had been "off and on" beginning when he was 14 years old. J.C.H. also testified that he witnessed the defendant perform sexual acts with his two siblings and that there were occasions on which the defendant engaged in sexual activities with all three of his children at the same time. These acts would take place, according to J.C.H., in one of the bedrooms in the family trailer, at a time when the mother and grandfather were not home. He also testified that, on one occasion, the defendant forced J.C.H. to place his penis in the defendant's anus.

¶ 15 J.C.H. testified that he did not tell anyone about the abuse at any time, including his mother and his grandparents. He also testified that he did not tell the judge in the divorce about the abuse because he wanted to live with the defendant due to his mother's drug abuse. He thought he would be safer with the defendant.

¶ 16 K.R.H., the defendant's stepdaughter, was 19 years old when she testified at the bench trial. She testified that she had lived with the defendant her whole life and that the

defendant had been sexually abusing her since she was a little girl. She also testified that "Uncle Davey" began sexually abusing her at the same time. She testified in specific detail to sexual acts committed by the defendant, both when they were alone and when one of her stepbrothers was present. She also testified that she walked in on the defendant and one of her siblings engaged in sexual acts. According to K.R.H., the defendant stopped engaging in sexual activity with her in 2004. Other than the sexual assaults, K.R.H. testified that the defendant was a good father.

¶ 17 On cross-examination, K.R.H. admitted that the defendant disapproved of her dating in the eighth grade. She was dating a boy who was three years older than her, and the defendant stopped the relationship. K.R.H. denied that she reported the defendant's alleged abusive activities because she was angry at the defendant for interfering with her dating. She also admitted that she did not tell the judge in the divorce proceedings about the alleged abuse, and she told the judge it was her preference to remain with the defendant after the divorce. She explained that she was afraid of the defendant's reaction if she indicated that she wanted to live with her mother after the divorce.

¶ 18 K.R.H. also admitted that she never disclosed any of the alleged abuse to her mother or grandparents, the social workers and counselors who worked with her during the divorce, or the school nurse, with whom she was particularly close.

¶ 19 DCFS Investigator Muench testified that on Friday, September 22, 2006, he was assigned to investigate an allegation that M.T.H. had sexually abused Z.H. Muench and Officer Ringberg interviewed M.T.H. the following Monday. Muench testified that, during that interview, M.T.H. first reported that the defendant and "Uncle Davey" had

each sexually abused him. Muench also testified that he interviewed K.R.H. that same day and that she corroborated what M.T.H. had told him. The defendant was arrested the next day. Muench then interviewed all three children the following day in the presence of Ringberg.

¶ 20 On cross-examination, Muench testified that the defendant had called the DCFS hotline over the weekend prior to his arrest to report the sexual act that M.T.H. had committed against Z.H.. Muench also described during cross-examination how Ringberg had threatened M.T.H. with a lie detector test which would "cost thousands of dollars, and if it showed he was lying, his dad would have to pay for it." Muench admitted that it was not normal investigative procedure to threaten a child to gain his cooperation.

¶ 21 Muench also testified that M.T.H. told him that the defendant stopped the abuse about one month before he started dating Jen Baum, which Muench calculated to be approximately August 2006. Muench had no explanation for the fact that a written DCFS report, prepared by someone other than himself, indicated that abuse of M.T.H. by the defendant "started five years ago and ended fourteen months ago."

¶ 22 Muench also admitted that he interviewed Albert Horton, the children's grandfather, who lived in the same trailer, the children's other grandfather, and the school nurse, none of whom had any idea that the children were allegedly being abused by the defendant. Muench also admitted that he was not aware that the children had been in counseling during the divorce proceedings, so he did not attempt to interview any of the counselors or social workers.

¶ 23 Sergeant Jim Ringberg testified that he interviewed M.T.H. along with Muench as part of the investigation of the sexual abuse of Z.H.. Ringberg testified that after M.T.H. told of the defendant sexually abusing him, and after K.R.H. corroborated those statement, he transported the defendant to the police station where he advised him of his rights, secured a written waiver of his constitutional rights, and then placed him under arrest. Ringberg testified that, after he told the defendant about the specific allegations made against him by M.T.H. and K.R.H., the defendant sat silently in a chair and then "suddenly blurted out" that he loved his children, he did not mean to hurt his children, and he wanted Ringberg to make sure the children got any help they needed.

¶ 24 Ringberg then testified that he transported the defendant by squad car to the Rock Island County Jail. He was accompanied by Officer Bonnie Francis. Ringberg testified that, en route, the defendant made the following statements:

"Ringberg, I wanted to talk to you, but it's so hard I don't know how to say it."

"Do you know how long I'm going to be in jail? Do you know what my bond is going to be?"

"I didn't mean to hurt my children. I just love them."

"I know I did wrong, and now I have to pay for it."

¶ 25 On cross-examination, Ringberg acknowledged that he did not hear J.C.H. tell Muench that the defendant had engaged in anal intercourse with J.C.H.. Ringberg also admitted that, after arresting Horton, he did not interview Albert Horton, the children's mother, the school nurse, or any of the counselors or social workers with whom the children had contact during the period of alleged abuse.

¶ 26 Officer Bonnie Francis testified that she accompanied Ringberg and the defendant on the drive to Rock Island. She affirmed Ringberg's account of the defendant's statements made during the trip.

¶ 27 The State rested its case-in-chief, and the court denied a defense motion for a directed finding.

¶ 28 The defendant testified after his wife, Joann, left their home and filed for divorce, he set up counseling for the three children so that they could have help coping with their mother's departure. He arranged counseling both in school and outside of school, and he testified that all counseling sessions took place outside of his presence. When his sister, Patti, called him to tell him about M.T.H. abusing her son, Z.H., the defendant immediately called Ann McCarroll, the school nurse and a close family friend. After talking to McCarroll, the defendant called DCFS and reported the allegation regarding M.T.H.. That same day, the defendant arranged for DCFS and the Hillside police to interview M.T.H..

¶ 29 The defendant testified that, after he was arrested by Sergeant Ringberg and was informed of the allegations made by M.T.H. and K.R.H., he completely denied the allegations. He testified that he told Ringberg that he never touched, abused, or molested any of the children. He further testified that Ringberg transported him to Rock Island in an SUV, not a squad car, and that Francis did not accompany them on the trip.

¶ 30 On cross-examination, the defendant was questioned about K.R.H. and the boy, she was dating. Horton testified that he disapproved of the difference in age between K.R.H. and the boy, and he wanted her to finish high school and not "wreck her life."

¶ 31 The court announced its guilty verdict, saying that the case came down to a question of credibility. The court noted that, in order to find the defendant not guilty, he would have to find that all six of the State's witnesses [M.T.H., J.C.H., K.R.H., Muench, Ringberg, and Francis] were "either lying, mistaken or confused." He noted that there were some problems with the State's case, particularly the fact that the threat of a polygraph to seek the cooperation of a 13-year-old witness was "inappropriate" and "unprofessional." He further noted, however, that he found Francis's testimony corroborating Ringberg's recounting of the defendant's statement during the trip to Rock Island to be particularly trustworthy. Viewing the totality of the evidence, the trial court announced that it was satisfied that the State had proven the defendant's guilt beyond a reasonable doubt.

¶ 32 Prior to the sentencing hearing, the defendant sent several letters to the trial court, at least two of which raised allegations that his trial counsel had been ineffective. Additionally, the defendant filed a *pro se* posttrial motion which alleged that his counsel was ineffective. Defense counsel then filed a posttrial motion which included allegations of his own ineffectiveness in failing to issue subpoenas for a videotape and records from the Rock Island County Jail, as well as failing to call Ann McCarroll and Dr. Hauck as witnesses.

¶ 33 The State responded to the ineffectiveness claims by pointing out that the defendant's counsel in the previous jury trial had issued subpoenas for the jail videotapes and records and had been informed that the tapes and records requested did not exist. The State also pointed out that McCarroll's testimony would have been cumulative and of

little relevance since K.R.H. testified concerning her close relationship with McCarroll, and the record established that no one had ever told her about the abuse. Lastly, the State noted that the court had decided prior to the first trial that Dr. Hauck would not be permitted to give opinion testimony concerning the defendant's propensity to commit sex offenses or the children's propensity to lie about the allegations.

¶ 34 The court asked defense counsel whether he had reviewed the report of proceedings of the first trial. Counsel indicated that he had reviewed the reports and had used transcripts from the first trial to impeach some witnesses at the bench trial. The trial court then denied all posttrial motions regarding allegations of ineffective assistance of trial counsel.

¶ 35 Following a sentencing proceeding, the trial court sentenced the defendant to four years' imprisonment on each of the three counts, to be served consecutively. The defendant appealed.

¶ 36 ANALYSIS

¶ 37 The defendant first maintains that the evidence was not sufficient to prove him guilty beyond a reasonable doubt of three counts of criminal sexual assault. He maintains that the testimony against him was not credible and uncorroborated. We disagree.

¶ 38 When presented with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant; rather, this court must examine the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found all the essential elements of the offense proven

beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274 (2004); *People v. Collins*, 106 Ill. 2d 237 (1985).

¶ 39 Here, the defendant maintains that the only evidence against the defendant was the testimony of the three children, which he claimed was rife with implausible claims, uncorroborated by any other witnesses, contradicted by their silence over the years despite several opportunities to have reported the alleged abuse to family, friends, school personnel, social workers, and even the judge in the divorce, and inconsistent as to dates the alleged abuse commenced and ceased. He further points out that it would be highly unlikely that he would have sought counseling for the children during the divorce if he had been sexually abusing them at the same time. Additionally, he points out that the investigators failed to interview key witnesses that would have corroborated or contradicted the children's stories, and he makes note that the record is bereft of any testimony corroborating the children's stories. He also seeks to cast doubt on the verdict by claiming that the trial judge himself expressed uncertainty as to guilt but ultimately found the defendant guilty only because of the cumulative effect of the supposedly deficient evidence.

¶ 40 While we do not agree with the defendant's characterization of the testimony against him as necessarily unreliable, we point out that the defendant's contention that the evidence was insufficient to support his conviction on the three counts of sexual assault on his children ignores one key piece of evidence, which the trial judge obviously found to be particularly compelling. Although the testimony of Officer Francis was quite brief, the trial judge made specific mention of her testimony when announcing his guilty verdict

("In order to find the defendant not guilty I would have to find that Officer Francis lied about being in the transport car going to the Rock Island County Jail"). Officer Francis's testimony corroborated Sergeant Ringberg's testimony that the defendant made some extremely self-incriminating statements, including the most damaging piece of evidence in the entire record when he told Ringberg *and* Francis, "I know I did wrong, and now I have to pay for it." On appeal, the defendant objects to the characterization of his statements as an admission of guilt, preferring to refer to his statements as "not an explicitly inculpatory statement regarding the charged conduct." The trial court obviously inferred otherwise, and we will not substitute our judgment for that of the trier of fact on questions involving reasonable inferences to be drawn from the evidence, the weight to be assigned to evidence, or the credibility of witnesses. *People v. Kotlarz*, 193 Ill. 2d 272 (2000).

¶ 41 Viewing the testimony of the three children, in light of the defendant's inculpatory statements to Ringberg and Francis, the children's testimony becomes more convincing. Delays in reporting incidents of abuse may be reasonable when, as here, it can be ascribed to fear, shame, guilt, or embarrassment. *People v. Duplessis*, 248 Ill. App. 3d 195 (1993). Also, sexual assault cases arising out of family relationships often lack an immediate outcry by the victim. *Id.* Moreover, a sexual assault victim's testimony does not have to be fully corroborated in order to justify a finding of guilt; any testimonial weaknesses, such as an inability to remember exact dates and times or other apparent deficiencies, go to the weight to be accorded the testimony. *People v. Williams*, 223 Ill. App. 3d 692 (1992).

¶ 42 We find, therefore, that all the evidence, viewed in total and in the light most favorable to the prosecution, was clearly sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant committed the charged offenses of sexual assault upon his children.

¶ 43 The defendant next maintains that he was denied a fair trial when the prosecutor referred on two occasions to statements made by the children during the DCFS investigation which had been ruled inadmissible in an order *in limine* issued prior to the first trial. The State maintains that this allegation of error was not raised at trial or in the posttrial motion and, therefore, has been waived on appeal. *People v. Enoch*, 122 Ill. 2d 176 (1988). The defendant maintains that the issue is subject to review under the plain-error doctrine. *People v. Mullen*, 141 Ill. 2d 394 (1990). The plain-error doctrine allows a reviewing court to consider unpreserved when a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or the error is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). However, if there is no error at all, we need not reach the question of plain error. *Id.* In other words, where there is no error, there can be no "plain error" and, thus, no need to resort to the two-pronged plain error analysis. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2006).

¶ 44 Here, the defendant argues that error occurred when the prosecutor was permitted to refer to evidence that had been barred by an order *in limine*. We find no error occurred. The record established that the trial judge was aware of the order *in limine*

entered prior to the first trial. As such, he would have known that any reference by the trier of fact to evidence barred from admission would have been improper. All trial judges are presumed to know and properly apply the law. *People v. Golden*, 229 Ill. 2d 277 (2008). We find no basis in the record to suggest that the trial judge in the instant matter gave any consideration to the prosecution's brief reference to the barred evidence.

¶ 45 Moreover, all trial judges conducting a bench trial in a criminal matter are presumed to only consider competent, legally admissible evidence in reaching a verdict. *People v. Nuccio*, 43 Ill. 2d 375 (1969). We can be confident that the trial judge in the instant matter considered only competent and legally admissible evidence in reaching the guilty verdict. There was extensive testimony from the three children that they had been sexually assaulted by the defendant, making any reference to the statements the children gave to Muench cumulative at worst. Also, the testimony from Ringberg regarding the fact that he told the defendant about the statements the children made to investigators was properly elicited and did not violate the order *in limine*. The testimony was clearly elicited as background to establish that the defendant's statements that he did not want to hurt his children, that he wanted them to get any help they needed, and that he knew what he did was wrong and he had to pay for it, were made in response to Ringberg telling the defendant that the children had reported his acts of sexual assault.

¶ 46 We find no basis upon which to find that the presumptions regarding the trial court's knowledge of the law, including the requirement that it only consider competent, legally admissible evidence, have been affirmatively overcome. Thus, we find no error

on the part of the trial court regarding the two isolated references to testimony barred by the pretrial order *in limine*.

¶ 47 The defendant lastly maintains that this matter should be remanded for an inquiry into his *pro se* allegations of ineffective assistance of counsel. See *People v. Baltimore*, 292 Ill. App. 3d 159 (1997). The two claims of ineffective assistance of counsel raised by the defendant *pro se* were failing to subpoena a videotape and other records from the Rock Island County Sheriff and failing to call Ann McCarroll as witness.

¶ 48 Where the defendant raises a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should examine the factual basis of the claim, and if the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2004); *Krankel*, 102 Ill. 2d at 189. On appeal, the operative concern for the reviewing court is whether the trial court "conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *People v. Bomar*, 405 Ill. App. 3d 139, 147 (2010) (quoting *Moore*, 207 Ill. 2d at 78). We review *de novo* the question of whether the trial court erred in the manner in which it addressed the defendant's posttrial claims of ineffective assistance of counsel. *Bomar*, 405 Ill. App. 3d at 147.

¶ 49 A defendant's *pro se* claims of ineffective assistance of counsel following trial must receive "at least some investigation." *People v. Barnes*, 364 Ill. App. 3d 888, 899 (2006). An adequate examination of the *pro se* claim can include *any* of the following: (1) the trial court may ask defense counsel about the circumstances surrounding the claim; (2)

the trial court may ask the defendant questions about his claim; or (3) the trial court may address the defendant's claim based upon its personal knowledge of defense counsel's performance at the trial, or the facial insufficiency of the defendant's allegations. *Moore*, 207 Ill. 2d at 78-79. Only if the trial court's inquiry reveals no legitimate allegations of ineffectiveness against defense counsel may the trial court reject outright the defendant's allegations. *People v. Jackson*, 131 Ill. App. 3d 128, 139 (1985).

¶ 50 Here, the record clearly established that the trial court addressed the defendant's claims based upon its personal knowledge of counsel's performance at trial. The judge questioned defense counsel regarding his trial strategy and addressed each of the defendant's claims, noting that the videotape had been inadvertently erased and that McCarroll's proposed testimony, if it had been presented, would not have changed the verdict. The record, therefore, clearly established that the trial court conducted an adequate investigation into the defendant's *pro se* claims.

¶ 51 CONCLUSION

¶ 52 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 53 Affirmed.