2013 IL App (3d) 110058-U

Order filed August 7, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-11-0058
v.	)	Circuit No. 09-CF-846
	)	
JESSICA HALL,	)	Honorable
	)	Glenn H. Collier,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Wright and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of aggravated battery. (2) Defendant's counsel provided effective assistance of counsel because defendant was not prejudiced by counsel's failure to object to the admission of defendant's statements regarding J.H.'s skull fracture that were made in violation of her sixth amendment right to counsel.

¶ 2 Following a bench trial, defendant, Jessica Hall, was convicted of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2008)) and sentenced to 15 years of imprisonment. Defendant appealed, arguing that: (1) the State failed to prove her guilty beyond a reasonable doubt; (2) she

was denied her sixth amendment right to counsel; and (3) she received ineffective assistance of counsel. We affirm.

¶ 3 FACTS

¶ 4 After giving birth to J.H. on May 27, 2009, defendant lived in an apartment with J.H. and her three-year-old daughter. On July 22, 2009, defendant bathed J.H. in the kitchen sink, and he incurred severe burns. On July 24, 2009, defendant brought J.H. to the hospital. On July 30, 2009, she was charged with aggravated battery of a child and was appointed counsel. Specifically, the information and superceding indictment alleged that defendant "knowingly" caused great bodily harm or permanent disfigurement to J.H. in that "she caused burns to [J.H.] by bathing him in hot water."

¶ 5 At trial, Dr. Gail Streater testified that she was a supervising attending physician at the Pediatric Ambulatory Clinic. J.H. was seen for his five-day and two-week checkups. He appeared to be healthy and gaining weight appropriately. During the two-week checkup, defendant was advised on water heater safety.

¶ 6 Officer Darryl Fuchs of the Peoria police department testified that on July 24, 2009, he was dispatched to St. Francis hospital in response to a "baby with severe burns." Fuchs photographed J.H.'s injuries and defendant's residence. The photographs were admitted into evidence.

¶ 7 Officer Shawn Meeks testified that on July 24, 2009, he went to the hospital to investigate J.H.'s injuries. Meeks and Megan Sturtevant, a child protection investigator with the Department of Child and Family Services (DCFS), drove defendant to her apartment so they could investigate the water temperature. Defendant told Meeks that she turned on the water and

placed J.H. in the kitchen sink to bathe him. J.H. was crying, but he usually cried when he was bathed. Defendant left J.H. in the sink with the water running to go upstairs to get a towel. She was gone for three to five minutes. When she returned, the water was not steaming and did not appear to be hot. When she removed J.H. from the water and dried him off, she noticed that "the skin was falling off." Defendant repeatedly insisted that the water was not too hot. Defendant said that the following day J.H. was "stinking a little bit." The day after that he was "stinking even more," hot to the touch, and needed to be awakened for feedings.

¶ 8 Meeks tested the water temperature at the kitchen sink in defendant's apartment. After Meeks let the water run for one minute, the water temperature was 148 degrees.

¶ 9 On July 29, 2009, Meeks read defendant *Miranda* warnings and interviewed her again. Defendant initially relayed the same story. After Meeks asked defendant how J.H. could have received severe burns if the water was not hot, she indicated that she was depressed that day and had gotten into an argument with her daughter's father. She also indicated that she did not want a second child and J.H.'s father had not participated in J.H.'s care. She was frustrated that J.H. cried all the time. J.H. was not as good a baby as her daughter.

¶ 10 Defendant explained that on the evening of the incident, she received a telephone call from a creditor and became frustrated. After she hung up the phone, she noticed that J.H. had spit up on himself so she decided to bathe him. Defendant placed J.H. in the kitchen sink and turned on the water. She noticed the water getting hotter and hotter. She watched as J.H. screamed and squirmed. At one point it appeared as if J.H. was trying to get away from the water. She did not attempt to take him out of the water or adjust the water. "[S]he just stood there and watched it." She knew that J.H. was being burned. She watched J.H. scream and

squirm for one to two minutes. When she removed him from the water his skin was peeling off and, at one point, appeared to be "melting" away. Defendant did not immediately seek medical care for J.H. because she was afraid that she would get into trouble. She decided to take J.H. in for treatment because, after he developed an odor and a fever, she thought he might die.

¶ 11 Sturtevant testified that on October 1, 2009, she interviewed defendant to discuss new medical evidence of J.H. having a skull fracture. Defendant indicated that she did not want to tell Sturtevant how J.H. incurred the skull fracture because the State would "tack on more charges." Defendant indicated she wanted to tell Sturtevant what happened but would not because she did not want Sturtevant to write it down.

¶ 12 Dr. Kay Saving, a child abuse pediatrician, testified she examined J.H. on September 18, 2009, and reviewed various records. Saving testified that J.H. had a significant lack of weight gain from the time of his birth until he was brought to the emergency room on July 24, 2009. J.H. dropped from the 75th percentile for weight at birth to the 7th percentile. Women, Infants, and Children (WIC) benefit records indicated that defendant was mixing too much formula with water for J.H. and had been instructed on properly mixing formula. Defendant was screened for depression, and no concerns were noted.

¶ 13 Saving testified that J.H. incurred second and third degree burns to his lower chest, abdomen, left side, left back, left arm, and left thigh. The burns covered 20 to 30 percent of his body. Also, when he was brought to the hospital on July 24, J.H. had a "very serious infection" and fever, and he was dehydrated. J.H. was placed into a pediatric intensive care unit, where he remained for 10 days. He received pain medication, antibiotics, nutritional support, fluids, and a platelet transfusion. He underwent a skin graft operation to aid in healing deep burns. A skeletal

survey of J.H. conducted on August 3, 2009, showed a skull fracture to the left side of his head.

¶ 14 Saving opined that the burns to J.H. were "abusive burns." She based her opinion on medical literature describing common factors identified in abuse cases. The "constellation" of factors she considered were: (1) defendant giving changing histories; (2) defendant's lack of concern for J.H. when he was being burned; (3) defendant's delay in seeking medical care for J.H.; (4) J.H.'s poor weight gain; and (5) J.H. having another injury–in this case, a skull fracture.

¶ 15 Saving elaborated on each of the factors. She stated that the history of injury frequently changed in abusive injuries and was usually consistent in accidental injuries, noting that the initial history defendant gave "did not really fit the burn injuries[.]" Saving indicated that a lack of concern for the victim was also common in abusive burn cases. Saving noted defendant displayed a lack of concern for J.H. when she knew he was being burned but did not immediately remove him from the water. Saving indicated a delay in seeking medical care was another common factor in abuse cases, noting defendant knew J.H. had burn injuries, a moderate fever, a smell, and a decreased appetite, but defendant failed to seek medical attention for J.H. for two days. Saving testified that J.H.'s poor weight gain and skull fracture were not commonly seen in cases of accidental trauma. Saving stated that it was the "constellations of findings" that made J.H.'s injuries "compatible with the diagnosis of an abusive burn."

¶ 16 Saving admitted that it was not known when J.H. incurred the skull fracture. She presumed the skull fracture happened prior to J.H. being hospitalized because his medical records did not note any swelling over the area or incidents in the hospital to account for the fracture. Saving admitted that nothing from observing J.H.'s injuries would indicate whether he was burned intentionally or accidentally. Saving testified that it would have been proper for

defendant to call an ambulance for a two-month-old in J.H.'s condition. She described J.H.'s injuries as "a true emergency" and indicated that he should have been treated immediately.

¶ 17 Saving testified that a two-month-old child would incur injuries from direct contact with 148 degree water in a second or less. She indicated that J.H.'s injuries were not compatible with defendant's original history because if the bath was completed, J.H. would have had additional burns and defendant would have had injuries to her hands. Even at a temperature of 130 degrees, defendant's hands would have been burned in 30 seconds. Saving indicated that J.H.'s injuries were compatible with defendant's final explanation of J.H.'s injuries.

¶ 18 A child abuse pediatrician, Dr. Marcus DeGraw, testified that the skin of a baby is much thinner than adult or adolescent skin, which makes infants prone to burn more severely and quickly. The general recommendation among agencies such as the American Academy of Pediatrics is that water heaters be set to 120 degrees. A two-month-old child exposed to 148 degree water would receive the types of burns J.H. incurred in "less than a couple seconds, if not instantaneous." An adult would burn in two to five seconds if exposed to 148 degree water. DeGraw testified that there was "nothing about the injury itself, the description of [J.H.], the appearance of [J.H.] or the injuries [J.H.] sustained, itself, that can be used to conclude that this must have been [a knowing or intentional] act." DeGraw indicated that J.H.'s injuries "could have occurred very quickly." DeGraw opined that "the injury would not have gotten any worse" if J.H. was removed within two to three seconds, or if he was left in the water for two or three minutes.

¶ 19 DeGraw testified that he did not have enough information to determine the reason for J.H.'s lack of weight gain. DeGraw would assume that defendant was not mixing the formula

correctly because after J.H. was hospitalized he gained weight properly. According to DeGraw, it is common in lack of weight gain cases for the formula to have been mixed incorrectly either due to the parent trying to make the formula last longer or a parent's inability to follow directions. If the WIC report was correct in that defendant mixed too much formula with water, J.H. should have been gaining weight appropriately. DeGraw opined that "given [J.H.'s] constellations of findings, there is significant concern that [J.H.] would be a victim of abuse." DeGraw was hesitant in making a definitive conclusion without the circumstances of J.H.'s skull fracture and lack of weight gain being further clarified.

¶ 20 Defendant testified that after J.H.'s birth she brought him to the Pediatric Ambulatory Clinic for his five-day and two-week checkups by way of the bus. She received "guidelines about feeding and little stuff like that" but no information about the water heater. Defendant denied that she ever mixed J.H.'s formula incorrectly.

¶ 21 Defendant testified that on July 22, 2009, she gave J.H. a bath by turning on both knobs of hot and cold water and laying J.H. in the sink. Defendant realized she did not have a towel, so she rushed upstairs to get one. She left J.H. in the sink with the water running. When she returned, J.H. was crying. When defendant began rinsing J.H. she realized the water was hot. She turned up the knob for the cool water, and continued to bathe J.H. When defendant took J.H. out of the water, she wrapped him in the towel and laid him on the couch. When she unwrapped him, she noticed that he was "real red" and a little piece of his skin had peeled off. Defendant put a diaper on J.H., and he acted normal. The following day the burns on J.H. appeared worse. The morning of July 24, 2009, defendant's sister visited. After having a conversation with her, defendant took J.H. to the hospital by way of the bus.

¶ 22 Defendant testified that when she was interviewed by Meeks, she told Meeks what happened to J.H. and "kept telling him." Meeks repeatedly asked defendant why she was not burned. Defendant "just bust[ed] out started crying." Defendant testified that she did not mean to say that she knew J.H. was being burned and had only said it because Meeks had repeatedly asked the same questions and acted as if he did not believe her answers. Defendant testified that she did not know that J.H. was burned until she unwrapped his towel after drying him off.

¶ 23 The trial court found defendant guilty of aggravated battery of a child. The court based its finding upon defendant's statement to Meeks admitting knowledge that J.H. was being burned and the physical and medical evidence. The court did not find defendant's initial statement to Meeks or her testimony at trial credible based on the extent of J.H.'s injuries, which were depicted in the photographs. The court found defendant's testimony that J.H. acted normal "incredible" in light of the injuries he had incurred. The court found defendant's statement to Meeks that she watched J.H. burn was more credible.

¶ 24 The court indicated that defendant's statement and the physical evidence was "sufficient" to find her guilty, but when adding the constellation of other findings it was "metaphorically speaking, like piling on after the tackle has already been made." The court specified that the skull fracture could possibly have happened in the hospital but, in using "common sense," it was not likely that the skull fracture was inflicted by hospital personnel handling a child in serious condition. The court also noted defendant's lack of surprise when informed of J.H.'s skull fracture and her indication that she was unwilling to explain the skull fracture out of fear of additional charges. The court also found defendant had a "consciousness of guilt" evidenced by her failure to take J.H. to the hospital for two days. The trial court found that it was not possible

that defendant did not know J.H. was injured or could not find a way to the hospital because "this [was] a kind of running-out-of-the-house screaming, somebody help me kind of thing."

¶ 25 Defendant was sentenced to 15 years of imprisonment. Defendant appealed.

¶ 26 ANALYSIS

¶ 27 I. Guilt Beyond a Reasonable Doubt

¶ 28 On appeal, defendant argues that the State failed to prove her guilty beyond a reasonable doubt. We will not overturn a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 214 Ill. 2d 206 (2005). When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. *People v. Givens*, 237 Ill. 2d 311 (2010). Rather, we review the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*; *Collins*, 214 Ill. 2d 206. Under this standard, a reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *Givens*, 237 Ill. 2d 311.

¶ 29 In this case, the State was required to prove that defendant committed aggravated battery of child. Under the Criminal Code of 1961 "[any] person of the age 18 years and upwards who intentionally or knowingly, and without legal justification and by any means, causes great bodily harm *** to any child under the age of 13 years *** commits the offense of aggravated battery of a child." 720 ILCS 5/12-4.3(a) (West 2008). Whether a person acted intentionally or knowingly with respect to bodily harm is, due to its very nature, often proved by circumstantial evidence. *People v. Lattimore*, 2011 IL App (1st) 093238; *People v. Williams*, 165 Ill. 2d 51 (1995)

(because intent is a state of mind, it can rarely be proven by direct evidence). Determining of the question of intent is for the trier of fact and will not be disturbed on review unless a reasonable doubt exists as to the defendant's guilt. *People v. Maggette*, 311 Ill. App. 3d 388 (2000).

¶ 30 Here, the record does support a finding, beyond a reasonable doubt, that defendant intentionally or knowingly burned J.H. The State provided evidence that defendant admitted to police that she placed J.H. in the sink and turned on the water. Defendant knew that the water was getting progressively hotter. She watch J.H. scream and did not attempt to remove him from the water or adjust the water temperature. Although she knew he was being burned, she simply stood there and watched for one or two minutes. Based on the evidence presented, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

¶ 31 II. Sixth Amendment Right to Counsel

¶ 32 Defendant further argues that she was denied her sixth amendment right to counsel when questioned by Sturtevant regarding J.H.'s skull fracture. The sixth amendment of the United States Constitution guarantees a right to counsel after the initiation of adversarial proceedings. U.S. Const., amend. VI.; *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964). The defendant has the right to the presence of an attorney during government efforts to elicit information, including during interrogations, after the sixth amendment right to counsel attaches. *People v. Garrett*, 179 Ill. 2d 239 (1997). DCFS investigators who inquire into abuse and neglect charges, and who instigate charges, are prosecutorial agents of the State. *People v. Curtis*, 219 Ill. App. 3d 218 (1991); *cf. People v. Hagar*, 160 Ill. App. 3d 370 (1987) (DCFS employees who only give counseling and do not solicit or encourage confessions are caseworkers and not prosecutorial agents).

¶ 33 Statements obtained in violation of a defendant's sixth amendment right are inadmissible at trial. *Maine v. Moulton*, 474 U.S. 159 (1985); *People v. Brown*, 358 Ill. App. 3d 580 (2005). The question of whether defendant's statements were obtained in violation of her sixth amendment right is a question of law that is reviewed *de novo.*

¶ 34 Here, at the time defendant was questioned regarding J.H.'s skull fracture, defendant had been charged with the crime in this case, her right to counsel had attached, and she was represented by counsel. At that point, the State was prohibited from interrogating defendant where the interrogation served as a continuing investigation of the charge of aggravated battery of a child. *People v. Wahl*, 285 Ill. App. 3d 288 (1996) (interrogation of defendant is prohibited on an uncharged criminal offense if the interrogation functions as a continuation of investigation of the factual transaction forming the basis of the previously charged offense). Consequently, defendant's statements to Sturtevant were obtained in violation of defendant's sixth amendment right to counsel, and were inadmissible at trial. However, a violation of defendant's sixth amendment right to counsel does not automatically require the reversal of a defendant's conviction. *Brown*, 358 Ill. App. 3d 580.

¶ 35 In this case, prior to defendant's bench trial, defense counsel filed a motion *in limine* seeking to bar evidence, argument or questions concerning the "state's expert witness' opinions, conclusions, or assumptions regarding the Defendant's unwillingness to answer law enforcements [sic] questions being any type of indicia of guilt as it violates the Defendant's Fifth Amendment rights." At the hearing on the motion *in limine*, counsel explained that he sought to bar testimony from the State's DCFS expert regarding a statement that defendant "allegedly made with regard to an injury to [J.H.] that is not charged" because an expert in child abuse is not qualified to "give

an opinion concerning somebody's mental health." The court postponed a ruling, informing counsel that his objections would be ruled upon as "these matters present themselves."

¶ 36 Defense counsel did not present an objection to evidence of the skull fracture or defendant's statement to Sturtevant regarding the skull fracture. Therefore, defendant has forfeited any argument that the trial court erred in admitting the evidence. See *People v. Enoch*, 122 Ill. 2d 176 (1988) (in order to preserve an issue for review, a defendant must both offer a specific objection at trial and raise the matter in a posttrial motion).

¶ 37 Defendant argues in her brief on appeal that her counsel objected to the evidence in a pretrial motion *in limine.* However, defendant's motion *in limine* focused on excluding Sturtevant's opinion of defendant's statements in regard to defendant's mental state. Defense counsel made no objection at trial as to the inadmissibility of defendant's statements to Sturtevant regarding J.H.'s skull fracture. As a result, there was no ruling on the admissibility of defendant's statement. Defendant also did not raise the sixth amendment issue in a posttrial motion. Therefore, the issue was forfeited.

¶ 38 Despite a forfeiture, unpreserved errors may be considered on appeal if the errors equated to plain error. Plain error may be invoked where the evidence was closely balanced or where the errors is so egregious that it deprived defendant of a fundamentally fair trial *People v. Herron*, 215 Ill. 2d 167 (2005). However, defendant did not argue for plain error and, therefore, forfeits a plain-error review. *People v. Nieves*, 192 Ill. 2d 487 (2000).

¶ 39 III. Ineffective Assistance of Counsel

¶ 40 Defendant argues that her counsel provided ineffective assistance by failing to object to evidence of J.H.'s skull fracture and her statements to Sturtevant regarding the skull fracture. To

establish ineffective assistance of counsel, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v. Houston*, 229 Ill. 2d 1, 4 (2008).

¶ 41 As discussed above, defendant's statements to Sturtevant regarding the skull fracture were obtained in violation of her sixth amendment right to counsel and were inadmissible at trial. Therefore, it was error for defendant's counsel not to object to the statements. Arguably, it was also error for defendant's counsel to fail to object to the introduction of evidence regarding the skull fracture because, as discussed above, there was no evidence attributing the skull fracture to defendant. See Ill. R. Evid. 403 (eff. Jan. 1, 2011) (codifying common law rule and providing evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury); *People v. Wheeler*, 226 Ill. 2d 92 (2007) (evidence should be excluded where it is too remote in time or too speculative to shed light on a fact to be found).

¶ 42 However, defendant was not prejudiced by her counsel's errors. There was sufficient evidence, even without the evidence of the skull fracture and defendant's statements regarding the skull fracture, to support defendant's conviction. Defendant admitted to taking no action to remove J.H. from the hot water while she watched him burn. Therefore, any error in counsel's failure to object to the admission of that evidence did not prejudice defendant.

¶ 43 CONCLUSION

¶ 44 The judgment of the circuit court of Peoria County is affirmed

¶ 45 Affirmed.