2014 IL App (3d) 110923-U

Order filed April 30, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court) of the 14th Judicial Circuit,) Rock Island County, Illinois,
Plaintiff-Appellee,	)
	) Appeal No. 3-11-0923
v.	) Circuit No. 10-CF-231
	)
JASON WILLIAM KUGLER,	) Honorable) Walter D. Braud and Michael F. Meersman,
Defendant-Appellant.	) Judges, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court's failure to dismiss a juror for cause was not reversible error. (2) The trial court's admission of certain hearsay statements was harmless error. (3) The cause is remanded for resentencing because the trial court's oral imposition of sentence conflicted with its written order, and the oral order was void. (4) Although defendant was absent from a posttrial hearing, further proceedings were not required.

¶ 2 Defendant, Jason William Kugler, was convicted of two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)), two counts of aggravated kidnaping (720 ILCS 5/10-2(a)(6)

(West 2010)), and three counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(8) (West 2010)). The trial court sentenced defendant to 75 years in prison. Defendant appeals, arguing: (1) the trial court erred when it failed to dismiss a juror for cause; (2) the trial court allowed inadmissible hearsay; (3) the cause should be remanded for resentencing because the trial court issued a sentence it did not intend to impose; and (4) the matter should be remanded for additional posttrial proceedings because defendant was not present at a hearing on his posttrial motion. We affirm in part, vacate in part, and remand the cause for resentencing.

¶ 3 FACTS

¶ 4 Defendant was charged with two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)), two counts of aggravated kidnaping (720 ILCS 5/10-2(a)(6) (West 2010)), and three counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(8) (West 2010)). The cause proceeded to a jury trial.

¶ 5 During *voir dire*, prospective juror L stated that she would likely believe a law enforcement officer's testimony over that of an average citizen due to the fact that they are trained in observation. However, she stated that she believed she could be fair. Defendant asked to have juror L dismissed for cause, but the trial court denied that request. Therefore, defendant used a peremptory challenge on juror L, and she was excused. Defendant later attempted to use a peremptory challenge on a subsequent juror after finding out that the juror's brother and niece had been murdered. The court denied defendant's request because he had exhausted his allotted number of peremptory challenges, and that juror sat on defendant's jury.

¶ 6 At trial, the two victims, B.G. and N.G., testified. B.G. stated that she, her husband, and N.G. were at a bus stop the day of the incident. As they waited for a bus to take them to work, a man in a van asked if they needed a ride, and B.G. and N.G. accepted. B.G. identified defendant as that man. As they drove toward the victims' work, defendant started to take a route unknown to B.G. She questioned him, and he stated that he was taking an alternate route. Eventually, the vehicle reached the end of the road. At that time, defendant told B.G. that he needed a global positioning system to find his way. He asked B.G. if he could use her telephone to call a friend. Defendant took the telephone but then pulled out a gun. He told B.G. and N.G. to get out of the van, but to leave their purses. Defendant took the women into an abandoned house.

¶ 7 Once they were in the house, defendant ordered the women to take off their coats, shoes, and pants. He gave them tape and told them to wrap their hands together. After their hands were tied, defendant grabbed B.G. and pulled her toward a sofa. Defendant made both victims kneel facing the sofa. N.G. initially refused and got into a struggle with defendant; however, defendant was able to restrain her. As they both were kneeling, defendant covered their heads with carpet so they could not see. B.G. testified that defendant then pulled down their underpants and inserted a finger into her vagina. Defendant then removed the carpet and forced B.G. to a different part of the house. B.G. stated that he forcibly moved her and N.G. a few times.

¶ 8 Eventually, defendant brought both victims together and tied their hands and legs using rope. Defendant then placed tape over the victims' mouths and removed B.G.'s brassiere and placed it over her eyes. The victims were told to lie down on a table. Defendant again removed B.G.'s underpants and inserted a finger into her vagina. Defendant then removed the tape from B.G.'s mouth, grabbed her hair, and forced his penis into her mouth a number of times. Defendant began to rub his penis on B.G.'s rectum. He then inserted his penis into her rectum and, later, into her vagina. When defendant stopped, B.G. could tell that he had moved on to

N.G. However, because of the restraints, she could not see exactly what he was doing.

¶ 9 After defendant finished with N.G., he told the victims that they had to stay in the house that night with him. He told them that he would shoot them if they moved or shouted. After saying this, B.G. heard defendant walk away from them. This led B.G. to believe that defendant had left. B.G. was able to loosen the tape from her mouth and told N.G. she believed defendant was gone. N.G. agreed, and they began to plan how to get out of their restraints. Eventually, they freed themselves, found their clothes, and left the house. After wandering for a while in the forest and along the river, they made their way to a road. A woman in a van stopped to help them. They told her what had happened and that they needed a ride. The woman let them in her van and took them to a telephone, where they were able to call the police.

¶ 10 N.G.'s testimony was substantially similar to B.G.'s. She identified defendant as the man who had picked them up at the bus stop and taken them to the abandoned house. N.G. also testified that defendant placed a finger in her vagina.

¶ 11 B.G.'s husband also testified. He identified defendant as the man who picked up B.G. and N.G. from the bus stop.

¶ 12 Police officer Jeffery Ronk testified that he responded to a vehicle containing B.G. and N.G. after they called the police. He stated that their clothes were rumpled and their hair was askew. Ronk testified that B.G. told him that they were picked up by a man while waiting at a bus stop and that he took them to a house where they were sexually assaulted.

¶ 13 Thomas Merchie, a crime scene investigator, testified that he examined the abandoned house and found tire tracks where a vehicle had stopped and saw several footprints in the snow. He also found a used condom, an empty cardboard tape roll, several individual pieces of duct tape, a pair of women's underpants, and pieces of rope. Robert Reneau, a latent print examiner, testified that he examined a fingerprint found on the duct tape and concluded that it belonged to defendant. Debra Milton, a forensic scientist, testified that she examined semen found as a result of vaginal and anal swabs conducted on B.G. Milton concluded that the semen contained DNA which matched the DNA profile of defendant. According to Milton, this would be expected to occur in 1 in 6.2 quadrillion whites, 1 in 4.2 quadrillion Hispanics, and 1 in 120 quintillion African-Americans.

¶ 14 Kathy Ryckingham testified that she was a nurse at the hospital where B.G. was treated. She stated, without objection from defense counsel, that B.G. told her that she had been kidnaped and sexually assaulted after she and a female relative accepted a ride from a man. Kelly McKay testified that she was a nurse who examined N.G. and noted that she had abrasions on her knees and wrists. McKay testified that as part of the examination, N.G. told her that she was waiting for a bus when a man stopped and offered a ride. After she got into the vehicle, he took her to an abandoned house and tied her up. Defendant's objection to McKay's testimony was overruled after the court concluded that it related to the nature of care she was receiving.

¶ 15 Heather Poston testified that she picked up B.G. and N.G. after she saw them on the side of the road. She stated that they had duct tape on and had been crying. The two women then told Poston that they had been kidnaped after they accepted a ride from a man while waiting for a bus. The women told Poston that defendant had threatened them with a gun. This led Poston to drive the women to a Dollar General store where they could call the police. The court allowed Poston's testimony regarding the victims' story over defendant's objection.

¶ 16 At the conclusion of the trial, the jury found defendant guilty of all charges. At the sentencing hearing, the trial court sentenced defendant to 10 years in prison on each of his seven convictions and imposed 15-year add-on terms for each count. The court concluded that defendant would have an aggregate sentence of 75 years in prison.

¶ 17 Thereafter, defense counsel filed a motion for a new trial and sentencing hearing or for reconsideration of sentence. During a hearing on the motion, the trial court again stated that defendant should be serving an aggregate sentence of 75 years in prison. At the conclusion of the hearing, the court denied defendant's motion. Defendant was not present for the hearing. Defendant appeals.

¶ 18 ANALYSIS

¶ 19 I. Dismissal of Juror

¶ 20 Defendant first argues that the circuit court erred when it failed to dismiss a juror for cause. Because defendant did not raise the issue in a posttrial motion, the State argues that it is forfeited and cannot be raised on appeal. See Ill. S. Ct. R. 615(a). Defendant argues that we should not consider the issue forfeited because postconviction counsel may not have received a copy of the *voir dire* proceedings. We find that defendant's argument is speculative because it contains no proof that counsel did not in fact receive the *voir dire* transcripts. Therefore, we agree with the State that the issue is forfeited. In the alternative, defendant argues that counsel was ineffective for failing to raise the issue in a posttrial motion.

¶ 21 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 result of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Haynes*, 192 Ill. 2d 437 (2000). Defendant must satisfy both prongs in order to prevail on a claim of ineffective assistance of counsel; however, if the claim can be disposed of on the ground that defendant did not suffer prejudice, a court need not determine whether counsel's performance was deficient. *Id.*

¶ 22 Here, defendant claims that the trial court's failure to dismiss a juror for cause led him to use a peremptory challenge he would have used on a different juror. In order to establish the prejudice necessary to succeed on his ineffective assistance claim, defendant must prove that counsel's inclusion of the issue in a posttrial motion would have ultimately led to success. Based on the following, we conclude the issue would not have succeeded.

¶ 23 As long as a defendant receives a fair and impartial trial, due process is not denied where a defendant exhausts all of his peremptory challenges, even if he used one of them to remove a juror who should have been removed for cause. *In re Commitment of Trulock*, 2012 IL App (3d) 110550. It is well settled in Illinois that a trial court's failure to remove a juror for cause is grounds for reversal only if prejudice can be shown. *Id.* The Illinois Constitution does not guarantee the right to a jury that is sympathetic to a specific party or to a specific legal theory. *Id.*

¶ 24 In making his argument, defendant does not contend that any of the jurors who were ultimately seated should have been removed for cause. Instead, he argues that he disfavored a juror and would have used a peremptory challenge against the juror if he had one. As noted above, a defendant does not have a right to a juror sympathetic to himself or a particular legal theory. However, even if defendant did have a right to a sympathetic juror, we find that the evidence against defendant was too strong for defendant to prove that the seating of a different juror would have resulted in an acquittal. The evidence included the victims' testimony and identification, the discovery of evidence such as rope and tape at the crime scene, and expert testimony connecting defendant's fingerprint and DNA to the crime. Because the evidence strongly supported defendant's conviction, we conclude that defendant was not prejudiced by the trial court's failure to dismiss a juror for cause. Therefore, because he cannot prove prejudice, we conclude that defendant would not have been successful on this issue had he raised it in a posttrial motion. Thus, we cannot find that counsel was ineffective.

¶ 25 II. Hearsay

¶ 26 Next, defendant argues that the cause should be remanded for a new trial because the court permitted the use of inadmissible hearsay. We review a trial court's determination regarding the admission of out-of-court statements for an abuse of discretion. *In re Jovan A.*, 2013 IL App (1st) 103835.

¶ 27 A. Forfeited Errors

¶ 28 Defendant claims that four different witnesses were allowed to testify to statements that amounted to inadmissible hearsay. Two witnesses, Ronk and Ryckingham, testified without objection from trial counsel. Counsel similarly failed to object to their comments in a posttrial motion. Therefore, the issue regarding these two witnesses has been forfeited. See Ill. S. Ct. R. 615(a). However, defendant argues that trial counsel's failure to object and raise the issue in a posttrial motion amounted to ineffective assistance of counsel.

¶ 29 As noted above, 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 result of the proceeding would have been different. *Albanese*, 104 Ill. 2d 504. If the claim can be disposed of on the ground that defendant did not suffer prejudice, a court need not determine whether counsel's performance was deficient. *Id.*

¶ 30 Ronk and Ryckingham were allowed to testify to B.G.'s account of the crime. After our review of their testimony, as well as the other evidence presented at trial, we conclude that defendant was not prejudiced by counsel's failure to object. This conclusion is based on the overwhelming evidence against defendant. Because the evidence strongly supported defendant's conviction, we conclude that defendant was not prejudiced by admission of the hearsay evidence, and therefore counsel was not ineffective for failing to object.

¶ 31 B. Preserved Errors

¶ 32 Two of the alleged hearsay statements were objected to at trial and raised in a posttrial motion. Therefore, we will consider whether the trial court erred when it admitted statements made by Poston and McKay.

¶ 33 Poston testified that she picked up the victims on the side of the road and drove them to a telephone so they could call the police. As part of her testimony, she stated what the victims had told her regarding their encounter with defendant. The trial court allowed the statements over defense counsel's objection. Testimony regarding an out-of-court statement is admissible to show its effect on the listener's mind or explain the listener's subsequent actions. *People v. Robinson*, 391 Ill. App. 3d 822 (2009). Here, Poston's testimony regarding the story the victims told her explains her subsequent action of driving them to a location where they could contact the police. Therefore, even if the statement was offered to prove the truth of the matter asserted, we find that it would be admissible under the above exception to the hearsay rule. The court did not err when it admitted the statements at trial.

¶ 34 McKay testified to statements N.G. made while she was treating her at the hospital. The statements included N.G. telling McKay that she accepted a ride from a male while she and the other victim were waiting at the bus stop. Under an exception to the hearsay rule, out-of-court statements made to a medical professional which are pertinent to diagnosis or treatment are admissible. *People v. Denny*, 241 Ill. App. 3d 345 (1993). After our review of McKay's testimony, we conclude that the majority of it would fall under the above exception to the hearsay rule. However, McKay's testimony regarding the victims accepting a ride from a male at the bus stop is not pertinent to diagnosis or treatment. Therefore, we conclude that it was error for the court to allow the statement. Nonetheless, we find that the trial court's error was harmless.

¶ 35 An error is harmless when it appears beyond a reasonable doubt that the error did not contribute to the verdict obtained. *People v. Stechly*, 225 Ill. 2d 246 (2007). There are three different approaches for determining whether an error is harmless: (1) focusing on the error to determine whether it might have contributed to the conviction; (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction; or (3) determining whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. *Id.*

¶ 36 In this case, all three approaches result in a finding that the error was harmless. A review of the record makes it clear that McKay's statement, which only served to corroborate other evidence already properly admitted, did not contribute to the conviction due to the overwhelming amount of evidence against defendant. Therefore, we conclude that the admission of McKay's statement was harmless error, and reversal is not warranted.

¶ 37 III. Sentencing Error

¶ 38 Defendant's third contention is that the cause should be remanded for resentencing because the trial court issued a sentence it did not intend to impose and one which the court was statutorily prohibited from imposing. Although sentencing issues are generally reviewed for an abuse of discretion, where, as here, the issue presents a question of statutory interpretation, our review is *de novo*. *People v. Anderson*, 402 Ill. App. 3d 186 (2010).

¶ 39 At sentencing, the trial court orally pronounced an aggregate sentence of 75 years in prison. However, a revised sentencing order issued by the court shows that defendant's aggregate sentence was actually 100 years. When a trial court's oral pronouncement of a sentence differs from a written order, the oral pronouncement controls. *People v. Moore*, 301 Ill. App. 3d 728 (1998). Therefore, we conclude that the trial court imposed an aggregate sentence of 75 years in prison.

¶ 40 Defendant and the State agree that an aggregate sentence of 75 years was not authorized by statute. When a trial court's oral pronouncement concerning a consecutive or concurrent term of incarceration is unauthorized by statute, it is void. *People v. Horrell*, 381 Ill. App. 3d 571 (2008). Under the applicable statutes in this case, the minimum aggregate sentence defendant could have been given was 84 years, as the court found that four counts should be consecutive, and the minimum sentence for each count was 21 years. See 730 ILCS 5/5-4.5-15, 5-8-4 (West 2010); 720 ILCS 5/18-2(b), 10-2(b), 12-14(d)(1) (West 2010); *People v. Arna*, 168 Ill. 2d 107 (1995). Based on our calculations, defendant's 75-year sentence was unauthorized and is void. Therefore, we vacate defendant's sentence and remand the cause for resentencing.

¶ 41 IV. Absence at Posttrial Hearing

¶ 42 Finally, defendant argues that the matter should be remanded for additional posttrial proceedings because he was not present during a hearing on his posttrial motion. Because this matter does not concern any factual or credibility disputes and involves a pure question of law, our review is *de novo*. *People v. Chapman*, 194 Ill. 2d 186 (2000).

¶ 43 A criminal defendant has a right to be present at all critical stages of a criminal proceeding from arraignment to sentencing. *People v. Lindsey*, 201 Ill. 2d 45 (2002). However, a defendant's right to be present generally has not been extended beyond the sentencing stage. *People v. Burke*, 226 Ill. App. 3d 798 (1992). In fact, a defendant's constitutional right to be present at trial does not embrace a right to be present at the argument of motions prior to or subsequent to a verdict. See *People v. Woods*, 27 Ill. 2d 393 (1963).

¶ 44 Here, defendant argues that he had a constitutional right to be present during a hearing on a posttrial motion. The hearing in question occurred after both trial and sentencing. A defendant's right to be present is limited to those situations when his presence is necessary to a fair trial. *People v. Bean*, 137 Ill. 2d 65 (1990). Here, because the hearing on defendant's motion occurred after trial and sentencing, it was not a situation where his presence was necessary to a fair trial. See *Woods*, 27 Ill. 2d 393. Based on the authority cited above, we conclude that the hearing was not a critical stage requiring defendant's presence. Therefore, defendant's absence from the hearing does not result in reversible error.

¶ 45 CONCLUSION

¶ 46 The judgment of the circuit court of Rock Island County is affirmed in part, vacated in part, and remanded for resentencing.

¶ 47 Affirmed in part and vacated in part; cause remanded.