2014 IL App (3d) 120837-U

Order filed December 12, 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 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0837 Circuit No. 08-CF-2446
JESSE R. PEREZ,	)	
Defendant-Appellant.	)	Honorable Carla Policandriotes, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Lytton and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not: (1) deny defendant his right to a public trial by conducting limited *voir dire* in private; (2) abuse its discretion when admitting a victim interview recording; or (3) violate defendant's right to counsel by not appointing new counsel for defendant's *pro se* posttrial motion. Defense counsel was deficient by failing to move to strike nonresponsive answers; counsel's performance did not prejudice defendant.

¶ 2 A Will County jury found defendant, Jesse R. Perez, guilty of two counts of predatory criminal sexual assault on the six-year-old daughter of his girlfriend.

¶ 3 Defense counsel filed a posttrial motion alleging trial errors, which the court denied. Defendant subsequently filed a *pro se* motion for a new trial, alleging several allegations of ineffective assistance of trial counsel. The court denied defendant's *pro se* motion and sentenced defendant to consecutive terms of 49 and 38 years in prison.

¶ 4 Defendant appeals, arguing that the trial court erred by: (1) conducting *voir dire* of seven venire members in the hallway; (2) admitting the recorded victim interview; and (3) failing to appoint new counsel on his *pro se* motion. Defendant also argues counsel was ineffective in failing to object to nonresponsive answers from a hostile witness.

¶ 5 For the following reasons, we affirm.

¶ 6 BACKGROUND

¶ 7 The State charged defendant with two counts of predatory criminal sexual assault. Count I alleged that defendant inserted his penis into the minor child's vagina. Count II alleged that defendant placed his mouth on the child's vagina. The case proceeded to trial in March of 2012. During jury selection, the trial court conducted *voir dire* of seven prospective jurors in a hallway. Defendant was not present; defense counsel and the court reporter were. Three of the seven prospective jurors made affirmative requests to speak in private. The others indicated that they might not be able to be fair or impartial. Ultimately, defense counsel used a peremptory challenge to reject one of the seven venire members. Both the prosecutor and defense counsel accepted the other six as jurors.

¶ 8 At trial, the victim testified that defendant put his penis inside her; defendant was going forward and backward. After the prosecution asked if defendant put any other body part on her private area, the victim testified that defendant put his mouth on her vagina. The victim testified that defendant put his penis in her anus. Defense counsel requested that the court instruct the

jury not to consider evidence of any uncharged allegations. The court granted defendant's request.

¶ 9 The victim's mother (Judith) and aunt (Perla) both testified that the day after the incident, the victim stated that defendant told her to take her clothes off and put a blanket over her head. The victim also told her mother and aunt that defendant spit on her private area; she felt "something really hurting her" while defendant humped her.

¶ 10 Prior to trial, medical personnel examined the victim. The parties stipulated to a report describing what the victim said during the examinations. Dr. Koburov and Dr. Magdziarz testified pursuant to the stipulation. Koburov testified that the victim said defendant did "something" that "hurt" her private. Magdziarz testified that defendant made the victim take down her pants and then "went too hard," which caused the victim to bleed.

¶ 11 Nurse Hoholic also testified as to the victim's statements in the stipulated report. On cross-examination of Hoholic, defense counsel sought to elicit testimony confirming that the victim never said defendant's mouth touched her. Hoholic testified that she read to the jury "word-for-word" what the victim told her. Defense counsel confronted Hoholic with the stipulated report and counsel asked if the report stated that anyone touched the victim. Hoholic replied that it did. Defense counsel then asked where; Hoholic replied, "[k]issing, licking, or sucking of breasts or other parts of the patient’s body. Yes. If yes, describe. Vagina." Hoholic later admitted that the report did not include such information. On redirect, Hoholic testified that the victim stated there had been kissing, licking, or sucking of her private part.

¶ 12 Denise Payton, a staff member at Will County Children’s Advocacy Center, conducted a videotaped interview of the victim three days after the incident. The court admitted the interview recording over defendant's objections. The State argued that the interview complied with the

requisite sufficient safeguards of reliability. Defense counsel argued that the interviewer used leading questions. During the interview, the victim told the interviewer that defendant took her into a house and told her to take off her pants and underwear. Defendant had the victim lie down on a bed. He put something over her face while he humped her hard; defendant was humping her with his penis. The victim said defendant spit on her vagina. Payton then asked the following:

> "Q. You said that Jesse spit in your private. Was his mouth at your private? Did he spit on his hand and put it there? What do you mean?
>
> A. He had his mouth.
>
> Q. He had his mouth where?
>
> A. Right here [Points to her vaginal area].
>
> Q. Right there? On the doll [anatomical drawing] can you show me where?
>
> A. [Points to area on diagram].
>
> Q. He had his mouth on your private, okay."

¶ 13 Payton asked whether the victim felt anything inside her body when he had his mouth on her private. She also asked how long defendant had his mouth on her private. The interviewer summarized the victim's answers as: "you said that he put his mouth on you, he spit on your private for a minute." The victim confirmed that was accurate. The court granted the jury's request that the interview be played again during deliberations. The jury found defendant guilty on both counts.

¶ 14 Defense counsel filed a motion for a new trial alleging trial errors, which the trial court denied. Additionally, defendant filed a *pro se* motion for a new trial alleging ineffective assistance of counsel. The court allowed defendant to argue his *pro se* motion. After finding defendant received effective assistance of counsel, the court denied defendant's motion. The court sentenced defendant to consecutive terms of 49 and 38 years in prison.

¶ 15 Defendant appeals.

¶ 16 ANALYSIS

¶ 17 I. Right to Public Trial and Private *Voir Dire*

¶ 18 Defendant argues that the trial court violated his right to a public trial when it excluded the public while conducting *voir dire* of seven potential jurors in private. Defendant does not argue that it was error for the trial court to exclude him from *voir dire*. The State argues that defendant waived this issue by not objecting when the court conducted *voir dire* in private. *People v. Hayden*, 338 Ill. App. 3d 298 (2003); *People v. Lane*, 256 Ill. App. 3d 38 (1993).

¶ 19 The federal and state constitutions guarantee the right to a public trial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. 1, § 8. The right to a public trial under the sixth amendment extends to *voir dire*. *Presley v. Georgia*, 558 U.S. 209, 212-13 (2010); *Waller v. Georgia*, 467 U.S. 39, 44-45 (1984).

¶ 20 To preserve an issue on appeal, defendant must object at trial and file a written posttrial motion raising the issue. *People v. Bannister*, 232 Ill. 2d 52, 64-65 (2008). Although there is a presumption that criminal cases are to be open to the public, defendant may waive that right where defense counsel fails to raise an objection to the exclusion of the public. *Lane*, 256 Ill. App. 3d at 55 (citing *Levine v. United States*, 362 U.S. 610, 619 (1960)). Despite his failure to object, defendant argues that he cannot forfeit his right to a public trial due to the fact that the

trial court is required to consider alternatives to courtroom closures, even where neither party offers alternatives. *Presley*, 558 U.S. at 214. *Presley*, however, is easily distinguishable. Unlike here, defense counsel in *Presley* objected to the exclusion of the public from the courtroom. *Id.* at 210. Further, defense counsel here actively participated in *voir dire* and defendant was aware that the court questioned venire members in the hall. Therefore, defendant forfeited the issue on appeal. *Bannister,* 232 Ill. 2d at 64.

¶ 21 Alternatively, defendant argues that the trial court committed structural error. A reviewing court may consider a forfeited issue under the plain-error doctrine when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189 (2010) (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)); *People v. Williams*, 139 Ill. 2d. 1, 14-15 (1990).

¶ 22 Before considering either prong of the plain-error doctrine, we must first determine whether the trial court committed any error. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). As to the three jurors who specifically requested to speak with the judge in private, the court did not commit error. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 512 (1994) (trial judge should not close *voir dire*, unless a juror requests to speak in private). As to the other venire members, we find that the trial court did not err in conducting limited *voir dire* in private. The court conducted private *voir dire* of the remaining venire members only after they stated they might not be able to be impartial. The court had an interest in ensuring that the venire members did not taint the entire venire by stating their prejudice in open court. By

exploring these reasons outside the presence of the venire, the court obviated the possibility that one of the prospective jurors would say something that might cause the court to excuse the entire venire. This, in turn, protected defendant's right to a fair and speedy trial. The trial court did not err; therefore, there was no error, plain or otherwise.

¶ 23 II. Admissibility of Videotaped Interview

¶ 24 Defendant argues that the trial court abused its discretion by admitting the interview recording. He argues that the victim changed her claim from defendant spitting on her to defendant putting his mouth on her private area only after being subjected to the interviewer's suggestive questioning.

¶ 25 We will reverse a trial court's determination as to the admissibility of evidence only if the court abused its discretion. *People v. Simpkins*, 297 Ill. App. 3d 668, 676 (1998) (citing *People v. Zwart*, 151 Ill. 2d 37, 45 (1992)). An abuse of discretion exists where the trial court admits evidence that is unreasonable, arbitrary, fanciful, or no reasonable person would agree with the court's decision. *People v. Ruback*, 2013 IL App (3d) 110256, ¶ 24.

¶ 26 Section 115-10 of the Code of Criminal Procedure of 1963 (the Code) allows for the admission of a testifying child witness's out-of-court statement, in spite of the hearsay nature of the statement, if the trial court finds that the "time, content, and circumstances of the statement provide sufficient safeguards of reliability." 725 ILCS 5/115-10(b)(1) (West 2008). This section was "enacted to provide for reliable, corroborating evidence of a child's 'outcry' statement." *People v. Bowen*, 183 Ill. 2d 103, 114 (1998) (citing *People v. Holloway*, 177 Ill. 2d 1, 9 (1997)).

¶ 27 The State bears the burden of proving that the statements are reliable, as opposed to the product of influence. *Zwart*, 151 Ill. 2d at 45. The court determines the degree of reliability by evaluating the totality of the circumstances concerning the hearsay statement. The court should

consider all the surrounding factors, including the child's spontaneity and repetition of the incident, the child's mental state, the lack of motive to fabricate, and the use of terminology. *Simpkins*, 297 Ill. App. 3d at 676 (citing *People v. West*, 158 Ill.2d 155, 164 (1994)).

¶ 28 Each member of this panel reviewed the interview recording; we find no abuse of discretion. During the interview, the victim stated that defendant spit on her private. The interviewer asked where defendant's mouth was. Payton provided the victim with an option by stating, "[y]ou said that Jesse spit in your private. Was his mouth at your private? Did he spit on his hand and put it there? What do you mean?" The victim pointed to her own vaginal area. The victim also pointed to the private area of a doll to indicate where defendant's mouth was located. The interviewer then said, "He had his mouth on your private. Okay." The victim did not contradict this statement. The State elicited testimony indicating the interviewer complied with the Child Advocacy Center's protocols for interviewing children. In addition, the victim's statements during the interview were consistent with the victim's statements to her mother and aunt after the incident occurred. Therefore, the court did not err in admitting the interview recording.

¶ 29 III. Ineffective Assistance of Counsel

¶ 30 Defendant argues that defense counsel was ineffective when she elicited testimony from Hoholic, which was contrary to the report. Furthermore, defendant argues that counsel denied him effective assistance by failing to move to strike Hoholic's nonresponsive answer.

¶ 31 The United States and Illinois Constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art I, § 8. In order for a defendant to prove that counsel’s assistance was so defective as to require reversal, defendant must show that counsel was deficient and counsel's deficient performance prejudiced

the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The standard the defense attorney needs to meet is reasonableness under prevailing professional norms. *Id.* at 688.

¶ 32 On cross-examination, defense counsel showed Hoholic the report pursuant to the stipulation. Counsel then asked the following questions:

> "Q. Can you tell me is there anywhere within the report that [M.G.] stated that anyone touched her?
>
> A. Yes.
>
> Q. There is somewhere? Can you read exactly to me where it says the word 'touch.'
>
> A. Kissing, licking, or sucking of breasts or other parts of the patient's body. Yes. If yes, describe. Vagina."

¶ 33 Hoholic eventually agreed that the report did not contain such information. Defense counsel did not move to strike the nonresponsive answers. We find that defense counsel breached her duty by failing to move to strike nonresponsive answers, but counsel's performance did not prejudice defendant.

¶ 34 In *People v. Bailey*, 374 Ill. App. 3d 608, 615 (2007), the court found that the first prong of *Strickland* was satisfied where counsel failed to move to strike a nonresponsive answer. The court further held that there is no trial strategy in eliciting a damaging, nonresponsive answer and then failing to move to strike the answer. *Id.* at 614. Here, Hoholic's answer departed from the statement contained in the report. Hoholic responded that there had been licking, sucking, or kissing of the victim's body, when in fact, the report did not contain such information. Defense counsel failed to move to strike the nonresponsive answer.

¶ 35 Next, we must determine whether counsel's failure to move to strike the nonresponsive answer prejudiced the defendant. Defendant must prove that there is a "reasonable probability" that the result would have been different but for counsel's errors. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Defendant cannot claim he was prejudiced by evidence where that evidence is cumulative of previously introduced evidence. *Nassar v. County of Cook*, 333 Ill. App. 3d 289, 303 (2002); (citing *Mitchell v. Palos Community Hospital*, 317 Ill. App. 3d 754 (2000)).

¶ 36 Here, Hoholic's nonresponsive answer was cumulative of other evidence. During her interview three days after the incident, the victim stated that defendant put his mouth on her. Additionally, the victim testified at trial that defendant put his mouth on her. We find that defendant has not established a reasonable probability that, but for counsel's error, the result would have been different. Defendant is not entitled to a new trial based on ineffective assistance of counsel.

¶ 37 IV. Right to New Counsel

¶ 38 Defendant argues that the trial court denied his right to counsel by failing to appoint new counsel for defendant's *pro se* posttrial motion alleging ineffective assistance of counsel.

¶ 39 In *People v. Krankel*, our supreme court held that defendant was entitled to new counsel to argue his motion alleging ineffective counsel. *Krankel*, 102 Ill. 2d 181, 189 (1984). In *People v. Crane*, our supreme court held that *Krankel* did not establish a *per se* rule requiring the court to appoint new counsel for all *pro se* motions for a new trial alleging ineffective counsel. *Crane*, 145 Ill. 2d 520, 532-33 (1991). The court stated "[a] trial court's decision not to appoint separate counsel on an ineffective-assistance-of-counsel claim will not be erroneous if the underlying claim is deemed to be without merit or related to a matter of trial tactics." *Id.* at 533; see also

People v. Moore, 207 Ill. 2d 68, 77 (2003). The trial court should first determine if the claim lacks merit or is based on a matter of trial strategy. *Moore*, 207 Ill. 2d at 78. If so, then there is no need to appoint new counsel and the court may deny the *pro se* motion. *Id.*

¶ 40 We must determine whether the trial court made an adequate inquiry into whether defendant received effective assistance of counsel. *Id.* The trial court may: (1) question counsel as to facts and circumstances surrounding the defendant's allegations; (2) ask the defendant to provide more specific information; or (3) rely on its knowledge of counsel's performance from observations made at trial and the "insufficiency of the defendant's allegations on their face." *Id.* at 78-79.

¶ 41 We find that the trial court made an adequate inquiry as to the facts and circumstances surrounding defendant's claim. The same judge conducted the trial and the posttrial motion hearing. She observed counsel's performance at trial and heard the evidence presented. The court considered defendant's allegations and afforded defendant the opportunity to provide additional information during his argument. Even though counsel's performance was less than perfect, such performance did not prejudice defendant. The court properly determined that defendant's motion was without merit. The trial court was not required to appoint new counsel. *Crane*, 145 Ill. 2d at 533; *Moore*, 207 Ill. 2d at 78.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 44 Affirmed.