2013 IL App (3d) 130388-U

Order filed October 11, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

A.D., 2013

In re B.D.C.,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
A minor.	)	Knox County, Illinois,
	)	
(The People of the State of Illinois,	)	
	)	Appeal No. 3-13-0388
Petitioner-Appellee,	)	Circuit No. 13-JD-11
	)	
v.	)	
	)	
B.D.C.,	)	Honorable
	)	James B. Stewart
Respondent-Appellant).	)	Judge Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held*: The trial court's failure to allow respondent an opportunity to present a closing argument constituted plain error, and warrants a new adjudicatory hearing.

¶ 2 The State filed a juvenile petition alleging the minor respondent, B.D.C. committed one

count of aggravated assault at Galesburg High School on January 10, 2013. After the close of evidence at trial, the trial court issued its ruling, finding respondent guilty, without providing respondent an opportunity to present a closing argument. Respondent appeals. We reverse and remand.

¶ 3 FACTS

¶ 4 On January 29, 2013, the State filed a juvenile petition alleging respondent committed one count of aggravated assault and requesting the court to adjudicate the minor respondent a ward of the court.

¶ 5 During the March 28, 2013, adjudicatory hearing, the State called Brett Wolfe, the assistant principal at Galesburg High School, who testified he was standing in a hallway of the high school on January 10, 2013, when he observed a large group of students heading in his direction. Wolfe witnessed a teacher walking behind the students, who advised Wolfe one of the students had been involved in "the situation." Wolfe directed the student identified by the teacher to come with Wolfe to the office.

¶ 6 While Wolfe walked toward the office with the student identified by the teacher, two other students later identified as respondent, B.D.C., and his brother, approached Wolfe and directly spoke to the first student by stating, "that mother f*cker got his a** beat." Wolfe directed both respondent and his brother to stay out of the situation. Wolfe explained to the court that, at the time of the incident, he did not recognize respondent because he had not yet encountered him as a student.

¶ 7 According to Wolfe, as he escorted the first student to the office, respondent walked to Wolfe's right and respondent's brother walked on Wolfe's left side. Wolfe stated that, after

telling the students three times to "stay put," Wolfe turned toward respondent and told him, "[D]on't come any further. Stay right here." Respondent became "incredibly aggressive" and began threatening Wolfe saying, "I'll f*ck you up. I'll split your mother-f*ckin head open. Don't – don't touch me, you white mother f*cker." At this point, Wolfe told respondent his involvement in the situation now required respondent to come to the office.

¶ 8 Wolfe radioed Officer Luna and another person for assistance. Upon hearing the radio traffic, respondent told Wolfe he didn't "give a f*ck about any f*cking officers. He'll f*ck us – f*ck us all up." According to Wolfe, when he and the three students, including respondent, approached the corner of the hall, all three students ran out the exit door and left school grounds.

¶ 9 Based on respondent's comments, Wolfe testified he feared respondent would cause him bodily harm, especially because Wolfe did not have a rapport or relationship with respondent. According to Wolfe, respondent's actions were "pretty volatile" and he was "pretty much in my face, extremely threatening."

¶ 10 On cross-examination, Wolfe testified he did not know to what extent respondent had been involved in the initial fight. Wolfe stated respondent didn't "actually swing" at him or "do anything towards hitting" him, nor did he see respondent with a weapon. On re-direct examination, Wolfe stated he verbally directed respondent to "go back down the hall" but did not attempt to make any physical contact with respondent.

¶ 11 After the State rested, respondent testified on his own behalf. Respondent testified he was a student at Galesburg High School on January 10, 2013, when he witnessed a fight. According to respondent, the student being escorted to the office by Wolfe requested respondent and his brother to "come with [him] to grab [his] stuff." Consequently, respondent and his

brother followed Wolfe and the student down the hallway. Respondent acknowledged Wolfe directed respondent and his brother to go back down the hall. Respondent told the court that after Wolfe told respondent a third time to leave, Wolfe stepped close to respondent, causing respondent to ask Wolfe to "back up a little bit." According to respondent, Wolfe directed respondent to come to the office after respondent told Wolfe not to touch him.

¶ 12 Respondent testified he "threatened [Wolfe] after he – after – after all this stuff was over, the only thing I said was, don't touch" and respondent admitted he "just tried to scare [Wolfe] a little bit so he could just back up so we could leave." Respondent stated Wolfe was trying to grab his brother, so he told Wolfe to "let him the f*ck go." Respondent denied making any move to swing at Wolfe. Respondent admitted, "I said some of the things, but I didn't say all the other stuff – some of the stuff [Wolfe] said."

¶ 13 On cross-examination, respondent stated he did not leave the situation because he wanted to grab his brother to prevent his brother from getting in trouble for something he wasn't involved in. According to respondent, Wolfe did not tell him to report to the office, and respondent and his brother were heading toward the exit door.

¶ 14 The following exchange then took place:

> THE COURT: Further evidence, Mr. O'Brien?
>
> MR. O'BRIEN (Defense counsel): No, Your Honor.
>
> THE COURT: Rebuttal?
>
> MR. BARBER (Assistant State's Attorney): No, Your Honor.
>
> THE COURT: Okay. I think he's guilty.
>
> MR. O'BRIEN: Well --

THE COURT: I don't think that there's any question about it. The assistant principal had the complete authority to be where he was under the circumstances.

Your client testified I just tried to scare him a little bit so he would back up and we could leave. That seems to be if not outrageous, at least suggestive of the – of the fact that he made the statements. He admitted to making some of the statements but not all of the statements.

Any of those statements made under those circumstances were unreasonable, and in the situation I think that Mr. Wolfe found himself in, it is not unreasonable to – for him to have assumed that an aggravated assault – that he was in – in reasonable apprehension of receiving a battery at that point in time.

I think he's guilty of the offense and I find him guilty.

MR. O'BRIEN: Okay. Judge, I do have case law regarding the – the question of whether there are – is any kind of action necessary to commit an aggravated assault rather than words alone.

THE COURT: Uh-huh.

MR. O'BRIEN: And – and the question of imminence – the related question of imminence.

THE COURT: I think it was imminent. I think under the circumstances, he's in school. That he had absolutely no authority in the – in the high school to be saying those kinds of things, to be involving himself in that fashion with the assistant principal.

I think he's guilty of the offense, and that's my finding."

The trial court then entered a written order adjudicating the minor delinquent of aggravated

assault.

¶ 15 On April 25, 2013, the minor filed a motion for a new trial arguing the evidence did not support a conviction for aggravated assault beyond a reasonable doubt. After hearing arguments, the trial court denied respondent's motion for a new trial noting respondent's close proximity and the "violent, confronting, argumentative nature of that particular altercation I think would have made any reasonable person including any reasonable school official in that position apprehensive of receiving an immediate battery and so it was for those reasons I found the minor guilty and I still believe he is guilty of the offense of aggravated assault."

¶ 16 After a sentencing hearing, the court sentenced respondent to a term of one year of probation, 50 hours of community service work, and ordered respondent to write a letter of apology to Wolfe. Respondent filed a timely notice of appeal.

¶ 17 ANALYSIS

¶ 18 On appeal, respondent first argues the State's evidence at trial was insufficient to adjudicate respondent guilty of aggravated assault because his threats were unaccompanied by any threatening gestures, and the conduct of both respondent and the victim demonstrated there was no reasonable fear of an imminent battery. The State responds the evidence established respondent's guilt beyond a reasonable doubt.

¶ 19 Second, respondent argues he is entitled to a new adjudicatory hearing because plain error occurred when the court found respondent guilty without allowing respondent an opportunity to present a closing argument. The State acknowledges the court found respondent guilty immediately after the close of evidence, but argues neither prong of the plain error analysis applies.

¶ 20 Plain error allows this court to consider a forfeited claim when (1) an error occurred and the evidence is so closely balanced, regardless of the seriousness of the error, or (2) the error is so serious it affected the fairness of respondent's trial and challenged the integrity of the judicial process, regardless of the strength of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). A criminal defendant's right to make a closing argument before the finder of fact is a fundamental right derived from the sixth amendment guarantee of assistance of counsel. *People v. Stevens*, 338 Ill. App. 3d 806, 810 (2003) (citing *Herring v. New York*, 422 U.S. 853, 856-57 (1975)). The trial court lacks discretion to deny a defendant his right to make a proper closing argument based on the evidence and applicable law in his favor. *Stevens*, 338 Ill. App. 3d at 810; *Herring*, 422 U.S. at 860. The right is so fundamental that its denial is grounds for reversal regardless of whether defendant was prejudiced. *Stevens*, 338 Ill. App. 3d at 810; *Herring*, 422 U.S. at 864-65.

¶ 21 In this case, after inquiring whether the parties had any further evidence to present, the trial court simply stated "Okay. I think [respondent's] guilty." The court also articulated the detailed basis for its finding. Immediately thereafter, respondent's counsel unsuccessfully, but politely, attempted to cite case law to the court. However, respondent's counsel failed to raise a clear objection to the court's failure to allow the defense to present a closing argument.

¶ 22 In *People v. Faint*, 396 Ill. App. 3d 614 (2009), the trial court failed to allow defendant to present a closing argument, or any evidence, before issuing its ruling against defendant. Based on the unusual circumstances in *Faint*, this court held the second prong of the plain error analysis required reversal. With respect to the absence of an opportunity to summarize evidence during closing argument, we relied heavily on a United States Supreme Court case, stating:

> "It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. [Citation].
>
> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *People v. Faint*, 396 Ill. App. 3d at 620 (citing *Herring v. New York*, 422 U.S. at 862).

In the case at bar, we conclude the trial court's decision to announce its decision in favor of the State, without allowing respondent an opportunity to present or voluntarily waive a closing argument, affected the fairness of respondent's trial so severely that he is entitled a new adjudicatory hearing.

¶ 23 Since we have determined respondent is entitled to a new adjudicatory hearing based on the second prong of the plain error analysis, we need not address his argument under the first prong of plain error based on closely balanced evidence. However, for purposes of double jeopardy analysis, we have carefully reviewed the evidence contained in the record and conclude,

if the court resolved issues of credibility in favor of the State, the evidence presented would have been sufficient evidence to convict respondent of aggravated assault. Accordingly, double jeopardy does not bar a retrial. See *People v. Jones*, 175 Ill. 2d 126, 134 (1997) (reviewing court must decide sufficiency of the evidence in order to remove the risk of subjecting defendant to double jeopardy); *People v. Baines*, 399 Ill. App. 3d 881, 900 (2010).

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, the decision of the circuit court of Knox County is reversed and the matter is remanded for a new adjudicatory hearing.

¶ 26 Reversed and remanded.

¶ 27 JUSTICE SCHMIDT, dissenting.

¶ 28 Apparently, the majority has found the second prong of plain error. At no place does the majority suggest that the evidence is closely balanced. To constitute plain error under the second prong, the error must be structural. *People v. Thompson*, 238 Ill. 2d 598 (2010). This is simply not a case of structural error.

¶ 29 While the trial court should have asked for argument, it is clear that the issues defense counsel wanted to discuss was whether words alone could constitute an aggravated assault and the related question of imminence.

¶ 30 No question, the trial court was a little quick on the draw. However, defense counsel did not advise the trial court that he would like to argue the issues beyond advising the court that he had case law on the issues.

¶ 31 Defense counsel did argue the issues more fully in his posttrial motion. Nowhere in that motion does defense counsel complain of being denied the right to make a closing argument. This is one of those errors that was found by appellate counsel through a careful search of the

record. I point that out not to criticize appellate defense counsel, who was also doing his or her job, but to show that there is no indication below that trial counsel thought his client was denied a fair trial.

¶ 32 The majority relies on *People v. Faint* to support the decision here. In *People v. Faint*, the trial court not only denied the defendant a right to put on a closing argument, it denied the defendant the right to put on *any* evidence. *Faint* is of faint value to our analysis here.

¶ 33 If defense counsel had wanted to make a closing argument beyond the comments he made, he should have advised the trial court. While there is no doubt it was error for the trial judge to announce that he thought respondent was guilty before asking for closing argument, the error was not structural and, therefore, it is forfeited.

¶ 34 Because I dissent from the majority's finding of structural error, I address the first issue raised by respondent on appeal and that is the sufficiency of the evidence. Respondent does not contest the evidence of the aggravating factor in this charge of aggravated assault; that is, he knew Wolfe was a school employee on school grounds. He argues only that the evidence was insufficient to prove an assault.

¶ 35 In a challenge to the sufficiency of the evidence, the standard of review to be applied is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt after reviewing the evidence in the light most favorable to the prosecution. *People v. Collins*, 106 Ill. 2d 237 (1985). The majority has laid out the facts above. Additionally, Wolfe testified that respondent was "pretty much in my face, extremely threatening." Respondent even admitted trying to scare Wolfe. Clearly under the facts presented, a reasonable trier of fact could have found that respondent's getting in the victim's face and

stating, "I'll fuck you up. I'll split your mother-fuckin head open" constituted an imminent threat. A reasonable trier of fact could find that respondent knowingly engaged in conduct which placed another in reasonable apprehension of receiving a battery. Respondent admitted that he was trying to strike fear into the victim.

¶ 36 Having found no plain error and sufficient evidence, I would affirm the trial court. Therefore, I respectfully dissent.