

No. 1-10-2481

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the   |
|                                      | ) | Circuit Court of  |
| Plaintiff-Appellee,                  | ) | Cook County.      |
|                                      | ) |                   |
| v.                                   | ) | No. 09 CR 1818    |
|                                      | ) |                   |
| ANTHONY RUCKER,                      | ) | Honorable         |
|                                      | ) | Clayton J. Crane, |
| Defendant-Appellant.                 | ) | Judge Presiding.  |

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JUSTICE MURPHY delivered the judgment of the court.  
Steele and Neville, JJ., concurred in the judgment.

**ORDER**

¶ 1 *Held:* The State presented sufficient evidence to prove defendant committed aggravated criminal sexual abuse; the trial court erred in concluding that defendant was eligible for Class X sentencing based upon a Mississippi conviction for burglary where the State failed to present sufficient evidence that the elements of the Mississippi conviction contained the same elements of burglary in Illinois. Affirmed in part; vacated in part; remanded for resentencing.

¶ 2 Following a bench trial, defendant, Anthony Rucker, was convicted of aggravated criminal sexual abuse and was sentenced to 13 years in prison. On appeal, defendant contests the sufficiency of the evidence to support his conviction for aggravated criminal sexual abuse. He also contends the trial court erred in sentencing him as a Class X offender because the trial court based the Class X status on a burglary conviction from Mississippi without the State presenting

1-10-2481

evidence that the elements of the Mississippi burglary offense mirrored those in Illinois, or evidence that the Mississippi burglary would have qualified as a Class 2 or greater offense in Illinois.

¶ 3 At trial, the State argued that defendant sexually abused six-year-old J.G. during a barbecue. Defendant, who was cooking, briefly left the grill and took J.G. into his basement apartment where he touched her inappropriately. J.G. made a prompt outcry to her grandmother at the barbecue, and later to an interviewer during a victim sensitive interview (VSI). Defendant admitted that he encountered J.G. in his apartment, but contended she wandered in while playing, and that he immediately told her to leave. Defendant denied any inappropriate contact.

¶ 4 Prior to trial, the trial court held a hearing to determine the reliability of J.G.'s outcry statements. During the hearing, Alexandra Levi, forensic interviewer for the Chicago Children's Advocacy Center, testified that she conducted a VSI of J.G. She and J.G. were alone in the room but a detective and an Assistant State's Attorney observed the interview through a two-way mirror.

¶ 5 J.G. told Levi that during a barbecue, she and a man named Anthony, later identified as defendant, were alone when defendant touched her on what J.G. called her "cat," which J.G. identified by pointing to her vagina and saying she uses it to pee. J.G. said that defendant touched her with his hand over her clothes and then demonstrated how he touched her. Defendant also kissed J.G. on her neck. He got on top of her and moved in a back-and-forth motion on her body. When J.G. began to cry, defendant eventually let her go.

¶ 6 Levi took a break from the interview to review her questions and to determine whether she needed to ask anything further. After the break, J.G. said defendant's genitalia, which she described as his "balls," felt hard against her when he was on top of her.

¶ 7 During cross-examination, defense counsel elicited that Levi went into the observation room during the break and spoke with the detective and Assistant State's Attorney regarding whether there were other questions that Levi needed to ask J.G. to better understand J.G.'s relation of

1-10-2481

the incident. Levi further testified that J.G. told her grandmother about the incident immediately after it occurred. The interview lasted approximately 39 minutes and was not recorded.

¶ 8 The State also called Glenda Harris, J.G.'s grandmother, during the hearing. On Labor Day in 2008, Glenda took J.G. and others to her friend Belinda Gray's house for a barbecue. Defendant, who lived in Belinda's basement, was present. Glenda had known defendant about 16 years.

¶ 9 Belinda called Glenda and said that J.G. had something to tell Glenda. When Glenda went into the house, she noticed that J.G. looked as though she had been crying. In response to Glenda asking J.G. what was wrong, J.G. said that "he" took her in the basement and then pointed to defendant. Defendant was standing at the grill. Glenda then said to defendant "how could you do this to my grandson [*sic*]? Did you do this?" Defendant responded, "No, no, no she can't talk – she don't know what she's talking about." Glenda then hit defendant. Glenda took J.G. to the police station at 8 a.m. the next morning. She waited until the morning because she needed to take her grandchildren home from the barbecue and wanted to tell J.G.'s mother, who was at work during the barbecue, what happened. Glenda did not give defendant permission to take J.G. into the basement.

¶ 10 On cross-examination, Glenda testified that she spoke to J.G. about the incident approximately three to four times. During those conversations, Glenda and J.G.'s mother, Shemetric Harris, discussed what happened with J.G. on the night in question. Glenda also talked to J.G. the next morning during the drive to the police station when Glenda asked J.G. whether she felt all right and whether she could tell the police what happened.

¶ 11 At the conclusion of the hearing, the trial court ruled that the initial outcry to Belinda Gray who then took J.G. to her grandmother, Glenda Harris, was a spontaneous utterance and thus reliable. The trial court also found that the time, content, and circumstances of J.G.'s statement to Levi provided sufficient reliability. Thus, the State's motion to admit J.G.'s outcry

1-10-2481

statements was granted. The State was granted leave to adopt the testimony of Levi and Glenda as part of its case in chief.

¶ 12 During the bench trial, Shemetric Harris testified that she left J.G. in Glenda's sole care, custody, and control and did not give defendant permission to take J.G. into Belinda's basement.

¶ 13 J.G. testified that she was playing during the barbecue when she went inside to use the bathroom, which was located near the kitchen. When J.G. came out of the bathroom, defendant was on the basement stairs in the kitchen pantry and he told her to go downstairs. When she was in the basement, defendant put J.G. onto the bed. J.G. then pointed to her vaginal area and said that is where defendant touched her with his hand and also demonstrated with a hand movement how he touched her. Defendant also kissed J.G. on her neck. When she tried to go upstairs defendant pulled her back down onto the bed and said he would not let her go. Defendant lay on top of J.G. and moved against her. J.G. felt that defendant's groin area was hard against her. To indicate defendant's groin area, J.G. pointed to her own vaginal area but stated that it was defendant that felt hard against her. When defendant let her go, J.G. was crying as she went outside. Her sister and Belinda asked her what was wrong, but J.G. did not tell them. Instead, J.G. told her grandmother what happened.

¶ 14 On cross-examination, J.G. testified that she screamed when defendant grabbed her. She knew that defendant stayed in the basement and that she was not supposed to go down there because her grandmother told her not to. Defense counsel also elicited that prior to going to court, J.G. spoke to her mother, who asked her whether J.G. was going to be strong, whether she was going to speak up, and whether she was going to do the best she could. She also said she would tell the truth. Prior to testifying before the court, J.G. was in a room with other family members, and they were saying hopefully J.G. gets the words right and demonstrates "what [she] learned." J.G. pointed out the Assistant State's Attorney as the person she learned the right words from. On re-direct, J.G. testified that the Assistant State's Attorney told her to tell the truth.

1-10-2481

¶ 15 Belinda Gray testified that on September 1, 2008, she hosted a barbecue at her house and that defendant was cooking on the grill. Belinda noticed that defendant left the backyard for 30 to 45 minutes, but she did not see where he went. Defendant returned to the backyard after J.G. ran into the backyard crying. When she noticed J.G. crying, Belinda asked her what was wrong, but J.G. did not tell her and only wanted to tell her grandmother, Glenda. J.G. pulled her grandmother aside into the kitchen and told her what happened. Belinda could not hear what J.G. said. After J.G. pointed to defendant, Glenda starting yelling at defendant and said, "You touched my grandbaby!" Belinda then told defendant to leave, and when he refused, Belinda had her son force him to leave. Defendant returned the next day to get some of his clothes. Belinda had known defendant for 19 years and never had a problem with him.

¶ 16 On cross-examination, Belinda testified that she did not see where defendant went when he left the backyard. Belinda knew that defendant was gone for "a minute" because she wondered where he went since he needed to check the meat that he was grilling. However, she does not know exactly how much time passed. Before J.G. came running from the side of the house, Belinda did not hear any screaming coming from inside the house.

¶ 17 Detective Hollendonner testified that he pulled defendant's "hard card" from the CLEAR system which indicated that defendant's birth date is May 2, 1963. The State then admitted a self authenticating certified copy of J.G.'s birth record.

¶ 18 The defense adopted its cross-examinations of Alexandra Levi and Glenda Harris from the hearing. Defense counsel then expanded its cross-examination of Levi and confirmed that J.G. never told Levi that she screamed, but only that she cried. Levi also confirmed that J.G. never said her grandmother told her not to go in the basement. During further cross-examination of Glenda Harris, Glenda testified that she never told J.G. not to go into the basement.

¶ 19 After the trial court denied defense motions for mistrial and directed verdict, the defense called Detective Paraday who testified that she is a detective for the Children's Advocacy Center of the Chicago Police Department. She observed J.G.'s VSI on September 15, 2008, along with

1-10-2481

an Assistant State's Attorney. Paraday took notes during the interview as she watched in a separate room, behind a two-way mirror. There were two breaks in J.G.'s interview. Paraday confirmed that during one of the breaks Levi asked Paraday and the Assistant State's Attorney whether there was anything else they needed to know. On cross-examination, Paraday admitted that she did not take verbatim notes of the interview.

¶ 20 Defendant testified that while barbecuing in the back yard he went into the basement to get marijuana and left the door cracked open when he entered. While in the basement, defendant heard noise and saw J.G. He yelled at her because she scared him and he did not know who she was. Defendant told J.G. to get out and she began crying. He followed J.G. out of the basement, and she went to the backyard where her grandmother was located. When they returned to the backyard, J.G. began speaking to her grandmother and when defendant returned to the grill, Glenda began hitting defendant. Defendant tried to defend himself and told her to stop hitting him. Glenda went back to J.G. and then Belinda's son hit defendant. Defendant left the backyard and went around the front of the house into the basement and went to bed. He continued to live there for approximately three more weeks. Defendant denied touching J.G.

¶ 21 On cross-examination, defendant confirmed that he was 45 years old on September 1, 2008. He also explained that five to seven minutes lapsed from the time he went into the basement until he returned to the backyard and that before following J.G. into the backyard, defendant had to level his television because he bumped into it. On redirect, defendant testified that he was guessing regarding how much time lapsed.

¶ 22 The trial court received into evidence a certified copy of defendant's conviction for failing to report change of address, in violation of the Sex Offender Registration Act, and concluded that the case came down to the credibility of J.G. and defendant. The trial court found that J.G.'s physical reactions on the date in question convinced the trial court of defendant's guilt beyond a reasonable doubt. The trial court denied the defense motion for judgment of acquittal or in the alternative for a new trial. The motion did not raise any of the issues raised in the instant appeal.

1-10-2481

¶ 23 During the sentencing hearing, the State argued that defendant's presentence investigation included a 1984 burglary conviction in Mississippi, and that because burglary is a Class 2 or greater offense in Illinois, the Mississippi conviction should be considered in elevating his sentencing to a Class X sentence. The defense attorney objected, and argued that the State could not ask for Class X sentencing because the State was required to prove that the elements of the offense in Mississippi mirror the elements of the offense in Illinois, and not just the name of the offense, and the State did not prove it. The trial court explained "[b]ased upon my review of the defendant's background, the term burglary is used in the state of Mississippi for the conviction in 1984. Common law definition of burglary is a felony in every state I've ever practiced in." The trial court found defendant to be Class X mandatory for purposes of sentencing but did not find consecutive sentencing appropriate. Defendant was sentenced to 14 years in prison. The trial court did not permit allocution prior to sentencing, but when defense counsel alerted the trial court to this, the trial court allowed allocution. The trial court then reduced defendant's sentence to 13 years in prison. It denied defendant's motion to reconsider sentence.

¶ 24 Defendant argues that the State failed to prove him guilty of criminal sexual abuse. J.G. testified that during a barbecue, defendant took her into the basement and touched her inappropriately. Defendant does not argue that, if believable, J.G.'s testimony failed to establish the elements of the offense. Rather, defendant contends that J.G.'s testimony was not credible.

¶ 25 In reviewing a challenge to the sufficiency of evidence, a reviewing court considers whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 47 (2011). We will reverse a conviction where the evidence is "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *People v. Herman*, 407 Ill. App. 3d 688, 704 (2011). This court will not retry a defendant when considering a challenge to the sufficiency of the evidence, and we will bear in mind that the trier of fact is in the best position to judge the credibility of witnesses. *Jonathon*

1-10-2481

*C.B.*, 2011 IL 107750, ¶59. We will give due consideration to the fact finder's opportunity to observe and hear the witnesses. *Id.*

¶ 26 Contrary to defendant's arguments, it is not implausible, as defendant argues, for these acts to have occurred during a barbecue. Belinda Gray testified that defendant was gone long enough from the barbecue grill for her to notice his absence because he needed to check the meat that he was grilling. Further, even if Glenda held preconceived notions about defendant, there was no evidence she coached J.G.'s testimony. Glenda testified that she only spoke to J.G. a few times, during which J.G. explained what happened and Glenda asked whether J.G. would be able to talk to the police. J.G. testified that her family said hopefully she gets the words right and demonstrates what she learned. She pointed to the Assistant State's Attorney as the person from whom she learned the right words, but on re-direct, J.G. clarified that the attorney told her to tell the truth. J.G.'s mother merely encouraged J.G. to be strong and to tell the truth. More importantly, the trial court deemed J.G.'s trial testimony and outcry statements to be credible. Giving due consideration to the trial court's observation of J.G. and the other witnesses, we do not find the evidence so unreasonable, improbable, or unsatisfactory that no rational trier of fact would find defendant guilty beyond a reasonable doubt.

¶ 27 Defendant also argues that the trial court erred in sentencing him as a Class X offender because the court based the Class X status on a 1984 burglary in Mississippi without the State presenting evidence that the elements of the Mississippi burglary offense mirrored those in Illinois, or evidence that the Mississippi burglary would have qualified as a Class 2 or greater offense in Illinois. Because this issue concerns whether the trial court violated defendant's right to due process where the trial court looked outside the record and instead impermissibly relied upon his own belief that the "[c]ommon law definition of burglary is a felony in every state I've ever practiced in," we review this issue *de novo*. *People v. Russell*, 385 Ill. App. 3d 468, 474 (2008).

¶ 28 Although the State argues that defendant forfeited this argument by failing to include the issue in his written motion to reconsider sentence, we may review the issue for plain error. The plain error doctrine allows a reviewing court to consider an unpreserved error 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 defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. Ill. S. Ct. R. 615(a) (eff. 1999); *People v. Piatkowski*, 225 Ill. 2d 551, 565, (2007); see also *People v. Woods*, 214 Ill. 2d 455, 471-72 (2005). In reviewing a plain error contention, this court first determines whether error occurred at all. See *People v. Bannister*, 232 Ill. 2d 52, 65 (2008); and *People v. Brant*, 394 Ill. App. 3d 663, 677 (2009). This requires "a substantive look at the issue." *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

¶ 29 The Illinois recidivism statute provides that a defendant shall be sentenced as a Class X offender "[w]hen a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state \*\*\* court of an offense that *contains the same elements* as an offense now \*\*\* classified in Illinois as a Class 2 or greater Class *felony* \*\*\*." 730 ILCS 5/5-4.5-95(b) (West 2009) (emphasis added).

¶ 30 The elements of burglary in Mississippi do not align with felony burglary in Illinois. In Illinois, section 19-1 of the Illinois Criminal Code of 1961 provides that a person commits burglary "when without authority he knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle \*\*\*, railroad car, or any part thereof, with intent to commit therein a felony or theft." 720 ILCS 5/19-1 (West 2010). Although there is significant overlap and many of the offenses described by the Mississippi statute are identical to the Illinois burglary offense, the Mississippi statute also proscribes several offenses which would not be felonies in Illinois. For example, some Mississippi burglary offenses require the offender to enter dwelling to commit *a crime* therein. See *Mississippi Code Annotated* §§ 97-17-

1-10-2481

23; 97-17-25; and 97-17-29. "Crime" in Mississippi's burglary statutes include "*misdemeanors as well as felonies*." *Ashley v. State*, 538 So. 2d 1181, 1184 (Miss. 1989) (emphasis added).

Entering a building with the intent to commit a misdemeanor is not generally a felony in Illinois.

¶ 31 Defendant cites *Shepard v. United States*, 544 U.S. 13 (2005), to support his position. In *Shepard*, the Supreme Court examined a sentence enhancement for the defendant who objected to having his sentence increased to a 15-year minimum for violating the Armed Career Criminal Act ("the Act"). *Id.* at 16. The Act applies when an offender possesses a firearm after three prior convictions for serious drug offenses or violent felonies. The Court held that in determining whether burglary constituted a violent felony, a sentencing court "is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."

Here, the State merely stated during the sentencing hearing that defendant's presentence investigation included a 1984 burglary conviction in Mississippi, and argued that because burglary is a Class 2 or greater offense in Illinois, that the Mississippi conviction should be considered in elevating his sentencing to a Class X sentence. In considering the Mississippi burglary conviction, the trial court stated that the "[c]ommon law definition of burglary is a felony in every state [he's] ever practiced in." The State did not present, and the trial court did not consider, any other evidence of defendant's Mississippi burglary conviction to determine if the elements of that offense constituted a Class 2 or greater felony or greater in Illinois.

¶ 32 The cases that the State cites, *People v. Williams*, 149 Ill. 2d 467 (1992), and *People v. Rivera*, 362 Ill. App. 3d 815 (2005) are distinguishable from the present case because they do not involve proving that the elements of an out-of-state conviction align with the offense the accused were convicted of in Illinois. See *Williams*, 149 Ill. 2d at 487-88 (at issue were the dates of prior felony convictions and not the facts underlying the prior convictions); and *Rivera*, 362 Ill. App. 3d at 816-17 (distinguishing *Shepard*, stating "[n]o question is raised here with regard to *how* the prior Class 2 felony offenses were committed").

1-10-2481

¶ 33 Sentencing in the present case requires examination of the facts of the underlying Mississippi burglary conviction. Because the State did not prove the elements of the Mississippi conviction for burglary contained the same elements as burglary in Illinois, we find that the trial court's sentencing defendant as a Class X offender based upon the prior Mississippi burglary conviction constituted error. Because we find that sentencing a defendant as a Class X offender without proper evidentiary support affects the fundamental fairness of the trial, we find it constitutes plain error of the second type. We, therefore, vacate defendant's sentence and remand for further proceedings not inconsistent with this Order.

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County finding defendant guilty of aggravated criminal sexual abuse and vacate defendant's sentence.

¶ 35 Affirmed in part; vacated in part; cause remanded.