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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-1921
)	
JOSE G. FIGUEROA,)	Honorable
)	Daniel B. Shanes,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: Defendant did not show second-prong plain error or ineffective assistance of counsel as to a jury instruction that incorrectly told the jury to convict defendant of indecent solicitation of a child only if he “reasonably” believed (as opposed to merely believed) that the victim was underage, as the error heightened the State’s burden of proof and thus worked to defendant’s benefit. We affirmed the judgment of the trial court.

¶ 1 Following a jury trial, defendant, Jose G. Figueroa, was convicted of three counts of indecent solicitation of a child (720 ILCS 5/11-6(a) (West 2010)), and he was sentenced to 24 months of probation. On appeal, defendant argues that he was denied a fair trial when the jury was given an

instruction that misstated the law. We determine that, although the instruction misstated the law, the error worked to defendant's advantage. Thus, we affirm.

¶ 2 At trial, it was revealed that an officer with the Lake County sheriff's department was assigned to find sexual predators online. In performing these duties, the officer engaged in conversations online while the officer pretended to be a young girl. While engaged in these conversations, the officer met defendant, a 24-year-old college student.

¶ 3 Although the conversations with defendant covered many benign topics, defendant eventually began talking with the fictitious girl about various acts of sexual penetration. Defendant made arrangements to meet the fictitious girl to engage in these acts, and, when he arrived at the specified Grayslake location, he was arrested. Defendant, who was told by the fictitious girl that she was 15 and indicated in his written statement that the girl was 15, nevertheless testified that he believed that the girl was 18. Defendant based this belief on the online photographs the fictitious girl shared with him. The photographs, which were admitted into evidence, were of an employee of the Lake County sheriff's department and were taken when that employee was approximately 15 years of age.

¶ 4 After the jury instructions conference and before closing arguments, the State informed the trial court that it wished to modify the indecent-solicitation-of-a-child instruction it had previously tendered. Based on that announcement, the following exchange occurred:

“MS. STANTON [Assistant State's Attorney]: Judge, *** I took a look at People's Instructions No. 14[, the indecent-solicitation-of-a-child instruction,] which was the issues instruction and I did catch something that needed to be corrected[.] ***

MS. STANTON: *** [R]egarding the propositions instruction People’s Instruction No. 14 I added the language that the Defendant with the intent that the offense of aggravated criminal sexual abuse [be committed] knowingly solicited a child or someone he reasonably believed. I had forgotten that language.

THE COURT: Oh, yes.

MS. STANTON: So that was added and to track also the definition reads that way as follows as well.

THE COURT: The definition does read that way. Any objection to this?

MR. PUGH [Defense Counsel]: Absolutely not.”

¶ 5 After closing arguments, the jury was instructed on the law. One of the instructions given to the jury provided:

“To sustain the charge of Indecent Solicitation of a Child, the State must prove the following propositions:

First Proposition: That the defendant, with the intent that the offense of aggravated criminal sexual abuse be committed, knowingly solicited a child or someone he *reasonably* believed to be under the age of 17 years, but more than 13 years of age; and

Second Proposition: That the defendant was then 17 years of age or older.”

(Emphasis added.)

¶ 6 The jury found defendant guilty of all three counts of indecent solicitation of a child, the trial court entered judgment on the verdict, and it thereafter sentenced defendant. This timely appeal followed.

¶ 7 On appeal, defendant argues that he was denied his right to a fair trial when the jury instruction for indecent solicitation of a child misstated the law. Specifically, defendant claims that the instruction should not have indicated that defendant could be found guilty if the jury concluded that he “reasonably” believed that the fictitious girl was younger than 17. Defendant claims that the term “reasonably” should have been excised from the instruction, leaving the jury to convict him only if it found that he actually believed that the fictitious girl was younger than 17.

¶ 8 Before considering the issue raised, we note that the record indicates that defendant did not object to the indecent-solicitation-of-a-child instruction that included the term “reasonably.” “Both a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial.” (Emphases in original.) *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). “[A] defendant generally forfeits review of any purported jury instruction error if the defendant does not object to the instruction, or tender an alternative instruction at trial, and does not raise the instruction issue in a posttrial motion.” *People v. Bannister*, 232 Ill. 2d 52, 76-77 (2008).

¶ 9 Here, defendant recognizes that he did not object to the instruction and that the issue he raises is subject to forfeiture. However, he advances two ways in which his claim may be addressed.

¶ 10 First, defendant contends that this court may review his claim for plain error. The plain-error doctrine allows a reviewing court to reach an unpreserved error when either: (1) the evidence in the case is closely balanced, regardless of the seriousness of the error, or (2) the error is so serious that the defendant was denied a substantial right, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant, by invoking the plain-error rule, bears the burden of establishing either prong. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). According to his initial and reply briefs, defendant contends that this court may review his claim under only the

second prong. That is, defendant argues that giving the jury the instruction that included the “reasonably believed” language constituted an error so serious that he was denied the right to a fair trial.

¶ 11 Second, defendant also contends that his counsel was ineffective for failing to object to the instruction and that he “should not be punished for an oversight by his trial attorney.” To establish that counsel was ineffective, a defendant must show that (1) counsel’s conduct fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different. *People v. Perez*, 2012 IL App (2d) 100865, ¶ 65. To prevail on a claim of ineffective assistance of counsel, the defendant must establish both prongs. *Id.* In reviewing a claim of ineffective assistance of counsel, there is a strong presumption that counsel’s performance fell within the wide range of reasonable professional assistance. *Id.* Moreover, counsel will not be deemed ineffective if counsel’s performance constituted trial strategy. *Id.*

¶ 12 Although the standards for plain error and ineffective assistance of counsel differ, under either approach a defendant must establish that an error detrimental to his case arose. See *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 24 (“The threshold step of plain-error review is determining whether an error occurred [citation], and similarly, counsel cannot be ineffective for failing to object if there was no error to object to [citation].”). Thus, we first address whether it was detrimental error to include the term “reasonably” in the indecent-solicitation-of-a-child instruction. We review this issue *de novo*. See *People v. Franklin*, 2012 IL App (3d) 100618, ¶ 21 (standard of review is *de novo* when issue raised concerns whether the applicable law was properly conveyed in the given jury instruction).

¶ 13 In determining whether the indecent-solicitation-of-a-child instruction that was given to the jury was proper, we must examine the statute and pattern jury instruction involved. We note that a prior version of the indecent-solicitation-of-a-child statute provided that it was appropriate to consider what the defendant “reasonably believed” to be the victim’s age. See 720 ILCS 5/11-6(b) (West 1998) (“It shall not be a defense to indecent solicitation of a child that the accused reasonably believed the child to be [of age].”). However, the current statute provides that, to prove defendant guilty of indecent solicitation of a child, the State had to establish that defendant was 17 years old or older and that he, with an intent to commit, as relevant here, aggravated criminal sexual abuse, “knowingly solicit[ed] a child or one whom he *** believe[d] to be a child to perform an act of sexual penetration or sexual conduct.” 720 ILCS 5/11-6(a) (West 2010). “Child” is defined as “a person under 17 years of age.” 720 ILCS 5/11-6(b) (West 2010).

¶ 14 The Illinois Pattern Jury Instruction (IPI) for indecent solicitation of a child, like the statute, does not provide that a defendant must “reasonably believe” that the person whom he solicits for a sex act is younger than 17. See Illinois Pattern Jury Instructions, Criminal, No. 9.02 (4th ed. 2000) (IPI Criminal 4th No. 9.02). Rather, the IPI provides that, to sustain a charge of indecent solicitation of a child, the State has to prove beyond a reasonable doubt “[t]hat the defendant [(solicited a child under the age of 13 years to do any act) (solicited a person to arrange an act with a child under the age of 13 years)] which if done would be [(aggravated criminal sexual assault) (predatory criminal sexual assault of a child) (criminal sexual assault) (aggravated criminal sexual abuse) (criminal sexual abuse)].” *Id.*

¶ 15 A cursory examination of the statute and instruction at issue here reveals, as the State concedes, that the jury was misinformed when it was advised that it could convict defendant only

if he “reasonably believed” that he fictitious girl was underage. However, given that the error worked in defendant’s favor, we determine that defendant is not entitled to any relief.

¶ 16 The instruction, by adding the term “reasonably,” subjected the State to a higher burden of proof. See, e.g., *People v. Ward*, 187 Ill. 2d 249, 265 (1999) (erroneous jury instruction is harmless if the trial result would not have been different had the proper instruction been given); see also *People v. Johnson*, 254 Ill. App. 3d 74, 78-79 (1993) (harmless error where erroneous jury instruction did not shift burden or make it easier for the State to prove its case). That is, not only did the State have to prove that defendant subjectively believed that the victim was under 17, but it also had to establish that such a belief was objectively reasonable. Given that the jury found defendant guilty despite this added element, the jury certainly would have found defendant guilty if the correct and less burdensome instruction had been tendered.

¶ 17 Accordingly, because we determine that the error in the jury instruction worked in defendant’s favor, we find that defendant has failed to establish either that (1) the error was so serious that defendant was denied a substantial right, regardless of the closeness of the evidence or that (2) defendant was prejudiced when his trial attorney did not object to the instruction. Thus, defendant has failed to prove plain error or his claim that defense counsel was ineffective for failing to object to the instruction.

¶ 18 For these reasons, we affirm the judgment of the circuit court of Lake County.

¶ 19 Affirmed.