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2012 IL App (3d) 090546-U

Order filed August 16, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 9th Judicial Circuit,
Plaintiff-Appellee,) Knox County, Illinois,
)
v.) Appeal No. 3-09-0546
) Circuit No. 04-CF-346
JERRY MABRY,)
) Honorable
Defendant-Appellant.) James B. Stewart,
) Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's admonishments to defendant substantially complied with Rule 401(a); the admission of hearsay testimony was harmless error.

¶ 2 Following a jury trial, defendant, Jerry Mabry, was convicted of attempted first degree murder (720 ILCS 5/8-4, 9-1(a)(1) (West 2004)), aggravated battery (720 ILCS 5/12-4(a) (West 2004)), unlawful restraint (720 ILCS 5/10-3 (West 2004)), and aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2004)). The trial court sentenced defendant to 12 years for

attempted first degree murder, a consecutive sentence of 10 years for aggravated criminal sexual assault, and a concurrent term of 2 years and 6 months for unlawful restraint. Defendant's convictions were affirmed on appeal. *People v. Mabry*, No. 3-05-0213 (2006) (unpublished order under Supreme Court Rule 23). Thereafter, defendant filed a postconviction petition. The circuit court vacated the jury's verdict following a finding of jury misconduct during deliberations. After a second trial, defendant was convicted of attempted first degree murder, unlawful restraint, and aggravated criminal sexual assault. Defendant was again sentenced to 12 years for attempted first degree murder, a consecutive term of 10 years for aggravated criminal sexual assault, and a concurrent term of 2 years and 6 months for unlawful restraint. Defendant appeals, arguing that his convictions should be vacated and the cause remanded for a new trial because the trial court failed to properly admonish him when he waived his right to counsel. Alternatively, defendant argues that the State improperly used the testimony of an emergency room nurse to bolster the victim's testimony. We affirm.

¶ 3

FACTS

¶ 4 Defendant was charged with attempted first degree murder (720 ILCS 5/8-4, 9-1(a)(1) (West 2004)), aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2004)), aggravated battery (720 ILCS 5/12-4(a) (West 2004)), unlawful restraint (720 ILCS 5/10-3 (West 2004)), and three counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2004)). Following a jury trial in which defendant represented himself, defendant was convicted of attempted first degree murder, aggravated battery, unlawful restraint, and one count of aggravated criminal sexual assault. The court sentenced defendant to 12 years for attempted first degree murder, a consecutive sentence of 10 years for aggravated criminal sexual assault, and a

concurrent term of 2 years and 6 months for unlawful restraint. Following a successful postconviction petition, defendant's convictions were set aside and he was granted a new trial.

¶ 5 Prior to the second trial, defendant filed a motion to again proceed *pro se*. On August 20, 2008, the trial court heard defendant's motion. During the proceeding, defendant informed the court that he did not believe that his counsel was spending enough time going over his case with him, and that he disagreed with certain strategies his counsel was pursuing. The trial court questioned defendant extensively about his education, his knowledge of subjects such as deoxyribonucleic acid (DNA) analysis and the rules of evidence, his research ability, and his ability to question experts. The court also noted its belief that defendant was making "the biggest mistake of [his] life" by proceeding *pro se*, mainly because the court did not believe defendant would be able to articulate his arguments effectively to the jury. However, at this time, the trial court did not openly inform defendant of the nature of the charges or the minimum and maximum sentences prescribed by law. The trial court granted defendant's motion to proceed *pro se*. Prior to trial, the court appointed standby counsel to assist defendant.

¶ 6 Defendant's trial began on October 20, 2008. During the trial, the victim, L.L., testified that prior to the incident she and defendant were just friends, although they had previously engaged in a consensual sexual encounter. Thereafter, defendant had informed L.L. that he would like to pursue a dating relationship with her. L.L. told defendant that she did not have time for such a relationship. Upon hearing this, defendant became upset and threatened to kill L.L. and her daughter.

¶ 7 A few weeks later, L.L. was home alone when she noticed defendant in her house. Defendant, still upset with L.L., said, "bitch, you got time for church. You got time for your

friends. You got time for your job. You got time for your child, and you don't have time for me." L.L. reached for the door in an attempt to escape; however, defendant slammed it shut and said, "bitch, you're not going anywhere." Defendant then struck L.L. on the back of the head, grabbed her, and swung her around, hitting her head on the side of the coffee table. He then struck her repeatedly about the face and upper body. As the attack continued, defendant threatened to kill L.L., repeatedly struck her face into the coffee table until it broke, and tore her dress and underwear off. At one point, L.L. had reached for her phone in order to call the police. Defendant yanked the phone from the wall and began choking L.L. with it. Thereafter, L.L. passed out. When she awoke in the morning, she was lying in a bedroom and had been raped.

¶ 8 The victim's daughter testified that she returned home the morning after the attack and saw blood everywhere. The police responded to the scene and arrested defendant as he was walking naked through the home. The officers then found L.L. naked, crying, and badly beaten in a bedroom. At the police station, defendant admitted that he had an altercation with L.L. and that he had punched her and threw her against the wall.

¶ 9 L.L.'s injuries were so severe that she was immediately transported to a hospital. An emergency room nurse testified that L.L. had suffered major trauma to her face. L.L. had a deep laceration above her right eye, a large laceration on her forehead, and another laceration over her left eye. Both of L.L.'s eyes were swollen shut, and she had bruises and swelling over most of her body. The nurse also noticed what appeared to be fingerprints or handprints on L.L.'s neck. The nurse testified that L.L. had told her defendant: (1) had made her engage in sexual conduct in the rear bedroom, and (2) said "Bitch, you might as well do what I tell you to do. I'm gonna kill you, bitch."

¶ 10 Because of the severity of her injuries, L.L. was hospitalized for nine days. An oral and maxillofacial surgeon operated on L.L. He attempted to repair the lacerations on her face as well as the muscles behind her eye that had been severed. According to the surgeon, hundreds of sutures were required to close up the lacerations. The doctors who operated on L.L. opined that she had suffered great bodily injury.

¶ 11 At the conclusion of the trial, the jury convicted defendant of attempted first degree murder, unlawful restraint, and aggravated criminal sexual assault. Defendant was again sentenced to 12 years for attempted first degree murder, a consecutive term of 10 years for aggravated criminal sexual assault, and a concurrent term of 2 years and 6 months for unlawful restraint. Defendant appeals.

¶ 12 ANALYSIS

¶ 13 Defendant first contends that his convictions should be vacated and the cause remanded for a new trial because the trial court failed to substantially comply with the admonishment requirements of Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). Initially, we note that defendant failed to object to the comments at trial or in a posttrial motion, and therefore the issue was forfeited and cannot be considered on appeal unless it was plain error. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). The plain error doctrine bypasses forfeiture principles and allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167 (2005). However, before we can determine whether an error fits within either of the above categories, we must first determine whether an error actually occurred. *People v. Cosby*, 231 Ill. 2d 262 (2008).

¶ 14 The sixth amendment of the United States Constitution entitles every defendant the right to counsel. U.S. Const., amends. VI, XIV; see also *People v. Hughes*, 315 Ill. App. 3d 86 (2000). A defendant may waive his right to counsel and proceed *pro se* only if he voluntarily and intelligently elects to do so. *People v. Baker*, 92 Ill. 2d 85 (1982). Under Rule 401(a), the trial court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first addressing defendant in open court and informing him of and determining that he understands the following: (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law, including penalties the individual faces due to prior convictions; and (3) that he has the right to counsel and, if he is indigent, to have counsel appointed for him by the court. Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

¶ 15 Here, we find that the trial court's admonition of defendant did not strictly comply with Rule 401(a). However, strict compliance with the rule is not required in every case. See *People v. Black*, 2011 IL App (5th) 080089. An otherwise inadequate admonition may be constitutionally sufficient, and therefore does not constitute error, if the absence of a detail did not impede the defendant from giving a knowing and intelligent waiver. *Id.*

¶ 16 In this case, we find that the inadequate admonition did not impede defendant from giving a knowing and intelligent waiver. In fact, defendant does not even argue on appeal that his waiver was not knowing and intelligent; he simply argues that the court did not strictly comply with the rule. Based on defendant's experience with his first trial on the same charges and the fact that defendant received the same sentence following his second trial, there is no question that defendant knew the charges he faced and the possible sentence he could receive. Defendant's waiver was further supported by the fact that the court questioned him extensively and told him

that he was making the biggest mistake of his life prior to granting his motion to proceed *pro se*. Therefore, based on the record, we find that there was substantial compliance with Rule 401(a). Having found substantial compliance, we do not find that the admonitions by the trial court were error. Because we have found no error, we cannot find plain error, and therefore conclude that the issue has been forfeited. See *People v. Nowicki*, 385 Ill. App. 3d 53 (2008).

¶ 17 We further note that even if we had found that defendant did not know the nature of the charges and the minimum and maximum sentence he could receive, the fact that defendant had the assistance of standby counsel during his trial would result in a similar finding that the admonishments were sufficient and no error had occurred. See *People v. Haynes*, 174 Ill. 2d 204 (1996).

¶ 18 Defendant also argues that the trial court erred in permitting the State to use the testimony of an emergency room nurse because the testimony was hearsay and was unrelated to medical treatment or diagnosis. Prior out-of-court statements offered to prove the truth of the matter asserted are generally considered inadmissible hearsay due to their lack of reliability. *People v. Belknap*, 396 Ill. App. 3d 183 (2009). However, in cases that involve criminal sexual assault, a victim's statements to medical personnel for the "purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule." 725 ILCS 5/115-13 (West 2008). We review a trial court's decision to admit or exclude hearsay statements for an abuse of discretion. *People v. Martin*, 401 Ill. App. 3d 315 (2010).

¶ 19 Here, defendant contends that the trial court should not have allowed an emergency room

nurse to testify that the victim told her that defendant: (1) had made her engage in sexual conduct in the rear bedroom; and (2) said "Bitch, you might as well do what I tell you to do. I'm gonna kill you, bitch." We believe that it was not an abuse of discretion for the trial court to allow the first part of the first statement, *i.e.*, that defendant had made the victim engage in sexual conduct, because this statement was necessary for medical examination and treatment. However, we do find that it was error to allow the nurse to testify as to where the sexual conduct took place and that defendant had made the second statement.

¶ 20 Even though we find error, we conclude that the error was harmless. An error is harmless where there is no reasonable probability that the jury would have acquitted defendant absent the error. *People v. Wilson*, 2012 IL App (1st) 101038. Here, the nurse's testimony was merely cumulative and in no way tipped the scale to convict defendant. In light of all the evidence, we conclude that no reasonable jury would have acquitted defendant absent the error. Therefore, the error is harmless beyond a reasonable doubt.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Knox County is affirmed.

¶ 23 Affirmed.