2017 IL App (2d) 150072-U
No. 2-15-0072
Order filed July 20, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-1684
JOSE MENDOZA-SOSA,	)	Honorable Thomas Clinton Hull III,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions of criminal sexual assault and aggravated criminal sexual abuse were affirmed. The trial court properly found that defendant forfeited his right to confront an unavailable witness. Defendant did not meet his burden to show that any errors in a restitution order constituted second-prong plain error.

¶ 2 Following a jury trial, defendant, Jose Mendoza-Sosa, was found guilty of 20 counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(1), (3) (West 2012)) and one count of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(b) (West 2012)). On appeal, he contends that the court erroneously admitted testimonial hearsay statements in violation of his right to confrontation. He also argues that the court erred by ordering him to pay restitution without

specifying a payment plan or considering his ability to pay. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 During the summer of 2012, defendant resided in Aurora, Illinois, with his wife, Alicia Olvera, and their two minor daughters, F.M. and L.M. Defendant's brother, Carlos Mendoza-Sosa, also stayed with the family on occasion. According to F.M., defendant sexually abused her multiple times that summer while her mother and uncle were at work. In addition to the charged conduct, both F.M. and L.M. detailed a pattern of sexual abuse occurring over the course of years. Because defendant does not challenge the sufficiency of the evidence against him, we limit our recitation of the facts to what is necessary to understand the two specific issues involved in this appeal.

¶ 5 A. Forfeiture By Wrongdoing

¶ 6 On August 26, 2014, approximately two weeks before the trial was scheduled to begin, the State filed a motion in *limine* seeking to admit Olvera's employment records based on the foundation provided in an affidavit submitted by her employer. According to the State, those records reflected that Olvera worked the night shift, thus corroborating that defendant was alone with F.M. when the sexual abuse was alleged to have occurred. The attached employment records pertained to a person named "Johanna Ivette N. Olmo."

¶ 7 The court held a hearing on the State's motion *in limine* on September 2, 2014. The defense objected to admitting the proffered records on the basis of lack of foundation, given that there was no evidence that Olvera was "Johanna Ivette N. Olmo." When the prosecutor asserted that Olvera would testify that she worked under a fictitious name, the attorneys and the court discussed whether Olvera should be advised at trial of her fifth amendment rights against self-

incrimination. In the course of that discussion, the prosecutor indicated that the State had "no intention of prosecuting" Olvera. The court responded that, irrespective of whether the State intended to prosecute her, she might face action from federal agencies. The court reserved ruling on the State's motion.

¶ 8 The next day, September 3, defendant made a phone call to Olvera from jail using a fellow inmate's PIN information. Although the conversation was in Spanish, the State later introduced at trial a transcript reflecting the English translation. In that conversation, defendant repeatedly urged his wife not to testify and to hide from the prosecution. Purporting to relate what he had heard at the court proceedings the day before, he told Olvera that she faced criminal charges and immigration consequences if she came to court.

¶ 9 The matter returned to court on September 4. At that time, the State withdrew its motion in *limine* with respect to Olvera's employment records. However, the State filed a new motion *in limine* seeking to bar the defense from impeaching Olvera with her use of an alias. In addressing that motion, the court noted that Olvera could potentially be charged with identity theft, giving rise to an argument that she was biased to testify for the State to avoid prosecution. The court reserved ruling on the State's motion with respect to the defense impeaching Olvera with her use of an alias.

¶ 10 On September 8, the prosecutor advised the court that she was aware that Olvera may have used a fake name, date of birth, and social security card to obtain employment. The State was willing to grant Olvera use immunity. However, the prosecutor acknowledged that the State could not grant immunity relating to federal immigration issues.

¶ 11 Olvera appeared in court for trial on September 9, and the court advised her of her rights against self-incrimination. At Olvera's request, the court appointed an attorney to represent her.

Later that day, the State offered Olvera use immunity in connection with her testimony. Olvera's attorney explained that his client would nevertheless assert her fifth amendment rights due to her concerns about potential federal charges.

¶ 12 On September 10, the State filed a motion to admit certain statements that Olvera had made to the State's investigator. The State argued that the statements should be admitted because, during the September 3 phone conversation, defendant had intimidated Olvera into making herself unavailable for trial. According to the State, defendant, by his own wrongdoing, had forfeited his right to cross-examine Olvera.

¶ 13 The court granted the State's motion to admit Olvera's out-of-court statements. The court acknowledged that Olvera had "a valid concern or interest to assert her rights or protections against incriminating herself." However, the relevant question, in the court's opinion, was whether defendant had intended to keep Olvera from testifying. To that end, the court found that defendant's statements during the September 3 phone conversation reflected such intent. Accordingly, the court determined that defendant forfeited his right to confrontation. Pursuant to the court's ruling, a criminal investigator with the Kane County State's Attorney's Office testified to his conversations with Olvera.

¶ 14 B. Restitution

¶ 15 Defendant also challenges on appeal the propriety of an order requiring him to pay for F.M.'s counseling.

¶ 16 At the sentencing hearing, as part of the State's recommendation regarding an appropriate sentence, the prosecutor argued as follows:

> "And in addition, Judge, the CAC [Children's Advocacy Center] has a contract as far as counseling sessions that are $75 an hour, and we would offer 10 sessions of counseling

for our victims.

We would ask that the defendant be ordered to pay restitution for services—excuse me, for counseling sessions for [F.M.] and—both [F.M. and L.M.] certainly will need counseling at a very minimum to get over this. ***"

The court later questioned the prosecutor about whether F.M. would seek counseling through the Kane County Children's Advocacy Center, given that she no longer resided in Illinois. The prosecutor responded:

"Judge, she is out of state. We would ask that she be reimbursed at that rate based on our contract, and even though it's out of state, that the Court consider what the cost is of counseling. We believe that's something the Court could impose as restitution."

The court asked the State whether any decision to order defendant to pay for F.M.'s counseling would be affected by the fact that defendant had no bond and faced a lengthy prison sentence. The prosecutor answered:

"[W]hile in the department of corrections, they do have jobs there.

They are essentially compensated for that. That could certainly be something that could be considered as a means or an ability to pay over the course of time for that as far as any sort of compensation he receives while in the department of corrections, so that would be the State's position."

¶ 17 In sentencing defendant, the court assessed costs for counseling as follows:

"I will also indicate and believe that based upon the victim impact statement that counseling is requested. Counseling is necessary. The request was for 10 sessions at $75 a session. That would be a total of $750. Those would be entered."

The written sentencing order pertaining to count III of the indictment indicated that defendant

was to pay restitution to F.M. in the amount of $750. Defendant did not challenge the propriety of the restitution order in his post-sentencing motion, but he filed a timely appeal from the court's final judgment.

¶ 18 II. ANALYSIS

¶ 19 A. Forfeiture By Wrongdoing

¶ 20 Defendant first argues that the admission of Olvera's out-of-court statements violated his right to confrontation. The State responds that defendant forfeited such right by engaging in wrongdoing that resulted in Olvera being unavailable for trial.

¶ 21 A criminal defendant has the right "to be confronted with the witnesses against him." U.S. Const., amend. VI. The evil that the Confrontation Clause seeks to address is the "use of *ex parte* examinations as evidence against the accused." *Crawford v. Washington*, 541 U.S. 36, 50 (2004). More specifically, the primary object of the sixth amendment is testimonial hearsay, which includes statements made to law enforcement during interrogations. *Crawford*, 541 U.S. at 53. A testimonial statement by a declarant who does not testify at trial is typically admissible only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine him or her. *Crawford*, 541 U.S. at 59.

¶ 22 One exception to this general rule is forfeiture by wrongdoing, which "extinguishes confrontation claims on essentially equitable grounds." *Crawford*, 541 U.S. at 62. In 1878, the Supreme Court described the doctrine as follows:

> "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person

> against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated." *Reynolds v. United States*, 98 U.S. 145, 158 (1878).

More recently, the Supreme Court explained that the doctrine of forfeiture by wrongdoing historically "permitted the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant." (Internal citations omitted.) *Giles v. California*, 554 U.S. 353, 359 (2008). In other words, courts are not required to acquiesce to a defendant's attempts to "undermine the judicial process by procuring or coercing silence from witnesses and victims." *Davis v. Washington*, 547 U.S. 813, 833 (2006).

¶ 23 The common-law doctrine of forfeiture by wrongdoing was codified by Illinois Rule of Evidence 804(b)(5) (eff. Jan. 1, 2011). *People v. Nixon*, 2016 IL App (2d) 130514, ¶ 49. That rule provides that "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is "not excluded by the hearsay rule if the declarant is unavailable as a witness." Ill. R. Evid. 804(b)(5). The State bears the burden of proving by a preponderance of the evidence that the defendant engaged in wrongdoing with the intent to procure the unavailability of the declarant. *Nixon*, 2016 IL App (2d) 130514, ¶ 49. In *Nixon*, we indicated that "[a] trial court's ruling on the admissibility of evidence will not be disturbed on appeal absent an abuse of discretion," but "as to whether defendant was denied his right to confront the witnesses against him, our review is *de novo*." *Nixon*, 2016 IL App (2d) 130514, ¶ 50.

¶ 24 Defendant insists that he did not engage in wrongdoing when he spoke with Olvera from jail on September 3, 2014. He claims that he merely informed her about what had occurred in court the day before, giving her the same legally accurate advice and information that was later conveyed to her by the court and by her own attorney. According to defendant, he was not wrong to inform Olvera about "possible immigration consequences" or to tell her that "she may be investigated or arrested if she testified as the State asked her to do." He maintains that his conduct was "not calculated to prevent [Olvera] from presenting incriminating testimony about the charged conduct at his trial, so much as to prevent her from being deported if she did testify."

¶ 25 The transcript of the September 3rd telephone conversation belies any suggestion that defendant gave Olvera accurate legal advice or that he merely informed her of "possible" immigration consequences. To the contrary, defendant blatantly misrepresented to Olvera what had occurred in court the previous day. He told her, in no uncertain terms, that she would face criminal charges and immigration consequences if she came to court. For example, defendant said: "Look, to start yesterday they were telling us, they are going to place charges for identity theft and even for immigration so do what's possible to hide during the following days for your own good eh." When Olvera asked defendant whether they would take her to immigration if she presented herself, he responded: "Immediately no, immediately no. But leaving be sure that right away, that is what was explained here, understand me." Contrary to what defendant told Olvera, the prosecution never stated or even intimated at the September 2nd hearing that any unit of government was going to bring charges for identify theft. In fact, the prosecutor said the opposite, informing the court that the State had "no intention of prosecuting" Olvera.

¶ 26 Moreover, defendant repeatedly urged Olvera during the September 3rd conversation to distrust and stop communicating with the prosecution and not to appear at trial. To that end, he

advised her to "[g]o with the compadre Jaime"[1] and not to open her doors. Some of his statements even appear to have been directed toward encouraging other members of his family not to testify. For example, defendant mentioned to Olvera "the problems that they [the prosecution] are going to make for *you all*," adding that "when you don't present *yourselves*, *you guys* are free, out of this ***." (Emphasis added.) He also misinformed Olvera that she "can't be obligated to come by force" to court and that it was "not an obligation" to appear.

¶ 27 Defendant unquestionably meant to scare Olvera into refusing to testify. It is true that the attorneys had discussed potential immigration and criminal consequences during the prior day's court proceedings. But the reality was that the State had no interest in prosecuting Olvera, and the federal government was apparently unaware that Olvera had obtained employment using a fake identity. Defendant thus conveyed a distorted sense of urgency to Olvera, making it seem certain that she would face criminal charges and deportation if she cooperated with the prosecution. Defendant's suggestion that he acted solely out of concern for his wife is not supported by the record. He did not simply advise her to decline to answer questions at trial that could reveal her status as an undocumented worker; he implored her to skip the trial entirely. Although defendant now claims that he merely gave Olvera the same advice that was later given to her by the trial court and by her own attorney, neither the court nor her appointed counsel told her that it was acceptable to refuse to come to court. Under the circumstances, the trial court properly concluded that defendant "engaged *** in wrongdoing that was intended to, and did, procure the unavailability of [Olvera] as a witness." See Ill. R. Evid. 804(b)(5).

¶ 28 We find support in *People v. Hampton*, 406 Ill. App. 3d 925 (2010). In that case, a codefendant, Cory Durr, pleaded guilty to the charges against him and was sentenced to prison.

[1] Defendant testified at trial that "compadre Jaime" was his friend.

Hampton, 406 Ill. App. 3d at 927. When the State subsequently called Durr as a witness at the defendant's trial, he invoked his fifth amendment rights despite being informed that he had no basis for doing so. *Hampton*, 406 Ill. App. 3d at 927. The trial court then allowed the prosecution to introduce a statement that Durr had previously provided to an assistant State's Attorney. *Hampton*, 406 Ill. App. 3d at 927. The defendant was found guilty of all charges. *Hampton*, 406 Ill. App. 3d at 928. The supreme court later remanded the matter to the trial court for an evidentiary hearing on the issue of whether the defendant had forfeited his right to confront Durr by engaging in wrongdoing. *Hampton*, 406 Ill. App. 3d at 928-29.

¶ 29 On remand, the trial court heard evidence that, prior to trial, the defendant had sent a letter to Durr directing him how to testify and telling him to "plead the fifth." *Hampton*, 406 Ill. App. 3d at 929-30. Prison officials confiscated that letter before Durr saw it. *Hampton*, 406 Ill. App. 3d at 929. The trial court also heard evidence that the defendant's mother had multiple telephone conversations with Durr while he was in prison. *Hampton*, 406 Ill. App. 3d at 931. During the course of those conversations, the defendant's mother urged Durr to "plead the fifth." *Hampton*, 406 Ill. App. 3d at 931-38. The trial court determined that the defendant, via his mother, had procured Durr's unavailability and thus forfeited his right to confrontation. *Hampton*, 406 Ill. App. 3d at 938.

¶ 30 On appeal, the defendant argued that the trial court's finding was erroneous because Durr had decided to plead the fifth before speaking with the defendant's mother, Durr had initiated the telephone calls without the defendant's knowledge, and the mother's discussions with Durr did not constitute wrongdoing. *Hampton*, 406 Ill. App. 3d at 938-39. The appellate court rejected those arguments, holding that "the State established by a preponderance of the evidence that defendant engaged in conduct intended to render Durr unavailable to testify against him at trial."

Hampton, 406 Ill. App. 3d at 940. The court explained that even though Durr did not receive the defendant's letter, such letter was "evidence of defendant's intent to influence Durr not to testify at defendant's trial." *Hampton*, 406 Ill. App. 3d at 940. The record also supported a finding that the defendant and his mother shared a common scheme to procure Durr's unavailability by pleading the fifth. *Hampton*, 406 Ill. App. 3d at 940. The court explained that the State was required to prove only that the defendant "engaged in conduct intended to render Durr unavailable to testify at defendant's trial"; it was not required to "show [that] defendant actually caused Durr's unavailability." *Hampton*, 406 Ill. App. 3d at 941-42.

¶ 31 *Hampton* supports the trial court's finding here that defendant forfeited his right to confront Olvera. As in *Hampton*, defendant engaged in the type of witness tampering that the forfeiture-by-wrongdoing-doctrine is designed to prevent. The argument in favor of forfeiture is perhaps even stronger in this case than it was in *Hampton*. Unlike in *Hampton*, defendant, using someone else's PIN from the jail, contacted Olvera directly rather than through a third party. He also flagrantly overstated the likelihood of Olvera facing criminal charges and immigration consequences, misrepresenting the previous day's court hearing. Additionally, whereas the defendant in *Hampton* advised the witness to "plead the fifth," defendant here told Olvera to avoid coming to court entirely. The trial court's finding of forfeiture by wrongdoing was appropriate under the circumstances.

¶ 32 B. Restitution

¶ 33 Defendant also argues that the court erred in ordering him to pay restitution in the amount of $750 for counseling sessions without specifying a payment plan or considering his ability to pay. Although he acknowledges that he failed to raise the issue in the trial court, he asks us to review the issue under the second prong of the plain-error doctrine. Defendant must demonstrate

that "a clear or obvious error occurred" and that "the error was so egregious as to deny the defendant a fair sentencing hearing." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 34 The restitution statute indicates that a court may order a person convicted of criminal sexual assault or aggravated criminal sexual abuse to "meet all or any portion of the financial obligations of treatment, including but not limited to *** psychological counseling, prescribed for the victim or victims of the offense." 730 ILCS 5/5-5-6(g) (West 2016). The statute further provides: "[t]aking into consideration the ability of the defendant to pay, including any real or personal property or any other assets of the defendant, the court shall determine whether restitution shall be paid in a single payment or in installments, and shall fix a period of time not in excess of 5 years, *** not including periods of incarceration, within which payment of restitution is to be paid in full." 730 ILCS 5/5-5-6(f) (West 2016). The statute directs that "[c]omplete restitution shall be paid in as short a time period as possible," but the trial court is empowered to extend the 5-year payment period if necessary and in the best interest of the victim. 730 ILCS 5/5-5-6(f) (West 2016). Unless the court finds good cause to impose a different obligation, where a defendant is ordered to pay restitution over a period greater than 6 months, the court must require the defendant to make monthly payments. 730 ILCS 5/5-5-6(f) (West 2016).

¶ 35 Defendant contends that the sentencing order here does not comply with the statute. According to defendant, by failing to specify whether he was to make payments in installments or a lump sum, the court failed to set a manner of payment. Defendant submits that, given the court's failure to fix a manner of payment, the court did not consider his ability to pay. He cites several cases supporting his argument that improper restitution orders may be challenged for plain error. See *People v. McCormick*, 332 Ill. App. 3d 491, 500 (2002); *People v. Rayburn*, 258

Ill. App. 3d 331, 335 (1994); *People v. Jones*, 206 Ill. App. 3d 477, 482 (1990). In defending the restitution order, the State relies on *People v. Hanson*, 2014 IL App (4th) 130330, in which the Fourth District criticized our decision in *Jones* and rejected the parties' suggestion that "all errors pertaining to a restitution order are *per se* plain error." *Hanson*, 2014 IL App (4th) 130330, ¶¶ 35-38, 40.

¶ 36 The trial court's written order did not explicitly set a timeframe for payment or otherwise indicate whether defendant was to pay restitution in a lump sum or in installments. Notwithstanding the appellate court cases that defendant cites, supreme court precedent suggests that it is reasonable not to specify a payment schedule where the defendant faces a lengthy prison sentence and the amount of his future income is unknown. See *People v. Brooks*, 158 Ill. 2d 260, 272 (1994). We recognize that, unlike the present case, the trial court in *Brooks* set a deadline for the defendant to pay restitution (within two years of his release from a 10-year prison sentence). *Brooks*, 158 Ill. 2d at 262. Nevertheless, there is a plausible argument under *Brooks* that the trial court's failure to specify a payment schedule here did not amount to error, let alone plain error.

¶ 37 Under the strict language of the statute, the trial court arguably should have set a specific deadline for defendant to pay restitution. Pursuant to the statute, such deadline would have been "not in excess of 5 years ***, not including periods of incarceration," unless the court decided that a longer period was necessary and in the victim's best interest. 730 ILCS 5/5-5-6(f) (West 2016). Defendant was 46 years old at the time of sentencing. He was sentenced to 90-years in prison. According to the presentence investigation report, he had minimal assets and he earned $9 per hour at the job he held before he was arrested. There was no cash bond to apply toward restitution. In setting a deadline, the trial court conceivably could have done something similar

to what the judge did in *Brooks*, *i.e.*, ordering defendant to pay restitution within a certain amount of time after being released from prison. But such deadline would have been merely theoretical given defendant's lengthy prison sentence.

¶ 38 Under these unique circumstances, we are not convinced that any errors in the restitution order were "clear or obvious." See *Hillier*, 237 Ill. 2d at 545. Even if there were clear or obvious errors, they certainly were not "so egregious as to deny the defendant a fair sentencing hearing." See *Hillier*, 237 Ill. 2d at 545. We agree with *Hanson* that errors in restitution orders do not constitute plain error *per se*. *Hanson*, 2014 IL App (4th) 130330, ¶ 40. Instead, " 'determining whether an error is reviewable as plain error requires more in-depth analysis.' " *Hanson*, 2014 IL App (4th) 130330, ¶ 37 (quoting *People v. Rathbone*, 345 Ill. App. 3d 305, 311 (2003)). As this court recently explained, "only an extraordinarily serious error" renders proceedings unfair within the meaning of the second prong of the plain-error doctrine. *People v. Johnson*, 2017 IL App (2d) 141241, ¶ 51. In *Johnson*, we held that the violation of a statutory requirement at a sentencing hearing did not rise to the level of structural error. *Johnson*, 2017 IL App (2d) 141241, ¶ 51. A similar result is warranted here. Although the trial court could have been more direct in expressing how and when defendant was to pay restitution, there was no second-prong plain error.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 41 Affirmed.