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2017 IL App (3d) 150060-U

Order filed March 20, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0060 Circuit No. 14-CF-208
DAVID DOZARD,	)	Honorable David A. Brown,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Holdridge and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's confession was not part of plea discussions under Supreme Court Rule 402(f).

¶ 2 Defendant, David Dozard, was convicted of aggravated criminal sexual abuse. On appeal, he argues that the circuit court's admission of his videotaped interrogation and confession was error because the video contained an inadmissible plea discussion under Illinois Supreme Court Rule 402(f) (eff. July 1, 2012). We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant by indictment with predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2014)). Prior to trial, defendant moved to suppress statements he had made during interrogation. In the motion, defendant argued that the interrogating officers had not properly advised him of his rights, that he was unable to knowingly waive those rights, and that his statements were coerced. The circuit court considered defendant's motion contemporaneously with his bench trial.

¶ 5 At issue in this appeal is defendant's videotaped interrogation, which was played at the combined bench trial/motion hearing. As our disposition turns solely on the contents of that video, we will describe it in detail.

¶ 6 The interrogation begins with Peoria detectives David Hoyle and Tammy Maher entering the room in which defendant is waiting. As Hoyle takes defendant's biographical information, defendant inquires, "What's this all about?" Hoyle tells defendant that he has to read defendant his rights before proceeding. He does so, and defendant signs a waiver form. Hoyle then begins the interrogation:

> "HOYLE: Basically, you had some kids over to your house last night?
>
> DEFENDANT: Yep.
>
> HOYLE: Tell us what happened.
>
> DEFENDANT: I don't know really to tell you the truth. I was drunk, so—I'll tell you this here: I'll plead guilty to contributing to the delinquency of a minor, for drinking. But other than that—[defendant shrugs].
>
> MAHER: What else are you worried about?

DEFENDANT: I ain't worried about nothing."

¶ 7 Defendant goes on to explain to Maher that he allowed the minors to drink beer with him. Defendant explained that there was one boy and two girls. He did not know them, but invited them in because they were in a cold hallway outside his door. They asked for beer, which he provided. Defendant also told the detectives that the minors smoked marijuana.

¶ 8 Later in the interrogation, the detectives pressed defendant on when and why the minors eventually left his apartment:

> "MAHER: Were they upset when they left?
>
> DEFENDANT: They didn't seem to be. No. What's this leading to?
>
> MAHER: Well, we're just trying to figure out what all happened at your place with the kids.
>
> DEFENDANT: I told you, I'll plead guilty to the contributing to the delinquency of a minor, but other than that, I don't know what the hell is going on here.
>
> HOYLE: What else would it be?
>
> DEFENDANT: I don't know, you tell me. You got me here.
>
> HOYLE: Well, I think you do know, David. That's what I'm saying.
>
> DEFENDANT: What do I know?"

¶ 9 Hoyle continues to insist to defendant that "it's obvious that you know what we're going to ask you about." Eventually defendant simply replies, "I didn't touch nobody, if you're going to say that." Defendant continues to repeat that denial: "I didn't touch nobody, man. Like I said, I'll plead guilty to contributing to the delinquency of a minor." Hoyle ignores that statement, and proceeds to lay out the incriminating facts for defendant.

¶ 10 As Hoyle continues to explain to defendant what he thinks happened in the apartment, defendant interjects, asking, "What kind of a bond am I going to have?" Hoyle replies: "You're probably not going to have a bond. You're going to have to go see the judge." After further questioning, defendant admits in detail to touching one of the minors' genitalia.

¶ 11 The circuit court denied defendant's motion to suppress and found him guilty of aggravated criminal sexual abuse. The court sentenced defendant to a term of 26 years' imprisonment.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant argues that the circuit court erred in admitting the video of his interrogation, on the grounds that the video contained inadmissible plea discussions. Defendant concedes that he failed to preserve this issue for review, as his motion to suppress the interrogation did not include the present argument. Defendant maintains, however, that this court should address the matter under the rubric of plain error. Specifically, defendant contends that the error in admitting the video amounted to a second-prong plain error.

¶ 14 The plain error doctrine allows reviewing courts to bypass normal forfeiture principles where a defendant can prove that he was prejudiced by a clear and obvious error. *People v. Herron*, 215 Ill. 3d 167, 186-87 (2005). Under the second prong of plain error, that prejudice will be presumed where the error is serious or implicates an important right, regardless of the closeness of the evidence. *Id.* at 187. The first step in any plain-error analysis is to determine whether a clear or obvious error has been committed. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 15 Illinois Supreme Court Rule 402(f) (eff. July 1, 2012) provides that "If a plea discussion does not result in a plea of guilty *** neither the plea discussion nor any resulting agreement,

plea, or judgment shall be admissible against the defendant in any criminal proceeding." Our supreme court has established a two-part test to determine whether certain statements fall under the purview of this rule. *People v. Rivera*, 2013 IL 112467, ¶ 18. The test considers " 'first, whether the accused exhibited a subjective expectation to negotiate a plea, and, second, whether this expectation was reasonable under the totality of the objective circumstances.' " *Id.* (quoting *People v. Friedman*, 79 Ill. 2d 341, 351 (1980)). We review the determination of whether defendant's statements were "plea discussion[s]" under Rule 402(f) *de novo*. *People v. Taylor*, 289 Ill. App. 3d 399, 402 (1997).

¶ 16 Our supreme court has frequently cautioned that "[t]here is a difference between a statement made in the course of a plea discussion and an otherwise independent admission, which is not excluded by Rule 402(f)." *Rivera*, 2013 IL 112467, ¶ 19; *People v. Jones*, 219 Ill. 2d 1, 28 (2006); *Friedman*, 79 Ill. 2d at 353. "Before a discussion can be characterized as plea related, it must contain the rudiments of the negotiation process, *i.e.*, a willingness by defendant to enter a plea of guilty in return for concessions by the State." *Friedman*, 79 Ill. 2d at 353; see also *People v. Hart*, 214 Ill. 2d 490, 504 (2005) ("[T]his court never intended Rule 402(f) to exclude as evidence mere offers to cooperate with the police, at least where the offers were not accompanied by 'the rudiments of the negotiation process[.]' " (quoting *Friedman*, 79 Ill. 2d at 353)).

¶ 17 In the present case, the most fundamental of "the rudiments of the negotiation process" is missing. *Friedman*, 79 Ill. 2d at 353. At no point during his interrogation did defendant ask for concessions from the State or otherwise indicate what concessions might be necessary in order to secure his guilty plea. In *Friedman*, our supreme court provided the following as an example of one of the rudiments of the negotiation process: "a willingness by defendant to enter a plea of

guilty in return for concessions by the State." *Id.* Clearly, only half of that example is present in defendant's case. Without any request for consideration from the State, defendant's repeated offers to plead guilty to contributing to the delinquency of a minor is nothing more than an "independent admission" (*Rivera*, 2013 IL 112467, ¶ 19) or a "mere offer[] to cooperate." (*Hart*, 214 Ill. 2d at 504).

¶ 18 Supreme court case law is replete with examples of courts finding statements not covered by Rule 402(f) on this very ground. In *Rivera*, the defendant twice asked a detective "what guarantees" the detective could make if the defendant gave a confession. *Rivera*, 2013 IL 112467, ¶ 6. The supreme court found the defendant had not shown a subjective expectation to negotiate a plea, in part because the "[d]efendant did not ask for any specific concessions from the State[.]" *Id.* ¶ 26.

¶ 19 In *Hart*, the defendant asked a detective "what [the detective] could do for him if he cooperated." *Hart*, 214 Ill. 2d at 495. The court held that a defendant's statements were not plea-related, finding:

> "[D]efendant suggested he might be willing to cooperate with Detective Beck, but he wanted to know what *Beck* could do for him. He did not ask what concessions the *prosecutor* might offer him. He did not ask Beck to initiate contact with the State's Attorney's office or convey terms to the prosecutor. He did not state what his 'cooperation' might entail or specify what, if anything, he would require in exchange for his cooperation." *Id.* at 511.

¶ 20 Appellate courts have also required some form of actual bargaining or negotiation before finding statements inadmissible under Rule 402(f). In *Taylor*, the Fourth District reiterated that "[n]ot all statements made in hopes of some concessions by the State are necessarily plea

discussions." (Emphasis omitted.) *Taylor*, 289 Ill. App. 3d at 401. In that case, the defendant had asked investigators, hypothetically, what would happen if he went to court and pled no contest. *Id.* at 402. In reversing the circuit court, the appellate court found that the defendant "did not ask for any concessions nor were any offered." *Id.* In *People v. Victory*, 94 Ill. App. 3d 719, 721 (1981), the defendant told investigating officers that he could not "afford to take an armed robbery charge, and that he would [be willing to] accept 10 years." The defendant also asked the officers if the State's Attorney "be willing to plea bargain." *Id.* The appellate court found the statements admissible, reasoning: "Defendant's comments appear to us to be more in the nature of his own speculation about a possible sentence and curiosity as to whether the State's Attorney plea bargains, rather than a subjective expectation to initiate plea discussions." *Id.* at 724.

¶ 21 The defendants in all of the above cases went further in pursuing a plea than did defendant in the instant case. Here, defendant made no inquiries, be they general or specific, regarding what concessions the State might be able to make or what sentence he might be able to procure. While defendant did use the phrase "plead guilty" on each occasion, he made that offer to plead guilty contingent upon nothing. Our supreme court has never provided any indication that a mere recitation of those words is sufficient to trigger the protections of Rule 402(f).

¶ 22 In his initial brief, defendant makes no argument that he sought or received any concessions from the State or from detectives Hoyle and Maher. He simply points out that he offered to plead guilty three times, and insists that those offers are sufficient to show a subjective expectation to negotiate a plea. Furthermore, defendant repeatedly mischaracterizes the evidence in his brief, writing: "[Defendant] *** offered to plead guilty in exchange for charging concessions," and "[defendant] *** offered to plead guilty for specific terms." Despite these

assertions, defendant makes no attempt to explain what these alleged concessions or specific terms were. In fact, the video of his interrogation completely belies defendant's claims that he sought any concessions or any specific terms.

¶ 23 Only in reply—after the State pointed out the insufficiency of this argument—does defendant make any specific allegations regarding concessions or conditions for his proposed plea. He contends that after initially offering to plead guilty to contributing to the delinquency of a minor, defendant shakes his head from side to side allegedly meaning that he would not plead to any other offenses, and that "limiting his exposure to a misdemeanor was a specific 'term or condition.' "

¶ 24 We reject this argument. Any actual concessions that defendant had in mind when he offered to plead guilty were left completely unsaid. Our supreme court has tacitly rejected the notion that a defendant's subjective intent should be inferred from a mere offer to cooperate. See, *e.g.*, *Rivera*, 2013 IL 112467, ¶ 6. As in *Hart*, defendant here failed to "specify what, if anything, he would require in exchange for his cooperation." *Hart*, 214 Ill. 2d at 511. Without attaching any specific conditions to his plea, defendant's offer was nothing more than a simple admission to the offense of contributing to the delinquency of a minor. The circuit court did not err in admitting the video of defendant's interrogation. Because no error was committed, we affirm the trial court.

¶ 25 CONCLUSION

¶ 26 The judgment of the circuit court of Peoria County is affirmed.

¶ 27 Affirmed.