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2017 IL App (3d) 150257-U

Order filed June 7, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-15-0257
)	Circuit No. 12-CF-811
NORMAN F. WILLIAMS,)	
Defendant-Appellant.)	Honorable Frank R. Fuhr, Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Holdridge and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The court erred when it instructed the jury that penetration was defined as contact between a finger and the sex organ of another, but this error was harmless. (2) We do not have jurisdiction to review the State's challenge to the propriety of defendant's fines.

¶ 2 Defendant, Norman F. Williams, appeals from his three convictions for criminal sexual assault. Defendant argues that the court erred in denying his motion for a new trial. The State argues that the court did not err, but defendant's fines must be vacated. We affirm.

FACTS

¶ 3

¶ 4

Defendant was charged with 13 counts of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2010); 720 ILCS 5/11-1.20(a)(2) (West 2012)) and 1 count of criminal sexual abuse (720 ILCS 5/11-1.50(a)(1) (West 2012)). Counts VIII, IX, X, and XII proceeded to a jury trial. The remaining charges were dismissed.

¶ 5

At trial, D.R., S.W., D.B., and M.B. testified that defendant, a gastroenterologist, had made inappropriate sexual contact with them during a medical examination. D.R. testified that she saw defendant about a lump that she had discovered on her anus. Defendant instructed D.R. to remove her clothing from the waist down and turn and face the examination table. D.R. complied, and during the examination, she felt defendant insert two fingers into her vagina. As defendant moved his fingers in and out of D.R.'s vagina, D.R.'s body became tense. Defendant then removed his fingers from D.R.'s vagina and started rubbing D.R.'s clitoris. D.R. jumped and noticed that defendant was not wearing gloves. Defendant washed his hands, wrote in D.R.'s chart, and diagnosed the lump as a hemorrhoid. The appointment left D.R. upset and she spoke to her aunt, Tanja Mitchell, and husband, Parrice May, about the incident. Mitchell and May each testified that D.R. was emotionally distraught after the appointment. D.R. contacted a lawyer about filing a medical malpractice lawsuit against defendant and reported the incident to Detective Marcie O'Brien of the Moline police department.

¶ 6

S.W. testified that defendant had treated her for several conditions. On April 5, 2012, S.W. saw defendant because she had begun lactating after she started taking a prescription drug that defendant had prescribed. In the examination room, S.W. removed her shirt to show defendant that she was lactating. Defendant helped S.W. onto the examination table, and examined S.W.'s breasts and stomach. S.W. told defendant that she had a rash around her lower

abdomen, and defendant lowered S.W.'s pants to further examine S.W.'s abdomen. S.W. felt defendant's hand "go down to [her] vaginal area." S.W. felt defendant's fingers rub her clitoris and enter her vagina. S.W.'s body jerked away from defendant, and defendant offered to help S.W. stand up. At that point, S.W. pulled up her pants and told defendant that she would see him in three weeks. S.W. scheduled a follow-up appointment and went to her vehicle where she started crying. S.W. called her sister, Linda Prebyl, and discussed the incident. Prebyl confirmed that S.W. was upset after seeing defendant. S.W.'s husband, Bruce W. also testified that S.W. was distraught after her appointment. Bruce accompanied S.W. to the police station, where she spoke with O'Brien. S.W. then submitted to a sexual assault examination at a hospital.

¶ 7 D.B. testified that defendant had performed two procedures to treat her hemorrhoids. On August 14, 2012, defendant performed a third procedure to remove a hemorrhoid. As the procedure began, D.B. felt defendant's finger touch her labia and attempt to enter her vagina. D.B. jerked her hips away from defendant. Defendant said nothing and completed the hemorrhoid procedure. After the procedure, D.B. was in a state of shock. She quickly dressed, and asked the nurse if she could leave. D.B. did not discuss the incident until her husband asked if she had been treated at the clinic where defendant worked because he saw a news article that alleged that defendant had committed sexual misconduct against some of his patients. D.B. cried and told her husband about the incident. The next morning D.B. spoke to O'Brien.

¶ 8 M.B. testified that on August 10, 2010, she saw defendant due to abdominal pain. After M.B. explained her symptoms, defendant instructed M.B. to lie on the table so that he could examine M.B.'s abdomen. Defendant then conducted an external examination of M.B.'s abdomen. Defendant said that he needed to do a full examination, and M.B. protested. However, defendant persisted that he needed to conduct a full examination, and M.B. relented

and lowered her pants. Defendant felt the outside of M.B.'s abdomen and then inserted his finger in M.B.'s vagina. Defendant's finger remained inside of M.B.'s vagina for a couple of minutes. When defendant finished the examination, M.B. noticed that defendant was not wearing gloves and he did not wash his hands. Defendant diagnosed M.B. with colon spasms and prescribed medication to treat the condition. M.B. thought that defendant's actions were wrong, but she was hesitant to question defendant because he was a doctor. M.B. told Lewanna Althaus and Frances McChesney-Pate about the incident. Althaus and McChesney-Pate testified that M.B. was visibly upset after the appointment. Despite the incident, M.B. continued to see defendant to get her prescriptions refilled. In 2012, M.B. saw a news article that stated that defendant had been arrested due to sexual misconduct with his patients. M.B. realized that defendant had engaged in similar misconduct with her and reported her incident to O'Brien.

¶ 9 Detective O'Brien testified that she interviewed the four victims. Each of the victims agreed to release their medical records to the police.

¶ 10 The parties entered two stipulations into the record. First, that forensic scientist Suzanne Kidd would testify that defendant's DNA was not found during the sexual assault examination of S.W. Second, Dr. Marshall Sparberg would testify that he was a professor at Northwestern University and past director of the Esophagus Laboratory. Sparberg would testify that he reviewed the medical records of the victims and concluded that any examination of the vaginal region of the victims would have been inconsistent with reasonable medical standards.

¶ 11 The defense initially called 14 witnesses who had worked with defendant as a nurse or office administrator. Each of the witness testified that defendant had a good and decent reputation in the community.

¶ 12 Defendant testified that, on June 29, 2011, D.R. came into defendant's practice because she had discovered a lump near her anus. Defendant examined D.R., while a nurse was present, and found that D.R. had a large internal hemorrhoid. After the examination, defendant disposed of his gloves, washed his hands, and left the room to record his notes. The nurse notified defendant once D.R. was ready for defendant's diagnosis and treatment recommendations. Defendant recommended that D.R. schedule a hemorrhoid banding procedure. D.R. scheduled the procedure with another physician in the practice. Defendant said that D.R.'s decision to have another physician perform the procedure was not unusual.

¶ 13 On August 10, 2010, defendant treated M.B. for heartburn, abdominal pain, and constipation. M.B.'s symptoms required defendant to examine the lower part of M.B.'s abdomen. M.B. did not disrobe for the examination, and defendant did not touch M.B.'s anus or vagina during the examination. Defendant diagnosed M.B. with bowel spasms, prescribed medication to treat the condition, and asked M.B. to schedule a follow-up appointment.

¶ 14 On April 5, 2012, defendant saw S.W. in regard to S.W.'s complaints about the side effects of a medication that defendant had prescribed. S.W. was experiencing leakage from her breast and abdominal bloating. While defendant was writing his notes, S.W. insisted that defendant see her breast leakage. Defendant recommended waiting until a nurse was in the room, but S.W. exposed her breast and showed defendant the leakage. Defendant did not conduct a breast examination. S.W.'s complaints did not require a vaginal or anal examination, and defendant did not touch S.W.'s vagina.

¶ 15 On August 14, 2012, defendant saw D.B. for a third hemorrhoid banding procedure. When defendant entered the procedure room, D.B. was undressed and a nurse stood nearby. The

nurse remained in the room throughout the procedure. The procedure was limited to the areas of D.B.'s buttocks and anus. Defendant did not touch D.B.'s vagina.

¶ 16 On cross-examination, the State posed the following questions.

“Q. With [D.B.], you reviewed that report?

A. Yes.

Q. Went through that procedure?

A. Right.

Q. And there would be no reason for you to touch the vagina?

A. No.

Q. With a hemorrhoid banding procedure?

A. No. Certainly not deliberately touched, no.

Q. They're close together, vagina and rectum?

A. Yeah, you can brush it as you go in, but not—you're not going to put your hand on it, no.”

Defendant also testified that he did not perform a rectal-type examination without a nurse present.

¶ 17 At the jury instruction conference, the State proffered an instruction that defined “sexual penetration.” However, the State said that its proffered instruction was incorrectly worded, and the instruction should read “[s]ex organ of one person and an object, because that’s what it says in the I.P.I.s, a finger is an object, so it should be—.” The State argued that the committee comments supported this phrasing. The court proposed instructing the jury that “sexual penetration means intrusion, however slight, of any part of the body of one person and the sex organ of another.” The State objected to the “intrusion” definition. The final agreed instruction

read “[t]he term ‘sexual penetration’ means any contact, however slight, between the sex organ of one person and a finger of another person.”

¶ 18 The jury found defendant guilty of the four charged counts. Defendant filed a motion for a new trial in which he argued that the jury was improperly instructed on the definition of sexual penetration. The State conceded that defendant should be granted a new trial on count X, which charged defendant with the sexual assault of D.B. The State argued that the other three charges were not reversible plain error because the evidence was not closely balanced and defendant received effective assistance of counsel.

¶ 19 The court found that the jury instruction was erroneous and potentially affected the outcome of the trial on count X. However, the evidence was overwhelming as to the remaining three counts and victims, and issuance of the correct instruction would not have altered the outcome. The court granted defendant’s motion as to count X and denied the motion on the remaining three counts.

¶ 20 On March 17, 2015, the court sentenced defendant to three consecutive terms of four years’ imprisonment. While pronouncing defendant’s sentence, the court said that when defendant is released, “the mandatory court costs will be imposed.”

¶ 21 On April 14, 2015, defendant filed a notice of appeal. On May 28, 2015, the circuit clerk entered into the record a memorandum of judgment. The memorandum stated that a judgment of \$2,890.67 was entered against defendant. A June 5, 2015, cost sheet delineated the individual financial assessments imposed as part of the \$2,890.67 judgment.

¶ 22

ANALYSIS

¶ 23

I. Jury Instruction

¶ 24 Defendant argues that the court erred in denying his motion for a new trial on counts VIII, IX, and XII because a jury instruction erroneously defined sexual penetration as contact between a person’s finger and the sex organ of another person. We find that the instruction was erroneous; however, this error was harmless as the evidence of defendant’s guilt of the three remaining charges was clear and convincing.

¶ 25 Defendant has forfeited review of this error as he did not make a timely objection to the court’s issuance of the erroneous instruction. See *People v. Cosby*, 231 Ill. 2d 262, 271 (2008) (to preserve an error for review, defendant must make a timely objection at trial and raise the error in his posttrial motion). Ultimately, forfeiture is a limitation on the parties and not on the reviewing court. *People v. Davis*, 213 Ill. 2d 459, 470 (2004). Illinois Supreme Court Rule 615(a) allows us to review “[p]lain errors or defects affecting substantial rights *** although they were not brought to the attention of the trial court.” As jury instruction errors have been recognized as implicating substantial rights, we elect to review the instant issue. See *People v. Keene*, 169 Ill. 2d 1, 32 (1995) (recognizing that jury instructions implicate substantial rights); see also *People v. Thurman*, 104 Ill. 2d 326, 329 (1984) (finding that the instructional error deprived defendant of his fundamental right to a fair trial).

¶ 26 The circuit court instructed the jury that “[t]he term ‘sexual penetration’ means any contact, however slight, between the sex organ of one person and a finger of another person.” This instruction was derived from Illinois Pattern Jury Instructions, Criminal, No. 11.65E (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 11.65E). IPI Criminal 4th No. 11.65E defines “sexual penetration” as:

“[1] contact, however slight, between the sex organ or anus of one person and [(an object) (the [(sex organ) (mouth) (anus)] of another person)].

[or]

[2] intrusion, however slight, of any part of [(the body of one person) (any animal) (any object)] into the [(sex organ) (anus)] of another person[, including but not limited to [(cunnilingus) (fellatio) (anal penetration)]]. [Evidence of emission of semen is not required to prove sexual penetration.]”

The instruction issued in this case was derived from the contact-based definition.

¶ 27 During the jury instruction conference, the State contended that the phrase “an object” included a finger. See IPI Criminal 4th No. 11.65E, Committee Note; *People v. Scott*, 271 Ill. App. 3d 307, 313 (1994) (determining that a victim’s finger can be an “object” within the statutory definition of sexual penetration). However, in *People v. Maggette*, 195 Ill. 2d 336, 350 (2001), the supreme court held that “neither a hand nor a finger is an ‘object’ for purposes of the ‘contact’ clause of the statutory definition of sexual penetration.” Therefore, the court erred in defining sexual penetration as “any contact, however slight, between the sex organ of one person and a finger of another person.”

¶ 28 When faced with this error, the circuit court concluded that it required a retrial on count X. Count X charged defendant with the sexual assault of D.B. D.B. had testified that she felt defendant’s finger touch her labia and attempt to enter her vagina during a hemorrhoid banding procedure. On cross-examination, defendant testified that he potentially made incidental contact with D.B.’s vagina while performing the hemorrhoid banding procedure. Effectively, the jury instruction transformed defendant’s defensive statement of incidental contact into an admission of sexual penetration. However, the effect of this error was limited only to count X as defendant’s testimony regarding incidental contact was specific to D.B. Defendant also testified that he did not touch the sex organs of the remaining victims.

¶ 29 The jury instruction error did not affect the outcome of the trial on counts VIII, IX, and XII, because the evidence that defendant committed an act of sexual penetration against D.R., M.B., and S.W., was clear and convincing. “Instructional errors are reviewed under a harmless error, not a reasonable doubt, analysis.” *People v. Dennis*, 181 Ill. 2d 87, 95 (1998). The harmless error analysis asks “whether the result at trial would have been different had the jury been properly instructed.” *Id.* Clear and convincing evidence of guilt renders an error harmless. *Id.*

¶ 30 In the instant case, the evidence of defendant’s guilt of the criminal sexual assault as charged in counts VIII, IX, and XII was clear and convincing. Under each of these charges, the State was required to prove that: (1) defendant committed an act of sexual penetration, and (2) the victim was unable to understand the nature of the act or unable to give knowing consent. 720 ILCS 5/12-13(a)(2) (West 2010); 720 ILCS 5/11-1.20(a)(2) (West 2012). Section 11-0.1 of the Criminal Code of 2012 defines “sexual penetration” as:

“any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including, but not limited to, cunnilingus, fellatio, or anal penetration. Evidence of emission of semen is not required to prove sexual penetration.” 720 ILCS 5/11-0.1 (West 2012).

¶ 31 At trial, D.R., S.W., and M.B. testified that defendant committed an act of sexual penetration during their respective medical examination or procedure. D.R. said that she felt defendant insert two fingers into her vagina while he was examining her anus. S.W. said that she felt defendant’s fingers enter her vagina while he was conducting an examination of her lower

abdomen. M.B. said that defendant inserted his finger into her vagina while conducting an abdominal examination. Each of the victims testified that defendant's misconduct had left them emotionally distraught. The victims' emotional state was corroborated by several witnesses who spoke with each of the victims after their appointment with defendant. Defendant's testimony that he did not commit an act of sexual penetration on the victims was the only evidence that directly contradicted the three victims' testimonies. Therefore, the evidence that defendant committed an unconsented to act of sexual penetration against D.R., S.W., and M.B. was clear and convincing, and the erroneous instruction on the definition of sexual penetration was harmless.

¶ 32

II. Fines

¶ 33

In its appellee's brief, the State argues that defendant's fines must be vacated and the cause remanded for the imposition of fines that were erroneously imposed by the circuit clerk. We find that we do not have jurisdiction to reach this issue as this is not an issue which the State can raise under Illinois Supreme Court Rule 604(a) (eff. Mar. 8, 2016).

¶ 34

In a criminal case, the State may only appeal matters delineated under Illinois Supreme Court Rule 604 (eff. Mar. 8, 2016). The validity of the imposition of defendant's fines is not one of these appealable matters. Ill. S. Ct. R. 604(a) (eff. Mar. 8, 2016); see also *People v. Newlin*, 2014 IL App (5th) 120518, ¶ 30 (finding that Rule 604(a) does not authorize the State to appeal sentencing orders or the imposition of fines). Because the State is not authorized by Rule 604(a) to appeal the imposition of a fine, we lack jurisdiction to address the State's argument. *Newlin*, 2014 IL App (5th) 120518, ¶ 30. Moreover, the State's argument that we may reach this issue in the interest of judicial economy is unavailing. The principle of judicial economy does not vest

this court with jurisdiction or render a matter which the State could not otherwise raise, reviewable.

¶ 35

CONCLUSION

¶ 36

The judgment of the circuit court of Rock Island County is affirmed.

¶ 37

Affirmed.