2017 IL App (4th) 160479-U

NO. 4-16-0479

FILED
February 10, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
KARL D. KINKADE,	)	No. 14CF297
Defendant-Appellant.	)	
	)	Honorable
	)	Mark A. Fellheimer,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not improperly provide the jurors with a definition of reasonable doubt during *voir dire*.

(2) The State did not improperly attempt to provide the jurors with a definition of reasonable doubt during its closing argument.

(3) The State did not improperly attempt to appeal to the emotions of the jurors in its closing argument.

(4) Defendant forfeited his argument regarding the State's improper remarks, which he believed tended to diminish the State's burden of proof, when he failed to comply with supreme court rules regarding the content of an appellant's brief.

(5) The State's closing argument did not constitute improper vouching for the credibility of the State's witness.

(6) The evidence was sufficient to prove defendant guilty beyond a reasonable doubt.

¶ 2 Defendant, Karl D. Kinkade, appeals from his conviction of two offenses related to the sexual abuse of a minor under the age of 13. He claims (1) the trial court erred by

discussing the concept of reasonable doubt with the jury, (2) the prosecutor engaged in several incidents of misconduct during closing argument, and (3) the State failed to prove him guilty beyond a reasonable doubt. After our careful review of the record, in particular our review of the transcript from the jury trial, we affirm.

¶ 3 I. BACKGROUND

¶ 4 In December 2014, the State charged defendant with three counts related to defendant's alleged inappropriate sexual behavior with two different minors. The counts were severed so that defendant's jury trial at issue in this appeal related only to defendant's misconduct with K.T. The State alleged defendant committed the offenses of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) (count I) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)) (count II) sometime between January 1, 2012, and June 30, 2013.

¶ 5 Defendant's jury trial began on September 14, 2015. First to testify for the State was the victim, K.T. She testified she was, at the time of trial, 12 years old. She believed she was 9 or 10 at the time of the abuse. On the night of the incident, she was staying overnight at her paternal grandmother's house. Her grandmother was married to defendant. K.T. said she was sleeping on the couch and woke up to defendant touching her. She had gone to bed in the bedroom but woke up on the couch. She tried to roll up in the blankets to "make it stop." Defendant put his finger in her "area." She said she "didn't like it" and she "was scared and [she] didn't know what to do." When asked to describe where her "area" was, K.T. said: "I pee out of it." Defendant stopped touching her when her grandmother came out into the living room. Defendant went to the kitchen to have coffee with her grandmother. K.T. did not tell anyone what happened.

¶ 6 K.T.'s mother testified in November 2014, she and K.T. were in the kitchen talking. She asked K.T. if anyone had ever touched her in her "important places." At first, K.T. said no. Her mother told her it was very important to tell the truth. She said she asked: "Do you swear to mommy that nobody has ever touched you?" K.T. reluctantly said yes, she had been touched by defendant. K.T. told her defendant " 'stuck his finger in her pee-pee.' " Her mother said, at that point, K.T. was nervous, upset, and began to cry.

¶ 7 Ellen "Jo" Sipes, a child forensic interviewer, testified that she interviewed K.T. on December 3, 2014. The interview was recorded on video and was played for the jury. After the video, Sipes said she gave K.T. an anatomical drawing and asked her to circle the part where defendant touched her. K.T. circled her vaginal area.

¶ 8 On the video recording of the interview, K.T. explained defendant put his fingers in her "area." She said she was sleeping on the couch and was awakened by defendant touching her. She pretended to stay asleep and tried to roll up in the blanket so he could not get to her. He stopped when her grandmother came into the room. She then asked defendant how she got out to the living room. Defendant told her she had sleepwalked into the living room. The State rested.

¶ 9 For defendant's case, he called K.T.'s father, who is also defendant's stepson as a witness. K.T.'s father sent his mother an e-mail on December 1, 2014, the day after K.T. told her mother about the incident. The e-mail said: "U will get arrested if you come around them so stay the fuck away so how's ur beautiful fucking life now[?]"

¶ 10 Jean Kinkade, defendant's wife, testified she recalled seeing K.T. on the couch with defendant only one time. K.T. had stayed overnight and sleepwalked to the living room and sat on the couch between her older brother and defendant. Jean was awakened by laughter. K.T.'s brother and defendant were laughing at K.T. because she was not making sense. Her

brother put her back in bed. Defendant and Jean went to the kitchen for coffee. Jean said K.T. never seemed afraid or nervous around defendant.

¶ 11 Jean described an incident that occurred in August 2014, when her stepson came into their house and began choking defendant and spit in his face while he slept. She said that incident had nothing to do with K.T.'s allegations.

¶ 12 Three witnesses, defendant's niece, Jean's sister, and Jean's niece, all testified they never saw K.T. acting nervous or scared in defendant's presence. Defendant himself testified. When asked if he ever put his finger in K.T.'s vagina, defendant said: "No, sir. I would never do that." He said he has never had a good relationship with his stepson, who has threatened defendant's life "many times." He recalled the August 2014 incident Jean had described where his stepson attacked him while he was sleeping. Defendant rested.

¶ 13 In rebuttal, the State recalled K.T., who testified she stayed overnight at her grandmother's house two more times after the incident. She denied her parents told her to make the allegations against defendant.

¶ 14 The State also recalled K.T.'s father, who admitted he attacked defendant. He said he was angry because his mother and defendant had kicked out his older daughter from their house in the rain. He denied telling K.T. to make up the allegations against defendant. The State rested in rebuttal.

¶ 15 After hearing closing arguments and the jury instructions, the jury retired to deliberate. Upon their request and without objection, the jurors again viewed the recording of the interview. After deliberations, the jury found defendant guilty of both offenses.

¶ 16 In June 2016, the trial court denied defendant's posttrial motion and sentenced defendant to eight years in prison. This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Defendant raises several contentions of error relating to comments by the trial judge, the State's closing argument, and the sufficiency of the evidence. Most of his contentions are raised pursuant to the plain-error doctrine because, although the issues were raised in his posttrial motion, they were not raised at trial. Defendant relies on the fact the evidence was closely balanced, which he claims allows for our review of the otherwise forfeited claims on appeal. See *People v. Herron*, 215 Ill. 2d 167, 178 (2005) (the plain-error doctrine allows for review when the evidence is so closely balanced the jury's guilty verdict may have resulted from the error and not the evidence).

¶ 19 A. Trial Court's Comments

¶ 20 Defendant first argues the trial court erred by commenting "extensive[ly]" on the concept of reasonable doubt during *voir dire*. He claims the court's remarks could "well have simply led to confusion as to what the reasonable doubt standard actually means." He claims, as a result of this error, he is entitled to a new trial.

¶ 21 We first note our supreme court has identified a defective reasonable doubt instruction as a structural error that qualifies as an error reviewable under the plain-error doctrine and requires reversal. See *People v. Washington*, 2012 IL 110283, ¶ 59; *People v. Thompson*, 238 Ill. 2d 598, 609 (2010); *People v. Averett*, 237 Ill. 2d 1, 13 (2010). Thus, for this claim, a determination of whether the evidence was closely balanced is unnecessary. Nevertheless, the first step in a plain-error analysis is to determine whether any error occurred. *People v. Eppinger*, 2013 IL 114121, ¶ 19.

¶ 22 A trial court's attempt to explain or define reasonable doubt is improper. *People v. Downs*, 2015 IL 117934, ¶ 24 ("[T]he term 'reasonable doubt' should not be defined for the

jury, that the term, in fact, needs no definition because the words themselves sufficiently convey its meaning."). The trial court in *Downs* had stated: " 'We cannot give you a definition [of reasonable doubt;] it is your duty to define [it].' " *Downs*, 2015 IL 117934, ¶ 24. The supreme court found that comment to be "unquestionably correct." *Downs*, 2015 IL 117934, ¶ 24.

¶ 23 Any attempt by a trial judge to explain the concept of reasonable doubt leads to confusion and raises questions on appeal about whether the jury may have relied on a standard less than beyond a reasonable doubt. "This quandary underscores the inappropriateness of any court in this state attempting to define reasonable doubt, where we have clearly stated that the term should not be defined for the jury." *Downs*, 2015 IL 117934, ¶ 30 (the trial court's response to the jury that it could not give the jury a definition—that it was the jury's duty to define "reasonable doubt," was a proper response). In other words, defining reasonable doubt is reversible error if there is a reasonable likelihood jurors understood the definition to allow conviction upon proof less than beyond a reasonable doubt. *Downs*, 2015 IL 117934, ¶ 18.

¶ 24 Defendant claims the trial court's discussion of reasonable doubt during *voir dire* was improper in that the "clear impression was given that reasonable doubt was a completely subjective standard for each juror to determine." During *voir dire*, the trial judge attempted to explain to the jurors that the concept of reasonable doubt would not be defined for them. The court stated:

> "You are going to get a whole bunch of jury instructions at the end. There is going to be one instruction that most jurors would like to have, but the law doesn't allow it, nor should it. That is this concept of reasonable doubt. I have already touched on that concept of reasonable doubt with all of you just a moment ago [(presumably referring to the explanation regarding the State's burden of

proof)]. Nobody, including myself, the attorneys, is going to be able to give you a definition of what is or what is not reasonable doubt. That is something that each juror first individually has to resolve amongst themselves. And then you are going to—you are able to discuss that with your other jurors as to what exactly is or is not reasonable doubt. So I am not going to plunk down a piece of paper in front of you saying here is what reasonable doubt is; go back there and decide it. That is something each juror is going to have to deal with on their own. I am not asking you right now if you have an idea in your mind of what is or what is not reasonable doubt. But does anybody right now as they sit there think that is going to be impossible for them to kind of grapple with this concept of reasonable doubt? If so, please raise your hand. I will show that no hands are raised."

¶ 25 The trial court's explanation fits squarely within the parameters of what is allowed when it comes to the proper way for the court to handle the absence of a definition of reasonable doubt. As in *Downs*, the trial court here made it clear to the jurors they would not be provided with a definition; that it was their duty to define the concept. That is, the court provided no guidance or insight as to what the term meant or how the jury should determine whether the State met its burden.

¶ 26 We find the trial court's explanation here was equivalent to the trial court's statement in *Downs*, where the trial judge had told the jury it could not provide a definition of reasonable doubt, and that it was the jury's duty to define the term. It was this statement the supreme court found "unquestionably correct." *Downs*, 2015 IL 117934, ¶ 24. Accordingly, we find no error in the trial court's statements.

¶ 27 B. The State's Discussion of Reasonable Doubt

¶ 28 Defendant also contends the trial court erred by failing to limit the State's discussion of reasonable doubt in its closing argument. Defendant contends the prosecutor made a statement during his closing argument that served to diminish the standard of reasonable doubt in the eyes of the jury. The prosecutor stated: "Reasonable doubt. It is a standard that is met in court rooms across the nation everyday of the week."

¶ 29 Defendant concedes he forfeited this claim by not preserving it for review, but he asks this court to consider the claim under the "closely-balanced" prong of the plain-error doctrine. Again, we note the first step in a plain-error analysis is to determine whether any error occurred. *Eppinger*, 2013 IL 114121, ¶ 19.

¶ 30 As explained above, our supreme court has "long and consistently held that neither the trial court nor counsel should define reasonable doubt for the jury." *Downs*, 2015 IL 117934, ¶ 19. "Reasonable doubt" is a self-defining term that requires no further definition. *Downs*, 2015 IL 117934, ¶ 19. However, the State may discuss reasonable doubt, suggest whether the evidence presented supports reasonable doubt or argue that the State does not have to prove the defendant's guilt beyond any doubt, that the doubt must be a reasonable one. *People v. Moody*, 2016 IL App (1st) 130071, ¶ 61.

¶ 31 This court has previously found: "It is not improper for a prosecutor to argue:

' "That is the same burden of proof in every case that is tried in this courtroom, every case that is tried in this county, and every case that is tried in this country. It is beyond a reasonable doubt. The penitentiary is full of people like Collins and Bracey who have been proved guilty beyond a reasonable doubt." ' " *People v. Carroll*, 278 Ill. App. 3d 464, 468 (1996) (quoting *People v. Collins*, 106 Ill. 2d 237, 277 (1985)).

¶ 32 Accordingly, as previously determined by this court, as well as our supreme court, the prosecutor's comments did *not* constitute error. The prosecutor did not attempt to provide the jury with a definition of reasonable doubt. *Cf. People v. Jones*, 241 Ill. App. 3d 228, 234 (1993) (this court found similar remarks improper; however, those remarks followed the prosecutor's attempt to define reasonable doubt for the jury).

¶ 33 C. The State's Appeal to the Emotions of the Jurors

¶ 34 Defendant next contends several comments made by the prosecutor in his closing argument improperly appealed to the emotions of the jurors, sufficient to justify a new trial. Again, defendant concedes he failed to properly preserve this issue for purposes of appeal, and he asks this court to consider the issue under the plain-error doctrine. And again, we determine as a first step in the analysis whether any error occurred.

¶ 35 During his closing argument, the prosecuted stated:

> "[A]nd then she has that feeling—it didn't feel good—of fingers going into her vagina at that age. And that is a lot to think about. That is a lot to carry with you. That is a lot for anyone, let alone a child.
>
> * * *
>
> The details, the crux of what occurred are the same, that he did this to her, he penetrated her vagina not once, but twice.
>
> * * *
>
> To put his fingers—not only to pull down her pants and her underwear, but then to put his fingers in her, it is only for one purpose.
>
> * * *

Who would want to live in a world where a victim's statement is not enough, a world where a defendant can commit unspeakable acts and get away with it. ***

*** What should a child do to prepare herself for a sexual encounter at age 10? ***

***

Words no parents should ever have to hear. That is what [K.T.'s mother] was confronted with last November, November 2014, that [K.T.] had been touched inappropriately."

¶ 36 It is well established that prosecutors are afforded wide latitude in closing argument. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). In reviewing comments made at closing arguments, a reviewing court asks whether the comments substantially prejudiced a defendant such that it would be impossible to say whether or not the comments resulted in a guilty verdict. *Wheeler*, 226 Ill. 2d at 123. In other words, misconduct in a closing argument is substantial and would warrant reversal and a new trial *if* the improper remarks constituted a material factor in a defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did *not* contribute to the defendant's conviction, a new trial should be granted." (Emphasis added.) *Wheeler*, 226 Ill. 2d at 123.

¶ 37 Defendant argues in this closely balanced case, the prosecutor's appeal to the jurors' emotions was a material factor in his conviction. Without the prosecutor's use of the emotional pleas, defendant contends, one could not say with confidence the jury would not have found him guilty. We disagree. We find the complained-of remarks do not meet the applicable standard. Nothing in the prosecutor's closing argument was so improper as to result in

substantial prejudice to defendant or caused the jury, *for no other reason*, to find defendant guilty. The comments were based on the evidence presented. K.T. testified defendant inserted his fingers into her "important area," and she did not like it. She was scared to tell anyone until her mother finally asked for the truth. We conclude the State's closing argument did not go beyond the bounds of the wide latitude afforded, and we find no error.

¶ 38 D. Whether the State's Closing Argument Diminished the Burden of Proof

¶ 39 Next, defendant challenges the prosecutor's following statement: "Who would want to live in a world where a victim's statement is not enough, a world where a defendant can commit unspeakable acts and get away with it?" Again, we determine first, as part of our plain-error analysis, due to defendant's admitted forfeiture, whether any error occurred.

¶ 40 The entirety of defendant's argument with regard to this issue is as follows:

> "Defendant contends that this statement diminished the State's burden of proof, and constituted plain error in a case where the evidence was closely balanced and completely dependent on the credibility of the minor child."

Defendant does not attempt to explain how this particular statement constitutes reversible error, or how this statement diminished the State's burden of proof. He cites no authority for his bald assertion.

¶ 41 Illinois Supreme Court Rule 341(h) (eff. Jan. 1, 2016) sets out the requirements for appellants' briefs. One such requirement is that the appellant provide an argument, "which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 20016). "An issue that is merely listed or included in a vague allegation of error is not argued and will not satisfy the requirements of the rule." *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010). Defendant

does not provide this court with a sufficient analysis of his contention of error. And, as we have said before, this court is not a depository unto which an appellant can dump the burden of argument and research. See, *e.g.*, *Elder v. Bryant*, 324 Ill. App. 3d 526, 533 (2001); *In re Austin C.*, 353 Ill. App. 3d 942, 948 (2004). As such, defendant has forfeited our review of this issue. *People v. Phillips*, 215 Ill. 2d 554, 565 (2005) (issue forfeited where defendant raised it but failed to make any argument or citation to relevant authority).

¶ 42 E. Whether the State Vouched for K.T.'s Credibility

¶ 43 Next, defendant contends the trial court erred in allowing the State to vouch for the credibility of K.T. Because he again concedes forfeiture of the issue but requests plain-error review, we determine whether any error occurred as the first step in our plain-error analysis.

¶ 44 The prosecutor stated the following in his closing argument:

> "One night in his home that is shared with [K.T.]'s grandmother, the defendant saw an opportunity to take advantage of a young girl asleep on the couch. He saw that opportunity and then he seized upon it and stole the young girl's innocence. And he did it not just one time, but he did it a second time until [K.T.] bravely stopped pretending to be asleep and came to and started to fully wake up. That is when he stopped. That is when he went about—he being *** the defendant—went about his business and into another room for a cup of coffee.
>
> Meanwhile, a young girl remained alone on that couch trying to make sense of what just happened to her. Keep in mind she was at her grandmother's house, this is blood, this is family. Think of grandparents' house or a family member's house or a friend's house where you felt safe, where you felt secure,

where you felt happy. And there she is in that very house thinking about dealing with what her step-grandfather, the man her grandmother married, just did to her.

And she thought about it and she carried it with her for months and for months until finally her mom asked her a question. Maybe it is a question, for those of you who are parents, you have asked your own children, or maybe parents elsewhere do, ask have you ever been touched inappropriately. And [K.T.] responded, yes. She had after many months, after thinking about this, after dealing with it, after trying to make sense of it, she finally said yes and she disclosed.

* * *

When you think about [K.T.]'s testimony, it was clear. She was clear about what happened. She was clear about details, where she was, about the time of year it was, what she felt as those fingers entered her vagina. She remembered pretending to be asleep. And she remembers waking up. She even remembered the detail of the defendant going into another room to get a cup of coffee after he just did that to her.

This is—these are not details of a child that is coached, a child coerced into making up some kind of story to get back at someone for some vague and unknown reasons. It is a child who internalizes what happened, who never forgot and will never forget what he did. ***

You can consider her demeanor. She answered the questions not just from us, but she answered them from Mr. McClarey [defense attorney]. She was not evasive, she was not inconsistent, she was not the kind of witness who gave the appearance that she had something to gain from this, that she was just out to get

him because her dad got upset at [defendant] at one time because [defendant] threw the daughter out in the rain.

* * *

And we heard from [K.T.'s mother], who testified, I would argue, testified candidly that day.

* * *

So we had leading questions on cross at a pretty rapid pace, a fast pace. [K.T.] answered them. She wasn't having to think what's the lie again? What did my parents tell me to say? It was easy for her to answer because it was the truth.

***

Now, the whole situation that [K.T.] was able to testify to can be boiled down pretty simply as Mr. McClarey did. [Defendant] put his fingers in her vagina that night. It's not something a kid would dream up, and it's not something that was fabricated and told to her on a lie to repeat, to repeat to the police, to repeat today. This isn't confusing."

¶ 45 Defendant argues, because this case boiled down to a credibility contest between K.T. and defendant, it was reversible error for the State to vouch for the credibility of K.T. over defendant with the statements above. Defendant relies on the First District's opinion in *Williams*, wherein the court found reviewing courts should use a commonsense approach when determining whether the prosecutor's statement improperly vouched for the credibility of a witness. *People v. Williams*, 2015 IL App (1st) 122745, ¶ 20.

¶ 46 Unlike the prosecutor in *Williams*, the prosecutor here did not convey to the jury that he had personal or specialized knowledge that K.T. was a credible witness, that he had other

information not otherwise available, or that the government somehow approved the credibility of K.T. See *Williams*, 2015 IL App (1st) 122745, ¶ 20. Instead, the prosecutor simply argued for the credibility of K.T. and against the credibility of defendant based upon the evidence presented at trial. See *People v. Pope*, 284 Ill. App. 3d 695, 706 (1996) (a prosecutor may comment on a witness' credibility and challenge a defendant's credibility and defense theory when those comments are based on facts in evidence or reasonable inferences drawn therefrom). We find no error or improper argument from the State.

¶ 47 F. Sufficiency of the Evidence

¶ 48 Finally, defendant claims the State failed to present evidence sufficient to prove him guilty of the alleged offenses beyond a reasonable doubt. He claims the only evidence sufficient to support a guilty verdict was the testimony of K.T., and K.T. had admitted she may have been sleepwalking on the night of the incident. Further, defendant claims, his wife testified the only time she saw K.T. sitting on the couch with defendant was the night K.T. had sleepwalked into the living room, sat between her brother and defendant, and was eventually put back to bed by her brother.

¶ 49 When met with a challenge to the sufficiency of the evidence, this court, viewing the evidence in the light most favorable to the State, considers whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Wheeler*, 226 Ill. 2d at 114. The critical question is whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Wheeler*, 226 Ill. 2d at 114. "This standard of review applies, 'regardless of whether the evidence is direct or circumstantial [citation], and regardless of whether the defendant receives a bench or jury trial [citation].' " *Wheeler*, 226 Ill. 2d at 114 (quoting *People v. Cooper*, 194 Ill. 2d 419, 431 (2000)).

¶ 50 It is not this court's function to retry a defendant when met with challenges to the sufficiency of the evidence. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Instead, our duty is "to carefully examine the evidence while giving due consideration to the fact that the [trial] court and jury saw and heard the witnesses." *Smith*, 185 Ill. 2d at 541. As such, the jury's findings regarding witness credibility are entitled to great weight. *Wheeler*, 226 Ill. 2d at 115. The jury's findings regarding witness credibility are neither conclusive nor binding, however, because reasonable people may act unreasonably on occasion. *Wheeler*, 226 Ill. 2d at 115. "Accordingly, a conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *Wheeler*, 226 Ill. 2d at 115.

¶ 51 Under this standard, defendant's argument does not affect the outcome of the jury's verdict. K.T. did, in fact, admit she may have sleepwalked the night of the incident. She testified she went to bed in the bedroom and awoke on the couch in the living room. This scenario, even if true, does not necessarily exonerate defendant or show the existence of reasonable doubt. K.T. testified defendant sexually abused her as she lay on the couch. She awoke to this abuse. It could very well have been true she sleepwalked to the couch before the abuse occurred. That is, her admission is not fatal to the State's case, as a rational trier of fact could have believed K.T.'s testimony and still found defendant guilty beyond a reasonable doubt.

¶ 52 III. CONCLUSION

¶ 53 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 54 Affirmed.