2018 IL App (3d) 150328-U

Order filed June 14, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0328 Circuit No. 13-CF-958
RICKIE BROWNSON,	)	The Honorable Carla A. Policandriotes, Judge, presiding.
Defendant-Appellant.	)	

JUSTICE McDADE delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Holdridge dissented.

ORDER

¶ 1 *Held*: Defendant is entitled to a new trial because the trial court did not comply with Illinois Supreme Court Rule 431(b).

¶ 2 Defendant Rickie Brownson was charged with multiple counts of aggravated criminal sexual assault, criminal sexual assault, and aggravated criminal sexual abuse and elected to be tried by a jury. During *voir dire*, the trial court asked potential jurors whether they understood and accepted two of the four Rule 431(b) principles: (1) the State must prove defendant guilty

beyond a reasonable doubt and (2) defendant was not required to present any evidence on his behalf. At the conclusion of trial, the jury found defendant guilty, and the court sentenced the 15-year-old defendant to three terms of eight years' imprisonment for the aggravated criminal sexual assault counts and two terms of seven years' imprisonment for the criminal sexual assault counts, to be served consecutively. Defendant filed a posttrial motion and a motion to reconsider sentences, and the trial court denied both motions. Defendant appealed. We vacate defendant's conviction and remand this cause for a new trial.

¶ 3 FACTS

¶ 4 Defendant Rickie Brownson was charged with counts I to III aggravated criminal sexual assault, counts IV to VIII criminal sexual assault, and counts IX to XI aggravated criminal sexual abuse. Ultimately, the State nol-prossed counts IX to XI. The indictment alleged that defendant, who was between 15 and 16 years old, knowingly engaged in vaginal and anal intercourse with Doe 1, Doe 2, and Doe 3 (collectively, the triplets), who were 8 years old.

¶ 5 The State sought leave to admit hearsay statements made by Jacqueline Lundquist, a forensic interviewer for the Will County Child Advocacy Center, and Diamond Brownson, defendant's half-sister, pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2016)). Following a hearing, the trial court determined that Diamond would be allowed to testify and that the DVD of Lundquist's victim sensitive interviews (VSI) with the triplets could be played at trial.

¶ 6 During *voir dire*, the trial court asked potential jurors whether they understood and accepted two principles: (1) the State must prove defendant guilty beyond a reasonable doubt and (2) defendant was not required to present any evidence on his own behalf.

¶ 7 Several witnesses testified at trial. Diamond testified that defendant was her half-brother from her father's side of the family. She and defendant were originally from Liberia and came to the United States in 2012. When they arrived, they lived in Bolingbrook with Paul, her father; Mary, Paul's wife; her half-sisters, Doe 1, Doe 2, and Doe 3; Annet, defendant's twin sister; and Jerilynn, Mary's daughter from a previous relationship. Diamond helped take care of the triplets. Afterward, everyone except Jerilynn moved to Plainfield. In December 2012, 17-year-old Diamond was in the room next to the triplets' room with Annet when she heard grunting sounds. She tried to open the door to the triplet's room, and later Paul and Mary's room, but they were locked. The noise stopped once Diamond and Annet tried to open the doors.

¶ 8 The next day, Diamond and Annet asked the triplets about the noise and they stated, " 'I can't tell you. I can't tell you.' " When Diamond spoke with the triplets individually, Doe 1 stated that her brother put his "nu-nu" in her front side and back side. Diamond knew that nu-nu was a term for private part in her native language. Doe 2 stated that defendant was touching them and " 'putting his nu-nu in our nu-nu, front and back' " and she saw it happen to her two sisters. Doe 3 stated that her brother touched her nu-nu and back side and kissed her. The triplets stated that defendant told them he would beat them if they told anyone.

¶ 9 On another day, Doe 3 told Diamond that defendant had touched her again. Diamond told Mary and Paul that the triplets stated that defendant touched them. Mary appeared upset and called Pastor Ernest Tabe of River Life Church. When Pastor Tabe visited the residence, he, Mary, and Paul talked to the triplets. Afterward, Pastor Tabe screamed at defendant and defendant started crying, asked God to forgive him, and stated that he only used his finger on the triplets. Defendant apologized to the triplets and told them he would not touch them anymore.

Pastor Tabe told defendant that if he did it again, Pastor Tabe would call the police. Pastor Tabe also stated that the situation was a matter that needed to be handled amongst the family.

¶ 10 In January 2013, Diamond, Mary, and the triplets were at a family friend's house when the triplets told Diamond that defendant started touching them again. Diamond and the triplets told Mary about defendant's continued behavior, and Mary appeared mad. At home, Mary and Paul got into an argument about defendant's behavior. Afterward, Paul and his friend Raymond Shaw talked to defendant.

¶ 11 A few days later, the triplets were going to defendant's room when Diamond told them to go to bed instead. Defendant got angry and called Paul. Paul told Diamond to leave his son alone, and Paul and defendant punched and kicked her. The next day, school officials noticed Diamond's injuries and called the Department of Children and Family Services (DCFS). Diamond discussed her injuries with a DCFS caseworker. Initially, she did not discuss the sexual abuse allegations with the caseworker; however, she eventually told the caseworker after Mary prompted her. The court ordered Paul and Diamond to live separately, but Diamond continued to lie about where Paul and defendant were living because she wanted to keep the family together. She told the police that she first told her caseworker about the allegations. This was a lie, however, because she was afraid that Mary would lose her section 8 housing if she stated Mary and Paul knew about the allegations. She believed that Paul controlled his children and favored defendant because defendant was his only son.

¶ 12 The triplets' VSI were admitted into evidence and played for the jury. Each victim was interviewed separately by Lundquist. During the interviews, Doe 1 stated that defendant did "something bad" to all three triplets at nighttime. He put his penis in her vagina and "ma[de] it wet." She stated that it felt big and squishy and would go all the way in. Defendant would

occasionally put his penis in her butt, and she saw blood come out of her butt when she used the toilet. She described it as squishy and uncomfortable. When she tried to leave, defendant would drag her by her legs back into the room. Defendant also kissed her. These incidents occurred at the Bolingbrook residence and the Plainfield residence in the triplets' room or sometimes in defendant's room. The triplets told Diamond, their mother, their father, and their pastor about defendant's actions. The pastor told defendant not to touch the triplets anymore. However, defendant did it again but only touched the triplets with his finger.

¶ 13 Doe 2 stated that defendant put his penis inside the triplets' vagina and butt at the Bolingbrook residence. He would take off their clothes and his penis would "go inside." She described it as really painful, "hurt like pepper," and felt squishy and nasty. Defendant also touched her butt and private parts with his hands. Defendant kissed her on the mouth and cheeks while using his tongue. and it felt "like smush." She tried to get away from defendant but he "kept pulling her." She also tried to help her sisters by pulling them away from him. He told the triplets not to tell anyone. Defendant's actions stopped when her father sent defendant to live with a family member. Doe 2 only told Diamond because she was scared to tell the rest of the family. She stated that Diamond was nice and a good sister who helped the triplets with their homework.

¶ 14 Doe 3 stated that defendant put his penis inside her vagina and butt. She stated that she felt pain when his penis touched her, that "it was big and it hurt a lot," and that it "felt wet." During the incidents, she saw blood and defendant would "spit on it so no blood would come." She also saw blood in the toilet after she used to the bathroom. She told him to stop but he said no. These incidents occurred at the Bolingbrook residence and Plainfield residence in the triplets'

room or sometimes in defendant's room. She also saw defendant touch her sisters while she pretended to be sleep. She stated that Diamond helped them because she was a good sister.

¶ 15 Monique Boozer, a child protection specialist for DCFS, interviewed the triplets at their Plainfield home. Doe 1 and Doe 3 stated that defendant put his private part in their private parts. A private agency advised Mary to take the triplets to the hospital for a medical examination.

¶ 16 Dr. Suchinta Hakim, a pediatrician, examined the triplets at Provena St. Joseph's Medical Center. Doe 1 and Doe 2 stated that defendant put his hand and private part in their private parts. The exam disclosed no injuries, abnormalities, blood, or redness. Hakim noted, however, that "fondling, touching, stimulating a pre-pubescent child does not necessarily result in injury in a physical sense to the perineum or the vagina or the anus."

¶ 17 Joliet Police Officer David Martis testified that Doe 1 told him that defendant touched her and her sisters on their private areas and placed his private part in their private parts more than one time.

¶ 18 Dr. Rangala conducted a medical examination on the triplets. Each triplet's exam results were normal. She noted that Doe 1 had a ridge inside of her vagina and a narrow hymen posteriorly. She stated a ridge inside the vagina was not a sign of abuse. She also stated that a narrow hymen was seen in children who had been sexually abused once the hymen healed after injury. A narrow hymen had once been considered a definitive indicator. However, because later studies had shown that narrow hymens were also found in children who were not exposed to sexual abuse, it was no longer considered a definitive finding.

¶ 19 She noted that Doe 2 complained of stomach pain. This was a red flag for children who have been sexually abused. Dr. Rangala explained, "There are children who keep coming to the ER with stomach aches or keep seeing their pediatrician for stomach aches. Some will see

gastroenterology specialist visits, and then they finally when they are able to disclose what's happened to them and almost overnight their stomach aches will go away." She stated, however, that Doe 2's symptom alone was not a definitive finding of sexual abuse.

¶ 20 The triplets testified that defendant never touched their private areas. The triplets stated that Diamond told them to lie and that she threatened them. Doe 2 and Doe 3 stated that they were scared of Diamond and that defendant was a good brother.

¶ 21 Mary Sumo testified that she and Paul were separated. Neither the triplets nor Diamond told her that defendant did anything bad to them. She denied being present for a meeting between Pastor Tabe and defendant in which defendant was accused of touching the triplets. A DCFS agent told her that Diamond said defendant was touching the triplets. The agent directed Mary to take the triplets for medical examinations and VSI. Although defendant spent time with the family at the Bolingbrook residence and, subsequently, the Plainfield residence, defendant never slept at either residence overnight.

¶ 22 Paul Brownson testified that neither the triplets nor Diamond told him that defendant touched the triplets' private parts. Paul also denied being present for a meeting between Pastor Tabe and defendant in which defendant was accused of touching the triplets. He first heard about the allegations from Mary when she was taking the triplets to the hospital for medical examinations. He asked defendant about the accusations, and defendant denied it. He stated that defendant and Diamond were constantly fighting. After the triplets' medical examination, he sent defendant to live with a relative in Massachusetts. He denied that he hit Diamond in January 2013 and stated that the argument that day was about her poor grade in school. Although defendant spent time at the Bolingbrook and Plainfield residences, he never spent the night at the

residences. He never heard defendant yell at the triplets but he had heard Diamond yell at them at home.

¶ 23 Pastor Tabe testified the family had attended his church. He denied being present for a meeting between himself and defendant in which defendant was accused of touching the triplets. After he heard about the allegations, he asked the triplets if defendant touched them and they responded no. He observed Diamond and defendant argue constantly.

¶ 24 Joliet Police Detective James Voudrie testified that he interviewed Paul and Mary, who told him that defendant lived in the Bolingbrook residence when he moved to the United States and occasionally stayed the night at the Plainfield residence. He also interviewed the triplets. In particular, Doe 3 told him that Paul stated it was her job to free defendant.

¶ 25 Nichole Pasteris, a victim advocate for the Will County State's Attorney's Office, testified that, in November 2013, she observed the girls crying in court. Paul took the girls outside of the courtroom and stated, "This is what happens when you talk to people without confirming with me first."

¶ 26 Annet testified that when she moved to the Bolingbrook residence and, subsequently, the Plainfield residence, defendant did not stay the night. Annet never heard screaming from the triplets' room, and Diamond never told Annet that she had heard screaming from their room. The triplets never told her that defendant had touched them inappropriately. There was never a conversation between Diamond, Annet, and the triplets during which the triplets stated that defendant had touched them inappropriately. She observed Diamond and defendant fight a lot and believed Diamond picked on everyone in the house.

¶ 27 Shaw testified that he was present when Paul and Diamond were arguing about Diamond's poor grade in school. He believed Diamond was "very loud and obnoxious."

¶ 28 The jury returned a verdict of guilty. Defendant filed a posttrial motion, arguing that the State did not prove him guilty beyond a reasonable doubt and that the court erred when it admitted Diamond's and Lundquist's section 115-10 testimony at trial. The trial court denied the motion. The court sentenced defendant to eight years each on counts I to III and seven years each on counts VII to VIII to be served consecutively. The court stated that it "merges the sentences on Counts IV, V and VI with I, II and III. Those judgments of conviction, however, to stand." Defendant filed a motion to reconsider his sentences and the court denied the motion. Defendant appealed.

¶ 29 ANALYSIS

¶ 30 Defendant claims that the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) because it did not ask the jury whether it understood and accepted (1) the defendant is presumed innocent of the charges against him and (2) it could not be held against defendant if he did not testify at trial. Defendant failed to preserve this issue for review.

¶ 31 The plain error doctrine allows this court to consider forfeited issues when a clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant or (2) the error is so serious that it affected the fairness of defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Jackson*, 2014 IL App (3d) 120239, ¶ 98 (citing *People v. Herron*, 215 Ill. 2d 178-79 (2005)).

¶ 32 Rule 431(b) attempts to ensure the seating of jurors who are fully informed and accepting of the rules that direct the exercise of their duties at trial. Rule 431(b) states:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following

> principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 33 "Rule 431(b), therefore, mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule." *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). The alleged error is only reviewable under the first prong of the plain error rule because a Rule 431(b) violation "does not implicate a fundamental right or constitutional protection." *Id.* at 614-15. "The only question in a first-prong case, once clear error has been established, is whether the evidence is closely balanced." *People v. Sebby*, 2017 IL 119445, ¶ 69.

¶ 34 The trial court failed to comply with Rule 431(b) when it did not ask the jurors whether they understood and accepted two of the four principles: (1) defendant is presumed innocent of the charges against him, and (2) defendant's decision not to testify should not be held against him. This failure of the trial court constituted clear and obvious error.

¶ 35 Furthermore, we find the evidence is closely balanced. Evidence is closely balanced when the jury's verdict is primarily based on its credibility determination. See *People v. Sebby*, 2017 IL 119445, ¶ 63 (ruling that the evidence was closely balanced because "the outcome of the case turned on how the finder of fact resolved a 'contest of credibility' "); *People v. Naylor*, 229 Ill. 2d 584, 668-69 (2008) (finding that evidence was closely balanced when "the evidence boiled down to the testimony of two police officers against that of the defendant" and there was no evidence to contradict or corroborate anyone's testimony); *People v. Vesey*, 2011 IL App (3d) 090570, ¶ 17 (determining evidence was closely balanced because "defendant's verdict was decided by who the jury found more credible); *People v. Evans*, 369 Ill. App. 3d 366, 376 (2006) (holding that evidence was closely balanced because "the verdict was primarily upon a credibility determination of the completing theories testified to by the parties' respective experts"); *People v. Williams*, 332 Ill. App. 3d 693, 699 (2002) (determining that evidence was closely balanced because the case came down to "the credibility of [the victim's] out-of-court statements as opposed to the believability of her trial testimony").

¶ 36 Here, there was no direct or objective evidence that the children had been molested or that the defendant had abused them, the testimony of the witnesses was wildly divergent, the victims recanted their earlier allegations against the defendant, and the jury was dependant on its assessment of witness credibility to render its verdict. The State presented incriminating testimony from Diamond, Dr. Hakim, Officer Martis, and the VSI. However, the triplet's mother, father, pastor, and half-sister all denied the occurrence of events and actions alleged by Diamond and discredited her testimony. Although in the VSI the triplets said that diamond was a good sister, at trial they recanted their statements and Doe 2 and Doe 3 testified that Diamond threatened them if they did not lie and that they were scared of her. Moreover, although Dr.

Rangala paid special attention to the narrow hymen of Doe 1 and complaints of stomach pain by Doe 2, she was unable to conclude that these were definitive indicators of sexual abuse in this case. Dr. Hakim's and Dr. Rangala's examinations of the triplets revealed no injuries. Therefore, we find that the evidence was closely balanced and that defendant has met the first prong of plain error review.

¶ 37 We next consider whether the constitutional prohibition against double jeopardy precludes a second trial for this alleged offense. The double jeopardy clause of the United States Constitution (U.S. Const., amend. V) protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *People v. Placek*, 184 Ill. 2d 370, 376-77 (1998). When a reviewing court reverses a criminal conviction and remands the case for a new trial without determining whether the evidence was sufficient, the court "risks subjecting the defendant to double jeopardy." *People v. Taylor*, 76 Ill. 2d 289, 309 (1979). Therefore, the double jeopardy clause requires a reviewing court to rule on defendant's challenge to the sufficiency of the evidence. *Id.*

¶ 38 Defendant argues that the State did not prove him guilty beyond a reasonable doubt because (1) the three victims testified that defendant did not touch them and that Diamond coerced them to make the incriminating statements, (2) multiple witnesses disputed Diamond's story, (3) there was no physical evidence, and (4) defendant did not make any incriminating statements.

¶ 39 A criminal conviction will not be set aside on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When determining the sufficiency of the evidence,

the question is whether, after viewing the evidence in the light more favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* This standard applies regardless of whether the evidence is direct or circumstantial. *People v. Pollock*, 202 Ill. 2d 189, 217 (2002).

¶ 40 Viewing the evidence in light most favorable to the State, we find that the evidence was sufficient to convict**.** The testimony of Officer Martis, Dr. Hakim, and Diamond and the triplets' VSI gave accounts of defendant's actions as they relate to the elements of the crime charged. See *People v. Smith*, 185 Ill. 2d 532, 541 (1999) ("The testimony of a single witness, if it is positive and the witness is credible, is sufficient to convict."). Therefore, the double jeopardy clause does not bar remand of this case for a new trial. Because the evidence is closely balance, we emphasize that our decision has no bearing on defendant's guilt on retrial. See *Taylor*, 76 Ill. 2d at 310.

¶ 41 CONCLUSION

¶ 42 The judgment of the circuit court of Will County is vacated and the matter remanded.

¶ 43 Vacated and remanded.

¶ 44 JUSTICE HOLDRIDGE, dissenting:

¶ 45 I agree with the majority that the trial court failed to comply with Rule 431(b). However, I dissent from the majority's conclusion that the evidence in this case was so closely balanced to warrant a new trial. Our supreme court stated, "a reviewing court must undertake a commonsense analysis of all the evidence in context when reviewing a claim under the first prong of the plain error doctrine." *People v. Belknap*, 2014 IL 117094, ¶ 50. Additionally, this commonsense analysis involves a *qualitative* assessment rather than a *quantitative* assessment. See *People v. White*, 2011 IL 109689, ¶ 139. Employing that qualitative contextual assessment in

this case, it is clear that the evidence was not closely balanced. The most compelling evidence in this case are the statements the triplets made in their VSIs that were played for the jury. *Supra* ¶¶ 12-14. Although the triplets later recanted these statements, the amount of detail and consistency between these statements cannot be ignored.

¶ 46 I also note that an overwhelming amount of evidence in this case demonstrates that the children did not want to disappoint their family. Diamond testified about the patriarchal structure of the family. She believed that Paul controlled his children and favored the defendant, his only son. Diamond also described a time when the defendant and Paul punched and kicked her. She went to school the next day, where school officials noticed her injuries and called DCFS. She described her eye as bruised and it hurt so bad she could barely open it. Paul testified that he did not hit Diamond. Pictures of Diamond's injuries were admitted into evidence. Despite this abuse, Diamond admitted that she lied about Paul and the defendant's living arrangements to protect her family. Also, Pasteris testified that she observed the triplets crying in court. She then saw Paul take them outside of the courtroom where he said "This is what happens when you talk to people without confirming with me first."

¶ 47 Reviewing the evidence in context with a qualitative and commonsense approach, I would conclude that the evidence in this case was not closely balanced. While the incriminating evidence in the case amounted to Diamond's testimony and the recanted VSIs, it is the quality of the evidence that matters—not the quantity. See *White*, 2011 IL 109689, ¶ 139. Diamond's testimony was consistent from the initial allegation up to and including her testimony at trial. Also, the triplets' VSI statements were consistent with one another and extremely detailed considering their age.

¶ 48 In support of its decision, the majority also notes that the triplets' physical examinations did not reveal signs of abuse. However, I find this unsurprising and of little value for determining whether the evidence was closely balanced, as lack of evidence from physical examinations is common in child sexual abuse cases.

¶ 49 For the foregoing reasons, I would affirm the defendant's conviction.