2018 IL App (4th) 160422-U

NO. 4-16-0422

FILED
October 10, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
ADAM S. ROGERS,	)	No. 15CF3
Defendant-Appellant.	)	
	)	Honorable
	)	Charles M. Feeney III,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant failed to establish the trial court's ruling allowing a police officer to briefly summarize a child victim's statement to him rises to the level of plain error.

(2) Defendant failed to establish his trial counsel was constitutionally ineffective for failing to preserve defendant's claim the police officer should not have been allowed to offer testimony regarding the substance of the child victim's statement to him.

(3) Trial court erred in imposing a Violent Crimes Victims Assistance Fund (VCVA) assessment greater than $100.

(4) Trial court erred in not considering defendant's ability to pay restitution within a certain period of time when it ordered defendant to pay restitution.

¶ 2 In January 2016, a jury found defendant guilty of aggravated criminal sexual abuse. On March 28, 2016, the trial court sentenced defendant to five years in prison, two years of mandatory supervised release, imposed other fines and fees, including a $372 Violent Crimes

Victims Assistance Fund (VCVA) assessment, and ordered defendant to potentially pay restitution of up to $2500 to reimburse the victim, C.A.C., for counseling she sought as a result of defendant's crime. On June 2, 2016, the court denied defendant's motion to reduce his sentence. Defendant filed this appeal, raising the following issues: (1) the court erred in allowing a police officer to testify as to the substance of C.A.C.'s out-of-court statement to him; (2) defendant's trial counsel was ineffective for failing to preserve this issue for appeal; (3) his VCVA assessment should be reduced to $100; and (4) the court improperly ordered defendant to pay restitution without considering his ability to pay. We affirm defendant's conviction but remand with directions for the trial court to lower defendant's VCVA assessment to $100 and hold a new restitution hearing.

¶ 3 I. BACKGROUND

¶ 4 In January 2015, defendant was indicted for indecent solicitation of a child (720 ILCS 5/11-6(a) (West 2014)), aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2014)), and two counts of sexual exploitation of a child (720 ILCS 5/11-9.1(a)(1) (West 2014)). The alleged incident in question occurred while defendant was renting a room in C.A.C.'s home from C.A.C.'s mother.

¶ 5 On March 30, 2015, the State filed a motion to allow hearsay statements made by C.A.C. (born on June 30, 2005) pursuant to section 115-10(a)(1) and (a)(2) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/115-10(a)(1), (a)(2) (West 2014)). The motion stated C.A.C. made a statement related to the offense to Tara Crady during a recorded interview at a child advocacy center on December 30, 2014. The motion also stated C.A.C. made statements related to the offense to Ashley Pinkham, C.A.C.'s babysitter, around December 28, 2014, prior to C.A.C.'s disclosure to Crady. We note the motion did not mention

C.A.C.'s statement to Officer Alan Burton, which occurred between C.A.C.'s statement to Pinkham and her interview with Crady, or C.A.C.'s statement to her mother. The State argued the time, content, and circumstances of these statements provided sufficient safeguards of reliability. The motion further noted C.A.C. would testify at trial. The State asked the court to allow it to introduce the following evidence: (1) C.A.C.'s recorded interview with Crady; (2) C.A.C.'s testimony regarding her disclosure of defendant's conduct to Pinkham; and (3) Pinkham to testify about C.A.C.'s disclosure of defendant's conduct to her.

¶ 6 On May 13, 2015, the trial court held a hearing on the State's section 115-10 motion and heard testimony from Crady and Pinkham. The court noted it would watch C.A.C.'s recorded interview on its own.

¶ 7 On June 4, 2015, the trial court heard arguments on the State's section 115-10 motion. In addition to C.A.C. making statements to Crady and Pinkham, the State also noted C.A.C. gave a very similar account as to defendant's conduct to C.A.C.'s mom and a police officer. The court granted the State's motion.

¶ 8 At defendant's first trial in July 2015, the jury found defendant not guilty of (1) indecent solicitation of a child, (2) sexual exploitation of a child by exposure, and (3) sexual exploitation of a child by masturbation. The jury found defendant guilty of aggravated criminal sexual abuse. However, in September 2015, the trial court vacated defendant's conviction for aggravated criminal sexual abuse after the State conceded it mistakenly did not turn over a videotaped interview of defendant's daughter, S.R., to defendant's attorney in this case. The court ordered a new trial on the aggravated criminal sexual abuse charge.

¶ 9 At defendant's second trial in January 2016, which is the subject of this appeal, Pinkham testified she babysat C.A.C. and her three brothers. Pinkham testified she learned

C.A.C. had said a man who was living at her house had bothered her while she was sleeping. Pinkham heard this information from a woman named Jennifer Gresham, who had a daughter who was friends with Pinkham and a daughter who was friends with C.A.C. Jennifer Gresham overheard C.A.C. making this statement to Gresham's son at Gresham's home.

¶ 10 On December 28, 2014, after C.A.C.'s three brothers had gone to bed, Pinkham asked C.A.C., who was nine at the time, if anyone had ever bothered her while she was sleeping. C.A.C. told Pinkham it only happened one time and asked Pinkham not to tell anyone. C.A.C. said she was sleeping in a bed with defendant and defendant's daughter, S.R. She woke up during the night because the bed was shaking. Defendant was playing with his "private area." Defendant then tugged on C.A.C.'s waistband and put his "private area on top of hers." (We note we are referring to Pinkham's testimony and not necessarily C.A.C.'s exact statement to Pinkham.) C.A.C. said she was wearing pajama shorts. C.A.C. told Pinkham the incident ended when she turned around and said "seriously." Defendant apologized to C.A.C. and said he was stressed. Defendant then moved to the floor. C.A.C. said S.R. was sick and sleeping when this happened.

¶ 11 Pinkham told C.A.C.'s mother what the child said. C.A.C.'s mother then spoke with C.A.C. C.A.C.'s mother called the police.

¶ 12 Pinkham testified Officer Alan Burton from the Minonk police department arrived at the house 10 to 15 minutes later. Burton spoke with Pinkham, C.A.C., and C.A.C.'s mother.

¶ 13 After Pinkham testified, the trial court instructed the jury as follows:

> "You have before you evidence that C.A.C. made statements concerning the offense charged in this case. It is for you to determine whether the statements were made and if so what weight should be given to the statements. In making

that determination you should consider the age and maturity of C.A.C., the nature of the statements, and the circumstances under which the statements were made."

¶ 14 S.R., 11 years old, testified defendant was her father. When visiting her father at C.A.C.'s house, she usually slept in C.A.C.'s room, which was across the hall from defendant's room. One night she and C.A.C. slept in defendant's room. S.R. got sick and threw up during the night. Prior to going to bed, S.R., defendant, and C.A.C. watched a movie. She and C.A.C. were on the floor, and defendant was on the bed. Before the girls went to sleep, she and C.A.C. moved to the bed, and defendant moved to the floor. During the night, she threw up in the hallway outside the bedroom. At that time, defendant was on the floor. She did not see anything happen between defendant and C.A.C. S.R. testified C.A.C. did not say anything to her about anything happening that night.

¶ 15 Officer Alan Burton responded to C.A.C.'s mother's call to the police on December 28, 2014, and met with C.A.C. and her mother. Burton testified he talked to C.A.C. for 5 to 10 minutes. When asked what C.A.C. told him, defense counsel made a hearsay objection. The State responded it was not seeking this information to show the truth of C.A.C.'s statement but to explain what Burton did next. The trial court told the jury:

> "Okay. Same ruling as to the information that he's going to receive here in this instance is hearsay, but I'm going to allow it in to show what he did. Not for the truth of the matter asserted but to show what this officer did as a result of receiving that information."

Officer Burton then testified:

> "[C.A.C.] told me that—and I don't believe she gave me an exact date, I would have to refer to my report—that she was at her home, was sleeping or

> getting ready to go to bed in an upstairs bedroom with the defendant and I believe the defendant's daughter, and that she awoke to the defendant—he had exposed himself and he was rubbing his—she told me he was rubbing his genitalia on her pubic region through the clothes. And then she told me that she asked him or she exclaimed ['']are you serious['] as a question, and that she then said that the defendant stopped and that the defendant then removed himself from the bed to the floor and had asked [C.A.C.] if he was going—if she was going to tell anybody, and she told me that she replied to him I don't know."

Officer Burton then contacted the Department of Children and Family Services (DCFS) and the Woodford County Children's Advocacy Center about the alleged incident.

¶ 16 C.A.C., who was 10 years old at the time of trial, testified she slept in defendant's room with defendant and S.R. one time and believed this happened after Thanksgiving. She remembered defendant getting into bed with her and S.R. S.R. did not feel well that night. C.A.C. was wearing a black tank top, underwear, and purple sweatpants in bed. She woke up during the night because the bed was shaking. She looked and saw defendant had his hand on his naked "private area" and was moving his hand "up and down." Defendant was breathing heavy and tried to pull her pants down. He then touched his "private area" to her "private area." She still had on her pants and underwear when this happened. This went on for a few minutes. C.A.C. testified she was scared. She then got up and said "are you serious" to defendant. Defendant then "clothed his area" and moved off the bed. Defendant told her he was sorry and asked if she was going to tell anyone. She said she did not know. Defendant then moved to the floor. C.A.C. fell back asleep. The next day she told S.R. something happened the night before between C.A.C. and defendant. S.R. asked what had happened, but C.A.C. said it was "nothing."

¶ 17 C.A.C. testified she did not tell anyone what happened for a month or so. The first adult she told was Ashley Pinkham. She then also told her mother. Her mother called the police, and a police officer came to the house. She told the police officer what happened with defendant. A few days later she spoke to Crady about what happened.

¶ 18 Tara Crady testified she is a forensic interviewer at the Tazewell County Children's Advocacy Center. On December 30, 2014, she interviewed C.A.C. in Eureka at the Woodford County Children's Advocacy Center. The interview was audio- and video-recorded. The recorded interview was played for the jury. Defendant concedes in his brief C.A.C.'s recorded statement was consistent with her trial testimony. After Crady's testimony, the State rested.

¶ 19 Kimberly Holterman testified for defendant. She and her two daughters met defendant, S.R., and C.A.C. at the Festival of Trees in Bloomington. According to evidence in the case, this was the day after S.R. and C.A.C. slept in defendant's room and the criminal conduct allegedly occurred. After attending the Festival of Trees, Holterman and her girls and defendant, S.R., and C.A.C. went to the Eastland Mall. They were all together eight or nine hours. Holterman testified C.A.C. did not seem to be afraid of defendant and appeared happy and at ease. She heard C.A.C. tell defendant she wanted him to be her dad. Defendant responded she already had a dad. Holterman stated defendant had a reputation for being a moral person.

¶ 20 Lisa Miller testified she and defendant had dated on and off for the past ten years and defendant had a "very good moral reputation." She was dating defendant at the time of the trial.

¶ 21 After Miller's testimony, the trial court noted it had forgotten to provide the jury

with an instruction after the jurors watched C.A.C.'s recorded interview. The court then told the jury:

> "You have before you evidence that C.A.C. made statements concerning the offense charged in this case. It is for you to determine whether the statements were made and, if so, what weight should be given to the statements. In making that determination you should consider the age and maturity of C.A.C., the nature of the statements, and the circumstances under which the statements were made."

¶ 22 Defendant then testified on his own behalf. He stated he had been involved in a sexual relationship with Pinkham while renting a room from C.A.C.'s mother at C.A.C.'s home. When he ended the relationship in the first part of December, Pinkham was not happy. Defendant had a daughter, S.R., who would occasionally stay with defendant at C.A.C.'s home. S.R. and C.A.C. would play together during these visits. On one occasion, while S.R. was at C.A.C.'s home, both girls slept in his room. This was not planned and only happened one time.

¶ 23 The girls asked to watch a movie in his room to get away from C.A.C.'s brothers. Defendant agreed. He testified he was on the floor and fell asleep while the girls were watching the movie. The girls were on the bed. He slept through the night, even when S.R. got up and vomited in the hall. He woke at 9 or 9:30 a.m. the next morning. The girls were playing with toys on the bed. He told them to get ready to go to the Festival of Trees. He then took a shower.

¶ 24 Defendant, C.A.C., and S.R. went to the Festival of Trees and met Holterman and her daughters. They were at the festival for four or five hours. They then went to the Eastland Mall with Holterman and her daughters. While at the Festival of Trees, C.A.C. told defendant she wished he was her father. He told her that was not going to happen. C.A.C. did not seem to be afraid of him the entire day.

¶ 25 Defendant denied inappropriately touching C.A.C., exposing his penis to her, masturbating in front of her, or touching her with his penis. He denied getting into the bed that night.

¶ 26 The jury found defendant guilty of aggravated criminal sexual abuse.

¶ 27 On March 22, 2016, defendant filed a motion for a new trial and other posttrial relief. On March 28, 2016, the trial court held a hearing and denied defendant's motion. The court then sentenced defendant to five years in prison, two years of mandatory supervised release, assessments including a VCVA penalty of $372, and restitution of up to $2500 to reimburse the cost of any counseling C.A.C. might receive.

¶ 28 In April 2016, defendant filed a motion to reconsider sentence. In June 2016, the trial court denied defendant's motion.

¶ 29 This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 A. Officer Burton's Testimony

¶ 32 Defendant first argues Officer Alan Burton's testimony about the substance of C.A.C.'s statement to him was erroneously admitted under the course of investigation exception to the hearsay rule. According to defendant, this was inadmissible hearsay and evidence of a prior consistent statement, which the State used to enhance C.A.C.'s credibility.

¶ 33 The State argues defendant forfeited this issue. Defendant acknowledges he did not properly preserve the issue because he did not include it in his posttrial motion. However, defendant notes he did object at trial. Defendant asks this court to review the issue pursuant to the plain-error doctrine. When determining whether we can review a forfeited issue pursuant to the plain-error doctrine, we first must determine whether a clear and obvious error occurred.

People v. Sebby, 2017 IL 119445, ¶ 49, 89 N.E.3d 675. If a clear and obvious error occurred, our supreme court has stated a reviewing court can reach a forfeited error in two circumstances:

> "First, where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, a reviewing court may consider a forfeited error in order to preclude an argument that an innocent person was wrongly convicted. [Citation.] Second, where the error is so serious that the defendant was denied a substantial right, and thus a fair trial, a reviewing court may consider a forfeited error in order to preserve the integrity of the judicial process. [Citations.] This so-called disjunctive test does not offer two divergent interpretations of plain error, but instead two different ways to ensure the same thing—namely, a fair trial." *People v. Herron*, 215 Ill. 2d 167, 178-79, 830 N.E.2d 467, 475 (2005).

¶ 34 The State argues no error occurred because the trial court did not abuse its discretion in allowing Officer Burton's testimony regarding C.A.C.'s statement to him about the alleged incident in this case. Citing *People v. Simms*, 143 Ill. 2d 154, 174, 572 N.E.2d 947, 954-55 (1991), the State contends a police officer's testimony regarding conversations with others is admissible if the testimony is not offered to show the truth of the matter asserted but is introduced to explain the investigative steps taken by the testifying officer. According to the State, it introduced this evidence through Officer Burton to explain the steps Burton took in investigating the offense and not for the truth of C.A.C.'s statement.

¶ 35 In *Simms*, our supreme court stated:

> "This court has held that a police officer may recount the steps taken in the investigation of a crime, and may describe the events leading up to the

> defendant's arrest, where such testimony is necessary and important to fully explain the State's case to the trier of fact. [Citations.] We have also held that a police officer may testify about his conversations with others, such as victims or witnesses, when such testimony is not offered to prove the truth of the matter asserted by the other, but is used to show the investigative steps taken by the officer. Testimony describing the progress of the investigation is admissible even if it suggests that a nontestifying witness implicated the defendant." *Simms*, 143 Ill. 2d at 174, 572 N.E.2d at 954-55.

Officer Burton's testimony regarding his conversation with C.A.C. went beyond offering an explanation for the investigative steps he took after talking to C.A.C. Instead, Officer Burton's testimony briefly went into the substance of C.A.C.'s allegation against defendant.

¶ 36 In *People v. Cameron*, 189 Ill. App. 3d 998, 546 N.E.2d 259 (1989), this court quoted with approval a leading treatise on evidence law on the issue of the investigative course of conduct exception to the hearsay rule:

> " 'In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct. His testimony that he "acted upon information received," or words to that effect, should be sufficient. Nevertheless, cases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted. The need for the evidence is slight, the likelihood of misuse great.' " *Cameron*, 189 Ill. App. 3d at 1004, 546 N.E.2d at 263, quoting McCormick,

Evidence § 249, at 734 (3d ed. 1984).

This court reflected on the need for courts to carefully assess this type of testimony to ensure it does not include things unnecessary to explain the police officer's conduct. *Cameron*, 189 Ill. App. 3d at 1004, 546 N.E.2d at 263. To keep unnecessary information from entering a trial pursuant to this hearsay exception, this court recommended trial courts hold a hearing outside the presence of the jury to determine what testimony would be allowed.

¶ 37 The situation in this case is unique because the State likely could have introduced C.A.C.'s statement to Officer Burton pursuant to section 115-10 of the Procedure Code (725 ILCS 5/115-10 (West 2014)) along with C.A.C.'s statements to Pinkham and Crady, which the trial court allowed. The State failed to take advantage of section 115-10 with regard to C.A.C.'s statement to Officer Burton and instead introduced the statement pursuant to the investigative course of conduct exception to the hearsay rule. Pursuant to this court's decision in *Cameron*, the trial court should have conducted a hearing outside the presence of the jury to determine both the scope of Officer Burton's testimony regarding C.A.C.'s statement to the officer and the need for the jury to hear this information to explain his course of conduct after speaking with C.A.C. The court did not do this, and Officer Burton was allowed to offer testimony which was unnecessary to explain his conduct after the interview. The trial court erred in allowing the State to introduce C.A.C.'s statement to Officer Burton in the manner it chose.

¶ 38 That being said, defendant has failed to establish this error rises to the level of plain error. We note the error only allowed the trier of fact to hear evidence it heard through other means which defendant does not challenge. For example, the jury heard the same information from C.A.C.'s live testimony, her recorded interview with Crady, and Pinkham's testimony about what C.A.C. told her. Burton's inappropriate testimony simply provided the

jury with redundant information.

¶ 39 Because the error only resulted in the jury hearing redundant evidence, defendant cannot establish the evidence was so closely balanced the jury's verdict may have resulted from the error and not the evidence (*Herron*, 215 Ill. 2d at 178, 830 N.E.2d at 475). Instead, the jury simply heard the same information it heard from sources defendant does not challenge. Further, because C.A.C.'s statements to Pinkham and Crady were deemed admissible and introduced pursuant to section 115-10, defendant cannot establish the court's error in allowing the jury to hear the same information from Officer Burton was so serious it affected the fairness of defendant's trial and challenged the integrity of the judicial process (*Herron*, 215 Ill. 2d at 179, 830 N.E.2d at 475).

¶ 40 Defendant also argues his trial counsel was ineffective for failing to preserve this issue for our review. To prevail on a claim of ineffective assistance of counsel, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish prejudice, a defendant must show a reasonable probability exists the result of the proceedings would have been different absent the error. *People v. Houston*, 229 Ill. 2d 1, 4, 890 N.E.2d 424, 426 (2008). Defendant cannot establish prejudice in this case. As noted earlier, the jury did not hear anything from Officer Burton regarding C.A.C.'s allegation other than what it heard from C.A.C. in court, C.A.C.'s recorded interview, and Pinkham's testimony regarding C.A.C.'s statement to her about what defendant did. Even if the error had been properly preserved in this case, the error was harmless because the jury learned no new information as a result of the error.

¶ 41 B. VCVA Assessment

¶ 42 Defendant next argues his VCVA assessment should be reduced from $372 to $100 because the offense occurred after July 1, 2012, which was after section 10(b)(1) of the Procedure Code (725 ILCS 240/10(b)(1) (West 2014)) was amended to allow for a VCVA penalty of $100 for an individual convicted of a felony. The State concedes defendant's VCVA assessment should be reduced to $100. We accept the State's concession.

¶ 43 C. Restitution

¶ 44 Defendant next argues the trial court erred in ordering defendant to pay restitution of up to $2500 for any costs C.A.C. incurred for counseling. Defendant argues the court erred in doing so without first considering defendant's ability to pay as required by section 5-5-6(f) of the Unified Code of Corrections (Corrections Code) (730 ILCS 5/5-5-6(f) (2014)). Defendant argues we must vacate the restitution order and remand the case to the trial court for a hearing to determine defendant's ability to pay restitution.

¶ 45 The State disagrees the trial court was statutorily obligated to consider a defendant's ability to pay restitution when imposing restitution. *People v. Otten*, 228 Ill. App. 3d 305, 313, 591 N.E.2d 907, 912 (1992). However, the State concedes the case should be remanded for a new restitution hearing because the court did not meet its requirement of considering defendant's financial ability to pay the ordered restitution within a certain period of time as required by section 5-5-6(f) of the Corrections Code (730 ILCS 5/5-5-6(f) (West 2014)). We accept the State's concession and remand this case for the trial court to vacate the restitution order and hold a new restitution hearing.

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated, we affirm defendant's conviction but remand this case with directions for the trial court to reduce defendant's VCVA assessment to $100, vacate the

restitution order, and hold a new restitution hearing. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 48 Affirmed in part; remanded with directions.