2018 IL App (4th) 160889-U

NO. 4-16-0889

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 11, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
DAVID A. McGEE,	)	No. 14CF926
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Harris and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding defendant forfeited review of his claim that the trial court erred in preventing a witness from testifying on the victim's alleged prior hallucinations.

¶ 2 In October 2016, a jury found defendant, David A. McGee, guilty of attempt (aggravated criminal sexual assault). The trial court sentenced him to 15 years in prison.

¶ 3 On appeal, defendant argues the trial court erred in ruling a witness could not testify about the victim's alleged prior hallucinations, which prevented defendant from presenting relevant evidence in his defense. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In August 2014, the State charged defendant by information with single counts of attempt (aggravated criminal sexual assault) (count I) (720 ILCS 5/8-4(a), 11-1.30(a)(5) (West 2014)) and unlawful restraint (count II) (720 ILCS 5/10-3(a) (West 2014)). In count I, the State

alleged defendant committed the offense of attempt (aggravated criminal sexual assault) in that he, with the intent to commit the offense of aggravated criminal sexual assault, performed a substantial step toward the commission of that offense, in that he put duct tape over the mouth of A.M., a person 60 years of age or older, threatened her with a knife, and attempted to remove her clothing while instructing her to have sexual intercourse with him. In count II, the State alleged defendant committed the offense of unlawful restraint in that he knowingly and without legal authority detained A.M., a person 60 years of age or older, within a bedroom of a Decatur residence. Defendant pleaded not guilty.

¶ 6 In September 2014, the State filed a petition to have defendant declared a sexually dangerous person. Over the next several months, defendant, who had been appointed counsel, filed multiple *pro se* motions. In October 2015, the trial court granted defendant's request to discharge his attorney and proceed *pro se*. In January 2016, the State withdrew its petition to declare defendant a sexually dangerous person. Four months later, defendant asked for an attorney to be appointed, and the court appointed the public defender.

¶ 7 A. Motion *In Limine*

¶ 8 Prior to trial, the State filed a sixth motion *in limine*, indicating it had come to its attention that Crystal Wood, defendant's mother and A.M.'s daughter, "intended to testify for the defense about [A.M.] possibly hallucinating in the past." The motion alleged, in part, as follows:

> "Crystal Wood intends to testify that in 2013, she wasn't sure if [A.M.] had hallucinated or not. Specifically, she stated that sometime in early 2013 her mother had been sleeping and awoke and told her she had seen a deceased relative and spoke with them. Crystal Wood stated that she didn't know if [A.M.] had dreamt it,

> had seen a ghost, or hallucinated that she had seen the deceased relative. She stated that a few months before [defendant] had moved in with [A.M.], [A.M.] had been sleeping and when she awoke she asked Crystal Wood a question about a conversation they had just had, but Crystal stated that they had not had a conversation and her mother had just woken up so she didn't know if she hallucinated the conversation or had dreamt that she had just spoken with her. She stated that she has never seen [A.M.] speaking to someone not there nor has she actually seen her having a hallucination or talking and not making any sense."

¶ 9 The State indicated Wood does not have any formal training in psychiatry, cannot diagnose whether someone has had hallucinations, and cannot render an opinion as to whether A.M. hallucinated in the past. The State also noted A.M. has never stated she hallucinated and no medical documentation indicated she had hallucinated in the past. Arguing that whether Wood believes A.M. could have possibly hallucinated in 2013 was not relevant and would be more prejudicial than probative to the truth of the matter, the State asked the trial court to "enter an order preventing Crystal Wood from testifying about her belief that [A.M.] may have hallucinated twice in 2013."

¶ 10 At the hearing on the motion *in limine*, the prosecutor responded to the trial court's question of whether Wood was surmising that A.M. had a hallucination by stating, in part, as follows:

> "It was myself and a victim advocate that met with [Wood], and she just indicated two different dates that she didn't remember

exactly where, her mother had woken up from a nap and had started talking about a conversation that she thought she had with Crystal already, but she had not had that conversation. So Crystal Wood indicated she didn't know if she had dreamed that they had talked about it or hallucinated it.

The other incident she said her mother had woken up from a nap and had told her that she had seen a deceased relative and talked to them, and she indicated to myself and the victim advocate that, again, she didn't know if she had just dreamed that, if she had seen a ghost, or if she had hallucinated but that's all. She did not indicate that [A.M.] told her she hallucinated. This was her interpretation of what her interaction was."

¶ 11 Defense counsel responded as follows:

"I'm not asking her to—to give a medical diagnosis. I'm just asking her to be able to relate what she saw and was present with in her presence. It's not like the grandmother in this case told her daughter, ['']Hey, I saw—I was talking with this deceased relative.['] The daughter was there when the grandmother woke up and said that she was just talking with his deceased relative, that's different. That's not saying she suffers from a condition, but that's saying that she has woken up from sleep in the past and relayed things to people that were not true."

¶ 12 The trial court ruled as follows:

"I'll allow the motion at this time without prejudice. In other words, if the issue depending on how the direct examination goes of the alleged victim, if it becomes relevant, then the Court will revisit it at that time. I just don't know how—there are occasions when people wake up from sleep and they had a dream and they think for just a few minutes the dream is true and it's not true, the dream, that happens.

That doesn't mean every time a person wakes up whatever they remember happening from that point forward really didn't happen. I don't see any connection necessarily between the incident in 2013 and whether or not it bears on the witness's credibility. If there was a medical or psychiatric [diagnosis] suggesting that this complaining witness had a thought disorder that affected her memory or her ability to perceive reality, that would be one thing.

But I haven't heard anything so far that leads me to believe that this Crystal Wood has the ability to provide that foundation. So we'll show motion allowed without prejudice."

¶ 13 B. Jury Trial

¶ 14 In October 2016, defendant's jury trial commenced. A.M. testified she was 81 years old at the time of trial. In December 2013, defendant, A.M.'s grandson, moved into A.M.'s residence, in which A.M. resided with her cat and dog. At approximately 2 a.m. on April 1, 2014, A.M. awoke in her bedroom and saw defendant naked and standing at the end of her

bed. When A.M. asked him what he was doing, defendant said he wanted her to come to the kitchen and "watch something" with him. A.M. walked to the kitchen and sat at the table. Defendant then said he "wanted to have sex with his grandma," but A.M. said no. They argued "a little bit," and then defendant went to bed.

¶ 15 Between 2 and 2:30 a.m. on May 13, 2014, A.M. woke up to find defendant "standing at the end of [her] bed with a knife in his hand." Defendant, who was naked at the time, wanted A.M. to go to the front room and watch something on the computer. A.M. said she did not want to, but defendant threatened to kill her cat. A.M. got up, went to the front room, and sat on the couch. At that time, defendant was holding a knife and duct tape, and the computer showed a pornographic video. Defendant then stated he "wanted to have sex" with A.M. A.M. said she could not and did not want to. After repeatedly telling him no, defendant told A.M. to put her hands out in front of her. A.M. said no, and defendant put the duct tape over her mouth and nose. A.M. told him she could not breathe, and defendant took the tape off her nose. A.M. and defendant started arguing, and A.M. told him to put his pants on. She also saw defendant standing by the computer touching his breasts and his genitals. "After about an hour," A.M. stated she had to use the bathroom. While in the bathroom, she tried to find her medical alert device, but she could not locate it. A.M. returned to the living room, and defendant tried to tape her arms down. They "struggled a bit," and A.M.'s nightshirt fell down off her shoulder. Defendant then tried to take down her bra strap but stopped. During the struggle, defendant dropped the knife. A.M. told defendant she was going to tell his mother, and defendant calmed down. A.M. testified defendant later said he "messed up" and his mother would make him leave the house. A.M. told him she would not say anything if the conduct did not happen again.

¶ 16 At approximately 2 a.m. on June 10, 2014, A.M. woke to find defendant naked

and standing at the end of her bed. A.M. activated her medical alert device, and the alarm in the front room sounded. Defendant ran to shut it off. A.M. then pushed "some boxes of clothes and blankets" in her room against the door. She called defendant's mother and said she needed help. The police arrived, and defendant locked himself in his room.

¶ 17 On cross-examination, A.M. testified she remembered talking to a police officer on June 10, 2014. She mentioned the three incidents, although she could not remember telling the officer certain aspects of each incident. When defense counsel asked if all three incidents began when she woke up, A.M. stated the May 13 incident began after she "had gotten up and went to the bathroom" and she was sitting on the bed when he entered.

¶ 18 Decatur police detective Joe Patton testified he met with A.M. on July 30, 2014. At that time, she brought a knife and a laptop computer. That same day, she brought in a roll of duct tape. On cross-examination, Patton testified A.M. mentioned three separate incidents involving defendant. During the April 1, 2014, incident, A.M. stated defendant came into her bedroom and said he wanted to have sex with her. Regarding the May 13, 2014, incident, A.M. stated defendant put duct tape on her mouth but took it off when she indicated she could not breathe. During the June 10, 2014, incident, A.M. called defendant's mother, who called the police.

¶ 19 Crystal Wood, defendant's mother and A.M.'s daughter, testified she received an early morning call from A.M. on June 10, 2014. During the call, Wood could hear her son's voice "getting louder." Wood told A.M. she would be right over. She called the police and drove to Decatur.

¶ 20 Justin Gray testified he worked as a Decatur police officer in 2014. He was dispatched to a Decatur residence at approximately 4:30 a.m. on June 10, 2014, to check on

A.M.'s welfare. Gray made contact with A.M. He entered the residence and saw a laptop computer that was "playing pornography." Gray proceeded to a locked bedroom door and asked defendant to come out. Defendant stated he would be out in a minute, as he was putting on clothes. Gray stated defendant came out wearing a pair of shorts after "approximately two minutes." Gray asked defendant "why there was pornography playing in the living room," and defendant said he was watching it. Gray asked defendant if he had attempted to have sex with his grandmother, and defendant said he did not. When asked why A.M. would make this allegation, defendant stated "he was pretty high and was doing some weird things and whatever she said is probably true." Gray later spoke with A.M., who was "talking pretty fast" with a "shake in her voice *** like she was scared."

¶ 21 Decatur police detective Ronald Borowczyk testified he conducted a forensic examination of the laptop computer, specifically looking at access to the Internet that occurred on April 1, 2014, May 13, 2014, and June 10, 2014. Borowczyk testified the Internet history for those days included known pornography websites.

¶ 22 After the State rested, the defense did not present any evidence. Following closing arguments, the jury found defendant guilty of attempt (aggravated criminal sexual assault) and not guilty of unlawful restraint.

¶ 23 In November 2016, defense counsel filed a motion for a new trial, arguing (1) the State failed to prove defendant guilty beyond a reasonable doubt, (2) the trial court erred in allowing evidence of him watching pornography on three different dates, and (3) the court erred in denying his motion for a directed verdict at the close of the State's case. The court denied the motion. The court then sentenced defendant to 15 years in prison. This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 Defendant argues the trial court erred in ruling that Wood could not testify about A.M.'s confusion upon awakening, which prevented him from presenting relevant evidence in his defense. We disagree.

¶ 26 Initially, we note defendant acknowledges trial counsel failed to preserve this issue by raising it in a posttrial motion. Thus, the issue is forfeited on appeal. See *People v. Hestand*, 362 Ill. App. 3d 272, 279, 838 N.E.2d 318, 324 (2005) (a defendant must object at trial and raise the issue in a posttrial motion to preserve the issue for review). However, he argues this court should review the issue as a matter of plain error.

¶ 27 The plain-error doctrine allows a court to disregard a defendant's forfeiture and consider unpreserved error in two instances:

> "(1) where a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error and (2) where a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process ***." *People v. Belknap*, 2014 IL 117094, ¶ 48, 23 N.E.3d 325.

¶ 28 "[T]he plain error rule is not a general savings clause for any alleged error, but instead is designed to address *serious injustices*." (Emphasis in original.) *People v. Williams*, 299 Ill. App. 3d 791, 796, 701 N.E.2d 1186, 1189 (1998). Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015. As the first step in the analysis, we must determine "whether there was a clear or obvious error at trial." *People v. Sebby*, 2017 IL 119445, ¶ 49, 89 N.E.3d

675. "If error did occur, we then consider whether either prong of the plain-error doctrine has been satisfied." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 31, 972 N.E.2d 1272.

¶ 29 " 'Generally, evidentiary motions, such as motions *in limine*, are directed to the trial court's discretion, and reviewing courts will not disturb a trial court's evidentiary ruling absent an abuse of discretion.' " *People v. Patrick*, 233 Ill. 2d 62, 68, 908 N.E.2d 1, 5 (2009) (quoting *People v. Harvey*, 211 Ill. 2d 368, 392, 813 N.E.2d 181, 196 (2004)). "An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37, 986 N.E.2d 634; see also *People v. Peterson*, 2017 IL 120331, ¶ 125, 106 N.E.3d 944 (stating "[t]he abuse-of-discretion standard of review is highly deferential").

> "A defendant has the right to present a defense, present witnesses to establish a defense and to present his version of the facts to the trier of facts. [Citation.] A trial court, however, may reject offered evidence on the grounds of irrelevancy if such evidence has little probative value due to its remoteness, uncertainty or its possibly unfair prejudicial nature. [Citation.] Evidence is relevant if it tends to make the question of guilt more or less probable." *People v. Wright*, 218 Ill. App. 3d 764, 771, 578 N.E.2d 1090, 1095 (1991).

¶ 30 In the case *sub judice*, the State sought to prevent Wood from testifying that A.M. may have hallucinated on two occasions in 2013. Both occasions involved A.M. waking up and then allegedly making statements about speaking with a dead relative or having had a conversation with Wood that did not occur. The State alleged Wood was not sure if A.M.

actually hallucinated and noted A.M. had never stated she hallucinated.

¶ 31 We find defendant has not established the trial court committed error in granting the State's motion *in limine*. Defendant claims the court erred by restricting cross-examination of Wood on the possibility that A.M. may have hallucinated in the past. However, such testimony would have been irrelevant and speculative. Wood was not a medical expert capable of giving an opinion on hallucinations and, according to the State, she was not even sure A.M. hallucinated in 2013. Moreover, the defense did not present any evidence that A.M. suffered from a mental illness or that similar incidents continued into 2014. The alleged hallucinations involved innocuous conversations after waking in 2013, in contrast to A.M.'s testimony of defendant's attempted sexual assaults after she awoke in 2014. A.M.'s testimony did not evince any inability to distinguish between fantasy and reality and the evidence corroborated her testimony, as shown by Borowczyk's analysis of the laptop computer revealing pornographic websites being visited on the dates of the attempted assaults. As we find no error, we hold defendant to his forfeiture of this issue.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 34 Affirmed.