2019 IL App (1st) 160334-U

No. 1-16-0334

Order filed March 27, 2019

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 11854
	)	
ARYEH DUDOVITZ,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for criminal sexual assault over his contentions that State failed to prove him guilty beyond a reasonable doubt and that trial court erred by admitting hearsay testimony.

¶ 2 Following a bench trial, defendant Aryeh Dudovitz was convicted of criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2006)) and sentenced to eight years' imprisonment. On appeal, defendant argues that his conviction should be reduced to aggravated criminal sexual

abuse because the State failed to present sufficient evidence that he committed an act of sexual penetration. He also argues that the trial court erred by admitting hearsay testimony. We affirm.

¶ 3 Defendant was charged by indictment with one count of criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2006)). The indictment alleged that defendant committed an act of sexual penetration, *i.e.* oral sex, with M.B., who was between the ages of 13 and 17, and defendant, a rabbi at M.B.'s synagogue, was 17 years of age or older, and held a position of trust in relation to M.B. Defendant waived his right to a jury, and the case proceeded to a bench trial.

¶ 4 M.B. testified that defendant was a rabbi at his family's synagogue. He described defendant as a spiritual leader who would lead the congregation in prayer. M.B. was 11 or 12 years old when he met defendant, who tutored him in preparation for his Bar Mitzvah. Defendant continued to informally tutor M.B. In 2006, M.B. was 15 years old and struggling with his faith. During this time, defendant privately tutored M.B. in religious studies. M.B. described defendant as a mentor.

¶ 5 In October of 2006, M.B.'s family was celebrating the Jewish holiday Sukkot. The holiday involves building huts in which celebrants eat, drink, and congregate. M.B.'s family built a hut for this purpose. M.B., who was attending school in New York at the time, was in town for the holiday. One night, M.B., his father, his two brothers, and defendant celebrated the holiday by drinking alcohol, singing, and dancing together in the family's hut. M.B., though a minor, drank beer and hard liquor.

¶ 6 Eventually, the others went to sleep, and only M.B. and defendant remained in the hut. The two continued drinking alcohol, with defendant "serving [M.B.] shots of Smirnoff." At some point, M.B. became sick and vomited in the hut. About midnight, M.B. told defendant that he

was going to sleep. M.B. invited defendant to spend the night on the couch, because defendant had a long walk home. Defendant declined, and M.B. saw him walk toward the exit. M.B. proceeded to the basement, where his room was located, and which he shared with his two brothers. M.B. stripped down to his underpants and got into bed.

¶ 7 M.B. awoke in the night to find defendant's head near his groin area. Defendant's head then moved to the side of M.B.'s bed and M.B. felt the elastic band on his underpants "snap" back into place. M.B. also noticed that his penis felt wet. M.B. described the feeling as "sticky, pasty" and he explained that he felt it on his penis and underpants. Defendant got to his feet and ran up the stairs. M.B. fell back asleep. M.B. explained that, at the time, he had no sexual education and was, therefore, unfamiliar with the concepts of oral sex and ejaculation. A few days later, defendant visited M.B.'s house and spoke to M.B. at the front door. Defendant told M.B. that he wanted to apologize for "what happened" that night without elaborating. M.B. returned to New York to continue with his schooling.

¶ 8 M.B. returned home again in December 2006 to celebrate the holiday of Chanukkah. On December 25th, M.B. was preparing to return to New York when his mother informed him that defendant had arrived and wished to speak with him. M.B. went into his room, where he found defendant waiting for him. Defendant asked M.B. to come closer to him and then began to embrace M.B., kissing his neck. Defendant began to breathe heavily and told M.B. how much he loved him. M.B. broke away and ran up the stairs.

¶ 9 On cross-examination, M.B. testified that he did not see defendant's mouth on his penis. M.B. also testified that he spoke with the rabbinical council in October 2006 and told the council

that defendant had “raped” him. M.B. also stated that, in November of 2006, he spoke with a member of the Department of Children and Family Services.

¶ 10 On re-direct examination, M.B. testified that, on December 25, 2006, he told his mother about the incident with defendant in October. He clarified that he spoke with the rabbinical court shortly after the conversation with his mother.

¶ 11 Faigy B., M.B.’s mother, testified that she first met defendant when he was a substitute teacher at her children’s school. Eventually, defendant became a rabbi at the synagogue that Faigy and her family attended. Faigy testified that she considered defendant to be a family friend and acknowledged that her family would sometimes provide him with financial support, such as hiring him to tutor M.B. in preparation for his Bar Mitzvah. When M.B. was 15 years old, Faigy asked defendant to mentor M.B. in an effort to guide him in his religious studies. In October of 2006, Faigy’s husband, M.B., and her other sons celebrated the Sukkot holiday with defendant. The following morning, defendant returned to the home and asked Faigy if he could speak with M.B. so that he could apologize to him. Defendant spoke with M.B. and, after defendant left, M.B. told his mother that defendant had apologized.

¶ 12 On December 25, 2016, defendant came over and Faigy met him at the door. She noted that defendant looked nervous and was wearing his prayer shawl, which she described as “unusual.” Faigy asked defendant if he was all right, to which he replied that he was “nervous about” M.B. because M.B. seemed “very cold.” Defendant asked to speak to M.B., who was in the basement packing to return to school in New York. Faigy saw defendant go down into the basement and then leave five minutes later. M.B. came up shortly after, appearing “very shaken up.” Faigy asked him what was wrong. She testified, over defense counsel’s objection, that M.B.

told her not to "let [defendant] in [the] house near any of the kids." Faigy asked M.B. to tell her what had happened. She described M.B. as being reluctant to answer. She told M.B. that he needed to tell her what had happened if he did not want defendant to harm any other children. Faigy and M.B. both started to cry. Faigy testified, again over defense counsel's objection, that M.B. stated that he remembered "waking up and feeling wet in his genitals" and he saw defendant "jump up and run up the stairs." Faigy contacted her rabbi to determine the best course of action. A rabbinical court was convened to address the situation. Faigy also testified that she took M.B. to speak to the police.

¶ 13 Love Moore, a child protection investigator with the Department of Children and Family Services, testified that she was assigned to M.B.'s case. On December 29, 2006, Moore interviewed defendant. During the interview, defendant admitted to entering M.B.'s room and fondling him. Defendant told Moore that when M.B.'s penis became erect, he performed oral sex on him. Defendant explained to Moore that he fled when he saw that M.B. had awoken. Moore testified that defendant admitted that he put his mouth on M.B.'s penis.

¶ 14 Zev Victor Cohen testified that he is a rabbi and that he created a special rabbinical council that deals with allegations of molestation within his community. In 2006, the council consisted of Cohen and three other rabbis. Near the end of December 2006, Cohen was made aware of an allegation against defendant. Cohen testified that he did not know either party prior to the allegation. Cohen explained that the council first met with M.B., then M.B.'s mother, and finally with defendant. Cohen recalled that M.B. alleged that defendant performed oral sex on him. Cohen testified that, when the council asked defendant if he had performed oral sex on M.B., defendant replied "yes."

¶ 15 Samuel Furest, a rabbi on the rabbinical council, testified that defendant was asked if he molested M.B., to which he replied "yes." He was then asked if he molested M.B. while he slept on a couch, and defendant again replied "yes." Defendant then admitted to the council that he opened M.B.'s pants and performed oral sex on him.

¶ 16 Edward Loew testified that he is a licensed clinical professional counselor. Loew explained that the special rabbinical council would use his services to aid the rabbis in their handling of sexual abuse cases. In December 2006, Loew participated in the rabbinical court's interviews with M.B. and defendant. During the interviews, defendant was presented with allegations that he performed oral sex on M.B., and he responded by admitting that M.B.'s statements were true. Loew explained that, as a mandated reporter, he contacted the Department of Children and Family Services and made an alleged child abuse report regarding defendant. A few days later, Loew called defendant on the telephone. During the course of their conversation, Loew asked defendant what motivated his decision to abuse M.B. Defendant responded, "If you knew how well endowed he was down there, you wouldn't think he was 15."

¶ 17 The State introduced into evidence a copy of M.B.'s birth certificate showing his date of birth. The State also introduced a copy of defendant's birth certificate, showing his date of birth to be July 10, 1967.

¶ 18 Based on this evidence, the court found defendant guilty of criminal sexual assault. In announcing its decision, the court stated that defendant's admission that he performed oral sex on M.B. was corroborated by M.B.'s testimony that he saw defendant's head move away from his groin area and that he felt wet. Defendant filed a motion to reconsider, arguing that there was insufficient evidence to independently corroborate his admission that he committed an act of

sexual penetration. The court denied defendant's motion, stating that his confession that he performed oral sex on M.B. was corroborated by M.B.'s testimony. The court then sentenced defendant to eight years' imprisonment.

¶ 19 On appeal, defendant first argues that the State failed to prove him guilty beyond a reasonable doubt because it failed to prove the *corpus delicti* of the offense. Specifically, defendant argues that the State failed to provide sufficient independent evidence to corroborate his out-of-court admissions that he committed an act of sexual penetration. He requests this court reduce his conviction to aggravated criminal sexual abuse.

¶ 20 When a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). A defendant's conviction will not be overturned unless the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48.

¶ 21 Here, defendant was found guilty of committing an act of sexual penetration, *i.e.* oral sex, with M.B. when M.B. was between the ages of 13 and 17 and defendant was 17 years or older and held a position of trust in relation to M.B. as a rabbi at M.B.'s synagogue. "Sexual penetration" means "any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person," including "fellatio." 720 ILCS 5/11-01 (West 2006).

¶ 22 Defendant does not dispute that performing oral sex on M.B. while he held the position of rabbi in M.B.'s synagogue, would be sufficient to sustain is conviction. Rather, he argues that the State did not present sufficient independent evidence to corroborate his out-of-court admissions that he performed oral sex on M.B. and, therefore, the State failed to prove the *corpus delicti* of the offense.

¶ 23 "Under the law of Illinois, proof of an offense requires proof of two distinct propositions or facts beyond a reasonable doubt: (1) that a crime occurred, *i.e.*, the *corpus delicti*; and (2) that the crime was committed by the person charged." *People v. Sargent*, 239 Ill. 2d 166, 183 (2010). "[P]roof of the *corpus delicti* may not rest exclusively on a defendant's extrajudicial confession, admission, or other statement." *Id.* If the State relies on a defendant's statements, the State must supplement those statements with "corroborating evidence independent of the defendant's own statement[s]." *Id.* The corroborating evidence need not be sufficient in itself to prove the offense beyond a reasonable doubt. *Id.* Instead, it must merely "tend to show" that the offense occurred. (Emphasis omitted.) *People v. Lara*, 2012 IL 112370, ¶ 18. "If a confession is not corroborated in this way, a conviction based on the confession cannot be sustained." *Sargent*, 239 Ill. 2d at 183.

¶ 24 In this case, after viewing the evidence in the light most favorable to the State, we find that there was sufficient independent evidence to corroborate defendant's admission that he performed oral sex on M.B. Stated differently, the independent corroborating evidence tended to show that defendant committed criminal sexual assault. The record shows that the State presented four witnesses who described two different statements made by defendant in which he admitted that he performed oral sex on M.B. Specifically, Moore testified that defendant

admitted that he fondled M.B. until his penis became erect and then performed oral sex on him. Moore further testified that defendant specifically confessed to putting his mouth on M.B.'s penis. Cohen, Furest, and Loew testified that, during the rabbinical council, defendant admitted to performing oral sex on M.B. The State supplemented defendant's statements with the testimony of M.B., who stated that he awoke to find defendant's head near his groin area and, when defendant's head pulled away toward the edge of the bed, the waistband of his underpants snapped back into place. M.B. testified that his penis felt wet, and described the feeling as "sticky, pasty." As our supreme court explained:

> "[T]he *corpus delicti* rule requires only that the corroborating evidence correspond with the circumstances recited in the confession and tend to connect the defendant with the crime. The independent evidence need not precisely align with the details of the confession on each element of the charged offense, or indeed to any particular element of the charged offense." *Lara*, 2012 IL 112370, ¶ 51.

¶ 25 M.B.'s testimony corresponds with defendant's multiple confessions. Although M.B. did not specifically see defendant's mouth on his penis, his testimony does "tend to connect" defendant with the crime insofar as he saw defendant's head near his groin and, after defendant's head pulled away, his underpants snapped back and his penis felt wet. Given this record, we conclude that defendant's multiple out-of-court confessions that he performed oral sex on M.B. were sufficiently corroborated by independent evidence. Accordingly, the State presented sufficient evidence to sustain defendant's conviction for criminal sexual assault.

¶ 26 Defendant next argues that the trial court erred in admitting M.B.'s statement to his mother on December 25, 2006, regarding the sexual assault that occurred in October of 2006.

Specifically, defendant challenges the trial court's ruling that M.B.'s statements were admissible as either excited utterances or a prompt complaint.

¶ 27 Defendant acknowledges that he has forfeited this issue on appeal by failing to raise the issue in a post-trial motion. *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion."). However, he asks us to review this issue under the plain-error doctrine, arguing that the evidence was closely balanced. He alternatively argues that his counsel was ineffective for failing to preserve a meritorious objection.

¶ 28 Under the first prong of the plain-error doctrine, a reviewing court may consider unpreserved error when "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." *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). The burden of persuasion is on the defendant. *People v. Nowells*, 2103 IL App (1st) 113209, ¶ 19. However, before considering whether the plain-error exception to the rule of forfeiture applies, a reviewing court must first determine whether an error occurred, for "without reversible error, there can be no plain error." *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010).

¶ 29 Defendant contends that M.B.'s statement to his mother is hearsay and does not fall into the exceptions for excited utterances or prompt complaints. Specifically, he argues that M.B.'s statement is not an excited utterance because it occurred months after defendant's conduct and came after questioning from his mother. He also argues that the statement is not admissible as a prompt complaint because only the fact that a prompt complaint occurred, and not the content of the complaint, is admissible under that doctrine.

¶ 30 But even if defendant were correct, he cannot establish first-prong plain error unless he can show that the evidence was closely balanced. "[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. Such an inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility. *People v. Sebby*, 2017 IL 119445, ¶ 53.

¶ 31 A common-sense review of the evidence shows that the evidence in this case was not closely balanced. M.B. testified that he awoke to find defendant's head near his groin and, when defendant's head pulled away, his underpants snapped back into place and his penis felt wet. Two months later, after another encounter during which defendant made sexual advances toward M.B., he informed his mother about the prior sexual assault.

¶ 32 The matter was referred to a rabbinical council, which met almost immediately after M.B.'s mother reported the allegation. Two rabbis, each of whom sat on the rabbinical council, testified that defendant admitted to performing oral sex on M.B. Loew, a licensed mental health professional who was also present during the rabbinical court's interview with defendant, likewise testified that defendant admitted to performing oral sex on M.B. during that interview. Finally, Moore, an investigator with the Department of Child and Family Services, testified that she interviewed defendant, and he confessed to fondling M.B. until he became erect and then performing oral sex on M.B. Moore stated that defendant specifically admitted that he put his mouth on M.B.'s penis.

¶ 33 Thus, in addition to M.B.'s testimony, four other witnesses testified to two different occasions where defendant admitted to performing oral sex on M.B. Given this record, we

conclude that the evidence is not so closely balanced that the court's alleged error threatened to tip the scales of justice against defendant.

¶ 34 Defendant alternatively argues that his counsel was ineffective for failing to preserve a meritorious objection for appeal by not including the issue in a posttrial motion. We evaluate claims of ineffective assistance of counsel under the two-prong approach set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). See *People v. Givens,* 237 Ill. 2d 311, 330-31 (2010). To prevail on a claim of ineffective assistance, a defendant must first demonstrate that counsel's performance was deficient by showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687; see also *People v. Coleman,* 183 Ill.2d 366, 397 (1998). Second, the defendant must show he was prejudiced by counsel's deficient performance, which means that that there must be a reasonable probability that, but for defense counsel's deficient performance, the result of the proceeding would have been different. *People v. Brown,* 2015 IL App (1st) 122940, ¶ 47. Failure to establish either prong precludes a finding of ineffective assistance of counsel. *People v. Henderson,* 2013 IL 114040, ¶ 11. A reviewing court need not examine counsel's performance where it may dispose of defendant's claim based on lack of prejudice. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 55.

¶ 35 Here, we find that defendant cannot show that he was prejudiced by counsel's failure to preserve the hearsay objection for appeal. As mentioned above, M.B.'s testimony regarding the sexual assault was corroborated by four witnesses who testified that defendant confessed to them, on two separate occasions, that he performed oral sex on M.B. This evidence is independent of any statement M.B. provided to his mother. Given this evidence, there is no

reasonable probability that the outcome of defendant's trial would have been different had his counsel included the hearsay objection in his post-trial motion. Accordingly, defendant's claim of ineffectiveness fails.

¶ 36 For these reasons, we affirm defendant's conviction.

¶ 37 Affirmed.