2019 IL App (1st) 160708-U

No. 1-16-0708

Order filed May 14, 2019

Second Division

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 11310
	)	
ALEJANDRO PEREA-CHAVEZ,	)	Honorable
	)	Thomas J. Byrne,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Mason and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: In predatory criminal sexual assault prosecution, trial court's failure to give the jury instruction required by section 115-10(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10(c) (West 2014)) after admitting a prior statement by the nine-year-old victim in accordance with section 115-10 did not rise to the level of plain error and trial counsel's failure to object did not constitute ineffective assistance. Defendant's 28-year sentence was not excessive.

¶ 2 Following a jury trial, defendant Alejandro Perea-Chavez was found guilty of predatory criminal sexual assault (720 ILCS 5/11-1.40(a)(1) (West 2012)) and sentenced to 28 years'

incarceration. Defendant contends that, although he failed to preserve the issue, the trial court's failure to instruct the jury as required by section 115-10(c) of the Code of Criminal Procedure of 1963 (725 ICLS 5/115-10(c) (West 2014)) was plain error and that trial counsel's failure to object to the failure to give the instruction constituted ineffective assistance. Defendant also contends that his sentence was excessive. We affirm.

¶ 3 Defendant was charged with predatory criminal sexual assault based on the allegation that he penetrated the then nine-year-old D.M.'s vagina with his penis. Prior to trial, the State moved for a hearing pursuant to section 115-10 of the Code seeking to introduce at trial a video recording of an interview conducted of D.M. at the Children's Advocacy Center in Chicago on April 4, 2013 (the VSI). Following a hearing on the motion, the trial court found that "based on the time, content and circumstances, of the statement, it does provide sufficient safeguards of reliability," and held that the hearsay statements in the video were admissible, but granted defendant leave to file a motion to redact certain double hearsay statements contained in the video.

¶ 4 The State subsequently also moved to admit evidence of other crimes or prior bad acts by defendant. The State argued that the prior bad acts were admissible to show propensity under section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2014)) and to prove motive, intent, identity, absence of mistake or accident, absence of consent, or *modus operandi* under common law principles. The trial court granted the motion in part and denied it in part, allowing evidence that defendant previously tried to touch D.M.'s "front private" and gave D.M. chocolate milk that induced a deep sleep.

¶ 5 At trial, D.M. testified that she was 12 years old and lived with her father. She was born on April 27, 2003. When she was nine years old, she lived with her mother and defendant on West 59th Street in Chicago. They lived in a one-bedroom apartment. D.M. testified she and her mother stopped living with defendant "[b]ecause he had done stuff to me that I didn't like."

¶ 6 The first time defendant did something D.M. didn't like, D.M.'s mother was in the apartment but in a different room., D.M. testified defendant "was touching my thigh and, like, closer to my front private part." D.M. testified that she used her front private part to "pee." Defendant used his hand to touch her and D.M. pushed it away. The court instructed the jury that evidence of uncharged acts was relevant for the issues of intent, motive, and propensity and that it was up to the jury to determine whether defendant was involved in the conduct and what weight to give the evidence.

¶ 7 D.M. testified that, the day she and her mother left the apartment, defendant had given D.M. a glass of chocolate milk. He had done this once before. The first time he gave D.M. chocolate milk, she drank it and fell asleep on the couch. She slept so soundly that she "peed the bed." She was nine years old at the time and had never slept so soundly that she "peed the bed." The trial court instructed the jury that the uncharged incident was received on the issue of defendant's intent, motive and *modus operandi*, and that it was up to the jury to decide whether defendant was involved in the conduct and what weight to give the evidence.

¶ 8 The second time defendant gave D.M. chocolate milk, she did not want to finish drinking it. Defendant told her to finish it all, and she did. As she was doing so, D.M. noticed "white stuff" in the bottom of the glass. D.M. asked defendant about the substance and he told her that they were vitamins and would help her. D.M. finished the glass of chocolate milk and fell asleep

on the couch. When D.M.'s mother woke her, D.M. was on the floor. D.M. was dizzy, and could not see "good." D.M. testified her mother seemed scared and looked worried. D.M. noticed that her underwear was "halfway down," but her pants were pulled all the way up. Her underwear was not like that when she fell asleep. She noticed that defendant was sweating. Defendant and D.M.'s mother had a loud, angry interaction. D.M.'s mother left the apartment, and when D.M. tried to leave, defendant blocked her path. He told her not to "tell" anyone or her mother would get hurt.

¶ 9 D.M. testified that defendant had given her chocolate milk on other occasions, but that those were the only two times she fell asleep immediately after drinking it. During the time that D.M. was living with her mother and defendant, she also spent the night at her father's house. Her father lived with Emmanuel Jimenez. She never slept "like that" at her father's house. After leaving the apartment, she and her mother lived with her uncle Osvaldo.[1] D.M. never slept like that at her uncle's house.

¶ 10 In April 2013, D.M. went to see Dr. Mathew. D.M. could not remember "what was happening with [her] body at that time." After seeing Dr. Mathew, D.M. saw a doctor at the Chicago Children's Advocacy Center. She also had a conversation with a woman there. D.M. testified she had watched a video recording of that conversation and, that during the conversation, she told the truth.

¶ 11 On cross-examination, D.M. acknowledged that, when defendant moved in with her and her mother, she did not want him there. D.M. also acknowledged that at some point her mother got pregnant and she was not happy about the pregnancy. D.M. testified that when defendant

[1] Osvaldo's last name does not appear in the record.

tried to touch her "front private," her mother was in the apartment. D.M. ran out of the room and told her mother what had happened. D.M. admitted that when defendant gave her the chocolate milk, she did not see him put anything in the drink. After she fell asleep on the couch, D.M. did not feel defendant touch her and did not hear defendant say anything. When D.M.'s mother woke her, defendant was in the room. D.M. acknowledged that, at that time defendant and her mother were not "getting along" and were not sleeping in the same bed anymore. When defendant told D.M. not to tell anyone, she did not know what he was talking about. D.M.'s mother took her to a doctor some weeks after they left the apartment because she had a sore throat and runny nose.

¶ 12 Dr. Annamma Mathew, a pediatrician, testified that on April 1, 2013, she treated D.M. for a sore throat, vaginal discharge, and genital itching. D.M. had not been previously treated for those symptoms. Mathew took a history and examined D.M. Mathew observed a yellowish vaginal discharge, which is abnormal in a nine-year-old child. Mathew ordered a test for chlamydia and asked both D.M. and her mother about a history of sexual abuse. Mathew also contacted the Department of Children and Family Services (DCFS) to report suspected child abuse. The test was subsequently reported positive for chlamydia. Mathew notified D.M.'s mother. D.M. and her mother came back to the clinic, but Mathew did not provide further treatment because DCFS asked her to refer D.M. to a child abuse clinic for treatment. Mathew testified that chlamydia is a sexually transmitted disease that is spread through genital contact. Patients do not always present with symptoms of chlamydia, and it can be asymptomatic.

¶ 13 On cross-examination, Mathew acknowledged that she did not see any evidence of genital injury during the examination. When she spoke to D.M., D.M. denied a history of

penetration or fondling. Mathew acknowledged that she did not follow up with D.M.'s mother personally, but testified that her office contacted her.

¶ 14 Dr. Marjorie Fujara, a child abuse pediatrician, testified that she has an office at the Children's Advocacy Center. On April 4, 2013, D.M. came to the center with her mother. Fujara and Dr. Jude Okeke examined D.M. D.M. was referred to the clinic because her routine pediatrician had diagnosed her with chlamydia. Chlamydia is a bacteria that is transmitted by sexual contact, usually the semen of a male and the vaginal secretions of a female. Fujara retested D.M. for chlamydia and performed a genital exam. The genital exam was normal, and Fujara explained that this was not inconsistent with a positive test for chlamydia because it is very rare to find genital injury in children with sexually transmitted diseases. Fujara further explained that chlamydia can be transmitted by "skin to skin contact" and she would not expect to find injury. Fujara opined that Chlamydia cannot be transmitted by blood, cloth or a toilet seat, and that D.M.'s "chlamydia infection is clinically certain evidence of sexual abuse."

¶ 15 On cross-examination, Fujara testified she was not familiar with a "sequencing test" that would be able to identify a particular strain of chlamydia, but did know that it was not available at the lab at the hospital where she worked. Fujara denied that there could be transmission of chlamydia without penetration, testifying: "you can't have a child be infected with chlamydia without there being some form of penetration."

¶ 16 Pamela Collar, a licensed practical nurse, testified that she collected a urine sample from defendant on April 26, 2013, and submitted that sample for chlamydia testing. Anthony Mazza, a microbiologist, testified that defendant's sample tested positive for chlamydia. Mazza also testified that defendant's date of birth was December 7, 1982.

¶ 17 Emmanuel Jimenez testified that, from December 2012 through April 2013, he shared a two-bedroom apartment with Ramon M., D.M.'s father. D.M. would occasionally stay with her father. Jimenez submitted a urine sample in April 2013 but was not treated for chlamydia. He never had sexual contact with D.M.

¶ 18 Ramon M., D.M.'s father, testified that he had been convicted of the felony offense of aggravated driving under the influence. On April 24, 2013, he was tested for chlamydia. He was never treated for chlamydia and never had sexual contact with D.M.

¶ 19 The parties stipulated to the foundation for a redacted version of the DVD of the victim sensitive interview conducted with D.M. on April 4, 2013, and the DVD was published to the jury.[2] In the video recording, D.M. tells the interviewer that defendant tried to touch her "front part," and gave her chocolate milk that made her sleep so deeply that she "wet the bed." D.M. also told the interviewer that defendant gave her chocolate milk a second time with a white substance in the bottom that defendant said were vitamins. She fell asleep after drinking the milk and when she woke up her pants were up but her underwear was down.

¶ 20 Defendant rested without presenting evidence, and the trial court conducted an instructions conference. The State did not tender Illinois Pattern Instruction, Criminal, No. 11.66 (approved December 8, 2011) (hereinafter IPI Criminal No. 11.66), which is the pattern instruction required when evidence is admitted pursuant to section 115-10. Defense counsel did not object or tender the instruction. The parties presented closing arguments and the trial court instructed the jury. The instructions did not include IPI Criminal No. 11.66.

[2] The DVD was edited to remove certain hearsay statements by D.M. ruled inadmissible by the trial court.

¶ 21 During jury deliberations, the court received two notes from the jury. The first read: "Can Chlamydia be transferred mouth to genitalia?" The second read: "Was Osvaldo living with [D.M.'s mother] and [D.M.]? Was he tested for STDs (Chlamydia)?" With the consent of the parties, the trial court answered both notes with: "You have received all the evidence in the case. Continue your deliberations." The jury found defendant guilty of predatory criminal sexual assault.

¶ 22 Defendant moved for a new trial. The trial court denied the motion. The trial court conducted a sentencing hearing, during which it received, *inter alia*, letters attesting to defendant's good character, and victim impact statements from D.M. and Ramon M. The trial court ultimately sentenced defendant to 28 years' incarceration. Defendant moved to reconsider the sentence, and the trial court denied the motion. Defendant timely appealed.

¶ 23 Defendant first contends that he was denied a fair trial as the trial court failed to instruct the jury using IPI Criminal 11.66 as required by section 115-10(c) of the Code. He acknowledges he did not preserve the error but argues it is reviewable as plain error and alternatively that defense counsel was ineffective for failing to offer the instruction or object to the failure to give the instruction.

¶ 24 Section 115-10 allows the admission of hearsay statements in prosecutions for a sexual act committed upon or against a child under the age of 13. Subsection (c) requires:

> "If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, ***

> the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." 725 ILCS 5/115-10(c) (West 2014).

IPI Criminal No. 11.66 provides the instructions required by section 115-10(c). See IPI Criminal No. 11.66 (committee note); *People v. Bryant*, 391 Ill. App. 3d 1072, 1084 (2009).

¶ 25 Here, following a pretrial hearing, the trial court found admissible D.M.'s out-of-court statements made during the VSI and allowed the recording of the interview, with redactions, to be published to the jury, but did not give IPI 11.66. The parties correctly agree that the failure to instruct the jury with IPI Criminal No. 11.66 was error. The parties also do not dispute that defendant failed to preserve the error by tendering the instruction himself or raising the failure to give the instruction during sentencing or in his posttrial motion. However, the parties dispute whether this error rises to the level of plain error such that it may be reviewed.

¶ 26 Illinois Supreme Court Rule 366(b)(2)(i) (eff. Feb. 1, 1994) provides that "No party may raise on appeal the failure to give an instruction unless the party shall have tendered it." See also *People v. Sargent*, 239 Ill. 2d 166, 188 (2010). In addition, our supreme court has held: "a defendant will be deemed to have procedurally defaulted his right to obtain review of any supposed jury instruction error if he failed to object to the instruction or offer an alternative at trial and did not raise the issue in a posttrial motion." *Sargent*, 239 Ill. 2d at 188-89 (citing *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007)).

¶ 27 Limited relief from this forfeiture principle is provided by Illinois Supreme Court Rule 451(c) (eff. Apr. 8, 2013). *Sargent*, 239 Ill. 2d at 189. Rule 451(c) provides, in relevant part: " 'substantial defects' in criminal jury instructions 'are not waived by failure to make timely

objections thereto if the interests of justice require.' " *Id.* (quoting Rule 451(c)). However, for the following reasons, this exception to the forfeiture principle is inapplicable here.

¶ 28 Rule 451(c) is coextensive with the plain-error clause of Supreme Court Rule 615(a) (eff. Jan. 1, 1967), which provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." See *Sargent*, 239 Ill. 2d at 189. The plain error doctrine allows a reviewing court to reach errors that were not preserved when either "(1) 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, or (2) 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, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565. Under both prongs of plain error, the burden of persuasion rests with the defendant. *Sargent*, 239 Ill. 2d at 190 (citing *People v. Naylor*, 229 Ill. 2d 584, 593 (2008)).

¶ 29 It is undisputed that sending the case to the jury without the section 115-10(c) instruction was clear and obvious error. Thus the question is whether either prong of the plain error test is met such that we may review this unpreserved error. Defendant first argues that the evidence of sexual penetration was closely balanced because the State's case was based on circumstantial evidence. Initially, we simply note the law does not distinguish between direct and circumstantial evidence when determining whether the State has met its burden of proof. See *People v. Johnson*, 2018 IL App (1st) 150209, ¶ 19 (citing *People. v. Jackson*, 232 Ill. 2d 246, 281 (2009)).

¶ 30 More importantly, the evidence in this case, even if circumstantial, was overwhelming. D.M. testified that, after defendant gave her chocolate milk with white residue, in the bottom, she quickly fell asleep on the couch and remembered nothing until her mother woke her on the floor. When she woke, she was dizzy and could not see clearly. Her pants were up, but her underwear was pulled down underneath them. Defendant was sweating and threatened D.M. not to tell anyone what had happened. Later, both D.M. and defendant tested positive for chlamydia. Dr. Fujara testified that chlamydia infection in children is "clinically certain" evidence of sexual abuse. Under cross-examination, she refused to admit that infection could be spread without penetration, stating "you can't have a child be infected with chlamydia without there being some form of penetration."

¶ 31 Moreover, the State presented evidence of propensity, intent, and *modus operandi*. Defendant had previously tried to touch D.M.'s "front private" while she was awake, and had previously given her chocolate milk that made her so sleepy she "peed the bed." Taken together, the evidence overwhelmingly establishes that defendant drugged D.M., penetrated her sexually while she was unconscious, and infected her with chlamydia. Accordingly, defendant has failed to persuade this court that the evidence was so closely balanced that the failure to give IPI Criminal 11.66 "threatened to tip the scales of justice" against him. Therefore, there can be no first-prong plain error. See *Piatkowski*, 225 Ill. 2d at 565.

¶ 32 Defendant also argues that we should find the failure to give IPI Criminal 11.66 constituted plain error under the second prong. We disagree. "The erroneous omission of a jury instruction rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so

as to severely threaten the fairness of the trial." *Sargent*, 239 Ill. 2d at 191 (citing *People v. Hopp*, 209 Ill.2d 1, 8 (2004)). When considering the effect of an instructional error, we must consider all of the instructions given and do not look at the error " 'in isolation.' " *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 68 (quoting *People v. Parker*, 223 Ill. 2d 494, 501 (2006)).

¶ 33 Here, the jury was instructed as follows:

> "Only you are the judges of the believability of the witnesses and the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, and any interest, bias or prejudice he may have and the reasonableness of his testimony considered in light of all the evidence in the case." See Illinois Pattern Instruction, Criminal, No. 1.02 (approved December 8, 2011) (hereinafter IPI Criminal No. 1.02).

IPI Criminal 11.66, which the court failed to give, provides, in pertinent part:

> " '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 [the alleged victim], [and] the nature of the statements, and the circumstances under which the statements were made [, and [*insert any other relevant factor concerning the weight and credibility of the statements*]].' " *Sargent*, 239 Ill. 2d at 192 (quoting IPI Criminal No. 11.66).

¶ 34 As our supreme court held in *Sargent*, while the language of these two instructions differs, they convey similar principles regarding the jury's role in assessing witness credibility. *Sargent*, 239 Ill. 2d at 192. Thus, under circumstances similar to those at bar, where the jury was

instructed with IPI Criminal No. 1.02 and the trial court conducted a pretrial hearing in accordance with section 115-10(b) of the Code (725 ICS 5/115-10(b) (West 2006)), the supreme court found the failure to give IPI Criminal 11.66 did not rise to the level of second prong plain error. *Sargent*, 239 Ill. 2d at 194. This court has reached the same conclusion in similar circumstances. See *People v Jackson*, 2015 IL App (3d) 140300, ¶ 57. We likewise conclude that, under the circumstances of this case, where the trial court conducted a pretrial hearing pursuant to section 115-10(b) and instructed the jury using IPI Criminal No. 1.02, the failure to instruct the jury using IPI Criminal No. 11.66 did not rise to the level of plain error.

¶ 35 Defendant argues that we should follow *People v. Turman*, 2011 IL App (1st) 091019, ¶ 34, which held that an instructional error was second-prong plain error. However, we find no guidance in *Turman*. *Turman* did not involve a child victim, a statement admitted under section 115-10, or the failure to instruct the jury with IPI Criminal No. 11.66. The only factual similarity is that the offense was a sex crime (*id.* ¶ 1) and the only legal similarity is that an erroneous jury instruction was given (*id.* ¶¶ 28-29). Accordingly, we find no reason to look to this largely unrelated case for guidance when there is a supreme court case directly on point. Therefore, we conclude that the instructional error does not rise to the level of plain error and we honor defendant's procedural default.

¶ 36 In reaching this conclusion, we also reject defendant's argument that his trial counsel was constitutionally ineffective for failing to object to the failure to give IPI Criminal No. 11.66 or request the instruction. A claim of ineffective assistance of counsel is governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Veach*, 2017 IL 120649, ¶ 29. To establish ineffective assistance of counsel, a defendant must prove that (1) counsel's

performance was deficient in that it fell below an objective standard of reasonableness and (2) he suffered prejudice as a result. *People v. Holt*, 2019 IL App (3d) 160504, ¶ 42. To establish prejudice, the defendant must show that, had counsel's performance not fallen below a reasonable standard of assistance, the outcome of the proceeding would have been different. *Id.* A defendant must satisfy both prongs of the *Strickland* standard, and a reviewing court may proceed directly to the prejudice prong if doing so would resolve a defendant's claim. *Id.*

¶ 37 A reviewing court's analysis of *Strickland* prejudice is similar to the analysis of the first prong of plain error. *Id.* ¶ 43 (citing *People v. Johnson*, 218 Ill. 2d 125, 143-44 (2005)). We have already determined that defendant cannot establish plain error under the first prong; the evidence against defendant was not closely balanced, but was, in fact, overwhelming. Accordingly, we hold that defendant cannot satisfy the prejudice prong of the *Strickland* inquiry. See *Id.* There is no reasonable probability that the outcome of defendant's trial would have been different had the trial court instructed the jury with IPI Criminal No. 11.66. Therefore, we reject defendant's ineffective assistance of counsel claim.

¶ 38 Defendant next contends that his sentence is excessive. A sentence within statutory limits is reviewed for an abuse of discretion. *People. v. Charles*, 2018 IL App (1st) 153625, ¶ 44. A reviewing court will alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Id.* The trial court has broad discretion in sentencing, and a reviewing court may not substitute its judgment simply because it would weigh the sentencing factors differently. *Id.*

¶ 39 When imposing a sentence, the trial court must consider both the seriousness of the offense and the defendant's rehabilitative potential. *Id.* ¶ 45 (citing Ill. Const. 1970 art. I, § 11).

Although a court may not disregard mitigating evidence, the most important sentencing factor remains the seriousness of the offense. *Id.*

¶ 40 Here defendant was guilty of the Class X offense of predatory criminal sexual assault because D.M. was under 13 when he committed an act of contact between his penis and D.M.'s vagina. 720 ILCS 5/11-1.40(a)(1) (West 2012). The sentencing range for the Class X offense was 6 to 60 years. 720 ILCS 5/11-1.40(b)(1) (West 2012). Defendant's 28-year sentence is near the middle of that range. Because it was within the statutory range, we presume it is valid. See *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 12 (citing *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007)).

¶ 41 Nevertheless, defendant argues that the trial court overlooked his rehabilitative potential. Defendant argues that he had never been convicted of a felony before, having only a conviction for driving without a license. Defendant further argues that he has a solid employment history and a goal of obtaining his GED and pursuing a career in culinary arts. However, it is difficult to overstate the seriousness of the offense. Defendant used his position as D.M.'s mother's paramour to deceive the nine-year-old into drinking chocolate milk laced with "vitamins" that caused her to fall into a deep sleep. While she was unconscious, defendant sexually penetrated the child and infected her with chlamydia. When she awoke, dizzy and unable to see clearly, defendant stopped her as she tried to escape with her mother, and threatened to harm her mother if D.M. told anyone what he had done. Moreover, there was evidence of planning and premeditation—defendant had drugged D.M. with chocolate milk once before after she rebuffed his attempts to touch her inappropriately. In light of the serious nature of the offense, and despite defendant's career aspirations and lack of serious criminal history, we cannot conclude that the

trial court's imposition of a 28-year sentence constituted an abuse of discretion. Moreover, this mitigation evidence was presented to the trial court in defendant's presentence investigation report and defense counsel's argument. The trial court is presumed to consider all evidence in mitigation presented to it. *People v. Brown*, 2018 IL App (1st) 160924, ¶ 24. Further, defendant points to nothing in the record affirmatively demonstrating the trial court did not consider these mitigating factors. See *Id.* Accordingly, we affirm defendant's conviction and sentence.

¶ 42 Affirmed.