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2011 IL App (3d) 090609-U

Order filed August 16, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

|                                      |   |                               |
|--------------------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court |
|                                      | ) | of the 12th Judicial Circuit, |
| Plaintiff-Appellee,                  | ) | Will County, Illinois,        |
|                                      | ) |                               |
| v.                                   | ) | Appeal No. 3-09-0609          |
|                                      | ) | Circuit No. 08-CF-1465        |
|                                      | ) |                               |
| GREGORY SIMPSON,                     | ) | Honorable                     |
|                                      | ) | Robert P. Livas,              |
| Defendant-Appellant.                 | ) | Judge, Presiding.             |

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Schmidt and Lytton concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Defense counsel's failure to move to sever defendant's charges for trial did not amount to ineffective assistance of counsel. Defendant cannot prove prejudice because evidence of both charges would have been admissible at separate trials.
- ¶ 2 Following a jury trial, defendant, Gregory Simpson, was found guilty of two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2004)) and was sentenced to a term of natural life imprisonment. Defendant appeals,

arguing ineffective assistance of counsel. We affirm.

¶ 3

### FACTS

¶ 4

Defendant was charged with two counts of predatory criminal sexual assault of a child (720 ILCS 5/12–14.1(a)(1) (West 2004)). The first count alleged that on or about September 1, 2004, to June 1, 2006, defendant placed his finger in the vagina of Kelly S., who was under 13 years of age. Count II alleged that on or about September 1, 2004, to August 31, 2005, defendant placed his penis in the mouth of Katie S., who was under 13 years of age. Defendant's attorney did not attempt to sever the two counts, and the cause proceeded to a jury trial.

¶ 5

At trial, the State called Shirley B., the grandmother of Kelly and Katie, as its first witness. She testified that her daughter, Beverly R., had lived with defendant for 20 years and that he was older than Beverly, who was 45 years old.

¶ 6

Detective John Ross of the Joliet police department testified to the foundation for a videotaped interview of the two victims conducted by a social worker at the Child Advocacy Center. Pursuant to his testimony, the video was admitted and played for the jury. In the video, both girls stated how they were assaulted by defendant.

¶ 7

Following the video, Kelly testified that she occasionally stayed at Beverly and defendant's house when her mother and grandmother had to work midnights. She testified that the assault occurred at nighttime, downstairs in the living room of defendant's house. She said that her sister was asleep and that defendant was watching television. At some point defendant stopped watching television and said "I'm going in the kitchen, when I come back, I want your shorts down." She did not comply, however,

when defendant returned. He again told her to take her shorts down, and this time she did as he instructed. According to Kelly's testimony, defendant then began touching her "privates" on the outside and the inside. She said that defendant stopped only after she asked him to stop twice. Upon cross-examination, she stated that she had talked about the assault with her sister, Katie.

¶ 8 The State next called Katie. She also testified that she had stayed at Beverly and defendant's house when her mother and grandmother worked midnights. She then testified about defendant's assault. According to her, defendant approached her while she was sleeping at night in the living room of his house. Her sister was likely in the room sleeping. Defendant then made her kneel down on the floor and inserted his "privates" into her mouth. She testified that he stopped after she said she was tired and wanted to go back to sleep. Upon cross-examination, Katie stated that she told Kelly about the assault after Kelly had told her what defendant had done to her.

¶ 9 After the State rested, the defense called Bonnie R., the victims' mother, as its first witness. Bonnie testified that Kelly and Katie would stay at Beverly and defendant's house when she worked the night shift at White Castle. She further testified that defendant had disciplined the girls on at least one occasion. Bonnie said that the girls told her about the assaults around Easter of 2007 and that she then stopped taking the girls over to defendant's house.

¶ 10 Beverly testified that defendant was her fiancé and that Kelly and Katie would occasionally spend the night at her and defendant's house. Beverly said that she learned of the allegations from her sister, Bonnie, and that she then talked to both girls about what

had happened. According to her testimony, Kelly said that defendant did not do anything to her but that he did something to Katie. Upon cross-examination, Beverly said that Katie told her that defendant made her suck on his "privates."

¶ 11 Defendant testified that Kelly and Katie would stay over at his house when their mother and grandmother worked midnights. He further testified that he had disciplined the girls before but denied that he had ever sexually assaulted the girls.

¶ 12 After deliberations, the jury returned a verdict of guilty on both counts. Defendant was sentenced to a term of natural life in prison on each count pursuant to section 12–14.1(b)(1.2) of the Criminal Code of 1961 (720 ILCS 5/12–14.1(b)(1.2) (West 2004)). Defendant appeals.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant raises the issue of ineffective assistance of counsel. Defendant claims that his counsel was ineffective for failing to sever the two assault charges at trial. In response, the State argues that counsel's decision to try the two charges together was not unreasonable. In the alternative, the State argues that even if the decision was unreasonable, the evidence from both assaults would have been admissible at each trial and, therefore, there is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's alleged error.

¶ 15 In *People v. Albanese*, 104 Ill. 2d 504 (1984), the supreme court adopted the ineffective assistance of counsel test from *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a

reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *Albanese*, 104 Ill. 2d 504. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Haynes*, 192 Ill. 2d 437 (2000). Defendant must satisfy both prongs in order to prevail on a claim of ineffective assistance of counsel; however, if the claim can be disposed of on the ground that defendant did not suffer prejudice, a court need not determine whether counsel's performance was deficient. *Id.*

¶ 16 Here, defendant's claim fails to establish ineffective assistance of counsel, because defendant has not met the second prong of the *Strickland test*. We find that even if the counts were severed, juries in the separate trials would have been able to hear evidence of both assaults.

¶ 17 Evidence that relates to a defendant's other crimes is normally inadmissible if offered to demonstrate the defendant's bad character or propensity to commit crime, because the probative value of such evidence is generally far less than its prejudicial value. *People v. Walston*, 386 Ill. App. 3d 598 (2008). However, section 115–7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115–7.3 (West 2008)) provides an exception to this rule and enables courts to admit evidence of other crimes in order to show a defendant's propensity to commit sex offenses. *Walston*, 386 Ill. App. 3d 598.

¶ 18 In deciding the admission of such propensity evidence, the trial court must weigh the probative value of the evidence against undue prejudice to the defendant. In doing so, the court may consider: (1) the proximity in time to the charged or predicate offense; (2) the degree of factual similarity to the charged or predicate offense; and (3) other relevant

facts and circumstances. 725 ILCS 5/115–7.3(c) (West 2008). Further, the court must admit only so much evidence as is reasonably necessary to establish propensity. *People v. Smith*, 406 Ill. App. 3d 747 (2010).

¶ 19 A reading of section 115–7.3 and the relevant case law makes it evident that the juries in both trials would have heard evidence of the two assaults. First, the two offenses were committed within a short time of one another. In *People v. Taylor*, 383 Ill. App. 3d 591 (2008), the Appellate Court, First District, held that a six-year time gap was not significant enough to bar admission of another offense. Here, both offenses were committed between September 1, 2004, and June 1, 2006. This represents a time gap of, at the most, 21 months. This gap is not significant and far less than the gap found in *Taylor*.

¶ 20 Further, the degree of factual similarity to the charged and predicated offenses is significant. As the *Taylor* court noted, as the factual similarities increase, so too does the probative value of other crimes evidence. *Id.* In addition, although other crimes evidence must have a threshold similarity with the charged offense, some factual disparity between the other offense and the charged offense will not defeat admissibility, as no two independent crimes are identical. *Id.*

¶ 21 Here, the facts of both offenses are very similar. Both offenses occurred in the defendant's living room, at night, while the victim's sister was asleep. Defendant held the same position of trust and authority over both victims, and the victims were sisters. The main differences are that the assaults likely did not occur on the same night, the victim was not the same, and the type of sexual assault was different. Nonetheless, these facts,

as a whole, establish a significant similarity between the two assaults.

¶ 22 In *Walston*, a case cited by defendant, the court held that a trial court's failure to properly sever two sexual assaults was harmless error because evidence of both assaults would have been admissible in the separate trials. *Walston*, 386 Ill. App. 3d 598. Here, the assaults on the sisters arguably contained more similarities than the assaults in *Walston*, and therefore admissibility would be supported on this ground.

¶ 23 Finally, evidence of the other assault would not produce concerns found in other cases. In *Smith*, the court was concerned that an excess of evidence could create a mini-trial. *Smith*, 406 Ill. App. 3d 747. Here, the testimony of the other victim would relate to a single offense and a single victim. From the record, it is clear that the evidence would not be excessive or confusing.

¶ 24 Based on these facts and the record as a whole, we conclude that the probative value of both assaults outweighs any undue prejudice, and thus, pursuant to section 115–7.3, the evidence of the two assaults would have been admitted at the two separate trials. Because we find that most, if not all, of the evidence presented at defendant's trial (including the testimony of the two victims) would have been admissible at separate trials, we find that defendant has failed to establish the prejudice necessary to meet the second prong of the *Strickland* test. Therefore, defendant's claim of ineffective assistance of counsel must fail.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we affirm defendant's conviction and deny relief based on the ineffective assistance of counsel claim.

¶ 27

Affirmed.