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2011 IL App (3d) 100020-U

Order filed August 19, 2011

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 10th Judicial Circuit,
	)	Stark County, Illinois
Plaintiff-Appellee,	)	
	)	Appeal No. 3--10--0020
v.	)	Circuit No. 08--CF--19
	)	
DAVID J. JONES, JR.,	)	
	)	Honorable Stephen Kouri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in joining defendant's two sex offense charges committed against the same victim for trial.

¶ 2 Following a trial, a jury found defendant, David J. Jones, Jr., guilty of two offenses:

criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2006)), and predatory criminal sexual assault of a child. 720 ILCS 5/12-14.1(a)(1) (West 2006). The circuit court of Stark County sentenced defendant to consecutive terms of four years for the criminal sexual assault conviction and six years for the predatory criminal sexual assault conviction. Defendant appeals, raising the single claim that the trial court erred in joining the two charges for trial. We affirm.

¶ 3 FACTS

¶ 4 The facts of this matter involve criminal sexual conduct between defendant and the victim, T.S. Defendant is the victim's stepbrother. Defendant's date of birth is October 19, 1987. T.S.'s date of birth is January 27, 1994.

¶ 5 On October 9, 2008, the State charged defendant by information alleging he committed criminal sexual assault (count I) by engaging in an act of sexual penetration with T.S., a minor. This criminal sexual assault count specifically alleged that "during the period of 2007," defendant placed his penis in the mouth of T.S. Thereafter, the State added a second count of criminal sexual assault (count II), which is not at issue in this appeal, that it ultimately dismissed.

¶ 6 The State also added a third count against defendant on August 21, 2009, by indictment that alleged defendant committed predatory criminal sexual assault of a child (count III). The indictment claimed that between October 20, 2004, through October 19, 2005, defendant committed the act of sexual penetration with T.S., a family member who was under 13 years of age, by placing his penis in the anus of T.S.

¶ 7 The State moved to join the offenses for trial, claiming they were part of the same

comprehensive transaction. Defendant objected to joining the offenses and the matter proceeded to a hearing on the State's motion. Ultimately, the court allowed the joinder over defendant's objection.

¶ 8 Prior to trial, defendant filed a motion to restrict testimony to that describing sexual acts between defendant and T.S. which occurred during the periods specifically identified in the charges. Defendant argued that allowing prior sexual acts to be introduced into evidence should not be permitted as those acts occurred when defendant was a juvenile. The trial court denied defendant's motion and ruled that the State could introduce testimony of the prior sexual acts to establish that the charged incidents were not the first sexual conduct between defendant and the victim.

¶ 9 At trial, T.S. testified that he was currently a sophomore in high school. He began living with defendant as stepbrothers when he was four years old. Sexual conduct began when the two took baths together, prior to T.S. even being old enough to go to school. The conduct escalated to oral sex when T.S. turned seven or eight years old. T.S. noted he was threatened and would put his mouth on defendant's penis. He claimed it happened "a lot," approximately five days a week.

¶ 10 T.S. noted that the summer before he attended sixth grade, defendant talked to him about trying anal sex. They did not try it at that time. Eventually, defendant tried to penetrate T.S. but it hurt too much so defendant stopped. Thereafter, defendant would thrust between T.S.'s legs under his buttocks as the primary form of sexual contact between the two. T.S. stated that the

final act of sexual contact occurred at the family home. As defendant was asleep in the living room, T.S. initiated "oral to him." T.S. believed this act occurred around 2005.

¶ 11 On cross-examination, T.S. admitted he had not always recalled the facts of his sexual encounters with defendant consistently. He claimed the cause of the inconsistencies was the fact that he was a 15-year-old boy who had experienced "years of molestation." After more thought, T.S. stated that the last act occurred in 2007. T.S. further testified that the anal sex incident occurred when defendant was 17 years old. He acknowledged that he had not always been consistent in describing when that event occurred, but as he testified, he was certain it occurred when defendant was 17.

¶ 12 The only other witness called by the State was Special Agent Tim Wilkins of the Illinois State Police. Wilkins testified regarding his involvement in the investigation of defendant. He recalled his interview with defendant and authenticated a voluntary written statement signed by defendant. Agent Wilkins noted defendant made some handwritten corrections to the statement. The trial court admitted the statement into evidence without objection and published it to the jury.

¶ 13 Defendant testified on his own behalf. He admitted attempting anal sex with T.S. one time. Defendant stated the act occurred in the summer of 2004 when defendant was 16 years old. Defendant claimed he told police he was 17 at the time of the incident due to a memory failure while being interrogated. He noted he wrote down that he had been 16 or 17 at the time, but after reflection and being given time to ponder the matter, he recalled he was only 16 at the time of the

anal sex incident with T.S.

¶ 14 Defendant also acknowledged the last incident of sexual conduct, that being the oral sex that occurred at his parent's house on the night of his brother's, M.J., sixteenth birthday party. Defendant noted he fell asleep after drinking himself "stupid" at the party. He awoke as he was ejaculating to T.S.'s oral sex. He did not recall someone unzipping his pants or removing his penis from his underwear. He saw T.S. on his knees when he woke up but did not remember anything else. Defendant admitted that his written statement was correct except for the dates relating to his age.

¶ 15 Brent Small testified for the defense. Small noted he met defendant in September of 2004 and became his boyfriend in 2005 after defendant turned 17. Small's testimony is seemingly irrelevant to the joinder matter at issue in this appeal. Small's testimony mainly concerned the night of the last sexual encounter between T.S. and defendant. Defendant's brother, M.J., also testified for the defense. The majority of his testimony also concerned the night of his party.

¶ 16 Ultimately, the jury found defendant guilty of criminal sexual abuse and predatory criminal sexual assault of a child. Defendant filed a motion for a new trial in which he argued that it had been error to join the charges. The court denied defendant's motion. This appeal followed.

¶ 17 ANALYSIS

¶ 18 Defendant raises the singular issue of whether the trial court erred when granting the State's motion to join the two charges for trial purposes. Defendant argues that charges were too

"temporally and factually disassociated" and, as such, should not have been joined.

¶ 19 Charges may be joined if the "offenses charged *** are based on the same act or on 2 or more acts which are part of the same comprehensive transaction." 725 ILCS 5/111-4(a) (West 2008). We will not reverse a trial court's ruling on a motion for joinder absent an abuse of discretion. *People v. Rodriguez*, 289 Ill. App. 3d 223 (1997). An abuse of discretion occurs only where no reasonable person would agree with the trial court's ruling. *People v. Walston*, 386 Ill. App. 3d 598 (2008).

¶ 20 Defendant argues the sexual acts described in each count against defendant were not part of the same comprehensive transaction. Citing to *People v. Gapski*, 283 Ill. App. 3d 937 (1996), defendant notes the test to determine whether different sex offenses are part of the same comprehensive transaction include: (1) their proximity in time and location; (2) the identity of evidence needed to demonstrate a link between the offenses; (3) whether there is a common method of committing the offenses; and (4) whether the same or similar evidence would establish the elements of the offenses. *Id.* at 942.

¶ 21 The State and defendant spend significant energy quarrelling over whether or not, after applying this test, the acts described in the charging instruments are part of the same comprehensive transaction. Each party makes salient points. Defendant correctly notes that approximately two years elapsed between the anal sex incident described in count III and the oral sex incident described in count I. Arguably, the "proximity in time" factor discussed above weighs against joinder. However, the location of the offenses both took place in the family

home, this is not a case involving different victims, and the common theme of defendant molesting the much younger victim is more than prevalent.

¶ 22 We certainly acknowledge that arguments can be made on each side of the joinder equation. However, assuming, *arguendo*, error occurred at all, we find such error harmless.

¶ 23 "Even where a trial court improperly joins charges against a defendant, the error will be deemed harmless where the evidence of all of the charged crimes would have been admissible in the separate trials that would have taken place if not for the misjoinder." *Walston*, 386 Ill. App. 3d at 609. The *Walston* court noted that while it concluded "that the offenses were not part of the same comprehensive transaction, we find no reversible error in the trial court's ultimate decision to join the charges, because the joinder error did not prejudice defendant and was therefore harmless." *Id.* at 609. This was so, found the *Walston* court, as the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-7.3 (West 2004)) "would have allowed the juries in the separate trials to hear evidence regarding the attacks on both victims." *Id.* at 609.

¶ 24 Generally, evidence of a defendant's other crimes is normally inadmissible if offered to demonstrate defendant's bad character or his propensity to commit crime. *People v. Evans*, 373 Ill. App. 3d 948 (2007). However, section 115-7.3 of the Code provides an exception to this general rule. 725 ILCS 5/115-7.3 (West 2008). Section 115-7.3 states that if "defendant is accused of predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, [or] criminal sexual abuse" then "evidence of defendant's commission of another [similar] offense or offenses *** may be

considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3 (a)(1), (b) (West 2008). In *People v. Donoho*, 204 Ill. 2d 159 (2003), our supreme court noted that section 115-7.3 "enable[s] courts to admit evidence of other crimes to show [a] defendant's propensity to commit sex offenses." *Id.* at 176.

¶ 25 Had defendant been tried separately in these matters, evidence of the acts constituting the respective individual crimes would have been admissible in the prosecution for the other crime. Defendant disagrees, claiming the crimes were too disassociated in time and nature to be admitted in individual prosecutions.

¶ 26 Admissibility of other-crimes evidence is not controlled by the number of years that have elapsed between the prior and current offenses. *People v. Illgen*, 145 Ill. 2d 353 (1991); *People v. Donoho*, 204 Ill. 2d 159 (2003). Moreover, the existence of some differences between offenses does not make the prior offenses inadmissible. *Illgen*, 145 Ill. 2d 353; *Donoho*, 204 Ill. 2d 159.

¶ 27 In *Donoho*, our supreme court held other-crimes evidence was admissible even though 12 to 15 years elapsed between offenses. *Id.* at 184. The *Donoho* court also signaled approval to the appellate courts that had "affirmed admission of other-crimes evidence over 20 years old under the exceptions because the court found it to be sufficiently credible and probative." *Id.* at 184 (citing *People v. Davis*, 260 Ill. App. 3d 176, 192 (1994)). Herein, defendant admitted to both acts that resulted in the factual basis for these charges. Clearly, evidence of these crimes is credible.

¶ 28 Moreover, significantly more factual similarities exist between the differing offenses in this case than between the other-crimes evidence, which our supreme court found properly admitted, and offense charged in *Donoho*. In *Donoho*, defendant was unrelated to the victims of the first offense but stepfather to the victims of the later offense; the earlier offense consisted of a single incident, while the later offense involved several incidents over the course of three years; the earlier incident involved a boy and a girl at the same time, while the later offense involved conduct occurring with each child separately; and the earlier offense was perpetrated by the defendant telling the children they were playing a game while the later offense involved the defendant threatening to punish the children if they told anyone. *Donoho*, 204 Ill. 2d at 165-67.

¶ 29 We acknowledge that some differences exist between the two crimes charged herein. While one crime involved oral sex and the other anal, we do not find different types of illegal sex with the same victim renders the incidents so dissimilar to prohibit application of section 115-7.3. Moreover, significant similarities exist between the offenses as well. The acts involved the same victim, were part of a continuous and longstanding relationship, and occurred in the same place: that being the defendant and victim's family home. These incidents also involved a defendant who gained power over the victim by not only being an older brother and authority figure, but by engaging in a course of molestation over the victim when the victim was as young as five years old. Clearly, the facts that served as the basis for these charges would have been admissible had the charges been tried separately. As such, any error in joining the charges for trial was harmless. *Walston*, 386 Ill. App. 3d at 609.

¶ 30 Finally, while not raising it as a separate issue on appeal, defendant argues almost as an aside that "the prosecution's over-emphasis of the prior acts also prejudiced the defendant as to both offenses." Defendant cites no authority linking the overemphasis of other-crimes evidence with improper joinder of charges. He simply reiterates his statements regarding the prejudicial nature the other-crimes evidence potentially had on the differing charges.

¶ 31 The State responds by claiming defendant has waived this issue. The State claims defendant neither objected to "over-emphasis" at trial nor raised the matter in its posttrial motion. Our review of the record indicates, however, that defendant did object during the State's opening statements as "excessive and beyond the latitude given by the court" as it pertained to discussing other crimes. Defendant also raised this matter in paragraphs three and six of his posttrial motion.

¶ 32 Again, however, defendant does not specifically develop this argument on appeal or cite authority to support his conclusion that the overemphasis of other-crimes or prior bad acts evidence at trial somehow rendered the decision to join the offenses for trial erroneous.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Stark County is affirmed.

¶ 35 Affirmed