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2012 IL App (3d) 110043-U

Order filed March 19, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 21st Judicial Circuit,
Plaintiff-Appellee,)	Kankakee County, Illinois,
)	
v.)	Appeal No. 3-11-0043
)	Circuit No. 08-CF-433
DAVID RYAN KASMAR III,)	
)	Honorable
Defendant-Appellant.)	Kathy Bradshaw-Elliott,
)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* The State proved that the defendant committed an act of sexual conduct beyond a reasonable doubt. The trial court did not err in allowing the State to introduce other crimes evidence that was similar to the circumstances surrounding the charges of criminal sexual abuse in this case, in light of the defendant's indications that he and the victim engaged in consensual kissing and groping but denied touching her breast.
- ¶ 2 Following a bench trial, the defendant, David Ryan Kasmar III, was found guilty of criminal sexual abuse. 720 ILCS 5/12-15(a)(1) (West 2008). He was sentenced to 30 months of sex offender

probation with treatment and 45 days in the county jail. The defendant appeals, arguing that: (1) the State failed to prove the element of an act of "sexual conduct"; and (2) the trial court erred by admitting other crimes evidence at trial. We affirm.

¶ 3

FACTS

¶ 4 The defendant was charged by indictment with three counts of criminal sexual abuse. The indictment alleged that by use of force the defendant knowingly, and for the purposes of his own sexual arousal or gratification, placed his hand on Caitlyn M's: (1) vagina (count I); (2) breast (count II); and (3) buttocks (count III).

¶ 5 At the bench trial, the evidence indicated that on April 20, 2008, at 9 p.m., 20-year-old Caitlyn attended a bonfire at the home of her friends, Ashley and Alyssa Petroni. As she was leaving at 11 p.m., the defendant passed Caitlyn as he was arriving at the bonfire. The defendant and Caitlyn did not know each other and did not speak with one another at that time. Shortly after leaving the party, Caitlyn received a text message from Alyssa's cellular phone and two telephone calls from the defendant indicating that she was wanted back at the party. Caitlyn thought that the telephone calls from the defendant were from a former high school classmate of hers, David Fear, who had also been at the bonfire that evening. At approximately 11:45 p.m., Caitlyn returned to the bonfire. At 12:30 a.m., everyone began to clean up. Ashley, Caitlyn, and Fear went inside, while Alyssa and the defendant went into the garage to look for Alyssa's camera.

¶ 6 Alyssa testified that the defendant "was being goofy and friendly and gave [her] a kiss" in the garage. Alyssa testified that although her back was against a boat in the garage, she did not feel threatened by the defendant or as if she could not leave the garage. She told the defendant that she felt uncomfortable because he was drunk and she did not want to stay in the garage. Alyssa also told

the defendant that she did not like him "since he was trying to force himself on [her]" when he was drunk.

¶ 7 Alyssa testified that she had given a statement to police indicating that she had to push her way past the defendant to get out of the garage. On cross-examination, the defendant's attorney asked Alyssa whether the defendant had previously hugged or kissed her, and whether she felt threatened by the defendant. Alyssa testified that if the defendant had previously kissed her it was a friendly kiss on the cheek and she never felt threatened by the defendant. After leaving the garage, Alyssa and the defendant returned to the others in the house.

¶ 8 Five minutes later, Caitlyn decided to leave, and the defendant walked her to her car, which was parked parallel to the street. The defendant's pick up truck was also parked parallel to the street and behind Caitlyn's car. Neither car was blocking the other vehicle from being able to leave. Caitlyn and defendant engaged in a conversation by their vehicles. Caitlyn testified that the defendant "started putting his hands up [her] shirt and kissin' on [her neck]." Her testimony continued as follows:

"Q. *** Where up your shirt did he put his hands?

A. Just above– Right underneath my bra.

Q. And what were you doing while he was doing that?

A. Trying to move away.

Q. Do you say anything to him?

A. I kept saying 'Stop. I wanna go home.'

Q. Did he stop?

A. No.

Q. When he put his hands up underneath your bra, uh, what part of your body was he touching?

A. His hand was on my hip, and his hand was, uh, just on my bra."

¶ 9 Caitlyn testified that the defendant bit and sucked on her neck, pulled her hair, and had his hand down her pants for a few seconds. She testified that the defendant attempted to put his hand in her underwear, but she would not let him. Caitlyn indicated that she was unable to push the defendant off of her and could not walk away because the defendant had her pinned against his pickup truck. The whole encounter lasted five to seven minutes.

¶ 10 Ashley testified that she had given a statement to police indicating that on the night of the bonfire the defendant had pressed her against a boat in the garage and began to kiss her. According to Ashley, prior to that evening, she and the defendant had hung out and were "almost dating[.]" but they were not serious. A couple of weekends prior to the bonfire, the defendant and Ashley were watching television together and were kissing, when the defendant began to put his hands in her pants and up her shirt. Ashley told the defendant to stop because she was tired, but he continued to attempt to kiss and touch her. Ashley did not remember "if it was [after] the second or third time" that she had asked the defendant to stop when he actually stopped touching her.

¶ 11 The defendant testified that when he arrived at the bonfire, a girl that he did not know was leaving. At the bonfire, Ashley showed the defendant a boat in the garage, where he gave Ashley a hug and kiss, asked her how things were going with her boyfriend, and then returned to the bonfire. As everyone sat around the bonfire, the defendant asked about the girl that had left as he was coming in. He suggested that Ashley invite Caitlyn back to the bonfire. Ashley sent Caitlyn a text message and gave the defendant Caitlyn's telephone number. The defendant called Caitlyn and invited her

to return to the bonfire.

¶ 12 When everyone was cleaning up, Alyssa mentioned that she had to find her camera. The defendant followed Alyssa into the garage. The defendant hugged and kissed Alyssa on the cheek and the lips, and asked her how everything was going. Alyssa indicated that everything was good and she was seeing a guy. Alyssa and the defendant left the garage and met up with everyone else in the kitchen, including Caitlyn.

¶ 13 According to the defendant, he walked Caitlyn to her car, and they began to converse about their careers, their tattoos, and Caitlyn's former boyfriend. Caitlyn showed the defendant her tattoos on her abdominal area near her navel and on her side. The defendant testified that Caitlyn kissed him on the cheek and continued talking. During their conversation he asked Caitlyn if she wanted to leave a couple of times after she mentioned having to get up early, but she said that if she wanted to leave she would do so. The defendant indicated that they were in a "kissing embrace" for four or five kisses. During the embrace, the defendant touched Caitlyn's buttocks, but he denied touching her breast or vagina. During the embrace they "switched back and forth" and sometimes her back was toward the car and sometimes his back was toward the car. On cross-examination, the defendant indicated that he and Caitlyn were rubbing each other when they were kissing.

¶ 14 After reviewing the evidence in the case, including the defendant's videotaped statement to police, the trial court found that Caitlyn was credible and the defendant was not credible. The trial court noted that the defendant had changed his version of events multiple times during his police interview, with defendant starting the interview by stating that he had not touched anyone, was not attracted to Caitlyn, and had turned away when she tried to kiss him. The defendant then indicated to police that he had only touched Caitlyn when he lifted her shirt to see her tattoos and to help with

her sweatshirt, and that he could have accidentally touched her chest or grabbed her when they were hugging or when he was looking at her tattoos. By the conclusion of the interview, the defendant indicated that he and Caitlyn were consensually touching and groping each other.

¶ 15 The trial court found the defendant guilty of count II of the indictment, which alleged criminal sexual abuse in that he used force to touch Caitlyn's breast for the purpose of sexual arousal or gratification. The defendant was sentenced to 30 months of sex offender probation with treatment and 45 days in the county jail. The defendant appealed.

¶ 16

ANALYSIS

¶ 17

I. Sexual Conduct

¶ 18 The defendant first argues that the State failed to prove an element of criminal sexual abuse, namely that the defendant committed an act of sexual conduct. In reviewing a claim of insufficiency of the evidence, the relevant question is whether, after viewing all the evidence in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Givens*, 237 Ill. 2d 311 (2010). Under this standard, the reviewing court must resolve all possible inferences in favor of the prosecution. *Givens*, 237 Ill. 2d 311.

¶ 19 As charged here, criminal sexual abuse consists of an accused committing an act of "sexual conduct" by the use of force or threat of force. 720 ILCS 5/12-15(a)(1) (West 2008). "Sexual conduct" is defined as "any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused *** for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/12-12(e) (West 2008). Touching a female's breast generally carries a sexual purpose, with the only exception

being a medical examination. *People v. Burton*, 399 Ill. App. 3d 809 (2010).

¶ 20 In this case, Caitlyn testified that the defendant placed his hand "underneath [her] bra" and "on [her] bra." Although it could be inferred that Caitlyn meant that the defendant had placed his hand just below her bra, or on her bra but not necessarily on the breast area of the bra, we must resolve all possible inferences in favor of the prosecution. Additionally, the trial judge had the opportunity to observe the witnesses, their demeanor, and their nonverbal responses and body language in determining the meaning of Caitlyn's testimony. Further, the trial court found Caitlyn credible and the defendant not credible. In viewing all the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that the defendant committed an act of sexual conduct.

¶ 21

II. Other Crimes Evidence

¶ 22 The defendant also argues that the trial court impermissibly allowed other crimes evidence of wrongful acts allegedly committed by the defendant against Alyssa and Ashley, through their written statements to police and their testimony at trial. The defendant has forfeited this issue on appeal because he failed to object at trial and raise the issue in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176 (1988) (providing that in order to preserve a claim for review a defendant must both object at trial and include the alleged error in a written posttrial motion). However, the defendant contends that we should review the issue for plain error. Plain errors or defects affecting substantial rights may be noticed on appeal although they were not brought to the attention of the trial court. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). Plain error exists where either: (1) an error was made in a case where the evidence was closely balanced regardless of the seriousness of the error; or (2) the error was so serious that it affected the fairness of the trial and challenged the integrity of

judicial process. *People v. Herron*, 215 Ill. 2d 167 (2005). The first step in any plain error analysis is to determine whether there was any error at all. *People v. Thompson*, 238 Ill. 2d 598 (2010).

¶ 23 Evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crimes. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); *People v. Lovejoy*, 235 Ill. 2d 97 (2009). Other crimes evidence may be admissible to show the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in committing the crime for which the defendant is being tried. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); *People v. Wilson*, 214 Ill. 2d 127 (2005). However, such evidence should not be admitted if the prejudicial effect substantially outweighs its probative value. *Lovejoy*, 235 Ill. 2d 97. Other crimes evidence is admissible so long as it bears some threshold similarity to the crime charged. *Wilson*, 214 Ill. 2d 127. The decision on whether to admit other crimes evidence rests within the sound discretion of the trial court, and we will not disturb that decision absent a clear abuse of discretion. *Lovejoy*, 235 Ill. 2d 97.

¶ 24 Here, the statements and testimony of Alyssa and Ashley were admissible to show defendant's motive, opportunity, intent, plan, or absence of mistake. The charged offense of criminal sexual abuse requires proof of "sexual conduct," *i.e.*, that the defendant intentionally or knowingly touched or fondled the victim's breast for the purpose of sexual gratification. 720 ILCS 5/12-12(e), 15(a)(1) (West 2008). During trial, the defendant admitted to hugging and kissing Caitlyn but denied touching her breast. The defendant's testimony and statement to police indicated that he and Caitlyn were touching each other. Here, there was a possible implication that if any improper contact had occurred, it was inadvertent when Caitlyn showed the defendant her tattoos or during what the defendant claimed was a consensual kissing encounter. In cases such as this, the evidence of other

offenses similar to the one charged may be admissible to show defendant's intent and that the touching was not incidental or accidental. See *Wilson*, 214 Ill. 2d 127. Accordingly, we conclude that there was not an abuse of discretion.

¶ 25

CONCLUSION

¶ 26 The judgment of the circuit court of Kankakee County is affirmed.

¶ 27 Affirmed.