

2013 IL App (2d) 120134-U
No. 02-12-0134
Order filed August 28, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Winnebago County.
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-231
)	
SCOTT A. JOHNSON,)	Honorable
)	Gary V. Pumilia,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err by allowing into evidence other bad acts and offenses committed by defendant, and the jury instructions were sufficiently clear, particularly in light of arguments of parties, as to not amount to plain error.

¶ 2 I. INTRODUCTION

¶ 3 Following a jury trial in the circuit court of Winnebago County, defendant, Scott A. Johnson, was convicted of two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16 (West 2010)). The trial court subsequently determined that the two counts merged and sentenced defendant to four years' probation. Defendant now appeals, raising two main issues. First, he contends that the trial

court erred in admitting evidence of certain other (purportedly) bad acts. Second, he asserts that the manner in which the jury was instructed amounted to plain error. We find neither argument persuasive; accordingly, we affirm.

¶ 4

II. BACKGROUND

¶ 5 Defendant was charged with two counts of aggravated criminal sexual abuse based on a single incident occurring sometime between July 1, 2010, and January 1, 2011 (the counts differed in that one alleged defendant was five years older than the victim and the other charged defendant held a position of trust, authority, or supervision relative to the victim). The incident at issue occurred when the victim accompanied defendant to a Comcast store to return a piece of equipment. During the ride home, defendant placed his hand on and rubbed the victim's vagina (through her shorts). The State filed a motion *in limine* seeking to admit certain other acts allegedly committed by defendant, to wit: (1) on July 4, 2010, defendant touched the victim's breast while they were swimming during a family vacation to Lake Koshkonong in Wisconsin; (2) On December 31, 2010, during a trip to a sporting goods store, defendant told the victim that he would buy her a pair of pants if she agreed to hug and kiss him and, on the way home, he parked "by a trailer near a J.C. Penny Outlet Store," he asked the victim if she still wanted to hug and kiss, the victim stated that she did not, they proceeded home, and, during the ride home, defendant stated that "it might be different if she were a few years older"; and (3) on "numerous occasions" between July 1, 2010, and January 1, 2011, defendant asked the victim if she wanted to cuddle. The State asserted that this evidence was admissible in accordance with section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2010)).

¶ 6 The trial court ruled that the State could introduce evidence concerning the Lake Koshkonong incident pursuant to section 115-7.3. Regarding the other two incidents, defendant argued that they were not admissible under section 115-7.3 because they did not involve “sexual conduct.” Defendant acknowledged that the acts were “creepy,” but pointed out that “creepy is not illegal.” The trial court then uttered the phrase, “Crimes, wrongs, or acts,” which, we note, is language used in Rule 404(3)(b) of the Illinois Rules of Evidence (eff. January 1, 2011). This phrase also occurs in Federal Rule of Evidence 404 (eff. December 1, 2006) and has been used by Illinois courts since the 1980s in addressing the admissibility of other-bad-acts evidence. See, e.g., *People v. Blommaert*, 184 Ill. App. 3d 1065, 1073 (1989). The trial judge subsequently stated, “I am not convinced there’s criminal acts alleged” regarding the latter two incidents. He continued, “I think that these certainly go to show intent, motive and lack of mistake.” However, he added, “I am not sure I am admitting in a crime.” Therefore, the trial court found that the latter two incidents “fall into the exceptions and go to prove intent, motive and lack of mistake.” Thus, the Lake Koshkonong incident was admitted in accordance with section 115-7.3 and the other two incidents were admitted pursuant to evidentiary rules.

¶ 7 Following the presentation of evidence (which we will not set forth here but discuss as it is relevant to the issues raised in this appeal), the trial court instructed the jury. It defined the crimes generally as defendant committing acts of “sexual conduct” with the victim with the appropriate attendant circumstances. The trial court also instructed the jury regarding what the State had to prove to sustain the charges. Regarding count I, the court stated:

“To sustain a charge of aggravated criminal sexual abuse, count I, the State must prove the following propositions:

First Proposition: That the defendant committed an act of sexual conduct upon [the victim]; and

Second Proposition: That [the victim] was at least 13 years of age but under 17 years of age when the act was committed; and

Third Proposition: That the defendant was at least 5 years older than [the victim].”

As for count II, the trial court charged:

“To sustain a charge of aggravated criminal sexual abuse, count 2, the State must prove the following propositions:

First Proposition: That the defendant committed an act of sexual conduct with [the victim]; and

Second Proposition: That [the victim] was at least 13 years of age but under 18 years of age when the act was committed; and

Third Proposition: That the defendant was 17 years of age or older; and

Fourth Proposition: That the defendant held a position of trust, authority, or supervision in relation to [the victim].”

The trial court went on to define “sexual conduct” as follows: “The term ‘sexual conduct’ means any intentional or knowing touching by the accused, either directly or through clothing, of the sex organ of the victim, for the purpose of sexual gratification or arousal of the victim or the accused.” Defendant was convicted of both counts and now appeals.

¶ 8

III. ANALYSIS

¶ 9 On appeal, defendant first contends that the trial court erred in admitting evidence of the other acts set forth in the State’s motion *in limine* (described above) because two of them did not

constitute offenses, as required by section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2010)) and also because the trial court did not properly balance their probative value relative to their tendency to cause unfair prejudice. He further asserts that these errors were not harmless. Second, he complains that the manner in which the jury was instructed was confusing in that the use of the generic term “sexual conduct” could have caused the jury to convict him based on the other-crimes evidence. We disagree with both contentions.

¶ 10

A. OTHER BAD ACTS

¶ 11 We first turn to defendant’s arguments concerning the admission of the other-acts evidence. Generally, we review such contentions using the abuse-of-discretion standard (*People v. Donoho*, 204 Ill. 2d 159, 182 (2003)), under which we reverse only if no reasonable person could agree with the trial court (*People v. Barner*, 374 Ill. App. 3d 963, 970 (2007)). To the extent a construction of section 115-7.3 is needed, the *de novo* standard applies. *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 31. Defendant’s argument involves a number of subarguments.

¶ 12 Defendant first contends that the exception to the usual prohibition on evidence relevant only to a defendant’s propensity to commit a criminal act (see, e.g., *People v. Dabbs*, 239 Ill. 2d 277, 283 (2010)) created by section 115-7.3 does not apply to two of the incidents of which the trial court allowed the State to present evidence. Section 115-7.3 provides, in pertinent part, as follows:

“(a) This Section applies to criminal cases in which:

- (1) the defendant is accused of predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, child pornography, aggravated child pornography, or criminal transmission of HIV;

(2) the defendant is accused of battery, aggravated battery, first degree murder, or second degree murder when the commission of the offense involves sexual penetration or sexual conduct as defined in Section 11-0.1 of the Criminal Code of 2012; or

(3) the defendant is tried or retried for any of the offenses formerly known as rape, deviate sexual assault, indecent liberties with a child, or aggravated indecent liberties with a child.

(b) If the defendant is accused of an offense set forth in paragraph (1) or (2) of subsection (a) or the defendant is tried or retried for any of the offenses set forth in paragraph (3) of subsection (a), *evidence of the defendant's commission of another offense or offenses set forth in paragraph (1), (2), or (3) of subsection (a)*, or evidence to rebut that proof or an inference from that proof, may be admissible (if that evidence is otherwise admissible under the rules of evidence) and *may be considered for its bearing on any matter to which it is relevant.*” (Emphasis added.) 725 ILCS 5/115-7.3 (West 2010).

As the italicized language indicates, section 115-7.3 only allows the admission of evidence pertaining to the other crimes that are set forth in the first subparagraph. It does not apply to acts that do not rise to the level of a criminal offense. Thus, as defendant correctly points out, this exception does not apply to either his request that the victim kiss and hug him or his attempts to get her to cuddle with him.

¶ 13 However, it is clear to us that the trial court was also aware that evidence of these acts did not fall under section 115-7.3. The trial court explicitly stated that it was not convinced that these acts were criminal. It used terminology contained in Evidence Rule 404(3)(b) (eff. January 1, 2011)

during its ruling. Most importantly, it limited the admission of these acts to the issues of “intent, motive and lack of mistake,” rather than propensity, which are uses expressly permitted by Rule 404 (which codified existing Illinois common law on admission of such evidence (see Ill. R. Evid., Committee Commentary (eff. January 1, 2011))). As such, it is abundantly clear that the trial court admitted this evidence pursuant to traditional other-acts principles rather than the statutory exception contained in section 115-7.3.

¶ 14 Defendant contends that the State’s motion *in limine* was based on section 115-7.3 rather than Evidence Rule 404 or its common-law predecessor. We note that the State orally asserted that defendant’s request that the victim cuddle with him was “also a prior bad act.” Moreover, defense counsel, obviously referencing other-acts principles, stated, “Crimes, wrongs or acts ***[,] certainly wrongs has a fairly wide berth.” Thus, it does not appear that defendant was surprised by the trial court basing its decision on such principles. It is well established that we may affirm on any basis apparent in the record. *People v. Dinelli*, 217 Ill. 2d 387, 403 (2005). Accordingly, we hold that evidence pertaining to defendant bartering for kisses and hugs from the victim as well as his attempts to get her to cuddle with him were properly admitted for the limited purposes identified by the trial court.

¶ 15 Regarding the Lake Koshkonong incident, defendant agrees that it “arguably” falls within the scope of section 115-7.3. However, he contends that the trial court did not properly balance its probative value and its potential to produce unfair prejudice. In making this determination, section 115-7.3 directs that a court consider the proximity in time to the charged offense; the degree of factual similarity to the charged offense; and anything else that is relevant. 725 Ill. 2d 5/115-7.3 (West 2010). Defendant initially complains of the proportion of the victim’s testimony that was

directed to the other-acts evidence. Defendant's complaint is not well founded in that the amount of other-acts evidence admitted does not, in itself, establish error if the trial court has not abused its discretion. *People v. Perez*, 2012 IL App (2d) 100865, ¶ 49. Defendant cites nothing to persuade us that no reasonable person could agree with the trial court's decision to admit this evidence based on the quantum of evidence presented. Defendant also complains of certain contradictions in the victim's testimony; however, those are matters of weight. See *People v. Lara*, 2011 IL App (4th) 080983-B, ¶ 42. As for the three factors set forth in section 115-7.3, defendant acknowledges that the first, temporal proximity, favors admission. He contends, however, that the only similarity between the two crimes is that they involved the same victim. That similarity is a significant one, as is the fact that both offenses involved defendant fondling the victim. See *People v. Reed*, 361 Ill. App. 3d 995, 1000 (2005) ("The previous offense in this case had a threshold 'factual similarity' to the charged offense in that both were oral sex performed by L.H. upon defendant."). Defendant seeks to distinguish the two incidents by pointing out that one involved touching the victim through her shorts and the other involved touching her under her shirt. However, a reasonable person could conclude that the fact that both incidents involved defendant touching the victim was more significant than the location of his hand relative to her clothes. Similarly, a reasonable person could also conclude that both incidents were similar in that they involved sexually touching the same victim rather than different because they involved different body parts. In other words, a reasonable person could agree with the trial court and no abuse of discretion occurred here.

¶ 16 Defendant relies on *People v. Smith*, 406 Ill. App. 3d 747 (2010), in support of this argument, however, that case is readily distinguishable. Initially, we note that in *Smith*, 406 Ill. App. 3d at 753, the reviewing court affirmed a trial court's decision to exclude certain evidence of prior bad acts.

Thus, *Smith* merely confirms a trial court's discretion in these matters; it does not provide an example of when that discretion is abused and therefore provides only limited guidance here. Further, *Smith*, 406 Ill. App. 3d at 754, involved "stale other-crimes evidence" of offenses occurring "25 to 42 years prior to the charged offense." Such considerations are not in play here.

¶ 17 We note also that defendant complains that the trial court "did not analyze the evidence with the statutory factors in mind, or at least not explicitly so." Defendant misconceives the process on appeal. We review the results to which the trial court came rather than its reasoning. *People v. Cash*, 396 Ill. App. 3d 931, 950 (2009). At this point, the burden is on defendant to demonstrate that no reasonable person could agree with the results to which the trial court came. Whether these results were produced by explicit reasoning is beside the point.

¶ 18 In short, we hold that evidence concerning defendant's attempts to get the victim to kiss, hug, and cuddle with him were properly admitted pursuant to other-acts principles to establish intent, motive, or lack of mistake. Furthermore, the trial court did not abuse its discretion in balancing the probative value of the Lake Koshkonong incident with its potential to cause unfair prejudice. As we have found no errors, this moots defendant's contention that no error was harmless.

¶ 19 **B. JURY INSTRUCTIONS**

¶ 20 Defendant next argues that the jury instructions regarding the crimes with which he was charged were confusing. He points out that, in describing the elements of the offenses, all instructions simply stated that the State must prove an act of "sexual conduct" with the victim without further defining the conduct with which he was actually charged. Hence, defendant reasons, the jury may have convicted him for any act of sexual conduct. He then asserts that, particularly in light of the emphasis placed on the other-acts evidence, the jury may well have convicted him based

on the uncharged incident that occurred at Lake Koshkonong when defendant touched the victim's breast. Defendant acknowledges that this issue is not properly preserved, but contends that it amounts to plain error. See *People v. Piatowski*, 225 Ill. 2d 551, 564 (2007). We do not find this argument persuasive for two reasons.

¶ 21 First, we note that in addition to instructing the jury that the State had to prove “sexual conduct” between defendant and the victim, the trial court also defined “sexual conduct”: “The term ‘sexual conduct’ means any intentional or knowing touching by the accused, either directly or through clothing, *of the sex organ of the victim*, for the purpose of sexual gratification or arousal of the victim or the accused.” Thus, it is difficult to see how the jury could have convicted defendant based on the Lake Koshkonong incident.

¶ 22 Notably, the legislature has defined, in pertinent part, sexual conduct in the following manner: “ ‘Sexual conduct’ means 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.” (Emphasis added.) 720 ILCS 5/12-12 (West 2010). “Sex organs, anus or breast” are set forth disjunctively, so the legislature clearly did not consider the breast to be a sex organ. Moreover, Webster's Third New International Dictionary, 2082 (1993), defines “sexual organ” as “an organ of the reproductive system.” In turn, Steadman's Medical Dictionary, 1272 (27th ed. 2000), excludes the breasts from the illustration of female reproductive organs. As such, we are unable to find that the jury would have construed “sexual conduct” to include contact with the victim's breast after it had been instructed that “sexual conduct” was the touching of the sex organ of the victim. See *People v. Herron*, 215 Ill. 2d 167, 187-88 (2005) (“Jury instructions should not be misleading or confusing [citation], but their correctness depends upon not whether defense

counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them [citation].”).

¶ 23 Moreover, this is particularly true in light of the arguments made by the parties. During the opening statement, the State said, “[Defendant] rubbed on the outside of her vagina on the outside of her shorts for that car ride home”—“[t]hat is the conduct that the Defendant is on trial for today.” During closing argument, the State went over the elements of the charges. It explained that it had to prove “that the Defendant committed an act of sexual conduct upon [the victim].” It continued:

“The first proposition is that the Defendant committed an act of sexual conduct upon [the victim]. Now you are going to get a definition of sexual conduct ***. The term sexual conduct means any intentional or knowing touching or fondling by the accused either directly or through the clothing of the sex organ of the victim for the purpose of sexual gratification or arousal of the victim or the accused. Well, let’s talk about that. It’s any intentional or knowing touching or fondling by the accused, this Defendant. [The victim] told you that this Defendant put his hand on her leg and moved it up and then rubbed her vagina with his hand.”

Later, the State explained:

“[E]vidence has been received that the Defendant has been involved in conduct other than that charged in the indictment. *** This evidence has been received on the issues of Defendants intent, motive and lack of mistake. It may be considered by you only for that limited purpose. It is for you to determine whether the Defendant was involved in that conduct and if so what weight should be given to this evidence on the issues of intent, motive and lack of mistake. Well, what does that mean? Well, it means you can consider that

incident at Lake Koshkonong, that you can consider that day on New Years Eve when they go to get the pants, to decide what was the Defendant's intent. Was it for sexual gratification or arousal of either [defendant] or [the victim]?"

In a similar vein, defense counsel explained during closing argument that the "[i]ndictment reads that he knowingly committed an act of sexual conduct with [the victim] in relevant part in that the Defendant placed his hand on the vagina of [the victim]. That's the charged conduct." Assuming, *arguendo*, that the jury might have been inclined to misinterpret the term "sex organ" to include breasts, any possibility of confusion was eliminated by the parties' arguments.

¶ 24 In sum, we cannot find plain error here. Before we can find plain error, we must first find that an error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Here, we find no error, as the jury instructions adequately conveyed to the jury what it was required to find to convict defendant. Moreover, the parties' arguments foreclosed any possibility of confusion. Accordingly, we reject defendant's argument on this subject.

¶ 25

IV. CONCLUSION

¶ 26 In light of the foregoing, the judgment of the circuit court of Winnebago County is affirmed.

¶ 27 Affirmed.