2015 IL App (3d) 130761-U

Order filed September 2, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0761
v.	)	Circuit No. 12-CF-43
	)	
DANIEL T. CROCKETT,	)	Honorable Kathy Bradshaw-Elliot,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion by permitting defendant's sister, Yalonda G., to testify that defendant committed multiple sex acts against her as permissible other crimes evidence. Although the trial court erred by admitting evidence of other crimes that defendant committed against another sister, Elizabeth C., in the form of a prior inconsistent statement, this forfeited error did not rise to the level of plain error.

¶ 2 A jury found defendant, Daniel T. Crockett, guilty of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)). The trial court sentenced defendant to 35 years' imprisonment. On appeal, defendant argues the trial court abused its discretion when it allowed

his sister, Yalonda G., to testify to multiple prior acts of sexual misconduct against her and Elizabeth C. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by indictment with one count of predatory criminal sexual assault of a child, D.G. Prior to trial, the State filed a motion to introduce evidence of hearsay statements made by the victim, D.G., in accordance with section 115-10 of the Code of Criminal Procedure of 1963 (Code). 725 ILCS 5/115-10 (West 2012). The State also filed a notice of intent to offer evidence of defendant's commission of another offense against Yalonda pursuant to section 115-7.3 of the Code. 725 ILCS 5/115-7.3 (West 2012).

¶ 5 On February 5, 2013, the court held a hearing on the State's motions. Yalonda testified she was 34 years old and defendant was her brother. Yalonda lived in an apartment with her adult son, Jeremiah, and her minor children, J.L. and D.G. Yalonda and her boyfriend, Andre Melton, slept in one bedroom. Jeremiah and his girlfriend Joy, slept in the second bedroom. J.L. and D.G. typically slept on two separate couches in the living room.

¶ 6 In October 2011, Yalonda occasionally allowed defendant to visit her home and spend the night. When defendant spent the night, he slept in the living room and J.L. and D.G. slept in Yalonda's bedroom.

¶ 7 On the morning of October 12, 2011, Yalonda noticed D.G. was sleeping in Yalonda's bedroom. After D.G. woke up, she told Yalonda defendant pulled down her underwear and "licked between her legs" while she was asleep on the couch. After the statement, Yalonda took D.G. to her father's house and called the police. The police transported Yalonda and D.G. to the hospital.

¶ 8 According to Yalonda, when she was 9 or 10 years old, defendant "messed with" her. On one occasion, Yalonda felt someone pull down her underwear in the middle of the night. Yalonda awoke and saw defendant standing over her. Yalonda said defendant touched her vagina with his hand. When defendant realized Yalonda was awake, he moved to the window and acted like he was looking outside. On another occasion, Yalonda saw defendant move the covers off her older sister, Elizabeth and touch her. Due to defendant's inappropriate actions, Yalonda and Elizabeth were placed in foster care. At the conclusion of the hearing, the court granted the State's motion to admit evidence of defendant's prior sexual misconduct.

¶ 9 At trial, Yalonda testified that she lived in an apartment with Melton, D.G., J.L., and Jeremiah, together with Joy and her two children. Yalonda explained she previously had a contentious relationship with defendant because defendant had "molested" her and Elizabeth when they were children. In October 2011, Yalonda's relationship with defendant was "shaky." She stated she and defendant began "speaking" over the course of the last four months. During this period, defendant visited Yalonda's home four or five times. On some of these visits, defendant slept on a couch in Yalonda's living room. When defendant spent the night, D.G. slept in Yalonda's bedroom.

¶ 10 On October 11, 2011, defendant visited Yalonda's home but left the household around 10 p.m. Before Yalonda went to bed, she saw D.G. sleeping on the couch in the living room. During the night, Yalonda awoke and discovered D.G. sleeping on her bedroom floor. In the morning, D.G. told Yalonda that defendant placed his tongue between her legs while she was sleeping in the living room. Yalonda took D.G. to her father's house and called the police.

¶ 11 Yalonda testified that when she was 10 or 11 years old, on one occasion, she awoke to find defendant pulling down her underwear. When defendant noticed Yalonda was awake, he

jumped up and acted like he was looking out the window. Yalonda said other similar incidents occurred.

¶ 12 During her testimony, Yalonda said when she was a child, her sister Elizabeth, who was one year older than Yalonda, also told Yalonda that defendant had sexually abused her. Defense counsel objected to Yalonda's hearsay testimony, and the court instructed the jury to disregard Yalonda's statement. Afterwards, the parties had a sidebar off the record. When the testimony resumed, the following exchange occurred:

"Q. Yalonda, do you remember testifying at a *** hearing that we held prior to today's date?

A. Yes.

Q. And that was on February 5th of 2013?

A. Yes."

Defense counsel inquired as to the page of the record the State was about to reference, and the case was briefly continued. When the trial resumed, the State asked Yalonda:

"Q. And the question–you were asked, what specifically did you see, and you gave this answer, him moving down the covers messing with her?

A. Yes.

Q. Okay. And do you recall then that happening?

A. Yes. Yep."

¶ 13 The State called D.G. to testify. D.G. was 12 years old and lived in a two bedroom apartment with Yalonda and Melton, and her brothers J.L., Jeremiah, and Jeremiah's girlfriend, Joy. Yalonda and Melton slept in one bedroom and Jeremiah and Joy slept in the second bedroom. D.G. and J.L. slept on the couches in the living room.

¶ 14 On the night of the incident, D.G. went to sleep on a couch in the living room. At the time, D.G. was wearing blue jeans and a shirt, and defendant was not in the apartment.

¶ 15 During the night, D.G. awoke when she felt someone touching her between her legs. D.G. felt wetness between her legs and noticed defendant had licked her genitals. At the time, D.G.'s pants and underwear were pulled down to her ankles. D.G. left the couch and went to the bathroom but defendant said nothing to her. D.G. did not return to the living room but slept in her mother's bedroom. In the morning, D.G. told her mother about the incident.

¶ 16 Melton testified that Yalonda was his girlfriend, and at the time of the incident, he lived in Yalonda's apartment. On the night of the incident, defendant visited the apartment, played cards and drank beer. Defendant did not spend the night. The next morning, Melton saw D.G. lying on the floor in Yalonda's bedroom. At the time, defendant was in the kitchen looking for food to take to work for his lunch. After speaking with D.G., Yalonda was crying and left the apartment with D.G.

¶ 17 Jessica Stevens, a nurse at St. Mary's hospital, testified that she treated D.G. on October 12, 2011. D.G. told the treating physician she was sleeping when defendant pulled down her pants and put his mouth on her genitals.

¶ 18 Forensic interviewer Andrea Longtin spoke with D.G. after the incident. The interview was video recorded, and the recording was played for the jury. In the video, D.G. said defendant touched her genitals with his tongue while she was sleeping.

¶ 19 Detective Avery Ivey testified he was called to the hospital on October 12, 2011. Yalonda told Ivey defendant previously sexually abused her and Elizabeth when they were children. In January 2012, Ivey located and interviewed defendant. Defendant provided Ivey with a buccal swab for DNA testing.

¶ 20 Ivey's video-recorded interview with defendant was played for the jury. On the video, defendant states he knew Yalonda was accusing him of an incident involving D.G. Defendant said Joy let him into Yalonda's apartment at 2 or 3 a.m. on the morning in question and he slept in the living room. During the interview, defendant denied any inappropriate contact with D.G.

¶ 21 Illinois State Police Forensic Biologist William Anselme tested portions of D.G.'s underwear for the presence of saliva. One of the areas tested negative for the presence of saliva, and a second area was inconclusive, meaning it was neither positive nor negative. Anselme also prepared the samples for DNA extraction.

¶ 22 Illinois State Police Forensic Biologist Katherine Sullivan tested the DNA samples procured by Anselme. Each of the three samples did not provide enough information to include or exclude defendant as a possible contributor of the genetic material.

¶ 23 Defendant testified that, in 2011, he lived with his brother, Richard Crockett, in Kankakee. While in Kankakee, defendant visited Yalonda at her home, and occasionally spent the night. When defendant stayed at Yalonda's apartment, he slept on a couch in the living room, and D.G. slept in Yalonda's room.

¶ 24 Defendant had two fights with Yalonda. One of the fights occurred in June 2011, while defendant was staying at Yalonda's apartment. The fight initially concerned Yalonda's son, J.L., who had purportedly stolen some pornographic videos. During the fight, Yalonda said defendant was a "pervert" and told him to leave the house. Yalonda also accused defendant of licking her when she was D.G.'s age and said defendant would do the same thing to D.G. while she was sleeping. Eventually, another individual called the police, and defendant was escorted out of the house.

¶ 25 The second altercation occurred on July 4, 2011. Defendant was attending a party at Richard's house. Richard placed defendant in charge while Richard was temporarily away from the party. Defendant ordered everyone out of the house, and D.G. attempted to reenter. Defendant tried to stop D.G., but she ignored his directions and went inside. Inside the house, Andrea, the mother of Richard's children, verbally quarreled with defendant. The confrontation moved to the porch where it grew into a physical altercation. Yalonda ran onto the porch and punched defendant in the face. D.G. witnessed the altercation before the police were called to break up the fight.

¶ 26 On October 11, 2011, defendant left Yalonda's apartment around 10 or 11 p.m. and went to a nearby tavern where he stayed until 3 a.m. At that time, defendant intended to spend the night with a female friend but the woman returned with another man. Consequently, defendant returned to Yalonda's apartment and Joy let defendant into the apartment. Defendant used the bathroom and went to sleep on the floor by the door. Defendant explained that after he arrived, D.G. left the couch, went to the bathroom, and slept in Yalonda's room. Defendant awoke the next morning, made a few sandwiches and left for work. Defendant denied touching D.G.

¶ 27 During closing arguments, the State said:

> "history repeated itself. The Defendant took advantage of another sleeping relative. This time it was his niece 11 year old [D.G.] Just as he had taken advantage of Yalonda and Elizabeth when they were young girls. Defendant waited until they were asleep, pulled down their pants and touched their private areas."

The State argued defendant touched Yalonda on multiple occasions and "he had used his finger and stuck it in her private." At the end of its closing argument, the State reiterated that history

repeats itself and defendant first touched Yalonda and Elizabeth, and he had now touched D.G. In rebuttal, the State argued defendant touched Yalonda and Elizabeth in the past, which demonstrated defendant's propensity to have sexual contact with 10 and 11-year-old girls.

¶ 28 The jury found defendant guilty of predatory criminal sexual assault of a child. Defendant did not file a posttrial motion, and the case proceeded to sentencing. After a hearing, the court sentenced defendant to 35 years' imprisonment. Defendant appeals.

¶ 29 ANALYSIS

¶ 30 Defendant argues the trial court abused its discretion by allowing Yalonda to testify to: (1) defendant's prior acts of sexual misconduct against her; and (2) defendant's sexual misconduct against Elizabeth. Defendant acknowledges he did not file a motion for new trial and forfeited review of both issues. However, defendant asks this court to review these issues under the second prong of the plain error doctrine. The first step of plain error review is to determine whether error occurred. *People v. Kitch*, 239 Ill. 2d 452, 462 (2011).

¶ 31 I. Other-Crimes Evidence

¶ 32 Defendant argues the trial court abused its discretion by admitting evidence of defendant's prior sexual misconduct with Yalonda and Elizabeth because the evidence was more prejudicial than probative. The State argues the trial court did not abuse its discretion and properly allowed the other-crimes evidence pursuant to section 115-7.3 of the Code. 725 ILCS 5/115-7.3 (West 2012).

¶ 33 Generally, evidence of a defendant's propensity to commit crimes is excluded from a criminal trial because it has " 'too much' " probative value. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003) (quoting *People v. Manning*, 182 Ill. 2d 193, 213 (1998)). However, section 115-7.3(a)(1) of the Code creates an exception which allows evidence of other sex crimes to show a

defendant's propensity to commit the currently charged sex offense. *Id.*; 725 ILCS 5/115-7.3(a)(1) (West 2012).

¶ 34 Before other-crimes evidence may be admitted, the trial court must balance its probative value against its prejudicial effect. 725 ILCS 5/115-7.3 (West 2012). Section 115-7.3(c) provides three factors that a court "may consider" when determining the probative value of other-crimes evidence used to establish propensity:

> "(1) the proximity in time to the charged or predicate offense;
>
> (2) the degree of factual similarity to the charged or predicate offense; or
>
> (3) other relevant facts and circumstances." 725 ILCS 5/115-7.3(c) (West 2012).

We review the trial court's ruling on the admission of other-crimes evidence for an abuse of discretion. *Donoho*, 204 Ill. 2d at 186.

¶ 35 To be admissible, first, the other-crimes evidence should be proximate in time to the charged offense. However, the " 'admissibility of other-crimes evidence should not, and indeed cannot, be controlled solely by the number of years that have elapsed between the prior offense and the crime charged.' " *Donoho*, 204 Ill. 2d at 183 (quoting *People v. Illgen*, 145 Ill. 2d 353, 370 (1991)). The proximity of time factor is evaluated on a case-by-case basis. *Id.*

¶ 36 Here, the prior misconduct occurred more than 20 years before the charged acts. Such a long gap between offenses lessens the probative value of the other-crimes evidence; however, it does not, by itself, necessitate the exclusion of this evidence. See *Donoho*, 204 Ill. 2d at 184 (other-crimes evidence admissible where other crime occurred 12 to 15 years before the charged offense); *People v. Braddy*, 2015 IL App (5th) 130354, ¶ 37 (holding that a 20-year time lapse, while significant, did not render the otherwise credible and reliable other-crimes evidence more prejudicial than probative); *People v. Davis*, 260 Ill. App. 3d 176 (1994) (other-crimes evidence

admissible where other crime occurred in excess of 20 years before the charged offense). Therefore, standing alone, the time gap is insufficient to compel the exclusion of the other-crimes evidence in this case.

¶ 37 Second, to be admissible, the other-crimes evidence must have "some threshold similarity to the crime charged." *People v. Bartall*, 98 Ill. 2d 294, 310 (1983). "As factual similarities increase, so does the relevance, or probative value, of the other-crimes evidence." *Donoho*, 204 Ill. 2d at 184.

¶ 38 Defendant's prior crimes are very similar to the charged offense. When Yalonda was approximately the same age as D.G., she awoke to find that defendant had removed her underwear. Additionally, Yalonda saw defendant inappropriately touch Elizabeth when Elizabeth was approximately the same age as D.G. Due to the high degree of similarity, the other-crimes evidence was highly probative of defendant's propensity to commit sexual offenses. See *People v. Wilson*, 214 Ill. 2d 127, 142 (2005) (noting that as factual similarities increase, so does the probative value or relevance).

¶ 39 Finally, we must consider any other relevant facts and circumstances that affect the probative value of the contested evidence. Defendant argues the probative value of his prior crimes was degraded by his subsequent participation in a sex offender treatment program and the incidents occurrence in a household environment where the boys were having sexual relations with Yalonda and Elizabeth. These factors are far outweighed by the similarity between the prior crimes and the offense at issue. Therefore, we conclude the trial court did not err by admitting evidence of defendant's prior sex crimes under section 115-7.3 of the Code.

¶ 40 II. Evidentiary Challenge

¶ 41 Defendant argues the evidence of prior crimes against Elizabeth was inadmissible on evidentiary grounds because the State impermissibly impeached its own witness. Defendant argues this error is reversible under the second prong of the plain error doctrine because it deprived him of a fair trial. The State argues it did not impeach Yalonda with her prior inconsistent statement, but simply refreshed her recollection.

¶ 42 Generally, " ' "an out of court statement *** offered to establish the truth of the matter asserted" ' " is hearsay and may not be admitted at trial. *People v. Gonzalez*, 379 Ill. App. 3d 941, 954 (2008) (quoting *People v. Rivas*, 302 Ill. App. 3d 421, 431 (1998), quoting *People v. Simms*, 143 Ill. 2d 154, 173 (1991)). However a witness' prior inconsistent statement is excluded from the hearsay rule and may be admitted to impeach the witness' credibility or used as substantive evidence under section 115-10.1 of the Code. *People v. Sangster*, 2014 IL App (1st) 113457, ¶ 60; 725 ILCS 5/115-10.1 (West 2012). A statement, which is otherwise inadmissible hearsay, is admissible under section 115-10.1 if:

> "(a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement—
>
> (1) was made under oath at a trial, hearing, or other proceeding, or
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
>
> (A) the statement is proved to have been written or signed by the witness, or

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording." 725 ILCS 5/115-10.1 (West 2012).

¶ 43 Here, defendant contends Yalonda's trial testimony was consistent with her pretrial statement, and therefore, the statement at issue did not qualify as an admissible prior inconsistent statement. We agree.

¶ 44 In this case, the State sought to admit Yalonda's prior statement to avoid the hearsay rule. However, Yalonda's prior statement was entirely consistent with her trial testimony, and therefore, could not be used substantively under section 115-10.1. The State also could not use Yalonda's prior statement as impeachment evidence because Yalonda's testimony did not affirmatively damage the State's case. See *People v. Cruz*, 162 Ill. 2d 314, 358 (1994) (to impeach a witness with a prior inconsistent statement, the witness' testimony must affirmatively damage a party's case).

¶ 45 Finally, the record does not reveal that Yalonda was having difficulty recalling the incidents. On this basis, we reject the State's argument that Yalonda's prior statement merely served to refresh her recollection.

¶ 46 Having determined the court erred by admitting Yalonda's prior consistent statement, we must next determine whether this unpreserved error constitutes plain error. Under the second prong, an unpreserved error is reversible when that error is so fundamental and of such

magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The supreme court has equated the second prong of the plain error analysis with structural error, *i.e.*, error which erodes the integrity of the judicial process and undermines the fairness of a trial. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010). More recently, the supreme court noted "[i]n order to obtain relief [under the second prong of plain error], defendant must demonstrate not only that a clear or obvious error occurred [citation], but that the error was a structural error." *People v. Eppinger*, 2013 IL 114121, ¶ 19. The supreme court has found structural error in a limited class of cases, including: a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. *Thompson*, 238 Ill. 2d at 609.

¶ 47 In this case, the evidentiary error at issue does not rise to the level of structural error which eroded the integrity of this proceeding or resulted in a trial that was so fundamentally flawed it should be deemed unfair. Therefore, the trial court did not commit plain error by erroneously admitting Yalonda's prior consistent statement for the jury to consider.

¶ 48 CONCLUSION

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

¶ 50 Affirmed.