2015 IL App (5th) 130140-U

NO. 5-13-0140

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Fayette County.
	)	
v.	)	No. 12-CF-89
	)	
RYAN E. MULVANEY,	)	Honorable
	)	S. Gene Schwarm,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Trial judge did not abuse discretion in denying motion for mistrial, because unsolicited use of the word "polygraphic" by a witness, with nothing more, did not amount to the "admission" of prohibited "polygraph evidence" that prevented the defendant from having a fair trial; although trial judge erred by failing to conduct "same comprehensive transaction" analysis when deciding question of joinder of charges, the failure did not prejudice the defendant and therefore did not constitute reversible error.

¶ 2 The defendant, Ryan E. Mulvaney, appeals his convictions and sentences, following a jury trial in the circuit court of Fayette County, for four counts of aggravated criminal sexual abuse. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. On June 7, 2012, the defendant was charged, by information, with four counts of aggravated criminal sexual abuse in violation of section 11-1.60(c)(1)(i) of the Criminal Code of 2012 (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)). The first three counts named as the victim M.P., and alleged that the defendant: (1) placed his penis against the buttocks of M.P. sometime during the month of February 2012 (count I); (2) touched the vagina of M.P. on or about February 4, 2012 (count II); and (3) placed M.P.'s hands on the defendant's penis on or about February 4, 2012 (count III). The fourth count named as the victim K.L., and alleged that "between March 15, 2012[,] and April 5, 2012," the defendant touched the breast of K.L. On June 26, 2012, attorney Bryan Kibler filed an entry of appearance as counsel of record for the defendant. Kibler filed a number of pleadings on behalf of the defendant, including, on October 17, 2012, a motion to sever count IV, which related to K.L., from counts I, II, and III, which related to M.P.

¶ 5 A hearing was held on the motion to sever, as well as on matters unrelated to this appeal, on October 23, 2012. Following argument, the judge who presided over the hearing, and who later presided over the defendant's jury trial, the Honorable S. Gene Schwarm, stated with regard to severance that even if the counts were severed, he would be "inclined" to allow the testimony of one victim at the trial on the counts regarding the other victim. He thereafter denied the motion to sever, ruling that pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3 (West 2012)), the probative value of each victim's testimony at the trial involving the other victim

would not be "outweighed by the prejudicial" effect. Judge Schwarm noted that "the proximity of time is very close *** within months of each other, and the factual similarity is almost identical. Little girls ages eight and ten, they were known to the [defendant], it occurred in either his home or the residence of the victim, and the factual similarity and the nature of the improper acts, the criminal acts[,] are very similar."

¶ 6 The case proceeded to trial, beginning on November 26, 2012. K.L. testified that 10 days prior to trial, she had turned 11 years old, and that the defendant, who was a friend of K.L.'s father, came to K.L.'s home sometime in the "spring or late winter" of 2012. K.L.'s family had taken in a stray dog, and on the afternoon of the defendant's visit, K.L. and the defendant were alone together in K.L.'s living room, sitting side by side on the floor, observing the dog, when the defendant reached around K.L.'s shoulder and rubbed K.L.'s breast in what was characterized as "a circular and up and down motion." K.L. testified that after she "sat there for a second," she "lifted his arm up and went back to the bedroom" where her female cousin was playing. She testified that the defendant subsequently "was winking and blowing kisses" to K.L. and her cousin in the kitchen.

¶ 7 K.L.'s cousin testified that on the afternoon in question, she was "back in the kitchen," but could see into the living room, and observed the defendant "put his arm around [K.L.]" and begin to rub "her chest area." The cousin did not observe the defendant blowing kisses to her or K.L. later. She testified that K.L. came into the kitchen and asked her if she had seen what the defendant had done, then the two girls went back to the bedroom, where they played.

¶ 8 K.L.'s father testified that on the afternoon in question, he left K.L. alone in the living room with the defendant while he went to the bathroom. He explained that a plumbing problem in the bathroom caused him to be gone for "[p]robably five minutes." He testified that he did not learn of the abuse by the defendant until "a week or two after" it occurred, when K.L. came "home from school crying about it." He testified that from that point onward, he did not have any "friendly" contact with the defendant.

¶ 9 M.P. testified that she was eight years old at the time of the trial and that the defendant is her uncle. She testified that earlier that year, she visited the defendant's home for a sleepover and birthday party for the defendant's daughter, who was approximately four years old. M.P. testified that she was sitting on the living room floor visiting with the defendant and the defendant's daughter when the defendant first picked up his daughter and tickled her, then picked up M.P. and tickled her. M.P. testified that the defendant placed her on his lap, and that his "private" was outside of his clothes. She testified that her "butt" came into contact with the defendant's "private." She testified that later, when sleeping in a bedroom of the defendant's home, she awoke to find the defendant in bed with her. She testified that the defendant "put my hand on his private and then he put his hand on my private," under her clothes, and that she washed her hand after touching his private because her hand had become "slimy." M.P. testified that she disclosed the abuse to her grandfather, who took her to speak with authorities.

¶ 10 Holly Finney, a special agent with the Illinois State Police, testified that as part of her duties related to the investigation involving the defendant, she interviewed K.L., and K.L.'s cousin, and was present for the interview of M.P. On cross-examination, she

testified that she could not recall whether M.P. had stated that the defendant's pants "were down to his ankles" at the time of the alleged abuse of M.P., but that she did remember that the defendant's penis "was exposed" at that time. She testified that M.P. had stated that the defendant touched her "over the clothes" rather than under them.

¶ 11 After the State rested, and the trial court denied the defendant's motion for a directed verdict, the defendant testified. He denied all of the alleged incidents of abuse, and stated that he could think of no reason why M.P. and K.L. would say that he abused them. Specifically, he denied that he ever put his arm around K.L.'s shoulder, or that he told Finney he had done so. The defendant's mother and father each testified that on the night of the sleepover, the defendant spent the night sleeping at their house, rather than his own nearby home.

¶ 12 In rebuttal, the State again called Holly Finney. The State asked Finney, "On April 26, 2012, at about 10:45 a.m., did yourself and Mark Murphy have a conversation with the defendant?" Finney began to answer, stating, "Mark Murphy is our polygraphic," but was cut off by the State before she could finish whatever she intended to say. The State then asked, "Did you have a conversation with the defendant with Mark Murphy present?" Finney answered, "No. Mark Murphy and I and the defendant did not all speak together." The State then asked if the defendant had told Finney that he had "in fact" put his arm around the shoulder of K.L. Finney answered yes.

¶ 13 At the jury instruction conference that followed, attorney Kibler stated he wished to make a record regarding Finney's use of the word "polygraphic," noting that his client, the defendant, believed the use of the term was "an egregious mistake" that warranted a

mistrial. The State responded that it had asked a yes or no question, and had cut Finney off as quickly as possible, once it became apparent that she might reference something related to a polygraph. The State noted that Finney had answered that Murphy was not present when she interviewed the defendant and posited that "so the jury, from all of that information, would conclude that there wasn't a polygraph involved."

¶ 14 Judge Schwarm denied the motion for a mistrial, stating that the State's characterization of the testimony mirrored his own memory of it, and that although it was "unfortunate that that word was mentioned by the witness," he did not believe it rose "to the level of causing the need for a new trial." He then asked Kibler if Kibler wanted "any type of admonishment to the jury or instruction to the jury that they should disregard?" Kibler responded, "Not at this time. It would just be making a bigger deal out of it than it is, so I'm not going to ask for an instruction on it," to which Judge Schwarm responded, "And I tend to agree. I think if I gave a special admonishment that may highlight that and cause the jury to concern themselves about that where they should not concern themselves about that."

¶ 15 After deliberating for approximately 40 minutes, the jury found the defendant guilty of all four counts against him. Subsequently, the defendant's posttrial motion, which was filed by new counsel Edwin Potter and which again raised the issue of Finney's testimony, was denied, the defendant was sentenced, and this timely appeal followed.

¶ 16 ANALYSIS

¶ 17 On appeal, the defendant contends he: (1) "was denied his right to a fair trial by

the erroneous testimony, elicited by the prosecutor in his rebuttal case, by Special Agent Finney about a polygraph or polygraph expert," and (2) is entitled to reversal of his convictions and sentences and remand for new trials in which the charges related to M.P. are severed from those related to K.L.

¶ 18 With regard to the first issue, in his opening brief, the defendant contends that "[s]ince there are no disputed facts about what occurred here, the standard of review is closer to *de novo* than an abuse of discretion." Thus, the defendant contends, this court "need not give deference to the circuit court here." We do not agree. It is well established that "[t]he decision whether to grant a mistrial rests within the sound discretion of the trial court, and this court will not reverse the trial court's decision absent an abuse of that discretion." *People v. Britt*, 265 Ill. App. 3d 129, 147 (1994). We will find an abuse of discretion "only when the trial court's decision is arbitrary, fanciful, or unreasonable." *Id.* Moreover, also in his opening brief, the defendant posits that the State's questioning of Finney about the presence of Murphy "is puzzling since the prohibition about polygraph evidence is so clear," and that "Finney's decision to mention the polygraph operator looks deliberate." In the trial court, counsel Potter, arguing the defendant's posttrial motion, went further, stating that the questioning of Finney led to the implication "that either with or without the prior collusion of [the prosecutor], Agent Finney wanted to plant the seed in front of the jury that there had been a polygraphic [*sic*] either done or offered." To the extent these statements from the defendant attempt to impugn the character and motive of the prosecutor and witness Finney in this case, and to imply that gamesmanship may have been at play during the defendant's trial, the

statements do not support *de novo* review by this court; to the contrary, they underscore the importance of employing an abuse of discretion standard of review, for there is no doubt that the trial judge was in a better position than is this court to observe and analyze the demeanors of the prosecutor and Finney during the questioning of Finney and immediately thereafter, and to determine whether an attempt was made by either to "sneak in" evidence that was otherwise not admissible. As the Supreme Court of Illinois has noted, "the trial court is in a better position than a reviewing court to judge the motives and intentions of [a] prosecutor[ ]." *People v. Ortega*, 209 Ill. 2d 354, 363 (2004). Accordingly, we decline to deviate from the established standard of review in cases involving a request for a mistrial, and we will reverse the trial judge only if we find his decision was arbitrary, fanciful, or unreasonable.

¶ 19 With regard to the substance of his first issue, the defendant notes that courts of review in Illinois "have consistently held that evidence pertaining to polygraph examinations is inadmissible," and that "the improper admission of polygraph evidence *** constitutes reversible error." This proposition is certainly true, and is supported by voluminous case law. However, we do not believe that what happened in the case at bar can reasonably construed to be the "admission" of "polygraph evidence." As explained above, Finney was asked a simple yes or no question: "On April 26, 2012, at about 10:45 a.m., did yourself and Mark Murphy have a conversation with the defendant?" She began to answer that question, apparently deeming it necessary to describe Murphy's position with the Illinois State Police, and stating "Mark Murphy is our polygraphic." She was cut off by the State before she could finish whatever she intended to say, and no additional

mention or reference to anything related to a polygraph examination or a polygraph examiner was made in front of the jury.

¶ 20 As described above, at the subsequent jury instruction conference, attorney Kibler moved for a mistrial on the basis of Finney's testimony. Judge Schwarm denied the motion, stating that although he considered it "unfortunate that that word was mentioned by the witness," he did not believe it rose "to the level of causing the need for a new trial." He then asked Kibler if Kibler wanted "any type of admonishment to the jury or instruction to the jury that they should disregard?" Kibler responded, "Not at this time. It would just be making a bigger deal out of it than it is, so I'm not going to ask for an instruction on it," to which Judge Schwarm responded, "And I tend to agree. I think if I gave a special admonishment that may highlight that and cause the jury to concern themselves about that where they should not concern themselves about that." Had Judge Schwarm believed, on the basis of his direct observation of the events surrounding Finney's statement, that there was any misconduct on the part of the prosecutor or Finney−such as the intent of the prosecutor to elicit a reference to a polygraph examiner or exam, or the intent of Finney, before she was stopped, to inject error into the trial−or had he observed any reaction from the jury that caused concern for him, undoubtedly he would have noted that for the record and weighed it when making his ruling. He did not.

¶ 21 In the absence of such a finding of fact by Judge Schwarm, as the State notes, there is simply no support in the record for any such conclusion. Indeed, as the State aptly puts it: "The record fails to support the allegation that the [p]rosecutor intended to extract from the witness improper testimony concerning a polygraph or polygraph

examiner. No question was asked nor testimony given that the defendant was offered or took a polygraph test and no question was asked or testimony given that the defendant refused to take a polygraph test. No results of any alleged polygraph test were in any way a part of the record" that was presented to the jury. We agree with the State that the facts in this case are far different from those found in the cases cited by the defendant, all of which address the issue of the exposure of the finder of fact to actual polygraph evidence, related to a defendant, codefendant, or witness taking or not taking a polygraph examination, and/or the results thereof. What is present in this case is something of a much different caliber: an unsolicited, truncated, and obscure use of the word "polygraphic," with nothing more. Because we do not believe that under these circumstances Judge Schwarm's decision to deny the defendant's request for a mistrial was arbitrary, fanciful, or unreasonable, we do not believe the decision was an abuse of discretion and we hereby affirm it.

¶ 22 With regard to the defendant's second issue on appeal, that he is entitled to reversal of his convictions and sentences and remand for new trials in which the charges related to M.P. are severed from those related to K.L., we begin by addressing the standard of review. "A trial court has substantial discretion in deciding whether to sever separate charges, and its decision will not be reversed on appeal absent an abuse of that discretion." *People v. Walston*, 386 Ill. App. 3d 598, 600 (2008). This court will find an abuse of discretion "only where no reasonable person would agree with the trial court's ruling." *Id*. at 601.

¶ 23 The defendant in the case at bar is correct that the trial judge erred by not

conducting the required "same comprehensive transaction" test to decide if the charges in this case properly could be joined or had to be severed. See, *e.g.*, *id.* at 601-09. The defendant also is correct that had the trial judge conducted the required "same comprehensive transaction" test, he would have necessarily concluded that the charges had to be severed. However, we agree with the *Walston* court that "[e]ven 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." *Id*. at 609.

¶ 24 In the case at bar, the trial judge ruled that pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3 (West 2012)), the probative value of each victim's testimony at the trial involving the other victim would not be "outweighed by the prejudicial" effect. Prior to so ruling, he stated, "When you think about if it is severed *** certainly I'd be inclined to allow that evidence to come in in the other trial." That was because, as he noted after ruling, "the proximity of time is very close *** within months of each other, and the factual similarity is almost identical. Little girls ages eight and ten, they were known to the [defendant], it occurred in either his home or the residence of the victim, and the factual similarity and the nature of the improper acts, the criminal acts[,] are very similar."

¶ 25 The State is generally prohibited from using other-crimes evidence to show the defendant's propensity to commit a charged offense. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). However, section 115-7.3 of the Code of Criminal Procedure of 1963 permits the admission of other-crimes evidence to show propensity to commit specified

sex offenses. 725 ILCS 5/115-7.3 (West 2012). The Illinois Supreme Court has upheld the constitutionality of section 115-7.3. *Donoho,* 204 Ill. 2d at 182. We review the admission of other-crimes evidence under an abuse of discretion standard. *Id.* We will not reverse the trial court unless the trial court's decision is " ' "arbitrary, fanciful or unreasonable" ' or ' "where no reasonable man would take the view adopted by the trial court." ' " *Id.* (quoting *People v. M.D.*, 101 Ill. 2d 73, 90 (1984) (Simon, J., dissenting), quoting *Peek v. United States*, 321 F.2d 934, 942 (9th Cir. 1963)). Section 115-7.3 specifies the factors the court must consider when weighing whether the prejudicial effect of admitting other-crimes evidence outweighs the probative value: "(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).

¶ 26 The court in *People v. Donoho* explained that there is no bright-line rule controlling when prior offenses are too old to be admitted under section 115-7.3. *Donoho*, 204 Ill. 2d at 183-84. The trial court must base its decision upon the facts of each case, and the appellate court may not simply substitute its judgment for that of the trial court. *People v. Illgen,* 145 Ill. 2d 353, 371 (1991). While the passage of a number of years may lessen the probative value of the other-crimes evidence, the passage of years alone does not determine its admission. *Id.* at 371; *Donoho,* 204 Ill. 2d at 186. In the case at bar, as Judge Schwarm noted, the proximity of the crimes was "within months of each other," which supports the admissibility of the evidence, especially when one considers that in *People v. Donoho*, the Illinois Supreme Court found other-crimes

evidence admissible after a 12- to 15-year time lapse. 204 Ill. 2d at 162.

¶ 27 With regard to the degree of factual similarity to the charged or predicate offense (see 725 ILCS 5/115-7.3(c) (West 2012)), Judge Schwarm noted that "the factual similarity is almost identical. Little girls ages eight and ten, they were known to the [defendant], it occurred in either his home or the residence of the victim, and the factual similarity and the nature of the improper acts, the criminal acts[,] are very similar." Other factors that might give a court pause, such as the desire of the State to introduce a large quantity of uncharged acts (see, *e.g.*, *People v. Walston*, 386 Ill. App. 3d 598, 618 (2008) (discussing how the "sheer quantity" of propensity evidence offered by the State potentially could cause unfair prejudice to a defendant)), are not present in the case at bar.

¶ 28 Our review of the record leads us to conclude that Judge Schwarm did not err in finding that, pursuant to section 115-7.3, the probative value of each victim's testimony at the trial involving the other victim would not be "outweighed by the prejudicial" effect and thus would be admissible therein. Accordingly, because "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" (*People v. Walston*, 386 Ill. App. 3d 598, 609 (2008)), Judge Schwarm's failure to sever the charges pursuant to the "same comprehensive transaction" test was harmless error.

¶ 29 The defendant contends, however, that we should not follow the harmless-error analysis found in *Walston* because in the case at bar, "the evidence of the underlying charges was more closely balanced," than in *Walston*, because "the complainants' stories

were not corroborated by physical evidence" and they did not immediately report the abuse. The defendant proclaims this case to be more of a credibility contest between the defendant and his victims, and contends that accordingly, we should not follow *Walston*. We disagree. First, we do not accept the proposition that the evidence in this case is "more closely balanced" than the evidence in *Walston*. The lack of potentially corroborating physical evidence and contemporaneous outcry in the case at bar notwithstanding, the defendant in *Walston*, like the defendant in the case at bar, testified in his own defense and vigorously maintained his innocence, taking the position that the women in question were not victims, but were people with whom he had consensual sex (a defense, we note, that was not available to the defendant in this case). 386 Ill. App. 3d at 624-25. He attacked the character and credibility of the women, and "challenged or refuted" their testimony "on several grounds." *Id.* at 625. *Walston* was indeed a credibility contest, and was hardly a slam-dunk conviction for the State.

¶ 30 Second, as the *Walston* court aptly noted, when a defendant challenges propensity evidence by attacking the credibility of the complaining witnesses, the defendant has "thus challenged the other-crimes evidence," and the danger of undue prejudice to a defendant likely is not as great when that defendant has offered a vigorous challenge to the other-crimes evidence than when the defendant has not challenged it. *Id.* at 623. As the *Walston* court noted, "section 115-7.3 contemplates that a defendant will challenge propensity evidence and thus implicitly contemplates that the State may offer more thorough evidence in anticipation of impeachment." *Id.* at 625.

¶ 31 Third, as explained above, section 115-7.3 specifies the factors the court must

consider when weighing whether the prejudicial effect of admitting other-crimes evidence outweighs the probative value: "(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). Had the General Assembly wished to delineate as specifically listed factors the existence or nonexistence of corroborating physical evidence or an immediate outcry or lack thereof by the victim or victims, the General Assembly certainly would have done so. It did not, and therefore, although those factors certainly bear consideration as part of the overall analysis of a particular case, we do not believe they *per se* provide justification for deviating from the harmless-error analysis of *Walston*, and we are not convinced deviation is dictated by the facts before us in this case.

¶ 32 Accordingly, we decline the defendant's invitation to depart from the harmless-error analysis of *Walston*. That said, we do share the concern of the *Walston* court that its holding might be seen by trial courts "as an invitation to overlook the joinder statute on the ground that even a misjoinder will not lead to reversal." 386 Ill. App. 3d at 623. Accordingly, we hold for the record, as did the *Walston* court, that "[a] trial court is required by statute to make an independent assessment as to whether two charges should be joined for a single trial, based solely on the law surrounding joinder," and reiterate that the trial court "may not *** skip the joinder inquiry and join the charges where it believes the decision, even if [erroneous], will not constitute reversible error." *Id*. at 609.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we affirm the defendant's convictions and sentences.

¶ 35 Affirmed.