2018 IL App (4th) 160047-U

NO. 4-16-0047

FILED
June 7, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Moultrie County
LARRY D. SMITH,	)	No. 14CF39
Defendant-Appellant.	)	
	)	Honorable
	)	Daniel Flannell,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Harris and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding (1) the trial court properly allowed admission of other-crimes evidence; (2) no error occurred when the prosecutor utilized other-crimes evidence in his closing argument; and (3) the statement of defendant contained in the presentence investigation report did not trigger the need for a *Krankel* inquiry.

¶ 2 In October 2014, the State charged defendant, Larry D. Smith, with predatory criminal sexual assault of a child under 13 (720 ILCS 5/12-14.1 (b)(2) (West 2006)) and aggravated criminal sexual abuse of a child under 13 (720 ILCS 5/12-16 (c)(1) (West 2006)), both involving his granddaughter, M.S. (born October 21, 1999). In March 2015, the trial court granted the State's motion *in limine*, allowing the use of defendant's August 1990 conviction of three counts of criminal sexual assault (Ill. Rev. Stat., 1989, ch. 38, ¶ 12-13 (a)(3)), and one count of aggravated criminal sexual assault (Ill. Rev. Stat., 1989, ch. 38, ¶ 12-16 (c)(1)(i)), all involving his daughter, Jane Doe, M.S.'s aunt. In November 2015, a jury found defendant guilty

on all counts. Following a sentencing hearing, the court sentenced defendant to a term of natural life in prison for predatory criminal sexual assault of a child and a term of seven years in prison for aggravated criminal sexual abuse of a child under 13 years old.

¶ 3 On appeal, defendant argues (1) the trial court erred by allowing the admission of other-crimes evidence; (2) the prosecution used an improper and prejudicial method to present the other-crimes evidence; (3) the court failed to instruct the jury on how to consider the other-crimes evidence; and (4) the court neglected to conduct a *Krankel* inquiry when defendant complained about his attorney in his presentence investigation report. For the reasons that follow, we affirm.

¶ 4 I. BACKGROUND

¶ 5 In October 2014, the State charged defendant with predatory criminal sexual assault of a child under 13 (720 ILCS 5/12-14.1 (b)(2) (West 2006)) and aggravated criminal sexual abuse of a child under 13 (720 ILCS 5/12-16 (c)(1) (West 2006)). The information alleged the victim to be M.S., the granddaughter of defendant. The allegations asserted that in 2006 or 2007, defendant sexually penetrated M.S. by putting his tongue into her vagina. The information went on to charge that on or about 2007 through 2009, defendant rubbed M.S.'s vagina through her clothing and touched her breasts for his sexual arousal.

¶ 6 A. Motion *in Limine*

¶ 7 In January 2015, the State filed a motion *in limine* seeking to admit defendant's August 1990 convictions for three counts of criminal sexual assault and one count of aggravated criminal sexual abuse, all against his daughter, Jane Doe. The charges arose from acts defendant committed against his daughter who was under 18 years old, including placing his penis in contact with her vagina, placing his penis in her mouth, placing his mouth on her vagina, and

fondling her breasts and vagina. Each incident occurred between December 30, 1989, and January 5, 1990. Following a plea of guilty to all four counts, defendant received a sentence of 4 years' probation with 180 days in jail.

¶ 8 In February 2015, the trial court held a hearing on the State's motion *in limine*. In support of the motion *in limine*, the prosecutor argued similarities existed between the cases because the prior and current case involved young, female family members, and defendant, an older male authority figure, placing his mouth on the family member's vagina and fondling the sex organs of the family member. In advocating against the motion, defense counsel argued (1) because of the passage of time, there was no opportunity to consider police reports from the old case to learn what circumstances led to the plea; (2) the incidents in the old case were not similar to conduct alleged in the current case; (3) it was hard to argue a pattern with so much time between the instances; and (4) factual dissimilarities made the prejudicial effect outweigh the probative value.

¶ 9 Following the hearing, the trial court entered a docket entry granting the State's motion and admitting defendant's other crimes to show *modus operandi* and/or propensity. The court admitted the other-crimes evidence because of similarities in the status and age of the victims, and what it described as remarkable similarities in the offenses. Ultimately, the court found the probative value of the other-crimes evidence outweighed the prejudicial impact.

¶ 10 B. Trial

¶ 11 In November 2015, the matter proceeded to a jury trial. We summarize only the evidence necessary for the resolution of this appeal.

¶ 12 M.S. testified she was born on October 21, 1999, making her 16 at the time of trial and a sophomore at Shelbyville High School. According to M.S., during her younger years,

she visited defendant every weekend and on school breaks. M.S testified that defendant served as a father figure in her life.

¶ 13 M.S. recalled the first time defendant touched her sexually took place after she and defendant played tag outside. After playing tag, defendant and M.S. went back inside defendant's house to M.S.'s bedroom. Defendant put M.S. on her bed and rubbed M.S.'s breasts. Defendant made skin-to-skin contact with M.S.'s breasts. M.S. remembered this because she wore her first bra, a Hannah Montana bra.

¶ 14 The second incident happened in M.S.'s bedroom after defendant played Farmville on Facebook and showed M.S. images of nude fairies. Defendant told M.S. the fairies were "anime adult fairies." Defendant then moved M.S. to her bed. Defendant touched M.S.'s breasts with his hands and rubbed M.S.'s vagina. Defendant took M.S.'s pants off and placed his tongue in her vagina.

¶ 15 The third incident took place in Sullivan, Illinois, in defendant's semi-truck, during third grade and before M.S. moved to Ohio. Defendant's semi-truck had a place for two beds. Defendant placed M.S. on one of the beds. Defendant put his mouth and tongue on M.S.'s vagina.

¶ 16 In 2010, M.S. moved to Ohio for a short time. When she was 10 years old, M.S. returned to Illinois to live with defendant. M.S. related defendant never touched her in a sexual manner following her return to Illinois. M.S. first reported defendant's sexual abuse when she was a freshman. M.S. testified she reported defendant's sexual offenses after a number of years went by because she was ashamed and wanted to keep the abuse a secret.

¶ 17 Tonya H., M.S.'s mother, testified she has two daughters, M.S. and O.J. Tonya testified M.S. visited defendant when she needed a babysitter. The grandparents visited or

picked M.S. up when they wanted to see her. When Tonya discovered M.S. cutting herself, she sent M.S. to counseling and learned of the sexual abuse after M.S. participated in counseling for two weeks.

¶ 18 The State offered group exhibit No. 1, defendant's prior convictions involving his daughter. Defense counsel asked for a continuing objection. The trial court admitted the exhibit over the objection of defense counsel.

¶ 19 At the conclusion of the evidence, the jury found defendant guilty of predatory criminal sexual assault of a child and aggravated criminal sexual abuse. In November 2015, defense counsel filed a motion for a new trial alleging the trial court erred by admitting other-crimes evidence. After a December 2015 hearing on defendant's motion for a new trial, the court denied the motion and proceeded to sentencing. In conducting the sentencing hearing, the court considered the presentence investigation report, which indicated defendant's dissatisfaction with defense counsel, and the arguments of counsel. Following the sentencing hearing, the court imposed a sentence of natural life in prison for predatory criminal sexual assault of a child and seven years in prison for aggravated criminal sexual abuse of a child under 13 years old.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 A. Admission of Other-Crimes Evidence

¶ 23 On appeal, defendant argues the trial court erred by allowing admission of other-crimes evidence. Defendant asserts the prior offenses were too remote in time and lacked sufficient similarity to the pending charges. The State contends the court properly considered all relevant factors and did not err by permitting the State to use other-crimes evidence under section 115-7.3(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3(a)

(West 2014)).

¶ 24 Other-crimes evidence "is generally inadmissible to demonstrate propensity to commit the charged crime (propensity). Such evidence is not considered irrelevant; instead, it is objectionable because such evidence has 'too much' probative value." *People v. Donoho*, 204 Ill. 2d 159, 170, 788 N.E. 2d 707, 714 (2003). However, statutory exceptions to this general rule do exist. Sections 115-7.3(a)(1), (b), and (c) state 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, criminal transmission of HIV, or child abduction as defined in paragraph (10) of subsection (b) of Section 10-5 of the Criminal Code of 1961 or the Criminal Code of 2012;
>
> * * *
>
> (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.

(c) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

(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(a)-(c) (West 2014).

¶ 25 "Where other-crimes evidence meets the initial statutory requirements, the evidence is admissible if it is relevant and its probative value is not substantially outweighed by its prejudicial effect." *People v. Vannote,* 2012 IL App (4th) 100798, ¶ 38, 970 N.E.2d 72. To weigh the probative value of the other-crimes evidence against undue prejudice to the defendant, the trial court may consider (1) the proximity in time to the charged offense, (2) the degree of factual similarity to the charged offense, and (3) other relevant facts and circumstances. 725 ILCS 5/115–7.3(c) (West 2014). "A court's decision to admit other-crimes evidence will not be reversed absent an abuse of discretion." *People v. Smith,* 2015 IL App (4th) 130205, ¶ 22, 29 N.E.3d 674. "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall,* 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000).

¶ 26 1. *Remoteness*

¶ 27 The underlying sexual offenses for defendant's other crimes occurred in 1989-90.

In this matter, the conduct occurred during 2006 to 2009. This leaves a 16-19 year gap between defendant's other crimes and the charges for which defendant went to trial.

¶ 28 Precedent teaches, "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. The decision whether to admit or exclude such evidence must be made on a case-by-case basis by the trial judge responsible for evaluating the probative value of the evidence." *People v. Ilgen*, 145 Ill. 2d 353, 370, 583 N.E.2d 515, 522 (1991). Further, there is no bright-line rule establishing at what point other crimes are *per se* too old to be admitted under section 115-7.3. Instead, it is a factor to consider when evaluating the probative value of the proposed evidence. *Donoho*, 204 Ill. 2d at 183-84.

¶ 29 The Illinois Supreme Court affirmed admission of other-crimes evidence 12 to 15 years old and held that, "while the passage of 12 to 15 years since the prior offense may lessen its probative value, standing alone it is insufficient to compel a finding that the trial court abused its discretion by admitting evidence about it." *Donoho*, 204 Ill. 2d at 184. The Second District affirmed admission of other-crimes evidence over 20 years old because the court found the evidence sufficiently credible and probative. *People v. Davis*, 260 Ill. App. 3d 176, 192, 631 N.E.2d 392, 401 (1994). Thus, the 16- to 19-year gap between other-crimes evidence in this case and the current offenses is not in and of itself determinative of the admissibility of the evidence.

¶ 30 Here, the record clearly demonstrates the trial court's careful consideration of the relevant factors, including the lapse in time between the crimes. Ultimately, while noting the substantial lapse of time between the conduct, the court found remarkable the similarities between the crimes. In the end, the court found the time lapse, while significant, failed to overcome the impact of the similarities between the current allegations and the other-crimes

evidence.

¶ 31 2. *Similarities*

¶ 32 "As factual similarities increase, so does the relevance, or probative value, of other-crimes evidence." *Donoho*, 204 Ill. 2d at 184. Defendant's other crimes and the current charges involve sexual offenses against female family members, namely his daughter and M.S., his granddaughter. Defendant's criminal sexual assault of his daughter occurred when she was under 13 years old. Defendant's current sexual offenses occurred when M.S. was less than 13 years old. M.S testified defendant served as a father figure in her life. In each case, defendant took advantage of his role as a father or father figure to abuse the victim.

¶ 33 When committing the prior offenses, defendant put his penis in his daughter's mouth and vagina, placed his tongue in his daughter's vagina, and fondled his daughter's vagina and breasts. In the case at hand, defendant put his tongue in M.S.'s vagina, and rubbed M.S.'s vagina and breasts. Thus, both cases involve defendant placing his tongue in the vagina of the victim and fondling the breasts and vagina of each victim. Based on these similarities, the trial court determined the probative value of the other-crimes evidence outweighed any prejudice to defendant.

¶ 34 In support of his position, defendant relies on *People v. Smith*, 406 Ill. App. 3d 747, 941 N.E.2d 419 (2010), wherein the State argued the factual similarities compensated for the time lapse between offenses against female family members—*Smith* involved sisters, daughters, and a granddaughter—and weighed in favor of admission. Defendant argues, like the *Smith* court, we should reject the State's argument and instead find the factual similarities are insufficient to overcome the lapse in time. We find *Smith* distinguishable.

¶ 35 In *Smith*, the prosecution sought admission of unreported and uncharged other-

crimes evidence. Here, the court admitted into evidence convictions entered after a plea of guilty. Notably, even in *Smith*, the court admitted some other-crimes evidence, only denying admission of uncharged other-crimes evidence dating back 25 to 42 years. Also, the other-crimes evidence admitted in *Smith* involved crimes against another granddaughter in a case where the defendant faced accusations of abusing a granddaughter. The trial court admitted the other-crimes evidence based on similarity in age, the victim's relationship to defendant, and the nature of the alleged abuse.

¶ 36 Finally, *Smith* involved an interlocutory appeal by the State, and the *Smith* court affirmed based in large part on the standard of review. In upholding the decision of the trial court to deny admission of some of the other-crimes evidence the court stated, "Although reasonable persons can disagree with the trial court's decision, the court's ruling was certainly not 'arbitrary,' 'fanciful,' or 'unreasonable.' Thus, it must be upheld." *Smith*, 406 Ill. App. 3d at 757. In actuality *Smith* fails to help defendant, and in many ways supports a result contrary to his position.

¶ 37 We conclude the trial court did not abuse its discretion in granting the motion *in limine* and allowing the State, under section 115-7.3(c), to use the other-crimes evidence at trial.

¶ 38 3. *Use of Other-Crimes Evidence During Closing Argument*

¶ 39 Defendant argues the prosecutor used an improper method of presenting the admitted other-crimes evidence. Defendant asserts prejudice occurred when the prosecution read the 1990 charging instrument to the jury during closing arguments. The State responds defendant forfeited his argument on this matter because he failed to (1) object to the prosecutor publishing the other-crimes evidence to the jury and (2) raise this issue in his posttrial motion.

¶ 40 "To preserve an issue for review, a party ordinarily must raise it at trial and in a

written posttrial motion." *People v. Cregan*, 2014 IL 113600, ¶ 15, 10 N.E.3d 1196. "*Both* a trial objection *and* a written posttrial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphases in original.) *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988).

¶ 41 Here, defense counsel objected to the motion *in limine*, noted a continuing objection during trial, and included the issue of the admission of the other crimes in a posttrial motion. Thus, we find the State's position disingenuous. Clearly, counsel for the defendant objected to the other-crimes evidence being before the jury in any way. Based on our review of the record and the circumstances of this case, we find the issue is not forfeited.

¶ 42 While the issue is not forfeited, defendant fails to persuade that the oral publication of the other-crimes evidence constituted error. Here, the jury did receive an instruction explaining closing arguments are not evidence. Also, it is well settled that prosecutors are granted wide latitude during closing argument. *People v. Wilson*, 2015 IL App (4th) 130512, ¶ 66, 44 N.E.3d 632. Thus, "a prosecutor may comment on the evidence presented and any fair and reasonable inferences it yields." *People v. Theis*, 2011 IL App (2d) 091080, ¶ 52, 963 N.E.2d 378. Given the trial court admitted the other-crimes evidence into evidence, the prosecutor acted appropriately in using the evidence in closing argument.

¶ 43 Defendant's reliance on *Donoho* to convince us otherwise fails to persuade. This case involves the prosecution reading a charging instrument. In *Donoho*, the prosecution sought to read an explicit and detailed statement explaining how defendant arranged and executed a prior sex crime. The statement included defendant's initial denial and eventual confession. We fail to see the similarities between the attempted publication in *Donoho* and what occurred here. *Donoho* is silent as to the propriety of reading a charging instrument that is part of the evidence

in the case to the jury. Thus, we find no error in the prosecution's use of an admitted exhibit during closing argument.

¶ 44 Defendant also argues he suffered unfair prejudice because the trial court did not provide guidance to the jury on how to consider the other-crimes evidence and the weight to give to the evidence. The State responds defendant's proposed jury instructions, Illinois Pattern Jury Instructions, Criminal, Nos. 3.13 and 3.14 (4th ed. 2010), are only appropriate when other-crimes evidence is admitted for some reason other than propensity. In such a situation, the jury needs to be instructed to not consider the evidence on the issue of propensity. The State also contends defendant forfeited his argument by failing to address the issue in his posttrial motion.

¶ 45 Even if defendant has not forfeited this argument, it lacks merit. Given the proper admission of the other-crimes evidence to show propensity, the instructions offered by defense counsel were inapplicable. It is unclear what instruction defendant is suggesting the trial court needed to give. The absence of an instruction telling the jury they could consider the other-crimes evidence as proof of propensity only worked in defendant's favor. We find no error in the trial court's failure to instruct the jury regarding the use of the other-crimes evidence.

¶ 46 B. Necessity of *Krankel* Inquiry

¶ 47 Next, defendant argues the trial court failed to make an inquiry into defendant's statement in the presentence investigation report mentioning his dissatisfaction with his attorney's handling of his case. Defendant seeks remand for a *Krankel* inquiry. See *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984).

¶ 48 The State contends *Krankel* did not require the trial court to make an inquiry into defendant's complaints because defendant never brought his claims to the court's attention. Further, the State contends defendant failed to state a clear claim of ineffective assistance of

counsel that would trigger the need for a *Krankel* inquiry.

¶ 49 "The common-law procedure, which has evolved from our decision in *Krankel,* is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel." *People v. Ayres*, 2017 IL 120071, ¶ 11, 88 N.E.3d 732. "Further, a *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention." *People v. Moore*, 207 Ill. 2d 68, 79, 797 N.E.2d 631, 638 (2003). A defendant is not required to file a written motion but may raise the issue of ineffective assistance of counsel orally or through a letter or note to the court. *Ayres*, 2017 IL 120071, ¶ 11. Additionally, "when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim." *Moore,* 207 Ill. 2d at 77-78.

¶ 50 Defendant argues he raised an ineffective assistance of counsel claim when he made the previously mentioned statement that probation included in his presentence investigation report. Initially, we note a "statement, contained only in [a] defendant's presentence investigation report, does not by itself bring to the court's attention a claim of ineffective assistance of counsel as to require further inquiry by the court." *People v. Harris,* 352 Ill. App. 3d 63, 71, 815 N.E.2d 863, 871 (2004). Additionally, in spite of multiple opportunities to bring his claim before the court, defendant failed to do so. Defendant neglected to raise his claim during the hearing on his posttrial motion or during his sentencing hearing. Lastly, defendant never raised such a claim through a written motion or in a letter or note to the court.

¶ 51 In light of defendant's failure to bring his claim before the court, we hold the trial court did not error by not engaging in a *Krankel* inquiry based on defendant's statement included in his presentence investigation report. Given our resolution finding defendant failed to bring his

claim before the court, we need not address whether defendant stated a clear claim of ineffective assistance of counsel.

¶ 52 III. CONCLUSION

¶ 53 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 54 Affirmed.