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2014 IL App (3d) 120643-U

Order filed May 6, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 13th Judicial Circuit,
)	Grundy County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-12-0643
v.)	Circuit No. 09-CF-111
)	
JAMES M. WYMORE,)	Honorable
)	Lance R. Peterson,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in allowing the State to introduce other-crimes evidence where the evidence was more probative than prejudicial.

¶ 2 Following a bench trial, the court found the defendant, James M. Wymore, guilty of two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)) and sentenced him to two concurrent three-year terms of imprisonment. The defendant appeals, arguing that the trial court erred by admitting other-crimes evidence. We affirm.

¶ 3 **FACTS**

¶ 4 The defendant was charged by indictment with two counts of aggravated criminal sexual abuse against his stepdaughter, S.W. 720 ILCS 5/12-16(d) (West 2008). The counts alleged that, at some time between August 2007 and November 2008, the defendant placed his hand on S.W.'s breasts and vagina, respectively, when S.W. was at least 13 but less than 17 years old, and the defendant was at least five years older than S.W.

¶ 5 The State filed a motion *in limine*, seeking to introduce other-crimes evidence under section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2008)). The motion sought to introduce the testimony of the defendant's cousin, L.S., that approximately 10 years prior to the charged offenses, when L.S. was 16 years old, the defendant committed aggravated criminal sexual abuse against her. L.S. would testify that she was working on the computer in her brother's bedroom, when the defendant, who was visiting, came up behind her and began rubbing her back. The defendant eventually moved his hands under L.S.'s shirt and touched her breasts. The defendant was 34 or 35 years old at the time. The court granted the motion, finding that the evidence was sufficiently similar to the charged crimes and that the evidence would not be unduly prejudicial because it would not be given much weight in comparison to other evidence.

¶ 6 The State later filed a second motion *in limine*, seeking to admit evidence of several other instances of bad acts committed by the defendant against S.W. The State argued that some of these instances amounted to sex crimes that could be admitted under section 115-7.3 of the Code, while the other instances could be admitted to show the relationship and familiarity of the defendant and S.W., citing *People v. Cregar*, 172 Ill. App. 3d 807 (1988). The court granted the motion as to most of the instances. The court did not specify which instances were being admitted under section 115-7.3 and which were admitted under *Cregar*. The court admitted evidence of the following acts: (1) when S.W. was in first or second grade, the defendant tied her

to her bunk bed and touched her legs and vagina; (2) when S.W. was in second grade, the defendant placed S.W. on a bed and put his penis in her "butt"; (3) when S.W. was in sixth or seventh grade, the defendant attacked her, and while S.W. fought back, the defendant ripped off her pants; (4) on three or four occasions during the time period of the charged offenses, the defendant would take off S.W.'s clothes and then masturbate in front of her; and (5) after the time period of the charged offenses: (a) the defendant continued to touch the breasts and vagina of S.W.; and (b) the defendant was in a vehicle with S.W. and her friend, M.T. when the defendant attempted to pull off S.W.'s pants.

¶ 7 The cause proceeded to a bench trial. The State called S.W., who testified that she was born in 1993. In 2007, when S.W. was 14 years old she moved with the defendant, her mother, and her brother to a house in Minooka. The move occurred before her freshman year of high school. S.W. testified that during her freshman year, the defendant touched her breasts and vagina on a daily basis. The defendant would defend his actions by claiming that he was merely getting "fresh" with S.W. S.W. testified to a specific occasion when the defendant carried S.W. into his room, took off her pants, sat on top of her, and touched her vagina.

¶ 8 In October 2007, S.W.'s mother moved out of the house, but S.W., the defendant, and S.W.'s brother continued to live there. After S.W.'s mother moved out, S.W.'s boyfriend, R.W., would spend the night every other weekend. Every time R.W. visited, the defendant would touch S.W.'s vagina in front of him. S.W. testified that she did not tell anyone about the abuse and told R.W. not to tell anyone.

¶ 9 In accordance with the second motion *in limine*, S.W. testified that on a couple of occasions during her freshman year, the defendant would tell her to take off her clothes and then masturbate in front of her. S.W. testified that the defendant continued touching her breasts and vagina until she moved out in April 2009. S.W. moved out after reporting that the defendant had

committed a domestic battery against her. However, at that time, S.W. did not report any sexual abuse because "I wasn't ready and I was scared." She moved in with her mother and later told her mother about the sexual abuse.

¶ 10 On cross-examination, defense counsel asked S.W. when the defendant began touching her. S.W. testified that the defendant started touching her vagina when she was four years old, although she hadn't stated that during a victim interview conducted before trial. On redirect examination S.W. testified that on one occasion, the defendant picked her and M.T. up from a party in Elmhurst. S.W. and M.T. were both drunk. M.T. drove, and the defendant sat in the backseat with S.W. He tried to take off her pants but was unable to.

¶ 11 L.S. testified for the State to the events described in the first motion *in limine*. L.S. testified that beginning when she was four years old, the defendant would ask to get "fresh" with her. Once when L.S. was 16, she was at home working on the computer when the defendant started giving her a back rub and then moved his hands under her shirt and began touching her breasts. L.S. did not tell anyone until about two years later, when she told her mom.

¶ 12 R.W. testified that he was S.W.'s boyfriend from the summer of 2007 through the fall of 2008, and he would stay at S.W.'s home every other weekend during that time. He testified that he witnessed the defendant touch S.W.'s vagina every time that he visited their home. On one occasion, the defendant instructed S.W. to perform oral sex on R.W., which S.W. did while the defendant watched. Defense counsel did not object to R.W.'s testimony about that encounter. R.W. testified that he did not tell anyone about the abuse he witnessed because he was scared. On cross-examination, defense counsel questioned R.W. to give a more detailed description of the encounter in which the defendant made S.W. perform oral sex on him. Defense counsel questioned R.W. whether S.W. agreed to perform the act or whether she physically resisted it by "fighting, kicking, screaming, punching, [or] biting[.]"

¶ 13 The defendant's theory was that S.W. had fabricated the allegations of domestic violence and sexual abuse so that she could move out of the defendant's house and back in with her mother. In pursuit of that theory, the court allowed the defendant to present evidence that the defendant had been found not guilty in a criminal prosecution for domestic violence allegedly committed by the defendant against S.W. The defense argued that when the domestic battery charges did not stick, S.W. fabricated the sexual abuse allegations.

¶ 14 The defense called S.W.'s friend, M.T., to testify. Previously, at the defendant's domestic battery trial, M.T. testified that the defendant had punched and slapped S.W. In the present case, M.T. testified that her testimony in the domestic battery case was true and that she had not been coerced by S.W. into giving false testimony. The defense then called the defendant's long-time co-worker and friend, Michael Muka, who testified that he was present at the defendant's domestic battery trial and overheard a conversation between M.T. and her mother before M.T. testified. M.T. told her mother that she did not want to testify because, in fact, "nothing happened."

¶ 15 The State called M.T. in rebuttal. However, M.T.'s rebuttal testimony focused on the sexual abuse M.T. witnessed, rather than her testimony at the domestic battery trial. M.T. testified that she had witnessed the defendant touch S.W.'s vagina and breasts during their freshman year of high school. On one occasion, the defendant was giving S.W. and M.T. a ride, when he pulled the car over and told M.T. to drive. The defendant got in the backseat with S.W., who was asleep, and attempted to take off her pants, but S.W. woke up before he could. On another occasion, when S.W. and M.T. were in seventh or eighth grade, the defendant made S.W. drive while he sat in the front passenger seat and M.T. sat in the backseat. While S.W. was driving, the defendant was touching her inner thigh, vagina, and breasts. M.T. did not specify whether this touching occurred on top of or under S.W.'s clothing. Prior to S.W. moving to

Minooka, M.T. witnessed the defendant touch S.W.'s vagina and breasts approximately 20 times at their home in Lombard. When S.W. would protest to the touching, the defendant would say, "I'm just being fresh." Defense counsel did not object to M.T.'s testimony.

¶ 16 The trial court found the defendant guilty on both counts. In reaching that verdict, the trial court found the testimony of S.W., L.S., and R.W. more credible than that of the defendant and Muka. The court observed that when the State's witnesses were testifying, they provided

"crucial, authentic moments of a stream of consciousness type of testimony and they occurred usually on Cross. *** [W]hen they would be prodded and be answering questions and describing instances that would just come up in examination, that's when their credibility truly became clear to me. *** [M]oments where I said, wow, this teenager is telling the truth in this courtroom, period, and I have no doubt of that at this moment."

Specifically, the court found the State's witnesses' testimony about uncharged crimes particularly credible because testimony about some of those instances came up spontaneously based on the questioning and could not have been rehearsed. The court stated that although L.S.'s testimony to other-crimes evidence was admissible, the court did not give much weight to that testimony and would have convicted the defendant even if L.S. had not testified. The court sentenced the defendant to concurrent terms of three years' imprisonment.

¶ 17 The defendant filed a motion for judgment notwithstanding the verdict and for a new trial, arguing that the court's findings of guilty were against the manifest weight of the evidence and that the court abused its discretion by admitting the other-crimes testimony of L.S. The court denied the motion. The defendant appeals.

¶ 18

ANALYSIS

¶ 19 The defendant claims that the court abused its discretion by admitting three pieces of other-crimes evidence: (1) L.S.'s testimony that the defendant touched her breasts when she was 16; (2) R.W.'s testimony that the defendant instructed S.W. to perform oral sex on R.W. while the defendant watched; and (3) M.T.'s testimony that the defendant touched S.W.'s breasts and vagina in S.W.'s home and that the defendant touched S.W.'s thigh, breasts, and vagina while S.W. was driving.

¶ 20 A. L.S.'s Testimony

¶ 21 L.S. testified that when she was 16 years old, the defendant touched her breasts while giving her a back rub at her home. This evidence was presented in the State's first motion *in limine*, and the court ruled the evidence admissible as other-crimes evidence under section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2012)). The defendant argues, as he did below, that the court abused its discretion by admitting this evidence, because the probative value of the testimony was substantially outweighed by the undue prejudice it caused the defendant.

¶ 22 Section 115-7.3 allows the introduction of other-crimes evidence in sex crimes cases to establish the defendant's propensity to commit the charged crime. Such other-crimes evidence is admissible so long as it is relevant and its prejudicial effect does not substantially outweigh its probative value. *People v. Donoho*, 204 Ill. 2d 159 (2003). The risk of prejudice associated with other-crimes evidence is that the evidence will prove "too much." *People v. Manning*, 182 Ill. 2d 193, 213 (1998). That is, the factfinder will convict the defendant merely because it believes he is a bad person deserving of punishment. *People v. Perez*, 2012 IL App (2d) 100865.

¶ 23 Section 115-7.3 specifies that, when balancing the probative value against the prejudicial effect, a court should consider the proximity in time of the other crime to the charged offense, the degree of factual similarity between the other crime and the charged offense, and any other relevant facts or circumstances. 725 ILCS 5/115-7.3(c) (West 2012). There is no bright-line rule

for when other-crimes evidence becomes too old to be admitted under section 115-7.3. As to similarity, the other crime must bear some " 'threshold similarity' " to the charged crime. *Donoho*, 204 Ill. 2d at 184 (quoting *People v. Bartall*, 98 Ill. 2d 294, 310 (1983)). " '[M]ere general areas of similarity will suffice.' " *Donoho*, 204 Ill. 2d at 184 (quoting *People v. Illgen*, 145 Ill. 2d 353, 373 (1991)).

¶ 24 We will not reverse a trial court's decision to admit other-crimes evidence unless we find that the court abused its discretion. *Donoho*, 204 Ill. 2d 159. A trial court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Wheeler*, 226 Ill. 2d 92 (2007).

¶ 25 In the present case, the other crime and the charged offenses were substantially similar. The other crime described the defendant touching the breasts of L.S. One of the charged crimes alleged that the defendant touched the breasts of S.W. In addition, the defendant used the term "fresh" when describing his behavior in both instances. Although close to 10 years had elapsed between the other crime and the charged offenses, the similarities between the offenses establish that the probative value of the other-crimes testimony outweighed its potential prejudicial effect. In addition, the trial court explained that L.S.'s other-crimes testimony did not weigh heavily in his decision. For the foregoing reasons, the court did not abuse its discretion by admitting L.S.'s other-crimes testimony.

¶ 26 B. R.W.'s Testimony

¶ 27 R.W. testified, in relevant part, that on one occasion while he was visiting S.W.'s house during the time period of the charged crimes, the defendant told S.W. to perform oral sex on R.W. S.W. complied, and the defendant watched. That testimony was not included in either of the State's motions *in limine*. The defendant argues that R.W.'s testimony was prejudicial other-crimes evidence that should not have been introduced.

¶ 28 The defendant did not object to R.W.'s testimony at trial. As a result, the defendant has forfeited his claim, and we review it under the plain error doctrine. *People v. Enoch*, 122 Ill. 2d 176 (1988). Plain error exists where the evidence was closely balanced, or the error was so serious as to deny the defendant a fair trial. *People v. Herron*, 215 Ill. 2d 167 (2005). First we must determine whether error occurred at all.

¶ 29 We find that the introduction of R.W.'s testimony was not error. The other crime testified to by R.W. shared similarities to the charged offenses. Both crimes involved S.W., and both occurred in the home shared by S.W. and the defendant. Although the offenses involved different acts, there were enough similarities between the offenses for R.W.'s testimony to be probative. The other crime was also close in time, as it occurred during the same period as the charged offenses. In addition, the trial court explained that it relied on other-crimes evidence—including R.W.'s testimony—mostly for credibility purposes, not to conclude that the defendant was a bad person deserving of punishment. The court did not abuse its discretion by finding that the prejudicial effect of this evidence did not substantially outweigh its probative value.

¶ 30 C. M.T.'s Testimony

¶ 31 The State recalled M.T. as a rebuttal witness after Muka testified that he overheard M.T. say that her testimony at the defendant's domestic battery trial was false. On rebuttal, M.T. testified that when she was in seventh or eighth grade, the defendant allowed S.W. to drive while the defendant sat in the front passenger seat, and M.T. sat in the backseat. While S.W. drove, the defendant reached over and touched her breasts, thigh, and vagina. M.T. also testified that during the same time period, she witnessed the defendant touch S.W.'s breasts and vagina at their home. The defendant argues that M.T.'s testimony prejudiced the defendant. Contrary to the State's assertions in its appellee's brief, the specific acts testified to by M.T. were not included in the State's motions *in limine*.

¶ 32 We find no error in the introduction of M.T.'s testimony. Again, the risk of other-crimes evidence is that the factfinder will focus too much on that evidence and convict the defendant merely because he has committed crimes in the past. *Donoho*, 204 Ill. 2d 159. In the present case, the trial court explained that it did not use the other-crimes evidence to find that the defendant was a bad person. Rather, the court relied on the defense witnesses' testimony to determine that the witnesses were credible. The other-crimes evidence had little, if any, prejudicial effect but had substantial probative value. As a result, the introduction of the evidence was not error.

¶ 33 CONCLUSION

¶ 34 The judgment of the circuit court of Grundy County is affirmed.

¶ 35 Affirmed.