2011 IL App (3d) 090505-U

Order filed September 21, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-09-0505
v.	)	Circuit No. 08-CF-1312
	)	
EARLY ATTERBERRY,	)	Honorable Daniel J. Rozak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices McDade and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in admitting evidence of defendant's alleged prior bad act, but the error was harmless.

¶ 2 While defendant, Early Atterberry, was on trial for sexually assaulting and sexually abusing his minor daughter in 2007, the State introduced evidence of a 2005 incident where defendant's wife observed him climb on top of the victim's bed, wearing only his underwear, while she was sleeping. Over defense counsel's objections, the trial court admitted this evidence

and did not issue a limiting instruction. The jury found defendant guilty of both charges. Defendant appeals, arguing that the trial court erred in admitting evidence of the alleged prior bad act and in not issuing a limiting instruction. We affirm.

¶ 3 FACTS

¶ 4 In August of 2008, defendant was indicted on charges of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2008)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2008)). The indictment alleged that defendant sexually assaulted his minor daughter in the fall of 2007 and sexually abused her in the summer of 2007.

¶ 5 At trial, the victim testified that starting in the summer of 2007, defendant would come into her room after school, when the other family members were away, and touch her chest and vagina beneath her clothes and have sex with her. The victim was 13 years old at the time. Testimony from the victim's brother corroborated the times that she was left alone with defendant after school. The victim's mother testified that she did not get home from work until 6:15 p.m. and that defendant watched the victim when he was not working. Further, she noted that the victim's behavior changed after the alleged incidents began. The mother testified that the victim became more withdrawn, dressed in layers before going to bed, and at times slept in her mother's room.

¶ 6 The victim testified that defendant entered her room at night and sexually assaulted her while the other family members slept. Altogether, defendant sexually assaulted the victim 10 times and also inappropriately touched her 10 times.

¶ 7 On Thanksgiving Day 2007, the victim stated that she was getting dressed in her room when defendant entered. At the time, the victim's mother and siblings had left the home.

Defendant then touched the victim on her vagina and chest while she was wearing only her underwear and attempted to have sex with her. The victim refused defendant's sexual advances, and he left the room when the victim's mother returned home.

¶ 8 The day after Thanksgiving, the victim spent the night at her aunt's apartment. In the morning, the victim decided to walk downstairs to her grandmother's apartment. However, her grandmother's door was locked, so she decided to take a walk. Upon discovering that the victim was missing, the victim's grandmother called the police, who picked her up and brought her to her grandparents' house.

¶ 9 Following the victim's return, defendant attempted to hit her with a belt for running away. The victim's mother and grandmother testified that they heard the victim respond to defendant's actions by saying "I'm tired of him touching me and stuff." The victim's mother testified that she then took the victim into another room and the victim stated that defendant had sexually assaulted and sexually abused her on several occasions. Thereafter, the victim informed the other family members that defendant had inappropriate contact with her. The victim's mother testified that she then heard defendant respond that "he was going to jail." She then called the police, and the victim filed a prompt complaint. Defendant was later indicted, and the case was set for jury trial.

¶ 10 Before jury selection, the State filed a motion to admit other crimes evidence against defendant. The State sought admission of a 2005 incident where the victim's mother observed defendant, wearing only his underwear, climb on top of the victim while she was sleeping in her bed. Upon noticing his wife's presence, defendant purportedly acted surprised and said "I'm sorry." Defendant told the victim's mother that he was only trying to hug the victim before he

left for work. At the time, defendant was working as a truck driver and was away from home for several days at a time. The victim's mother called the police, who interviewed the victim and herself but did not arrest defendant.

¶ 11 The trial court admitted the 2005 incident under two theories: first, as evidence of a similar offense under section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2008)), and second, "to show motive, intent, absence of mistake or common scheme of plan" under the common law. Defendant objected to the introduction of the 2005 incident, stating that "there [was] no bad conduct."

¶ 12 Prior to the introduction of the 2005 incident, defense counsel told the trial court that she was unsure whether a limiting instruction was necessary because its ruling "was that [it was] going to allow this testimony to come in, but [it was not] really clear under which of these alternative[s]." The trial court stated that the evidence was going to be admitted under both exceptions. The trial court then permitted defense counsel to consider the issuance of a limiting instruction, stating "we won't give them any instruction at this point in time." The victim's mother testified to the incident she witnessed in 2005 without objection from defendant or the issuance of a limiting instruction.

¶ 13 At the jury instruction conference, the State did not offer Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.14), the standard limiting instruction used when a defendant's prior offenses are admitted into evidence. Defendant did not object to the omission of IPI Criminal 4th No. 3.14 and did not offer his own limiting instruction. Thus, the jury was never so instructed and found defendant guilty of criminal sexual assault and aggravated criminal sexual abuse.

¶ 14 In his motion for a new trial, defendant argued that the trial court erred in admitting "[e]vidence of other crimes against [the victim]." The motion did not raise the trial court's failure to issue a limiting instruction.

¶ 15 The trial court denied defendant's motion and sentenced him to 10 years' imprisonment for criminal sexual assault and a consecutive 5-year term of imprisonment for aggravated criminal sexual abuse. Defendant appeals.

¶ 16 ANALYSIS

¶ 17 Defendant contends that evidence of the 2005 incident was inadmissible under section 115-7.3 of the Code because his actions were not one of the enumerated offenses. See 725 ILCS 5/115-7.3 (West 2008). The State concedes that the trial court should not have admitted the 2005 incident under the statutory exception for propensity evidence but argues that the error was harmless.

¶ 18 Generally, evidence of a defendant's other offenses, crimes, or bad acts are inadmissible for the purpose of showing a defendant's disposition or propensity to commit crimes. See *People v. Illgen*, 145 Ill. 2d 353 (1991). However, this type of evidence is admissible under section 115-7.3 of the Code to show a defendant's propensity to commit certain sex offenses. 725 ILCS 5/115-7.3 (West 2008).

¶ 19 "The admissibility of evidence at trial is a matter within the sound discretion of the trial court, and that court's decision may not be overturned on appeal absent a clear abuse of discretion." *Illgen*, 145 Ill. 2d at 364. On appeal, the State concedes the trial court erred by admitting this evidence under section 115-7.3. We agree that this concession is appropriate since defendant's unusual actions in 2005 did not constitute a criminal act or a prior bad act *per se*.

Next, we consider whether the error was harmless.

¶ 20 Here, defendant properly preserved this error by raising this issue at trial and in his posttrial motion. See *People v. Johnson*, 218 Ill. 2d 125 (2005). Thus, the burden is on the State to prove that the error was not "so substantial that it undermines our confidence in the jury verdict." *Id.* at 141.

¶ 21 We agree with defendant's premise that the 2005 incident did not constitute a criminal offense or previous bad act. Although it was error for the trial court to admit this evidence because the 2005 behavior did not fall within the statutory guideline for admission of other crimes evidence, the fact that the incident did not involve other crimes dilutes any potential negative impact of this evidence. Thus, we are left with the conclusion that this error was harmless.

¶ 22 Finally, defendant argues that he was substantially prejudiced because the trial court erroneously failed to issue a limiting instruction to the jury concerning the 2005 incident. However, during trial, defendant did not request a limiting instruction or object to the absence of this instruction. In addition, defendant did not include the limiting instruction issue in his posttrial motion. Consequently, we conclude that defendant has forfeited this issue for purposes of this appeal. *People v. Herron*, 215 Ill. 2d 167, 175 (2005).

¶ 23 Nevertheless, we may exercise review over unpreserved "errors or defects affecting substantial rights *** although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999).

¶ 24 An unpreserved error constitutes plain error when:

" '(1) a clear or obvious error occurred and the evidence is so closely balanced

that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 25 In the present case, the evidence was not closely balanced. The victim presented credible testimony regarding multiple incidents of sexual penetration and inappropriate sexual contact. The victim's brother corroborated the times when the victim and defendant were home alone. Furthermore, the victim's mother and grandmother confirmed that the victim said she ran away because she was tired of defendant touching her. Additionally, the victim's mother observed the victim's behavior change after the sexual assault and abuse incidents began in the summer of 2007. Therefore, we find that the evidence was not so closely balanced that the error alone threatened to tip the scales of justice against defendant. *Herron*, 215 Ill. 2d 167.

¶ 26 Further, when considering the second prong of the plain error test, other courts have held that "[t]his prong of the plain error test is reserved for rare cases where a reviewing court must correct an error 'to preserve the integrity and reputation of the judicial process.' " *People v. Lusietto*, 316 Ill. App. 3d 143, 146 (2000) (quoting *People v. Herrett*, 137 Ill. 2d 195, 214 (1990)). Our supreme court has held that the second prong of plain error review requires "automatic reversal *** where [the] error is deemed structural, *i.e.*, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial." (Internal quotation marks omitted.) *Thompson*, 238 Ill. 2d at 613-14 (quoting *People v. Glasper*,

234 Ill. 2d 173, 197-98 (2009) (quoting *Herron*, 215 Ill. 2d at 186)). "A finding that defendant was tried by a biased jury" would satisfy the second prong of plain error review. *Thompson*, 238 Ill. 2d at 614.

¶ 27 Having concluded that the 2005 incident was a noncriminal act that would not necessitate the issuance of a limiting instruction, it would not be possible for the jury to become biased against this defendant based on an isolated incident of noncriminal conduct. In support of our ruling, we note IPI Criminal 4th No. 3.14 states "[e]vidence has been received that the defendant has been involved in ((an offense) (offenses) (conduct)) other than those charged in the indictment." Consequently, we conclude that the trial court's failure to issue a limiting instruction did not constitute plain error.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 30 Affirmed.