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2011 IL App (3d) 100661-U

Order filed July 12, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	Appeal No. 3–10–0661
)	Circuit No. 07-CF-2030
)	
COY RUSSELL, JR.,)	Honorable
)	Carla Policandriotes,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's conviction for predatory criminal sexual assault was upheld on appeal because the trial court did not abuse its discretion in admitting hearsay statements of the child victim after finding that the time, content, and circumstances of the statements provided sufficient safeguard of reliability. It was also not an abuse of discretion to allow testimony of a prior victim, even though the offenses occurred seven years apart, because of the factual similarity between the offenses. The jury's finding of guilt was not unreasonable or improbable, and the defendant's prison sentences, which were within the statutory range, were not excessive.

¶ 2 Following a jury trial, defendant Coy Russell, Jr., was convicted of three counts of predatory criminal sexual assault (720 ILCS 5/12--14.1(a)(1)(West 2006)). The trial court

sentenced the defendant to consecutive terms of 22, 26, and 28 years' imprisonment. The defendant appealed, arguing that: (1) the trial court abused its discretion by admitting hearsay statements of the victim pursuant to section 115--10 of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/115--10 (West 2006)); (2) the trial court abused its discretion by allowing the testimony of a prior victim pursuant to section 115--7.3 of the Criminal Code (725 ILCS 5/115--7.3 (West 2006)); (3) the trial court abused its discretion in denying the defendant's motion for a mistrial; (4) the evidence failed to establish the defendant's guilt beyond a reasonable doubt; and (5) the defendant's sentences were excessive.

¶ 3

FACTS

¶ 4 The defendant was charged with three counts of predatory criminal sexual assault of a child (720 ILCS 5/12--14.1(a)(1)(West 2006)) for allegedly placing his penis in his niece's (A.L.'s): (1) vagina; (2) rectum, and (3) mouth, between May 1, 2007, and August 23, 2007.

The evidence established that the defendant's wife, Angela, made a telephone call to A.L.'s father, James, on September 24, 2007, which prompted James to ask A.L. if she had ever been touched by the defendant in an inappropriate way.

¶ 5 Prior to trial, the trial court held a hearing pursuant to section 115--10 of the Criminal Code (725 ILCS 5/115--10 (West 2006)) to determine if the State could introduce the out-of-court statements of A.L. The trial court found that A.L.'s statements to her father and to a forensic interviewer during a victim sensitive interview (VSI), with certain enumerated exceptions, bore sufficient indicia of reliability and were admissible at trial.

¶ 6 James testified at trial that he asked A.L. if she had ever been touched inappropriately, in general or by the defendant. Initially, A.L. denied any inappropriate touching, and then the two of them sat side by side for 30 seconds to a minute. Then, A.L. started to cry and asked if James

would be mad at her for something she had to say. A.L. went on to tell James that the defendant had touched her privates on more than one occasion. James called the police, and the VSI was arranged.

¶ 7 Three days later, Mary Jane Pluth, the main forensic interviewer at the Will County Advocacy Center, conducted the VSI of A.L., which was recorded and observed behind a one-way mirror by a detective, a DCFS investigator, and an assistant state's attorney. During the VSI, A.L. stated that she was 10 years old and that she lived with her dad, James, and her stepmother, Laura. A.L. had visitation with her mother, Sheryl, during the summer and every other weekend during the school year. During her visits with her mother, A.L. would visit Sheryl's sister, Angela, who lived with her husband, the defendant, and A.L.'s three cousins.

¶ 8 A.L. told Pluth that, during the summer that had just passed, the last time that A.L. visited her aunt's house, the defendant told A.L. to come up to his bedroom. The defendant told her to take off her pants and underwear, close her eyes, and lie down on the bed. A.L. heard something like a belt and pants coming off, and then she thought he kneeled in front of her. He told her to lift her legs, which she demonstrated as bending her knees up to her shoulders. A.L. told Pluth that the defendant's hands were on the underside of her thighs, which were up near her chest. Something hard, that hurt and felt too big, went into her "private." The defendant moved in a circle motion and up and down. After the defendant stopped, A.L. felt wetness on the bed. After the defendant told her to open her eyes, A.L. saw the defendant buckling his belt. Afterward, he asked her to help him fold clothes. During the VSI, A.L. also told Pluth that during the past summer, in the same house as the above event, the defendant had taken her to the basement and put a towel down on the basement floor. He told her to take down her pants and then placed the same thing in her "private." Her little cousin came down to the basement, and

the defendant stopped, but then resumed by placing the same thing in her “butt.” A.L. told Pluth that the abuse had started when she was 8 or 9 years old, and the defendant would sometimes tell her to pick a side (the private or the butt).

¶ 9 The time before the last time, A.L. stated, the defendant took her to his bedroom in his current home, had her kneel and close her eyes. He placed something “rubbery and stuff” in her mouth, and something that “tasted weird” came out. She spit it out on the floor.

¶ 10 A.L. also testified at the defendant’s trial. During A.L.’s direct examination, defense counsel objected numerous times, arguing the lack of foundation as to A.L.’s testimony regarding incidents of sexual assault that lacked specificity with regard to dates and times. A.L. testified to the same three sexual assaults that she described in the VSI. She added, however, that not only would the defendant tell her to close her eyes, but he would grab something for her to put over her head, like a blanket or a hat. She described the thing that the defendant put in her private as “hard and mushy,” and it would cause her pain. She was more vague about the dates and times than she was during the VSI. She thought the last times occurred about two years earlier, while she was on break from school during the summer.

¶ 11 At the conclusion of A.L.’s direct examination, the trial court struck any testimony that would arise to criminal offenses between the defendant and A.L. outside the time period alleged in the indictment and instructed the jury to disregard. Thereafter, the trial court denied the defendant’s motion for a mistrial, noting that the testimony regarding events outside the scope of the indictment were minimal and without detail. The trial court found no need for a mistrial, and instructed the jury to disregard any testimony of conduct between A.L. and the defendant before May 1 or after August 23, 2007.

¶ 12 Angela’s daughter, J.S., also testified at trial, after the trial court allowed the State’s

request to admit evidence of another offense under section 115--7.3 of the Criminal Code (725 ILCS 5/115--7.3 (West 2008)). The trial court allowed the testimony because, although the alleged events occurred about seven years apart, both girls were approximately 10 years old at the time of the abuse. Both victims were allegedly abused in the defendant's bedroom; both were told to take off their clothing and close their eyes. Also, the defendant's access to both was based on a family relative status. At the time of the trial, J.S. was 20 years old. J.S. testified that she lived in Texas and was raised by her grandparents. During the summer of 2000, when she was 10 years old, she came to visit her mother and the defendant. J.S. testified that she was playing outside and the defendant asked her to come in the house and help him fold laundry in his bedroom. He told her to go in the bathroom and get undressed, then lie down on the bed and close her eyes. She then felt something in her vagina, which the defendant told her was a flashlight. She believed it was either a penis or a finger. The defense fully cross-examined J.S., specifically about her illegal drug use and her custody troubles with her children.

¶ 13 Dr. Sangita Rangala, a physician with specialized training in the care of children who may have been sexually abused, testified that she examined A.L. on October 1, 2007. Dr. Rangala testified that her examination of A.L. revealed normal findings. Those findings were not surprising, however, since 98 to 99 percent of sexually abused children have completely normal exams, especially when if the examination takes place more than a month after the last incident of abuse.

¶ 14 Angela and the defendant both testified for the defense. They both testified that they moved into their current home on July 7, 2007, and, prior to that, their family had been residing in a hotel since May 1, 2007. Angela testified that A.L. visited their home twice between July 7 and August 23, 2007, but Angela was always home when the defendant was home. Angela

indicated that during that time, she was driving the defendant to and from work every day because he had broken his foot in January or February 2007.

¶ 15 The jury found the defendant guilty of all three offenses. The defendant's motion for a new trial or a judgment notwithstanding the verdict was denied. In sentencing the defendant, the trial court stated that it had reviewed the presentence investigation report (PSI), the addendum to the PSI, the evidence presented by both parties, letters in support of the defendant, the nature of the charges, and the statutory mitigating and aggravating factors. Although the defendant had no criminal history, the trial court placed great weight upon the defendant's position as a trusted family member when he abused A.L. Thus, the trial court sentenced the defendant to consecutive prison terms of 22, 26, and 28 years. The defendant's motion to reconsider his sentence was denied, and the defendant appealed.

¶ 16 ANALYSIS

¶ 17 On appeal, the defendant contends that: (1) the trial court abused its discretion by admitting A.L.'s hearsay statements pursuant to section 115--10 of the Criminal Code (725 ILCS 5/115--10 (West 2006)); (2) the trial court abused its discretion by allowing J.S.'s testimony of an earlier incident of sexual abuse by the defendant pursuant to section 115--7.3 of the Criminal Code (725 ILCS 5/115--7.3 (West 2006)); (3) the trial court abused its discretion in denying the defendant's motion for a mistrial; (4) the evidence failed to establish the defendant's guilt beyond a reasonable doubt; and (5) his sentences were excessive.

¶ 18 I. Victim's Hearsay Statements

¶ 19 Pursuant to section 115--10 of the Criminal Code (725 ILCS 5/115--10 (West 2006)), the State filed a pretrial notice of intent to introduce hearsay statements of A.L., specifically, her statements to her father and in the VSI. The defendant objected. At a hearing, James, Pluth, and

a detective testified. The State indicated that A.L. would testify at trial. The trial court found the hearsay statements, with specified exceptions, were admissible under the statute. At trial, James was allowed to testify as to some of the statements that A.L. made to him on September 24, 2007. A redacted copy of the VSI and a transcript were admitted at exhibits at trial, and A.L. testified.

¶ 20 The defendant contends that the trial court abused its discretion in finding that the time, content, and circumstances of A.L.'s hearsay statements provided sufficient safeguards of reliability to be admitted pursuant to section 115--10 of the Criminal Code (725 ILCS 5/115--10 (West 2006)). The State contends that the statements bore sufficient indicia of reliability.

¶ 21 Section 115--10 of the Criminal Code allows the admission of hearsay statements by victims of sexual offenses who are under 13 years of age. 725 ILCS 5/115--10 (West 2006). The State, as the proponent of the hearsay statements, bore the burden of proving that the time, content, and circumstances of A.L.'s statements provided sufficient safeguards of reliability for admission. *People v. Cookson*, 215 Ill. 2d 194, 204 (2005). When evaluating reliability, the trial court must evaluate the totality of the circumstances surrounding the statements. *People v. Stechly*, 225 Ill. 2d 246, 313 (2007). Some factors that a trial court may consider in making the reliability determination are: (1) the child's spontaneity and consistent repetition of the incident, (2) the child's mental state, (3) the use of terminology unexpected of a child of similar age, and (4) the lack of motive to fabricate. *People v. Sharp*, 391 Ill. App. 3d 947 (2009). On appeal, a trial court's determination on the admissibility of evidence will only be overturned upon a showing of an abuse of discretion. *People v. Cookson*, 215 Ill. 2d at 204.

¶ 22 In this case, A.L.'s initial report of the abuse was not entirely spontaneous. At least a month had passed since the last incident of alleged abuse, and A.L. did not tell James until after

she initially denied any abuse in response to questioning by James. However, courts have recognized that victims of abuse are often threatened not to tell anyone, and such threats may delay a victim's report. *People v. Zwart*, 151 Ill. 2d 37, 45 (1992). In addition, although James testified that A.L. denied any abuse when he was asking her questions, she thereafter spontaneously admitted to the abuse after sitting in silence for approximately 30 seconds. Three days later, A.L.'s recount of the abuse to Pluth, the forensic interviewer, was consistent with the details A.L. had shared with James. In response to Pluth's questioning, A.L. shared more details of the abuse by the defendant. A.L., who was 10 years old, only used the words "private" and "butt"; she did not use any terminology that would be unexpected of a child her age.

¶ 23 Although the initial report occurred after questioning by her father, A.L.'s statements of abuse did not appear to be brought about by substantial adult intervention. Although James asked A.L. some additional questions, he did not ask for many details. Those questions were asked by Pluth, a trained forensic interviewer. A.L. was not questioned by the police; they appropriately relied on the interview by Pluth.

¶ 24 The defense argues that the statement by A.L. that the last abuse happened about six weeks before the VSI because "that's what my stepmom thinks" is evidence of significant adult intervention. However, other statements of record indicate that A.L.'s stepmother was trying to help identify A.L.'s last visit to the defendant's home based on A.L.'s visitation schedule with her mother and the school calendar. Considering the totality of the circumstances, the trial court did not abuse its discretion in finding that the State met its burden of proving that the time, content, and circumstances of A.L.'s statements provided sufficient safeguards of reliability for admission.

¶ 25

II. Evidence of Prior Sexual Offense

¶ 26 The defendant argues that J.S.'s testimony should not have been admitted because the prejudice from her testimony outweighed the probative value. The defendant contends that there was no question as to identity, intent, or lack of mistake, the allegations of abuse were too far apart in time, and the allegations were factually dissimilar. The State contends that the trial court did not abuse its discretion in allowing evidence of the prior sex offense because the circumstances were so factually similar.

¶ 27 Section 115--7.3 of the Criminal Code (725 ILCS 5/115--7.3 (West 2006)) provides an exception to the common law rule that other-crimes evidence normally is inadmissible if offered only to demonstrate the defendant's propensity to commit the charged. *People v. Donoho*, 204 Ill. 2d 159 (2003). Under section 115--7.3 of the Criminal Code, if the other-crime evidence meets the preliminary statutory requirements, it is admissible if it is relevant and if its probative value is not substantially outweighed by its prejudicial effect. *Id.* In making that determination, section 115--7.3 of the Criminal Code specifies that the trial court should consider: (1) the proximity in time between the two offenses; (2) the degree of factual similarity between the offenses; or (3) other relevant facts and circumstances. 725 ILCS 5/115--7.3 (West 2006). We review whether a trial court's admission of other-crimes evidence for an abuse of discretion. *Donoho*, 204 Ill. 2d 159.

¶ 28 There was no abuse of discretion. The trial court found that the two cases were substantially factually similar. Both were females of a similar age, the defendant's access to both was due to his family relationship, both reported that abuse occurred in the defendant's bedroom, and both were told to remove their clothing and close their eyes. Although the offenses occurred about seven years apart, that was the approximate age difference between A.L. and J.S., making them both about the same age at the time of the offenses.

¶ 30 The defendant contends that the trial court abused its discretion in denying his motion for a mistrial after A.L. was allowed to testify regarding visits to the defendant's home outside the indictment time frame over defense objections as to foundation. Although the trial court subsequently struck all testimony that occurred outside the dates alleged in the indictment, the jury had already heard the evidence. In denying the motion for a mistrial, the trial court found that although the foundation for A.L.'s testimony was weak and inconsistent, it was not insufficient to establish foundation. The State contends that there was no basis for a mistrial; the testimony that the trial court struck was admissible, so even if the jurors considered the evidence, there was no prejudice to the defendant.

¶ 31 Generally, if a timely objection is made at trial, the trial court can correct an error by sustaining the objection or instructing the jury to disregard the question and the answer. *People v. Hall*, 194 Ill. 2d 305 (2000). A mistrial should be granted when an error of such a magnitude has been committed so that the defendant had been denied fundamental fairness. *People v. Nelson*, 235 Ill. 2d 386, 435 (2009). A trial court's decision to grant or deny a motion for a mistrial is reviewed for abuse of discretion. *Id.*

¶ 32 A review of A.L.'s testimony reveals that, as the trial court pointed out, little of her testimony related to incidents prior to the date alleged in the indictment. A.L. was not as specific during her trial testimony, two years after the alleged events, as she was during her VSI taken soon after the dates alleged in the indictment. However, A.L. did testify that the three events alleged in the indictment all occurred during the summer of 2007 and in the defendant's current home. According to the testimony of both Angela and the defendant, they did not move into that home until July 7, 2007. Thus, although A.L. could not remember specific dates from

two years ago, when she was only 10 years old, she did remember the details of the abuse, including which home where it occurred, which reasonably puts the abuse within the indictment timeframe. Although A.L. did make reference to abuse happening in the defendant's prior home, and beginning when she was 8 or 9 years old, the trial court found that those references were vague and instructed the jury to disregard any testimony of abuse prior to the indictment timeframe. It appears that the trial court adequately instructed the jury to disregard and any error was such so that the trial court's denial of the defendant's motion for a mistrial was not an abuse of discretion.

¶ 33 IV. Guilt Beyond a Reasonable Doubt

¶ 34 The defendant contends that there was a reasonable doubt as to his guilt because the State's evidence was unreasonable, improbable, unconvincing, and contrary to human experience. The defendant argues that there were extreme discrepancies and variances in A.L.'s testimony. The State contends that the evidence presented at trial was sufficient to allow a rational trier of fact to find the defendant guilty. The State argues that the discrepancies in A.L.'s testimony were minor, and it was the jury's responsibility to determine credibility and the weight to be given to testimony.

¶ 35 Due process requires proof of guilt beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255 (2008). When reviewing a challenge to the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Id.* A conviction will be reversed when there is a reasonable doubt as to the defendant's guilt because the evidence is so unreasonable, improbable, or unsatisfactory. *Id.*

¶ 36 A defendant commits predatory criminal sexual assault of a child when he is 17 years of age or over and commits an act of sexual penetration with a victim who is under 13 years of age when the act was committed. 720 ILCS 5/12--14.1(a)(1)(West 2006). Here, the State alleged that the defendant committed three acts of criminal sexual assault against A.L. between May 1 and August 23, 2007. The State alleged that the defendant placed his penis: (1) in A.L.'s vagina; (2) in A.L.'s rectum, and (3) in A.L.'s mouth.

¶ 37 After reviewing the evidence in the light most favorable to the State, we conclude that the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt. Although initially denying questions by her father, A.L. spontaneously told her father that she had been sexually abused by Russell. Her statements during the subsequent VSI were more detailed than her report to her father, but the statements were consistent. A.L. also identified the defendant in court and testified to the same three incidents. The defendant had the opportunity to cross-examine A.L. and raise questions as to the reliability of her out-of-court statements, and the jury had the opportunity to determine the reliability and weight to be given to A.L.'s out-of-court statements. The jury's finding that the defendant was guilty beyond a reasonable doubt was not unreasonable or improbable.

¶ 38 V. Sentencing

¶ 39 The defendant contends that his sentences were excessive, arguing that the trial court failed to adequately consider the defendant's rehabilitative potential and other mitigating factors. The State responds that the trial court acted within its discretion. It is well-established that the trial court has broad discretionary powers in choosing the appropriate sentence a defendant should receive. *People v. Alexander*, 239 Ill. 2d 205 (2010). The trial court is in the superior position to assess the credibility of the witnesses and to weigh the evidence presented at the

sentencing hearing. *Alexander*, 239 Ill. 2d 205. A trial court's sentencing decision will not be reversed on appeal absent an abuse of discretion. *People v. Jackson*, 375 Ill. App. 3d 796 (2007). Where it is claimed that a sentence within the statutory limits is excessive, we will not disturb the sentence unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Finley*, 312 Ill. App. 3d 892, 898. The seriousness of the crime is the most important factor to be considered in imposing sentence. *People v. Quintana*, 332 Ill. App. 3d 96 (2002).

¶ 40 In the instant case, there is no dispute that the sentences the trial court imposed were within the statutory sentencing range. The defendant was found guilty of three counts of predatory criminal sexual assault, Class X felonies punishable by sentences of 6 to 30 years. 720 ILCS 5/12--14.1(b)(1)(West 2006); 730 ILCS 5/5--8--1(a)(3) (2006). The trial court stated that it reviewed the presentence investigation report (PSI), the addendum to the PSI, the evidence presented by both parties, letters in support of the defendant, the nature of the charges, and the statutory mitigating and aggravating factors. In sentencing the defendant to consecutive terms of 22, 26, and 28 years, respectively, in prison, the trial court placed great weight on the defendant's position as a trusted family member. We cannot conclude the trial court abused its discretion in imposing the sentences.

¶ 41 CONCLUSION

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

¶ 43 Affirmed.