2012 IL App (3d) 100745-U

Order filed May 8, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court) of the 21st Judicial Circuit,) Kankakee County, Illinois,
Plaintiff-Appellee,	)
	) Appeal No. 3-10-0745
v.	) Circuit No. 08-CF-177
	)
LOUIS J. BEVERLY,	) Honorable) Kathy Bradshaw-Elliott,
Defendant-Appellant.	) Judge, Presiding.

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

ORDER

¶ 1 *Held:* (1) The trial court properly admitted evidence of alleged prior sexual assault on the victim by defendant. (2) The trial court did not abuse its discretion by declining to answer the jurors' question of whether "skin ha[d] to touch skin" for an aggravated criminal sexual assault to have occurred and, instead, advising jurors that they had heard the evidence and had been instructed as to the applicable law.

¶ 2 After a jury trial, defendant, Louis J. Beverly, was convicted of aggravated criminal sexual assault. 720 ILCS 5/12-14(b)(i) (West 2008). He was sentenced to 15 years of imprisonment. On appeal, defendant argues that trial court erred by: (1) allowing the State to

present evidence of the victim's allegations of prior sexual assaults by defendant; and (2) failing to answer the jury's question during deliberations of whether skin on skin contact was required to constitute an aggravated criminal sexual assault. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by indictment with aggravated criminal sexual assault. The indictment alleged that between December 1, 2007, and March 25, 2008, defendant, who was under the age of 17, knowingly committed an act of sexual penetration with D.K., who was under the age of 9, in that he placed his penis in D.K.'s anus. The evidence at trial indicated that on March 25, 2008, during spring break, the 16-year-old defendant and his younger siblings were at the home of their aunt Latonia K. to use her shower due to a water problem at their home. At some point during the morning, their other aunt, Latyria, came for defendant and his siblings to bring them to her house two blocks away. Defendant sent his younger siblings with Latyria and remained in Latonia's home to use Latonia's computer to play video games and view pornography. Sometime later, D.K., who resided in the home with her brother and mother (Latonia), returned. D.K. had been dropped off by her older sister after having attended a day camp. Defendant agreed to watch D.K. until D.K.'s brother came home.

¶ 5 Latonia testified that when she came home from work on March 25, 2008, D.K. told her that defendant "touched her inappropriate and he then told her to bend over the [computer] chair, and he proceeded to have into her with his private part, and touched her private part." D.K. told her mother that it hurt, and it was very uncomfortable. D.K. told her mother that after the incident, defendant put D.K. in the bathtub. D.K. said that similar incidents with defendant occurred around Christmas and on Martin Luther King, Jr., Day or President's Day. D.K.

indicated that during the incidents she asked defendant to stop, but he did not stop until "he peed on [him]self." After D.K. described the incidents, Latonia put D.K.'s clothes and underwear in a grocery bag and brought her to the emergency room. The following day defendant told Latonia that he was viewing pornography and masturbating when D.K. "bumped" him and semen got on her.

¶ 6 D.K.'s 26-year-old sister testified that she had picked D.K. up from defendant's care on March 25, 2008. D.K. said that defendant had told her to lie and say that she took a bath because she spilled Kool-Aid on herself after defendant "peed" on her.

¶ 7 D.K. testified that defendant pulled down her pants and underwear and "put his 'D' inside [her] butt." When asked if defendant stayed on the outside of her buttocks, or if he went inside, she indicated, "[i]nside." During the incident D.K. was on her stomach on the computer chair and defendant had "clear stuff" on his "D."

¶ 8 D.K. testified that defendant had assaulted her on three prior occasions. The first incident occurred in D.K.'s home when she was lying on her stomach on the couch and watching cartoons. Defendant came downstairs and started touching her, and she kept telling him to stop. D.K. wiped "clear stuff" that was "[r]ubberish" off of her buttocks. The clear stuff was also on defendant's "D." The second assault occurred by the Christmas tree in the home of her aunt Connie (defendant's mother), after defendant told his younger cousins to hide for a game of hide-and-seek. D.K. hid on the couch under a blanket. Defendant pulled down D.K.'s pants and touched her with his "D" inside her buttocks. D.K. told him "a million times" to stop. The third incident occurred on Martin Luther King, Jr., Day when defendant touched D.K.'s buttocks with his "D." His "D" went inside her buttocks.

¶ 9 On the night of March 25, 2008, D.K. told the emergency room nurse that defendant took her pants down and touched his privates to her buttocks and "peed on himself." She also told the nurse that she had told defendant to stop, but he did not listen. The nurse took vaginal and anal swabs from D.K. as evidence for a rape kit. A deoxyribonucleic acid (DNA) analyst with the Illinois State Police determined that DNA recovered from D.K.'s underwear matched defendant.

¶ 10 During the first hour of defendant's interview with police, he denied any sexual contact with D.K. When defendant was asked how he would explain DNA evidence on D.K., defendant stated, "I possibly could have done something." Defendant gave a video-recorded statement indicating that he was masturbating when D.K. sat on his lap and the tip of his penis went into her buttocks.

¶ 11 At trial, defendant testified that when D.K. arrived home on March 25, 2008, he told D.K. to take a bath. Defendant thought D.K. needed to bathe because she was wearing pajamas. Defendant did not know it was pajama day at D.K.'s day camp. D.K. went into the bathroom to bathe, and defendant returned to viewing pornography on the hallway computer. Defendant was masturbating when D.K. appeared in her underwear. Defendant froze, and D.K. climbed on his lap because she wanted to use the computer. When she sat on his lap she started to scream that defendant had peed on her and that she was going to tell on him. Defendant panicked and cleaned himself up in the bathroom. Defendant told D.K. to say that she took a bath because she spilled Kool-Aid on herself.

¶ 12 Prior to closing arguments, the trial court issued jury instructions. Over defendant's objection, the jury was instructed that:

> "The Indictment states that the offense [*sic*] charged were committed on or

between the first day of December 2007 and the 25th day of March of 2008. If you find the offenses charged were committed, the State is not required to prove that they were committed on that particular date charged."

¶ 13 During closing arguments the prosecutor argued:

"On March 25, 2008, [D.K.] was having a good day. *** [It] was a regular day for [D.K.], but when [she] was dropped off at home, she learned the only person that was there was her cousin, *** the defendant.

As D.K. was playing on the computer, the defendant came out of her room, pulled down her pants, pulled down her underwear, pulled down his own pants and underwear and put his D in her butt. *** [H]e told her to lie[.] *** March 25th was the date that [D.K.] told the truth.

***

The Indictment states that the offense [*sic*] charged were committed on or between the first day of December 2007 and the 25th day of March of 2008. If you find the offenses charged were committed, the State is not required to prove they were committed on that particular date charged. It doesn't matter if it occurred on March 25th or if it occurred on two weeks before Christmas or on the date in January of an important person's birthday.

If you believe that it happened *** that's all the State needs to prove to you that it happened. We don't have to prove to you that it happened on any specific date. Now March 25th is obviously a–a date that's very clear in [D.K.]'s mind, but so are the other times that it happened just perhaps not the dates.

* * *

Now the defendant in the interview says, I only did this this one time and in fact he is charged with only one incident. As I said before, if you believe it happened on any one time, that's all that matters. The other times do not matter. He's charged with only one incident. They matter from the point of view that they happened, but from the point of view of charging, if you believe it happened once, he's guilty."

¶ 14 During deliberations, the trial judge received a note from the jury, which asked:

"[F]or aggravated criminal assault to occur does skin have to touch skin? For example is it still considered aggravated criminal sexual assault if his bare naked penis touches her butt then it's covered up with her panties[?]"

¶ 15 Defendant's attorney argued that the judge should respond, "Yes" to indicated that skin must touch skin for aggravated sexual assault. Over the objection of defendant's attorney, the trial court replied to the jury that they had heard the evidence and had been instructed as to the applicable law.

¶ 16 The jury found defendant guilty of aggravated criminal sexual assault. Defendant was sentenced to 15 years of imprisonment. Defendant appealed.

¶ 17 ANALYSIS

¶ 18 I. Evidence of Prior Sexual Act with the Victim

¶ 19 On appeal, defendant first argues that he was denied his right to a unanimous verdict based on specific illegal conduct because: (1) the State improperly introduced evidence regarding three prior offenses against the victim; (2) in closing arguments the prosecutor told the jury that defendant was guilty if they believed he committed the charged offense on any date; and (3) the

single verdict form returned by the jury did not indicate that the jury unanimously convicted defendant of one specific offense.

¶ 20 Here, the indictment alleged that defendant committed aggravated criminal sexual abuse between December 1, 2007, and March 25, 2008, by placing his penis in D.K.'s anus. The State argues that defendant was properly indicted based on a range of dates during which the illegal conduct occurred, with evidence introduced to establish that defendant performed one act of aggravated criminal sexual assault within the specified time frame. The actual date of the offense is not an essential ingredient in child sex offense cases. *People v. Barlow*, 188 Ill. App. 3d 393 (1989). In this case, given the minor victim's young age and the alleged various assaults having occurred over three months, the dates provided by the State were acceptable. Because defendant was charged with an assault as part of a continuing course of conduct within the three-month period, the evidence of the various assaults was admissible as relevant substantive evidence of the charged offense.

¶ 21 Even if the evidence of the alleged assaults that took place prior to March 25, 2008, was viewed as uncharged "other-crimes" evidence instead of substantive evidence of the alleged crime, the trial court did not err in admitting the evidence. Under the common law, other-crimes evidence is generally not admissible to show a defendant's propensity to commit crimes. *People v. Donoho*, 204 Ill. 2d 159 (2003)); Ill. R. Evid. 404(b) (eff. Jan. 1, 2011)). However, in a trial for a sexual offense, sexual activities with the same child are admissible to show the relationship and familiarity of the parties, to show defendant's intent, design, or course of conduct, and to corroborate the victim's testimony concerning the offense charged. *People v. Foster*, 195 Ill. App. 3d 926 (1990). Thus, evidence of defendant's other crimes was admissible under this

exception.

¶ 22 Furthermore, evidence of defendant's other crimes was also admissible under the Code of Criminal Procedure of 1963 (Code). Section 115-7.3(b) of the Code provides a statutory exception to the general rule against introducing other-crimes evidence when defendant is accused of specified sex crimes. 725 ILCS 5/115-7.3(b) (West 2008); Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). The section states that evidence of another criminal sexual assault may be admissible if it is otherwise admissible under the rules of evidence and "may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(b) (West 2008). Any matter to which the evidence is relevant encompasses defendant's propensity to commit sex offenses. *Donoho*, 204 Ill. 2d 159. However, other-crimes evidence, even if offered for a relevant purpose, will not be admitted if its prejudicial effect substantially outweighs its probative value. *People v. Dabbs*, 239 Ill. 2d 277 (2010). In determining whether to admit other-crimes evidence and weighing the probative value against prejudice to defendant, the 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 2008). The admissibility of other-crimes evidence is within the sound discretion of the trial court, and we will not reverse the trial court's decision to admit other-crimes evidence absent an abuse of discretion. *Donoho*, 204 Ill. 2d 159.

¶ 23 In this case, all of defendant's alleged assaults on D.K. took place within a three-month period. See *Donoho*, 204 Ill. 2d 159 (finding no abuse of discretion in admitting evidence of a sex offense that preceded the charged offense by 12 to 15 years). Each of the previous offenses were factually identical to the charged offense in that defendant allegedly placed his penis in

D.K.'s buttocks and ejaculated on her. See *People v. Wilson*, 214 Ill. 2d 127 (2005) (indicating that as the factual similarities increase, so does the relevance or probative value). Additionally, the evidence of the prior assaults did not become the focal point of the trial so that it was overly prejudicial. See *Smith*, 406 Ill. App. 3d 747 (a trial court must only admit so much prior-crimes evidence as is reasonably necessary to establish propensity so as to ensure that defendant is convicted of the charged offense rather than the past crimes). Under the circumstances of this case, the evidence of defendant's prior assaults on the victim was admissible, and the trial court did not abuse its discretion by allowing evidence of the prior assaults into evidence.

¶ 24 Defendant also contends that the prosecutor's remarks during closing arguments indicating that he was guilty if the jury believed that he committed the charged offense on any date were improper. As noted above, the date of the offense is not an essential factor in a child sex offense case. *People v. Guerrero*, 356 Ill. App. 3d 22 (2005). Thus, a jury finding as to the specific date was not necessary, and the prosecutor's remarks were not improper.

¶ 25 II. Response to Jury Question During Deliberations

¶ 26 Defendant argues that the trial court erred by refusing to answer the jurors' question of whether "skin ha[d] to touch skin" for an aggravated criminal sexual assault to have occurred.

¶ 27 Generally, the trial court has a duty to provide clarification to the jury where it has posed a question of law, even though the jury was initially properly instructed. *People v. Childs*, 159 Ill. 2d 217 (1994). However, a trial court may decline to answer a jury's questions if: (1) the jury instructions are legally correct and understandable; (2) further instructions would mislead the jurors; (3) the jurors raise questions of fact; or (4) answering the question would likely direct a verdict. *People v. Hill*, 315 Ill. App. 3d 1005 (2000). A trial court's decision to answer or refrain

from answering a question from the jury will not be disturbed absent an abuse of discretion. *People v. Reid*, 136 Ill. 2d 27 (1990).

¶ 28 In this case, defendant's conviction was based on defendant committing an act of sexual penetration with D.K. The jury was instructed that:

> "A person commits the offense of aggravated criminal sexual assault when he commits an act of sexual penetration with a victim and is under 17 years of age and the victim is under 9 years of age."

¶ 29 The jury was further instructed that:

> "The term 'sexual penetration' means any contact, however slight, between the sex organ or anus of one person and the anus of another person. Evidence of emission of semen is not required to prove sexual penetration."

¶ 30 During deliberations, the jurors asked the court whether aggravated criminal sexual assault required skin-on-skin contact. In response, the trial court advised the jury that they had heard the evidence and had been instructed as to the applicable law.

¶ 31 Section 12-12(f) of the Criminal Code of 1961 (720 ILCS 5/12-12(f) (West 2008)) and the Illinois Pattern Jury Instructions (Illinois Pattern Jury Instructions, Criminal, No. 11.65E (4th ed. 2000)) describe "[s]exual penetration" as including "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person[.]" The definition of "sexual penetration" does not specify whether skin-on-skin contact is required and does not indicate whether the contact through the clothing of the victim is sufficient. 720 ILCS 5/12-12(f) (West 2008) (defining "[s]exual penetration"); *contra* 720 ILCS 5/12-12(e) (West 2008) (specifying that "[s]exual conduct" as required for the offense of criminal sexual

abuse is defined as touching or fondling of the sex organ, anus, or breast, either "directly or through clothing").

¶ 32 On appeal, defendant argues that the judge was "obligated to inform the jury that sexual penetration required actual contact between the defendant's penis and the complainant's anus." The State argues that "[t]he law does not require skin-on-skin contact for a defendant to be found to have sexually penetrated a victim" and "[s]uch an instruction in this case would have been both legally wrong and misleading." The State contends that if aggravated criminal sexual assault required skin-on-skin contact, then a defendant could avoid a conviction by wearing a condom or by attempting to penetrate the victim through underwear.

¶ 33 We agree with the State that answering the jurors' question in the affirmative to indicate that skin-on-skin contact was required for an aggravated criminal sexual assault would have been incorrect. The primary rule of statutory construction is to ascertain and give effect to the legislature's intent. *Brucker v. Mercola*, 227 Ill. 2d 502 (2007). The language of the statute is the best indication of legislative intent. *Id.* In determining the General Assembly's intent, we may not only properly consider the language of the statute, but also the purpose and necessity for the law, the evils sought to be remedied, and the goals to be achieved. *Id.* Further, when undertaking the interpretation of a statute, we must presume that when the legislature enacted a law, it did not intend to produce absurd, inconvenient or unjust results. *Id.*

¶ 34 Interpreting sexual penetration as requiring skin-on-skin contact in every case would produce absurd results that could not have been intended by the legislature. A defendant could preclude a conviction for sexual assault simply by placing a condom, clothing, or any other type of material between an object or his penis, mouth, or anus and a victim's sex organ or anus.

Since we do not believe the legislature intended such a result, we interpret sexual penetration as not requiring skin-on-skin contact in every case. In this case, D.K. testified that defendant put his penis "inside" her buttocks and indicated that it hurt. Defendant denied doing so. Ultimately, whether there was "any contact" between defendant's penis and D.K.'s anus was a question of fact for the jury to resolve. Consequently, an affirmative answer to the jurors' question in this particular case, as suggested by defendant, would have misled the jury.

¶ 35 Therefore, the trial court did not abuse its discretion in refraining from answering the jurors' question.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 38 Affirmed.