2016 IL App (1st) 140417-U

SIXTH DIVISION
DECEMBER 16, 2016

No. 1-14-0417

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 4861
	)	
WILLIE WASHINGTON,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for predatory criminal sexual assault where the trial court did not allow excessive evidence of defendant's other criminal acts at trial; we amend defendant's mittimus to reflect the proper amount of presentence custody credit.

¶ 2 Following a jury trial, defendant Willie Washington was convicted of predatory criminal sexual assault and sentenced to an extended term of 50 years' imprisonment. On appeal, defendant contends that the trial court erred in failing to consider the undue prejudice that resulted in allowing admission of excessive evidence regarding other crimes of sexual assaults, which resulted in an improper mini-trial of the other offenses. Defendant also contends that his mittimus must be amended to reflect the proper amount of presentence custody credit to which

he is entitled. We affirm the judgment of the circuit court of Cook County as modified.

¶ 3 Defendant, the step-grandfather of the victim, was charged with predatory criminal sexual assault in that on or about April 29, 1999 continuing through June 29, 2003, he, being 17 years of age or over, intentionally or knowingly committed an act of sexual penetration upon the victim in that there was contact between defendant's penis and the victim's anus while she was under 13 years of age when the act was committed. 720 ILCS 5/12-14.1(a)(1) (West 2002) (now codified as 720 ILCS 5/11-1.40(a) (West 2014)).

¶ 4 Before trial, the State filed a motion and an amended motion to allow evidence of other sexual assaults by defendant as proof of his propensity to commit sex offenses pursuant to section 115-7.3 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-7.3 (West 2002)). The State also moved to allow this evidence to prove motive, intent, identity, absence of mistake or accident, and *modus operandi*. Specifically, the State described defendant's sexual assaults of the victim, her sisters S1 and S2,[1] and her two cousins. Defendant responded, objecting to the other-crimes evidence as unnecessary and unduly prejudicial.

¶ 5 Following a hearing, the trial court granted the State's motion to allow evidence of those incidents related to the victim's sisters, S1 and S2, but denied it as to the victim's cousins. The court held that the evidence as to S1 and S2 was admissible to show defendant's propensity to commit sex offenses pursuant to section 115-7.3 of the Code. Furthermore, the court found this other-crimes evidence permissible to prove motive, intent, identity, absence of mistake, and *modus operandi*. The court also stated that the evidence regarding S1 and S2 was more probative

[1]In the interest of confidentiality, we refer to the victim's sisters, who were minors at the time of the sexual assaults, as S1 and S2 because they have the same initials and distinctive names. See *In re Edgar C.*, 2014 IL App (1st) 141703, ¶ 8 (citing Ill. S. Ct. R. 660(c) (eff. Oct. 1, 2001)).

than prejudicial where there were "striking similarities" between defendant's assaults on all three girls. Defendant was the girls' step-grandfather, they lived in the same residence, were similar in age, and the acts allegedly occurred in the same places within the residence over the same time period.

¶ 6 The court also stated that because defendant denied that any offenses against any victim occurred, identity was an issue that the State needed to prove beyond a reasonable doubt. In addition, the State needed to provide corroborating evidence where it is alleging that defendant committed acts upon the victim while she was alone with defendant. The court stated that any inconsistencies in the reports regarding the type of alleged acts that occurred would go to the weight of the evidence, not its admissibility. Significantly, the court emphasized that:

> "if the State does put on proof of other crimes as to the two girls for which I allowed it ***, I would like to show [*sic*] ahead of time the number of witnesses that you would like to call because I don't want this to turn into a mini trial within a big trial.
>
> So the number of witnesses will be limited, but I will leave that for you after you prepare further to tell me who you want to call then we will have a number of witnesses to call."

In denying the State's request to present other evidence of defendant's alleged sexual assaults of the victim's two cousins, the court found that their testimony would be more prejudicial than probative as those girls did not live in the same household and defendant's acts allegedly committed against them did not consist of the variety of acts allegedly committed against the victim and her sisters.

¶ 7 During opening statements, the State argued that the case involved not only the sex acts

defendant committed against the victim, but also the acts he committed against the victim's sisters. The State emphasized that defendant lived with and cared for the girls, and was a person of authority in their lives. Defense counsel argued that not only was there reasonable doubt that defendant was the perpetrator of the abuse, but there was a question as to whether the girls suffered abuse at all.

¶ 8 At trial, the victim, who was born on April 29, 1993, testified that from 1997 to 2003, she lived at 10532 South Oglesby Avenue in Chicago with her mother, Eurydice M.; her sisters, S1 and S2; her two brothers; her grandmother; and her step-grandfather, defendant. Defendant would babysit the victim and her siblings, and there were times the victim and defendant were alone together. After attending classes at elementary school, the victim played in a park near her residence. Defendant called her inside and took her up to his bedroom. When the victim entered the bedroom, defendant put his penis into her buttocks using Vaseline, and put his penis into her mouth. She recalled defendant committing these sex acts against her one time. The victim did not tell anyone what defendant did to her.

¶ 9 The victim and her family moved to a house on Morgan Street in 2003. At the Morgan Street house, the victim recalled one time when she was in about fifth grade that defendant assaulted her in the basement when no one else was present. Specifically, defendant "lifted up [the victim's] gown and licked [her] vagina." The victim subsequently talked to S1 and learned that defendant was assaulting her too. Although the victim told defendant to stop the assaults, he refused. The victim stated that defendant "would keep trying, but it would never work."

¶ 10 The victim told her aunt Tiffany about the assaults. She then had a medical exam and participated in a victim sensitive interview where she did not tell the interviewer everything regarding the assaults because the penis to mouth assault was embarrassing. The victim did not

recall what she told medical examiner Dr. Emily Siffermann, but did remember telling an assistant State's Attorney (ASA) about defendant putting his mouth on her vagina.

¶ 11 S2 testified that she lived at the Oglesby Avenue address until she was eight years old. At that address, defendant touched and entered her vagina with his penis multiple times using Vaseline. Defendant also touched her buttocks with his penis about three times and put his mouth on her vagina multiple times. S2 did not tell anyone because she was scared and thought she might get into trouble. When S2 moved to Morgan Street with her family, defendant touched S2's vagina with his penis and put his mouth on her vagina multiple times. S2's sisters would sometimes be in the room during the assaults. S2 told her aunt Tiffany, who lived in Arkansas, about the assaults over the phone. Following the conversation with her aunt, S2 spoke to police, was interviewed about defendant's assaults, and had a medical exam.

¶ 12 S1 testified that when she was five years old and living at the Oglesby Avenue address, defendant touched her vagina and buttocks with his penis. Defendant would put Vaseline on his penis when she told him that he was hurting her. Defendant put his tongue on S1's vagina. He would touch S1 about five to six times per week. When S1 was in third grade, her family moved to the Morgan Street address where defendant assaulted her about twice per week by putting his tongue on her vagina, inserting his penis, and making her put her mouth on his penis. At times, S2 was with S1 during the assaults. When S1 was 12 years old, she moved to Arkansas to live with her aunt Tiffany. At age 13, S1 told Tiffany about defendant's assaults on her, and then Tiffany took S1 to an Arkansas police station to report the incidents.

¶ 13 Dr. Emily Siffermann testified that she examined the victim and S2 on January 18, 2008. The victim told Siffermann that someone had put his private part in her buttocks and that it happened many times. The victim stated that the abuse began when she was in second or third

grade and continued until the start of eighth grade. S2 initially told Siffermann that nothing bad had happened to her, but later stated that someone touched her private parts. The exams of both the victim and S2 were normal, but nevertheless consistent with their accounts of what had happened as the genital area is elastic and can heal quickly after an injury without scarring.

¶ 14 Eurydice M., the mother of the three girls, testified that she never saw defendant touch any of her children, but, when S1 was five years' old, she took her to the clinic because she had blood in her underwear.

¶ 15 ASA Michael Sorich testified that defendant admitted to molesting the three girls, including touching their buttocks and vaginas. Sorich wrote a summary of defendant's statements, which defendant signed. The statements, which were read to the jury, indicated that defendant stated that the victim, S1, and S2 were under the age of 13 when he began touching their breasts, buttocks, and vaginas. Defendant said he inappropriately touched the three girls multiple times in two residences.

¶ 16 After the State rested, Sergeant Jarrod Smith testified in defendant's case-in-chief. He stated that he conducted a victim sensitive interview of the victim on January 18, 2008. Defense counsel asked Smith if the victim told him how often she had been molested by defendant. Smith responded affirmatively, stating that the victim told him it occurred once per week and that the abuse stopped when she was in the fourth grade. Defense counsel also asked Smith if the victim told him that defendant had asked her if he could put his penis in her mouth. Smith again responded affirmatively, indicating that the victim replied to defendant's request by stating "no because it was nasty." Smith later observed an interview conducted with S2, who stated that defendant had put his private part into her private part 3 or 10 times. Smith never interviewed S1.

¶ 17 The defense rested and closing arguments followed. In making its closing argument, the

State told the jurors they should consider the acts committed against all three girls, and repeatedly referenced the acts against the victim's two sisters. Defense counsel argued that it was the victim's testimony that mattered in this case, not her sisters, and the victim's testimony was inconsistent regarding the frequency and type of the alleged acts. Defense counsel also highlighted that the victim was examined by Dr. Sifferman and the result was a "normal exam."

¶ 18 The jury found defendant guilty of predatory criminal sexual assault. Defendant filed a motion for a new trial, arguing, *intera alia*, that the court erred in admitting other-crimes evidence. The circuit court denied the motion and sentenced defendant to an extended term of 50 years' imprisonment.

¶ 19 On appeal, defendant contends that the trial court erred in failing to consider the undue prejudice that resulted from allowing admission of excessive evidence regarding other-crimes evidence of sexual misconduct against the victim's two sisters. Defendant maintains that this excessive other-crimes evidence created an improper mini-trial.

¶ 20 We initially note that defendant preserved this issue on appeal by filing a written objection to the State's motion to admit other-crimes evidence prior to trial, and including the issue in his posttrial motion. See *People v. Denson*, 2014 IL 116231, ¶ 18 (an issue is preserved for review where a defendant raises it in either a motion *in limine* or an objection at trial and then again raises the issue in a posttrial motion).

¶ 21 Whether to admit evidence of a prior criminal offense rests within the sound discretion of the trial court, and we will not reverse its decision unless there was a clear abuse of discretion. *People v. Chapman*, 2012 IL 111896, ¶ 19. We will find an abuse of discretion when a trial court's decision is "arbitrary, fanciful or unreasonable." *People v. Donoho*, 204 Ill. 2d 159, 182 (2003).

¶ 22 Generally, evidence of other crimes is admissible only if it is relevant for any purpose other than to show the defendant's propensity to commit a crime, such as *modus operandi*, intent, motive, identity, or absence of mistake. *Id*. at 170. However, section 115-7.3 of the Code provides an exception to the common law bar against the use of other-crimes evidence to show propensity in cases, where, as here, a defendant is accused of predatory criminal sexual assault. Under this section, evidence of another criminal sexual assault "may be admissible *** and may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(b) (West 2002).

¶ 23 Where the other-crimes evidence meets the threshold statutory requirement of relevance and contains probative value, it is presumed to be admissible if its probative value is not substantially outweighed by its prejudicial effect. *Donoho*, 204 Ill. 2d at 182-83. The statute provides:

> "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(c) (West 2002).

¶ 24 Defendant states in his reply brief that he "does not contest the fact that the evidence satisfied the statutory prerequisites for admissibility in terms of proximity in time and the similarities between the alleged assaults; instead, he argues that it is precisely *because* of the

significant similarities between the charged and uncharged offenses that the admission of the other crimes evidence was so prejudicial." (Emphasis in original.) The focus of defendant's argument is that the amount of other-crimes evidence that the State was allowed to admit resulted in a mini-trial within his jury trial. Defendant thus maintains the court's failure to restrict the volume of other-crimes evidence presented at trial unfairly prejudiced him.

¶ 25 Even if the other-crimes evidence is relevant and probative, such evidence must not become the focal point of the trial. *People v. Smith*, 406 Ill. App. 3d 747, 755 (2010). When evidence of other crimes is admitted to show propensity, a trial court should not permit a mini-trial of the other offenses. *Id*. Instead, the other-crimes evidence should be limited to that which is necessary to help clarify the issue for which the other crime was introduced. *Id*. As a substantial amount of evidence of other crimes may make probative other-crimes evidence overly prejudicial, the trial court should limit the evidence of other crimes when the defendant's propensity can be established by a few instances of uncharged conduct or by other admissible evidence. *Id*.

¶ 26 Here, we find that the trial court did not conduct a mini-trial of the other-crimes evidence. The trial court excluded the testimony of the victim's cousins, finding that their testimony would be more prejudicial than probative as defendant's alleged acts to those girls lacked the degree of factual similarity to the charged offense necessary to warrant admission. Furthermore, the trial court stated that it would limit, if necessary, the other-crimes evidence as it related to the victim's sisters to ensure that no mini-trial would occur. In so finding, the court carefully balanced the risk of unfair prejudice to defendant in admitting the other-crimes evidence.

¶ 27 Defendant maintains that, despite the trial court's words, it did not limit the amount of

other-crimes evidence, allowing a mini-trial to occur. Defendant specifically points to the trial court's allowance of his statements to ASA Sorich detailing the repeated fondling of S1 and S2, and Dr. Sifferman's testimony as to her examination of S2. Moreover, defendant asserts that the testimony of S1 and S2 contributed to the creation of the alleged mini-trial where they were allowed to "extensively" address how defendant sexually abused them. Defendant specifically points out that S2 testified that on more than 20 occasions at the Ogelsby apartment and more than 10 times at the Morgan house, he put his penis into her vagina, often using Vaseline, he touched his penis to her buttocks, and touched his mouth to her vagina. S1 testified that defendant regularly put his penis in her vagina and anus, using Vaseline at least once, and that he put his tongue on her vagina.

¶ 28 To support his argument that the quantity of this evidence created an improper trial within a trial, defendant relies on *People v. Cardamone*, 381 Ill. App. 3d 462 (2008), and *People v. Nunley*, 271 Ill. App. 3d 427 (1995). In these cases the reviewing courts held that the trial courts abused their discretion by admitting too much evidence of other offenses (26 charged and 158-257 uncharged acts defendant allegedly committed) (*Cardamone*, 381 Ill. App. 3d at 491, 497), and other-crimes evidence involving conduct "far more grotesque than that for which [the defendant] was on trial" (*Nunley*, 271 Ill. App. 3d at 432). Here, however, the testimony of the victim's two sisters, ASA Sorich's testimony regarding defendant's written confessions, and Dr. Sifferman's testimony, did not amount to the kind of excessive other-crimes evidence presented in *Cardamone*. The testimony of Sorich and Dr. Sifferman were not merely corroborating evidence as suggested by defendant. Instead, their testimony demonstrated that the sex acts committed against all three girls were similar, distinguishing this case from *Nunley*, and that defendant was the perpetrator of the conduct, a fact which defense counsel disputed during

opening and closing arguments. For the same reasons, we find *People v. Bedoya*, 325 Ill. App. 3d 926, 940-41 (2001), also relied on by defendant, distinguishable from the case where the repetitious and detailed presentation of the other crimes in that case "had nothing to do with the purported purpose of the evidence."

¶ 29 Defendant's further reliance on *People v. Brown*, 319 Ill. App. 3d 89 (2001), is misplaced where that case was reversed, not only based on the excessive other-crimes evidence, but also on a defective jury instruction and the trial court's improper response to a question posed by the jury during deliberations. *Id.* at 101. Moreover, the court held that the trial court did more than conduct a mini-trial on the other-crimes evidence as it "switched the focus of the trial to the prior incident." *Id.* at 97. Here, however, there was no cumulative error at trial, and the trial court never "switched the focus" of the victim's trial to the other-crimes evidence.

¶ 30 Defendant next maintains that the State's remarks during opening, closing, and rebuttal arguments were further evidence that the court allowed it to present excessive details about the other-crimes evidence, making it difficult for the jury to decipher between the evidence offered on those other acts and the evidence offered to prove the charged offense. Defendant forfeited this issue by failing to object to the State's comments during argument, and by failing to include it in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 31 Defendant nevertheless maintains that we can review the alleged error as ineffective assistance of counsel, or, alternatively, under plain error. In this case, however, it is clear from the record that defendant cannot show prejudice, and, therefore, we need not resolve whether the State erred in making its opening, closing, and rebuttal arguments. See *People v. White*, 2011 IL 109689, ¶ 134 (stating that where the record is clear that a defendant cannot show prejudice, "[t]here is no reason to go further for purposes of either an ineffective assistance analysis or one

founded upon the closely balanced prong of plain error"); see also *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78 (finding that error in closing argument does not fall into the type of error recognized as structural, which has been equated with the second prong of plain error analysis).

¶ 32 Defendant finally contends that his mittimus should be amended to reflect the proper amount of time he spent in presentence custody. He initially maintained that his mittimus, which shows he is entitled to 2,168 days of presentence custody, should be amended to reflect 2,171 days' credit. The State responded, and defendant conceded in his reply brief, that he calculated his presentence custody using an incorrect date of arrest of January 10, 2008. Defendant indicated that the State accurately noted that he was arrested on January 9, 2008, and he is thus entitled to 2,172 days of presentence custody credit.

¶ 33 A defendant is entitled to receive custodial credit against his sentence for the time spent in custody before he is sentenced. 730 ILCS 5/5-4.5-100(b) (West 2012). A defendant held in custody for any part of a day should be given credit against his sentence for that day. *People v. Smith*, 258 Ill. App. 3d 261, 267 (1994). However, a defendant is not entitled to presentence custody credit for the date of sentencing. *People v. Williams*, 239 Ill. 2d 503, 510 (2011). Defendant was arrested January 9, 2008, and remained in custody until he was sentenced on December 20, 2013. We thus agree with the parties that defendant was entitled to 2,172 days of presentence custody credit.

¶ 34 For the foregoing reasons, we amend the mittimus to award defendant 2,172 days of presentence custody credit, and affirm the judgment of the trial court in all other respects.

¶ 35 Affirmed; mittimus corrected.