2016 IL App (4th) 140605-U

NO. 4-14-0605

FILED
August 24, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
JUBAL G. SHAW,	)	No. 13CF681
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's error, in improperly admitting prior crimes evidence to prove propensity, was harmless.

¶ 2 In June 2013, the State charged defendant, Jubal G. Shaw, with one count of aggravated criminal sexual abuse (720 ILCS 5/11-1.60 (West 2012)). In April 2014, a jury found defendant guilty of the charged offense. In July 2014, the trial court sentenced defendant to seven years in prison.

¶ 3 Defendant appeals, arguing (1) that the trial court erred in allowing the State to present evidence of a prior crime, under section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3(c) (West 2012)), for the purpose of showing defendant had a propensity to commit sexual offenses and (2) the trial court's error was not harmless. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 In June 2013, the State charged defendant by information with one count of aggravated criminal sexual abuse based on allegations he touched a minor's buttocks in Decatur, Illinois, on May 25, 2013 (720 ILCS 5/11-1.60 (West 2012)).

¶ 6 The following pertinent facts were gleaned from the testimony presented at trial.

¶ 7 A. Dreamland Lake

¶ 8 On May 25, 2013, two boys, A.R., age 13, and B.R., age 9, were dropped off at Fairview Park's Dreamland Lake to fish while their mother and father went to exercise at a local gym. The two brothers were there for a short while before defendant approached them. Defendant was carrying food and a drink, which he offered to share with the boys. The boys declined. Defendant inquired about the brothers' fishing and what they were using as bait. The two boys then took up different positions around the lake to fish, while defendant sat down on a nearby bench.

¶ 9 After approximately 45 minutes, B.R. caught a turtle. A.R. walked over to where his little brother stood and bent over to examine the turtle. Defendant joined the boys and leaned over next to A.R. to see the turtle. A.R. testified that, while he was bent over, he felt defendant's hand touch his buttocks and move in a "circular motion." A.R. withdrew immediately, told defendant "no," and began to cry. B.R. did not see defendant's groping of his brother. The two brothers distanced themselves from defendant.

¶ 10 A.R. called his mother to report what happened. She promptly left the gym and drove to the park, leaving her husband behind. In the meantime, defendant had moved and now occupied a bench elsewhere on the lake. The boys were standing by, awaiting their mother's arrival. When their mother arrived, the boys got into her car and she called the police. As she

called the police, defendant began to walk away and then began running. Two rangers from the Decatur park district police department, Steve Chabak and Tim Boulware, responded to the mother's call. They relayed a description of the suspect's appearance to Decatur police officer Ed Cunningham. Cunningham saw defendant walk out of a CVS pharmacy. Cunningham thought defendant matched the description the rangers had provided him, although defendant was not wearing the coat that he had been reported as wearing. After Cunningham detained defendant, CVS manager Brad Mitchell discovered a coat in the pharmacy's bathroom garbage bin.

¶ 11 A.R., B.R., and their mother were taken to a "showup" at CVS pharmacy, where each of the three members of the family identified defendant as the man at the lake with the boys that morning. Boulware interviewed defendant. Although defendant initially denied it, defendant eventually admitted being at the lake and interacting with the boys as they fished. He also admitted that he may have placed a hand on the shoulder of one of the boys, but he denied touching A.R.'s buttocks. Defendant told police that he thought something was wrong when the boys' mother arrived and that is why he left the area.

¶ 12 B. Prior-Crimes Evidence

¶ 13 Before trial, the State filed a motion to allow other-crimes evidence, pursuant to section 115-7.3 of the Code, to show defendant's state of mind, intent, and propensity toward the commission of sexual offenses. Specifically, the State argued for the admission of evidence that defendant had previously been charged with indecent solicitation of a child, resisting arrest, and public indecency, and he pleaded guilty to the latter.

¶ 14 Following a hearing, the trial court, over defense counsel's objection, granted the State's motion. In reaching its ruling, the court stated:

> "THE COURT: The striking thing about the [prior] case, obviously, the same number of children, two children on each incident, happened during the daytime hours. The most striking thing about this particular case is the fact that it took place allegedly at the same location, a public park, not just a public park, but the same public park, Fairview Park, Decatur, Illinois. I think in that circumstance under this particular statute, that factual similarity is sufficient for the court to find that the other incident would be admissible in the State's case in chief."

¶ 15 After the trial court gave a limiting instruction regarding other-crimes evidence, S.J., the 13-year-old female who witnessed the events leading to defendant's public indecency conviction, testified that on June 13, 2010, she was bicycling at Fairview Park with a friend, a 16- or 17-year-old male. When the two sat down at a pavilion in the park, there was a man already there. The man, whom S.J. identified as defendant in open court, began talking to S.J. and her friend. Defendant asked them general questions, including questions about what they did for fun and whether S.J. had a boyfriend. S.J.'s friend received a phone call and walked toward the bike trail to talk. S.J. "turned around to see where [her friend] was going and when [she] turned back around [defendant] had his penis out and was masturbating." S.J. got up and got on her bike to join her friend, who called the police on his cell phone. When the police arrived, defendant began running, but the police caught and arrested him.

¶ 16 Following closing arguments, the jury was given the following instruction regarding other-crimes evidence:

"Evidence has been received that the defendant has been involved in an offense other than that charged in the information.

This evidence has been received on the issues of the defendant's state of mind, intent, and propensity and may be considered by you only for that limited purpose.

It is for you to determine if the defendant was involved in that offense, and if so, what weight should be given to this evidence on the issues of the defendant's state of mind, intent, and propensity."

¶ 17 C. Verdict and Sentencing

¶ 18 In April 2014, the jury found defendant guilty of aggravated criminal sexual abuse (720 ILCS 5/11-1.60 (West 2012)). In July 2014, the matter proceeded to a sentencing hearing. The trial court sentenced defendant to seven years in prison.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, both defendant and the State agree the trial court erred in instructing the jury that, pursuant to section 115-7.3 of the Code (725 ILCS 5/115-7.3(c) (West 2012)), it could consider prior-crimes evidence to prove defendant had a propensity to commit sexual offenses. However, defendant argues the error was not harmless and asks that the matter be reversed and remanded for a new trial. The State argues the error was harmless, as the other evidence was clear and convincing in demonstrating defendant's guilt.

¶ 22 A. Standard of Review

¶ 23 When reviewing a claim concerning improper jury instructions, we must first de-

termine whether any error occurred. *People v. Dennis*, 181 Ill. 2d 87, 95-96, 692 N.E.2d 325, 330 (1998). As previously mentioned, the parties agree the court erred when it instructed the jury that the prior-crimes evidence showing defendant masturbated in public could be considered as evidence of defendant's propensity to commit sexual offenses. Given the prior-crimes offenses—indecent solicitation of a child, resisting arrest, and public indecency—are not listed in section 115-7.3(a) of the Code (725 ILCS 5/115-7.3(a) (West 2012)), we agree and so find. Even so, our inquiry does not end there. If the result at trial would have been different in the absence of the improper instruction, reversal is required. *Id*. However, if we find that in spite of the error the evidence of defendant's guilt was so clear and convincing as to render the error harmless beyond a reasonable doubt, reversal is not required. *Id*.

¶ 24 B. Aggravated Criminal Sexual Abuse

¶ 25 Here, the State charged defendant with aggravated criminal sexual abuse (720 ILCS 5/11-1.60 (West 2012)). The State's evidence at trial showed that, on May 25, 2013, defendant was 30 years old and A.R. was 13 years old. A.R. testified that defendant rubbed his buttocks when he was bent over to examine a turtle his brother caught at Dreamland Lake in Decatur, Illinois. The State also presented evidence that immediately following the incident, defendant fled the scene and changed his appearance.

¶ 26 Defendant also argues that, without allowing the jury to consider the prior-crimes evidence for the purpose of propensity, the remaining evidence that defendant touched A.R.'s buttocks for the purpose of sexual gratification was not clear and convincing so as to render the error harmless. Defendant's sexual gratification or arousal, however, may be inferred without direct evidence of sexual arousal. *People v. Calusinksi*, 314 Ill. App. 3d 955, 960, 733 N.E.2d 420, 425; see also *In re A.P.*, 283 Ill. App. 3d 395, 398, 669 N.E.2d 1273 (1996) ("[I]t is not nec-

essary for anyone to testify that the [defendant] had an erection, that the [defendant] was fondling himself, or that the [defendant] was leering, drooling, or moving in a sexually suggestive way. *** [I]t is not necessary for the State to present *any direct* evidence of 'for the purpose of sexual arousal[.]' ") (emphasis in original).

¶ 27 Here, defendant's acts themselves allow the inference they were done for his sexual arousal or gratification. A.R. testified that defendant's grip on his buttocks was "tight" and that he rubbed it in a "circular motion" for "probably like half a second." The manner of the contact between defendant's hand and A.R.'s buttocks suggest an impetus sexual in nature. The buttocks are generally regarded as a private area of the body not customarily rubbed absent a medical or sexual purpose. Moreover, if defendant's actions were arguably benign, it would have been unnecessary for him to flee the scene and discard his jacket. Therefore, even absent the prior-crimes evidence being admitted to show propensity, the act itself shows defendant rubbed A.R.'s buttocks with the intent to receive sexual gratification.

¶ 28 Further, absent the admission of prior-crimes evidence for the impermissible purpose of showing propensity, the prior-crimes evidence was properly admitted to show defendant's intent. In general, evidence of other bad acts is admissible to prove a defendant's intent. See, *e.g.*, *People v. Wilson*, 214 Ill. 2d 127, 135, 824 N.E.2d 191, 196 (2005). This purpose is served by evidence of defendant's masturbation in the presence of a minor in the park, from which a jury could infer defendant is sexually aroused in the presence of unattended minors in public. Such an inference suggests defendant intended to receive sexual gratification when he rubbed A.R.'s buttocks.

¶ 29 Therefore, in spite of the improper jury instruction, we find the evidence of defendant's guilt was so clear and convincing so as to render the error harmless beyond a reasona-

ble doubt. *Dennis*, 181 Ill. 2d at 96, 692 N.E.2d at 330.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 32 Affirmed.