2017 IL App (2d) 150564-U
Nos. 2-15-0564 & 2-16-0914 cons.
Order filed September 28, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FRANK MARTIN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Boone County. No. 13-CF-122 Honorable C. Robert Tobin III, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not commit reversible error by instructing the jury with IPI Criminal 4th No. 3.14: although the instruction was unnecessary, it was accurate, and although the instruction might have highlighted defendant's uncharged conduct, defendant was not prejudiced, as the instruction highlighted it no more than the evidence itself did.

¶ 2 Defendant, Frank Martin, was charged by indictment in the circuit court of Boone County with 10 counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1 (West 2000)) and 5 counts of aggravated criminal sexual abuse (720 ILCS 5/12-16 (West 2000)). The charges were based on allegations that defendant committed acts of sexual penetration and sexual

conduct with his daughter, A.M., when she was under 13 years of age. Following a jury trial, defendant was found guilty of four counts of predatory criminal sexual assault of a child and two counts of aggravated criminal sexual abuse. The trial court sentenced defendant to eight years' imprisonment on each count of predatory criminal sexual assault of a child and four years' imprisonment on each count of aggravated criminal sexual abuse. The trial court ordered the sentences for the four counts of predatory criminal sexual assault of a child to be served consecutively to one another and concurrently with the sentences for aggravated criminal sexual abuse. Defendant has appealed both from his conviction (case No. 2-15-0564) and from the denial of a petition for relief from his conviction pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)) (case No. 2-16-0914). Defendant moved to consolidate the appeals and we granted the motion. In the appeal from his conviction, defendant contends that the trial court erred in instructing the jury as to how it could consider evidence of uncharged offenses and other conduct committed by defendant. Defendant has not raised any issues bearing on the denial of the section 2-1401 petition. We affirm defendant's conviction and dismiss the appeal from the denial of his section 2-1401 petition.

¶ 3 Evidence admitted at trial established that A.M. is the oldest of defendant's children with his former wife, H.M. A.M. was born in 1990. Her brother Z.M. was born in 1992. Two other children, D.M., who is female, and T.M., who is male, were born later. H.M. testified that, when A.M. and Z.M. were in early elementary school, she worked days and defendant worked the second or third shift. Defendant took care of the children while H.M. was at work, and vice versa. Later, defendant worked days and H.M. stayed home. A.M., Z.M., and D.M. were involved in Brownies, Girl Scouts, and Cub Scouts. H.M. was a troop and den leader. During evenings, H.M. and one or more of the children were often busy with troop or den meetings and

outings. On some evenings, H.M. attended meetings of a parent-teacher group at the children's school.

¶ 4 H.M. testified that, shortly after she and defendant married, defendant told her that he was a nudist and that he wanted to practice nudism in their home. Defendant was often nude around A.M. and Z.M. when they were very young. When A.M. and Z.M. got older, H.M. insisted that defendant wear clothes in the house when they were around. H.M. testified that the children often told her that defendant was nude in their presence when she was not at home. In 2007, A.M. told H.M. that defendant explained sex to her while they were both naked. Defendant admitted to H.M. that he had done so. He denied that he had ever touched or raped A.M. The incident led H.M. to demand that defendant move out of the house. She later obtained a divorce from defendant.

¶ 5 Z.M. testified that, when he was a child, defendant was often nude around the house when H.M. was not home. When Z.M. was between the ages of 6 and 10, he and defendant would watch television after other family members had gone to bed. Defendant would have Z.M. lie on the couch with him. Defendant would take Z.M.'s clothes off. Defendant would also be naked. This occurred 30 to 50 times. When Z.M. was seven or eight years old, he and defendant took a trip to Indiana to attend the Brickyard 400 race. They shared a hotel room the night before the race. As Z.M. was going to sleep, defendant asked him to come to his bed. Defendant took Z.M.'s shorts off. They were both naked. Defendant touched Z.M.'s penis and made Z.M. touch defendant's penis. Z.M. slept in defendant's bed. In the morning, they started to "play"-wrestle. Defendant pinned Z.M. on his stomach. Defendant then placed his erect penis between Z.M.'s buttocks.

¶ 6 Z.M. testified that, after a family celebration in 2013, his fiancée complained that defendant had been looking down her shirt. That triggered "a flood of memories" for Z.M., who was also concerned that defendant might be engaging in inappropriate behavior with T.M., who was 10 years old at the time. Z.M. contacted the police and related the incident in Indiana.

¶ 7 A.M. testified that defendant claimed to be a nudist and was often naked when H.M. was out of the house. When A.M. was between the ages of 5 and 12 or 13, defendant would take her hiking. Defendant would hike naked. When A.M. was younger, she would hike naked with him. As A.M. got older, she went hiking less and less, and would not take her clothes off.

¶ 8 A.M. testified that, when she was five or six years old, defendant would come to her bedroom naked to tuck her in at night. He would crawl into her bed and kiss her face, cheek, and chest. She would often end up undressed, and defendant would touch her chest, her vagina, and sometimes her buttocks. When A.M. was eight or nine years old, defendant started performing oral sex on her. Defendant would also place his finger in A.M.'s vagina and place A.M.'s hand on his penis. This occurred at least 50 times over the course of several years. A.M. further testified that defendant often came into her bathroom and watched her while she was in the shower. A.M. did not tell her mother about defendant's conduct. When A.M. was 17 years old, she told H.M. that defendant "wouldn't wear clothes around us and tried to get us to not wear clothes." A.M. told H.M. that defendant stared at her and her friends and that she was uncomfortable being at home with him. On cross-examination, A.M. testified that H.M. asked if defendant had ever touched her and she said that he had not. A.M. testified that she spoke with the police in 2013 after Z.M. contacted them.

¶ 9 Defendant was interviewed by police just prior to his arrest. A video recording of the interview was admitted into evidence and played for the jury. During the interview, defendant

told police that he was a nudist, but he denied being nude around his children. He admitted that he had hiked naked, but he denied that he had done so with A.M. He denied touching A.M. or Z.M. inappropriately.

¶ 10 Defendant testified on his own behalf. He denied having oral sex with A.M. or digitally penetrating her. He also denied touching her breasts or buttocks or placing her hand on his penis. Defendant testified that from around September 1999 until June 2003 he worked at Continental Web Press in Itasca, which was more than an hour's drive from home. He worked a 12-hour shift, 6 or 7 days a week. He would leave for work at 4:30 p.m. and return home at 7:30 a.m. Defendant carpooled to work with Thomas Zastrow and another individual. Zastrow corroborated defendant's testimony about the times they left for and returned from work.

¶ 11 Over defendant's objection, the trial court instructed the jury as follows:

> "Evidence has been received that the defendant has been involved in offenses and conduct other than those charged in the indictment.
>
> Ordinarily, this type of evidence has been received on the issue of the defendant's intent, motive, and knowledge and may be considered by you only for that limited purpose.
>
> However, in this case, the evidence that the defendant has been involved in offenses and conduct other than those charged in the indictment has also been received on the issue of the defendant's propensity to commit sexual acts upon children[.]
>
> It is for you to determine whether the defendant was involved in those offenses and conduct and, if so, what weight should be given to this evidence on the issues of motive, intent, knowledge, and propensity to commit sexual acts upon children."

On appeal, defendant challenges this instruction.

¶ 12 Under the common law, evidence of uncharged offenses and other conduct is not admissible to show a defendant's propensity to commit crimes. *People v. Childress*, 338 Ill. App. 3d 540, 548 (2003). However, a statutory exception applies in prosecutions for certain sex offenses, including the ones charged here. Section 115-7.3(b) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3(b) (West 2014)) provides that, in such prosecutions, evidence of the defendant's prior commission of any of the specified sex offenses "may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant." Relevant purposes include showing the defendant's propensity to commit sex offenses. *Childress*, 338 Ill. App. 3d at 549.

¶ 13 Although the common-law rule bars admission of other-crimes evidence to show criminal propensity, such evidence can be admitted for other purposes. When it is, the jury should be given Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.14), which sets forth the purpose or purposes for which the evidence was admitted. Here, the trial court instructed the jury that evidence of uncharged offenses and certain other conduct was received on the issue of propensity to commit sexual acts upon children, as well as the issues of intent, motive, and knowledge. Although IPI Criminal 4th No. 3.14 instructs jurors as to the purposes for which uncharged offenses and other conduct may be considered, defendant argues that the instruction's "only purpose *** is to prevent the jury from considering evidence of uncharged crimes as propensity evidence." Thus, according to defendant, when the evidence *is* admissible on the issue of propensity, it is unnecessary and improper to instruct the jury on the purposes for which the evidence may be considered. Defendant contends that the evidence against him was not overwhelming, so the error cannot be considered harmless.

¶ 14 It is true that, when evidence is admissible under section 115-7.3 for any purpose, it is unnecessary to instruct the jury as to the purposes for which it was admitted. *People v. Perez*, 2012 IL App (2d) 100865, ¶ 59. Whether such an instruction is grounds for reversal, however, is less clear. *People v. Johnson*, 2014 IL App (2d) 121004, cited by the State, held that it was not reversible error to instruct the jury that evidence of uncharged sex offenses was admissible on the issues of propensity, intent, motive, lack of mistake, and *modus operandi*. However, the defendant's challenge to the instruction focused on issues other than propensity. The defendant did not argue, as defendant does here, that it was error to give any instruction at all. Thus, although the *Johnson* court stated that it was proper to instruct the jury that it could consider the defendant's uncharged crimes as evidence of propensity, the propriety of doing so was simply not at issue in the case. *People v. Godbout*, 42 Ill. App. 3d 1001, 1009 (1976), cited by defendant, supports the general proposition that "instructions calling particular attention to certain portions of the evidence are improper." However, the *Godbout* court's decision to reverse appears to have flowed from the court's conclusion that the particular instructions given "may have mistakenly suggested to the jury that defendant was guilty of driving under the influence solely on the basis of breathalyzer results." *Id.* Here, in contrast, the instruction made clear that it was the jury's prerogative to determine the credibility of the evidence and what weight to give it in determining whether defendant was guilty of the charged offenses.

¶ 15 A reviewing court will not ordinarily reverse a conviction because of faulty jury instructions unless the instructions clearly misled the jury and resulted in prejudice to the accused. *People v. Walker*, 392 Ill. App. 3d 277, 293 (2009). The challenged instruction did call attention to defendant's uncharged conduct, and it was arguably improper to do so. Nonetheless, the instruction was an accurate statement of the law and did not clearly mislead the jury.

Moreover, it strikes us as naïve to think that the instruction drew more attention to the evidence than the evidence drew to itself. With or without the instruction, the evidence of defendant's uncharged sexual conduct was likely to have impressed itself upon the jurors' minds and entered into their deliberations. That is simply the nature of such evidence. Consequently, we cannot conclude that the instruction on the evidence (as opposed to the evidence itself) could have affected the outcome of the trial.

¶ 16 As noted, defendant has not raised any issue concerning the denial of his section 2-1401 petition. Accordingly, we dismiss defendant's appeal from that order.

¶ 17 For the foregoing reasons, we affirm the judgment in case No. 2-15-0564. We dismiss the appeal in case No. 2-16-0914. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 18 No. 2-15-0564, Affirmed.

¶ 19 No. 2-16-0914, Appeal dismissed.