2018 IL App (3d) 150647-U

Order filed April 20, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0647 Circuit No. 14-CF-367
DAVID A. WHEELER,	)	Honorable Howard C. Ryan Jr.,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Text messages sent by defendant to the victim's mother, even if considered other-crimes evidence, were admissible for the purpose of showing the continuing narrative of the event in question.

¶ 2 Defendant, David A. Wheeler, appeals his convictions of two counts of predatory criminal sexual assault of a child. Defendant asserts he is entitled to a new trial because improper other-crimes evidence was introduced at his trial. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged with two counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)) in that he placed his penis in the mouth of F.L. on two separate occasions. The indictment alleged that one of the incidents occurred in November 2013 and the other incident occurred on or about July 31, 2014. Defendant was 54 and 55 years old, respectively, at the time of the offenses. F.L. was 9 and 10 years old, respectively, at the time of the offenses. A bench trial was held on the charges.

¶ 5 F.L. testified that Julie L. was her mother. Defendant was Julie's former boyfriend. F.L. stated that defendant treated her poorly when he was dating Julie. Defendant "would cut [F.L.] down and call [her] names, and he would abuse [her]." Defendant would also use profane language around F.L., yell at F.L. about waking up on time to go to school, and yell at F.L. about cleaning her room.

¶ 6 On one occasion in November 2013, she was in a vehicle in a fast food drive-through lane with defendant. Defendant pulled down his pants. He then made F.L. lean over the center console and put her hands and mouth on his penis while they were waiting for their food. No one else was in the vehicle. The incident lasted approximately four to five minutes.

¶ 7 She also testified about an incident that occurred on July 31, 2014. F.L. was at home with Julie and her brother. The neighbor children and their mother came over. Defendant also came over to spend the night with Julie. Everyone was in the driveway. Defendant went inside the house. F.L. later went inside the house to check the time. When F.L. entered the house, she attempted to check the time on the cable box on the television, but it was not working. F.L. then looked for defendant. She found him in the bathroom sitting on the toilet with the door open. F.L. asked defendant what time it was, and he motioned for her to enter the bathroom. She complied because she was "kind of afraid of him." When F.L. went inside the bathroom,

defendant made her put her hands and mouth on his penis. After a few minutes, F.L. told defendant she had to stop. Defendant then said "to save the rest for later." The incident lasted approximately three to four minutes.

¶ 8 F.L. went back outside to the driveway. She was going to tell her mother what had happened, but she did not because defendant came outside as well. F.L. was afraid of defendant, and she believed he would become angry if she told her mother what had happened. Later that evening, Julie and defendant had an argument and defendant left the residence. F.L. then told Julie about the incident in the bathroom, and Julie called the police.

¶ 9 She stated that defendant had sexually abused her on more than just the two occasions she testified about. F.L. said that defendant sexually abused her over 20 times. F.L. could not remember the first time it happened. F.L. said it often happened at night when she was helping defendant remove his leg brace. She told Julie on approximately seven to nine occasions that defendant had sexually assaulted her, but Julie did not believe F.L. until July 31, 2014. Julie told F.L. that she had been "too blinded by love" to believe F.L. When defendant would ask if he could spend the night at Julie's house, F.L. would cry and beg Julie to say no. F.L. told Julie that she was afraid of defendant.

¶ 10 F.L. testified that she had previously been interviewed by the Department of Children and Family Services (DCFS) about the incident in the bathroom. During the DCFS interview, F.L. said that defendant asked her to touch his penis. She did not say that she put her mouth on defendant's penis. F.L. explained that at the time of her DCFS interview, she "wasn't exactly comfortable saying everything that happened." F.L. testified that she told DCFS most of what happened, but not everything. F.L. said she was now "ready to open up about everything."

¶ 11 Julie testified that defendant was her former boyfriend. They dated for almost three years. During their relationship, defendant would yell at F.L. about cleaning her room, getting ready for school, taking her medication, and other things. Defendant would call F.L. names and make her sit in front of a wall as a punishment. F.L. began telling Julie that she was afraid of defendant in July 2014, but F.L. had not said anything before that time.

¶ 12 F.L. first told Julie that defendant had been sexual abusing her approximately three weeks before July 31, 2014. F.L. told Julie that when she helped defendant remove his leg brace, defendant would tell her to put her mouth on his penis. Julie did not believe F.L. That was the only time F.L. told Julie that defendant sexually abused her before July 31, 2014.

¶ 13 Julie testified that in November 2013, she was at defendant's house with her son and F.L. Defendant and F.L. left to purchase food at a fast food restaurant. When they returned, F.L. was crying and shaking. Defendant told Julie that F.L. was crying because she slammed the door to his vehicle too hard.

¶ 14 Julie testified that on July 31, 2014, she and defendant sent text messages to each other about defendant coming over and staying the night. In one of the text messages defendant sent Julie, he asked if Julie was "going to teach [F.L.] the ropes." Julie took this to have a sexual meaning. The State asked Julie why she thought it was sexual. Julie replied: "Because it came across sexual. It came across lewd and disgusting, twisted." Julie also said she believed the text message to have a sexual meaning "[b]ecause—just him implying what he wanted between [F.L. and Julie] and texting that." The State asked Julie why this came up on July 31. Julie replied, "Um, in his sick little warped mind, he thought he was going to have a threesome with me and my daughter." Julie stated that defendant had brought up the issue of bringing F.L. into their

relationship on several prior occasions, and Julie had ignored him. However, defendant was "pushing" the issue on July 31.

¶ 15 Julie identified three photographs of her cell phone containing text messages defendant sent to her on July 31, 2014. The first text message was sent at 4:30 p.m. and stated: "If I come stay tonight are you going to show [F.L.] the ropes we can sit on the couch and play." Julie identified a photograph of her cell phone displaying another text message that defendant sent her 12 minutes later. The text message said: "Only if you're sure." Eleven minutes after that, defendant sent Julie another text message that said: "Sweet." Julie stated that she had deleted the text messages she sent to defendant in response. Julie explained that she deleted her responses because she "always would cram [her] messages and not delete them enough."

¶ 16 Julie testified that the first time she talked to the police about the text messages, she told the police she did not understand what they were about. Defense counsel asked Julie if she said that the text messages were sexual after she was coached by the police, and Julie said yes.

¶ 17 Julie testified that defendant came over to Julie's house at approximately 5 p.m. on July 31, 2014, shortly after sending her the text messages. Defendant, Julie, Julie's children, and Julie's children's friends were all in the driveway. At some point in the evening, defendant went into the house. F.L. then went into the house to check the time because her friends had to leave at a certain time. F.L. was in the house for seven or eight minutes. When F.L. came back outside, defendant was right behind her. F.L. ran away from him and sat down next to her friend.

¶ 18 Later that night, Julie and defendant got into a fight because defendant did not "get what he wanted when he came over." Julie testified that defendant told her that he wanted her and F.L. to touch him sexually that night. When that did not occur, defendant told Julie that she did

not care about him and that he was done with her. Defendant headbutted Julie and shoved her. Defendant packed up some things and said he was never coming back. After defendant left, F.L. told Julie that defendant had sexually assaulted her in the bathroom earlier that night. Julie called the police. When the officer arrived, Julie and F.L. told him about Julie's dispute with defendant. F.L. then told the officer about the incident with defendant in the bathroom.

¶ 19 Julie acknowledged that she previously pled guilty to sexual exploitation of a child for having oral sex with defendant in the presence of her children. She received a sentence of probation. As part of her plea agreement, she was required to testify truthfully at defendant's trial.

¶ 20 Police Officer Patrick Hardy testified that he was dispatched to Julie's residence on July 31, 2014. Julie and F.L. told Hardy that defendant had made F.L. touch his penis with her hand and mouth earlier that evening.

¶ 21 Police Officer Scott Cruz testified that he interviewed defendant. Defendant never admitted to engaging in sexual conduct with F.L. The State showed Cruz the photographs of Julie's phone that Julie had identified earlier. Cruz testified that he took the photographs. The court admitted the photographs into evidence. Initially, Julie told Cruz that she did not know what the first text message meant. Cruz then confronted Julie with her statements to a DCFS investigator, and Julie then said that the text message had a sexual connotation. Cruz asked defendant about the text messages and he said that he meant nothing sexual by them.

¶ 22 The State rested.

¶ 23 Defendant testified that he had several prior felony convictions for drug-related offenses. Defendant had never been convicted of sexual assault. Defendant stated that he had never had sexual contact with F.L. Defendant testified that he and F.L. drove through a drive-through lane

at a fast food restaurant in November 2013. Defendant said that he had no physical contact with F.L. in the drive-through lane. F.L. was crying when they returned to defendant's residence because defendant yelled at her for slamming the door to his vehicle.

¶ 24 On July 31, 2014, defendant went over to Julie's house. The children were playing in the driveway when he arrived. Defendant went into the house to use the bathroom. When defendant went into the bathroom, he closed the door. Defendant did not hear F.L. enter the house while he was in the bathroom. Defendant had no physical contact with F.L. that day. Later that evening, defendant and Julie argued because Julie's children were misbehaving. Defendant admitted that he would occasionally yell at F.L., but he denied using any profane language.

¶ 25 Defense counsel showed defendant the photographs of the text messages which had been previously introduced into evidence. Defendant admitted that he sent the text messages. Defendant testified that when he said "show [F.L.] the ropes," he meant showing her how to hang up her clothes. He had previously tried to teach her to fold her clothes and put them in her drawers, but she refused to do so. The part about sitting on the couch and playing was just about defendant and Julie. Defendant explained that he and Julie always sat on the couch and watched television after the children went to bed.

¶ 26 When the police interviewed defendant, defendant believed that it was about a domestic violence complaint. When the police told defendant about F.L.'s allegations that defendant had sexual contact with her, defendant told the police that it never happened.

¶ 27 During closing argument, the State argued that F.L. was a credible witness. The State then discussed the text messages. The State argued:

> "The text messages, I think, clearly bear out—and I wish that Julie *** had not deleted the other part of the conversation because this case would be

> significantly better. And I'll—I'll admit that to Your Honor. But the—the text messages in this case absolutely jibed with the way this case was presented."

Regarding the text messages, the State also argued:

> "The text messages bear out that [defendant's] intent, I believe, when he goes over there—or—or I submit to Your Honor that the text messages show that his intent when he went over there that night was to solicit and get [F.L.] involved in their sexual activity that night. And when it didn't work that way, he blew up."

¶ 28 The court found defendant guilty of both counts of predatory criminal sexual assault of a child. The court found that the case presented a "credibility question." The court found F.L. to be a credible witness. The court found Julie to be less credible than F.L., but the court noted that Julie corroborated some points of F.L.'s testimony. Regarding the text messages, the court stated:

> "This text, also the Court places an individual of some weight on (sic). If I come stay tonight, are you going to show [F.L.] the ropes? We can sit on the couch and play. The defendant gave an explanation of that which the Court finds just absolutely incredible. Folding clothes and hanging clothes? Absolutely incredible, especially in light of the little girl's testimony when she says what happened."

¶ 29 The court sentenced defendant to 18 years' imprisonment on each count of predatory criminal sexual assault of a child, to be served consecutively.

¶ 30 ANALYSIS

¶ 31 On appeal, defendant has abandoned his position that the text messages were about teaching F.L. to hang her clothes in the closet and spending time on the couch with only Julie.

Instead, defendant argues that the text messages constituted other-crimes evidence of the offenses of sexual exploitation of a child, indecent solicitation of a child or an adult, or solicitation. Defendant contends that these text messages were improperly admitted to show defendant's propensity to commit sex offenses.

¶ 32 Initially, we note that the State argues only that the text messages were not other-crimes evidence. Accepting defendant's argument on its face, we assume, without deciding, that the text messages were other-crimes evidence. We find that the text messages, even if other-crimes evidence, were admissible for the nonpropensity purpose of showing the continuing narrative of the incident on the evening of July 31, 2014.

¶ 33 "Evidence regarding other crimes is generally inadmissible to demonstrate propensity to commit the charged crime ***." *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). "Courts generally prohibit the admission of this evidence to protect against the jury convicting a defendant because he or she is a bad person deserving punishment." *Id.* Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011) provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith ***. Such evidence may *** be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

¶ 34 Also, "[o]ther-crimes evidence is admissible if it is part of a continuing narrative of the event giving rise to the offense, intertwined with the charged offense, or explains an aspect of the charge which would otherwise be implausible or inexplicable." *People v. Patterson*, 2013 IL App (4th) 120287, ¶ 58. "[W]hen facts concerning other criminal conduct are part of a

continuing narrative that relates to the circumstances attending the entire transaction, ' "they do not concern separate, distinct, and unconnected crimes." ' " *People v. Slater*, 393 Ill. App. 3d 977, 992 (2009) (quoting *People v. Thompson*, 359 Ill. App. 3d 947, 951 (2005), quoting *People v. Collette*, 217 Ill. App. 3d 465, 472 (1991)). Our supreme court has explained the continuing narrative exception to the rule against other-crimes evidence as follows:

> "[E]vidence of other crimes may be admitted if it is part of the 'continuing narrative' of the charged crime. [Citation.] Such uncharged crimes do not constitute separate, distinct, and disconnected crimes. [Citation.] It is this latter type of crime with which the other-crimes doctrine is concerned." *People v. Pikes*, 2013 IL 115171, ¶ 20.

¶ 35 We find that the text messages in the instant case were admissible for the nonpropensity purpose of showing the continuing narrative of the events of July 31, 2018. The text messages were "part of a continuing narrative that relate[d] to the circumstances attending the entire transaction." *Slater*, 393 Ill. App. 3d at 992. Julie testified that defendant sent the text messages shortly before coming over to her residence on the evening of July 31, 2014. The text messages, along with Julie's testimony, showed that defendant planned to engage in sexual contact with Julie and F.L. that evening. This provided context for F.L.'s testimony that defendant told her to "save the rest for later" after he had her put her mouth on his penis in the bathroom. This evidence also explained defendant's argument with Julie later that evening. Specifically, Julie testified that she and defendant got into an argument when defendant did not have sexual contact with her and F.L.

¶ 36 In reaching our holding, we acknowledge that the State argued in its brief as follows:

> "Even though some so-called other crimes evidence may be admitted if it is part of the 'continuing narrative' of the charged crime, the admissibility of the text messages is sufficiently separate that it should be judged under ordinary principles of relevance."

This argument was advanced in support of the State's position that the text messages were not other-crimes evidence at all. To the extent that the above excerpt from the State's brief constituted a concession that the continuing narrative exception does not apply, we reject the State's concession. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010) ("[A] reviewing court is not bound by a party's concession."); see also *People v. Horrell*, 235 Ill. 2d 235, 241 (2009).

¶ 37 Having found that the text messages were admissible for the nonpropensity purpose of showing the continuing narrative of events on July 31, 2014, we find that the probative value of the text messages was not substantially outweighed by the danger of unfair prejudice to defendant. See Ill. R. Evid. 403 (eff. Jan. 1, 2011). The text messages, along with Julie's testimony concerning the text messages, were probative evidence because they showed that defendant intended or planned to engage in sexual conduct with F.L. and Julie on the evening of the incident. This evidence supported F.L.'s testimony that defendant did in fact have sexual contact with her that evening. It also supports F.L.'s testimony that when she told defendant she had to stop, he told her to "save the rest for later." The evidence was undoubtedly prejudicial to defendant, but the prejudice to defendant did not substantially outweigh the significant probative value of the evidence. See *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011) ("[T]here is no rule that requires the State to present a watered-down version of events simply because otherwise highly probative evidence is unflattering to defendant.").

¶ 38 Because we have found that the text messages, even if other-crimes evidence, were admissible for a nonpropensity purpose, we need not address defendant's forfeiture arguments of plain error and ineffective assistance of counsel.

¶ 39 CONCLUSION

¶ 40 The judgment of the circuit court of La Salle County is affirmed.

¶ 41 Affirmed.