2018 IL App (3d) 170547-U

Order filed December 14, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellee,	)	Rock Island County, Illinois.
	)	
v.	)	Appeal No. 3-17-0547
	)	Circuit No. 17-CM-116
JOSHUA L. DOWNEY,	)	
	)	The Honorable
Defendant-Appellant.	)	Carol M. Pentuic
	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in (1) finding defendant guilty of domestic battery where he spanked and pushed his 13-year-old autistic son, causing red marks on his chest and buttocks, (2) allowing witnesses, including defendant himself, to testify that defendant spanked his son on prior occasions, and (3) admitting a video of the incident taken by defendant's wife where she testified that she made the video and that it accurately depicted what happened.

¶ 2 Defendant Joshua L. Downey was charged with domestic battery against his 13-year-old autistic son, J.J.D. Prior to his bench trial, defendant raised the affirmative defense of reasonable discipline of a child. At trial, defendant, J.J.D. and other family members testified that defendant,

as well as J.J.D.'s mother, spanked J.J.D. on previous occasions. The trial court allowed the State to introduce a video taken by J.J.D.'s mother on the day of the incident, showing defendant spanking J.J.D. and pushing him against a dresser. After hearing the testimony and considering the evidence, the trial court found defendant guilty of domestic battery. Defendant appeals, arguing that (1) the evidence was insufficient to find him guilty, (2) the trial court erred in allowing testimony about prior spankings at trial, and (3) the court should not have admitted the video taken by J.J.D.'s mother into evidence. We affirm.

¶ 3 FACTS

¶ 4 On January 25, 2017, defendant was charged with domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2016)) for causing bodily harm to J.J.D. by pushing him and striking him on the buttocks causing red welts. Prior to trial, defendant filed a "Notice of Affirmative Defense" giving notice of his intent to raise the affirmative defense of "Reasonable Action by a Parent to Discipline his Child." The case proceeded to a bench trial.

¶ 5 Defendant's wife and J.J.D.'s mother, Autumn, testified that on January 24, 2017, she tried to wake up J.J.D. for school, beginning at 7:00 a.m. After Autumn failed to get J.J.D. out of bed, defendant returned home from work. Defendant went into J.J.D.'s room, turned on a radio and played a guitar to try to wake up J.J.D. When J.J.D. still refused to get up, defendant spanked J.J.D. on his buttocks with an open hand several times. J.J.D. was wearing only boxer shorts at the time. After being spanked, J.J.D. began screaming, and Autumn went into his room, where she found J.J.D. on his bed crying. Autumn told defendant that "wasn't the right way to get [J.J.D.] up." Autumn then left the room but returned when she heard J.J.D. screaming and crying again. When she returned, she saw that J.J.D.'s bed was tipped over against a wall and defendant

was spanking J.J.D., who was on the floor between his bed and the wall. Autumn took a photograph of the condition of J.J.D.'s room.

¶ 6 Autumn told defendant to stop spanking J.J.D., but he refused. Autumn called the police and then returned to J.J.D.'s room with her cell phone to record what defendant was doing. When Autumn went back to J.J.D.'s room, defendant picked up J.J.D. and "push-walked" him over to his dresser and pushed him up against the dresser by leaning against his body. J.J.D. was screaming, crying, and asking defendant to stop, while Autumn recorded the incident. Autumn also yelled at defendant to stop, but he would not. Defendant mocked Autumn and made faces at her. Defendant then walked J.J.D. to the bathroom. Defendant tried to close the bathroom door, but Autumn stopped him by wedging her foot in the doorway. In the bathroom, J.J.D. laid on the floor in the fetal position and defendant stood by the sink. Police arrived soon after.

¶ 7 While the police handcuffed defendant, Autumn examined J.J.D. and saw "raised welts and hand marks" on J.J.D.'s "butt", as well as marks on J.J.D.'s chest from being pushed against the dresser. J.J.D. was scared and crying. She admitted that she and defendant were not having good marital relations on January 24, 2017, and separated on that date.

¶ 8 Autumn testified that defendant had spanked their children in the past, but this time defendant spanked J.J.D. "much harder" than usual. She explained that this day was different "[b]ecause [defendant] had just got home from work, and he was tired, and he was immediately really grouchy. And he was irritated with [J.J.D.], and then he just spanked him way too hard." Autumn said the spanking was so hard she could "hear the cracks" from outside J.J.D.'s room. She described defendant's spanking as "extreme." She stated that defendant "was angry; he was irritated, and he spanked [J.J.D.] way too hard."

¶ 9 Autumn admitted that she had spanked J.J.D. "since he was young" but said that waking up J.J.D. by spanking him "was a shock to his system" because he suffers from "sensory issues." According to Autumn, J.J.D. has been diagnosed with Autistic Spectrum Disorder. He has sensory problems and is more sensitive to light and sound than most people. According to Autumn, he "reacts more strongly to outside influences." J.J.D. attends a special school.

¶ 10 The State moved to admit the photograph and video Autumn took on January 24, 2017. Defendant did not object to admission of the photo but argued that the video was inadmissible because it did not show what J.J.D. was doing. The trial court allowed both to be admitted into evidence.

¶ 11 J.J.D. testified that defendant came into his room on January 24, 2017, and was "really mad." After spanking J.J.D. several times, defendant pushed him up against his dresser. J.J.D. said that hurt and made it hard for him to breathe. Defendant then took J.J.D. into the hallway and spanked him again before taking him to the bathroom. J.J.D. said he had a "red spot" on his body from the dresser. Defendant had spanked him before, but this time he spanked him "harder than usual." J.J.D. said he was scared and angry when defendant was spanking him. J.J.D. felt pain from the spanking "[a]ll day" until approximately 6:00 pm that evening.

¶ 12 L.D., J.J.D.'s 17-year-old sister, testified that when she woke up on January 24, 2017, she heard her mother yelling and J.J.D. crying while being spanked. She thought it sounded like a "normal spanking" she had heard "over the years." When she looked in J.J.D.'s room, she saw defendant and J.J.D. up against the dresser and J.J.D.'s bed up against the wall. She told defendant to stop because she could see that J.J.D. was in pain. After that, defendant put his arms underneath J.J.D.'s and "drug him" into the hallway and then into the bathroom.

¶ 13 L.D. testified that defendant spanked J.J.D. "often," at least twice a week and had spanked him a week earlier. Both defendant and Autumn spanked J.J.D., but defendant spanked him harder and more often. The spanking on January 24, 2017, seemed to last longer than previous spankings. According to L.D., defendant "just wouldn't stop." Defendant did not appear to be spanking J.J.D. any harder than usual. J.J.D. responded to this spanking in the same way he responded to all other spankings, by having a "meltdown."

¶ 14 Terry Engle of the Hampton Police Department responded to Autumn's 9-1-1 call on January 24, 2017. When Engle entered the residence and asked defendant what was going on, defendant replied that he was "abusing his child." When Engle asked if defendant was admitting wrongdoing, he said he was being sarcastic. Engle cuffed defendant and put him in his squad car as a protective measure. After returning inside, Engle found J.J.D. on the bathroom floor in the fetal position. J.J.D. told him that defendant had "spanked him many times." Engle observed a welt on J.J.D.'s right buttocks, as well as a red line on J.J.D.'s chest area. Engle interviewed the witnesses and reviewed the video taken by Autumn, which showed defendant holding J.J.D. against the dresser and J.J.D. struggling to breathe. Engle then arrested defendant for domestic battery.

¶ 15 Defendant testified that he and Autumn had been having difficulty getting J.J.D. out of bed prior to January 24, 2017. He spanked J.J.D. to get him out of bed twice in the two months prior to the incident and was successful in getting him out of bed. Defendant testified that Autumn used to spank J.J.D. but doesn't anymore because he is too big.

¶ 16 Defendant testified that after playing loud music and yelling at J.J.D. on the morning of January 24, 2017, he warned him that he would spank him if he didn't get up. Instead of getting up, J.J.D. hid under the covers. Defendant pulled the covers off J.J.D. and spanked him on his

buttocks with "normal" force several times. J.J.D. still did not get up, so defendant lifted the side of the bed, and J.J.D. rolled off. J.J.D. crawled under the bed and defendant lifted it to get to him. Defendant then picked J.J.D. up and took him to the dresser to get dressed. Defendant denied pressing J.J.D. against the dresser. After that, defendant took J.J.D. to the bathroom because he was coughing and defendant was afraid he was going to be sick.

¶ 17 Defendant said he spanked J.J.D. a total of 10 times that day with "typical" force. He agreed that it was not normal for J.J.D. to scream for help when he spanked him. Defendant admitted that he was frustrated by J.J.D. refusing to get out of bed.

¶ 18 The trial court found defendant guilty of domestic battery, stating that defendant's actions "were not reasonable direction of a minor child by a parent." Specifically, the court noted that J.J.D. was "hurt" and "had marks that w[ere] observed by his mother and a police officer." The court also believed that this and other spankings were done out of frustration, rather than discipline.

¶ 19 Defendant filed a motion for JNOV, or, in the alternative, a new trial, arguing, in part, that the trial court erred in considering evidence of defendant's prior spankings and admitting Autumn's video into evidence. The trial court denied defendant's motion. The court sentenced defendant to 24 months of conditional discharge and 30 days in jail but stayed the jail sentence upon his compliance with the court's order. The court also ordered defendant to pay fines and fees and to register as a violent offender of youth for 10 years.

¶ 20 ANALYSIS

¶ 21 I. Sufficiency of the Evidence

¶ 22 Defendant first argues that the evidence against him was insufficient to prove him guilty of domestic battery because his actions against J.J.D. constituted reasonable discipline of his child and did not cause J.J.D. permanent injuries.

¶ 23 When reviewing the sufficiency of the evidence used to convict a defendant, a reviewing court asks whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp,* 241 Ill.2d 1, 8 (2011). As a reviewing court, "[w]e will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins,* 214 Ill.2d 206, 217 (2005). This standard applies in both jury and bench trials. *People v. Kotlarz*, 193 Ill. 2d 272, 298 (2000).

¶ 24 A person commits domestic battery when he knowingly, without legal justification, causes bodily harm to a family or household member. 720 ILCS 5/12–3.2(a)(1) (West 2016). The common-law rule that parents may take "reasonable steps to discipline their children when necessary" is a legal justification for an otherwise criminal act. *People v. Green*, 2011 IL App (2d) 091123, ¶ 16; *People v. Roberts*, 351 Ill. App. 3d 684, 688 (2004); see also Restatement (Second) of Torts § 1471(1), at 265 (1965) ("A parent is privileged to apply such reasonable force *** as he reasonably believes is necessary for its proper control, training, or education.") To sustain a conviction of domestic battery where a claim of parental right has been asserted, the State must prove beyond a reasonable doubt that the discipline used exceeded the standards of reasonableness. *Green,* 2011 IL App (2d) 091123, ¶ 16.

¶ 25 In assessing whether the discipline exceeded the bounds of reasonableness, the court should consider the following factors: (1) the degree of injury inflicted upon the child, (2) the likelihood of future punishment that might be more injurious, (3) the psychological effects of the

discipline on the child, and (4) whether the parent was calmly attempting to discipline the child or lashing out in anger. *Green,* 2011 IL App (2d) 091123, ¶ 24. The court need not make express findings as to each factor when determining reasonableness. *People v. Parrott*, 2017 IL App (3d) 150545, ¶ 28. Discipline may be unreasonable even in the absence of physical injuries. *Green*, 2011 IL App (2d) 091123, ¶¶ 23-26. The reasonableness of the punishment is to be determined by the finder of fact. *Id*. ¶ 24.

¶ 26 While the court did not make express findings regarding all of the reasonableness factors, the court stated that defendant's conduct "hurt" J.J.D. and resulted in visible red marks on J.J.D.'s body that both Autumn and Engle observed. The court also found that defendant was acting out of anger and frustration when spanking J.J.D. This finding was supported by the testimony of the witnesses: J.J.D. described defendant as "really mad" when he entered his room; Autumn described defendant as "very irritated" when the spanking began; and defendant himself admitted that he was frustrated by J.J.D.'s refusal to get out of bed. The court also expressed concern about the pattern of violence in J.J.D.'s home, where J.J.D. received "normal beatings" regularly. Finally, the court found that J.J.D. was psychologically traumatized by this incident. J.J.D. testified that his father's behavior scared him, and Engle testified to finding J.J.D. lying on the bathroom floor in the fetal position.

¶ 27 The undisputed evidence established that defendant spanked and pushed a 13-year-old autistic child who is more sensitive to touch than most children, leaving marks on the child's chest and "welts" on the child's buttocks. This evidence was sufficient to prove that defendant's conduct was unreasonable considering that J.J.D. (1) was autistic, (2) was spanked "harder than usual" 10 times for failing to get out of bed, (3) was pushed up against a dresser, and (4) had red marks on his chest and buttocks. Reviewing all of this evidence, we find it was rational for the

trial court to determine that defendant's discipline of J.J.D. exceeded the bounds of reasonableness.

¶ 28 II. Testimony about Prior Spankings

¶ 29 Defendant also argues that the trial court erred in allowing testimony that he had previously spanked J.J.D. because such testimony was improper "other conduct" evidence.

¶ 30 Trial courts should carefully limit evidence of other conduct of the defendant unless it is relevant to show intent, motive, *modus operandi*, identity, absence of mistake, or any relevant fact other than propensity. *People v. Brown*, 319 Ill. App. 3d 89, 96-97 (2001). Evidence of a defendant's prior acts of violence toward a family member or victim can be properly admitted as evidence of the defendant's intent, state of mind, motive, absence of mistake, or inclination to harm the victim. See *People v. Chapman*, 2012 IL 111896, ¶ 33; *People v. McCarthy*, 132 Ill. 2d 331, 344 (1989); *People v. Jenk*, 2016 IL App (1st) 143177, ¶ 40.

¶ 31 The problem with evidence of other conduct is that it "can overpersuade the jury to convict the defendant as a bad person, rather than because he was guilty of the crime charged." *Brown*, 319 Ill. App. 3d at 96. Where there is no jury, the concern of admitting such evidence is assuaged. In a bench trial, it is presumed that the judge will exclude from consideration any improper evidence. *People v. Peterson*, 273 Ill. App. 3d 412, 427 (1995). Even if other conduct evidence is improperly admitted, the admission will be considered harmless error unless the defendant shows that he was prejudiced or denied a fair trial by its admission. *People v. Nieves*, 193 Ill. 2d 513, 530 (2000).

¶ 32 Here, the trial court heard testimony about defendant's prior instances of spanking J.J.D. from Autumn, J.J.D., L.D. and defendant himself. Defense counsel failed to object to this

testimony at trial, resulting in forfeiture of any claim of error. See *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 26; *People v. Pitchford*, 401 Ill. App. 3d 826, 835 (2010).

¶ 33 Forfeiture aside, this testimony was admissible to show defendant's intent, motive, absence of mistake, or inclination to harm J.J.D. in the course of this domestic battery. See *Chapman*, 2012 IL 111896, ¶ 33; *McCarthy*, 132 Ill. 2d at 344; *Jenk*, 2016 IL App (1st) 143177, ¶ 40. In denying defendant's motion to reconsider, the court stated:

> "The prior spankings had, basically, very little effect on the Court's determination. The trial was held on the incident that happened on this date, and that was the focus, but the fact that both Mr. Downey and his estranged wife said that they both used physical discipline on the child in the past, that's – families do corporally punish children, and in this case, they had in the past. This particular occasion was very different, and I focused on this occasion, *** so those prior spankings had little to no effect."

Because this was a bench trial, we presume that the trial court did not consider the "other conduct" evidence of defendant's prior spankings for an improper purpose. See *Peterson*, 273 Ill. App. 3d at 427.

¶ 34 III. Admission of Video

¶ 35 Finally, defendant argues that the trial court erred in admitting Autumn's video into evidence because Autumn did not provide a proper foundation for its admission.

¶ 36 Video evidence may be introduced as substantive evidence provided that a proper foundation is laid. *People v. Taylor*, 2011 IL 110067, ¶ 27. "[S]ufficient foundation for the admission of a videotape is laid when a witness with personal knowledge of the filmed object

testifies that the film is an accurate portrayal of what it purports to show." *People v. Vaden*, 336 Ill. App. 3d 893, 899 (2003).

¶ 37 Here, the video was properly authenticated by Autumn: she had personal knowledge of what occurred on the video and testified that it fairly and accurately depicted what she saw on the day of the incident. This testimony provided a proper foundation for the admission of the video. See *id*.

¶ 38 Defendant contends that we should rely on the Second District's decision in *People v. Flores*, 406 Ill. App. 3d 566 (2010), which held that "an adequate foundation must show that the original has been preserved without change, addition, or deletion and that, if a copy is introduced into evidence, there must be a cogent explanation of any copying such that the court is satisfied that during the copying process there were no changes, additions, or deletions." *Id*. at 577. We decline to do so because *Flores* is "both distinguishable and unhelpful." *People v. Johnson*, 2016 IL App (4th) 150004, ¶ 64.

¶ 39 *Flores* is distinguishable because the testimony in that case raised serious questions as to whether the video had been altered in some fashion. *Id*. ¶ 65. In this case, there is no suggestion that Autumn's recording was altered in any way. Additionally, *Flores* is unhelpful because the key authority the Second District relied on was its earlier decision in *People v. Taylor*, 398 Ill. App. 3d 74 (2010), which the Illinois Supreme Court subsequently reversed in *People v. Taylor*, 2011 IL 110067, ¶ 1. *Johnson*, 2016 IL App (4th) 150004, ¶ 66. The supreme court stated that the "principal issue" in *Taylor* was whether the video was properly admitted under the "silent witness" theory. 2011 IL 110067, ¶ 1. Under that doctrine, "a witness need not testify to the accuracy of the image depicted in the photographic or videotape evidence if the accuracy of the process that produced the evidence is established with an adequate foundation." *Id*. ¶ 32.

However, this case does not involve the "silent witness" doctrine because Autumn had personal knowledge of the events portrayed in the video and testified that the video accurately portrayed the events she witnessed that day.

¶ 40 As we held in *Vaden*, 336 Ill. App. 3d at 899, once a witness with personal knowledge of the filmed object testifies that the film is an accurate portrayal of what it purports to show, the video recording is admissible substantively, and no further foundation evidence is necessary. *Johnson*, 2016 IL App (4th) 150004, ¶ 67. Here, Autumn testified that she took the video and it accurately depicted what she witnessed on the day of the incident. No further foundational evidence was necessary. The trial court properly admitted the video into evidence.

¶ 41 CONCLUSION

¶ 42 The judgment of the circuit court of Rock Island County is affirmed.

¶ 43 Affirmed.