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STATE OF NEBRASKA, APPELLEE, V. SAMUEL W. CRAIGIE, APPELLANT.

813 N.W.2d 521

Filed April 24, 2012. No. A-11-529.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is 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.
3. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
4. **Rules of Evidence: Other Acts: Sexual Assault.** Under Neb. Rev. Stat. § 27-414(1) (Cum. Supp. 2010), evidence of a criminal defendant's commission of another sexual assault offense is admissible if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses. If admissible, such evidence may be considered for its bearing on any matter to which it is relevant.
5. **Judgments: Trial: Evidence: Proof: Appeal and Error.** In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury.
6. ____: ____: ____: ____: ____. In order to establish reversible error based on the erroneous admission of evidence in a bench trial, the appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence; if there is other sufficient evidence to support the finding of guilt, the conviction will not be reversed.
7. **Trial: Evidence: Proof: Presumptions: Appeal and Error.** The burden rests on the appellant to establish reversible error based on the erroneous admission of evidence in a bench trial because of the presumption that the trial court, sitting as the fact finder, disregards inadmissible evidence.
8. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural

background, past criminal record, and motivation for the offense, as well as the nature of the offense and the violence involved in the commission of the crime.

9. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Timothy M. Eppler for appellant.

No appearance for appellee.

MOORE, CASSEL, and PIRTLE, Judges.

CASSEL, Judge.

INTRODUCTION

Samuel W. Craigie appeals his convictions and sentences for third degree sexual assault of a child, with a prior registrable conviction, and for child abuse. He mainly attacks the district court's evidentiary admission, at a bench trial, of his prior sexual assault conviction. Because the prior assault was sufficiently similar to the instant offense, the controlling statute authorized its admission. Moreover, because the court did not expressly rely upon the evidence, its admission would not constitute reversible error. We also find no merit to Craigie's other assignments of error that the evidence was insufficient and that the sentences were excessive. We therefore affirm.

BACKGROUND

On December 2, 2010, the State filed an amended information charging Craigie with two crimes: third degree sexual assault of a child, with a prior registrable conviction, and child abuse. Craigie filed a motion in limine seeking to prohibit the State from mentioning, among other things, that he had previously been convicted of a sexual assault crime and had been required to register as a sex offender. The State gave notice under Neb. Rev. Stat. §§ 27-404 and 27-414 (Cum. Supp. 2010) of its intent to offer evidence of Craigie's other

crimes, specifically of his sexual contact or penetration of J.W. Following a hearing, the court determined that evidence of Craigie's prior sexual assault was admissible.

Craigie waived his right to a jury trial, and a bench trial followed. The evidence established that Craigie had been friends, off and on, with E.S.' stepfather since the 1990's and that he later developed a relationship with E.S.' mother, who married E.S.' stepfather in 2008. As a friend of the family, Craigie periodically visited E.S.' home, and E.S. visited Craigie's apartment on at least two occasions. E.S., who was 7 years old at the time of trial, testified that his mother would drop him off at Craigie's apartment and that then he and Craigie would play on a computer or watch television.

On September 3, 2009, Nebraska State Patrol investigators went to E.S.' home after finding pictures of E.S. on Craigie's computer. At that time, E.S.' mother repeatedly told the investigators that she had never left E.S. alone with Craigie, but she eventually told them that she may have left E.S. with Craigie on one occasion for about 15 minutes while she ran an errand. One of the investigators spoke with E.S., who said that Craigie was his friend, that he liked Craigie, and that he wanted to go to Craigie's apartment. The investigator testified that E.S. told him that when he was at Craigie's apartment, he would be alone with Craigie and they would play games together, but that he did not go to Craigie's very often. The investigator testified that E.S. initially denied playing "tickle games" with Craigie, but that he later changed his response and stated that they did play tickle games. The investigator testified that E.S. initially said he and Craigie "would tickle almost everywhere," but that when asked where specifically, E.S. referred to his chest.

On September 10, 2009, E.S. was interviewed at the Child Advocacy Center and denied any sort of touching by Craigie. He told the interviewer that he called his penis his "private." After the interview, E.S. and his mother went out to eat, during which time E.S. said something that his mother found to be unusual, so she notified the investigating officer when she got home. E.S. returned to the Child Advocacy Center on September 11 and was interviewed by a sergeant with the Lancaster

County sheriff's office. During that interview, E.S. disclosed that Craigie had touched E.S.' "pee pee" one time. The sergeant testified that E.S. said at least twice that "'it wasn't hard,'" but that E.S was unable to explain what he meant by that. The sergeant testified E.S. said that he was wearing pants at the time and that Craigie touched his penis by putting his hand up E.S.' pant leg, which E.S. also demonstrated on a doll. The sergeant testified that E.S. denied that Craigie touched him by reaching through the top of the pants. The sergeant testified that E.S. told him Craigie did not say anything afterward and that E.S. denied being told by Craigie to not tell anyone.

At trial, E.S. testified that he did not remember anything "weird or strange" happening at Craigie's apartment. When E.S. was asked if anyone other than a doctor or his parents ever touched his "pee pee," he answered, "[Craigie], I think." He testified that Craigie touched him underneath his underwear with his hand by putting his hand down the top of E.S.' pants. E.S. testified that he told Craigie "[t]o not do that" and that Craigie "said okay, then he stopped." E.S. did not think that he told anyone about the incident, and he testified, "I think [Craigie] told me not to."

The State called J.W. to testify, and Craigie objected that such testimony was improper. The court overruled the objection, "consistent with the [c]ourt's prior rulings," and allowed Craigie a continuing objection to J.W.'s testimony. J.W., a male who was born in 1990, testified that on a day when Craigie was babysitting him, Craigie put his penis in J.W.'s anus. Craigie also objected to the testimony of the officer who investigated that incident, stating that it was improper under § 27-404 or § 27-414. The court again overruled the objection and allowed a continuing objection. The officer testified that he investigated a sexual assault of J.W. by Craigie in 1996, that Craigie was frank in answering the officer's questions, and that Craigie admitted to the facts in the matter.

Craigie, who was born in 1972, testified that he and E.S.' mother began having a sexual affair in October 2007. There is no dispute that E.S.' mother kept a bag in Craigie's bedroom which contained women's undergarments, toiletries, and a prescription bottle. Craigie initially told the Nebraska

State Patrol that the bag belonged to a friend who left it there in case she needed a place to stay because she was having marital problems. At trial, Craigie testified that E.S.' mother left the bag in his apartment so she could go home in clean undergarments if they engaged in sexual activity. E.S.' mother denied having a sexual relationship with Craigie. She admitted that she sent Craigie a text message stating that she loved him unconditionally, but claimed that it was "nothing romantic." She testified that she "always ha[s] an emergency bag set up in case I need to go to the hospital or something emergently."

Craigie testified that he went to E.S.' house two to four times a week in 2009, but that his involvement with the family diminished after July 24. Craigie testified that on that day, E.S.' mother asked him to go swimming with her two children and the son of E.S.' stepfather. According to Craigie, he had an agreement with E.S.' stepfather that Craigie would not be involved with the son of E.S.' stepfather and Craigie broke that agreement when they went swimming. He testified that he decreased his time with the family because E.S.' mother did not respect his boundaries with the son of E.S.' stepfather. Craigie testified that on August 22, he ended his sexual relationship with E.S.' mother and his "interpersonal relationship" of "hanging out" with E.S. and his mother. Craigie also testified that he had hemmed six to eight pairs of E.S.' pants, which involved measuring E.S.' inseam. He testified that on one occasion, he cuffed E.S.' pants while E.S. was wearing them, but that he touched only E.S.' ankle area.

E.S.' stepfather testified that he had applied anti-itch ointment to E.S.' penis when E.S. was younger. He also testified that the mother of his son accused him during a custody dispute in late 2008 of inappropriately touching their son, who would have been about 8 years old at the time, which allegation E.S.' stepfather denied.

Immediately after closing arguments, the district court stated that it found Craigie guilty of both crimes beyond a reasonable doubt. On May 31, 2011, the court imposed a sentence of 20 to 40 years' imprisonment for the sexual assault conviction and a concurrent sentence of 4 to 5 years' imprisonment for

the child abuse conviction. Craigie will be subject to lifetime community supervision upon his release.

Craigie timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Craigie assigns three errors. First, he alleges that the district court erred by admitting evidence of his prior conviction for sexual assault. Second, Craigie claims that the evidence was insufficient to sustain the convictions. Third, he contends that the court abused its discretion by imposing excessive sentences.

STANDARD OF REVIEW

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

[2] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is 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. *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[3] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

ANALYSIS

Admission of Prior Conviction.

[4] Craigie argues that under § 27-414, the district court erred by admitting evidence of his prior sexual assault

conviction, because the risk of prejudice substantially outweighed the probative value of the evidence. Under § 27-414(1), evidence of a criminal defendant's commission of another sexual assault offense is admissible "if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses. If admissible, such evidence may be considered for its bearing on any matter to which it is relevant." There is no doubt that Craigie committed the prior sexual assault—he described the assault in detail to the investigating officer and entered a plea of guilty. Craigie's point of contention is that his prior conviction was not similar to the allegations in this case.

Pursuant to § 27-414(3), the court held a hearing to determine whether Craigie's prior sexual assault conviction should be admitted. We observe that § 27-414 is a new Nebraska evidentiary rule that became operative on January 1, 2010. According to § 27-414(3),

> the court shall apply a section 27-403 balancing and admit the evidence unless the risk of prejudice substantially outweighs the probative value of the evidence. In assessing the balancing, the court may consider any relevant factor such as (a) the probability that the other offense occurred, (b) the proximity in time and intervening circumstances of the other offenses, and (c) the similarity of the other acts to the crime charged.

We cannot say that the court abused its discretion in admitting the evidence. Craigie admitted to committing the earlier offense, which occurred in 1996 and led to Craigie's incarceration until 2006. Both offenses involved young boys—J.W. was 5 years old and E.S. was 6 years old—and both occurred at a time when Craigie was acting as a babysitter for the boys.

Craigie cites *State v. Welch*, 241 Neb. 699, 490 N.W.2d 216 (1992), in support of his argument. In that case, the defendant argued on appeal that the trial court erred in receiving evidence of a previous conviction for a similar offense, which had occurred 21 years earlier. The Nebraska Supreme Court agreed, determining that the evidence had "an undue tendency to influence the jury's verdict on an improper basis." *Id.* at 704, 490

N.W.2d at 220. We do not find the case to be helpful for three reasons. First, it was decided well before § 27-414 became law. Second, the time between offenses is not as remarkable in the instant case. Although Craigie committed the first offense 13 years earlier, he had been incarcerated until 2006, during which time his opportunity to commit a similar crime was eliminated. From the time of his release from incarceration—when his opportunity to reoffend began—only 3 years elapsed until the time of the assault on E.S. Finally, *State v. Welch* involved a jury trial, whereas Craigie's trial was to the bench. This last difference has a further consequence in law, to which we now turn.

[5-7] Even if admission of the evidence were erroneous, Craigie has failed to establish reversible error. Significantly, we are reviewing the appeal from a bench trial, not a jury trial. In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009). In order to establish reversible error based on the erroneous admission of evidence in a bench trial, the appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence; if there is other sufficient evidence to support the finding of guilt, the conviction will not be reversed. See *id.* The burden rests on the appellant to establish reversible error based on the erroneous admission of evidence in a bench trial because of the presumption that the trial court, sitting as the fact finder, disregards inadmissible evidence. See *id.* Craigie has not met his burden. Because the district court made no factual determinations based upon Craigie's prior sexual assault conviction and E.S.' testimony alone is sufficient to support the finding of guilt, Craigie has not established any reversible error.

Sufficiency of Evidence.

Craigie asserts a rational trier of fact could not have concluded that he subjected a person 14 years of age or younger to sexual contact or that he knowingly or intentionally permitted a minor child to be placed in a situation to be sexually abused. His argument focuses on inconsistencies in E.S.' statements and testimony. But under our standard of review, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. See *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

The relevant question for an appellate court reviewing a sufficiency of the evidence claim is 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. *Id.* We find the evidence to be sufficient to support both convictions.

The evidence supports a conviction for third degree sexual assault of a child under Neb. Rev. Stat. § 28-320.01(3) and (5) (Reissue 2008). There is no dispute that Craigie was at least 19 years of age, that E.S. was 14 years of age or younger, and that Craigie had previously been convicted of attempted first degree sexual assault on a child. Craigie argues that the missing element for the sexual assault conviction was "sexual contact." Under Neb. Rev. Stat. § 28-318(5) (Reissue 2008), "[s]exual contact means the intentional touching of the victim's sexual or intimate parts . . . . Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party." According to E.S.' testimony, Craigie put his hand under E.S.' pants and underwear and touched E.S.' penis. Those circumstances support the finding that the touching was intentional and that it was for the purpose of Craigie's sexual arousal or gratification.

The evidence was also sufficient to support the child abuse conviction. Under Neb. Rev. Stat. § 28-707(1)(e) (Reissue 2008), "[a] person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be . . . [p]laced in a situation to be sexually abused as defined in section 28-319, 28-319.01, or 28-320.01." Craigie argues only

that the State did not prove that he sexually abused E.S.—an argument we have already rejected. Viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found that Craigie intentionally placed E.S. in a situation to be sexually abused. This assignment of error lacks merit.

Excessive Sentences.

Finally, Craigie claims that his sentences were excessive. The district court convicted Craigie of a Class IC felony, see § 28-320.01(5), and a Class IIIA felony, see § 28-707(4). A Class IC felony is punishable by 5 to 50 years' imprisonment, and a Class IIIA felony is punishable by up to 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105(1) (Reissue 2008). The sentences imposed by the court of 20 to 40 years' imprisonment for the sexual assault conviction and a concurrent sentence of 4 to 5 years' imprisonment for the child abuse conviction were within the statutory limits. Thus, our inquiry focuses on whether the sentences were an abuse of judicial discretion. See *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

[8,9] When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record, and motivation for the offense, as well as the nature of the offense and the violence involved in the commission of the crime. *Id.* In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

The presentence investigation shows that Craigie was 38 years old at the time of its preparation and that he had completed the 12th grade. Craigie reported to the probation officer that his oldest brother sexually abused him when Craigie was a third grader and that another older brother had sexual contact with him when Craigie was 13—which contact was Craigie's idea. In November 2006, Craigie was accepted into

an outpatient sex-offense-specific treatment program for adults, but he was terminated from the program upon being charged with a crime in this case, which case began as a result of a child pornography investigation. Craigie has a history of criminal activity. He was adjudicated as a juvenile for attempted arson and for breaking and entering. While on probation, he was arrested for additional theft offenses, which were handled in adult court and resulted in jail time. As an adult, Craigie was convicted of other theft crimes, traffic-related offenses, and the attempted first degree sexual assault on a child. A test administered as part of the presentence investigation showed Craigie as a very high risk in the category for "companions" and as a high risk in categories measuring criminal history, family/marital, leisure/recreation, and antisocial pattern.

After considering the nature and circumstances of the crimes and Craigie's "history, character and condition," the district court found that imprisonment was necessary for the protection of the public. In determining the sentences, the court stated that it considered the facts and circumstances of Craigie's prior criminal history, including the 1996 conviction for attempted first degree sexual assault on a child and the resulting sentence of 12 to 20 years' imprisonment. We find no abuse of discretion by the court in sentencing Craigie.

CONCLUSION

We conclude that the court did not abuse its discretion in admitting evidence of Craigie's prior sexual assault conviction, but that even if the evidence were not admissible, Craigie failed to meet the burden to establish reversible error in a bench trial. We further conclude that sufficient evidence supports Craigie's convictions and that the court did not abuse its discretion in imposing sentences within the statutory limits.

AFFIRMED.