

No. 1-11-2513

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 10 CR 127
)	
ANTONIO ALEXANDER,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellee.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order denying the State's motion to admit other crimes evidence under section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3 (West 2010)), reversed where the motion was not dilatory and where the probative value of the proffered evidence outweighed undue prejudice to defendant.

¶ 2 In July 2010, the State charged defendant, Antonio Alexander, with four counts of criminal sexual assault and two counts of aggravated criminal sexual abuse against S.B. (case No. 10 CR 12701). In June 2011, the State moved to admit evidence of defendant's prior conviction for criminal sexual assault against G.R. in case No. 10 CR 11312. The motion was

made pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2010)), and was denied by the court. In this challenge to that ruling on appeal (Ill. S. Ct. R. 604(a)(1) (eff. Jul. 1, 2006)), the State contends that the trial court erred in (1) failing to engage in a meaningful assessment of the probative value of the evidence versus the prejudicial effect of admitting it, (2) deeming the evidence as exhausted in the prior prosecution, and (3) denying its motion as dilatory.

¶ 3 The record shows that case No. 10 CR 11312 was pending in the trial court prior to the case at bar, and that both cases appeared simultaneously on the trial court's docket for various status dates. The case at bar first appeared on the trial court's calendar on July 20, 2010, and, during the pretrial status proceedings held that day regarding both cases, the State noted that, in the "new case," the State "expect[s] to be filing a motion to admit proof of other crimes based on the two cases that are charged."

¶ 4 The record further shows that on August 12, 2010, the State elected to move forward on case No. 10 CR 11312, and, on September 30, 2010, filed a motion to admit proof of other crimes, through which it sought to introduce evidence from the case at bar. After a hearing on December 7, 2010, the court granted the State's motion, finding that the evidence from the case at bar was "material and relevant" to, and shared "very specific" factual similarities with, case No. 10 CR 11312, and that the evidence would not unfairly prejudice defendant. That case proceeded to trial on May 26, 2011, and other crimes evidence from this case was admitted through the testimony of S.B., resulting in defendant's conviction for criminal sexual assault.

¶ 5 On June 24, 2011, defendant was sentenced in case No. 10 CR 11312. That same day, the State elected to proceed on the case at bar, and filed a motion to allow other crimes evidence from case No. 10 CR 11312, pursuant to section 115-7.3 of the Code. In its motion, the State articulated its expectation that this evidence would show that, on or about May 7, 2010,

defendant committed the crimes of criminal sexual abuse and aggravated criminal sexual abuse against S.B., his 15-year-old cousin, and described the incident as follows.

¶ 6 On the night of the incident, defendant was socializing with various family members, including S.B., who was smoking marijuana, at S.B.'s home. S.B. then went to a bedroom and fell asleep fully clothed. While S.B. was asleep, defendant entered the bedroom, pulled down her shorts and underwear, and touched his mouth to her vagina, which caused S.B. to wake up. At that point, defendant attempted to force his penis into S.B.'s vagina, but she was able to push him off, after which defendant stated that he was going to "finish eating your pussy." S.B. said "no," and defendant left the room. S.B. was afraid to tell family members about the incident, but told her cousin about it the following day. S.B.'s mother eventually learned of the incident and reported it to police on May 19, 2010.

¶ 7 The State sought to introduce evidence that on May 15, 2010, defendant committed the offense of criminal sexual assault against his cousin G.R., describing the incident as follows: On the evening of May 14, 2010, defendant, G.R., and other relatives were at a party at a home located at 7136 South Marshfield in Chicago. G.R. drank alcohol throughout the evening, left the party around 3:00 a.m. on May 15, 2010, returned to her home at 3304 West 59th Place in Chicago, and, once there, fell asleep in a bedroom. Defendant rang the doorbell at G.R.'s home at approximately 5:00 a.m. and told Relunda, G.R.'s mother, that he wanted to play video games. Relunda allowed him into the house and returned to her bedroom.

¶ 8 Defendant then entered the room where G.R. was still asleep fully clothed and in a face down position. Defendant pulled down G.R.'s pants and underwear and placed his penis inside her vagina. G.R. woke up and managed to push defendant off her and ran out of the bedroom calling for help. When Relunda confronted defendant, he claimed that he did not know who he

was having sex with and left the home. G.R. reported the incident to police and was taken to a hospital where a sexual assault kit was completed.

¶ 9 The trial court denied the State's motion, stating "at this time that is denied," and, on July 20, 2011, the State filed a motion to reconsider. During the hearing held on that motion on August 9, 2011, the State informed the court that, to reduce any undue prejudice to defendant, it was not seeking to admit a certified conviction or any evidence that would alert the jury that defendant had been convicted for the conduct in case No. 10 CR 11312. The court, however, denied the State's motion, finding the motion dilatory and the evidence overly prejudicial.

¶ 10 On August 31, 2011, the State filed a certificate of substantial impairment alleging that the order denying its motion to admit proof of other crimes substantially impaired its ability to prosecute this case. In this interlocutory appeal, the State contends that the trial court erred in denying its motion to admit proof of other crimes.

¶ 11 Pursuant to section 115-7.3 of the Code, evidence of certain other sex offenses is admissible to prove the defendant's propensity to commit the charged sex offense. 725 ILCS 5/115-7.3 (West 2010), *People v. Donoho*, 204 Ill. 2d 159, 176 (2003). However, the probative value of the proffered evidence must outweigh its undue prejudice. 725 ILCS 5/115-7.3(c) (West 2010), *People v. Reed*, 361 Ill. App. 3d 995, 999 (2005). A trial court's decision whether to admit other crimes evidence under section 115-7.3 will not be disturbed absent an abuse of discretion. *Donoho*, 204 Ill. 2d at 182. That occurs where the court's ruling is arbitrary, fanciful, or where no reasonable person would take the view adopted by the court.¹ *People v. Childress*, 338 Ill. App. 3d 540, 545 (2003).

¹ The State cites *Donoho*, 204 Ill. 2d at 172 and *People v. Chapman*, 194 Ill. 2d 186, 208 (2000) for the proposition that *de novo* review applies in matters of statutory construction. This case does not involve a matter of statutory construction, and thus *de novo* review is inapplicable.

¶ 12 The parties agree that the evidence at issue falls within the purview of section 115-7.3 of the Code, but disagree as to whether it is unduly prejudicial to defendant. The State contends that the trial court failed to engage in a meaningful assessment, contrary to the direction of the supreme court in *Donoho*, "urg[ing] trial judges to be cautious in considering the admissibility of other-crimes evidence to show propensity by engaging in a meaningful assessment of the probative value versus the prejudicial impact of the evidence." *Donoho*, 204 Ill. 2d at 186.

¶ 13 In weighing the probative value of evidence of other sex offenses against undue prejudice to defendant, the court may consider (1) the proximity in time to the charged or predicate offense, (2) the degree of factual similarity to the charged or predicate offense, or (3) other relevant facts and circumstances. 725 ILCS 5/115-7.3(c) (West 2010).

¶ 14 Here, in denying the State's motion to reconsider, the court stated as follows:

"THE COURT: The other one, I find balancing – and certainly it comes within the province of Donahoe [sic], but I'm looking at the totality of the facts in this case and balance – applying the balancing factors, I find that it's overly prejudicial, it outweighs its probative value; therefore the motion to reconsider is denied."

These statements reveal that the trial court was aware of the relevant balancing factors and considered them in arriving at its decision. That said, the question remains whether the trial court abused its discretion in denying the State's motion to admit the other crimes evidence.

¶ 15 As to proximity in time, we observe that there is no bright line rule regarding when a prior offense would be deemed too remote to be admitted under section 115-7.3 (*Donoho*, 204 Ill. 2d at 183-84), and that evidence of other crimes has been admitted where more than a year and up to 15 years has elapsed between the incidents at issue (*Donoho*, 204 Ill. 2d at 186;

Childress, 338 Ill. App. 3d at 553). Here, the incidents occurred a mere eight days apart, which is extremely close in time, thereby increasing the probative value of the evidence of defendant's other crimes. See *Childress*, 338 Ill. App. 3d at 553.

¶ 16 With regard to the second factor, the supreme court has held that as factual similarities between the two incidents increase, so does the probative value of the other crimes evidence. *Donoho*, 204 Ill. 2d at 184. Moreover, where other crimes evidence is not being offered to show *modus operandi*, mere general areas of similarity will suffice in supporting its admission. *People v. Ilgen*, 145 Ill. 2d 353, 372-73 (1991).

¶ 17 In this case, the record shows that the two incidents share many factual similarities that go beyond mere generalities, including that both victims were defendant's female cousins and within the same age range. The record also shows that defendant was socializing with each victim prior to each incident, observed both consume a substance that might make them vulnerable, and that both incidents occurred in the early morning hours in a bedroom in the victim's residence where the victims were asleep and fully clothed at the time defendant approached them. In addition, each victim awoke to find defendant on top of her engaged in sexual activity, and both victims ended the attack by pushing defendant off her respective person.

¶ 18 As the trial court noted in ruling on the motion to admit other crimes evidence in case No. 10 CR 11312, the factual similarities between the two cases is "very specific." Although some differences between the two incidents exist, that does not defeat admissibility. *Donoho*, 204 Ill. 2d at 185. Given the quantity and specificity of factual similarities here, the probative value of the proffered evidence clearly weighs toward admission. See *Donoho*, 204 Ill. 2d at 184.

¶ 19 As to the third factor, we find that the other relevant facts and circumstances in this case also weigh in favor of admission of defendant's other crimes. Such facts include that (1) the same trial judge previously found that the conduct at issue in the case at bar would not be overly

prejudicial to defendant when he was being tried for the case comprised of the evidence that is being sought to be introduced here, (2) defendant has already been convicted in the other case, and (3) the State was not seeking to admit a certified conviction or any evidence to alert a jury that defendant had been convicted in the other case. Under these circumstances, we find that the probative value of the other crimes evidence clearly outweighed any prejudice to defendant, and that the court should have allowed it to be admitted as evidence of defendant's propensity to commit a sexual offense. *People v. Taylor*, 383 Ill. App. 3d 591, 594-95 (2008).

¶ 20 In reaching this conclusion, we have considered *People v. Smith*, 406 Ill. App. 3d 747, 754-55 (2010), which defendant cites in support of the trial court's ruling. In *Smith*, the State sought to present other crimes evidence consisting of testimony of six family members who claimed that defendant had abused them. *Smith*, 406 Ill. App. 3d at 748. The trial court allowed evidence as to only one victim, and, in affirming that ruling, the reviewing court noted that in spite of the exclusion of the remainder of the proffered other crimes evidence, the State would be left with "an ample basis to argue propensity at trial." *Smith*, 406 Ill. App. 3d at 749-50, 754-55. Here, in contrast, the State sought to present other crimes evidence from only one victim, and thus would not have "ample" evidence of propensity were it to be excluded at trial.

¶ 21 We next consider whether the trial court abused its discretion in denying the State's motion for being "dilatory." Section 115-7.3(d) provides as follows:

"In a criminal case in which the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown." 725 ILCS 5/115-7.3(d) (West 2010).

¶ 22 In explaining its reasoning for finding the State's motion to be dilatory, the trial court stated as follows:

"First of all, the conviction was, according to the State's brief, on December 7, 2010. All right. So the State, first of all, had absolute notice of that because it was a conviction, but prior to that, they had used this evidence of other crimes their previous motion. At this time, this case first came on my call July 20, 2010. So one of the reasons I'm denying it is because it's dilatory."

¶ 23 The State contends that these comments show that the trial court erroneously viewed the other crimes evidence from case No. 10 CR 11312 as having been "used up." Although the court referred to the State's previous use of other crimes evidence, we find upon reviewing the trial court's statements as a whole, that the court did not view the evidence as exhausted, but rather, was merely stating that, because the case at bar had been pending since July 2010, and the proffered evidence had led to a conviction in the prior case on December 7, 2010, the State's motion, filed on June 24, 2011, was dilatory.

¶ 24 The court's statements reflect its focus on the amount of time that had elapsed since the case at bar first appeared on its calendar. However, pursuant to the statute, the relevant inquiry is not how much time elapsed from the inception of the case to the filing of the motion, but rather, whether the State disclosed the evidence it sought to introduce in a reasonable time in advance of trial.² 725 ILCS 5/115-7.3(d) (West 2010). We find that it did.

¶ 25 In its motion to allow other crimes evidence, the State included a summary of the evidence it sought to introduce. This summary detailed the events preceding the incident, the

² For this same reason, the fact that on July 20, 2010, the State informed the trial court that, in relation to the "new case," it expected to file a motion to admit proof of other crimes, does not end the inquiry, as no evidence related to the motion had been disclosed at that point.

incident itself, as well as what transpired immediately after the incident. The summary specified the victim by name, how defendant gained access to the victim, and the sexual acts defendant performed on the victim. We find this summary sufficient to meet the requirements of the statute. Moreover, defendant was convicted in case No. 10 CR 11312 for the acts constituting the evidence the State is seeking to introduce in this case, and heard the testimony at issue during trial. Thus, defendant cannot claim to be taken by surprise by the contents of the State's motion.

¶ 26 Moreover, the record reflects that at the time the State filed the motion at issue, no trial date had yet been set in this case. Although a trial date was set immediately after the trial court denied the State's motion to allow other crimes evidence, that trial date was not kept; and after the trial court denied the State's motion for rehearing on August 9, 2011, defense counsel clarified that defendant was not demanding trial at that time. These factors show that the State provided the summary of the evidence at a reasonable time in advance of trial.

¶ 27 Finally, due to the manner in which prosecution of the two cases developed, we find that the State was diligent in handling the timing of the motion to admit other crimes evidence in this case. The State elected to first proceed with trial in case No. 10 CR 11312, at which point, this case was essentially placed on hold until the other case was resolved. That resolution occurred on June 24, 2011, the date on which defendant was sentenced, and the State elected to proceed in this case, and filed the motion at issue. We thus fail to see how this timing can be deemed dilatory.

¶ 28 For the foregoing reasons, we find that the trial court abused its discretion in denying the State's motion to admit other crimes evidence, and, therefore reverse that judgment and remand the cause for further proceedings.

¶ 29 Reversed and remanded.