

2013 IL App (1st) 113327-U

SIXTH DIVISION
August 9, 2013

No. 1-11-3327

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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 5042
)	
TERRY WILLIAMS,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellee.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justice REYES concurred in the judgment.
Justice Gordon dissented

ORDER

¶ 1 *Held:* In prosecution for aggravated criminal sexual assault and aggravated unlawful restraint, trial court did not abuse its discretion in barring the State from introducing evidence of two additional instances in which defendant allegedly sexually assaulted two other individuals.

¶ 2 Defendant Terry Williams was charged by indictment with four counts of aggravated criminal sexual assault and one count of aggravated unlawful restraint. The State filed a pretrial motion seeking to use proof of two other alleged crimes as evidence against defendant. The trial court denied the motion, and the State has appealed.

¶ 3 We summarize the alleged facts of defendant's case, and the alleged facts of the two other offenses, using the allegations contained in the State's supplemental motion to use proof of other crimes as evidence and in defendant's response. All three cases occurred in Chicago. In the case being prosecuted, it is alleged that defendant had dated 19-year-old A.J. about five times over the period of a month and they had exchanged phone numbers. On June 27, 2009, defendant picked up A.J. in a red Nissan. They drove around for a while until, at A.J.'s request, defendant drove her to her girlfriend's house near 81st and Ashland to bring her girlfriend some food. Defendant waited in his car while A.J. delivered the food. When A.J. came back, defendant drove her to the alley behind 6210 South Honore. On the way, A.J. tried to get out of the car, but defendant kept locking the door. In the alley, defendant sexually assaulted A.J. orally and vaginally, while armed with a handgun. He then told A.J. to get out of the car or else he would pistol whip her or kill her. A.J. left the car and notified the police. DNA taken from A.J. at the hospital matched defendant's DNA.

¶ 4 Two months earlier, on April 23, 2009, D.T. was allegedly assaulted about one block away from the location of A.J.'s assault, in an alley off of 6211 South Wolcott. D.T. was waiting for a friend at about 3 p.m. when she saw a maroon car drive around the block several times. The maroon car, driven by a man, drove up to D.T. The man pointed a gun at her and told her to get in the car or else he would shoot her. D.T. got in the car and the man drove into the alley and parked behind an abandoned building. D.T. tried to engage the man in conversation, and learned that his name was Terry. The man then assaulted her vaginally. When he was finished, the man told D.T. that if she did not get out of the car he would shoot her. D.T. notified the police about the assault. DNA taken from her at the hospital matched defendant's DNA. However, the State rejected felony charges against defendant in part because D.T. made inconsistent statements.

¶ 5 About six weeks after A.J. was allegedly assaulted, at about 2 a.m. on August 8, 2009, police officers patrolling the area of 6221 South Wolcott heard J.S. running down the street, calling for help and waving her shoes in the air. J.S. told the officers that she had been sexually assaulted. She had been sitting at 24th and Pulaski when a man drove up in a gold Buick with temporary plates and began to speak with her. The man pulled out a black handgun and ordered her into the car and drove her into an alley at 6221 South Wolcott, where he sexually assaulted her vaginally. He then told J.S. to "clean up" and "get out of the car." J.S. ran away without putting on her shoes, and flagged down the police. There was no DNA match in this case. When J.S. was shown a photo array, she identified a photo of the defendant and said she was "pretty sure" he was the man who attacked her. She also told the police that she had made other claims of sexual assault against other individuals.

¶ 6 The trial court denied the State's request to use the facts of the cases of D.T. and J.S. against defendant in this case in order to show propensity. The State has appealed from that decision.

¶ 7 Defendant has been charged with four counts of aggravated criminal sexual assault of A.J., and one count of aggravated unlawful restraint of A.J. By statute in Illinois, when a defendant is charged with aggravated criminal sexual assault or certain other offenses involving sexual activity, a trial court has the discretion to admit, for any relevant purpose, evidence that a defendant has committed another such sexual offense. 725 ILCS 5/115-7.3 (West 2008). It is primarily the trial court's task to determine whether the prejudicial effect of the evidence sought to be introduced substantially outweighs its probative value. *People v. Donaho*, 204 Ill. 2d 159, 182-83 (2003); *People v. Chambers*, 2011 IL App (3d) 090949, ¶12. In the exercise of its discretion to determine whether to allow this evidence, the trial court may consider the proximity in time to the charged offense, the degree of factual similarity to the charged offense, and other

relevant facts and circumstances. 725 ILCS 5/115-7.3(c) (West 2008). Relevance, or probative value, increases as factual similarities in the evidence increase. *Donaho*, 204 Ill. 2d at 184. But our Supreme Court has urged the exercise of caution when considering the admissibility of other crimes evidence to show propensity to commit a crime. *Donaho*, 204 Ill. 2d at 186. This is because of concern that propensity evidence may prove too much. *People v. Dabbs*, 239 Ill. 2d 277, 284 (2010) (dangers of prejudice, confusion and time consumption may outweigh probative value, particularly in the setting of a jury trial). On review of a trial court's determination of admissibility of such evidence, we will not reverse unless we find that the court so abused its discretion that no reasonable man would adopt the court's decision. *Donaho*, 204 Ill. 2d at 182.

¶ 8 Here, the factor of the timing of the other cases supports their admission. They occurred two months before and six weeks after A.J. was allegedly assaulted.

¶ 9 However, in reviewing the evidence in these three cases for similarities and differences, we reach a mixed result. The sexual assaults took place in alleys within several blocks of each other. A gun was used in all three cases. In all three cases, when the assailant was finished with his assault, he ordered the victim out of the car. On the other hand, the colors of the cars were somewhat different (red, maroon, and gold). The time of day was different (3 p.m. in D.T.'s case, 2 a.m. in J.S.'s case, unspecified in A.J.'s case). DNA in two cases (A.J. and D.T.) matched defendant's DNA, but there was no DNA match in J.S.'s case. J.S. and D.T. were allegedly assaulted by strangers, whereas A.J. and defendant had dated five times in the past month. J.S. was "pretty sure" that defendant was the assailant, based on a photo array; there was no evidence of an identification by D.T.; and A.J. knew defendant. These factors do not support a finding that the trial court abused its discretion in excluding this evidence.

¶ 10 As for other relevant considerations, the trial court was justifiably concerned with allowing admission of D.T.'s case where, despite a DNA match, the State had determined that it

would not prosecute the defendant for a felony because of inconsistent statements by D.T. In J.S.' case there was no DNA match; after being shown a photo array she was "pretty sure" defendant was the man who had attacked her; and J.S. told the police she had made other claims of sexual assault. These are all factors which support the trial court's decision not to admit the facts of these other cases in defendant's case.

¶ 11 Upon consideration of all of these factors, we do not find that the trial court abused its discretion in barring evidence that in two other instances defendant had committed the same crime with which he was charged in this case. We cannot say that no reasonable man would have made the exclusion determination made by the trial court. *Donaho*, 204 Ill. 2d at 182. For these reasons, we affirm the trial court's order and remand for further proceedings.

¶ 12 Affirmed and remanded.

Justice Gordon, dissenting:

This is an interlocutory appeal by the State from a trial court's denial of a pretrial motion, in which the State seeks permission to use proof of two other sex crimes as evidence in its case against defendant for aggravated criminal sexual assault and unlawful restraint. The question for us is whether the trial court erred in denying the State's pretrial motion.

The State appeals pursuant to Supreme Court Rule 604 which permits the State to appeal an order "suppressing evidence." *People v. Holmes*, 235 Ill. 2d 59, 61 (2009) (where a trial court denies the State's pretrial motion to admit evidence of defendant's prior sex offenses in a current sex offense prosecution, that order is appealable under Rule 604(a)(1), if the 30-day time limit is met). "[A] party seeking review of an order appealable under Rule 604(a)(1)" must "appeal or file a motion to reconsider within 30 days." *Holmes*, 235 Ill. 2d at 61. In the case at bar, the State filed a motion to reconsider within 30 days of the trial court's original order, and then filed

this appeal within 30 days of the trial court's denial of the State's motion to reconsider. Thus, we have jurisdiction to hear this appeal.

BACKGROUND

The facts are stated in the majority's opinion, so I will only summarize the facts very briefly here. In the case at bar, the State alleges that defendant had dated 19-year old A.J. about five times when, on June 27, 2009, he drove her to an alley behind 6210 South Honore Avenue and sexually assaulted her. A.J. tried unsuccessfully to escape defendant's vehicle, but he was armed with a handgun. After the assault, he told her to exit the vehicle or he would pistol whip or kill her. A DNA sample later obtained from A.J. matched a DNA sample obtained from defendant. *Supra* ¶ 4.

The State seeks to admit evidence of two other similar crimes that occurred two months before and six weeks after the offense at issue. The primary difference between the crime at bar and the two other crimes is that, in the two other crimes, the victims had never met defendant before. In the first crime, D.T., the victim, alleges that, on April 23, 2009, she was assaulted about one block from the location of A.J.'s assault, in an alley behind 6211 South Wolcott Avenue. As in A.J.'s case, defendant was armed with a gun. Defendant pointed the gun at D.T. and told her to enter his vehicle or he would shoot her. As in A.J.'s case, the assault occurred in an alley and in his vehicle. D.T. alleged that defendant drove into an alley and sexually assaulted her there. After the assault, he told her if she did not exit his vehicle, he would shoot her, which was very similar to the threats made in A.J.'s case after the assault. As in A.J.'s case, the DNA sample later obtained from D.T. matched the DNA sample obtained from defendant. *Supra* ¶ 5.

Six weeks after the assault alleged in the case at bar, J.S. also alleged that defendant sexually assaulted her in his vehicle in an alley near the location of the other two assaults, while armed with a handgun. On August 8, 2009, police officers observed J.S. running down the street

and calling for help. She alleged that defendant drove up, pulled out a handgun and ordered her into his vehicle. Then he drove to another nearby alley, behind 6221 South Wolcott Avenue, where he sexually assaulted her. Although there was no DNA match in this case, J.S. identified defendant from a photographic array stating that she was "pretty sure" he was her assailant.

Supra ¶ 6.

In defendant's brief to the trial court, defendant claimed that felony charges were not brought in D.T.'s case, in part, because she had allegedly made inconsistent statements; and that J.S.'s "pretty sure" identification was not sufficiently strong.

In its ruling, the trial court did not find that the other crimes were dissimilar. The trial court denied the State's motion solely on credibility grounds, stating in full:

"Weighing the prejudicial effect against the probative value of having other crimes to rebut the claim of consent, the Court finds the two instances here are problematic in terms of being as the defense points out reliable as to the charges that were leveled.

The first case – just a moment – took place before this incident, and that would be Miss [D.T.] a month or so, a few weeks before this incident. While there was DNA that linked defendant with having sex with Miss [D.T.], it was not charged. State's Attorney declined to bring the charges against him, so there were credibility factors.

Courts of law operate on credibility, and if it is not credible enough for its own charges, I don't see how we can level it against defendant where any type of certainty that it happened, and I'm not allowing that proof of this offense as to Miss [D.T.]

Now the second offense that the State wishes to admit as proof of other crimes involves Miss [J.S.]. There was no DNA in this matter, and – just a moment. However, the identification of the perpetrator is at issue in her case. She did not know the person, but she says, 'I'm pretty sure,' when she saw a photo array, 'that this is the person who attacked me.'

I don't think that the identification of her attacker would be a problem in her own case, and I don't think it would be fair to the defendant to allow [J.S.] to level her charges against him in that she wasn't certain of the identify of her attacker, and it's problematic and prejudicial as to [J.S.] as well.

So the motion involving these two offenses for lack of credibility, and reliability, and identification, the motion is denied."

The above credibility determinations were made solely on the basis of a cold record, since no witnesses testified and no evidence was presented. The credibility determinations were made based on (1) the trial court's interpretation of the words "pretty sure," and (2) its assumption that, since the "State's Attorney declined to bring the charges against him," there must have been "credibility factors." In essence, the trial court interpreted the words "pretty sure" to mean uncertain, and a lack of charges to mean incredible. With respect to D.T.'s case, the trial court held that, "if it is not credible enough for its own charges, I don't see how we can level it against defendant."

ANALYSIS

On this interlocutory appeal, the State argues that the trial court erred in barring it from presenting evidence of other sex crimes in a prosecution against defendant for sexual assault.

For the following reasons, I would find, first, that our standard of review is *de novo*. However, even if our standard of review is the more deferential abuse-of-discretion standard, I would still find that the trial court erred and reverse.

Standard of Review

The State argues that we should apply a *de novo* standard of law because the trial court erred as a matter of law. In the alternative, the State argues that, even if we apply an abuse-of-discretion standard, the trial court still erred. As I explain below, I agree with both points.

A trial court abuses its discretion where its ruling is arbitrary, fanciful or where no reasonable person would take the view adopted by the trial court. *People v. Taylor*, 383 Ill. App. 3d 591, 594 (2008). By contrast, *de novo* consideration means that we perform the same analysis that a trial judge would perform. *People v. Daniel*, 2013 IL App (1st) 111876, ¶ 22.

Although a trial court's evidentiary rulings are normally reviewed only for an abuse of discretion, this deferential standard applies because the trial court has the advantage over the appellate court of having heard the witnesses firsthand. *People v. Harris*, 231 Ill. 2d 582, 590 (2008) (applying the deferential abuse-of-discretion standard to review a trial court's admission of prior offenses, our supreme court stated "[t]his court gives great deference to the trial court's interpretation of a witness's testimony"). See also *People v. Snyder*, 2011 IL 111382, ¶ 36 (a reviewing court gives substantial deference to a trial court's decision when the trial judge heard the defendant and the proceedings and was thus "in a much better position" to consider factors such as credibility and demeanor); *In re Marriage of McBride*, 2013 IL App (1st) 112255, ¶ 42 ("the trial court is in the best position to determine the credibility of a witness and accept or reject their testimony and we will not overcome such a determination absent an abuse of discretion") Thus, for example, our supreme court applied an abuse-of-discretion standard in *Donoho* when reviewing a trial court's exclusion of other sex crimes evidence, where the evidence was admitted

in the middle of trial, and the trial court had heard not only the defendant's direct testimony, but also the testimony of all the other trial witnesses. *Donoho*, 204 Ill. 2d at 166-67, 182.

However, when a trial court makes a ruling based solely on a cold record, then our standard of review is normally *de novo*, because the trial court's vantage point is no longer superior to that of the appellate court. *McWilliams v. McWilliams*, 387 Ill. App. 3d 833, 844 (2009) (" 'When a trial judge bases [her] decision solely on the same 'cold' record that is before the court of review, it is difficult to see why any deference should be afforded to that decision' " (quoting *Toland v. Davis*, 295 Ill. App. 3d 652, 654 (1998))); see also *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, ¶ 23 (also quoting with approval the same sentence from *Toland*). In the case at bar, where the trial court had not yet heard any witnesses and where it made a decision based on a cold record, I would find that the appropriate standard of review is *de novo*.

Although I would apply a *de novo* standard, my conclusion would be the same under either standard of review, for the reasons which I explain below.

Statutory Factors

In the case at bar, the State sought to admit evidence pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (the Code), which permits the admission in a sex crime prosecution of "evidence of the defendant's commission" of another sex offense "for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3 (West 2010). Section 115-7.3 provides the following guidance to the trial court which must determine whether the evidence is "relevant":

"(c) In weighing the probative value of the evidence against undue prejudice to the 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 or circumstances." 725

ILCS 5/115-7.3 (West 2010).

Our supreme court has held that, in weighing the above factors, the trial court may exclude the evidence only if its prejudicial effect "substantially" outweighs its probative value. *Donoho*, 204 Ill. 2d at 183; see also *People v. Perez*, 2012 IL App (2d) 100865, ¶ 49 ("danger of unfair prejudice in the context of a section 115-7.3 case *** is greatly diminished by the very fact that section 115-7.3 upended the long-standing rule that other-crimes evidence to establish propensity is *per se* unfairly prejudicial").

In the case at bar, the trial court did not bar the evidence because of either a lack of "proximity in time" or a lack of "factual similarity." Thus, the trial court based its ruling on the third factor: "other relevant facts or circumstances." 725 ILCS 5/115-7.3 (West 2010).

As part of the "other relevant facts or circumstances," the trial court must consider whether the State has satisfied its burden in showing "that a crime took place and that 'the defendant committed it.'" *People v. Gwinn*, 366 Ill. App. 3d 501, 515 (2006) (quoting *People v. Thingwold*, 145 Ill. 2d 441, 455-56 (1991)). The State need not prove this beyond a reasonable doubt, but must demonstrate more than a mere suspicion. *Thingwold*, 145 Ill. 2d at 455-56 ("Proof that the defendant committed the crime, or participated in its commission, need not be beyond a reasonable doubt, but it must be more than a mere suspicion."), *cited with approval in People v. Oaks*, 169 Ill. 2d 409, 454 (1996) (when the State seeks to admit other crimes evidence under the common-law exception to show intent, motive or *modus operandi*, "[p]roof that the defendant committed or participated in the crime need not be beyond a reasonable doubt, but must be more than a mere suspicion"). In their briefs to this court, both parties agree on this

standard of "more than a mere suspicion," which appears by its very wording to be a low threshold.

In the case at bar, the trial court erred by excluding evidence of an uncharged offense, simply because it was uncharged, when the Code expressly permits admission of uncharged offenses. Section 115-7.3 permits the admission of "evidence of the defendant's commission of another offense." 725 ILCS 5/115-7.3 (West 2010). Nowhere does this section require a conviction; the section states that "evidence of *** commission" is sufficient. 725 ILCS 5/115-7.3 (West 2010); *People v. Perez*, 2012 IL App (2d) 100865, ¶ 54 ("evidence of uncharged crimes" admitted under section 115-7.3); *People v. Smith*, 406 Ill. App. 3d 747, 754-55 (2010) (same). Disregarding the plain language of the statute, the trial court in the case at bar held that "if it is not credible enough for its own charges, I don't see how we can level it against defendant." Thus, the trial court erred as a matter of law by excluding evidence simply because a prior prosecutor decided not to bring charges. *Taylor*, 383 Ill. App. 3d at 594 (although we normally review a trial court's decision under section 115-7.3 for an abuse of discretion, "[t]o the extent that the trial court determine[s] that the evidence [is] inadmissible *per se* as to its probative value for propensity, that decision is incorrect as a matter of law," (quoting *People v. Childress*, 338 Ill. App. 3d 540, 552 n.2 (2003))).

In essence, the trial court deferred to a prior prosecutor's assessment of whether the evidence constituted proof beyond a reasonable doubt, when the statutory section requires the trial court to make its own assessment and to make that assessment under a completely different standard. *People v. Ash*, 346 Ill. App. 3d 809, 816 (2004) ("To hold that evidence of other crimes is more prejudicial than probative simply because the crimes are uncharged would be tantamount to barring all evidence of other crimes.").

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In addition, the prior victim's statement that she was "pretty sure" defendant was her assailant, coupled with her selection of defendant from a photographic array, rises way above the low threshold of a "mere suspicion." *Thingwold*, 145 Ill. 2d at 455-56. Thus, I would find that the trial court abused its discretion in denying the State's motion.

CONCLUSION

For the foregoing reasons, I would find that the trial court erred in denying the State's pretrial motion, and I would reverse this order.