

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).

2013 IL App (3d) 110352-U

Order filed November 19, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-11-0352
)	Circuit No. 08-CF-2176
)	
DEMOND A. BARNES,)	Honorable
)	Edward A. Burmila, Jr.,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held:* (1) Trial court's decision to admit other-crimes evidence under section 115-7.3 of the Code of Criminal Procedure of 1963 was not an abuse of discretion; (2) trial court did not err in not *sua sponte* declaring a mistrial in light of the other-crimes evidence; (3) trial counsel was not ineffective for failing to object to the other-crimes evidence.

¶ 2 Defendant, Demond A. Barnes, was convicted of eight counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (2008)) and one count each of failure to register as a sex

offender (730 ILCS 150/6 (West 2008)), aggravated unlawful restraint (720 ILCS 5/10-3.1 (West 2008)), and obstructing justice (720 ILCS 5/31-4(a) (West 2008)). Prior to trial, the trial court had deemed admissible testimony from the State's witness, M.K., concerning two prior sex crimes committed by defendant. During her testimony at trial, M.K. testified to additional details of the other crimes that had not been presented to the court before trial. Defendant was found guilty and sentenced to natural life in prison.

¶ 3 Defendant appeals, arguing that: (1) the trial court abused its discretion by admitting the additional details of the other-crimes testimony by M.K.; (2) M.K.'s testimony created a manifest necessity for the trial court to *sua sponte* declare a mistrial; and (3) trial counsel was ineffective for failing to object when M.K.'s trial testimony deviated from the testimony presented at the hearing on the motion *in limine*. We affirm.

¶ 4 FACTS

¶ 5 I. Trial Testimony Concerning the Presently Charged Crimes

¶ 6 At trial R.B. and M.R. testified about events that occurred on September 5 and 6, 2008. R.B. testified that on September 5, 2008, she was drinking with her good friend M.R. at a picnic area outside M.R.'s apartment building. Defendant, who had a sexual and dating relationship with M.R. for about two weeks, was also present and drinking. R.B., M.R., and defendant eventually relocated to M.R.'s apartment, along with two other women, where they continued to drink while listening to music and dancing.

¶ 7 R.B. testified that around 2 a.m. on September 6, she was dancing when defendant got up close to her and tried to put his hands inside her clothing. R.B. pushed defendant away and told him to stop. Later, M.R. and defendant went into M.R.'s bedroom to talk. M.R. testified that

while she was in the bedroom with defendant, they began screaming at each other, at which point defendant used a shoelace to tie her hands behind her back. Meanwhile, the other two women left the apartment, and R.B. fell asleep on a futon in the living room.

¶ 8 R.B. was awakened by defendant trying to remove her pants. When she told him to stop, defendant produced a knife and pulled R.B. by her hair into the bedroom, where M.R. was lying on the bed with her hands tied behind her back and her knees and ankles bound. Defendant told R.B. to take off her clothes or else defendant would kill her. R.B. took off her clothes and pleaded with defendant to stop. Defendant then forced R.B. to have vaginal sex with him. Afterward, M.R., still present in the room, was crying because her wrists were bound so tightly. Defendant kicked M.R. in the face and threatened to kill her if she did not be quiet. He then retied M.R.'s wrists. Defendant again forced R.B. to have vaginal sex with him. M.R. was still crying, so defendant forced R.B. to make M.R. ingest Tylenol PM and beer.

¶ 9 R.B. testified that defendant then took her to the bathroom to shower. While she was showering, defendant entered the shower and forced R.B. to have anal sex with him. R.B. begged defendant to stop, and defendant did. R.B. tried to run from the bathroom, but defendant grabbed her and took her back into the bedroom. Defendant then forced R.B. to have anal, vaginal, and oral sex with him.

¶ 10 After lying in bed for a while, defendant took R.B. into the living room and tied her wrists together in front of her body with shoelaces. Defendant forced R.B. to have vaginal sex with him. Defendant then brought M.R. into the living room. Defendant tied gags around both women's mouths and put pillowcases over their heads.

¶ 11 Defendant began pacing around and cleaning up the apartment. He put R.B. in the

bedroom and tied her ankles together, but R.B. was able to free herself. She ran out of the bedroom and tried to escape from the apartment, but defendant caught her before she could make it outside. He choked her and explained that he would now have to kill both women. R.B. told defendant that if he would let the women go, they would not go to the police.

¶ 12 Defendant seemed unsure of what to do next. M.R. suggested that if R.B. were allowed to shower, any evidence of the crimes would be washed away. Defendant took R.B. into the shower and washed her body. After showering R.B., defendant continued cleaning up the apartment, wiping off counters and picking up trash. He opened R.B.'s purse and examined her driver's license. He told the women that if they told anybody about what had happened, he would kill them. He eventually untied the women and left the apartment with a bag of trash, which the women saw him deposit in a dumpster.

¶ 13 The women then called the police, and R.B. was taken to the hospital and examined. Police took photographs of the injuries suffered by the women, including marks on M.R.'s face, wrists, and ankles, and marks on R.B.'s chin, neck, and wrists. Police recovered the trash bag from the dumpster, in which they found shoestrings and pieces of draw cords. Defendant was later arrested in his apartment building.

¶ 14 Defendant testified that the sex was consensual. He testified that he was dancing with R.B. earlier in the evening, and she was "bumping and grinding" on him. Later, when defendant and R.B. were alone in the living room, they began rubbing and kissing each other. They went into the bedroom. When they entered, M.R. left the bedroom and went to the living room. Defendant and R.B. then had consensual oral and vaginal sex. They began to have anal sex, but R.B. said it hurt, so defendant stopped. R.B. and defendant then fell asleep together in the

bedroom. When defendant awoke in the morning, he found the women sitting together on a futon in the living room. They seemed fine and were not crying or injured. Defendant told the women he needed to leave, and they asked him to take a bag of trash out with him. He left the building and threw the trash in a dumpster. Defendant denied tying up the women, threatening them, or assaulting them.

¶ 15

II. Other-crimes Evidence

¶ 16 At a pretrial hearing on the State's motion *in limine*, the State moved to present evidence of two prior uncharged sex crimes committed by defendant, admissible under section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) to show defendant's propensity to commit the current charged crimes. 725 ILCS 5/115-7.3 (West 2008). The State argued that on September 21, 2002, and September 25, 2002,¹ defendant committed sex crimes against a woman named M.K. when she was 22 years old.

¶ 17 At the hearing, the State summarized the other-crimes evidence by describing the similarities it shared with the charged crime: defendant tied and retied both victims several times; defendant knew both victims prior to committing the crimes; defendant assaulted the victims multiple times over a period of several hours; defendant forced M.K. to ingest sleeping pills and whiskey and forced M.R. to ingest Tylenol PM and beer; defendant released the victims only

¹ The State refers to the "September 25, 2002 incident" in its motion in limine. M.K.'s trial testimony states, in apparent error, that this incident began on the evening of September 24, 2002, and ended "the next day" on the afternoon of September 26, 2002. We will assume that the incident began on September 24, 2002, and ended the next day on September 25, 2002. For clarity, we will use the date of September 25, 2002, to refer to this part of M.K.'s testimony.

after they agreed not to go to the police; defendant used a knife during all three incidents; defendant vaginally assaulted both victims while the victims were lying on their stomachs; defendant ejaculated several times during each crime; lastly, during the attack on September 25, 2002, defendant attempted to make M.K. take a bath or shower and, during the currently charged crimes, defendant made R.B. shower. This list of shared similarities served as the only description of the prior crimes introduced at the hearing. The State did not introduce testimony from M.K., nor did it introduce a narrative describing the prior crimes.

¶ 18 The trial court found that the evidence of the crimes committed against M.K. could be admitted at trial to establish defendant's propensity to commit the currently charged sex crimes.

¶ 19 At trial, M.K. testified to the alleged other crimes committed by defendant. M.K. explained that she had dated defendant for approximately four years, beginning in 1998. In early September 2002, M.K. broke off the relationship with defendant and moved out of the apartment they shared together. On September 20, 2002, M.K. wanted to get away from the new place in which she was living, so she went to the old apartment to sleep for a night. Defendant was not in the apartment when M.K. fell asleep.

¶ 20 When M.K. awoke, early in the morning of September 21, 2002, defendant was standing over her laughing and holding a knife. M.K. tried to get out of the bed, but defendant held her down and forced her to take sleeping pills. Defendant removed M.K.'s clothes and forced her to have vaginal sex with him while she told him to stop. Defendant then tied her hands and feet with twine. He forced her to remain on the bed and had sex with her four or five more times throughout the day. He tied and retied M.K. several times. Defendant eventually untied M.K. and allowed her to leave the apartment after she told him that she would not contact the police.

M.K. did not contact the police.

¶ 21 M.K. testified that on the evening of September 24, 2002, while M.K. was making a telephone call at a pay phone outside a gas station, defendant approached her, put a knife to her stomach, and forced her into her car. He ordered her to drive them back to the apartment. Once inside the apartment, defendant began tying her up. The prosecution then asked the following question:

"Q: Do you recall how the apartment looked at the time?"

A: It was horrible. He had—He peed over everything. It was horrible. I mean everything I had was ruined."

M.K. then testified that after defendant tied her up, he forced her to drink rat poison and threatened to electrocute her in the shower. Defendant removed M.K.'s clothes and forced her to have vaginal sex with him. Defendant kept M.K. in the apartment for several hours and had vaginal sex with her several times. He also tied and retied her several times. Defendant eventually let M.K. leave on the afternoon of September 25, 2002, telling her not to call the police.

¶ 22 M.K. testified that because she was afraid, she did not initially contact the police. At a later date, when M.K. was alone at her father's home, defendant called the house telephone and informed M.K. that he was outside. M.K. testified that she then called the police, who arrived and arrested defendant outside the house. She testified that she filed a police report and spoke with a detective to whom she told about the two recent incidents. The detective called her back once but she heard nothing further from him. M.K. wanted to be done with the incidents and did not call the police again to follow up. No charges were brought against defendant based on these

two incidents.

¶ 23 Before M.K. testified, defense counsel renewed its objection to her testimony concerning defendant's other crimes, relying on the same arguments it made at the hearing on the motion *in limine*. Counsel did not raise any further objection while M.K. testified. The defense's cross-examination of M.K. consisted of two questions about whether defendant had been charged with or convicted of a crime as a result of M.K.'s allegations.

¶ 24 After M.K.'s testimony was complete, the trial court excused the jury and explained that M.K. had testified about three matters that the court did not expect: that M.K. was abducted at knife point from the gas station; that defendant had urinated on M.K.'s property in the apartment; and that defendant forced M.K. to ingest rat poison. All three of these actions occurred as part of the alleged sex crime of September 25. The trial court explained that the testimony about defendant's urination could dehumanize defendant to the jury and was not relevant to defendant's propensity to commit sex crimes.

¶ 25 Despite the potential prejudicial effect of the unexpected testimony, the trial court determined that, had it been aware of the additional testimony at the pretrial hearing, it nonetheless would have admitted the entirety of M.K.'s testimony—although the decision would have been a "close call." The court absolved the prosecution of wrongdoing by explaining that the State would not have knowingly extracted this testimony from M.K. Despite concluding that M.K.'s testimony remained admissible, the court admonished the State that any mention of the three additional portions of M.K.'s testimony during closing argument would result in a mistrial. The court did not admonish the jury not to consider the additional testimony.

¶ 26 After the close of evidence, the jury returned guilty verdicts on eight counts of aggravated

criminal sexual assault, one count of obstructing justice, one count of aggravated unlawful restraint, and one count of unlawful restraint. Defendant filed a motion for a new trial in which he renewed his objection to M.K.'s testimony. The motion was denied. Defendant appeals.

¶ 27

ANALYSIS

¶ 28 Defendant raises three issues on appeal: (1) the trial court abused its discretion when it admitted M.K.'s testimony of other-crimes evidence; (2) the trial court should have *sua sponte* declared a mistrial after M.K.'s testimony deviated from the way the testimony was represented at the hearing on the motion *in limine*; (3) defendant's trial counsel was ineffective for failing to object when M.K.'s testimony deviated from the testimony represented at the hearing on the motion *in limine*.

¶ 29

A. Admissibility of Other-Crimes Evidence

¶ 30 Defendant first argues that the trial court abused its discretion when it admitted M.K.'s additional other-crimes testimony because the prejudicial effect of the testimony substantially outweighed its probative value. Defendant preserved review of this issue by objecting to M.K.'s testimony during the hearing on the motion *in limine* and before M.K. testified at trial, and also by raising the error in a posttrial motion.

¶ 31 When a defendant is charged with certain sex crimes, including aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (2008)), section 115-7.3 of the Code states that evidence of other sex crimes committed by defendant "may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(b) (West 2008). Other-crimes evidence is usually not admissible to show that a defendant has the propensity to commit the charged crime. However,

section 115-7.3 creates an exception, allowing evidence of other sex crimes to show defendant's propensity to commit the currently charged sex crime. *People v. Donoho*, 204 Ill. 2d 159 (2003).

¶ 32 Before the other-crimes evidence may be admitted, the trial court must assess and balance its probative value against its prejudicial effect. Other-crimes evidence is admissible only if it is relevant and if its probative value is not substantially outweighed by its prejudicial effect. *Id.* Other-crimes evidence is potentially prejudicial because of the risk that the jury might "convict the defendant only because it feels he or she is a bad person deserving punishment." *People v. Lindgren*, 79 Ill. 2d 129, 137 (1980). We will not reverse a trial court's decision to admit evidence unless we find that the court abused its discretion. *People v. Heard*, 187 Ill. 2d 36 (1999).

¶ 33 Section 115-7.3 outlines three factors that courts "may consider" when determining the probative value of other-crimes evidence used to establish propensity: "(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 2008).

¶ 34 As to proximity in time, " 'admissibility of other-crimes evidence should not, and indeed cannot, be controlled solely by the number of years that have elapsed between the prior offense and the crime charged.' " *Donoho*, 204 Ill. 2d at 183 (quoting *People v. Illgen*, 145 Ill. 2d 353, 370 (1991)). Courts should evaluate proximity on a case-by-case basis, rather than adopting a bright-line rule. *Donoho*, 204 Ill. 2d 159. In the present case, the other crimes occurred approximately six years prior to the charged offenses, a substantial period of time. But see, *e.g.*, *Donoho*, 204 Ill. 2d 159 (other-crime evidence admissible where other crime occurred 12 to 15 years prior); *People v. Davis*, 260 Ill. App. 3d 176 (1994) (other-crime evidence admissible

where other crime occurred in excess of 20 years prior). We find that the length of time between the other crimes and the present crimes was not so long as to make the other crimes inadmissible.

¶ 35 The second factor considers the similarities between the currently charged crime and the prior crime. Some differences between the crimes will not defeat admissibility because "no two independent crimes are identical." *Donoho*, 204 Ill. 2d at 185. However, the other-crimes evidence must have " 'some threshold similarity to the crime charged.' " *Donoho*, 204 Ill. 2d at 184 (quoting *People v. Bartall*, 98 Ill. 2d 294, 310 (1983)). " '[M]ere general areas of similarity will suffice' to support admissibility." *Donoho*, 204 Ill. 2d at 184 (quoting *Illgen*, 145 Ill. 2d at 373).

¶ 36 Here, the present crimes and the two crimes alleged by M.K. shared sufficient similarities. Defendant forced M.R. to take Tylenol PM; he forced M.K. to take sleeping pills. He tied and retied the victims several times. He demanded that both R.B. and M.K. take a shower after the incident. He knew his victims prior to committing the crime. He assaulted each victim several times over a period of hours. He used a knife during each offense. These similarities were sufficient to make the other-crimes evidence admissible.

¶ 37 We find no other relevant facts or circumstances that would significantly weigh against admissibility.

¶ 38 The probative value of the other crimes, when weighed against their prejudicial effect, favors admissibility. Although M.K.'s additional testimony concerning the urination and rat poison was prejudicial, that prejudice was outweighed by the probative effect of her testimony. In addition, it is difficult to separate those details from the general narrative of M.K.'s testimony about the sex crimes. M.K. testified that she noticed the urination after she was led at knifepoint

into an apartment to be sexually assaulted. In a similar vein, she testified that she was forced to ingest rat poison after being tied up in the apartment and subsequently sexually assaulted. The testimony about the abduction, defendant's urination, and the rat poison were part of the broader narrative about how the sexual assault began and was carried out. The court did not abuse its discretion in finding that the probative effect of M.K.'s testimony as a whole outweighed its prejudicial effect.

¶ 39 B. *Sua Sponte* Mistrial

¶ 40 Defendant claims that the trial court should have *sua sponte* declared a mistrial when M.K.'s testimony deviated from the way it was represented at the hearing on the motion *in limine*. We have already established that the court's decision to admit M.K.'s testimony in whole was not error. Therefore, there was no basis for the court to declare a mistrial.

¶ 41 C. Ineffective Assistance

¶ 42 Defendant claims that his trial counsel provided ineffective assistance of counsel by failing to object when M.K.'s testimony at trial deviated from the description of her testimony presented prior to trial.

¶ 43 To succeed upon a claim of ineffective assistance of counsel, the defendant must establish: (1) that his attorney's performance was objectively unreasonable under prevailing professional norms; and (2) a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 44 Defendant's claim fails because he cannot establish that counsel's performance was unreasonable. Although counsel failed to object to M.K.'s additional testimony, the court addressed the testimony on its own accord and decided that the testimony was admissible. We

upheld that decision in Part A of this order. Therefore, there was no error for counsel to object to, and counsel's performance was reasonable.

¶ 45 CONCLUSION

¶ 46 The judgment of the circuit court of Will County is affirmed.

¶ 47 Affirmed.

¶ 48 JUSTICE McDADE, dissenting.

¶ 49 The majority has approved the admission of the other-crimes evidence tendered by the State in its prosecution of defendant, Demond Barnes. For the reasons that follow, I would reverse the trial court's judgment and I, therefore, respectfully dissent from the majority's contrary decision.

¶ 50 At the outset, it should be emphasized that none of defendant's alleged conduct with the three victims can be justified or condoned, and that is not the purpose of this dissent. The sole issues presented on appeal are procedural. They are (1) whether any or all of the other-crimes evidence was improperly admitted against defendant at trial and (2) whether the trial court, the prosecutor and/or defense counsel erred in seeking, allowing or acquiescing in the admission of the challenged evidence.

¶ 51 Factually, I cannot characterize the actions of the State relative to the other-crimes evidence as benignly as did the trial court and as does the majority. In tendering the other-crimes evidence via its motion *in limine*, the State summarized the similarities it saw between the sexual conduct in the instant case and that alleged by M.K. to have taken place six years earlier. In doing so, it failed to fully advise the court of several "details" to which M.K. subsequently testified at trial. On the basis of the State's incomplete representations, the trial court decided the

evidence of defendant's alleged assault of M.K. could be admitted to show propensity to commit sexual crimes.

¶ 52 When M.K. actually testified to two sexual assaults by defendant, she added allegations that had been omitted from the State's summary to the court, including a claim that defendant had "peed over everything" and that "everything [she] had was ruined." M.K. also testified she was abducted at knife point and taken to the apartment and that during the course of the assault, defendant forced her to ingest rat poison. These claims had also not been reported to the trial judge by the State. It seems clear from M.K.'s testimony that the urinating occurred a couple of days after the first assault and before defendant brought M.K. back to the apartment they had shared for the second alleged assault. It was not part of either assault.

¶ 53 There are multiple problems with the admission of this testimony. First, the supreme court in *People v. Donoho*, 204 Ill. 2d 159 (2003), stated that before other-crimes evidence can be admitted, the trial court must assess and balance the probative value and the prejudicial effect of the other-crimes evidence. *Donoho*, 204 Ill. 2d at 183. In this case the court was precluded from doing that balancing *before* admission of the evidence by the State's failure to put all of M.K.'s evidence before it during the hearing on the motion *in limine*. The first time the court became aware of the undisclosed claims was during M.K.'s testimony in the presence of the jury.

¶ 54 The court's reaction after hearing that testimony was contradictory. The judge excused the jury, observed – apparently to counsel – that M.K. had testified to three matters – which he listed – that were undisclosed to him, that the testimony about urination could dehumanize defendant to the jury and that that testimony was not relevant to defendant's propensity to commit sex crimes. Then, having acknowledged, albeit not in the exact terms, that the testimony

was prejudicial and lacked probative value, the court stated that if the full testimony had been disclosed, it still would have let it in, although it would have been a “close call.”

¶ 55 The court then concluded that the State would not have knowingly solicited the undisclosed information from M.K., thereby absolving the prosecution of any wrongdoing. Yet there *was* that inexplicable question posed to M.K. by the prosecutor—“Do you recall how the apartment looked at the time?” It is difficult to discern, in context, a purpose for that question except to elicit the urination testimony.

¶ 56 Finally the court forbade the State from making any mention of the surprise testimony during closing argument or suffer a declaration of mistrial.

¶ 57 None of this sounds to me like the trial judge actually believed the evidence had been or could be properly admitted. Rather, it sounds like the court had been sandbagged and was trying to salvage the trial.

¶ 58 There are other problems with the other-crimes evidence which are troubling. First, beyond the trial court's concern that the urination evidence could dehumanize the defendant, it shared no similarity to the presently charged crimes. M.K.'s testimony about the urination was, therefore, irrelevant to establishing defendant's propensity to commit the currently charged sex crimes. Introducing such evidence created a serious risk of prejudice.

¶ 59 Second, six years had passed between the assaults alleged by M.K. and those described by M.R. and R.B. The fact that courts have found, on a case-specific analysis, time periods of 12-15 and 20 years not to be too long between crimes does not make a 6-year period automatically acceptable. Indeed the majority cites *Donoho* for the fact that admissibility of other crimes evidence "should not, and indeed cannot, be controlled solely by the number of years that have

elapsed between the prior offense and the crime charged." *Donoho*, 204 Ill. 2d at 183. And yet that is precisely what the majority has done. It finds, without any analysis, that 6 years is a substantial period of time, but it is less than *Donoho's* 12-15 years and the 20+ years validated in *People v. Davis*, 260 Ill. App. 3d 176 (1994), and is not "so long as to make the other crimes inadmissible."

¶ 60 Third, while the plain language of section 115-7.3 makes it clear that defendant need not have been charged with or convicted of the other crimes for the evidence to be admissible, it is nonetheless significant that defendant was charged and actively prosecuted in the instant case, but was never even charged with M.K.'s assaults despite her having reported the assaults to the police and a police report having been generated. Apparently neither she nor the police found the assault worth pursuing.

¶ 61 Finally, I believe the State, as prosecutor and as officer of the court, had an ethical obligation to proactively address M.K.'s additional testimony. The testimony presented by M.K. at trial deviated significantly from the State's representation of her testimony in its motion *in limine*. Either the State was not expecting M.K. to testify the way she did, or the State actively misrepresented the evidence in the hearing. Section 115-7.3 requires the State to "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 2008). The State failed to inform the court and defendant about the full content of M.K.'s testimony and, as mentioned earlier, foreclosed the court from assessing the propriety of admitting it. The State should, of its own volition, have corrected its error by either moving to exclude the undisclosed testimony of M.K. or moving to

declare a mistrial.

¶ 62 I would further find that defense counsel should have sought a mistrial and that the failure to do so was deficient performance. In the absence of such a request by either the State or defense counsel, the trial court, faced with undisclosed evidence that it described as dehumanizing and irrelevant and that it had been unable to evaluate before deciding on its admissibility, should, in my opinion, have declared a mistrial *sua sponte*. I, therefore, respectfully dissent from the decision of the majority affirming the conviction.