

No. 1-11-3005

**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).

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**IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT**

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 14631
	)	
TOMMIE NAYLOR,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HARRIS delivered the judgment of the court  
Justices Pierce and Liu concurred in the judgment.

**ORDER**

¶ 1 *Held:* Naylor's convictions for aggravated criminal sexual assault and aggravated kidnapping are affirmed where the evidence proved him guilty beyond a reasonable doubt, and the trial court properly admitted other crimes evidence to show Naylor's propensity to commit a sex crime. We order the mittimus corrected to show the correct sentence of 10 years' imprisonment for the aggravated kidnapping conviction, and a pre-sentence credit of 784 days.

¶ 2 Defendant, Tommie Naylor, appeals his conviction after a jury trial of aggravated criminal sexual assault and aggravated kidnapping, and his sentences of 30 years' and 10 years'

imprisonment, to be served consecutively. On appeal, Naylor contends that this court should reverse his conviction for aggravated criminal sexual assault because (1) the State failed to prove beyond a reasonable doubt that he threatened to use a dangerous weapon during the assault; and (2) the trial court improperly admitted other crimes evidence for the purpose of showing Naylor's propensity to commit sexual assaults. Naylor also requests that this court amend his mittimus to reflect the actual sentence the trial court ordered and the correct number of days served in presentence custody. For the following reasons, we affirm Naylor's convictions and sentences, and order his mittimus amended to reflect the proper sentence and days served.

¶ 3 JURISDICTION

¶ 4 The trial court sentenced Naylor on August 24, 2011. He filed a notice of appeal on September 16, 2011. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 603 (eff. Oct. 1, 2010); R. 606 (eff. Mar. 20, 2009).

¶ 5 BACKGROUND

¶ 6 Naylor was charged with four counts of aggravated criminal sexual assault, four counts of aggravated kidnapping, criminal sexual assault, two counts of kidnapping, and unlawful restraint of C.B. The State filed a motion to admit other crimes evidence, specifically the sexual assaults of T.B., S.W., S.D., and T.H. After argument by the parties, the trial court allowed the other crimes evidence. The trial court acknowledged that the State would use the evidence to show propensity to commit sexual assaults, which is allowed under section 115-7.3 of the Code of Criminal Procedure of 1963 (West 2008) (Code). Pursuant to the statute's provisions, the trial

court balanced the evidence's probative value against the prejudicial effect. It noted that the other cases of sexual assault occurred within a five-year period and involved young girls ages 14 to 16 years old. All victims were pulled from the street and assaulted in the back seat of a vehicle. In each incident, Naylor allegedly used force or threat of force, and a weapon or cutting instrument was involved. The trial court found that the probative value of the evidence far outweighed its prejudicial effect because it tended to show C.B.'s assault was "not an isolated incident" and Naylor has a propensity to commit sex crimes. The trial court stated that it would instruct the jury that it is allowing the other crimes evidence only for the purpose of showing Naylor's propensity to commit sexual assaults.

¶ 7 The jury trial against Naylor proceeded on three counts of aggravated criminal sexual assault and two counts of aggravated kidnapping. The evidence presented at trial showed that on November 12, 2008, C.B., who was 15 years old at the time, left her home and headed to a gas station about a block away. As she crossed an alley, she noticed a parked black SUV affixed with a logo from The Riders motorcycle club. A man called to her, saying "Hey you," "Hey you," three times. C.B. ignored the man but he grabbed her by her left arm. He had his left arm folded behind his back as he yanked C.B. toward his SUV. He told C.B., "Don't say nothing, don't scream or I'll cut you." C.B. froze because she believed the man would cut her if she tried to escape. C.B. looked at the man and saw that he was around 30-40 years old, wore his hair in braids, and had pock marks or acne scars on his face. C.B. identified Naylor as the man who grabbed her.

¶ 8 Naylor opened the rear passenger door and forced C.B. into the back seat. He threw the object he had been holding onto the front seat, got into the driver's seat, and then drove down an alley into an alcove where the vehicle could not be seen from the street. C.B. did not try to

escape because she was afraid he would hurt her "with whatever he had behind his back." Although C.B. never saw the object in Naylor's hand, she assumed it was a knife or "something sharp" because he had threatened to cut her. As Naylor drove, C.B. noticed that he wore a light blue baseball hat backward on his head, and she could see the logo of the United States Postal Service. He was also wearing a Postal Service short sleeved button-down shirt.

¶ 9 After Naylor parked the car, he jumped into the back seat and told C.B. to remove her belt. When she refused, Naylor again ordered her to remove her belt and then reached toward the front seat where he had thrown the object that he had earlier held behind his back. He told C.B. that he did not need to rape her and that he had a wife at home. C.B. was crying and holding her legs against her body to prevent Naylor from touching her. When C.B. did not remove her belt, Naylor, who was six-foot-one-inch tall and weighed 250 pounds, put his forearm on C.B.'s chest and pulled her pants down to her thigh. He unbuttoned his pants and inserted his penis into her vagina. C.B. continued to struggle and after three or four minutes, C.B. got up and got into the driver's seat. He drove back to the area where he had first grabbed C.B. and told her to get out of the vehicle. C.B. grabbed her belongings, including her belt and keys, and exited the SUV. She did not immediately run home because she was afraid Naylor would discover where she lived. After he left, C.B. ran home and started screaming. She saw her mother on the second floor and screamed that she had been raped. C.B. was holding onto her belt and keys, and her pants were unfastened. Her mother called 911 and shortly thereafter the police and an ambulance arrived.

¶ 10 C.B. was transported to Jackson Park Hospital where Laytonia Goodman, a registered nurse, cared for her. Goodman aided Dr. Napolez in conducting an examination of C.B. They collected, among other items, blood samples and took pelvic swabs. Goodman closed, sealed,

and signed a sexual assault kit and turned it over to the police where it was inventoried. The sealed kit was then sent to the Illinois State Police Laboratory in Chicago. Forensic scientist Jennifer Belna examined the swabs and performed tests on the specimens. She concluded, within a reasonable degree of scientific certainty, that the swabs tested positive for the presence of semen. Forensic scientist Pauline Gordon examined the DNA found in the semen and identified a male profile. She could not confirm the identity of the donor, however, because she had no standard with which to compare at the time. However, the profile was connected with another sexual assault investigation.

¶ 11 Detective Clifford Martin investigated C.B.'s case and learned that the DNA analysis associated with C.B.'s case was connected to the unknown male profile in two sexual assault cases in Chicago. One of those cases involved T.B. who was not related to C.B. Detective Martin reviewed the police report in T.B.'s case and discovered similarities with C.B.'s case, including geographic vicinity of the assaults, the perpetrator's hair in braids, the age of the victims, the acts involved, and the statements of the perpetrator. T.B. also provided some digits of the license plate of the vehicle used in her assault, and in searching the Secretary of State's database Detective Martin found a black SUV registered to someone who lived five blocks from where the incidents occurred. A further search revealed that the person owning the SUV worked for the United States Postal Service in Forest Park, Illinois, and also had a motorcycle registered to him.

¶ 12 From his information, Detective Martin prepared an array of photographs to show to C.B. and T.B. On June 30, 2009, C.B. and T.B. were shown the photographs separately and each identified Naylor as the offender. Naylor was arrested at his place of employment and at the

time of his arrest, Naylor wore his hair in braids. After separately viewing a physical lineup, both C.B. and T.B. identified Naylor as the offender.

¶ 13 At the police station, evidence technician Pamela Schaffrath collected and sealed a buccal swab standard taken from Naylor. Forensic scientist Meredith Misker received the standard and compared it to the male profile from the semen found on C.B. Misker concluded that Naylor could not be excluded as a donor of the profile and that the chances of another person with the same profile as that on the swabs collected from C.B. would be 27,000 times 6.9 billion.

¶ 14 The State called two witnesses to present other crimes evidence. Before each witness testified, the trial court issued a limiting instruction to the jury. T.B. testified that on May 10, 2006, she was 16 years old. She was waiting for a bus to go to Evergreen Plaza Mall around 4 p.m. when she noticed a man in a four-door black car calling out to her and honking the horn. She identified Naylor as the man in the black car. T.B. ignored him, but he came up to her, grabbed her forearm and told her to get in or he would kill her. Naylor shoved T.B. into the front seat and threatened to kill her while holding a screwdriver-type tool in his hand. As he drove away, T.B. cried and tried to escape by climbing to the back seat. Naylor pulled into an alley and told T.B. that he was not going to rape her because he was "better than that."

¶ 15 Naylor asked T.B. to help him make his girlfriend jealous by making sexual noises in the background while he was on the phone with her. T.B. refused and then Naylor ordered her to play with herself. She again refused, but when Naylor said he was going to kill her she complied. He told T.B. to pull her pants down and play with herself, and when she refused he said, "[d]o what I ask or I will kill you." She complied and when Naylor came to the back seat he told T.B. to "tell him to fuck me." Although she at first refused, T.B. did as Naylor ordered because he threatened to kill her.

¶ 16 After he forced himself on her, Naylor told T.B. not to tell the police what happened because he had recorded everything and she had told him to "fuck her." T.B. quickly exited the car and when she was some distance from Naylor she called for help and nearby construction workers called the police. T.B. was transported to the hospital where a sexual assault kit was collected. T.B. gave police a description of the car and 6 digits of the license plate number. T.B. also described the perpetrator as having braided hair and wearing a janitor-type uniform.

¶ 17 Next, the State called S.W. as a witness. S.W. testified that on December 10, 2003, she was 14 years old. She was walking to a friend's house when a car pulled up behind her. A man grabbed her and pulled her into the back seat of his car. The man drove and turned into an alley. S.W. tried to escape but could not open the door. After parking, the man climbed into the back seat and laid on top of S.W. She could see his face at this point and noticed that his hair was in braids. S.W. identified Naylor in court as the man who grabbed her. Naylor took off S.W.'s shirt and touched her breasts. He then unzipped his pants and placed his penis between her breasts. S.W. screamed for him to stop. Naylor reached into the front seat and grabbed a knife which he held to S.W.'s throat. He told her, "Bitch, shut up. I'll kill you if you don't be quiet, stop yelling." Naylor pulled down S.W.'s pants, ripped her panties, and forced himself into her until he ejaculated. Afterwards, Naylor pushed S.W. out of the car and threw \$50 at her. S.W. ran to her aunt's house where her aunt called 911. S.W. was transported to the hospital where a sexual assault kit was collected. She also gave a statement to police later that day.

¶ 18 After presentation of S.W.'s testimony, the State informed the trial court that it would not present the remaining other crimes witnesses. Out of the jury's presence, Naylor confirmed to the trial court that he did not wish to testify. Naylor then moved for a directed verdict which

the trial court denied. The defense rested without presenting evidence. The jury found Naylor guilty of three counts of aggravated criminal sexual assault and two counts of aggravated kidnapping.

¶ 19 Naylor filed a motion for a new trial. The trial court denied the motion. It noted that it had balanced the factors in section 115-7.3 of the Code and affirmed that allowing the other crimes evidence in this case was proper. The trial court also found the evidence against Naylor overwhelming. At sentencing, the trial court merged Naylor's aggravated criminal sexual assault convictions into count one, which charged Naylor with aggravated criminal sexual assault with a dangerous weapon under section 12-14(a)(1) of the Code. 720 ILCS 5/12-14(a)(1) (West 2008). The trial court noted that pursuant to section 12-14(d)(1) it was required to impose an additional 10-year term to the sentence. The trial court also merged the two counts of aggravated kidnapping. It sentenced Naylor to 30 years' imprisonment for aggravated criminal sexual assault, and 15 years' imprisonment for aggravated kidnapping, to be served consecutively. The trial court ordered the sentence for aggravated criminal sexual assault be served at 85% and the sentence for aggravated kidnapping to be served at 50%. It estimated that the Naylor would remain in custody for a total of 33 years.

¶ 20 Naylor filed a motion to reconsider sentence and at the hearing the State acknowledged that she erroneously had informed the trial court that Naylor would received day-to-day credit against his aggravated kidnapping sentence when, in fact, he must serve 85% of the sentence pursuant to the statute. Since the trial court based its sentence on the actual time Naylor must serve, defense counsel argued that the court should reconfigure the aggregate sentence. The trial court then reduced the sentence for aggravated kidnapping from 15 years to 10 years in

order to approximate the actual number of years served under the previous sentence. Naylor filed this timely appeal.

¶ 21

ANALYSIS

¶ 22 Naylor first contends that the State failed to prove beyond a reasonable doubt that he threatened to use a dangerous weapon during the sexual assault against C.B. When presented with a challenge to the sufficiency of the evidence, this court determines whether any rational trier of fact, when viewing the evidence in the light most favorable to the prosecution, could have found the elements of the crime beyond a reasonable doubt. *People v. De Filippo*, 235 Ill. 2d 377, 384-385 (2009). It is not the function of a reviewing court to retry the defendant; rather, it is the trier of fact who assesses the credibility of witnesses, determines the appropriate weight to give testimony, and resolves conflicts or inconsistencies in the evidence. *People v. Evans*, 209 Ill. 2d 194, 209-11 (2004). This court will not reverse a conviction unless the evidence proves so unreasonable, improbable, or unsatisfactory so as to raise a reasonable doubt of defendant's guilt. *Id.* at 209.

¶ 23 Naylor contends that his conviction and sentence cannot stand because C.B. never saw the object he held in his hand, could not testify as to the nature of the object in his hand, and therefore the State did not present any evidence that "Naylor did, in fact, use a dangerous weapon." Naylor argues that section 12-14(a)(1) of the Code requires proof that he actually used a dangerous weapon. We note that Naylor does not argue that the State failed to prove the elements of criminal sexual assault, only that it failed to prove the statutory aggravating factor of his use of a dangerous weapon.

¶ 24 In construing a statute, this court's primary objective is to ascertain and give effect to legislative intent. *People v. Robinson*, 172 Ill. 2d 452, 457 (1996). The most reliable indication

of that intent is the plain meaning of the statute's terms. *Id.* If the statutory language is clear and unambiguous, we must apply its terms without using further aids of statutory construction. *Id.*

Statutory construction is a question of law which we review *de novo*. *Id.*

¶ 25 Section 12-14(a)(1) provides:

"(a) The accused commits aggravated criminal sexual assault if he or she commits criminal sexual assault and \*\*\* :

(1) the accused displayed, threatened to use, or used a dangerous weapon, other than a firearm, or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon;" 720 ILCS 5/12-14(a)(1) (West 2008).

¶ 26 The second district appellate court addressed the issue of whether section 12-14(a)(1) requires that the defendant actually possess a dangerous weapon during the offense in *People v. Daniel*, 311 Ill. App. 3d 276 (2000). In *Daniel*, the victim M.M. testified that as she waited in the drive-through lane of a McDonald's, defendant approached her and asked if she could give him a ride. She initially refused, then relented because he told her he needed to get home to see his young son. After stopping at the location defendant indicated, defendant thanked her and began to exit the car. Suddenly, he reached into the backseat and grabbed her backpack, telling her he was going to "rip [her] off." *Id.* at 278. Defendant also reached toward his feet and told M.M. that he had a pistol and needed money to buy cocaine. M.M. told defendant she had no money but could get some from her boyfriend who worked at a nearby gas station. Defendant then ordered M.M. to take off her pants and underwear. When she refused and tried to open the car door, defendant told her he would shoot her in the back if she tried to run. M.M. complied with his demand because he told her he had a gun and she was afraid. Whenever M.M. resisted defendant,

he made a motion toward where he indicated he had the gun. After the assault, defendant told M.M. that he was sorry he had to rape her but that she "better not call the police" because he knows where her boyfriend works and will kill him. M.M. never saw a weapon during the encounter. *Id.* at 278-79.

¶ 27 On appeal, defendant complained that his conviction for aggravated criminal sexual assault pursuant to section 12-14(a)(1) cannot stand because neither the victim nor any other witnesses actually saw him in possession of a dangerous weapon. *Id.* at 283. The *Daniel* court reasoned that the clear language of section 12-14(a)(1) does not indicate that a weapon must be displayed during the threat, or that a weapon need be recovered. Rather, the threat to use a dangerous weapon "simply means that an accused need only threaten to use a dangerous weapon during the commission of the offense, nothing more, nothing less." *Id.* at 284. Defendant indicated that he had a pistol, which is a dangerous weapon, and threatened numerous times to use it against M.M. M.M. was afraid and therefore complied with his demands. The *Daniel* court held "that defendant's threat to use a pistol, even in the absence of a pistol being observed, displayed, produced, or later recovered, is sufficient to sustain his conviction for aggravated criminal sexual assault." *Id.* at 285.

¶ 28 The facts in the case before us prove more compelling than the *Daniel* case in that C.B. was aware of an actual object that Naylor held behind his back and then threw onto the front seat. Naylor argues, however, that section 12-14(a)(1) requires that the object is actually a dangerous weapon. The indictment referred to a "cutting instrument" but that does not mean the State must prove Naylor had a knife or other inherently sharp and dangerous weapon. An object may be considered a dangerous weapon if it is used "in a manner dangerous to the well-being of the individual threatened." *People v. Charles*, 217 Ill. App. 3d 509, 512 (1991). As our supreme

court reasoned, "[a]n object not deadly per se may still be a dangerous weapon because of its capacity to inflict serious harm even though not designed for that purpose." *People v. Skelton*, 83 Ill. 2d 58, 65 (1980). Generally, whether an object is a dangerous weapon is a question of fact for the fact finder. *Id.* at 66.

¶ 29 In our case, Naylor had his left arm folded behind his back as he yanked C.B. toward his SUV. He told C.B., "Don't say nothing, don't scream or I'll cut you." C.B. froze because she believed the man would cut her if she tried to escape. After Naylor forced C.B. into the back seat, he threw the object he had been holding behind his back onto the front seat and drove down an alley into an alcove. C.B. did not try to escape because she was afraid he would hurt her "with whatever he had behind his back." Although C.B. never saw the object in Naylor's hand, she assumed it was a knife or "something sharp" because he had threatened to cut her. Naylor jumped into the back seat and told C.B. to remove her belt. When she refused, Naylor again ordered her to remove her belt and then reached toward the front seat where he had thrown the object that he had earlier held behind his back. C.B. complied with Naylor's request because she was frightened. Given these facts, the jury could reasonably believe that the object Naylor held in his hand and then threw onto the front seat was a dangerous weapon. We find the evidence is sufficient to sustain Naylor's conviction for aggravated criminal sexual assault.

¶ 30 Naylor next contends that the trial court erred in admitting evidence of his other crimes to demonstrate his propensity to commit aggravated criminal sexual assault. He argues that the prejudicial impact of the evidence far outweighed its probative value, and the harmful effect was magnified when the trial court failed to limit the scope of the testimony. A reviewing court will not overturn the trial court's decision to admit other crimes evidence absent an abuse of discretion. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). An abuse of discretion occurs if

the trial court's determination is unreasonable, arbitrary, or fanciful, and no reasonable person would adopt the court's view. *Id.*

¶ 31 Under common law, evidence offered only to show a defendant's propensity to commit the charged crime is generally inadmissible. *People v. Manning*, 182 Ill. 2d 193, 213 (1998). The State, however, filed a motion to admit the other crimes evidence pursuant to section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2012)). As our supreme court noted in *Donoho*, the legislature passed this statutory provision to address the need to protect society from sex offenders with a propensity to repeat their crimes. *Donoho*, 204 Ill. 2d at 174. Therefore, through this provision "the legislature chose to change the common law rule in this narrow class of crimes" and allow the admission of other crimes evidence to show a defendant's propensity to commit sex offenses. *Id.* at 174-75. Before admitting such evidence, the trial court must weigh its probative value against its prejudicial effect and may consider (1) proximity in time to the charged offense; (2) factual similarity to the charged offense; or (3) other relevant facts or circumstances. See 725 ILCS 5/115-7.3 (West 2012).

¶ 32 The State presented T.B. and S.W. to testify about Naylor's assaults against them. The trial court expressly stated that it would balance the evidence's probative value against the prejudicial effect as required by section 115-7.3. It noted that the other cases of sexual assault occurred within five years of C.B.'s assault, and involved young girls ages 14 to 16 years old. All victims were pulled from the street and assaulted in the back seat of a vehicle. In each incident, Naylor allegedly used force or threat of force, and a weapon or cutting instrument was present. The trial court found that the probative value of the evidence far outweighed its prejudicial effect because it tended to show that Naylor has a propensity to commit sex crimes. The trial court also gave a limiting instruction to the jury before each witness testified. The trial

court conducted a meaningful analysis of the statutory factors. We find that its determination was not unreasonable, arbitrary, or fanciful.

¶ 33 Naylor contends, however, that even if the trial court properly allowed such evidence, it erred in failing to limit the scope of the testimony. As a result, the testimony resulted in a mini-trial on the other offenses and confused the jury about the issues in his case. As support, Naylor cites *People v. Cardamone*, 381 Ill. App. 3d 462 (2008) and *People v. Nunley*, 271 Ill. App. 3d 427 (1995). In *Cardamone*, the trial court allowed evidence involving 26 charged acts as well as testimony from seven witnesses regarding 158 to 257 uncharged acts the defendant allegedly committed. *Cardamone*, 381 Ill. App. 3d at 491. In *Nunley*, the trial court allowed details about the other crime that had no connection with the crime charged against the defendant, and those details also proved far more grotesque. *Nunley*, 271 Ill. App. 3d at 432. In the case at bar, the State presented only two witnesses although the trial court gave permission for four witnesses to testify. Each described an encounter with Naylor that was factually similar to C.B.'s case. Their combined testimony consisted of less than 80 pages of a record containing 330 pages of proceedings. We find our case distinguishable from *Cardomone* and *Nunley*.

¶ 34 Furthermore, given C.B.'s testimony, her positive identification of Naylor, and the DNA evidence linking Naylor to the assault, the evidence against Naylor was overwhelming. If any error occurred in admitting the other crimes testimony here, it was harmless error. Also, before each witness testified the trial court gave a limiting instruction to the jury. We presume that the jury will follow the instructions of the court. *People v. Taylor*, 166 Ill. 2d 414, 438 (1995). We find that the trial court did not abuse its discretion in admitting the testimony of T.B. and S.W.

¶ 35 Naylor's final contention is that this court should order the mittimus corrected to reflect his actual sentence and the correct number of days served in pre-sentence custody. The State agrees with Naylor, and acknowledges that the mittimus should be corrected to reflect the trial court's sentence of 10 years' imprisonment for aggravated kidnapping and 30 years' imprisonment for aggravated criminal sexual assault, to be served consecutively. Naylor must serve 85% of his sentences. Naylor also requests that the mittimus be corrected to reflect a pre-sentence credit of 784 days, since he was arrested on July 1, 2009, and sentenced on August 24, 2011. He remained in custody throughout the proceedings. The State does not challenge Naylor's request. Therefore, we order the mittimus corrected to reflect the sentence for aggravated kidnapping as 10 years' imprisonment instead of 15 years, and to reflect a pre-sentence credit of 784 days.

¶ 36 For the foregoing reasons, we direct the clerk of the circuit court to amend Naylor's mittimus as indicated, and we affirm the judgment of the circuit court in all other respects.

¶ 37 Affirmed; mittimus corrected.