2015 IL App (4th) 121128-U

NO. 4-12-1128

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 16, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
EDDIE E. SMITH,	)	No. 11CF621
Defendant-Appellant.	)	
	)	Honorable
	)	Lisa Holder White,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion in allowing the admission of other-crimes evidence when the prejudicial effect outweighed the probative value. The State's introduction of the other-crimes evidence was not necessary to prove defendant's identity in the commission of the crime.

¶ 2 After a jury trial, defendant, Eddie E. Smith, was convicted of unlawful delivery of a controlled substance within 1,000 feet of a church. 720 ILCS 570/407(b)(2) (West 2008). The trial court sentenced him to 12 years in prison. Defendant appeals on four grounds. First, he argues the trial court erred by allowing the State to present prejudicial other-crimes evidence when such evidence was unnecessary to prove defendant's identity. We agree with this argument, and we find the admission of the evidence seriously prejudiced defendant's right to a fair trial. The remedy for a prejudicial error occurring during a jury trial is a new trial.

¶ 3 Defendant's second and third arguments challenge the sufficiency of the evidence. His second argument relates to the State's lack of proof that the building on the corner near the residence where the alleged drug transaction took place was operating at the time as a church. His third argument challenges the sufficiency of the evidence as it relates to the elements of the delivery-of-a-controlled-substance charge. Defendant's fourth argument challenges the evidence presented at sentencing. Because we are ordering a new trial on the basis of prejudicial error relating to the admission of other-crimes evidence, we do not reach the second, third, or fourth grounds of appeal. We reverse the trial court's judgment and remand for a new trial.

¶ 4 I. BACKGROUND

¶ 5 After being arrested in June 2009, Teresa William-Smith agreed to act as a police informant. At that time, Decatur police detective Jeffrey Hockaday was involved in a narcotics investigation of Juan Britton and his associates. Defendant was included as one of Britton's associates. Hockaday's investigation centered on the 1100 to 1200 block of East Leafland Avenue in Decatur. Carolyn Smith, defendant's mother, lived at 1234 Leafland Avenue. William-Smith told Hockaday she had known Carolyn Smith for more than six years and therefore was familiar with defendant as well.

¶ 6 On August 12, 2009, Hockaday and William-Smith met for the purpose of arranging a drug buy. William-Smith called defendant and requested to purchase a "yard" of crack cocaine. The telephone call was recorded. At trial, Hockaday identified the two voices on the recording as William-Smith's and defendant's. Before William-Smith left to meet defendant, Hockaday searched her person and her vehicle for contraband. None was found. However, Hockaday testified he did not pat down William-Smith's private areas because no female officer was present. Hockaday gave her a marked $100 bill. William-Smith's vehicle was equipped

with a camera that recorded the transaction. Hockaday identified defendant in the video recording. When William-Smith returned to Hockaday, she gave him six bags of crack cocaine. He testified he again searched her person and vehicle, though in his police report, he did not indicate he had searched William-Smith after the transaction. Hockaday did not recover the money or arrest defendant that day.

¶ 7 Hockaday testified there was a church in the area. He used a "traffic wheel" to measure the distance between the residence where William-Smith purchased the drugs at 1234 Leafland Avenue and the church building at 1222 East Grand Avenue. Hockaday said he "zeroed and calibrated" the wheel before each use. He measured the distance as 400 feet. He did not take any photographs of the church building and he did not recall seeing a sign with worship times indicated. Hockaday said he saw a large sign in front of the church "naming whatever the name of the church is." He said he "took it for what it was."

¶ 8 Before summarizing the other trial testimony, we must mention the State's motion *in limine*, wherein the State sought permission to admit other-crimes evidence against defendant. According to the motion, defendant had sold crack cocaine to William-Smith at Carolyn's residence approximately 10-15 times in the six months preceding the July 2012 trial. The State asserted the evidence of these prior purchases was relevant to prove identity, knowledge, intent, and design, and it was necessary to explain to the jury the relationship between William-Smith and defendant. The prosecutor argued if the State presented the evidence of this transaction to the jury as if to imply it occurred "out of the blue[, it] would be disingenuous." Also, because the identity of the person selling drugs to William-Smith on the video was at issue, evidence she had previously purchased drugs from defendant would bolster her identification of him as the

seller. Defendant argued against the admission of these other alleged transactions as more prejudicial than probative.

¶ 9 At the hearing on the State's motion *in limine*, the Honorable Timothy J. Steadman allowed evidence of prior transactions only on the issue of identity, finding the prejudicial effect of allowing such evidence did not substantially outweigh the probative value. However, the Honorable Lisa Holder White presided over defendant's jury trial. On the first day of trial, defendant again objected to the introduction of evidence of the alleged prior drug transactions between William-Smith and defendant. Judge Holder White questioned whether the State would be able to introduce specific information related to the alleged prior transactions, namely the date of each. The State informed the court the dates of the purchases had not been documented, and, in the prosecutor's opinion, any further detailed information would "tip the balance" on the prejudice-probative scale. Judge Holder White was concerned defendant would be unable to rebut the information if details were not provided. She directed the State to obtain specific dates. The State was able to obtain only one date: September 20, 2009. Nevertheless, the State argued, it should be able to introduce testimony that William-Smith purchased drugs from defendant on other occasions because "you don't just go out and show up at somebody's door to buy cocaine. You have to have some kind of history usually with them in order to have that kind of relationship." The court noted, without dates, the testimony is unsubstantiated. The court asked for an offer of proof.

¶ 10 William-Smith testified as follows:

> "Q. [Assistant State's Attorney:] Prior to this date [(August 12, 2009)], were you familiar with [defendant]?
>
> A. Yes.

Q. And how is that you were familiar with him?

A. Well, I have known him for a while, and I just have purchased things from him before.

Q. Did you know any other members of his family?

A. Yes.

Q. Who was it is that you knew?

A. His mom, his brother.

Q. And his mom is whom?

A. Carolyn.

Q. And had you known her for some time?

A. Yes, I had.

* * *

Q. And how long have you known his brother?

A. I known him—I am not exactly [sure] for how long, but it's been awhile.

Q. On this date, August 12th, when you went out to make the purchase of cocaine from [defendant], had you previously gone to that location to purchase cocaine from him?

A. Yes.

Q. And with regards to the—had you gone out to that particular location, that 1234 East Leafland on more than one occasion?

A. Yes.

Q. Do you recall the time frame between the August 12th date and going back how frequent it was or how recent it was to that date that you had been out there to purchase cocaine?

A. Not exactly remember how many times I have been there, but it was a few times at that same location.

THE COURT: I am sorry. Ma'am, she is asking you how much before the August 12th date had you been out there; what was the most recent time prior to August 12th that you had been out there to purchase.

A. I am not sure. I couldn't tell you the date or anything or time.

Q. Was it within a matter of weeks or was it a matter of a month?

A. A matter of weeks

Q. Okay."

¶ 11 On cross-examination, William-Smith testified:

"Q. [Defense attorney:] You are friends with [defendant's] mom?

A. Yes, I knew her.

Q. And how long had you been friends with her or known her?

A. For some years. I can't say exactly how many years.

Q. Give us an estimate.

A. Over six years.

Q. And during that six-year period, you had, I am assuming, that you had seen [defendant] coming and going?

A. Yes.

Q. So you knew what he looked like?

A. Yes.

Q. And his brother, you indicated you had seen him as well?

A. Yes.

Q. You knew what these guys looked like?

A. Yes.

Q. And this was a long time before buying any drugs, right?

A. This is a long time for what?

Q. That you knew what these guys looked like before you bought any drugs from them?

A. Yes.

Q. So, essentially, you have been a friend of the family for roughly six years?

A. Yes.

Q. And you knew what [defendant] looked like based on that?

A. Yes.

Q. And you are not sure dates or times that you had actually purchased any cocaine from [defendant]?

A. No."

¶ 12 The prosecutor argued the "prior transactions, according to the cases, do not have to be proven beyond a reasonable doubt. It is something more than mere [suspicion] and something less than reasonable doubt." She asserted the transactions would not be admitted to show propensity, only identity. Defendant's counsel argued, based upon William-Smith's testimony, the best way to establish identity is "not from 10 to 15 prior drug deals, it is from being a friend of the family and knowing [defendant]." He argued allowing the evidence of prior "drug deals" was going "to give the jury an opportunity to look at it as a propensity thing rather than this question of identity that's really not going to be a question from what I just heard on the stand."

¶ 13 Judge Holder White found the testimony "relevant and that the probative value is not outweighed by the prejudicial effect." The court limited the proffered testimony for identification purposes only.

¶ 14 The jury trial continued with testimony from William-Smith. Prior to her testimony, the trial court instructed the jury as follows:

"Ladies and gentlemen of the jury, before we hear from this witness, I want to give you a special instruction regarding this witness's testimony and that instruction is as follows:

Evidence will be received that the defendant has been involved in offenses other than charged in the information. This evidence will be received on the issue of the defendant's

identification and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in those offenses; and, if so, what weight should be given to this evidence on the issue of identification."

¶ 15 William-Smith testified she had known Carolyn Smith and her family for more than six years. She recalled she had been arrested in June 2009 for possession of a controlled substance. She agreed to work as an informant for the Decatur police department. The following exchange occurred:

"Q. [Assistant State's Attorney:] And at the time that you met with Detective Hockaday to place this call [to defendant], had you had prior dealings with the defendant?

A. Yes.

Q. And when you say yes, had you made prior purchases of cocaine from [defendant]?

A. Yes.

Q. More than one?

A. Yes.

Q. And do you recall the time frame in relation to when you made this phone call on August 12th, do you recall how recent it was that you had last made a purchase from him?

A. Maybe a couple weeks in between."

¶ 16 William-Smith testified when she placed the call on August 12, 2009, she recognized the male voice that answered the phone as defendant's because she had prior contact

with him in person and on the telephone. They made arrangements for her to "get six for the hundred" worth of cocaine at Carolyn's house on Leafland Avenue. When she arrived at the house, she handed defendant the money and he handed her six individual bags of cocaine.

¶ 17 After the transaction, Hockaday took the cocaine from William-Smith and conducted another search, finding no contraband. Hockaday contacted Officer Warren Hale, the patrol officer for the area where the Leafland Avenue address was located. Hale testified Hockaday asked him to assist in an identification of a subject at the 1234 Leafland Avenue address. Hockaday described the subject as a black male wearing a white tank top and a baseball cap. Hale said he drove by the residence and identified Juan Britton, who was wearing a white shirt and blue jeans. He also identified the subject matching Hockaday's description as defendant. Hockaday asked Hale to view the video of the drug transaction. After doing so, Hale identified defendant as the subject on the video who sold the drugs to William-Smith.

¶ 18 The State rested. Defendant moved for a directed verdict, arguing the State had not proved the transaction occurred within 1,000 feet of a church. The State asked to reopen the evidence after the trial court asked the following question of the prosecutor: "[D]o you believe that there was any testimony as to whether or not it existed as a church on the date in question?"

¶ 19 The State called Officer Hale, who testified he had been the patrol officer for that district since 2005. Hale said he was familiar with the address of 1222 East Grand Avenue, which he identified as the Faith Fellowship Missionary Baptist Church. He had been to the church "multiple times on details" to speak with the pastor. Hale said: "In 2009, it was a church. Prior to that, in 2005, I don't know about then. But prior to it being a church, it was an old school." He clarified that, on August 12, 2009, it was a church.

¶ 20 Defendant renewed his motion for a directed verdict, but the trial court denied the same. Defendant presented the testimony of Michael Tarczan, a private investigator, and Sharon Smith, defendant's aunt. Both witnesses described defendant's various tattoos on his upper body.

¶ 21 After considering the evidence, closing arguments, and the jury instructions, the jury returned a guilty verdict. Defendant filed a posttrial motion, again claiming the trial court erred in admitting the other-crimes evidence, as well as the other issues raised in this appeal. The court denied defendant's motion and sentenced him to 12 years in prison.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

> "Evidence regarding other crimes is generally inadmissible to demonstrate propensity to commit the charged crime (propensity). Such evidence is not considered irrelevant; instead, it is objectionable because such evidence has 'too much' probative value. [Citation.] Courts generally prohibit the admission of this evidence to protect against the jury convicting a defendant because he or she is a bad person deserving punishment. [Citation]. Defendant is entitled to have his guilt or innocence evaluated solely on the basis of the charged crime. [Citation.]
>
> Other-crimes evidence is admissible, however, to prove intent, *modus operandi*, identity, motive, absence of mistake, and any material fact other than propensity that is relevant to the case (exceptions). [Citation.] Even if other-crimes evidence falls under one of these exceptions, the court still can exclude it if the

> prejudicial effect of the evidence substantially outweighs its probative value. [Citation.]" *People v. Donoho*, 204 Ill. 2d 159, 170 (2003).

¶ 24 First, the trial court must determine whether the evidence constitutes other-crimes evidence. If so, to determine admissibility, the court must decide whether it comes within one of the exceptions to the general rule against such evidence. *People v. Johnson*, 368 Ill. App. 3d 1146, 1154 (2006). We review the trial court's decision allowing the admission of other-crimes evidence for an abuse of discretion. *Johnson*, 368 Ill. App. 3d at 1155. Thus, the central issue on appeal is whether the court abused its discretion by finding that the probative value of the evidence was not outweighed by its prejudicial effect.

¶ 25 Although this particular statute only applies to charges related to sex offenses, the language in section 115-7.3(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3(c) (West 2012)) notes the importance of the factual similarity of the "other crime" when determining whether the probative value outweighs the prejudicial effect. The supreme court has stated that, when considering the admissibility of other-crimes evidence under the statute, "we urge 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.

¶ 26 There is no question the evidence of defendant's prior drug transactions does, in fact, constitute other-crimes evidence. To determine whether the trial court abused its discretion when weighing the probative value of this evidence versus the prejudicial effect, we begin by asking the following question. Without the other-crimes evidence, would the State have been able to provide any reasonable or explicable theory as to why William-Smith asked defendant to

sell her drugs? Was that evidence necessary as the only way to prove that William-Smith knew defendant and, therefore, could identify him? We answer the first question in the affirmative and the second in the negative. That is, the State had other evidence at its disposal that would have been sufficient to explain how it was that William-Smith knew defendant and that defendant would sell her cocaine without the admission of the other-crimes evidence.

¶ 27 "Evidence of other offenses is admissible, if relevant for any purpose other than to show a mere propensity on the part of the defendant to commit the crime." *People v. Cole*, 29 Ill. 2d 501, 503 (1963). Our supreme court has allowed evidence of prior narcotics transactions by a defendant, other than the one for which he was being tried, where such evidence was relevant for any purpose other than to show a mere propensity to commit the crime. For example, the court has allowed such evidence to prove a defendant's guilty knowledge (*People v. Aldridge*, 19 Ill. 2d 176, 180 (1960); *People v. Lewerenz*, 24 Ill. 2d 295, 299 (1962)) or to show his design or system (*People v. Steele*, 22 Ill. 2d 142, 146 (1961)). The court has also allowed the evidence for, as was requested in this case, the purpose of proving identity. See *People v. Lopez*, 10 Ill. 2d 237, 240 (1957); *People v. Reed*, 21 Ill. 2d 416, 418 (1961). However, *Lopez* and *Reed* are not dispositive as applied to the facts presented in the case *sub judice*.

¶ 28 In *Lopez*, the defendant was convicted of "selling and dispensing narcotics." *Lopez*, 10 Ill. 2d at 238. At trial, the State presented testimony regarding three previous occasions when the defendant had sold narcotics to the same purchaser. *Lopez*, 10 Ill. 2d at 239. The supreme court affirmed the trial court's admission of the purchaser's testimony on the issue of the defendant's identity. *Lopez*, 10 Ill. 2d at 240. The purchaser testified he had seen the defendant, known to him only as "The Killer," on three previous occasions when he had purchased marijuana from him. *Lopez*, 10 Ill. 2d at 240. The court held the "testimony was

material to [defendant's] identification, and is not rendered inadmissible because it also brought to the jury's attention evidence of three prior offenses." *Lopez*, 10 Ill. 2d at 240. In other words, this testimony was relevant and aided in identifying the defendant as the person who committed the crime for which he was on trial. *Lopez*, 10 Ill. 2d at 239-40.

¶ 29 In *Lopez*, the supreme court noted the Ohio Supreme Court's opinion in *Whiteman v. State*, 119 Ohio St. 285 (1928). There, the defendant was convicted of robbery after a jury trial, at which evidence of alleged previous robberies committed by the defendant was admitted as tending to show a common scheme or plan. *Whiteman*, 119 Ohio St. at 287. In determining whether such admission was erroneous, the court noted as follows:

> "In all cases, civil and criminal, evidence must be confined to the point in issue and must be relevant to the issue. The test of relevancy is not always an easy problem. In any case a trial judge of experience is able to determine that certain lines of evidence are clearly relevant and certain other lines as clearly irrelevant. On the other hand, a twilight zone is frequently found, where the problem is one of great difficulty. The adjudicated cases present a great variety of definitions of relevancy. It has been said that relevancy is that which conduces to the proof of a pertinent hypothesis. Again, it is said that the word 'relevant,' as applied to the admission of evidence, means that any two facts to which it is applied are so related to each other that according to the common course of events one of them, taken by itself or in connection with other facts, proves or renders probable the past, present, or future

> existence or nonexistence of the other. These definitions may be found substantially stated in a large number of cases. They do not render the task of the trial judge an easy one, because it still remains to determine whether they both legally and logically tend to elicit the truth." *Whiteman*, 119 Ohio St. at 288.

¶ 30 Indeed, the question of the admissibility of the evidence at issue here may well be described as being in the "twilight zone" of relevancy. Logically, it may seem reasonable that William-Smith and defendant's prior drug transactions are relevant to prove why William-Smith told Hockaday she knew she could purchase drugs from defendant and how she was able to identify him during the transaction. However, demonstrating legal relevancy may be more difficult, as it requires a high standard of probative value. "The mere fact that testimony is logically relevant does not in all cases make it admissible." *Whiteman*, 119 Ohio St. at 289.

¶ 31 Under Federal Rule of Evidence 403, evidence which is logically relevant may be too prejudicial to be admissible and so is deemed not legally relevant. 28 U.S.C. app. Fed. R. Evid. 403 (1994). "The Supreme Court declared that 'there can be no question that evidence of the [same] name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant.' " *People v. Peete*, 318 Ill. App. 3d 961, 966-67 (2001) (quoting *Old Chief v. U.S.*, 519 United States 172, 185 (1997)). In determining legal relevance, a court could consider whether the particular proposition could be proved by any other evidence—evidence not as prejudicial. In fact, the Supreme Court noted, quoting the Advisory Committee's Notes to Rule 403, "when a court considers 'whether to exclude on grounds of unfair prejudice,' the 'availability of other means of proof may *** be an appropriate factor.' " *Old Chief*, 519 U.S. at 184.

¶ 32 Although in Illinois, there is no rule of evidence identical to Federal Rule of Evidence 403, Illinois courts have long recognized, as a matter of common law, the identical standard: A trial court may exercise its discretion to exclude evidence, even when it is relevant, if its prejudicial effect substantially outweighs its probative value. *People v. Walker*, 211 Ill. 2d 317, 337 (2004). We conclude the evidence of prior drug transactions between William-Smith and defendant was prejudicial to defendant, outweighing any probative value when the identity of defendant could have been proved by other, less prejudicial evidence. This is especially true when the other-crimes evidence was identical to the offense for which defendant was on trial. If there was no other feasible way for the State to sufficiently prove defendant's identity, the scale may have tipped in the State's favor, with the probative value outweighing the prejudicial effect. However, the State had sufficient evidence to reasonably explain to the jury how it came to be that William-Smith recommended a transaction with defendant without introducing prior transactions.

¶ 33 The only "back story" needed for the jury to reasonably understand the relationship between the two would have been William-Smith's testimony of her familiarity with defendant, not necessarily that she had purchased drugs from him before. It would have been feasible for the jury to believe that, because she had known defendant and his family for more than six years, she was familiar enough with defendant that she was comfortable requesting that he sell her cocaine. Such a request would not be considered "out of the blue" based upon the status of their relationship as acquaintances.

¶ 34 In this case, the "other crimes" were not merely crimes which tended to explain some detail about the present crime. Here, the "other crimes" were of the precise nature of the crime for which defendant was on trial. The risk was great the jury would believe, since

defendant sold drugs to William-Smith before, it was very likely he did so this time as well. "The concern is not that such evidence is lacking in probative value, but that it may overpersuade the jury, which might convict the accused because it believes he or she is a bad person." *People v. Pikes*, 2013 IL 115171, ¶ 16.

¶ 35 We agree with defendant that the State's explanation to the trial court when arguing for the admission of the other-crimes evidence further supports our conclusion. The prosecutor's explanation made it clear the evidence was speaking to defendant's propensity to sell drugs, not to the issue of identification. When speaking from William-Smith's perspective, the prosecutor stated:

> "I was able to purchase from him on this day, I was able to make contact with him and make these arrangements on this particular day while under police surveillance with the video and audio because I had done it before. That's why it was so easy for me to do it on this particular occasion."

William-Smith could have testified she knew the family and was confident she could initiate a transaction, and, in fact, it was defendant who sold her the drugs. She knew it was defendant because she had known him for more than 6 years. In other words, it was apparent from the prosecutor's above-quoted comment that an underlying objective of the admission of William-Smith's testimony was to make the jury aware of defendant's propensity to sell drugs. Otherwise, William-Smith's testimony that she knew the family and had an established friendship with defendant's mother long before she had purchased drugs from defendant would suffice to prove identity.

¶ 36 Further, this is not a case where the admission of other-crimes evidence is necessary to somehow explain, as a continuing narrative, the circumstances of the transaction. The prior drug transactions spoke of in this case are not inextricably intertwined so as to remove them from other-crime consideration. *Cf. People v. Batinich*, 196 Ill. App. 3d 1078, 1084 (1990) (evidence of prior drug transactions was admissible as relevant to explain the circumstances of the defendant's arrest). Rather, evidence of the prior transactions is considered extrinsic "other crimes" or acts subjected to the usual prejudice versus probative value balancing test. We conclude, when that test is applied, the prejudicial effect far outweighs the probative value under the circumstances of this case.

¶ 37 Finally, we question whether the court's limiting instruction prior to the testimony was sufficient to protect defendant against undue prejudice. "[F]aith in the jury to follow instructions and *** separate issues is 'the cornerstone of the jury system.' " *People v. Johnson*, 239 Ill. App. 3d 1064, 1075 (1992) (quoting *People v. Illgen*, 145 Ill. 2d 353, 376 (1991)). However, "[w]hen the unfair prejudice is excessive, a limiting instruction will not save admissibility of the evidence." *People v. Boyd*, 366 Ill. App. 3d 84, 94 (2006). " 'The question is whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction.' " *Chapman v. California*, 386 U.S. 18, 23 (1967). We conclude a strong probability exists the admission of this evidence may have contributed to the verdict. We reverse the trial court and remand for a new trial. Because we are ordering a new trial on the basis of prejudicial error relating to the admission of other-crimes evidence, we do not reach defendant's other grounds of appeal.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we reverse the trial court's judgment and remand for a new trial.

¶ 40 Reversed and remanded.