2018 IL App (1st) 152074-U

SIXTH DIVISION
Order filed: March 23, 2018

No. 1-15-2074

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 12 CR 20738
	)	
MELVIN FAGAN,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it permitted a single witness to testify about other crimes to demonstrate the defendant's propensity to commit the instant sexual assault and murder where there were sufficient similarities between the other crimes evidence and the charged conduct; the defendant's fines and fees order must be corrected.

¶ 2 Following a jury trial, the defendant, Melvin Fagan, was found guilty of first degree murder and aggravated criminal sexual assault. He was sentenced to 45 years' imprisonment for the murder conviction and to a consecutive 15-year sentence for aggravated criminal sexual

assault. On appeal, the defendant contends that the trial court erred when it admitted certain other crimes evidence because the evidence was presented with "unnecessary detail" and where the probative value of the evidence was "substantially outweighed by undue prejudice." He also challenges the assessment of certain fines and fees. For the following reasons, we affirm, and correct the fines and fees order.

¶ 3 The defendant's arrest and prosecution arose out of the December 16, 2009, strangulation death of the victim, A.D. Prior to trial, the State moved to admit proof of other crimes for the purpose of showing the defendant's propensity to commit sex crimes and to negate consent. Specifically, the State requested admission of the defendant's sexual assaults of G.M. from March 24 through 26, 2010, and M.S. on April 26, 2010. The defendant objected arguing, *inter alia*, that any factual similarities were general in nature and that the admission of this other crimes evidence was more prejudicial than probative. After hearing argument, the trial court granted the State's motion in part, ruling that the State could present evidence of the defendant's crimes against G.M. through the testimony of one witness. However, the court denied the State's motion as to M.S. The matter thereafter proceeded to a jury trial.

¶ 4 At trial, Lonnie Holder testified that, in December 2009, he used to "hang out" at an abandoned building at 5515 South Seeley Avenue in Chicago. Around two o'clock on the afternoon of December 16, 2009, he went there to smoke. On the second floor, he discovered a body on the floor and recognized the victim, who he knew as "Little Kim." He spoke to police and later agreed to give a buccal swab.

¶ 5 On cross-examination, Holder admitted that he was going to smoke marijuana in the house and had previously gotten high on crack and cocaine there. He had known the victim for four or five months and had gotten high on cocaine with her a week or so prior to her death. On

redirect examination, Holder testified that, that morning, he told an assistant State's Attorney (ASA) and trial counsel that, prior to finding the victim's body, he had engaged in sexual intercourse with her once in the building but did not recall whether he used a condom.

¶ 6 The State presented forensic evidence through the testimony of current and former employees of the Illinois State Police Crime Lab. Certain vaginal and anal swabs tested positive for presence of semen, and cellular material was collected from the knotted area of a ligature recovered from the victim's neck. Analysis of the anal swabs revealed that the defendant could not be excluded to having contributed to the "sperm fraction." Tests indicated that the human male DNA profile from the vaginal swabs matched that of defendant and that defendant's DNA profile was found on a portion of the ligature.

¶ 7 Detective Timothy Nolan testified that, in October 2010, he received a lab report regarding the defendant's DNA. He then secured a search warrant for a biological sample and subsequently served that warrant upon the defendant. Nolan spoke to the defendant at the police station on November 29, 2010. The conversation was videotaped and this video was published to the jury. During the conversation, Nolan asked the defendant about a scar on his neck. The defendant replied that it was probably from having sex. Nolan then testified that he submitted the ligature from the victim's neck for additional DNA testing. On October 17, 2012, Nolan received a lab report indicating that there was a match to the defendant on the ligature. The defendant was taken into custody on October 18, 2012, and Nolan spoke to him that evening. The conversation was videotaped, and the video was published to the jury. During the conversation, the defendant denied knowing the victim and stated that he did not remember having sex with a female prostitute around 55th Street and Seeley Avenue.

¶ 8 The trial court then instructed the jury that it was about to hear evidence that the defendant had been involved in conduct other than that which was charged in the indictment. The court further stated this evidence was to be received on the issue of lack of consent and the defendant's propensity to commit aggravated criminal sexual assault and could be considered by the jury only for that limited purpose.

¶ 9 G.M., who had a previous conviction for possession of a controlled substance, testified that, on the morning of March 24, 2010, she drove to a location to buy a bag of crack. Once there, defendant came to the car, opened the passenger door, and got inside. G.M. later drove defendant, pursuant to his instructions, to an abandoned building. G.M. planned to drop him off. At this point, the defendant put a screwdriver to G.M.'s head, face, and neck, and said that he was going to kill her and stab her in the "F-ing face" and that he wanted to " 'F' " her. The defendant pulled her toward him and "dragged" her out through the passenger side of the car. He continued to drag G.M. towards the door of the abandoned building. G.M. was screaming although the defendant told her to "shut up." The defendant then threw her on the building's exterior stairs and "punctured" her neck with something "to a point" where she could not talk.

¶ 10 The defendant proceeded to drag G.M. into the building, up a set of stairs, and down a hallway. The defendant threw G.M. on a mattress, cut off her clothes, and engaged in "violent oral sex" with her. He also inserted his penis into her vagina and "butt." G.M. testified that it was "violent" and that she stayed quiet because the defendant had "knives or what all," and because he threatened to kill her. As it began to get light outside, the defendant put a rag in G.M.'s mouth and duct-taped it shut. He also tied her hands with her bra and duct-taped her legs together. The defendant then dragged G.M. back down the stairs and outside. Once there, he stated that he was

going to put her in the trunk. Although she fought the defendant, she ended up in the trunk. The defendant then drove around, all the while threatening to kill her.

¶ 11 At one point, G.M. felt the car "lurking [*sic*] to one side." When the car stopped, the defendant stated that he was in a garage, that he was going to open the trunk, and that he would kill her if she screamed. When he opened the trunk, he bit G.M. and again inserted his penis into her vagina. G.M. "kept begging" the defendant to let her go. Eventually, the defendant drove to a train station and accompanied her inside. Once inside, G.M. began asking for help to get on the train. She then "just dropped," said he "raped me[,]" and began crying. Police and an ambulance came and G.M. was taken to a hospital. On cross-examination, G.M. denied telling officers that she agreed to drive the defendant to 6500 South Wolcott Avenue for $80 so he could install ceiling fans. The State then rested and the defense proceeded by way of stipulations.

¶ 12 The parties stipulated that, if called to testify, Detectives Miner and Jay Ghosten would testify that, on March 26, 2010, they interviewed G.M. at a hospital, and that she stated that she agreed to drive the defendant to a location to install ceiling fans in exchange for $80.

¶ 13 The parties further stipulated that Maggie Mahalik would testify that she was present on June 27, 2014, when Holder spoke to two ASAs and stated that he had engaged in sexual intercourse with the victim and a prostitute in the abandoned building on prior occasions.

¶ 14 The defense then presented the testimony of Investigator Steven Ramsey, who worked for the Office of the Public Defender. He testified that, on December 4, 2014, he met with G.M. in the presence of an ASA and trial counsel and asked her to clarify the portion of her statement in which she indicated that the defendant offered her $80 to give him a ride. G.M. stated that the defendant was going to be paid $80 for installing a ceiling fan and that they were then going to use the money to purchase drugs. On December 3, 2014, Ramsey spoke to Holder in the

presence of an ASA, trial counsel, and Mahalik. During this conversation, Holder stated that he had sex with the victim in the building although he could not recall when and that he and the victim smoked crack together on several occasions.

¶ 15 The jury found the defendant guilty of first degree murder and aggravated criminal sexual assault. The defendant filed a motion and amended motion for a new trial, alleging, in pertinent part, that the trial court erred when it permitted the State to present proof of other crimes through the testimony of G.M. The court, however, denied the motions.

¶ 16 The defendant was sentenced to 45 years' imprisonment for the murder conviction and to a consecutive 15-year sentence for the conviction of aggravated criminal sexual assault. He was assessed $774 in fines and fees, and credited with 928 days of presentence custody credit. The defendant now appeals.

¶ 17 On appeal, the defendant first contends that the admission of the other crimes evidence of his assault of G.M. was unduly prejudicial because the evidence was "excessive," presented with "unnecessary" detail, and led to "an improper mini-trial" of those offenses.

¶ 18 Before reaching the merits of the defendant's contention on appeal, we must determine whether the alleged error was preserved. The State argues that the defendant has forfeited this contention on appeal because, although trial counsel objected to the admission of G.M.'s testimony, counsel never sought to limit that testimony in any way. The State further argues that, although the defendant argued in his motions for a new trial that the trial court erred in admitting G.M.'s testimony, the defendant did not raise the claim that G.M. testified with an excessive amount of detail. We disagree.

¶ 19 Here, trial counsel objected to the admission of G.M.'s testimony and argued in the motions for a new trial that the trial court erred when it permitted the State to present proof of

other crimes through the testimony of G.M. Thus, the defendant has preserved the issue of whether the trial court abused its discretion in admitting G.M.'s testimony; there is no requirement that he make the exact same arguments on appeal. See *People v. Minter*, 2015 IL App (1st) 120958, ¶ 43 ("Defendant did not need to raise his argument in precisely the same way in order to preserve it on appeal.").

¶ 20 The admission of other crimes evidence rests within the trial court's sound discretion and this court will not reverse the trial court's ruling absent an abuse of that discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12. A trial court abuses its discretion where its ruling is arbitrary or one with which no reasonable person would agree. *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 21 The admission of other crimes evidence is limited to protect against the danger that the jury will convict a defendant because he is a bad person deserving of punishment. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). Therefore, evidence of other crimes is generally admissible only for purposes other than to show the defendant's propensity to commit a crime, such as *modus operandi*, intent, motive, identity, or absence of mistake. *Id.* Section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2008)), however, sets forth an exception allowing admission of other crimes involving sexual offenses, including aggravated criminal sexual assault, and provides that such evidence "may be considered for its bearing on any matter to which it is relevant." The other crimes evidence must be relevant and will be admitted unless the prejudicial effect of the evidence substantially outweighs its probative value. *Donoho*, 204 Ill. 2d at 177, 182-83. Section 115-7.3(c) lists three factors that a trial court should weigh when determining whether the probative value of the evidence exceeds any undue prejudice to the defendant: "(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).

¶ 22 Here, the defendant argues that the admission of the other crimes evidence unduly prejudiced him because its detailed nature improperly shifted the focus of his trial to the incident with G.M., resulting in a mini-trial on that offense. We disagree because the admitted evidence highlighted the numerous similarities between the encounter with G.M. and the instant offense.

¶ 23 Regarding the first factor, the proximity of time to the charged or predicate offense, the instant offense occurred in December 2009 and the offense involving G.M. occurred in March 2010; both took place on the Southside of Chicago. We cannot agree that it was an abuse of discretion for the trial court to admit the other crimes evidence at issue when the two incidents happened within three months of each other and in the same general area of Chicago. See 725 ILCS 5/115-7.3(c)(1) (West 2008).

¶ 24 Next, we find that the second factor, the degree of factual similarity to the charged or predicate offense, is also met in the case at bar. To be admissible, 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)). "As factual similarities increase, so does the relevance, or probative value, of the other-crimes evidence." *Id.* Where such evidence is not being offered under the *modus operandi* exception, general areas of similarity will suffice. *People v. Illgen*, 145 Ill. 2d 353, 372-73 (1991). Here, there were sufficient similarities between the charged conduct and the other offense where both incidents took place in abandoned buildings and involved women, who were drug users, being vaginally and anally penetrated by the defendant using force. We, therefore, conclude that the factual similarities in this case were sufficient to justify the admission of the other crimes evidence. See *People v. Ramsey*, 2017 IL

App (1st) 160977, ¶ 33 (the trial court did not abuse its discretion in finding that the probative value of the other crimes evidence outweighed its prejudicial effect because the defendant's victims shared multiple situational and temporal similarities).

¶ 25 Moreover, evidence that the defendant had a propensity to use force to engage in vaginal and anal intercourse with women in abandoned buildings was probative of whether he penetrated the victim vaginally and anally, and strangled her in an abandoned building. Given all of the above-mentioned facts, we find that the probative value of G.M.'s testimony was not outweighed by its prejudicial effect and the trial court did not abuse its discretion in allowing this evidence to be admitted pursuant to section 115-7.3 of the Code. See 725 ILCS 5/115-7.3 (West 2008).

¶ 26 To the extent that the defendant contends that G.M.'s testimony resulted in a mini-trial of the offenses committed against her, we disagree. Even when other crimes evidence is relevant and probative, it must not become a focal point of the trial. *People v. Arze*, 2016 IL App (1st) 131959, ¶ 98. When a trial court admits evidence of other crimes to show propensity, the court should not permit a mini-trial of these other uncharged offenses, but should only allow the evidence that is necessary to illuminate the issue for which the other crime was introduced. *Id.*; see also *People v. Chromik*, 408 Ill. App. 3d 1028, 1041 (2011) ("Courts have warned about the dangers of putting on a trial within a trial with detail and repetition greatly exceeding what is necessary to establish the particular purpose for the evidence."). The defendant asserts that G.M.'s testimony, consisting of 96 pages of the transcript, was voluminous and that "[n]o other witness testified to as much information or for as long." He also argues that G.M.'s testimony was not limited to just an alleged sexual assault; rather, she also testified about "other crimes" that he allegedly committed against her.

¶ 27 In the case at bar, the State called G.M. as witness to testify about the defendant's propensity to commit aggravated criminal sexual assault and the jury was instructed that it was to consider her testimony for that purpose only. Although G.M. testified in detail about her encounter with the defendant, as factual similarities between the other crimes evidence and the predicate offense increase, so does the relevance of the other crimes evidence. See *Donoho*, 204 Ill. 2d at 184. To the extent that the defendant contends that G.M.'s testimony contained proof of crimes against her other than sexual assault, it is unclear how G.M. could have testified to the sexual assault without explaining how she arrived at the abandoned building where the assault took place or how she was able to get away from the defendant.

¶ 28 We are unpersuaded by the defendant's reliance on *People v. Cardamone*, 381 Ill. App. 3d 462, 496-497 (2008), a case where this court found that the volume of the other crimes evidence presented at trial, that of between 158 and 257 uncharged acts involving several witnesses, was overwhelming and more prejudicial than probative. Unlike *Cardamone*, in this case, G.M. was the only witness who testified regarding the other crimes and presented evidence to show that the defendant had a propensity to take drug-using women to abandoned buildings and use force in order to vaginally and anally penetrate them, much as he was accused of doing to the victim. See *Arze*, 2016 IL App (1st) 131959, ¶ 100 (upholding the other crimes evidence testimony of two additional victims); See *People v. Perez*, 2012 IL App (2d) 100865, ¶ 54 (finding no abuse of discretion when the court directed the State to select "only three or four incidents to provide context for the charges").

¶ 29 Ultimately, in the case at bar, we find no abuse of discretion where the evidence was not complex, the contextual relevance of the other crimes evidence was on point, and the court limited the other crimes evidence to one witness and properly instructed the jury regarding the

other crimes evidence. See *id.* (finding no abuse of discretion when "the issues were not complex, and the volume of other-crimes evidence, while greater than that pertaining to the charges, was not excessive").

¶ 30 The defendant next challenges the assessment of certain fines and fees. Although he acknowledges that he failed to raise this issue before the trial court, he contends that a defendant's request to have his fines and fees order "corrected" is not subject to the rule against forfeiture. In the alternative, the defendant contends that this court has the authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), to issue a corrected mittimus.

¶ 31 It is well settled that a defendant forfeits a sentencing issue that he fails to raise in the trial court through both a contemporaneous objection and a written post-sentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). We also disagree that this court can reach the merits of the defendant's claims under Rule 615(b). See *People v. Grigorov*, 2017 IL App (1st) 143274, ¶¶ 13-14. However, the rule against forfeiture also applies to the State and, where the State fails to argue that a defendant has forfeited an issue, it forfeits the forfeiture. *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000) (rules of waiver and forfeiture apply to the State). Here, the State does not argue that the defendant forfeited his challenge to the fines and fees order; thus, we will address the merits of his claim. The propriety of court-ordered fines and fees is reviewed *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 32 The defendant first contends that he was improperly assessed the $100 Violent Crime Victim Assistance (VCVA) fine (see 725 ILCS 240/10(b)(1) (West 2012)), because that fine did not become effective until July 16, 2012, and the instant offense was committed in December 2009. He thus argues, and the State agrees, that the imposition of this fine violated *ex post facto* principles.

¶ 33 In 2009, when the defendant committed the instant offenses, the VCVA Act (Act) (725 ILCS 240/1 *et seq*. (West 2008)), imposed a "penalty of $4 for each $40, or fraction thereof, of [other] fine[s] imposed." 725 ILCS 240/10(b) (West 2008). This penalty is a fine. See *People v. Vlahon*, 2012 IL App (4th) 110229, ¶ 37. Effective July 16, 2012, section 10 of the Act was amended by Public Act 97-816, which increased the fine to $100 for any felony conviction. Pub. Act 97-816 (eff. July 16, 2012) (amending 725 ILCS 240/10(b)(1)). Because the amended version of section 10(b) was not yet in effect at the time of the offenses and the fine is now greater than the punishment that previously existed, the trial court violated *ex post facto* principles by assessing a $100 VCVA fine against the defendant and it must be vacated.

¶ 34 The defendant further contends that the trial court improperly assessed a $25 VCVA fine because such a fine could only be imposed when "no other fine is imposed" and he was assessed the $15 State Police Operations fee. See 725 ILCS 240/10(c)(1) (West 2008) (the $25 assessment is imposed only when "no other fine is imposed"). The State contends, however, that this fine was properly assessed because it was the only fine assessed under the Act. We note that, despite its label, the $15 State Police Operations fee has been held to be a fine (see *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31); we, therefore, agree with the defendant that the $25 VCVA assessment must be vacated.

¶ 35 The defendant next contends that he was improperly assessed two quasi-criminal complaint conviction fees. First, he argues that the $50 quasi-criminal complaint conviction (clerk) fee (705 ILCS 105/27.2a(w)(2)(B) (West 2012)), is duplicative of the $190 felony complaint filed (clerk) fee (705 ILCS 105/27.2a(w)(1)(A) (West 2012)), imposed in this case. The State concedes, and we agree, that the $50 quasi-criminal complaint conviction (clerk) fee must be vacated. See *People v. Martino*, 2012 IL App (2d) 101244, ¶¶ 34-35 (one complaint or

charging instrument incurs one fee under this statutory provision). Second, the defendant asserts that he was improperly assessed a $25 quasi-criminal complaint conviction (local prosecutor) fee pursuant to section 4-2002.1(b) of the Counties Code, which entitles a municipality to "a $25 prosecution fee for each conviction for a violation of the Illinois Vehicle Code." See 55 ILCS 5/4-2002.1(b) (West 2012). As conceded by the State, this case did not concern the Illinois Vehicle Code and thus the fee was improper. We agree and order that this fee be vacated.

¶ 36 The defendant also argues, and that State concedes, that the imposition of the $5 Electronic Citation fee must be vacated because he was convicted of felonies and this fee only applies in traffic, misdemeanor, municipal ordinance, and conservation cases. See 705 ILCS 105/27.3e (West 2012). We agree and order that the $5 Electronic Citation fee be vacated.

¶ 37 The defendant next contends, and the State agrees, that he was improperly assessed the $25 court services (sheriff) assessment (55 ILCS 5/5-1103 (West 2012)), because the offenses of which he was convicted, first degree murder and aggravated criminal sexual assault, are not qualifying offenses under the language of the statute. We do not accept the State's concession.

¶ 38 This court has consistently held that section 5-1103 permits the court services (sheriff) assessment to be assessed against defendants convicted of offenses that are not listed within the statute. See *People v. Adair*, 406 Ill. App. 3d 133, 144 (2010) ("Based on the encompassing language of the statute and its clear purpose of defraying court security expenses, we are unpersuaded that the [statute's] failure to list the offenses the defendant committed means he cannot be required to defray the expenses incurred by the sheriff for his court proceedings."); *People v. Lattimore*, 2011 IL App (1st) 093238, ¶¶ 102-05 (finding the list of statutes following the phrase "sentence of probation" modified only that phrase); *People v. Bowen*, 2015 IL App

(1st) 132046, ¶ 61. We therefore conclude that the $25 court services (sheriff) assessment was correctly imposed against the defendant in this case.

¶ 39 The defendant also argues that he was improperly assessed a $5 court system fee under section 5-1101(a) of the Counties Code. See 55 ILCS 5/5-1101(a) (West 2012). The State does not respond to the defendant's argument; rather it argues that defendant cannot offset this assessment with his presentence custody credit. We agree with the defendant that because the $5 court system fee only applies in traffic cases it must be vacated.

¶ 40 The defendant finally contends, and the State agrees, that he is entitled to use his presentence custody credit to offset the $15 State Police Operations fee. Because this court has concluded that the $15 State Police Operations fee (705 ILCS 105/27.3a(1.5) (West 2012)), is a fine, the defendant is entitled to offset it with his presentence custody credit. See *Millsap*, 2012 IL App (4th) 110668, ¶ 31; *People v. Robinson*, 2017 IL App (1st) 161595, ¶ 132 ("Under section 110-14 of the Code ***, the presentencing credit applies only against fines."). Here, defendant's credit totaled $4640 based upon 928 days spent in presentence custody. See 725 ILCS 5/110-14(a) (West 2012).

¶ 41 Accordingly, we affirm the defendant's conviction. The fines and fees order is hereby corrected to reflect that the $15 State Police Operations fee is offset by the defendant's presentence custody credit and the $100 VCVA fine, $25 VCVA fine, $50 quasi-criminal complaint conviction (clerk) fee, $25 quasi-criminal complaint conviction (local prosecutor) fee, $5 Electronic Citation fee, and $5 court system fee are vacated, for a new total of $519 due.

¶ 42 Affirmed; fines and fees order corrected.