FOURTH DIVISION
December 13, 2018

Nos. 1-16-3246 & 1-17-0467 (cons.)

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 13 CR 18961
JULIUS ARMOUR,	)	
Defendant-Appellant.	)	Honorable Charles P. Burns, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where the State proved the elements of criminal sexual assault beyond a reasonable doubt, the trial court did not abuse its discretion in admitting evidence of defendant's prior bad act, and the trial court did not improperly rely on evidence that was not admitted at trial.

¶ 2 Following a bench trial, defendant Julius Armour was convicted of two counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(2) (West 2012)) and was sentenced to two

consecutive seven-year terms in the Illinois Department of Corrections (IDOC). The court further imposed mandatory supervised release for a term to be determined by the IDOC upon defendant's release. On appeal, defendant contends (1) the State failed to prove beyond a reasonable doubt that he knew the victim was unable to give knowing consent at the time of the offenses, (2) the trial court abused its discretion in admitting evidence of a prior bad act, and (3) the trial court deprived him of due process by improperly relying on evidence that was not admitted at trial. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by indictment with three counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(2) (West 2012)). The indictment alleged that on September 8, 2012, and continuing through September 9, 2012, defendant committed three acts of sexual penetration upon M.R., including contact between defendant's penis and M.R.'s vagina and anus, and contact between defendant's mouth and M.R.'s vagina, while knowing M.R. was unable to give knowing consent.[1] The matter then proceeded to a bench trial on the three counts.

¶ 5 At trial, the State presented the testimony of M.R., Aaron Green (Green), a friend of defendant, and Cook County Assistant State's Attorney Joseph DiBella (DiBella), and adduced the following evidence. M.R. and defendant were members of the same religious organization, and first met several months prior to the offenses. M.R. testified she and defendant became friends, and she related to defendant that she had recently ended a long-term relationship. On September 8, 2012, defendant invited M.R. out for food and drinks with a group of friends to "get [her] mind off of things." M.R. drove to defendant's apartment that evening where she and defendant were picked up by Green. Green then picked up defendant's sister, Catherine Armour

[1] We acknowledge that the parties elicited conflicting testimony regarding the date of the offenses. This discrepancy, however, is not at issue on appeal. We therefore reference the dates contained in the indictment in order to remain consistent.

(Catherine), from her apartment, and they joined four other individuals at Bar Louie. M.R. consumed one vodka cocktail and two shots of tequila at Bar Louie. She did not eat any food. The group stayed at Bar Louie for approximately two hours, then M.R., defendant, Catherine, and Green walked back to Green's vehicle.

¶ 6 M.R. testified her next memory was waking up naked with defendant, who was also naked, in his apartment on September 9, 2012. According to Green's testimony, the group that met at Bar Louie had visited a second bar that evening, Crocodile. While at Crocodile, the group ordered two to six "fish bowls," which Green described as 8-12 inch wide communal glasses containing hard alcohol. Green observed M.R. drinking from the fish bowls. He further observed that the group ordered a round of shots, although he could not recall if M.R. drank one. The group left Crocodile sometime before 2 a.m. Green testified it appeared the alcohol was "starting to affect" M.R. at that time, and she was having "a little" trouble walking.

¶ 7 The group then visited a third bar, Betty Blue Star (Blue Star). Green drove defendant, M.R., and Catherine, and observed M.R. sleeping in the backseat of the vehicle. The group stayed at Blue Star for at least an hour, and left before 4 a.m. According to Green, M.R. continued drinking at Blue Star and when the group left she required assistance walking from the bar to his vehicle. M.R. again fell asleep in the vehicle while Green drove to Catherine's and then to defendant's apartment. In the vehicle, Green related to defendant that because M.R. was not able to walk unassisted, she would not be able to drive home. Green further testified at that time, M.R. needed to be taken care of. When they arrived at defendant's apartment, Green and defendant assisted M.R. to the bottom of the stairs outside of the building. Green testified at that time, M.R.'s speech was "a little" slurred. Green opined that M.R. would not have been able to walk up the stairs to defendant's third floor apartment unassisted.

¶ 8 Green testified he did not observe M.R. hug or kiss defendant at anytime during evening. He stated he left M.R. in defendant's care because he "wasn't going to babysit her." Green further testified he did not believe defendant would have sex, or attempt to have sex, with M.R.

¶ 9 M.R. testified when she awoke in defendant's apartment she was experiencing pain on the inside and outside of her vagina and anus. She did not recall visiting two bars after Bar Louie. She also did not recall drinking at the other establishments, or how she got to defendant's apartment. M.R. testified that when she woke up she noticed vomit in her hair, but she did not recall vomiting. She inquired as to what occurred the prior evening, and defendant responded that they had sex. M.R. further questioned whether she had done anything to indicate she wanted to be intimate. Defendant shrugged in response.

¶ 10 M.R. subsequently left defendant's apartment. She returned later the same evening because she was "confused" and "needed to know exactly what happened to [her]." According to M.R., defendant stated she was "really drunk, throwing up, passing out and then he just—we had sex." M.R. testified that upon further inquiry, defendant stated "that he pretty much did everything sexually to me," "he said that he—we did vaginal, we did anal, and oral," and "he used all available holes." M.R. further testified she never agreed to engage in any sexual acts with defendant and had no romantic interest in him. She did not plan on staying overnight at defendant's apartment; she had planned on driving home. M.R. stated that prior to the assault, she only drank socially and had never blacked out or passed out from drinking.

¶ 11 On cross-examination, M.R. testified that prior to the offenses, she spoke with defendant on the telephone and exchanged text messages with him. She further testified that she felt "fine" when she left Bar Louie. She stated that on the morning after the assault, prior to leaving, she remained at defendant's apartment for approximately 15-20 minutes.

¶ 12 On examination by the trial court, M.R. testified defendant did not profess any interest in changing their relationship from "friendship" to something "more advanced."

¶ 13 DiBella testified that in 2013, he spoke to defendant regarding the accusations of M.R. and a second alleged victim, J.S. According to DiBella, defendant related the events of September 8-9, 2012, consistently with Green and M.R.'s testimonies, including that defendant and M.R. frequented several bars, M.R. was intoxicated and vomited, both Green and defendant assisted M.R. to defendant's stairs, M.R. could not balance or walk unassisted, defendant took M.R. inside and had sex with her, and when M.R. asked the following day what had happened, defendant responded that they had sex.

¶ 14 DiBella further testified defendant related the following concerning his alleged assault on J.S. Defendant considered J.S. a cousin. On the evening of the alleged assault, defendant and J.S. frequented multiple bars. They were asked to leave one of the bars because J.S. was highly intoxicated. Defendant ordered a taxi, but J.S. was unable to provide her address, so defendant directed the taxi to his apartment. Once they arrived at defendant's apartment, J.S. could not maintain her balance. The taxi driver and defendant both assisted J.S. to defendant's apartment. Once inside his apartment defendant laid J.S. down. Defendant further related that J.S. had vomited sometime during the evening.

¶ 15 According to DiBella, defendant stated J.S. wanted to videotape their sex acts. Defendant created a videotape, but later erased it. The following morning, when J.S. asked defendant what happened, defendant responded that they had sex. Defendant related to DiBella that he was "confused" during his sexual encounter with J.S. and could not remember the specifics of the sex acts.

¶ 16 On cross-examination, DiBella testified he did not record defendant's interview and he

did not obtain a written statement.

¶ 17 Following DiBella's testimony, the parties stipulated to and adopted the testimony of J.S. from defendant's trial involving his alleged criminal sexual assault of J.S. This testimony, however, is not contained in the record on appeal. The parties further stipulated J.S. would testify that as of August 22, 2013, the date she first learned of M.R.'s allegations against defendant, she knew of M.R. but did not know her personally and she had never had a conversation with M.R. The State then rested its case.

¶ 18 Defendant moved for a directed finding, which the trial court denied.

¶ 19 Defendant then testified on his own behalf. He testified consistently with Green regarding the various bars they visited. Defendant further testified he and M.R. consumed alcohol at each of the bars. According to defendant, he could not remember the rest of the evening after leaving Blue Star, except for a portion of the drive back to his apartment. Contrary to DiBella's testimony, defendant testified he could not recall returning to his apartment, entering his apartment, assisting M.R. inside, or engaging in the sexual acts with M.R. Defendant testified he related to DiBella that he and M.R. had sex because they both woke up naked and there was "only one explanation." Defendant further testified that when he and M.R. awoke on the morning of September 9, he did not notice vomit in M.R.'s hair. According to defendant, when M.R. inquired as to what had occurred the prior evening and defendant stated that they had sex, M.R. responded, "ah, oh, well." He and M.R. then made plans to attend a block party together later that evening.

¶ 20 On cross-examination, defendant testified he could not remember his conversation with Green regarding M.R.'s level of intoxication. Defendant stated he had no personal knowledge of assisting M.R. to his apartment, and was aware he had done so only because Green had related as

much to him. Defendant denied relating to DiBella that M.R. had vomited, that she could not walk unassisted, that he and Green assisted M.R. to the bottom of his stairs, or that he held M.R. up as he brought her into his apartment.

¶ 21 Defendant further testified regarding the alleged assault of J.S. According to defendant, J.S. was his cousin through marriage and was a member of his religious organization. He testified he and J.S. visited a bar where he worked as a promoter because the bar was sponsoring free drinks. Defendant further stated that J.S. was "extremely intoxicated" when they were asked to leave the bar.

¶ 22 According to defendant, once they arrived at his apartment, J.S. removed her clothes and defendant then did the same. Defendant recalled sitting in the bathroom near the toilet because he had to vomit, and J.S. entering the bathroom because she also had to vomit. Defendant moved so J.S. could reach the toilet, and then fell asleep. While they were in the bathroom, defendant retrieved his video camera and began recording. He denied that J.S. was sleeping, but conceded that for 22 seconds in the videotape, he was attempting to wake her. Defendant testified he did not recall J.S. standing up and he did not recall turning on the sink, lubricating his penis, inserting his penis into J.S.'s vagina, closing the bathroom door while recording the sexual acts, or inserting his finger into J.S.'s anus. Defendant testified he deleted the video immediately after he discovered it on his camera, but the video was ultimately recovered by the State. Defendant denied recalling that the following morning, he related to J.S. that they engaged in vaginal, anal, and oral sex. He apologized to J.S. the following day and sent her text messages stating "I want to apologize," "this never should have happened," and "I should have protected you, but I did just the opposite."

¶ 23 Defendant denied recalling any portion of the sexual acts, but recalled J.S. entering the

bathroom and stating she wanted to have sex. He further denied having any memory of the sexual encounter with M.R. Finally, defendant testified he did not recall most of his conversation with DiBella.

¶ 24 Defendant's sister, Catherine, testified that, contrary to Green's testimony, she drove Green's vehicle from Blue Star to her apartment and M.R. was not asleep during this time.

¶ 25 Following closing arguments, and prior to the trial court making its ruling, the court noted that although it considered the facts of the case involving J.S. (the J.S. case) as proof of a prior bad act (for the purpose of establishing intent, *modus operandi*, lack of consent, and propensity), it was not making a determination as to the guilt or innocence of defendant in that case. The trial court specifically noted it considered the fact that defendant was acquitted of the charges in the J.S. case. The trial court then opined that defendant's testimony was "convenient," because of his "lack of memory as to anything that he did wrong in this case." The court further determined that M.R. was extremely intoxicated and could not have voluntarily given consent. The trial court found defendant guilty of two counts of criminal sexual assault based on the sexual penetration of defendant's penis and M.R.'s vagina and anus while M.R. was unable to give knowing consent. The trial court found defendant not guilty of one count of criminal sexual assault based on the contact between defendant's mouth and M.R.'s vagina. This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 Defendant raises three claims on appeal: (1) the State failed to prove beyond a reasonable doubt that he knew M.R. was unable to give knowing consent at the time of the offenses; (2) the trial court abused its discretion in admitting evidence relating to the J.S. case as evidence of a prior bad act; and (3) the trial court deprived defendant of due process by relying on evidence

that was not admitted at trial.

¶ 28 Prior to addressing the merits of defendant's claims, we observe defendant failed to cite to the record in his opening brief, in violation of Illinois Supreme Court Rule 341(h)(7) (eff. May 25, 2018). *Johnson v. Johnson*, 386 Ill. App. 3d 522, 533 (2008) ("Failure to cite to the pages in the record relied upon is thus a violation of Supreme Court Rule 341 and results in [forfeiture] of that argument"). Instead, defendant cites to his separate appendix. Because the doctrine of forfeiture is a limitation on the parties and not the court, and because defendant's violation does not impede our ability to review his claims, we will address the merits of his contentions. *People v. Carter*, 208 Ill. 2d 309, 318 (2003). For the following reasons, we affirm the trial court's judgment.

¶ 29 A. Sufficiency of the Evidence

¶ 30 Defendant contends the State failed to prove the elements of criminal sexual assault beyond a reasonable doubt. The due process clause of the fourteenth amendment to the United States Constitution safeguards an accused from conviction in state court except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *Jackson v. Virginia,* 443 U.S. 307, 315-16 (1979); *People v. Cunningham,* 212 Ill. 2d 274, 278 (2004). When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Giraud*, 2011 IL App (1st) 091261, ¶ 17. On review, all reasonable inferences from the evidence are drawn in favor of the State. *People v. Martin,* 2011 IL 109102, ¶ 15. The trier of fact is best equipped to judge the credibility of

witnesses, and due consideration must be given to the fact that it was the fact finder that observed and heard the witnesses. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). Accordingly, a trier of fact's finding concerning credibility is entitled to great weight. *Id.* at 115. Moreover, it is not the function of this court to reweigh the evidence. *People v. Leak*, 398 Ill. App. 3d 798, 818 (2010). A defendant's conviction will be reversed only if the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 31 Here, defendant was convicted of two counts of criminal sexual assault. To sustain a conviction for criminal sexual assault, the State had to prove, beyond a reasonable doubt, that defendant (1) committed an act of sexual penetration upon M.R. and (2) knew she was unable to give knowing consent. 720 ILCS 5/11-1.20(a)(2) (West 2012). Defendant does not challenge the trial court's finding as to the first element—that the sexual acts occurred. Instead, defendant maintains the State failed to prove M.R. consumed enough alcohol to render her unable to give knowing consent. Defendant further maintains the State failed to establish precisely when the offenses occurred, and therefore failed to demonstrate M.R. was still intoxicated and unable to consent at that time.

¶ 32 "Consent," refers to the victim's "freely given agreement to the act of sexual penetration." 720 ILCS 5/11-1.70(a) (West 2012). The focus is on what the defendant knew or reasonably should have known regarding the victim's willingness or ability to give knowing consent. *People v. Roldan*, 2015 IL App (1st) 131962, ¶ 19. The purpose of the criminal sexual assault statute is to prohibit a perpetrator from taking sexual advantage of another when the other individual is unable to knowingly consent to the act. *People v. Fisher*, 281 Ill. App. 3d 395, 402 (1996). Accordingly, if the perpetrator knows that the other individual may be unable, for any

reason, to give consent to the sexual act, the perpetrator should refrain from taking advantage of the situation. *Id*.

¶ 33 In this case, contrary to defendant's assertion, the State presented sufficient evidence of M.R.'s alcohol consumption, level of intoxication, and inability to consent to the sex acts. The record discloses that the State presented evidence that M.R. was drinking alcohol throughout the entire evening. Specifically, M.R. testified she consumed a vodka cocktail and two shots of tequila at Bar Louie; defendant testified the group drank six fish bowls at Crocodile; Green testified the group ordered a round of shots at Crocodile, although he could not recall if M.R. had one; and defendant further testified M.R. continued to order alcohol at Blue Star. The evidence further established that M.R could not recall any portion of the evening after leaving Bar Louie, fell asleep or passed out in Green's vehicle on the way to defendant's apartment, had slurred speech and immediately prior to entering defendant's apartment, could not walk unassisted, vomited sometime during the evening, and had no memory of the sex acts. Based on these facts, a rational trier of fact could conclude M.R. was unable to give knowing consent to the sexual acts. See *Giraud*, 2011 IL App (1st) 091261, ¶ 17.

¶ 34 We observe, however, that a defendant's wrongful act establishes the crime of criminal sexual assault, not the victim's level of intoxication. In cases where the State alleges the victim was too intoxicated to consent, the question for the trier of fact is whether the defendant reasonably believed the victim had consented to the sex acts. *Fisher*, 281 Ill. App. 3d at 402. Such a determination necessarily hinges on the witnesses' credibility (*id.*) which the trier of fact determines (*Wheeler*, 226 Ill. 2d at 114-15). Here, the trial court found defendant's testimony "convenient," "favorably crafted," and "inconsistent" because although defendant described the sex acts to both DiBella and M.R., he testified he had no memory of the offenses at trial. The

trial court observed and heard the witnesses and is therefore best equipped to judge their credibility. *Id*. We reiterate that it is not our function to reweigh this evidence. *Leak*, 398 Ill. App. 3d at 818. We will not substitute our judgment for that of the trier of fact. *People v. Whitten*, 269 Ill. App. 3d 1037, 1040 (1995). Accordingly, defendant has not demonstrated that, when viewed in the light most favorable to the State, the evidence was so unreasonable, improbable, or unsatisfactory as to raise a reasonable doubt that defendant knew M.R. was unable to give knowing consent to the sexual acts. See *Smith*, 185 Ill. 2d at 542; *Roldan*, 2015 IL App (1st) 131962, ¶ 19. We therefore affirm the trial court's finding of guilt. See *Smith*, 185 Ill. 2d at 542.

¶ 35 We acknowledge that defendant relies primarily on *People v. Peters*, 277 F.3d 963 (7th Cir. 2002), and *Roldan*, 2015 IL App (1st) 131962. Defendant's reliance on these cases is misplaced. First, we observe that *Peters* was decided by a lower federal court and although it may be of persuasive value, it is not binding on our court. See *People v. Loferski*, 235 Ill. App. 3d 675, 689 (1992). Second, the offense at issue in *Peters* involved a substantially disparate crime under a federal statute. See *Peters*, 277 F.3d at 966. The federal offense in *Peters* required the government to prove the victim was "*physically incapable* of declining participation in, or communicating unwillingness to engage in, th[e] sexual act," an element which is not at issue in this case. (Emphasis added.) 18 U.S.C. 2242(2)(B) (2000); see *U.S. v. James*, 810 F.3d 674, 682-83 (9th Cir. 2016) (victim was physically incapable of declining participation in the sexual act because she suffered from cerebral palsy and did not have use of her arms); *U.S. v. Fasthorse*, 639 F.3d 1182, 1184-85 (9th Cir. 2011) (victim was physically incapable of declining participation in the sexual act because she was asleep when the defendant commenced the assault); *U.S. v. Demery*, 674 F.3d 776, 780 (8th Cir. 2011) (same). Moreover, the facts of *Peters*

are inapposite. See *Peters*, 277 F.3d at 964-65. While defendant relies on *Peters* for the proposition that the State was required to prove precisely when the sex acts occurred, this reliance is misplaced where, here, the State did not have to prove M.R. was *physically incapable* of declining participation (*i.e.*, that she was asleep or passed out) at the time of the offenses. See *id.* at 966-68.

¶ 36 Regardless, the State did establish when the sex acts occurred. During DiBella's testimony, the State inquired, "[d]id the defendant say what, if anything, he did with [M.R.] once inside his apartment?" DiBella responded, "[h]e said that he had sex with her in the apartment that evening." Although defendant argues in his opening brief that it is possible "they immediately fell asleep once they arrived at [defendant's] apartment and had sex only a few hours before they woke up," he points to no evidence supporting that assertion. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009) ("the trier of fact is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt"). Based on the evidence presented, a reasonable trier of fact could infer the offenses occurred "that evening" after defendant and M.R. returned to defendant's apartment and while M.R. was still highly intoxicated. See *Wheeler*, 226 Ill. 2d at 117 (the trier of fact is not required to disregard inferences which flow normally from the evidence); *People v. Tates*, 2016 IL App (1st) 140619, ¶ 17 (where the evidence produces conflicting inferences, the trier of fact resolves the conflict).

¶ 37 *Roldan* is also inapposite based on its facts. In that case, the court held the defendant could not have known the victim was unable to consent to the sexual acts because three witnesses testified the victim "seemed 'fine,' " did not require assistance walking, and was not slurring her words immediately prior to and after the sex act occurred. *Roldan*, 2015 IL App (1st)

131962, ¶ 23. Here, by contrast, Green testified M.R. "needed help," could not walk unassisted, and was slurring her words immediately prior to being assisted into defendant's apartment. Moreover, defendant admitted to DiBella that M.R. was intoxicated and vomited, that M.R. required assistance walking to the stairs outside of his apartment, and that he later engaged in the sex acts with her.

¶ 38 Despite these contrasting facts, defendant relies on *Roldan* for the proposition that "the consumption of alcohol does not necessarily render a person unable to consent to sex." *Id.* ¶ 24. The court's observation that alcohol consumption alone does not render an individual unable to consent, however, was coupled with the overwhelming testimony that the victim did not appear to be unable to consent to the sex acts immediately prior to or after they occurred. *Id.* ¶¶ 8-11, 14-15, 23. No such testimony was presented here, and M.R. did not merely "consume alcohol." As discussed above, unlike the evidence presented in *Roldan*, the record here demonstrates M.R.'s alcohol consumption prior to the sex acts with defendant was significant; she experienced severe memory loss, her speech was slurred, she vomited, and she could not walk unassisted. Defendant's reliance on *Roldan* is therefore misplaced. We thus conclude a rational trier of fact could find, beyond a reasonable doubt, that defendant knew M.R. was unable to consent to the sex acts when they occurred. See *id.* ¶ 19; *Giraud*, 2011 IL App (1st) 091261, ¶ 17.

¶ 39 B. Evidence of a Prior Bad Act

¶ 40 Defendant next argues the trial court abused its discretion by admitting evidence of a prior bad act, *i.e.*, evidence of defendant's alleged criminal sexual assault of J.S. According to defendant, the evidence of the alleged criminal sexual assault of J.S. was more prejudicial than probative and thus warrants reversing defendant's conviction.

¶ 41 Prior to addressing the merits of defendant's claims, we observe that defendant failed to

cite to any authority in support of his argument, in violation of Rule 341(h)(7). Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). Although defendant has thus forfeited his claim regarding prior-bad-act evidence, we nevertheless consider his contention. *Id.*; see *People v. Macias*, 2015 IL App (1st) 132039, ¶ 88.

¶ 42 Generally, evidence of prior bad acts may be admitted if it tends to demonstrate intent, *modus operandi*, identity, motive, absence of mistake, and any material matter other than propensity. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003); *People v. Johnson*, 2014 IL App (2d) 121004, ¶ 46. Under section 115-7.3 of the Code of Criminal Procedure (Code) (725 ILCS 5/100-1 *et seq*. (West 2012)), the legislature has determined that when a defendant is accused of certain sex offenses, including criminal sexual assault, evidence of defendant's commission of other enumerated offenses may be admissible and "may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(a)(1), (b) (West 2012). Evidence of a defendant's commission of another enumerated offense, including criminal sexual assault, may therefore be admitted to demonstrate propensity to commit certain sex offenses under section 115-7.3(b) of the Code. 725 ILCS 5/115-7.3(a)(1), (b) (West 2012); *Donoho*, 204 Ill. 2d at 176.

¶ 43 Section 115-7.3(c) of the Code provides that a court may consider, among other relevant facts and circumstances, the temporal proximity and the degree of similarity between the charged offense and the prior bad act sought to be introduced to determine whether the probative value of the evidence exceeds any undue prejudice to the defendant. 725 ILCS 5/115-7.3(c) (West 2012). Proof of a prior bad act may be admitted even where the defendant was charged with a crime in relation to the bad act and was subsequently acquitted. *People v. Baldwin*, 2014 IL App (1st) 121725, ¶¶ 72-73. The trial court's decision to admit evidence of a prior bad act will not be reversed absent an abuse of discretion. *People v. Johnson*, 406 Ill. App. 3d 805, 808 (2010). We

will find an abuse of discretion only if the trial court's evaluation is unreasonable, arbitrary, or fanciful, or where no reasonable person would adopt the trial court's view. *Donoho*, 204 Ill. 2d at 182.

¶ 44 Here, defendant argues the evidence regarding his alleged criminal sexual assault of J.S. was more prejudicial than probative because the prior bad act was not sufficiently similar to the instant offenses. Specifically, defendant asserts the J.S. case differed from the case at bar where (1) the State presented evidence that J.S. was so intoxicated on the evening of the alleged offense that she and defendant were asked to leave the bar they were frequenting and J.S. was unable to remember her address, (2) the State had video evidence of the sex act involving J.S. which illustrated her level of intoxication and ability to consent, and (3) defendant did not invite J.S. to go out in a group with other individuals.

¶ 45 The existence of some differences between the prior bad act and the current charge does not defeat admissibility because no two independent crimes are identical. *People v. Illgen*, 145 Ill. 2d 353, 373 (1991). Mere general areas of similarity are sufficient to support admissibility. *Donoho*, 204 Ill. 2d at 184. There must be a higher degree of identity between the facts of the two offenses only when the prior bad act is used to prove *modus operandi* or a common design. *People v. Boyd*, 366 Ill. App. 3d 84, 93 (2006); *Illgen*, 145 Ill. 2d at 372-73. "As factual similarities increase, so does the relevance, or probative value, of the [prior-bad-act] evidence" *Boyd*, 366 Ill. App. 3d at 93.

¶ 46 In this case, the trial court admitted evidence of defendant's alleged criminal sexual assault of J.S. in order to demonstrate intent, lack of consent, propensity, and *modus operandi*. A high degree of similarity between the two offenses must therefore exist. *Id*. The facts of both assaults are sufficiently similar here: (1) both victims are petite, African-American women;

(2) both were friendly with defendant but did not have a romantic relationship with him prior to the offenses; (3) both were members of defendant's religious organization; (4) both had recently ended long-term relationships before defendant invited them out for drinks; (5) both consumed significant amounts of alcohol; (6) both blacked out and had no memory of many events throughout the evening in question, including the sex acts; (7) both were unable to walk unassisted before entering defendant's apartment; (8) both awoke with vomit in their hair and each woman complained of pain in her vagina and anus; and (9) both testified they would never have consented to any sexual acts with defendant.[2] Defendant's attempts to distinguish the two offenses by identifying minor differences are unavailing. See *Boyd*, 366 Ill. App. 3d at 93; *Donoho*, 204 Ill. 2d at 184; *Illgen*, 145 Ill. 2d at 373.

¶ 47 Moreover, our supreme court has urged trial courts to engage in a meaningful assessment when considering the admissibility of prior-bad-act evidence to demonstrate propensity. *Donoho*, 204 Ill. 2d at 186. Here, the trial court engaged in a meaningful assessment of the prejudicial effect of the prior-bad-act evidence compared to its probative value. The record demonstrates the trial court took into consideration the fact that in most criminal sexual assault cases involving the affirmative defense of consent, the victim can testify to the events in question. The trial court noted that by contrast, neither M.R. nor J.S. could remember the sexual acts in question or testify regarding the facts of the occurrence. The trial court considered the prior bad-act evidence to be highly probative of defendant's affirmative defense of consent, especially where neither victim could testify to the facts surrounding the sexual acts. Although the evidence was undeniably prejudicial, as all evidence of a prior bad act is, we cannot say that the trial court abused its discretion in determining that its probative value outweighed its prejudicial effect given the

[2] We acknowledge that in support of several of these similarities, the State references J.S.'s testimony, which was not contained in the record. Defendant, however, does not refute any of these facts.

factual similarities between the victims and between the offenses. See *Donoho*, 204 Ill. 2d at 182; *Illgen*, 145 Ill. 2d at 373; *Johnson*, 406 Ill. App. 3d at 808; *Boyd*, 366 Ill. App. 3d at 93.

¶ 48 C. Reliance on Evidence Not Admitted at Trial

¶ 49 Defendant next contends he was deprived of due process because the trial court improperly relied on evidence that was not admitted at trial, specifically all of the evidence related to the J.S. case. In support of his argument, defendant observes that the judge who presided over the instant case also presided over the J.S. case where he was presented with all of the evidence introduced in that case, including a videotape that was not introduced in the case at bar.

¶ 50 It is well settled that the deliberations of the trier of fact are limited to the record made before it during the course of the trial. *People v. Jackson*, 409 Ill. App. 3d 631, 647 (2011). A determination made by the fact finder based upon facts not introduced at trial, including private investigation, or private knowledge untested by cross-examination or any of the rules of evidence, constitutes a denial of due process of law. *People v. Johnson*, 327 Ill. App. 3d 203, 206 (2001). When reviewing a bench trial, we presume the trial court considered only admissible evidence and disregarded inadmissible evidence in reaching its conclusion. *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). Such a presumption is only overcome when the record affirmatively demonstrates the trial court considered improper evidence. *People v. Holmes*, 234 Ill. App. 3d 931, 945 (1992). This presumption was not overcome here.

¶ 51 Initially, we observe the only authority defendant relies on in support of his contention, *People v. Wallenberg*, 24 Ill. 2d 350 (1962), is inapposite. In *Wallenberg*, the defendant testified he could not have committed the robbery in question because at the time of the offense he had damaged one of the tires on his truck 79 blocks from where the crime occurred. *Id.* at 352. The

defendant further testified there were no gas stations along his route where he could stop and fill his tire. *Id.* at 353. The trial court explicitly stated that it did not believe the defendant's testimony because it "happen[ed] to know different" about gas stations on that particular route. *Id.* at 353-54. There had been no evidence introduced to rebut the defendant's testimony. *Id.* at 354. Our supreme court held the trial court's reliance on private knowledge, "untested by cross-examination, or any of the rules of evidence," constituted a denial of due process. *Id.* Here, the record demonstrates that the trial court never explicitly stated it was relying on its own personal knowledge or any other evidence that was not admitted at trial. Instead, defendant makes two misguided inferences in support of his contentions.

¶ 52 First, defendant observes that in making its ruling the trial court referenced an "extra-record" videotape which was produced in the J.S. case, but which was not admitted at defendant's trial in the instant case. We observe, however, that evidence of the videotape's existence and contents was introduced several times during the instant trial: (1) the videotape was discussed in J.S.'s testimony, which was properly admitted in its entirety at defendant's trial;[3] (2) the videotape was referenced by DiBella during his testimony; and (3) the contents of the videotape were addressed during defendant's cross-examination testimony. The trial court's mere reference to the videotape therefore does not support a finding that the trial court based any findings on the portions of the videotape that were not testified to at trial. See *Holmes*, 234 Ill. App. 3d at 945.

¶ 53 More importantly, the trial court made clear during its ruling that it was not relying on the videotape in reaching its conclusion. The record demonstrates that the trial court's sole reference to the videotape was in order to explain why it acquitted defendant in the J.S. case. Specifically,

[3] Although J.S's testimony was not included in the record, defendant does not refute the State's contention that the videotape was discussed during the testimony.

the trial court stated,

> "[i]n the case of [J.S.], there is, in fact, a videotape that I saw on the prior trial that was stipulated to. And on the videotape, it shows the defendant having sex with the victim while she was bent over a sink. There is some statements [*sic*] made by the victim at this point in time that raised a reasonable doubt in my mind as to whether or not it was consensual, such as a statement 'close the door,' and a couple of other statements that could be interpreted some way or another. But there was no doubt that the victim appeared to be under the influence of something, albeit I could not say that it was at such a level that she was unable to give consent.
>
> It was videotaped. The defendant talked on the videotape. And conveniently now when the defendant testifies, he has no memory of what happened."

The trial court then discussed the facts of this case at length and later specified—without referencing the videotape—numerous reasons for finding beyond a reasonable doubt that the sexual acts in question occurred without M.R.'s consent.[4] We must therefore presume the trial court only considered evidence of the videotape that was properly introduced through the testimony of J.S., DiBella, and defendant—and disregarded any evidence of the videotape that was not introduced at the instant trial—in finding defendant guilty where (1) the trial court's reference to the videotape was limited to its explanation of why it acquitted defendant in the J.S. case, and (2) the trial court specified its reasoning for finding defendant guilty without referencing the videotape. See *Naylor*, 229 Ill. 2d at 603; *Holmes*, 234 Ill. App. 3d at 945.

¶ 54 Defendant next observes the trial court stated it was considering "the [J.S.] case" as evidence of a prior bad act, despite the fact that the only evidence of a prior bad act that was

[4] The reasons enumerated by the trial court are quoted *infra* ¶ 56. In finding defendant guilty, the trial court further relied on defendant's statements to M.R. and DiBella, and M.R. having experienced physical symptoms consistent with the offenses, including pain in her vagina and anus.

admitted at trial was J.S.'s testimony and DiBella's testimony regarding the statements defendant made to him. According to defendant, the trial court's reference to its consideration of "the [J.S.] case" indicated the trial court was considering all of the evidence introduced in that case.

¶ 55 Defendant's reliance on the trial court's reference to the J.S. case is unconvincing when the trial court's comments are considered in context. Initially, we observe that *prior to* referencing the J.S. case, the trial court had already expressly found M.R. was unable to voluntarily give consent to the acts in question. The trial court's reference to the J.S. case thus was not relevant to its finding that defendant lacked consent from M.R.

¶ 56 Moreover, the record does not affirmatively demonstrate the trial court considered any evidence from the J.S. case other than J.S.'s testimony when making its ruling. After finding M.R. did not consent to the sexual acts with defendant, the trial court elaborated,

> "Again, in considering the circumstances, *the [J.S.] case* as proof of [a prior bad act], not guilt of another crime, but just inference for the purposes that I have listed before, I do not find that that evidence combined with the victim's testimony, combined with the victim's intoxication at that time, combined with the defendant's change in stories with regard to what happened here, combined to [*sic*] the defendant's own admissions that they had sex, I, in fact, am convinced beyond a reasonable doubt that the sexual acts occurred without the victim's consent." (Emphasis added.)

Where the trial court did not specify which evidence from the J.S. case it was relying on, we must presume it relied only on the admitted evidence, *i.e.*, J.S.'s testimony, and disregarded inadmissible evidence in reaching its conclusion. See *Naylor*, 229 Ill. 2d at 603; *Holmes*, 234 Ill. App. 3d at 945.

¶ 57 Defendant further maintains the trial court improperly relied on the facts of the J.S. case

and mistook them for the facts of the instant case in support of its finding that M.R. was too intoxicated to consent to the sexual acts. Specifically, defendant observes the trial court stated, "[t]here is independent testimony that [M.R.] had to be assisted inside [defendant's] home." According to defendant, it was during the trial involving J.S. that testimony was elicited demonstrating J.S. was assisted into defendant's apartment. The evidence produced at the trial in the instant case demonstrated that M.R. was assisted only to the bottom of defendant's stairs, and no evidence was presented indicating she was assisted inside of the apartment.

¶ 58 We reject defendant's contention for two reasons. First, given the evidence in the record, including (1) Green's testimony that both he and defendant needed to assist M.R. to the bottom of defendant's stairs, (2) Green's testimony that M.R. would not have been able to walk up the stairs unassisted, and (3) DiBella's testimony that defendant related M.R. could not walk unassisted once they reached the bottom of the stairs and after they entered his apartment, the trial court could reasonably infer that defendant assisted M.R. into his apartment. See *Martin,* 2011 IL 109102, ¶ 15; *Wheeler*, 226 Ill. 2d at 117. Second, the trial court relied on an abundance of evidence, and not merely the fact that M.R. was assisted into defendant's apartment, in concluding M.R. was unable to give knowing consent to the sexual acts due to her level of intoxication. This evidence includes: (1) Green's testimony that (a) M.R. was unable to walk unassisted after leaving Blue Star, (b) M.R. was slurring her words upon arriving at defendant's apartment, (c) both he and defendant assisted M.R. to the stairs outside of defendant's apartment, and (d) M.R. was not in a condition to drive her vehicle, she needed "babysitting," and she "needed help;" (2) M.R.'s testimony that she blacked out from the time the group left Bar Louie (the first of three bars they visited) through the remainder of the evening; and (3) DiBella's testimony that (a) defendant confirmed both he and Green assisted M.R. to the bottom of his

stairs, and (b) defendant stated that at the end of the evening M.R. vomited, was intoxicated, and could not walk or balance unassisted, even after entering the apartment. Based on the foregoing, we are not convinced the trial court relied on evidence from the J.S. case that was not admitted during the instant trial in determining M.R. was too intoxicated to consent. See *Naylor*, 229 Ill. 2d at 603; *Holmes*, 234 Ill. App. 3d at 945. Accordingly, defendant was not deprived of due process. See *id*; *Johnson*, 327 Ill. App. 3d at 206.

¶ 59 III. CONCLUSION

¶ 60 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 61 Affirmed.