

NOTICE
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2014 IL App (5th) 120497-U

NO. 5-12-0497

IN THE

APPELLATE COURT OF ILLINOIS

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Marion County.
)	
v.)	No. 12-CF-159
)	
BRETT A. NOLLMAN,)	Honorable
)	Michael D. McHaney,
Defendant-Appellant.)	Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Justices Chapman and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's convictions and sentences affirmed where evidence of the defendant's other crimes and a video-recorded interview of the defendant's mother by police detective was not improperly admitted.

¶ 2 The defendant, Brett A. Nollman, was convicted, following a jury trial, of attempted home invasion (720 ILCS 5/8-4(a) (West 2012)) and criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2012)). He was sentenced to 15 years of imprisonment on the attempted home invasion conviction and 364 days of imprisonment on the criminal damage to property conviction. He appeals his convictions and sentences, arguing that he is entitled to a new trial because evidence of other crimes was

erroneously admitted, as was the entire recorded statement of a witness when the State was seeking to admit prior inconsistent statements. The defendant contends that, rather than admitting the entire statement, the video should have been redacted to allow only the inconsistent statements of the witness to be heard by the jury.¹ For the following reasons, we affirm.

¶ 3

FACTS

¶ 4 On May 30, 2012, the defendant was charged by information with one count of attempted home invasion (720 ILCS 5/8-4(a) (West 2012)) and one count of criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2012)). A jury trial was held on August 21, 2012. Before testimony commenced, the defendant filed four motions *in limine*. In the first motion, the defendant requested the circuit court to preclude the State from presenting evidence of his prior criminal convictions. In ruling on the motion, the circuit court allowed admission only of the defendant's 2006 conviction of felony DUI and his 2009 conviction of aggravated battery, both for impeachment purposes only, and denied the admission of three additional convictions, holding that presenting those to the jury would be more prejudicial than probative.

¶ 5 In the second motion *in limine*, the defendant requested the circuit court to preclude the State from presenting evidence of certain prior bad acts of which the

¹We were unable to view the video in the record on appeal, but note that none of the actual contents of the statements are in dispute between the parties and are of no consequence to our disposition of the issues.

defendant was not convicted. In particular, the motion alleged that the defendant's mother stated in a videotaped interview with the police on April 27, 2012, that she must lock her doors because the defendant enters her home without her consent and steals from her. The State sought to introduce that evidence to show the defendant's intent regarding the offenses in the instant case. The circuit court denied the second motion.

¶ 6 In the third motion *in limine*, the defendant requested the circuit court to preclude the State from presenting evidence that he was under the influence of bath salts on the date of his arrest, arguing that any testimony to that regard was speculative. The circuit court granted the motion to the extent that "no witness can say it was bath salts."

¶ 7 In the fourth motion *in limine*, the defendant requested the circuit court to preclude the State from presenting evidence of his alleged prior bad acts of battery against his niece, Kellee Lamb, and his nephew, Doug Dearing, which occurred a couple of hours prior to the offenses in the instant case, when Lamb and Dearing attempted to persuade the defendant to leave his mother's property. The circuit court denied the motion.

¶ 8 After the rulings on the four motions *in limine*, the circuit court asked defense counsel if there were further motions, to which he replied in the negative. After *voir dire*, the following testimony and evidence was presented. Don Evischi testified that he is 73 years old and has resided with his girlfriend, Sandra Nealy—who is also the defendant's mother—for 11 years. Don testified that the defendant acted aggressively toward him and Sandra in the past. In particular, in 2009, Don was at home with Sandra and her sister, when the defendant came in and started going through Sandra's purse. Sandra's sister tried to stop the defendant and he pushed her away, said "I'll do any fucking thing I want

to," and then ran at Don, pushed him backwards over his lounge chair, jumped on him, knocked over a table and lamp, and started hitting him, kicking him, and stomping his head. Don testified: "We must have been fighting for [10] minutes. I never got up, I was flat on my back." When the police arrived, he was still lying on the floor. The defendant was arrested, convicted, and sentenced to prison following the incident.

¶ 9 Don testified that the defendant got out of prison only a few days before the incident in question in the instant case and upon his release, he lived across the street from Don and Sandra in a home that Sandra owns. Don testified that on April 27, 2012, he and Sandra left the home to run errands. When they returned, the defendant was in their home without their permission. Sandra had instructed the defendant to stay away from their home when he was drinking, and he had been drinking for a few days. Don testified that when he realized the defendant was there, he was uncomfortable so he decided to go to Sandra's daughter's home to stay out of the defendant's way. Sometime later, Don received a phone call from Sandra, informing him that the defendant had left. Accordingly, Don returned to the home to find the defendant in the yard with the defendant's sister and niece. Don testified that the defendant was subsequently arrested and taken to the police station.

¶ 10 At some point later in the day, Don and Sandra were home when they observed the defendant walking into their driveway toward the house. Accordingly, Sandra hurriedly locked the doors. Don reported that the defendant came to the side door and pounded on it. Sandra told him to leave, but the defendant refused and said, "Open the fucking door and let me in." Don testified that Sandra refused and told the defendant that she did not

want him in the house. The defendant told Sandra, "Open the fucking door or I'll go kick the God damn back door in." At that point Don went to the back room, called 9-1-1, and retrieved his handgun. Don explained that he was frightened for himself and Sandra "because of what happened to me three years ago when I didn't have [a gun] and he tried to stomp my head in."

¶ 11 Don returned with the gun and found the defendant had moved from the side door to the back door where he was trying to force his way in and telling Sandra, "Mom, open this fucking door or you are going to be sorry." Sandra was holding the door in an attempt to prevent the defendant from entering. Don testified that the defendant proceeded to kick the door in, which caused the glass to shake and splinter. Don explained that "the door was bulging pretty good and [Sandra] couldn't quite hold it." Don then displayed the gun to the defendant and told him to leave. The defendant responded by swearing sarcastically at Don, and he continued to force his way in, threatening that they would be sorry if they did not let him in. The defendant kicked the door again and Don fired a warning shot through the bottom of the door in an attempt to frighten the defendant away. By that time, the glass was shattered but the defendant was still screaming and cursing at Don and Sandra. Don fired another warning shot and the defendant said, "Shoot me, you mother fucker, shoot me." Don testified that the defendant reached through the glass with both arms, knocked Don's glasses off, and said, "I'll kill you, you mother fucker." Don stepped back away from the defendant and at some point he shot the defendant in the side of the leg, but the defendant still refused to leave and continued to threaten to kill Don. At that point, the police arrived. Don

testified that the defendant could see through the house from the back door to the front door when the police car pulled into the driveway. After observing the police car, the defendant retreated to the back yard, where he was apprehended by the police.

¶ 12 Sandra Nealy testified that she is 74 years old and the mother of the defendant. She and Don have been together as a couple for about 12 years and they have resided together in Centralia for approximately 8 years. Being declared a hostile witness, Sandra's testimony was laborious. She agreed that the defendant has a problem with alcohol and he gets "a little out of control sometimes" when he is drinking and that he became aggressive with Don in 2009. Regarding that incident, Sandra testified that the defendant was drinking and came to her house wanting money. She told him no. Don told him to quit aggravating his mother. Sandra testified that Don and the defendant got into a fight, which resulted in the defendant going to prison. Sandra testified that the defendant was released from prison on April 3 or 4, 2012. When asked where the defendant lived upon his release, Sandra replied that "he didn't really have a place." Sandra testified that the house across the street had been where the defendant stayed and she rented the house to her grandson while the defendant was in prison. When the defendant was released, Sandra thought the two "might be able to live together, but it didn't work." She added, "[The defendant] had no home actually, so I told him he could come across the street and stay with us." Sandra acknowledged that she gave a statement to a detective following the incident on April 27, 2012, but she could not recall telling him that the defendant lived across the street.

¶ 13 Sandra testified that the defendant started drinking again within a couple of days after being released from prison, and she admitted that she had problems with him entering her home without her consent prior to the incident on April 27, 2012. She explained that her practice was to refuse the defendant entry to her home if he was drinking. She did not recall telling the detective about problems with the defendant entering her home and stealing things when she was not present. Nor could she recall telling the detective that she was required to lock all of the doors and windows to prevent the defendant from entering her home and stealing from her. She conceded that the police removed the defendant from her property two or three times before April 27, 2012, but she did not want to sign statements against him. Sandra testified that if the defendant was drinking and came to the home, Don usually left the house. She denied ever hearing the defendant threaten to kill Don prior to April 27, 2012.

¶ 14 Sandra testified that she and Don left the house on April 27, 2012. She acknowledged that she told the detective in the interview that she locks her house because "it's a bad neighborhood and then I didn't want anybody coming in, [the defendant] or anyone else." Sandra testified that the defendant was in the house when she and Don returned on April 27, 2012. She asked him how he got in and he said the door was open. Sandra could not recall if she locked the door or not, but she knew the defendant did not have a key. She did not recall telling the detective that she was certain that the doors were locked.

¶ 15 Sandra testified that the defendant was there wanting something to eat. Accordingly, Don went to Sandra's daughter's home and Sandra told the defendant that

she would give him some food, but after that he had to leave. When the defendant finished eating, he left and Sandra called Don to tell him to come home. Sandra testified that the defendant came back to the house before Don returned and she refused to let him in. She stated that he began kicking the side door but she would not let him in. When asked if the defendant removed the screen from the side door, Sandra replied in the negative. She did not recall telling the detective that the defendant removed the screen then replaced it when he could not get in.

¶ 16 Sandra testified that the defendant then went to the back door and she was required to hold the door shut as she continued telling the defendant to go away. Sandra was on the phone with her daughter, Dana Lamb, at the time. Dana called the police and came to Sandra's house with her daughter, Kellee Lamb, in an attempt to calm the defendant. Sandra's grandson, Doug, who lives across the street from Sandra, also came to the house. Sandra testified that an argument ensued, during which the defendant hit Doug and pushed Kellee. The defendant was subsequently arrested and Don returned home in the meantime.

¶ 17 Sandra testified that the defendant was released following his arrest and returned to the house yet again. She reluctantly conceded that when the defendant arrived, he was at the side door yelling that he wanted in but she would not allow it. In response, the defendant began kicking the door and pounding on it. Sandra could not recall telling the detective that the defendant threatened to go to the back door and kick it in, but she testified that he went to the back door and wanted in and she told him to go away. She

admitted that she was holding the door closed and the defendant continued to pound on and kick the door, despite her telling him to leave.

¶ 18 Sandra attested that Don left the room, returned with a gun, and told the defendant that he would shoot him if he did not leave, but the defendant would not leave. Sandra confirmed that Don fired a warning shot but the defendant became angrier and told them they would be sorry if they did not open the door. Sandra also admitted that the defendant threatened to kill Don and attempted to grab him after the defendant was shot in the leg and the glass in the door was shattered.

¶ 19 Joe Rizzo testified that he is a police officer for the city of Centralia. At 4:39 p.m. on April 27, 2012, Rizzo was dispatched to Sandra's home upon report that the defendant was intoxicated and attempting to enter the house against Sandra's will. Upon arrival, Rizzo located the defendant in the back yard and took him into custody. He could tell that the defendant had been drinking. No charges arose from the defendant attempting to enter the home because no one signed a statement against him. However, upon arrival at the Centralia police department, the defendant was questioned about the battery of Doug Dearing earlier that day. Subsequently, the defendant was charged with battery and released with a notice to appear.

¶ 20 Rizzo testified that about 20 minutes after the defendant left the police department, he received another dispatch to go to the same residence. Rizzo and another officer arrived at the same time and pulled into the driveway of Sandra's house. As Rizzo approached the side door, he could see the defendant in the back yard attempting to scale the fence and escape. At that point, Don came out of the house and informed Rizzo that

he thought the defendant was shot in the leg. Rizzo witnessed the defendant starting toward Don, so he instructed Don to step back into the house, after which he climbed the stairs and blocked the door. Rizzo then instructed the defendant to go to the street and he called for backup and an ambulance. The defendant was transported to the hospital for treatment.

¶ 21 Rizzo testified that Sandra and Don came to the police department to give statements. Rizzo interviewed Don and another officer interviewed Sandra. After Don's interview, Rizzo was dispatched to the hospital because the defendant was "being difficult" and "wanting to leave against medical advice." When Rizzo arrived at the hospital, the defendant had checked himself out of the hospital and was walking out of the emergency room. Rizzo and another officer took the defendant into custody.

¶ 22 Blaine Uhls testified that he is a detective with the Centralia police department. On April 27, 2012, Uhls went to Sandra's residence to collect evidence. Upon his arrival, Detective Rich Stevenson was already there and the two proceeded to work together. Uhls testified that a glass crack pipe was recovered from the defendant's pants pocket. However, he reported that the pipe was not submitted to the Illinois State Police crime lab because they no longer test for residue on such items. After collecting all of the evidence, Stevenson returned to the police department and Uhls went to the emergency room to interview the defendant. Uhls noted that he was unable to obtain a statement from the defendant because he was very disoriented. After checking with hospital staff, Uhls learned that the defendant had been given pain medication. Accordingly, Uhls did not attempt to interview the defendant.

¶ 23 At the beginning of the second day of the trial, defense counsel presented a fifth motion *in limine*, in which the defendant requested the circuit court to preclude the State from presenting the hour and 40 minute videotaped interview of Sandra Nealy by Detective Stevenson on April 27, 2012. Although the written motion requests that the entire video be excluded, in arguing the motion, defense counsel conceded that any prior inconsistent statements on the video were admissible, but any additional material displayed to the jury would be duplicative of her testimony and/or prejudicial. Defense counsel specified that the video contains a comment by Sandra regarding her belief that the defendant was using bath salts, the reference to which was barred when the circuit court granted the corresponding motion *in limine* before testimony commenced on the first day of the trial. Defense counsel added that Detective Stevenson stated during the interview that the defendant had "been in prison a bunch of times" and that allowing the jury to hear such a statement would be prejudicial to the defendant. Defense counsel further asserted that Sandra's prior inconsistent statements could be highlighted by the testimony of Detective Stevenson who interviewed her, rather than by the video.

¶ 24 Counsel for the State argued that the motion *in limine* was untimely and the video could have been edited prior to the trial, had earlier notice been given. He stressed that defense counsel had access to the video over a month before the trial began, which allowed him to request any redacts in a timely fashion. However, defense counsel waited until the week before the trial to notify the State that he was having difficulty playing the video on his computer. Although counsel for the State offered to allow defense counsel to watch the video at his office, defense counsel did not do so.

¶ 25 Counsel for the State averred that the video was admissible for impeachment and as substantive evidence and that foundation for the video was established during Sandra's testimony. He emphasized that, during her testimony, Sandra reluctantly admitted once or twice to making certain statements to Detective Stevenson, but the majority of the time she either denied any statements or claimed not to remember making the statements. The State agreed that Detective Stevenson wrote a statement as he interviewed Sandra, which she signed, but argued that admitting the video would decrease any likelihood of the defense arguing that the detective took any of Sandra's words out of context or recorded her statement incorrectly.

¶ 26 The State could not recall whether Sandra's statement about bath salts was in the video or in the police report. Regarding Detective Stevenson's alleged statement that the defendant had been in prison "a bunch of times," the State recalled the detective stating that the defendant had been in trouble before and that he had been in prison before, but he pointed out that there was no specific discussion about what he had been in prison for. Moreover, the jury already heard testimony that the defendant had been in prison before. The State suggested that the defense stop the video at any questionable point and request limiting instructions to the jury as necessary.

¶ 27 The circuit court agreed that the issue could have been raised earlier, and observed that it was too late to begin redacting the video, as the jury would reassemble in 10 minutes. The video was admitted and the circuit court noted that the defense could make a motion for some sort of *limine* instruction at the appropriate time. The circuit court added for purposes of review on appeal that the video should also be allowed because

Sandra was very tearful throughout her testimony and "was doing everything in her power to minimize and take back what she obviously told the police on the date of this incident." The circuit court underlined the fact that when Sandra left the witness stand, she went out of her way to walk behind the counsel table and bench, and squeezed the defendant's shoulder in full view of the jury.

¶ 28 After the circuit court denied the motion *in limine*, Detective Rich Stevenson took the stand and laid the foundation for his videotaped interview of Sandra on April 27, 2012. The video was admitted into evidence and played for the jury, over defense counsel's objection. At the conclusion of the video, a recess was taken and the following colloquy occurred outside the presence of the jury. Defense counsel requested a curative instruction due to two references made in the video, regarding the defendant being in prison. One occurred when Detective Stevenson referenced "this last time he went to prison" and another occurred when Detective Stevenson said "he spent most of his adult life in prison." Defense counsel also requested an instruction to cover "all the speculative comments [Sandra] made during her questioning." Defense counsel made no mention of a curative instruction for any specific mention of bath salts. When the jury reconvened, the circuit court gave the following curative instruction:

"Ladies and gentlemen, you have heard evidence regarding the fact that the defendant was released from prison in April regarding an incident with respect to Mr. Evischi. You heard on the video references to other times the defendant may have been in prison. With respect to any other time other than Mr. Evischi, that

incident, you are to disregard any evidence that the defendant spent any time in jail or prison. Any time before the Mr. Evischi incident."

¶ 29 After the curative instruction, defense counsel called Sandra to the stand. When asked why her testimony differed from her statements to Detective Stevenson on the video, she replied that she was "mad and confused and traumatized and listening to other people" prior to her interview and when she read her statement several days later she thought, "Oh, my goodness, this isn't the way it was."

¶ 30 After closing arguments and before deliberations, the circuit court admonished the jury once again that any evidence that was received for a limited purpose should not be considered for any other purpose. The circuit court also emphasized that evidence was presented that the defendant had been involved in offenses other than those charged in the information and that such evidence was admitted on the issues of the defendant's intent, state of mind, and/or motive, and may be considered solely for that limited purpose.

¶ 31 After deliberating, the jury returned its verdict, finding the defendant guilty on both counts. The defendant was subsequently sentenced to 15 years of imprisonment on the attempted home invasion conviction and 364 days of imprisonment on the criminal damage to property conviction. The defendant filed a posttrial motion for a new trial, which the circuit court denied. The defendant filed a timely notice of appeal.

¶ 32 ANALYSIS

¶ 33 The defendant raises two issues on appeal, which we have restated as follows: (1) whether the defendant is entitled to a new trial where the State presented evidence of other crimes, and (2) whether the defendant is entitled to a new trial where the circuit

court admitted Sandra's entire recorded interview, rather than admitting only the inconsistent statements.

¶ 34

I. Other Crimes Evidence

¶ 35 The first issue is whether the defendant is entitled to a new trial because the State presented evidence of his other crimes. "The admission of other crimes evidence is within the sound discretion of the trial court and will not be overturned on appeal absent a clear abuse of discretion." *People v. Reeves*, 314 Ill. App. 3d 482, 492 (2000). "Other crimes evidence is admissible to show, among other things, *modus operandi*, motive, knowledge[,] and defendant's attitude toward the victim." *Id.* Other crimes evidence is also admissible "when it constitutes a continuing narrative of the circumstances attending the entire transaction." *People v. Carter*, 362 Ill. App. 3d 1180, 1189 (2005). "This court has specifically recognized evidence of another crime is admissible if it is part of a continuing narrative of the event giving rise to the offense or, in other words, intertwined with the offense charged." *Id.* at 1189-90 (quoting *People v. Thompson*, 359 Ill. App. 3d 947, 951 (2005)).

¶ 36 In this case, the defendant argues that evidence of his aggravated battery of Don in 2009 was improperly admitted, as were references to his use of drugs, his prior threats to kill Don, as well as his burglary of Sandra's home, attempts to force entry into Sandra's home, and the fight in the street before the instant offenses. The defendant contends that evidence of these other crimes was improperly admitted because the State conducted a prejudicial "mini-trial" with that evidence, which the supreme court has advised against for the sake of judicial economy. See *People v. McKibbins*, 96 Ill. 2d 176, 186-87

(1983). However, such evidence is admissible when the same does not constitute prejudicial error. See *id.* at 187. The prejudicial error test is whether the probative value of such evidence is outweighed by its prejudicial effect. *People v. Donoho*, 204 Ill. 2d 159, 183 (2003). Factors to consider when conducting a balancing test between the probative value and prejudicial effect of other crimes evidence include " '(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.' " *Id.* (quoting 725 ILCS 5/115-7.3(c) (West 1998)).

¶ 37

1. 2009 Aggravated Battery

¶ 38 Here, while the evidence of the defendant's 2009 aggravated battery of Don is remote in time to the instant offense, we find the facts surrounding that incident relevant and admissible to establish the defendant's intent, *modus operandi*, and attitude toward Don. See *Reeves*, 314 Ill. App. 3d at 492. The defendant's intent to harm Don and his hostility toward him was unquestionably established in 2009. Moreover, we find a factual similarity between the two cases in that the defendant was at Sandra's home uninvited before he assaulted Don in 2009, as he was in this case. For these reasons, we find the probative value of the evidence of the 2009 aggravated battery is not outweighed by any prejudicial effect. Because the evidence of the 2009 aggravated battery was not admitted to show the defendant's propensity to commit crimes, it was not an abuse of discretion for the circuit court to admit it.

defendant was bad when consuming alcohol and worse when something else was added, and Sandra's statement to Detective Stevenson that the defendant stole money from her to buy drugs. As stated, we were unable to review the video to confirm the accuracy of these alleged statements. However, even if these statements were made on the video as the defendant says, we find the probative value is not outweighed by the prejudicial effect due to the following relevant facts and circumstances. See *Donoho*, 204 Ill. 2d at 183.

¶ 43 First, these statements are admissible to establish the defendant's *modus operandi* (see *Reeves*, 314 Ill. App. 3d at 492), as Sandra's testimony established that the defendant's ongoing pattern was to cause trouble when he was under the influence and her rule was to never allow him in her home if he had been drinking.

¶ 44 Second, we find Sandra's statement that the defendant stole from her to buy drugs admissible to show the defendant's motive for the instant offenses. We are mindful that the circuit court granted the defendant's motion *in limine* to the extent that no witness could talk about bath salts, and the prosecution agreed that any reference thereto would be speculative and improper. Accordingly, no reference to bath salts was brought out in testimony or closing arguments. The references the defendant complains of were passing comments on the hour and 40 minute video of Sandra's interview with Detective Stevenson, and we find those comments had no bearing on the outcome of the trial.

¶ 45 Because the probative value of the references to the defendant's drug use is not outweighed by any prejudicial effect and because the evidence was not admitted to show the defendant's propensity to commit crimes, it was not an abuse of discretion for the circuit court to admit it.

¶ 46

4. Prior Threats to Kill Don

¶ 47 We find the probative value of the evidence of the defendant's prior threats to kill Don is not outweighed by the prejudicial effect due to the following relevant facts and circumstances. See *Donoho*, 204 Ill. 2d at 183. First, although Sandra testified that she never witnessed the defendant threaten to kill Don before the date of the instant offenses, the defendant concedes that Sandra told Detective Stevenson during the interview that Don was afraid of the defendant because he threatened him so many times. These statements are admissible as prior inconsistent statements to impeach Sandra's testimony. See *People v. Leonard*, 391 Ill. App. 3d 926, 935 (2009) (circuit court did not abuse its discretion by allowing State to impeach defendant with evidence of his prior inconsistent statement to police). These statements are also admissible to establish the defendant's attitude toward Don. See *Reeves*, 314 Ill. App. 3d at 492.

¶ 48 We find the probative value of the defendant's prior threats to kill Don is not outweighed by any prejudicial effect and because the evidence was not admitted to show the defendant's propensity to commit crimes, it was not an abuse of discretion for the circuit court to admit it.

¶ 49 For the foregoing reasons, we find the defendant is not entitled to a new trial because evidence of his other crimes was properly admitted into evidence.

¶ 50

II. Admission of Videotaped Interview

¶ 51 The second issue on appeal is whether the defendant is entitled to a new trial where the circuit court admitted the video of Detective Stevenson's interview of Sandra in its entirety, rather than admitting only the inconsistent statements. "Admissibility of

evidence is a matter for the trial court's discretion, and a trial court's evidentiary rulings will not be disturbed on appeal absent an abuse of discretion." *People v. Swanson*, 335 Ill. App. 3d 117, 125 (2002).

¶ 52 In this case, the circuit court denied the defendant's fifth motion *in limine* to exclude the videotape of Detective Stevenson's interview of Sandra because the motion was untimely and because Sandra was tearful throughout her testimony and attempted to minimize what she told the detective on the date of the offense. "Motions *in limine* are designed to call to the attention of a trial court, in advance of trial, some evidence which, because of its potentially prejudicial nature, cannot be discussed in the jury's presence until the court has determined it is admissible." *People v. Owen*, 299 Ill. App. 3d 818, 822 (1998). As our brethren in the Fourth District observed, "Given the uncertainties that are inherent with any motion *in limine*, it is difficult to envision a situation in which a trial court would abuse its discretion by choosing not to entertain the motion and instead requiring that the matter be presented and resolved at trial." *Id.* at 824. "Although we have trouble envisioning what might constitute an abuse of such discretion, we have no difficulty in determining what does not: denying a motion *in limine* on the ground that it is untimely or on the ground that resolving it might take too much time cannot constitute an abuse of the trial court's discretion." *Id.* "This is particularly so when *** the motion *in limine* is made on the date of trial, and in order for the court to address it, the court would need to keep a jury waiting, wondering why nothing was happening despite the jurors' having been required to appear at the courthouse." *Id.* This is precisely what happened here.

¶ 53 Defense counsel argues that he could not have presented the motion to exclude the video prior to Sandra's testimony because it was not until after her testimony that the State sought to introduce the video. However, the record reflects that defense counsel had or could have had sufficient prior knowledge of the probability of the use of the video and the necessity to present the motion *in limine* prior to the trial when there would have been sufficient time for the State to redact it.

¶ 54 The State revealed that although defense counsel possessed the video for a month before the trial, it was not until the week before the trial that he informed the State that his computer would not play the video. Although the State invited defense counsel to his office to view the video, he did not do so. The record reflects that defense counsel watched the video in the jury room of the courthouse immediately preceding the trial. Before *voir dire*, when defense counsel presented the first four motions *in limine*, during the first motion, the State informed the circuit court that the defense disclosed a summary of Sandra's testimony, which led the State to believe that Sandra was "going to try to water it down and even trying to say that [the defendant] had authority to be in the house." Having just watched the video, defense counsel knew or should have known by this discussion that the State was not pleased with the inconsistency between Sandra's testimony and the information she provided to the detective, thereby making it highly probable that the State would use the video to impeach any inconsistencies in Sandra's testimony. After ruling on the fourth motion *in limine*, the circuit court asked defense counsel if he had any further motions, to which he replied in the negative, although even

at that point the motion would have been untimely because raising it then would have kept the jury waiting. See *Owen*, 299 Ill. App. 3d at 824.

¶ 55 Sandra testified on the first day of the trial, yet defense counsel did not present the motion *in limine* until the beginning of the second day of the trial, 10 minutes prior to the jury reassembling. At that point, there was certainly not adequate time for the State to redact the video to include only the inconsistent statements. Had defense counsel raised the motion at the end of testimony on the first day, this would have allowed a more reasonable amount of time for the State to attempt to redact the video before the second day of the trial. Even after listening to Sandra's testimony and knowing the inconsistencies between that testimony and her statements to Detective Stevenson, defense counsel still did not present the motion *in limine* at the end of the first day of the trial, thereby foregoing yet another chance to raise the motion in a more timely fashion.

¶ 56 Even assuming, *arguendo*, that the motion was timely, we note that, according to the assertions of both parties, the video is replete with inconsistencies between Sandra's testimony and her statement to Detective Stevenson. The parties both point out the following inconsistencies: (1) Sandra testified that the defendant lived with her or that she told the defendant he could stay with her, but she told Detective Stevenson that the defendant lived across the street, (2) Sandra testified that the defendant did not steal from her, but she told Detective Stevenson that the defendant stole from her many times and she had to hide her purse to prevent it, (3) during her testimony, Sandra did not recall saying that she locked her doors to keep the defendant from stealing from her, but she told Detective Stevenson that she locked her doors and windows because the defendant

had been getting into her home and stealing, (4) Sandra testified that the defendant never threatened to kill Don, but she told Detective Stevenson that he did previously threaten to kill Don, (5) during her testimony, Sandra did not recall whether she locked her door on the day of the offenses, nor did she recall whether the defendant was intoxicated and inside the home when she and Don returned, but she told Detective Stevenson that she locked the doors that day, the defendant was inside the home when she and Don returned, he was holding a beer, and he was intoxicated, (6) Sandra testified that the defendant did not remove the screen from the side door, but she told Detective Stevenson that he did remove it, and (7) Sandra testified that only after three gunshots, the defendant reached through the door and tried to grab Don, but she told Detective Stevenson that the defendant was trying to kill Don and that he reached through the door and tried to grab Don prior to the shots being fired.

¶ 57 The defendant takes issue with the fact that many statements on the DVD were not inconsistent with Sandra's testimony, but were consistent with and repetitive of her testimony and the same was inadmissible. The defendant does not challenge the admissibility of the prior inconsistent statements, but basically everything on the video other than the inconsistent statements. In *People v. Salazar*, 126 Ill. 2d 424, 457 (1988), in looking at the admissibility of prior inconsistent statements, the Illinois Supreme Court held that section 115-10.1 of the Illinois Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2012)) does not require a minimal amount of inconsistencies between a witness's testimony and the witness's prior inconsistent statement. Moreover, while only inconsistent portions of a witness's prior inconsistent statement are admissible,

admissibility does not require the trial court to make a " 'quantitative or mathematical analysis' " of whether the witness's entire statement is inconsistent for the entire statement to be admissible. *People v. Govea*, 299 Ill. App. 3d 76, 87 (1998) (quoting *Salazar*, 126 Ill. 2d at 456-58); see also *People v. Steele*, 265 Ill. App. 3d 584, 596 (1994) (because of the significant inconsistencies, the trial court did not err in admitting prior statements even though some of the prior statements were consistent with the trial testimony). Inconsistencies may be found where a witness is evasive or silent, or changes his position. *People v. Zurita*, 295 Ill. App. 3d 1072, 1077 (1998). Also, professed memory loss may be deemed inconsistent with a prior statement. *People v. Vannote*, 2012 IL App (4th) 100798, ¶ 25.

¶ 58 Here, given the large number of inconsistent statements and/or claims by Sandra not to remember what she told Detective Stevenson, we find the above cases applicable to the admission of the video. Also noteworthy is that once the video was played, defense counsel requested the circuit court to give a limiting instruction to the jury, taking issue with only two specific references to the defendant being in prison. The circuit court gave a curative instruction directly after the video, and before deliberations, the circuit court admonished the jury that evidence received for a limited purpose should not be considered for any other purpose. The circuit court also emphasized that evidence was presented that the defendant had been involved in offenses other than those charged in the information and that such evidence was admitted on the issues of the defendant's intent, state of mind, and/or motive, and may be considered solely for that limited purpose.

¶ 59 In *People v. Bishop*, 218 Ill. 2d 232, 250-51 (2006), the defendant argued that a witness's passing statement in testimony that she did not want the defendant to return to jail, denied him a fair trial. The circuit court in *Bishop* gave a curative instruction to the jury and the issue was not brought up again at the trial or in closing arguments. *Id.* at 251. The Illinois Supreme Court noted that "[t]he mere fact, without more, that defendant had previously been in jail says nothing about the type of offense involved." *Id.* at 253. The Illinois Supreme Court also rejected the defendant's argument that the evidence was closely balanced (*id.*) and concluded that the defendant was not so prejudiced by the statement that he was denied a fair trial. *Id.* at 254.

¶ 60 Similarly, in this case, the defendant took issue with two comments on the video, the circuit court gave a specific curative instruction, and the issue was not repeated throughout the remainder of the trial. Likewise, we find the evidence in this case is not closely balanced and the outcome would not have been different even if the statements had not been made. Accordingly, we find that the defendant was not so prejudiced by the statements that he was denied a fair trial, and the circuit court did not err in denying his posttrial motion for a new trial on that basis.

¶ 61 CONCLUSION

¶ 62 For the foregoing reasons, we affirm the defendant convictions and sentences.

¶ 63 Affirmed.