2012 IL App (1st) 093388-U

FIRST DIVISION
FILED: May 7, 2012

No. 1-09-3388

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 11443
	)	
JERYME MORGAN,	)	Honorable
	)	John J. Scotillo,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment entered on defendant's convictions of aggravated criminal sexual assault,robbery, and kidnapping affirmed over claim that trial court abused its discretion in admitting evidence of other crimes; defendant forfeited claim that jury instruction was overly broad; fines and fees order modified.

¶ 2 Following a jury trial, defendant, Jeryme, Morgan was found guilty of three counts of aggravated criminal sexual assault, as well as one count each of robbery and kidnapping. The trial court sentenced him to serve an aggregate term of 52 years' imprisonment and assessed fines and fees totaling $1,390. On appeal, defendant contends that the trial court erred by admitting evidence of other crimes to show his intent and *modus operandi*, and by providing an overly broad jury instruction that failed to limit the use of that evidence to relevant purposes. He also challenges the calculation and assessment of certain of the pecuniary penalties imposed by the court.

¶ 3 The record shows that defendant was tried on three counts of aggravated criminal sexual assault and one count each of robbery and kidnapping, stemming from his sexual attack on M.H. during the early morning hours of April 21, 2007. Prior to trial, the prosecution requested leave to present evidence that the defendant had put a gun to the head of "another young woman" and pulled her toward his car before fleeing when he realized someone was watching the attack. The State argued, *inter alia*, that this other-crimes evidence was admissible to show *modus operandi*, common scheme or design, identity, lack of mistake, and knowledge. The trial court granted the State's motion, finding that there were several similarities in the nature and circumstances of the two offenses and that the later offense, which did not result in a sexual assault, "mitigates in the defendant's favor as not being overly prejudicial."

¶ 4 At trial, M.H. testified that she was 25 years of age, and that about 3 a.m. on April 21, 2007, she returned to her apartment in Hoffman Estates, Illinois, after spending the night with friends. She parked about three or four spaces away from her building, and as she was walking to the entrance, defendant came up behind her, put her into a choke hold, and placed a gun to her head. He then pulled her backwards towards a "tealish color" SUV, put her in the backseat, got in on the driver's side, and backed the car into the visitor lot. Thereafter, he moved to the backseat and forcibly undressed her. He also repeatedly hit her in the head with his gun as she struggled to get away and to open the car door. He then took off his pants and rubbed his penis on her vagina and her anus. When she continued to struggle, defendant bit her neck hard enough to break the skin and forced her to perform oral sex on him at gunpoint.

¶ 5 After the sexual assault, defendant returned to the front seat and demanded her credit cards, ATM card, and keys. M.H. stated that she was bleeding from the head and neck at this point, and she complied with his request. Defendant told her to keep her eyes closed while he drove to an ATM. About 10 minutes later, he stopped and asked for the PIN to her ATM card. After defendant withdrew money from the ATM, he pointed his gun at her as he demanded that she give him her cell

phone and then told her to get out of the car. She did as instructed and then ran to a grocery store across the street, where someone called 911. Later, she described defendant to police as a black male, about 5' 7" tall, who had corn rows in his hair and was wearing a jersey. At trial, she identified a photograph of defendant's vehicle and the gun he used during the assault.

¶ 6 The State called Monika Solek to testify during its case-in-chief, and, without objection from counsel, the court instructed the jury that her testimony was to be admitted only with regard to the issue of the defendant's identification, intent, and *modus operandi* and could be considered only for those limited purposes. Monika testified that shortly before midnight on April 30, 2007, she was on the phone with her mother and standing behind her car which was parked in a closed garage at 655 Perrie Drive, in Elk Grove Village, Illinois. She then heard the garage door open, and saw her neighbor Maricel Marcial pull into the garage and park next to her. The two exchanged greetings, and Maricel walked around her car, took something out of the back seat, and walked towards the exit leading into their apartment building.

¶ 7 When Maricel was about 30 feet from the door, a man came out from behind a wall with a gun in his hand. The man pushed or pulled Maricel down to the ground, and Maricel dropped her bags and began to scream. Monika testified that she told her mother, "[s]omebody is here with a gun," and put her phone down. At that point, she and the gunman made eye contract from about 30 feet away, and stared at each other for four to five seconds. The gunman and Maricel then "disappeared," and she got into her car and called her husband. She subsequently heard footsteps, got out of her car, and saw Maricel on the phone. Monika described the gunman as a black male, medium-build, about 5' 4" to 5' 5" tall, wearing a light white shirt and pajama pants, with his hair styled in corn rows. She also identified the same gun identified by M.H. as the one used by the gunman during the attack.

¶ 8 The State then called Maricel to testify, and again, without objection from counsel, the court instructed the jury that her testimony related to conduct other than that charged in the indictment and

was to be considered only for the limited purposes of resolving the issues of defendant's identification, intent and *modus operandi*. Maricel testified that she was 36 years old and that, at about 11 p.m. on April 30, 2007, she pulled into the covered garage of her condominium building at 655 Perrie Drive. After parking her car, she waved to her neighbor, who had parked in the adjacent spot and was talking on her phone. As she walked to the door leading into her building, defendant approached her from the front and pulled a gun out of his pocket. He then pulled her to the ground by her hair and dragged her toward a corner.

¶ 9 Maricel further testified that she observed defendant and Monika looking in each other's direction. After walking her toward a garage door at gunpoint, he "broke away" and then entered a dark green SUV. Maricel stated that she pressed a button to open the garage door and then called 911, providing a description of defendant's vehicle and his direction of travel. She also described defendant as "a black guy about 20s with corn roll braids," wearing a white shirt "with like a black print in front and baggy pants." Some time after the police arrived, they brought her to a location that was about 10 minutes away, where she saw defendant and identified him as the person who had assaulted her. At trial, Maricel identified the vehicle M.H. was raped in as the one driven by defendant on the night he attacked her. She also identified the gun used during the rape of M.H. as the one defendant held to her head during the attack.

¶ 10 Prior to deliberations, the trial court instructed the jury that "[a]ny evidence that was received for a limited purpose should not be considered by you for any other purpose." The court also instructed the jury as follows:

> "Evidence has been received that the defendant had been involved in the offense other than that charged in the indictment. This evidence has been received on the issues of the defendant's identification, intent and modus operandi and may be considered by you for only those limited purposes.

> It is for you to determine whether the defendant was involved in that offense, and if so what weight to be given to this evidence on the issues of identification, intent and modus operandi."

Defense counsel did not object to these instructions

¶ 11 Following deliberations, the jury found defendant guilty of three counts of aggravated criminal sexual assault and one count each of robbery and kidnapping. The court then sentenced defendant to three consecutive terms of 15 years' imprisonment on the aggravated criminal sexual assault convictions, a seven-year consecutive term on the robbery conviction, and a seven-year concurrent term on the kidnapping conviction, for an aggregate sentence of 52 years' imprisonment.

¶ 12 On appeal, defendant contends that the trial court committed reversible error by admitting the evidence of other-crimes to show intent and *modus operandi*. He further asserts that the other-crimes jury instruction was improper because it was overly broad, confusing, and failed to limit the use of that evidence to its relevant purposes.

¶ 13 We observe, however, that defendant has forfeited the right to challenge the allegedly improper jury instruction by failing to object to its issuance, offer an alternative instruction, or raise the instruction issue in a post-trial motion. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005). Consequently, we address only that portion of defendant's argument concerning the admission of evidence of other crimes.

¶ 14 Under Illinois law, all relevant evidence is admissible unless otherwise provided by law. *People v. Dabbs*, 239 Ill. 2d 277, 289 (2010), citing Ill. R. Evid. 402 (eff. Jan. 1, 2011). Relevant evidence is that which has any tendency to make the existence of any fact of consequence to the determination more or less probable than it would be without such evidence. *People v. Illgen*, 145 Ill. 2d 353, 365-66 (1991). Though evidence of other crimes is inadmissible to show a defendant's disposition or propensity to commit crime (*Illgen*, 145 Ill. 2d at 364), such evidence may be admitted if relevant for any other purpose, so long as its prejudicial effect does not substantially outweigh its

probative value (*Dabbs*, 239 Ill. 2d at 283-84). Other such purposes may include motive, intent, identity, and lack of mistake. *Dabbs*, 239 Ill. 2d at 283. It is within the sound discretion of the trial court to decide whether evidence of other crimes is admissible, and that decision will not be disturbed absent a clear abuse of discretion. *Dabbs*, 239 Ill. 2d at 284.

¶ 15 In this case, the record shows that the State filed a motion *in limine* seeking to introduce evidence of defendant's attack on Maricel for the purpose of showing *modus operandi*, common scheme or design, identity, lack of mistake, and knowledge. We find that defendant's attack on Maricel was highly relevant to establishing his identity as M.H.'s attacker. *People v. Cardamone*, 381 Ill. App. 3d 462, 490 (2008). In reaching this conclusion, we note that other crimes evidence is admissible to show identity if it links defendant to the offense at issue through some evidence, typically an object, from another offense. *People v. Quintero*, 394 Ill. App. 3d 716, 727 (2009).

¶ 16 Here, the record establishes that Maricel and M.H. were both attacked in the parking lots of their respective housing complexes, described their attacker as a black male with corn rows in his hair, and identified defendant as their attacker at trial. In addition, both women testified that defendant brandished a handgun at them during the attack and identified the same weapon at trial. The women also testified that defendant was driving a green-colored SUV at the time of the attack, and they identified the same vehicle at trial. These strong evidentiary similarities were clearly sufficient to link defendant's attack on Maricel to his attack on M.H., making Maricel's testimony relevant to establishing his identity as the perpetrator. *Quintero*, 394 Ill. App. 3d at 727. Though the evidence demonstrated that M.H.'s attacker intended to sexually assault her, the State introduced evidence of defendant's attack on Maricel, in part, to prove defendant's intent to criminally accost a lone female at gunpoint in the night, thus providing further proof of his identity as M.H.'s attacker. See *People v. Heard*, 187 Ill. 2d 36, 60 (1999).

¶ 17 The testimony of Maricel and Monika was highly probative of defendant's identity as M.H.'s attacker in that the attack on Maricel occurred just nine days after that on M.H., which took place

in a similar setting, and with the same weapon and vehicle that had been used by defendant in the later attack. Because we cannot say, as a matter of law, that the probative value of the subsequent-act evidence was substantially outweighed by the danger of unfair prejudice, and find no abuse of discretion in the admission of the evidence of defendant's attack on Maricel. *Illgen*, 145 Ill. 2d at 375-76.

¶ 18 Defendant next challenges the calculation and assessment of certain of the pecuniary penalties imposed by the court. Though these claims were not raised in the circuit court, a sentence that does not conform to a statutory requirement is void and may be attacked at any time. *People v. Jackson*, 2011 IL 110615, ¶ 10. The propriety of court-ordered fines and fees raises a question of statutory interpretation, which we review *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 19 Defendant first argues, and the State concedes, that the $500 Sex Offense fine and $30 Children's Advocacy Center fee should be vacated because they were not in effect at the time he committed the instant offenses, and therefore violate the proscription against *ex post facto* laws. See Pub. Act 95-600 (eff. June 1, 2008) (adding 730 ILCS 5/5-9-1.14, renumbered as 5/5-9-1.15 by Pub. Act 95-876 (eff. Aug. 21, 2008)); Pub. Act 95-103 (eff. Jan. 1, 2008) (adding 55 ILCS 5/5-1101(f-5)). The State also agrees that the $5 Court System fee, $25 Traffic Court Supervision fee, and $20 Serious Traffic Violation fee should be vacated because he was not convicted of an offense under the Illinois Vehicle Code or a similar municipal ordinance. See 55 ILCS 5/5-1101(a); 625 ILCS 5/16-104c; 625 ILCS 5/16-104d (West 2006)). Consequently, the fees specified above must be vacated.

¶ 20 Defendant next claims, and the State concedes, that he is entitled to a $5 *per diem* credit for the 889 days he spent in presentence custody for a total $4,445 credit to offset his fines. We find that such credit applies to offset the $10 Mental Health Court fine, $5 Youth Diversion/Peer Court fine, and $5 Drug Court fine. See 725 ILCS 5/110-14(a) (West 2008)); *People v. Graves*, 235 Ill. 2d 244,

255 (2009); *People v. Sulton*, 395 Ill. App. 3d 186, 193 (2009)). Accordingly, defendant is entitled to a credit of $20.

¶ 21 Defendant also asserts that he was improperly assessed a $25 Court Services fee. Under section 5-1103 of the Counties Code (55 ILCS 5/5-1103 (West 2006)), the court may assess a $25 Court Services fee against a defendant upon a finding of guilty resulting in a judgment of conviction. Here, judgments of conviction were entered against defendant, making him eligible for the Court Services fee (*People v. Williams*, 2011 IL App (1st) 091667-B, ¶ 18), which we affirm. We also affirm the $10 Arrestee's Medical Costs Fund charge. See *Jackson*, 2011 IL 110615, ¶ 24.

¶ 22 Pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967)), we order the clerk of the circuit court to vacate the $30 Children's Advocacy Center Fee, $500 Sex Offense fine, $5 Court System fee, $25 Court Supervision fee, and $20 Serious Traffic Violation fee, and we order the clerk to amend defendant's fines and fees order to reflect a $20 credit for his $10 Mental Health Court fine, $5 Youth Diversion/Peer Court fine, and $5 Drug Court fine. We affirm the judgment in all other respects.

¶ 23 Affirmed, as modified.