SECOND DIVISION
June 26, 2012

No. 1-10-3077

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. 09 CR 22159
	)	
JOSE G. MARQUEZ,	)	The Honorable
	)	James P. Etchingham,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Quinn and Justice Connors concurred in the judgment.

O R D E R

¶ *1* *Held*: Where victim testified that defendant became angry and set her on fire and defendant claimed victim committed self-immolation, the State was properly allowed to introduce evidence of a previous incident in which defendant threw boiling water at his sister after he became upset with her and then told others she burned herself; the judgment of the trial court was affirmed.

¶ 2 Following a jury trial, defendant Jose G. Marquez was convicted of heinous battery and aggravated domestic battery for setting his wife on fire in 2009. Defendant was sentenced to 28 years in prison. On appeal, defendant contends the trial court erred in allowing the State to

present evidence that he threw boiling water at a family member during an argument in 1995 to support the prosecution's theory that the injuries to defendant's wife in this case did not occur accidentally. We affirm defendant's convictions and sentence but vacate two of the fines assessed against defendant and modify the amount of the fines and fees order.

¶ 3 In the case being appealed, the State presented evidence that on October 17, 2009, defendant poured rubbing alcohol on Cristina Espinosa, his wife, and set her upper body on fire at their home in Elgin. Prior to trial, the State filed a motion *in limine* seeking to introduce evidence that in 1995, defendant was charged with aggravated battery, domestic battery and the violation of an order of protection involving his sister, Maria Marquez. According to the State's motion, defendant went to Maria's apartment, and during an argument, defendant picked up a pot of boiling water from a nearby stove and threw it on Maria. When police officers arrived at the scene, defendant told them he was taking Maria to the hospital because she burned herself.

¶ 4 In granting the State's motion, the trial court ruled the 1995 incident was "probative of the defendant's criminal intent in the present case." The court continued:

> "Intent may be defined as the absence of an accident. The defendant's prior act of burning his sister and then claiming that she burned herself tends to negate the likelihood that the victim in this case burned herself and could thereby prove his intent. A simple incident of injury may, in fact, be accidental. A second similar injury decreases the likelihood of unintentional conduct. The proffered evidence may be probative as to intent or the absence of an innocent state of mind."

¶ 5 At trial, Espinosa testified she and defendant previously were married for seven years.

On October 17, 2009, Espinosa and their daughter, Celeste, arrived home as defendant was talking on the phone. Defendant hung up the phone and told Espinosa he would dial a phone number and she should leave a message that defendant wanted $2,300 on Monday.

¶ 6 Defendant became angry and choked Espinosa when she did not leave the message as he had directed. Defendant followed Espinosa into a bedroom, poured rubbing alcohol on her body and lit the alcohol with a lighter as she lay on the bed. Defendant laughed as Espinosa attempted to put the flames out. Celeste testified defendant choked her mother but Celeste then left the room at her mother's behest and did not see how the fire started.

¶ 7 Defendant drove Espinosa to the hospital even though Espinosa's sister, who lived in the same building, said she was calling an ambulance. Defendant's vehicle was stopped by police on the way to Sherman Hospital. Espinosa testified she told a police officer that she burned herself because she feared retribution from defendant.

¶ 8 Elgin police officer Nicholas Kozicki testified he and other officers performed a traffic stop of defendant's vehicle. Officer Kozicki observed Espinosa in the vehicle and noted she was shaking and her skin was burned. When the officer asked what had happened, Espinosa replied, "I don't know."

¶ 9 Defendant was taken to the police station and read his *Miranda* rights, after which he was asked if he knew why he was there. According to Officer Kozicki, defendant responded he was taking his wife to the hospital because she burned herself by setting herself on fire.

¶ 10 Elgin police officer Matthew Vartanian testified that during the traffic stop, defendant was placed in the back seat of the officer's squad car. The officer testified that he observed singed hair on defendant's forearms and hands and smelled a burning odor.

¶ 11 Dr. Nilesh Patel testified that he treated Espinosa at Sherman Hospital for third-degree

burns on her upper arms, torso and abdomen and a large area of less severe first-degree and second-degree burns. Dr. Patel estimated that 27 percent of Espinosa's body was burned. Espinosa was transferred to the burn unit at Loyola Hospital. Dr. Patel testified he smelled a "petroleum-based accelerant" on Espinosa's body. Espinosa received treatment for her burns for more than two weeks.

¶ 12 Pursuant to the State's motion *in limine*, Maria Marquez testified that at about noon on September 8, 1995, defendant arrived at her apartment in Harvard, Illinois. Defendant and Maria talked, and defendant put water on the stove to boil to make hot dogs. Defendant asked her to look for a phone number, which she did without success. Maria testified that defendant told her to continue looking for the phone number, and she refused. Defendant took the pot of boiling water from the stove and poured it on Maria's chest and left arm. Maria testified that she left her residence and encountered their mother on the street. Defendant caught up with Maria and said they should go to the hospital. On cross-examination, Maria was impeached with her statement to a police officer, as memorialized in a police report, that defendant poured a cup of water on her, as opposed to a pot of water.

¶ 13 Also regarding the 1995 incident, Harvard police officer Dean Burton testified that Maria's mother came to the police station, followed by Maria and defendant. Officer Burton testified that when he asked defendant what happened, defendant said Maria had burned herself and he was taking her to the hospital.

¶ 14 After the testimony of Maria and Officer Burton, the jury in the instant case was informed that criminal charges were brought against defendant in the 1995 incident but were dismissed on the State's motion. The jury was instructed that the evidence of the 1995 incident was "received on the issues of the defendant's intent and the absence of mistake or accident" and could be

considered by the jury only for that limited purpose. The jury also was instructed it should determine if defendant was involved in the 1995 incident and, if so, the weight to be given that evidence on the issues of intent and absence of mistake or accident.

¶ 15 The defense presented two witnesses. Leanna Baly Miehlich, a Cook County assistant State's Attorney, testified she met with Espinosa at Loyola in November 2009. Espinosa said defendant poured the alcohol on her chest and arms but she was not sure who set her on fire.

¶ 16 Elgin police detective Brian Gorcowski testified Espinosa told him on the night of the incident that she burned herself. Detective Gorcowski also interviewed Celeste, who said she did not know what transpired because she was not in the room with her parents when the fire started. The detective again interviewed Espinosa, who stated that defendant choked her but did not pour alcohol on her or light her on fire. Several days later, Espinosa told the detective that defendant choked her and poured alcohol on her but she was not sure how the fire started. On November 21 or 22, she told the detective that defendant had set her on fire. The parties also stipulated that Dr. Victoria Pepper would testify she treated Espinosa at Loyola and Espinosa said she poured alcohol on herself and set herself on fire while her husband tried to stop her.

¶ 17 At the close of evidence, the jury found defendant guilty of heinous battery (720 ILCS 5/12-4.1(a) (West 2010)), which is a Class X offense, for the act of setting Espinosa on fire, and aggravated domestic battery (720 ILCS 5/12-3.3 (a-5) (West 2010)), which is a Class 2 offense, for the act of choking or strangling Espinosa. After hearing evidence in aggravation and mitigation, the court imposed sentences of 23 years for heinous battery and 5 years for aggravated domestic battery. The court ordered defendant's sentences to be served consecutively pursuant to section 5-8-4(a)(iii) of the Unified Code of Corrections (730 ILCS 5/5-8-4(a)(iii) (West 2010)), which, *inter alia*, requires consecutive sentences in cases involving multiple

offenses where one of the crimes was heinous battery. Defendant now appeals his convictions and seeks a new trial.

¶ 18 On appeal, defendant contends the trial court erred in admitting evidence of the 1995 incident as probative of his intent or to demonstrate the absence of an accident as to the burning of Espinosa in this case. Defendant argues the admission of that evidence deprived him of his due process right to a fair trial because it was not relevant for any proper purpose and because its potential probative value was outweighed by its prejudicial effect.

¶ 19 It is within the trial court's discretion to decide whether evidence is relevant and admissible, and a trial court's decision concerning the relevance and admissibility of evidence will not be reversed absent a clear abuse of discretion. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001). An abuse of discretion occurs when the ruling is arbitrary or fanciful, or where no reasonable person would adopt the trial court's view. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). Put another way, this court will not reverse an evidentiary determination of the trial court unless the record "clearly demonstrates" the court's discretion was abused. *People v. Harris*, 231 Ill. 2d 582, 588 (2008).

¶ 20 Evidence is admissible if it (1) fairly tends to prove or disprove the offense charged; and (2) is relevant in that it tends to make the question of guilt more or less probable. *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). A trial court may reject offered evidence on the grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty or possibly unfair prejudicial nature. *Id.* "Evidence should be excluded if it is too remote in time or too speculative to shed light on a fact to be found."

Wheeler, 226 Ill. 2d at 132.

¶ 21 Evidence of a crime or bad act for which the defendant is not currently on trial is not admissible if it would be relevant only to establish the defendant's propensity to commit crime. *People v. Heard*, 187 Ill. 2d 36, 58 (1999). However, such "other-crimes" evidence is admissible when it is relevant for any purpose other than to show a propensity to commit a crime, *e.g.*, to prove *modus operandi*, intent, identity, motive or absence of mistake. *People v. Kliner*, 185 Ill. 2d 81, 146 (1998).

¶ 22 Other crimes evidence can be admitted to show the absence of an accident. *People v. Woods*, 2011 IL App (1st) 091959, ¶ 33; *People v. Young*, 381 Ill. App. 3d 595, 601 (2008) ("[w]hile an innocent state of mind might be present in one instance, the more often it occurs with similar results, the less likely that it was without criminal intent"). Evidence of a defendant's previous crime may be admitted to show that "the act in question was not performed inadvertently, accidentally, involuntarily, or without guilty knowledge." *People v. Haley*, 2011 IL App (1st) 093585, ¶ 55, citing *People v. Wilson*, 214 Ill. 2d 127, 136 (2005).

¶ 23 Defendant contends that despite the admissibility of other-crimes evidence as relevant to intent, his intent was not at issue. He points out that he did not claim he performed the act but did so accidentally and without the intent to harm Espinosa. He points out that his theory of defense was that Espinosa intentionally burned herself, as she initially told police and medical personnel, and that she lacked credibility when she later claimed that defendant set her on fire.

¶ 24 The State responds that defendant's failure to raise the issue of his intent or state of mind is not dispositive because the prosecution was required to prove defendant's intent to commit the charged offenses. The State relies on *People v. Heard,* 187 Ill. 2d 36 1(1999), which rejected an argument similar to that posed by defendant here. In *Heard,* the defendant argued he was

elsewhere at the time of the murders, and the defendant claimed the trial court abused its discretion in allowing evidence of his prior crimes as relevant to his motive and intent to harm the victims. *Heard*, 187 Ill. 2d at 58-59. In rejecting the defendant's position that the previous crimes lacked relevance because he denied involvement in the instant offenses, the supreme court stated that the prosecution "had to prove that defendant was the shooter" and the evidence was introduced to demonstrate the motive and intent of the defendant in particular, as opposed to the motive or intent of another unknown person, to kill the victims. *Heard*, 187 Ill. 2d at 59.

¶ 25 Defendant asserts *Heard* is distinguishable from the instant case because the prior acts in *Heard* involved the eventual murder victims, whereas in this case, the previous altercation involved defendant's sister, and not Espinosa. Defendant also points out that *Heard*, unlike the instant case, involved more than one prior criminal act by the defendant.

¶ 26 We do not find *Heard* to be distinguishable on either of defendant's points, which are not persuasive. First, contrary to defendant's assertion, numerous cases have held that proof of a previous crime against someone other than the victim in the case under consideration is admissible other-crimes evidence. See, *e.g.*, *People v. Morales*, 2012 IL App (1st) 101911, ¶ 35 (evidence of beating of different victims in prior incident admissible to provide context for defendant's involvement in murder); *People v. Johnson*, 406 Ill. App. 3d 805, 806 (2010) (State introduced evidence of uncharged sexual assaults to show intent to assault victim). Moreover, defendant does not direct this court to any authority to support his proposition that a single previous crime by a defendant would be automatically less relevant than multiple previous crimes.

¶ 27 Defendant directs our attention to *People v. Lenley*, 345 Ill. App. 3d 399 (2003), and *People v. Knight*, 309 Ill. App. 3d 224 (1999), in which this court deemed evidence of the

defendants' other crimes inadmissible where the intent of the defendants was not at issue. We do not find the facts of either case comparable to those here. In *Lenley*, the defendant was charged with burglary in connection with the taking of various items from a barn, and the trial court permitted the State to introduce proof of three other burglaries committed by the defendant. *Lenley*, 345 Ill. App. 3d at 400-01. This court reversed and remanded for a new trial, noting that the prosecution did not attempt to explain how the prior crimes were relevant to show intent, motive, design or absence of mistake, noting the intent with which the burglar entered the barn was not at issue, and no claim of mistake was made by the defendant, for example, that he entered the barn under the belief he had permission to borrow the items. *Lenley*, 345 Ill. App. 3d at 407-09. Here, the State argued the 1995 incident was relevant to show that the instant crime did not occur by accident.

¶ 28 In *Knight*, this court held that the trial judge erred in admitting into evidence the defendant's statement to the victim that he would kill her if she slept with his friends to show his intent to commit sexual assault and domestic battery. *Knight*, 308 Ill. App. 3d at 227. This court held the defendant's prior threat was improperly admitted because the defendant did not argue he lacked the intent to harm the victim but instead claimed he was not present when the offenses occurred. *Knight*, 308 Ill. App. 3d at 227. Here, in contrast, defendant admitted he was present at the two incidents at issue but contends he stood by while his sister burned herself with water and his wife set herself on fire. The 1995 incident was admitted to show the absence of an accident.

¶ 29 The trial court did not abuse its discretion by admitting evidence of the previous incident involving defendant and his sister. In both instances, the victim accused the defendant of burning her, either with hot water or with fire. Defendant did not argue that he was elsewhere when the

incidents occurred but, rather, that both women injured themselves as he watched. In granting the State's motion *in limine*, the trial court held the proffered evidence was probative of the absence of an innocent state of mind. The fact that, in 1995, defendant (1) burned his sister when she did not act as he directed; (2) immediately took her to the hospital; and (3) told others that she burned herself, when considered as a whole, made it more probable that he took the same course of action against Espinosa. See *People v. Antonio*, 404 Ill. App. 3d 391, 404 (2010) (where defendant was convicted of killing his girlfriend, trial court correctly allowed statement of his former wife that he threatened her in a similar situation; testimony was probative of defendant's intent and the absence of mistake and illustrated defendant's "manner of handling stressful or upsetting situations"). Here, both incidents occurred after the women told defendant they would not do what he demanded of them.

¶ 30 In summary on this point, the trial court acted within its discretion in admitting the evidence of the 1995 incident. Furthermore, the record on appeal establishes the trial court provided limiting instructions to the jury that it should consider the 1995 incident only as to the defendant's intent and the absence of mistake or accident and that the jury was to consider the weight to be given that evidence.

¶ 31 Defendant also challenges the imposition of several fees and fines by the trial court, as well as the amount of credit he received for time in custody prior to sentencing. Defendant asserts, and the State correctly agrees, that the $35 traffic court supervision fee (625 ILCS 5/16-104c (West 2010)) and the $20 serious traffic violation assessment (625 ILCS 5/16-104d (West 2010)) should only be imposed when a defendant has violated the Illinois Vehicle Code (625 ILCS 5/11-501 *et seq.* (West 2008)).

¶ 32 Defendant's remaining contention is that the amount of fines and fees should be reduced

by $450 to reflect a $5-per-day credit for his time spent in custody prior to sentencing. The State agrees defendant is entitled to credit toward $250 of his fines but points out, citing the supreme court's decision in *People v. Johnson*, 2011 IL 111817, which was issued during the pendency of this appeal, that the $200 DNA analysis fee cannot be offset by pre-sentencing custody credit. In reply, defendant concedes that *Johnson* forecloses his claim of any credit toward the $200 DNA analysis fee. Therefore, a credit of the remaining $250 in fines should be applied to defendant's fines for his time spent in custody before sentencing.

¶ 33 Accordingly, for the reasons stated above, the amount of fines and fees assessed should be reduced from $1,020 to $715 to reflect: (1) the vacating of the $35 traffic court supervision fee and the $20 serious traffic violation assessment and (2) the application of a $250 offset for defendant's time spent in custody prior to sentencing. The judgment of the trial court is otherwise affirmed.

¶ 34 Affirmed in part; vacated in part; fines and fees order corrected.