FIRST DIVISION
March 31, 2014

No. 1-12-1479

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. 08 CR 14851
	)	
HANCY McDOWELL,	)	Honorable
	)	Timothy J. Joyce,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held*:** Where evidence of two other sexual assaults were relevant to prove defendant's criminal intent, the trial court did not abuse its discretion in admitting evidence of other crimes as probative of defendant's propensity to commit sex offenses. Defendant's mittimus is amended to show he is entitled to 1,575 days of presentence custody credit.

¶ 2 Following a jury trial, defendant Hancy McDowell was convicted of two counts of aggravated criminal sexual assault and was sentenced to two consecutive terms of 18 years in prison. On appeal, defendant contends the trial court abused its discretion in admitting evidence of two separate prior sexual assaults to show his propensity to commit sexual offenses and to

prove identity. Defendant also contends that his mittimus must be amended to reflect an additional 25 days of presentence custody credit. We affirm as modified.

¶ 3 Before trial, the State filed a motion to allow evidence of other assaults by defendant as proof of his propensity to commit sex crimes, motive, intent, identity, knowledge, and modus operandi. Specifically, the State described the sexual assaults of two women in addition to T.G., the victim in the instant case. The motion described attacks on C.D. on June 12, 2007, and O.R. on October 5, 2007.

¶ 4 Following a hearing, the trial court granted the State's motion to allow evidence of those incidents. The court noted the offenses occurred less than two years after the charged assault and were committed in a similar manner, *i.e.*, a weapon was displayed; the victims were forced to perform oral sex on defendant; the victims were placed on their hands and knees and ordered to bend over before defendant forced his penis into their vaginas; and, in two of the instances, property was taken. The court ruled the subsequent sexual assaults were admissible under section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2006)), to prove defendant's propensity to commit such offenses, and to prove *modus operandi*. The court further held that any prejudicial effect of admitting the subsequent sexual assaults was diminished by their probative value to show propensity.

¶ 5 At trial, T.G. testified defendant sexually assaulted her on July 20, 2006. T.G. was featured on an escort website, and she received a call at 3 a.m. on the date in question from a man named "George" who asked her to come to his house at 9634 South Winston Avenue in Chicago. When she arrived, defendant grabbed her before she was able to knock on the door. Defendant told her that she was at the wrong house, and they ran into the basement stairwell of 9636 South Winston Avenue. Defendant pulled out a black revolver, placed the gun to T.G.'s head, and told her not to move or he would kill her. Defendant then said "suck my dick, bitch"

as he grabbed the back of T.G's neck and forced his penis into her mouth until he ejaculated. He also pulled up T.G.'s shirt, sucked her breasts, and told her to turn around before throwing her against the concrete steps. Defendant ordered T.G. to remove her pants or lest he kill her. She complied, and defendant penetrated her vagina with the gun before putting a condom on his penis and forcing it into her anus. Defendant left the scene with T.G.'s purse. Following the incident, T.G. went to the hospital where buccal swabs were taken from her and the police were contacted. Nearly two years later, police contacted T.G. and told her that they "had a DNA match." On April 16, 2008, T.G. identified defendant as the man who raped her in a photo array at the police station, and then again in a lineup on July 17, 2008.

¶ 6 Illinois State Police Forensic Scientist Pauline Gordon testified that she tested buccal swabs taken from T.G. and a buccal swab taken from defendant, and found that the DNA profile recovered from T.G.'s mouth matched the DNA profile of defendant.

¶ 7 In accordance with the court's ruling on the State's motion to admit evidence of other sex offenses, C.D. and O.R. testified. C.D. testified that she met defendant, who called himself "Keith," at a gas station in early June of 2007. C.D. gave defendant her telephone number, which he later called from "708-757-****." C.D. agreed to meet defendant at his residence near 207th Place and Sandridge Drive in Lynwood, Illinois. At about 11 p.m. on June 11, 2007, C.D. parked her car and started walking toward his house. Defendant grabbed her, pressed a silver gun to the back of her head, and threatened to kill her. Defendant took C.D. to the rear of the house on Sandridge Drive, ordered her to strip, and went through her pockets taking her cell phone. He then ordered her at gunpoint to get down on her knees and "suck [his] dick." C.D. complied and defendant told her to "get on all fours." He forced his penis into C.D.'s vagina. Defendant fled when a woman stepped out of her house and turned on a nearby light. A few hours later, C.D. reported the incident to police, and then went to the hospital where a rape kit

was administered. On July 17, 2007, C.D. positively identified defendant as her rapist in a lineup at the police station.

¶ 8 Tanis Wildhaber Pfoser, a forensic scientist, testified that she compared the DNA analysis test results on stains from C.D.'s blue jeans with defendant's buccal swab. The DNA profiles found on C.D.'s blue jeans and defendant's buccal swab matched defendant's profile.

¶ 9 O.R. also testified as a second other-crimes evidence witness. O.R. worked on an adult entertainment website, and, after being contacted by a stranger after midnight on October 5, 2007, she agreed to meet him. The caller indicated his name was "Dave," and provided her the same 708 phone number as appeared on C.D.'s caller I.D. O.R. parked at the agreed location on Sandridge Drive. When she got out of the car, she noticed defendant, who identified himself as "Dave," walking towards her. After the two walked to the rear of a nearby house, defendant brandished a knife and placed it up to O.R.'s throat. Defendant demanded that O.R. "suck [his] dick," and O.R. complied out of fear for her life. Defendant ejaculated on O.R.'s chest and in her mouth, and then he demanded a condom, which O.R. gave him. Defendant made her bend over on all fours while he put the condom on his penis. He forced his penis into O.R.'s vagina for about a minute and then told her to leave. O.R. had to drive to the nearest gas station to call the police because defendant took her cell phones. O.R. was taken to the police station where she was presented with a photo array and identified defendant as her rapist. She then went to the hospital where she was treated and a rape kit was administered.

¶ 10 Following closing arguments, the jury found defendant guilty of two counts of aggravated criminal sexual assault. This appeal followed.

¶ 11 On appeal, defendant contends that the trial court abused its discretion in admitting evidence of the sexual assaults of C.D. and O.R. where it failed to employ the proper balancing test before allowing the introduction of this evidence.

¶ 12 Whether to admit evidence of a prior criminal offense rests within the sound discretion of the trial court, and we will not reverse its decision unless there was a clear abuse of discretion. *People v. Chapman*, 2012 IL 111896, ¶ 19. We will find an abuse of discretion only when a trial court's decision is "arbitrary, fanciful or unreasonable." *People v. Donoho*, 204 Ill. 2d 159, 182 (2003).

¶ 13 Section 115-7.3 of the Code provides an exception to the common law bar against the use of other-crimes evidence to show propensity in cases, where, as here, a defendant is accused of aggravated criminal sexual assault. Under this section, evidence of another criminal sexual assault "may be admissible *** and may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(b) (West 2006). Our supreme court has held that under this statute, relevant matters include allowing evidence of other crimes to show a defendant's propensity to commit sex offenses. *Donoho*, 204 Ill. 2d at 176.

¶ 14 Where the other-crimes evidence meets the threshold statutory requirement of relevance and contains probative value, it is presumed to be admissible if its probative value is not substantially outweighed by its prejudicial effect. *Id.* at 182-83. The statute provides:

> "In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:
>
> (1) the proximity in time to the charged or predicate offense;
>
> (2) the degree of factual similarity to the charged or predicate offense; or
>
> (3) other relevant facts and circumstances." 725 ILCS 5/115-7.3(c) (West 2006).

¶ 15 Defendant claims that the trial court erred in its application of the balancing test prescribed by section 115-7.3(c) of the Code. Accordingly, the first question for us on appeal is

whether the trial court abused its discretion when it determined that the prejudicial effect of the evidence of defendant's prior offenses was not substantially greater than its probative value.

¶ 16 The record shows that the trial court properly conducted an analysis of the three factors listed in the statute for weighing the probative value of the other-crimes evidence against the danger of unfair prejudice. At the pretrial hearing, the trial court stated:

> "First is time in relation to the predicate offense. I can appreciate [defense counsel] pointed out that here one offense was committed, 6/12/07 case, involving a woman named [C.D.] was committed roughly 13 months after the charged offense. The October 5, 2007, case involving [O.R.] that offense was committed against her roughly 15 or 16 months *** after the charged offense. *** [Eleven] months or 15 months is sufficiently approximate in the time so as to favor admission under [section] 115-7.3.
>
> Second factor *** is the degree of facts or of similarity to the charged or predicate offense ***. In these instances, in addition to the proximity of time, you have the offender using the false name, two instances using a gun, one instance using a knife. In that sense, it [is a] distinction and in one sense it's a similarity because it [is] a weapon. *** The manner in which these were committed is that the weapon is displayed. Oral sex is had by virtue of utilization of the weapon and then the complaining witnesses are placed on their hands and knees and ordered to bend over and then assault by penis to vagina is effectuated in all three instances. Two instances the charged offense and October 5, 2007, *** property was taken. ***
>
> The third factor *** is the catch-all phrase, other relevant facts and circumstances. I don't know that really applies in this instance because, frankly, under the proximity in time factor and degree of factual similarity, although I don't doubt there are discrete differences, there are also substantial similarities such that the Court will grant the motion for purposes of 115-7.3 over your well stated objection in order to prove propensity."

¶ 17 Nonetheless, defendant highlights a portion of the trial court's ruling in contending that it erred in conducting the balancing test. He specifically points to the trial court's statements:

> "In light of the fact that the Court in its discretion believe[s] that the circumstances strongly favor their admission for propensity purposes, then the probative value, prejudicial effect

> analysis that the Court has to go through for any other purpose, such as *modus operandi*, is kind of changed since it's going in for propensity anyway, any resulting prejudicial effect is diminished by virtue of the fact it's going in for probative value for propensity."

Defendant maintains that, based on that explanation, the trial court mistakenly thought it did not have to do a balancing test if the other factors were met, and failed to follow the balancing act prescribed by statute. However, taking the court's statements in their entirety, we find that it properly weighed the probative value of the other-crimes evidence against the prejudice to defendant, and did not abuse its discretion in admitting such evidence.

¶ 18 In so finding, we note that defendant's contention that the assaults on C.D. and O.R. were not similar enough to the charged offense to be probative of his propensity to commit sexual offenses is unpersuasive. He points out the weapons used to commit the assaults were different, *i.e.*, a black gun was used in the charged offense, while a silver gun and a knife were used in the other offenses. He also points out that the victim in the case at bar was an escort, while O.R. was listed on an adult website, and C.D. met her offender at a gas station. In addition, defendant notes that the charged offense was committed 20 miles from the location of the other crimes.

¶ 19 "The existence of some differences between the prior offense and the current charge does not defeat admissibility because no two independent crimes are identical." *Donoho*, 204 Ill. 2d at 185. Here, in considering the probative value of the subject incidents, the trial court noted that the offenses occurred within two years, and that, in each case, false names were provided to the victims, and weapons were used to force them to perform oral sex on the offender before being placed on their hands and knees and sexually assaulted again. In two of the three instances, property was taken and the victim was solicited through an escort-type service. For this evidence to be inadmissible, its prejudicial effect must substantially outweigh its probative

value. *Donoho*, 204 Ill. 2d at 182-83. Here, the trial court found the opposite to be true, and it did not abuse its discretion in doing so.

¶ 20 Defendant also maintains that even if the other-crimes evidence was properly admitted, the trial court failed to limit the State's use of the evidence, creating a prejudicial "mini-trial." We disagree.

¶ 21 "[R]elevant, detailed evidence of *** other crimes is admissible to the extent necessary to fulfill the purpose for which the evidence is being admitted." *People v. Colin*, 344 Ill. App. 3d 119, 130 (2003). Here, the trial court emphasized that the other-crimes evidence was admitted because it was relevant to show defendant's propensity to commit sexual assaults. Defendant, however, maintains that the State went far beyond the purpose for which the other-crimes evidence was admitted. In particular, defendant argues that the testimony of C.D. and O.R. was needlessly graphic regarding their attackers' actions, a forensic expert for the investigation in C.D.'s case testified, and the jury was allowed to see crime scene photos from C.D. and O.R.'s assaults. Despite defendant's contention to the contrary, the reason the testimony of C.D. and O.R. was graphic was because their assaults were graphic, and not because the witnesses were attempting to exaggerate the severity of the assaults. In addition, because *modus operandi* was at issue, the State necessarily had to delve in sufficient detail of the assaults of C.D. and O.R. to establish the similarities to the present charged offense. See *Colin*, 344 Ill. App. 3d at 131. Moreover, the crime scene photos and the forensic expert's testimony were admitted to corroborate C.D. and O.R.'s accounts of their abuse. Considering that the other-crimes evidence was not excessive such that an improper and prejudicial mini-trial occurred, we find that the trial court did not abuse its discretion in allowing this testimony. Compare *People v. Smith*, 406 Ill. App. 3d 747, 755 (2010) (trial court did not abuse its discretion in refusing to allow an "avalanche of other crimes evidence," *i.e.*, six instances of the defendant's alleged

abuse of female relatives), *with People v. Nelson*, 2013 IL App (1st) 102619, ¶ 45 (trial court did not abuse its discretion in admitting evidence of one prior assault).

¶ 22 In addition, defendant asserts he suffered prejudice when the State referenced the assaults to C.D. and O.R. when it delivered its closing argument. Defendant specifically points out that the State repeatedly stated that because he was able to get away with T.G.'s assault, he continued to assault others.

¶ 23 A comprehensive review of the closing arguments requires us to reject defendant's position. In the State's initial closing argument, the prosecution compared the factual similarities between the charged offense and the sexual assaults inflicted on C.D. and O.R., *i.e.*, the fake name, weapon, and turning the victim around to assault her. The prosecutor also asserted that the sexual assaults of C.D. and O.R. demonstrated defendant's propensity to commit sex crimes. Defense counsel responded by stating that the State presented the testimony of C.D. and O.R. in order to garner sympathy from the jury for the victim and anger towards defendant. Defense counsel also argued that the assaults against C.D. and O.R. were different from the facts of the charged offense. In rebuttal, the State argued that because defendant got away with sexually assaulting T.G., he believed he could do the same thing again to other victims and not get caught. The State reiterated that defendant "pretty much [did] the exact same thing to [the three women]," and that C.D. and O.R.'s testimony was used to prove defendant's propensity and *modus operandi*, not to acquire sympathy from the jury. Defendant does not complain that any of the State's arguments were improper but, rather, claims they illustrate the prejudice he incurred due to the admission of the detailed other-crimes evidence. In viewing the closing arguments in their entirety, we find the State's closing argument and rebuttal properly focused on the trial evidence and defendant's sexual assault of T.G.

¶ 24 Defendant also contends, and the State correctly agrees, that he is entitled to 1,575 days of presentence custody credit. The record shows that defendant was arrested on October 5, 2007, and sentenced on January 27, 2012. Nevertheless, he only received 1,550 days of credit for the days he spent in presentence custody.

¶ 25 A sentencing order may be corrected at any time. *People v. Latona*, 184 Ill. 2d 260, 278 (1998). The right to receive *per diem* credit is mandatory, and normal waiver rules do not apply. *People v. Williams*, 328 Ill. App. 3d 879, 887 (2002). A defendant is statutorily entitled to credit for all time "spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2012); *Latona*, 184 Ill. 2d at 270. A defendant held in custody for any part of a day should be given credit against his sentence for that day. *People v. Smith*, 258 Ill. App. 3d 261, 267 (1994). However, a defendant is not entitled to presentence custody credit for the date of sentencing. *People v. Williams*, 239 Ill. 2d 503, 510 (2011). Therefore, we award defendant presentence custody credit from October 5, 2007, through January 26, 2012, which amounts to 1,575 days.

¶ 26 For the foregoing reasons, we amend the mittimus to award 1,575 days of presentence custody credit to defendant, but affirm the judgment of the trial court in all other respects.

¶ 27 Affirmed; mittimus corrected.