2017 IL App (2d) 141101-U
No. 2-14-1101
Order filed March 16, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-CM-1396
	)	
STEVEN J. ACQUAVIVA,	)	Honorable
	)	John A. Noverini,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Hudson and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in admitting other-crimes evidence: evidence of the prior incident at issue was admissible under section 115-7.4, and, although defendant asserted that the specific evidence that the court allowed was unduly detailed, we could not say that the court's ruling was unreasonable in light of the statute's purpose.

¶ 2 Defendant, Steven J. Acquaviva, appeals from his convictions of domestic battery (physical contact of an insulting or provoking nature with the victim, his wife) (720 ILCS 5/12-3.2(a)(2) (West 2014)) and interference with the reporting of domestic violence (720 ILCS 5/12-3.5(a) (West 2014)). He argues that the court improperly admitted evidence relating to other

offenses and bad acts of his toward the victim; he contends that the evidence was excessively detailed and thus unduly prejudicial. We hold that the court's choices in what evidence to permit were consistent with the purpose of section 115-7.4 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.4 (West 2014)) in allowing other-crimes evidence in domestic violence cases. We hold that the court did not abuse its discretion, and we thus affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by complaint with two offenses stemming from an April 9, 2014, incident. As amended, the complaint charged him with the two offenses of which he was convicted.

¶ 5 The State moved *in limine* to admit evidence of prior related offenses occurring on September 2, 2013, in July 2013, on May 13, 2013, and on August 13, 2007. Defendant objected to all this evidence except that of the May 13, 2013, incident. The court admitted evidence of that incident and the September 2, 2013, incident, but excluded evidence of the others. Finally, the court permitted the State to introduce a recording of a neighbor's April 9, 2014, call to 911.

¶ 6 At defendant's jury trial, Beth Cozza, who lived "[t]hree houses down" from the Acquavivas and had known the victim for eight or nine years, was the State's first witness. On April 9, 2014, at about 9 or 9:30 p.m., the victim appeared at her door, looking "[s]haken, flustered." After Cozza spoke with the victim for a minute or two, she called 911. She identified a recording of the 911 call as reflecting the call she initiated, and the State played the recording for the jury.

¶ 7 In the recording, Cozza speaks first and then puts the victim on the line. The victim's words are not always intelligible, in part because she sounds upset. However, she seems to describe a struggle and says that defendant threw her phone on the ground.

¶ 8 The victim testified after Cozza. She said that she had been at home that evening and was upstairs and heading to bed by about 9 p.m. The couple's son, a 14-year-old, was showering. She heard a "loud bang," and, thinking that someone had fallen over the dog gate, went downstairs to investigate. She found that the gate was broken. Defendant was then downstairs but went out to the garage after she came down. She followed, and the two started having "a very loud conversation." Defendant asked her to "give [him] five minutes," but she stayed and tried to get him to tell her what had happened. The State asked her if she "remember[ed] any physical altercation that day," to which she responded, "That day? No." The State showed her her handwritten statement in the police report from April 9, which she recognized. After a defense objection, the court allowed the State to ask the victim about every part of the statement.

¶ 9 The State read the statement to her phrase by phrase, with her agreeing to parts and insisting that others were inaccurate. The court admitted the statement into evidence:

> "Tonite [*sic*] he broke the dogs gate [*sic*] & I asked him why, he said I'm a piece of shit[.] I went to the living room to close the drapes he came towards grabbed by hair and spit in my face. I scratch [*sic*] him when I pushed him away. I then went to the garage and told him I was done and if he doesn't [*sic*] leave I was calling cops. He threw a beer at me as I walked down at the end of garage and opened my phone[.] When he came behind me and tried to get my phone I struggled with him and bit his arm as he was pushing me around between both cars. He grabbed my phone, threw it to the ground and smashed it. I then opened the garage and went to neighbors House [*sic*]."

¶ 10 In response to the State's reading of the statement, the victim asserted that nothing had happened in the living room—she stated that defendant "was already in the garage." She further

denied having told defendant that she was "done" and that she would call the police if he did not leave. She denied that defendant threw a beer at her or had tried to take her phone from her hands; she said that she had been "writing things out of rage." She said that what had actually happened was that, when she first went out to the garage, she put her phone on a shelf, and then she had grabbed defendant to get her phone back so she could go back into the house. Responding to the part of the statement in which she had said that defendant grabbed her and smashed the phone, she said that what had really happened was that, "when I had his arms, I pushed him back because he was heading towards the garage because he said just go. We need five minutes, just take five minutes and I wasn't cooperating." She agreed that she had opened the garage door and gone to the neighbor's house.

¶ 11 The State asked the victim if she remembered an incident on September 2, 2013. She indicated that that date did not mean anything to her. Shown her statement to the police from that day, she said that she vaguely remembered the incident, but did not remember any specifics. This written statement, like the first, was admitted into evidence:

> "Thru out the day he got more verbally abusive, say I was a pathetic loser, I tried to ignore and tell him he was rite [*sic*], to stop talking to me[.] I closed the bedroom door, he came back. Kicked or pushed open the door spit on me and called me useless. I told him stop or his son will call the cops, Then [*sic*] asked me 'why did you already call' and I said no."

The victim testified that she did not recall the incident.

¶ 12 The State, over defendant's objection, asked the victim whether she had obtained an order of protection against defendant a few days later. The victim said that she remembered a bit about that. She further agreed that she remembered that she had made a sworn statement in

support of the order. That statement, read to the jury over defendant's objection, described the September 2, 2013, incident in terms similar to those in the police report. The State asked the victim about each sentence separately. We list them in order:

> "[W]hile under the influence of alcohol, the respondent leaned over the petitioner while she was in bed."
>
> "[The respondent] took the cable box from the television the petitioner was watching, spit on the petitioner as she laid [*sic*] in bed and called the petitioner, quote, a worthless piece of shit, end quote."
>
> "[T]he respondent left the bedroom and continued to call the petitioner names in the hallway."
>
> "[T]he respondent kicked or kicked [*sic*] the door from outside the bedroom."
>
> "[T]he respondent spit on the petitioner a second time and asked if she was going to call the police."
>
> "[T]he petitioner's 13-year-old son called the police and the respondent was arrested and charged with domestic battery."

The victim said that she recalled only that defendant took the cable box.

¶ 13 The State then introduced a copy of the order documenting defendant's guilty plea to battery in the case that arose from the September 2, 2013, incident.

¶ 14 The State turned next to the incident of May 13, 2013. When it asked the victim about that day, she said that she knew that something happened then, but, when the State prompted her with more detail, she said that she "d[id]n't remember any more information." The State asked her if she remembered defendant blocking her from entering the house to get belongings. She said that something like that happened, but the items were things that her college-age daughter

was "moving down to school." She agreed that someone had called the police, but she did not concede that there had been any reason for it.

¶ 15 On cross-examination, the victim denied that any "physical altercation" had occurred on April 9, 2014, other than that she had pushed defendant out of the way. She said that she had followed defendant out to the garage. She had put her phone on a shelf, but thought that she must have left it hanging over the edge. That would have caused the phone to fall, if, when she pushed defendant, he bumped against the shelf. She said that, when defendant had stepped back after she pushed him, he put his foot down on the phone.

¶ 16 Andrew Dykstra, the patrol officer with the Algonquin police dispatched in response to Cozza's 911 call on April 9, 2014, testified after the victim. He arrived at Cozza's house and spoke to the victim and her son. Dykstra testified that the victim mentioned everything that she wrote in her handwritten statement. When Dykstra spoke to the victim, her demeanor was "indifferent."

¶ 17 After speaking to the witnesses, Dykstra went to the Acquavivas' house. He found that the lights were off, the doors were locked, and no one would answer the door. The victim, who did not have keys with her, tried to let him in by using a keypad to open the garage door, but the keypad was either disabled or nonfunctional.

¶ 18 Dykstra was not present for defendant's arrest, but did transport him to a bond call the next day. At that point, defendant had two scratches on his face, one on each of his cheeks. Dykstra believed that these were consistent with the victim's statement that she had scratched defendant as she tried to get him to release her.

¶ 19 Dykstra had also been the backup officer responding to the incident on September 2, 2013. When he spoke to the victim on that day, she was upset and shaken. He had also observed

defendant, who was intoxicated and unhappy that a police vehicle was visible in the driveway. Dykstra had seen the victim write her statement on both September 2, 2013, and April 9, 2014. He estimated that she had taken 20 or 30 minutes each time.

¶ 20 On cross-examination, Dykstra said that, on April 9, 2014, the victim had not had any visible injuries, and there was no spit on her face when he saw her. When he observed defendant the next day, the two scratches on his face were obvious. On the other hand, although he examined defendant's arms, he did not see any bite marks.

¶ 21 José Pelayo, an Algonquin patrol officer, and the principal officer responding to the September 2, 2013, incident, followed Dykstra to the witness stand. He had driven to the Acquavivas' house and then had stood on the porch until Dykstra arrived. As he waited, he heard a male voice in the house yelling. When Dykstra arrived, Pelayo went to the door, and the victim let him in. As the door opened, he saw a man, whom he would later learn was defendant, run up the stairs. Pelayo interviewed both defendant and the victim. Defendant, who was "intoxicated and uncooperative," told Pelayo that he and the victim had simply been having an argument. The victim described events consistent with the statement she wrote for Dykstra.

¶ 22 Joshua Latina, a third Algonquin patrol officer, was the State's final witness. On May 13, 2013, he had been dispatched to the Acquavivas' address. He found the victim outside the house with her son and daughter. The victim seemed "scared and nervous." She told him that she wanted to get into the house to collect the possessions that she needed to take her children somewhere else for the night, but that defendant was keeping her out by blocking the door. Latina used the victim's key to enter the house. Defendant was in the shower, but came out soon after Latina arrived. Defendant was angry that Latina was in the house uninvited, but Latina told defendant that the victim had let him in.

¶ 23 The State rested after Latina's testimony and the admission of a stipulation. At the jury instruction conference, the State explained that it intended the officers' testimony concerning the victim's statements to serve as impeachment evidence, whereas it intended the victim's written statements to serve as substantive evidence.

¶ 24 Defendant moved unsuccessfully for a directed verdict on both counts. Defendant rested without presenting evidence, and the jury found him guilty on both counts.

¶ 25 In his posttrial motion, defendant argued that the court erred in admitting the entirety of the 911 tape and evidence of the September 3, 3013, incident. The court denied the motion without comment and sentenced defendant to 18 months' probation. Defendant timely appealed.

¶ 26 II. ANALYSIS

¶ 27 Defendant argues on appeal that the evidence of the September 2, 2013, incident should not have been admitted. He contends that that evidence "created a danger that the jury would speculate that the defendant had a pattern of domestic violence" toward the victim. He further argues that the evidence was excessively detailed and thus unduly prejudicial. (He originally argued that the court also erred in allowing evidence of the May 13, 2013, incident, but, in reply to the State's brief, he concedes that he forfeited the issue.)

¶ 28 The State responds that the evidence of the September 2, 2013, incident was within the range of prior-offense evidence permissible in domestic violence cases.

¶ 29 Defendant, replying, suggests that the court's allowing the State to rely entirely on out-of-court statements for the events of September 2, 2013, weighed against admission of that evidence. He further argues that the court unfairly allowed the State to bolster the victim's September 2013 statement to the police with her affidavit from the order-of-protection application and with defendant's guilty plea. He concludes that "[e]ven though evidence of the

September 2013 incident may have potentially been admissible as propensity evidence under [section 115-7.4 of the Code] in this domestic violence prosecution, it should have been excluded because its probative value was substantially outweighed by its prejudicial effect."

¶ 30 We hold that the admission of this evidence was not an abuse of discretion. Evidence of other crimes is usually inadmissible to show the defendant's propensity to commit a crime (*People v. Donoho*, 204 Ill. 2d 159, 170 (2003)), although it is admissible to show *modus operandi*, intent, motive, identity, or absence of mistake (Ill. R. Evid. 404(b) (eff. Jan. 1, 2011)). Further, subsections 115-7.4(a), (b) of the Code makes other-crimes evidence admissible in domestic violence cases as relevant, even for propensity:

> "(a) In a criminal prosecution in which the defendant is accused of an offense of domestic violence *** evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and *may be considered for its bearing on any matter to which it is relevant*.
>
> (b) 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." (Emphasis added.) 725 ILCS 5/115-7.4(a), (b) (West 2014).

Our review of this issue is for an abuse of discretion. *People v. Smith*, 2012 IL App (1st) 113591, ¶ 23. We deem a trial court's ruling on an evidentiary issue to be an abuse of discretion only when the ruling "is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 31 The purpose of section 115-7.4 is to alleviate evidence problems that commonly arise in the prosecution of offenses of domestic violence and the like:

> "When it enacted [the law that included section 115-7.4], the General Assembly was legitimately concerned with the effective prosecution of crimes of domestic violence, which pose some of the same concerns as sex crimes. An abuser may have a pattern of targeting victims who are vulnerable. *Such a victim may be reluctant to testify against her abuser, or the effectiveness of her testimony in court may be affected by fear or anxiety.* The abuser may also be adept at presenting himself as a calm and reasonable person and his victim as hysterical or mentally ill. Evidence that the defendant has been involved in a similar incident may persuade a jury that the present victim is worthy of belief because her experience is corroborated by the experience of another victim of the same abuser." (Emphasis added.) *People v. Dabbs*, 239 Ill. 2d 277, 293 (2010).

Because section 115-7.4 partially abrogates a common-law rule of evidence, courts must construe it narrowly, "in a manner that preserves for defendant[s], as much as is possible consistent with the legislative purpose, all of the protections that otherwise exist in our rules of evidence." *Dabbs*, 239 Ill. 2d at 288.

¶ 32 The current case presents a clear instance of a victim of domestic violence who did not wish to testify. The victim's attempt to explain away the damage to her phone was particularly striking. Under these circumstances, admission of other crimes clearly served the purpose intended by the drafters of section 115-7.4. This is so plainly the case that defendant does not suggest that the court should have refused to admit all such evidence. Rather, he argues only that the quantity and vividness of the evidence was excessive.

¶ 33 A decision on the right amount or right quality of evidence requires the court to balance probative value with potential for unfair prejudice. Such balancing is a particular competence of the trial court; hence, the deferential review we give to evidentiary decisions such as those here. Thus, as long as the trial court did not act arbitrarily, fancifully, or unreasonably, or take a view that no reasonable person would adopt, we will not second-guess it. Defendant's arguments go only to what the ideal balance might have been; they never point to any arbitrariness in the court's rulings.

¶ 34 In holding that the court did not abuse its discretion, we recognize that the requirement to construe section 115-7.4 narrowly means that trial courts must exercise caution to admit no more other-crimes evidence than is necessary. However, that recognition does not change the character of our review. Thus, for instance, although we see some justice in defendant's claim that the State could have presented essentially the same case without reading from the victim's statement for the order of protection, that statement did show that the victim's state of mind at trial was such that she was prepared to disavow even her own sworn statements. This presents the sort of difficulty that the General Assembly intended to remedy with section 115-7.4; the bolstering of the victim's out-of-court statements fell within the section's purpose.

¶ 35 Defendant asks us to consider *People v. Gist*, 2013 IL App (2d) 111140, as a case that supports reversal here. We deem *Gist* inapposite except perhaps as an illustration of the broad discretion a trial court has in ruling on admissibility under section 115-7.4. In *Gist*, the State appealed the denial of its motion to admit other-crimes testimony, which the trial court had excluded based largely on concerns that the witness lacked a good view of the event the State wanted her to describe. *Gist*, 2013 IL App (2d) 111140, ¶ 16. We upheld the trial court's decision in *Gist*, emphasizing that it was within the court's discretion. *Gist*, 2013 IL App (2d)

111140, ¶ 18. Of course, our holding says little about whether we would have upheld the court had instead the appeal been the defendant's after the court had admitted that same evidence. By their nature, many truly discretionary decisions fall into a range such that we might uphold a decision in either direction.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm defendant's convictions. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 38 Affirmed.