

No. 1-11-1319

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).

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 12679
)	
DANIEL FLOYD,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

ORDER

- ¶ 1 *Held:* In prosecution for aggravated criminal sexual abuse, the prosecution proved beyond a reasonable doubt the aggravating factor that during the commission of the offense, defendant used force that caused the victim bodily harm. The trial court did not err in permitting evidence that defendant had sexually assaulted another victim three and one-half years earlier.
- ¶ 2 In a bench trial, defendant Daniel Floyd was convicted of aggravated criminal sexual abuse and sentenced to four years in prison. On appeal, defendant contends that the prosecution failed to prove beyond a reasonable doubt that his act of striking the victim over the head

occurred during the commission of criminal sexual abuse, which was the aggravating factor for aggravated criminal sexual abuse. Defendant also contends that the trial court erred when it permitted the prosecution to introduce evidence that he had committed another sexual assault three and one-half years earlier. Finally, the parties agree that the mittimus must be corrected.

¶ 3 At trial, A.D. testified to the following sequence of events. On the evening of June 19, 2009, she went to the Vine Bar in Chicago to celebrate the birthday of her friend, Ann Rothstein. Another friend, Heather Williams, was also there along with defendant, who was dating Ann. The four planned to spend the night at defendant's apartment. A.D. first met defendant that evening.

¶ 4 Between 8 p.m. and 11 p.m., A.D. had five vodka drinks. She then began to feel sick and went to the bathroom, where she vomited. The group agreed that defendant would accompany A.D. to the apartment, and the others would join them later. A.D. testified that she was not afraid to have defendant accompany her because he was Ann's boyfriend and she trusted him. When A.D. and defendant reached defendant's apartment, he had to help her climb the stairs. In the apartment, A.D. went to use the bathroom, but defendant followed her in. A.D. was frightened and asked what he was doing. Defendant suggested that she change into some pajamas, and he left the bathroom and came back with a shirt and shorts. When A.D. began to change, defendant said he would help her, but she asked him to stop. Defendant left the bathroom, leaving the door partially open. A.D. began to take off her shirt when she heard the click of a cell phone camera. When A.D. asked defendant about the sound, he told her he was texting Ann. Defendant then came back into the room and took off A.D.'s bra, telling her that she needed some help. He then put the shirt on A.D., took off her pants, and put the shorts on her. A.D. had told him to stop, but he continued to dress her.

¶ 5 Defendant and A.D. walked into a bedroom, where there was an air mattress on the floor. A.D. wanted to sleep there, because that was where Heather would be sleeping. When she knelt down next to the bed in order to get in, she felt a blow to the back of her head. Defendant was still in the room. He told her she had fallen, and asked if she was alright. When A.D. touched the back of her head, she saw blood on her hand, and repeatedly asked defendant to call 911 so she could go to the hospital. She was frightened and thought she was going to die. Defendant left the room, and when he came back, he told A.D. that there was no ambulance in the area, but they would get one to her when they could. A.D. asked him to call again, but he refused, saying he had already called. Defendant left the room again and returned with gauze, a bandage and some paper towels. He put the bandage on A.D.'s head, wiped the blood off her hands, and had her lie down on the bed. As A.D. was lying down, defendant sat next to her and put his hand underneath her shirt, touching her breast. She was not wearing a bra at that time. A.D. was very frightened, thinking that defendant was going to rape her or kill her. She asked defendant to stop, but he did not do so, continuing to fondle her breasts for about five minutes. Defendant lifted up A.D.'s shirt and took a picture with his cell phone. He began to put his hands down A.D.'s pants but he stopped when he was under the edge of her underwear, because she had on a sanitary napkin. A.D. then asked defendant if she could speak to Ann. Defendant made a call, but would not allow A.D. to speak to Ann. At trial, A.D. identified three cell phone photographs as having been taken by defendant that night. One was of her and defendant at the bar; a second was of her changing in defendant's bathroom; and the third was of her bare chest, taken after defendant lifted up her shirt.

¶ 6 About 40 minutes after defendant and A.D. entered the apartment, Ann and Heather arrived. When Heather, defendant and Ann came into A.D.'s room, A.D. pulled Heather down next to her and whispered that defendant had hit her and she needed to go to the hospital.

Heather announced that A.D. needed to go to the hospital, and called 911. Heather and A.D. then went outside to wait for the ambulance, leaving defendant and Ann in the apartment. While they were waiting, A.D. told Heather that defendant had touched her and photographed her. An ambulance arrived and took them to the hospital, where A.D. told a nurse and a doctor that she had hit her head when she fell. Heather told A.D. to report defendant, but A.D. did not do so. In her testimony, A.D. explained that she had not decided whether she wanted to report defendant's actions. She knew he was Ann's boyfriend and she did not know what Ann would think. She was also afraid that something else might happen to her, and she was tired, confused, and in pain.

¶ 7 Heather stayed with A.D. at the hospital while seven staples were used to close A.D.'s wound. A.D.'s parents took her home, and Heather went back to defendant's apartment. A.D. did not immediately tell her parents what had happened because she remained unsure about reporting defendant's conduct and she was also embarrassed. The following day, her boyfriend convinced her to call the police.

¶ 8 Ann testified that she was dating defendant on the day in question. That evening, she, defendant, Heather, and A.D. were celebrating her birthday at the Vine Bar. They all planned to go back to defendant's apartment to sleep after they celebrated. A.D. and Heather would sleep on one bed and defendant and Ann would sleep on the other bed. After A.D. had about four vodka drinks, she became sick and vomited in the bathroom. At Ann's suggestion, defendant took A.D. back to his apartment so she could sleep. About an hour later, defendant telephoned Ann to tell her that A.D. had fallen and hit her head, but that no ambulance was required. Ann and Heather went to defendant's apartment, where A.D. was lying on an air mattress, with a bandage on her head. After speaking with A.D., Heather called an ambulance, which took A.D. and her to the hospital. The following day, the police came to defendant's apartment and took Heather and

defendant away while Ann remained at the apartment. When she found defendant's cell phone and saw photographs of A.D. on it, she called the police.

¶ 9 The parties stipulated that Heather Williams would testify that at the time in question she joined A.D., Ann, and defendant at the Vine Bar. A.D. became ill after consuming a few alcoholic drinks and left with defendant, who was supposed to take care of her. Later that evening, Heather went to defendant's apartment where she saw that A.D. had a bandaged head. A.D. asked for an ambulance, telling her that defendant had hit her over the head, tried to rape her, and lifted up her shirt and fondled her breasts. A.D. also said that defendant took a photograph of her with his cell phone. Heather called an ambulance and accompanied A.D. to the hospital.

¶ 10 Prior to trial, the prosecution filed a motion *in limine*, seeking leave to introduce other crimes evidence against defendant. This motion was granted, and at trial the prosecution presented the testimony of J.R. concerning a prior sexual assault on her by defendant. J.R. testified that she had dated defendant in high school. Their relationship became sexual, but they then broke up, while remaining friends. In December 2005 J.R. visited defendant at his college. While they were in defendant's room, he forced her to drink "shots" of vodka, slapping her repeatedly when she initially refused. Defendant forced J.R. to take off her dress and made her put on a t-shirt and shorts which he furnished. He forced J.R. to drink more shots and then made her take off all her clothes. Defendant placed his finger in J.R.'s vagina, made her take off his clothes, and made her perform oral sex on him. He then had sexual intercourse with her and ejaculated on her face, stomach, and leg. He also took a photograph of her without her shirt. When they went to a bar, J.R. escaped, and reported the assault to the police. J.R. denied consenting to have sex with defendant and denied consenting to have him take a picture of her

while she was naked. She also testified that although she told the police she wanted to testify against defendant, she never followed up with them.

¶ 11 Defendant introduced stipulations concerning the testimony of two nurses and a doctor who were on duty when A.D. came to the emergency room. All three would testify that their treatment notes did not indicate that A.D. had reported any sexual abuse. Their notes also indicated that A.D. told them that she injured her head when she fell.

¶ 12 At the close of all the evidence, the trial court found defendant guilty of aggravated criminal sexual abuse and subsequently sentenced him to four years in prison. This appeal ensued.

¶ 13 Defendant contends that the prosecution failed to prove that the bodily harm inflicted on A.D. occurred "during" the commission of criminal sexual abuse (720 ILCS 5/12-15(a)(1) (West 2008)) against her. Proof of this factor enhances criminal sexual abuse to aggravated criminal sexual abuse. 720 ILCS 5/12-16(a)(2) (West 2008). Defendant does not challenge the sufficiency of the evidence to prove that he fondled A.D.'s breasts and therefore committed criminal sexual abuse. Nor does he challenge the sufficiency of the evidence to prove that he caused bodily harm to A.D. by striking her on the head with such force that she required seven staples to close her head wound. But he contends that this act did not occur during the sexual abuse, as required by statute to enhance criminal sexual abuse to aggravated criminal sexual abuse. Our review of this legal issue is *de novo*. *People v. Donaho*, 204 Ill. 2d 159, 172 (2003).

¶ 14 In support of this contention, defendant cites to the recent case of *People v. Giraud*, 2012 IL 113116. In *Giraud* the defendant, who was HIV positive, had forcible sexual intercourse with his teenage daughter without wearing a condom. *Id.* ¶ 1. For this act he was charged with aggravated criminal sexual assault. *Id.* The prosecution asserted that the aggravating factor was that he threatened or endangered the life of the victim by exposing her to the risk of contracting

HIV. *Id.* ¶ 6. Our supreme court held that because the victim did not contract the HIV virus, the defendant had not threatened or endangered her life. *Id.* ¶¶ 33-39. According to the court, threatening the victim's life would have required the defendant to tell the victim at the time of the assault that he was HIV positive. *Id.* ¶¶ 14-16. As to endangerment, the court held that this would require that the victim actually become infected with the HIV virus during the assault. *Id.* ¶¶ 33-35.

¶ 15 The facts of this case do not resemble those in *Giraud*, where the court found that no aggravating factor had occurred. *Id.* ¶39. Here, the aggravating factor was causing bodily harm to the victim, and the only issue is whether it occurred during the commission of the offense. Defendant notes that under the statute, the only aggravating factor which requires merely that it occur "as part of the same course of conduct" as the commission of the offense is the delivery of any controlled substance. 720 ILCS 5/12-16a(7) (West 2008). The other aggravated factors, including the infliction of bodily harm, must occur "during" the commission of the offense. We do not find convincing defendant's assertion that the bodily harm to the victim was not inflicted during the commission of the sexual abuse. The case law supports a determination that the victim was harmed by a blow to the head during the commission of sexual abuse.

¶ 16 This case is more like *People v. Colley*, 188 Ill. App. 3d 817 (1989), where the defendant was convicted of aggravated criminal sexual assault. The defendant entered the victim's home at night and sexually assaulted her in her bedroom. *Id.* at 818. He demanded money, and when she refused, he struck her, threw her on the bed, and placed a pillow over her head. *Id.* The defendant then ordered the victim to go downstairs, where he cut her on the neck and chin with a knife. *Id.* at 818-19. On appeal, the defendant contended that the aggravating factor, cutting the victim with a knife, took place too long after the sexual assault and was not "during" the commission of the sexual assault, as required by statute. *Id.* at 819-20. We held that the stabbing

was sufficiently close in time to the sexual assault to be deemed to have been committed "during the course" of the sexual assault. *Id.* at 820. In a number of cases we have ruled, as we did in *Colley*, that acts of bodily harm which did not occur simultaneously with a sexual assault were still close enough in time to be considered to have occurred during the commission of that assault. *People v. Thomas*, 234 Ill. App. 3d 819, 825 (1992) (the defendant sexually assaulted the victim, forced her to submit to another sexual act by a person he had invited into the room, was interrupted by another person coming into the room to speak with him, then branded the victim with a hot fork and forced her to go to an apartment where he sexually assaulted her again); *People v. White*, 195 Ill. App. 3d 463, 465 (the defendant struck the victim repeatedly and ripped off her nightgown, allowed her to go upstairs to get dressed, and then sexually assaulted her).

¶ 17 In this case, defendant forced the victim to disrobe, took her picture, and made her put on clothes he brought to her. He then accompanied her to another room where he struck her on the head. After leaving the room twice to allegedly call 911 and to obtain materials with which he dressed her wound, he reached under her shirt and fondled her breasts for about five minutes. He then took a picture of her bare chest. We find that the aggravating factor in this case, hitting the victim over the head with an object that caused a wound which bled and required staples to close, was close enough in time to the sexual abuse which followed to be considered to have occurred during the commission of that abuse. Accordingly, we find that the prosecution proved defendant guilty of aggravated criminal sexual abuse beyond a reasonable doubt.

¶ 18 Defendant also contends that the trial court erred in allowing the prosecution to introduce other crimes evidence against him. Illinois law provides that when a defendant is charged with aggravated criminal sexual abuse or certain other offenses involving sexual activity, a trial court has the discretion to admit, for any relevant purpose, evidence that a defendant has committed

another such sexual offense. 725 ILCS 5/115-7.3 (West 2008). The trial court must determine whether the prejudicial effect of this evidence substantially outweighs its probative value. *People v. Donaho*, 204 Ill. 2d 159, 182-83 (2003); *People v. Chambers*, 2011 IL App (3d) 090949, ¶12. The trial court may consider the proximity in time to the charged offense, the degree of factual similarity to the charged offense, and other relevant facts and circumstances. 725 ILCS 5/115-7.3(c) (West 2008). Relevance, or probative value, increases as factual similarities in the evidence increase. *Donaho*, 204 Ill. 2d at 184. But our Supreme Court has urged the exercise of caution when considering the admissibility of other crimes evidence to show propensity to commit a crime. *Id.* at 186. This is because of concern that propensity evidence may prove too much. *People v. Dabbs*, 239 Ill. 2d 277, 284 (2010) (dangers of prejudice, confusion and time consumption may outweigh probative value, particularly in the setting of a jury trial). However, on review of a trial court's determination of admissibility of such evidence, we will not reverse unless we find that the court so abused its discretion that no reasonable man would adopt the court's decision. *Donaho*, 204 Ill. 2d at 182.

¶ 19 Here, defendant notes that the crimes were committed about three and one-half years apart. But even a time lapse of 20 years or 12 to 15 years has not barred such evidence where other factors support its admission. *Id.* 204 Ill. 2d at 159 (12 to 15 years); *People v. Davis*, 260 Ill. App. 3d 176, 192 (1994) (over 20 years). Defendant also points to differences between the two cases. In J.R.'s case, defendant was apparently not prosecuted, as J.R. testified that she never followed up after reporting the offense. The sexual acts in both offenses were different. Also, J.R. reported the offense the same day, while A.D. waited a day before she reported defendant's offense. But these offenses have two striking and unusual similarities. In both cases, defendant dressed the victim in other clothes. Also in both cases, defendant took photographs of the victims during the abuse. We find that these similarities in themselves were sufficient to permit

the introduction into evidence of the facts of the prior criminal sexual abuse of J.R. But there were additional similarities. In both cases defendant knew the victim, although in the case of A.D., defendant had only been introduced to the victim on the day of the offense. In both cases the victims consumed a great deal of alcohol, although in J.R.'s case, defendant forced her to do so. In both cases, defendant used violence against the victims. Finally, in both cases the abuse took place in defendant's residence. This was a bench trial. We do not find that the trial court so abused its discretion that no reasonable man would adopt the court's decision to allow this other crimes evidence. *Id.* at 182. Nor do we find that the prejudicial effect of this evidence outweighed its probative value. *Id.* at 182-83. Accordingly, we find that the trial court did not err in admitting this other crimes evidence against defendant.

¶ 20 Finally, the record shows that defendant was charged with a second count of aggravated criminal sexual abuse, alleging that he fondled A.D.'s vagina. Defendant notes that at the close of the State's evidence, the court granted defendant's motion for a judgment of acquittal as to this count. However, the mittimus indicates that defendant was convicted of both counts, as it states that the second count merged into the first count. The State concedes this error, and we order that the mittimus be corrected to indicate that defendant was only convicted of the first count.

¶ 21 For the reasons set forth in this order, we affirm defendant's conviction and sentence and order that the mittimus be corrected.

¶ 22 Affirmed; mittimus corrected.