

No. 1-13-0525

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 11 CR 19824
	)	
MARCUS JACKSON,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellee.	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court's order denying the State's motion to admit other crimes evidence pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3 (West 2010)) affirmed where the probative value of the other crimes was outweighed by the undue prejudice to defendant.
- ¶ 2 Defendant Marcus Jackson was charged by indictment with, *inter alia*, attempted murder and criminal sexual assault. The State later sought leave to admit evidence of other crimes to show defendant's propensity to commit sexual offenses against intoxicated women during which he strangled them. After hearing argument, the trial court ruled that the State could only

introduce the other crimes evidence if defendant testified that his encounter with the victim was consensual. The State then filed a certificate of substantial impairment alleging that the order denying its motion to admit proof of other crimes substantially impaired its ability to prosecute this case. In this interlocutory appeal, the State contends that the trial court erred because the other crimes evidence at issue establishes defendant's propensity to commit sexual offenses. We affirm.

¶ 3 In November 2011, defendant was charged by indictment with attempted first degree murder, aggravated criminal sexual assault, and criminal sexual assault arising out of a January 2005 incident involving the victim T.B. In 2012, the State filed a motion and amended motion pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2010)), to admit evidence of other crimes, *i.e.*, the sexual assault and strangulation of J.J. to show, *inter alia*, defendant's propensity to commit sexual crimes and to rebut a potential consent defense.

¶ 4 The motion alleged that the victim in this case, a 26-year-old Caucasian female, was walking home, intoxicated, at 2 a.m., when defendant walked up behind her, engaged her in conversation, and offered to accompany her to ensure that she arrived safely. Defendant followed the victim into her building's elevator where he put his hands on her throat and kissed her. He then followed her to her apartment door, pushed her inside after she opened the door, choked her and forced her into the bedroom. There, defendant ripped off the victim's skirt and panties, choked her, and placed his fingers and penis into her vagina. After a few minutes, defendant indicated that he was too drunk and it was not working. At this point the victim told defendant to leave. The incident was reported to the police and the victim subsequently underwent a sexual assault kit examination. Defendant was eventually linked to the instant offense by DNA evidence.

¶ 5 The motion further alleged that the State wished to admit evidence of a June 2011 incident in California involving J.J. (the California case). In that case, J.J., an intoxicated 26-year-old Caucasian female, went to defendant's home after the bar where they were drinking closed. Defendant was also intoxicated. Once there, J.J. and the victim began to argue and J.J. attempted to leave. Defendant would not permit her to leave and ordered her to remove her clothes. After a struggle, J.J. ran from the apartment naked and was chased by defendant, who was not wearing pants. Although J.J. told a neighbor she was scared of defendant, the neighbor took J.J. back to defendant's apartment. Once inside, defendant touched J.J.'s breasts and buttocks against her will, and attempted to have sexual intercourse with J.J. while choking her. When the neighbor knocked on the door, J.J. was able to run away. Defendant then drove away, although he was subsequently stopped by police at a gas station. J.J. identified defendant as the person who had assaulted her.

¶ 6 At a hearing on the State's amended motion to admit other crimes evidence, the State explained that the instant offense occurred in 2005, but that DNA taken from defendant in the California case tied defendant to the instant offense. The State then argued that the two incidents were approximately six years apart, that the victim in each case was an intoxicated 26-year-old Caucasian woman, and that the other crimes evidence would rebut any allegation of consent. The defense responded that the other crimes evidence in this case was not a prior bad act and that the facts of each incident were consistent with a "one night consensual encounter." The defense further argued that nothing in the facts of the other crime at issue marked the crime as the "handiwork" of defendant.

¶ 7 In denying the State's motion, the trial court stated that although section 115-7.3 permitted the admission of propensity evidence, the court still had to weigh the statutory factors, and although the State made a persuasive argument regarding the California case, the court

explained that it found the two incidents to be factually distinct but that it was concerned about the degree of factual similarity. The court noted, however, that in both instances defendant's response to a woman's rejection was to choke that woman. Therefore, the court held that if, and only if, defendant testified that he engaged in a consensual act with the victim, the State could present evidence of the California case in rebuttal. The court also indicated that it was concerned that the introduction of other crimes evidence would create a mini-trial and take the jury's eye off what was relevant and probative, so the court would give a limiting instruction to the jury prior to J.J.'s testimony. In other words, the court would not allow the introduction of the other crimes evidence to show defendant's propensity to commit sexual offenses, but if defendant testified that his encounter with the victim was consensual and denied choking her, the court believed that such testimony would open the door to evidence that on another occasion when defendant was "rebuffed," he responded by choking J.J.

¶ 8 The State then filed a motion to reconsider. In denying the State's motion, the trial court reiterated that it had considered the statutory balancing factors and concluded that the prejudicial effect of the other crimes evidence outweighed its probative value. The State then filed a certificate of substantial impairment alleging that the order denying its motion to admit proof of other crimes substantially impaired its ability to prosecute this case.

¶ 9 In this interlocutory appeal, the State contends that the trial court erred in denying its motion to admit proof of other crimes when the evidence at issue establishes defendant's propensity to commit sexual offenses against intoxicated women.

¶ 10 Pursuant to section 115-7.3 of the Code, in the prosecution of certain sexual offenses the State is permitted to introduce evidence that the defendant has committed a sexual offense for any purpose, including to show the defendant's propensity to commit sexual offenses. 725 ILCS 5/115-7.3(West 2010), *People v. Donoho*, 204 Ill. 2d 159, 176 (2003). However, the probative

value of the proffered evidence must outweigh its undue prejudice to the defendant. 725 ILCS 5/115-7.3(c) (West 2010), *People v. Reed*, 361 Ill. App. 3d 995, 999 (2005). In weighing the probative value of evidence of other sex offenses against undue prejudice to a defendant, the trial court may consider the proximity in time to the charged offense, the degree of factual similarity to the charged offense, or other relevant facts and circumstances. 725 ILCS 5/115-7.3(c) (West 2010).

¶ 11 Generally, the risk associated with the admission of other crimes evidence is that it might render a factfinder inclined to convict a defendant simply because he is a bad person deserving of punishment. *Donoho*, 204 Ill. 2d at 170. In other words, a trial court should avoid admitting evidence that convinces a factfinder that the defendant is guilty because he is a bad person, "rather than basing its verdict on proof specific to the offense charged." *People v. Smith*, 406 Ill. App. 3d 747, 751 (2010). Accordingly, our supreme court has advised trial courts "to be cautious in considering the admissibility of other-crimes evidence to show propensity by engaging in a meaningful assessment of the probative value versus the prejudicial impact of the evidence." *Donoho*, 204 Ill. 2d at 186. A trial court's decision to admit other crimes evidence will not be reversed unless the court abused its discretion. *Id.* at 182.<sup>1</sup> A trial court abuses its discretion if the court's determination is unreasonable, arbitrary, or fanciful. *Id.* For the following reasons, we conclude that the trial court did not abuse its discretion in denying the State's motion to admit other crimes evidence in the instant case.

¶ 12 First, as to proximity in time, there is no bright line rule precluding the admission of aged events. See *Donoho*, 204 Ill. 2d at 183-84 (affirming the admission of other crimes evidence

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<sup>1</sup> The State cites *Donoho*, 204 Ill. 2d at 172, and *People v. Chapman*, 194 Ill. 2d 186, 208 (2000), for the proposition that *de novo* review applies in matters of statutory construction. However, as this case involves the trial court's ruling on the admissibility of evidence, *de novo* review is inapplicable.

when the incidents occurred 12 to 15 years before the conduct at issue and noting other cases admitted such evidence when it was over 20 years old); *People v. Illgen*, 145 Ill. 2d 353, 370 (1991) (whether other crimes evidence is to be admitted "should not, and indeed cannot, be controlled solely by the number of years that have elapsed "). However, when weighing the probative value of other crimes evidence, proximity or remoteness in time to the charged offense must be considered. *Id.* Here, the two incidents were approximately six years apart. Thus, the remoteness in time between the charged conduct and the California case, while not sufficient to preclude admissibility, supported the trial court's decision not to allow the admission of the other crimes evidence. See 725 ILCS 5/115-7.3(c) (West 2010) (in weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider the proximity in time to the charged offense, the degree of factual similarity to the charged offense, or other relevant facts and circumstances).

¶ 13 We next consider whether the State's argument that the remoteness in time of the California case is mitigated by its factual similarity to the charged conduct. See *e.g.*, *Donoho*, 204 Ill. 2d at 184 (affirming the admission of other-crimes evidence when the incidents occurred 12 to 15 years before the conduct at issue). In other words, do the factual similarities compensate for the time lapse between the offenses and weigh in favor of admission of the other crimes evidence. See *Smith*, 406 Ill. App. 3d at 753. Although the existence of some differences does not defeat admissibility because no two independent crimes are identical, to be admissible other crimes evidence must have some threshold similarity to the charged offense. *Donoho*, 204 Ill. 2d at 184-85. As factual similarities increase, so does the relevance or probative value of the other crimes evidence. *Id.* at 184. Conversely, however, as the number of dissimilarities increase, so does the prejudicial effect of the other crimes evidence. *Smith*, 406 Ill. App. 3d at 754.

¶ 14 In the case at bar, the trial court determined that the two incidents were factually distinct because they occurred years apart in different states, but was "concerned" about the "degree of factual similarity" between the instant incident and the California case. Although the victim in each case was an intoxicated Caucasian woman, in the instant case defendant accompanied the victim to her front door, and in the California case defendant drove J.J. to his home. While "no two independent crimes are identical" (*Donoho*, 204 Ill. 2d at 185), the more numerous the differences between the charged offense and the other crimes evidence, the greater the prejudicial effect (*Smith*, 406 Ill. App. 3d at 754). The trial court considered whether the factual similarities between the two incidents could distract the jury from the relevant issue, *i.e.*, whether defendant was guilty of the instant offense. See *Illgen*, 145 Ill. 2d at 375-76 (deferring to the trial court's ability to evaluate the impact of other crimes evidence on the jury). Ultimately, the trial court concluded, after considering the proximity in time between the two incidents and the circumstances of each, that the prejudicial effect of the other crimes evidence outweighed its probative value. See *Donoho*, 204 Ill. 2d at 186 (when considering the admissibility of other crimes evidence the trial court should engage in "a meaningful assessment of the probative value versus the prejudicial impact").

¶ 15 Although we agree with the State that there are some similarities between the two incidents, there are also differences. Ultimately, whether the probative value of other crimes evidence is outweighed by its prejudicial impact is a determination left to the trial court's discretion as the trial court is in the best position to weigh the prejudicial impact of the other crimes evidence within the context of the entire case. *People v. Carter*, 362 Ill. App. 3d 1180, 1192 (2005). Reviewing the trial court's decision under the appropriate standard, we conclude that the trial court did not abuse its discretion when, after weighing probative value of the proffered evidence against the undue prejudice to defendant, the court determined that its

probative value was outweighed by its prejudicial effect, and denied the State's motion. See *Donoho*, 204 Ill. 2d at 186 (reasonable minds can differ about whether other crimes evidence is admissible without requiring reversal under the abuse of discretion standard).

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 17 Affirmed.