

NOTICE
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2017 IL App (5th) 140209-U

NO. 5-14-0209

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Hamilton County.
)	
v.)	No. 11-CF-3
)	
BRIAN K. BOWLBY,)	Honorable
)	Barry L. Vaughan,
Defendant-Appellant.)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court abused its discretion in admitting the defendant's prior convictions for impeachment purposes without first determining whether the probative value substantially outweighed the prejudicial effect.

¶ 2 The defendant, Brian K. Bowlby, was convicted of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2010)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2010)) following a jury trial in Hamilton County. The defendant claims on appeal that the circuit court abused its discretion in admitting his prior convictions for impeachment purposes without first determining whether the probative value substantially outweighed the prejudicial effect and in admitting other-crimes evidence as

proof of propensity. The defendant also argues that he received ineffective assistance of counsel at sentencing. We reverse and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 We will limit our initial recitation of the facts to only those that are generally pertinent to the issues raised on appeal. However, as needed, we will refer to specific testimony and other facts for clarification during our analysis.

¶ 5 The defendant's biological daughter, A.B., was born in August 1994. She lived with the defendant, her mother (Victoria), her sister, and three brothers in Saline County, Illinois. In 2003, the family moved to Hamilton County, Illinois. Following the defendant and Victoria's separation in May 2010, A.B. moved to Fairfield, Illinois, with Victoria and her siblings. Victoria divorced the defendant shortly thereafter. In December 2010, A.B. told Victoria that she had been repeatedly sexually abused by the defendant when she was six years old while she lived in Saline County. The abuse continued until she was 11 years old and living in Hamilton County. Victoria reported this information to the local police department.

¶ 6 Rick White, special agent with the Illinois State Police (ISP), conducted an investigation into A.B.'s sexual abuse allegations. He interviewed the defendant in December 2010 and January 2011. After Agent White completed his investigation, both Saline and Hamilton County State's Attorneys filed charges against the defendant for the alleged sexual offenses committed against A.B.

¶ 7

Saline County Offenses

¶ 8 On January 25, 2011, the defendant was charged by indictment with 20 counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse in Saline County. The State alleged that the defendant committed the offenses when he lived with A.B. in Saline County between August 2001 and February 2003.

¶ 9 Before trial, the defendant's cousin (Allen), contacted the State and claimed that she had also been sexually abused by the defendant. She represented that the abuse began when she was 6 years old and ended when she was 11 years old. The State filed a notice of intent to introduce Allen's testimony as other-crimes evidence. Over the defendant's objection, the circuit court determined that Allen's testimony would be admissible at trial.

¶ 10 On February 2, 2012, the defendant was convicted of all pending counts following a jury trial.¹ The defendant was sentenced to 19 consecutive, 15-year terms of imprisonment on the convictions for predatory criminal sexual assault of a child and a concurrent, 6-year term of imprisonment on the conviction for aggravated criminal sexual abuse. The defendant appealed, and this court affirmed the convictions. See *People v. Bowlby*, 2014 IL App (5th) 120520-U.

¶ 11

Hamilton County Offenses

¶ 12 On January 27, 2011, the defendant was charged by information with one count of predatory criminal sexual assault of a child (count I) and one count of aggravated criminal sexual abuse (count II) in Hamilton County. In count I, the State alleged that the defendant

¹Throughout the defendant's brief he asserts that the circuit court erred in admitting the 18 prior convictions for impeachment purposes; however, the correct number of prior convictions is 20.

was over 17 years of age when he committed an act of sexual penetration with A.B., who was under 13 years of age between June 1, 2005, and August 21, 2005. In count II, the State alleged that the defendant knowingly placed his finger on A.B.'s vagina for the purpose of his own sexual arousal. Both offenses allegedly occurred while A.B. lived in Hamilton County.

¶ 13 On February 7, 2011, the defendant filed a motion *in limine* to preclude the State from admitting his prior convictions as impeachment evidence in the event that he testified.² The defendant argued that his convictions had no relationship to his credibility or veracity; that the jury would likely conclude that the factual similarities were an indication of guilt; and that the probative value of the prior convictions was greatly outweighed by the danger of unfair prejudice.

¶ 14 On September 27, 2013, the State filed a notice of intent to admit Allen's testimony as other-crimes evidence to demonstrate the defendant's propensity to commit the charged offenses. The State's notice of intent addressed only Allen's testimony and provided: (1) the approximate dates of the defendant's uncharged sexual offenses against Allen, which purportedly occurred 10 to 14 years earlier than the offenses against A.B.; and (2) that the factual similarities of the offenses against the two victims were "significant." The State alleged the following similarities:

"The defendant is related to both victims. He is the biological father of A.B. He is the first cousin of Stacy Allen (Stacy Allen's father and defendant's mother are brother

²At the time the defendant filed this motion *in limine* he did not have any prior felony convictions. As previously stated, the date of the defendant's convictions in Saline County was February 2, 2012.

and sister.) Both *** were under the age of 13 when the offenses occurred. The defendant penetrated the vaginas of both ***. The defendant also fondled the vaginas of both *** with his hand. The offenses against A.B. occurred in the defendant's home. Some of the offenses against Stacy Allen occurred in the defendant's home."

¶ 15 The defendant filed a motion *in limine* to preclude the State from introducing Allen's testimony as propensity evidence. The defendant argued that there was a lack of similarity in the alleged sexual offenses and that the evidence was highly prejudicial.

¶ 16 The defendant was then convicted in Saline County, and prior to the hearing on the defendant's motion *in limine*, the State filed a notice of intent to admit the defendant's prior convictions as impeachment evidence, pursuant to *People v. Montgomery*, 47 Ill. 2d 510 (1971), in the event that he testified. The State asserted that the convictions were more probative than prejudicial.

¶ 17 *Pretrial Hearing*

¶ 18 On October 21, 2013, the circuit court heard arguments on the admissibility of the defendant's prior convictions as impeachment evidence and the admissibility of Allen's testimony as propensity evidence. With regard to the defendant's motion *in limine*, defense counsel argued that the Saline County convictions were too factually similar and would work prejudice on the jury.

¶ 19 In response, the State asserted that the jury would hear testimony from A.B. regarding the abuse that led to the convictions in Saline County. The State further asserted that the introduction of the defendant's prior convictions would not be prejudicial because of the testimony of A.B. and Allen.

¶ 20 Next, the State argued that Allen's testimony was admissible as propensity evidence because her testimony was admitted in the defendant's trial in Saline County. The State reiterated the similarities in the alleged sexual abuse of Allen and A.B., and argued that the "factual evidence," case law, and the legislative intent to admit sexual offenses as other-crimes evidence supported the admission of Allen's testimony as propensity evidence.

¶ 21 In response, the defendant argued that admission of other-crimes evidence was not mandatory "even when the statutory factors [had been] satisfied." Rather, the defendant argued that the other-crimes evidence should not become the "focal point of the trial" and the details should be limited to avoid a "trial within a trial." The defendant also argued that the large volume of uncharged offenses prevented the defendant from being able to prepare a defense and would lead to "juror-confusion." Lastly, he asserted that when the court conducted the required section 115-7.3(c) "prejudicial-versus-prohibitive value balancing test," the court would find that the probative value would not outweigh the "distinct prejudicial value against the defendant."

¶ 22 Referencing section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2012)), the circuit court indicated that it had considered the factual similarities and proximity in time. With regard to Allen's sexual abuse, the court found that the similarities provided sufficient probative value to overcome the remote proximity in time. The court denied the defendant's motion *in limine*, allowing the Saline County convictions to be admitted into evidence at trial. The court also ruled that A.B.'s statements and Allen's testimony, limited to her allegations between 1991-95, would be admitted at trial.

The court entered a hand-written order: "The motion *in limine* is denied per 725 ILCS 115-7.3; objection to admission of evidence from 1991-1995 is overruled."

¶ 23

Trial

¶ 24 On October 28, 2013, the defendant's trial commenced. In opening statement, the State mentioned that the sexual assaults of A.B. started in Saline County. The defense objected to the State's mention of the defendant's sexual assaults of A.B. prior to June 2005, the date alleged in the Hamilton County offenses. The circuit court sustained the objection. The State then moved to amend its notice of intent to admit Allen's testimony as propensity evidence to include A.B.'s testimony of sexual abuse in Saline County. The State argued that the previous acts were sufficiently similar to the acts in Hamilton County and would be used to show propensity under section 115-7.3 of the Code. Defense counsel objected and argued that the State's motion to amend during trial was in violation of the statutory disclosure requirement and the late disclosure hindered his ability to prepare a defense to the earlier sexual crimes in Saline County. Defense counsel also argued that A.B.'s testimony was not sufficiently similar to the sexual acts in Hamilton County, given that the sexual acts against A.B. occurred over a period of six years.

¶ 25 The circuit court determined that the State failed to comply with section 115-7.3(d) of the Code, which required disclosure of the earlier sexual abuse allegations and a summary of A.B.'s testimony within a reasonable time in advance of trial. 725 ILCS 5/115-7.3(d) (West 2012). The court found that no good cause existed to excuse the late disclosure and the court barred the State from eliciting testimony from A.B. regarding the sexual abuse that occurred in Saline County.

¶ 26

Testimony of A.B.

¶ 27 A.B. testified to the following facts. At the time of the trial, A.B. was 19 years old. She was currently employed as a certified nursing assistant at a local nursing home and was attending college to become a registered nurse. The defendant started sexually abusing her when she was very young. In February 2003, A.B. moved to Hamilton County with her family where they lived with a family friend. Following the move, the defendant sexually abused her approximately once a month. A.B. disclosed two specific instances of sexual abuse that occurred while camping in the summer of 2005. While her siblings were asleep, the defendant used his hand to rub her vagina and then placed his penis inside her vagina. The defendant would often create opportunities to sexually abuse her. In particular, he would direct Victoria to take A.B.'s four siblings to the store, or he would instruct A.B. to stay inside the house while her siblings played outside. The defendant would take A.B. to his bedroom and force her to have sexual intercourse with him.

¶ 28 In May 2010, A.B. moved with Victoria and her siblings to Fairfield, Illinois. A.B. no longer voluntarily visited the defendant; however, she and her siblings were forced to visit him on a monthly basis at his home in Shawneetown, and later in Carmi, Illinois. In December 2010, the visits ended after A.B. informed Victoria that she had been sexually abused by the defendant. A.B. told Victoria about the sexual abuse because she feared that the defendant would sexually abuse her sister and another female family member. A.B. also felt compelled to disclose the sexual abuse after she refused to bring her brother and sister to

the defendant's house on Christmas, which upset the defendant and led to an argument between the defendant and A.B.

¶ 29 *Testimony of Allen*

¶ 30 Following A.B.'s testimony, the State indicated that it would call Allen as a propensity witness pursuant to section 115-7.3 of the Code. Defense counsel objected and reiterated his arguments regarding the admissibility of Allen's testimony. In addressing counsel's arguments, the circuit court referenced *People v. Donoho*, 204 Ill. 2d 159, 176 (2003), which allowed the admission of other-crimes evidence to prove propensity. The court found that Allen's testimony regarding the defendant's prior acts was not too remote for admission at trial given the factual similarities. The court overruled counsel's objection and the State called Allen to testify.

¶ 31 Allen testified to the following details. Allen was 28 years old at the time of the trial. The defendant was her first cousin, and he was 13 years older than her. In the early 1990s when Allen was between the ages of 6 and 11 years old, the defendant repeatedly "sexually molested" her. The two would go fishing and he would kiss her and touch her private parts. Allen recalled one sexual encounter that happened shortly after A.B. was born. The defendant took Allen into her bedroom, undressed her, and rubbed his penis on her vagina. Allen further recalled other instances where the defendant sexually molested her at her grandmother's home while her family was asleep. This sexual abuse occurred periodically over several years until Allen moved.

¶ 32

Testimony of ISP Special Agent Rick White

¶ 33 Agent White testified to the following facts. Agent White investigated the sexual abuse allegations made by A.B. and Allen. He interviewed the defendant in December 2010 at the Salem police department. Initially, the defendant denied all sexual abuse claims. The defendant told Agent White that he was being set up by A.B. and Victoria because he had refused A.B.'s request for expensive clothes and to cosign on a loan for Victoria. However, the defendant eventually acknowledged an incident when he woke up in a tent and realized that his hand was inside A.B.'s underwear. The defendant admitted several other instances where he touched A.B.'s vagina in his home but denied that sexual intercourse ever took place. He also told Agent White that he would "finish" by masturbating, and on occasion, had ejaculated in front of A.B after he touched her.

¶ 34 In January 2011, the defendant was interviewed a second time while incarcerated in the Saline County jail. The defendant changed many details from the December 2010 interview. He first claimed that he never touched A.B. in a tent, but inside a building behind his house, and that he had never ejaculated in front of her. The defendant claimed that he had taken muscle relaxers before the first interview, which caused him "not to remember a lot of things."

¶ 35

Testimony of the Defendant

¶ 36 Prior to the defendant testifying, the circuit court informed him that his prior convictions would only be admissible if he testified and that he would be subject to cross-examination by the State. In addition, the court indicated that the details of the defendant's

convictions would be inadmissible, but that "the nature of the offense, without details, and a sentence received may be admissible."

¶ 37 The defendant testified to the following facts. The defendant denied all sexual contact with A.B. He believed that A.B. was lying because he had refused to purchase her a pair of boots and a coat in November 2010. Before the first interview, the defendant had taken two prescription pain pills and four prescription muscle relaxers, which caused him not to remember anything that happened that day. Additionally, he had no recollection of a second interview, despite having heard Agent White's testimony.

¶ 38 The defendant had been previously convicted and sentenced in Saline County of "approximately 18 counts of sexual offenses" that related to a different time frame than those charged in Hamilton County. The Saline County convictions were on appeal. On cross-examination, the defendant admitted that the sexual offenses in Saline County were the same type as those charged in Hamilton County (predatory criminal sexual assault of a child) and that they had occurred a few years earlier. The defendant was convicted in Saline County of an additional count of aggravated criminal sexual abuse against A.B., the only victim named in the Saline County convictions.

¶ 39 *Jury Instructions, Verdict, and Sentencing*

¶ 40 The circuit court gave two limiting jury instructions. First, the jury was instructed that "[e]vidence that a witness has been convicted of an offense may be considered *** only as it may affect the believability of the witness"; and that "evidence *** received on the issue of the defendant's propensity to commit the crime charged *** may be considered by you [the jury] only for that limited purpose."

¶ 41 The jury found the defendant guilty of one count of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. At the defendant's sentencing hearing, the State asserted that a mandatory life sentence applied to the count of predatory criminal sexual assault of a child, pursuant to section 11-1.40(b)(2) of the Criminal Code of 1961, because the defendant had been previously convicted of predatory criminal sexual assault of a child. 720 ILCS 5/11-1.40(b)(2) (West 2010). Defense counsel agreed. Based on this assertion, the circuit court sentenced the defendant to a term of natural life imprisonment for the predatory criminal sexual assault of a child and a consecutive term of seven years' imprisonment for the aggravated criminal sexual abuse. The defendant appealed.

¶ 42

ANALYSIS

¶ 43 The defendant raises three issues on appeal. First, he claims that the circuit court abused its discretion in admitting the defendant's prior convictions as impeachment evidence. Next, he claims that the court erred in admitting Allen's testimony as propensity evidence. Lastly, the defendant claims that defense counsel was ineffective during sentencing.

¶ 44 We first address the defendant's claim that the circuit court abused its discretion in admitting the defendant's prior convictions as impeachment evidence. Specifically, the defendant argues that the court failed to conduct the required *Montgomery* balancing test to determine whether the probative value of admitting his prior convictions outweighed the danger of unfair prejudice, and whether the court, by erroneously referencing section 115-7.3 of the Code, improperly admitted his convictions as impeachment evidence. The State argues that the court did not err when it "impliedly found that no prejudice would exist when it conducted its *Montgomery* balancing test before trial." We agree with the defendant.

¶ 45

Montgomery Balancing Test—Impeachment Evidence

¶ 46 Our supreme court in *Montgomery* determined that evidence of a witness's prior conviction is admissible to attack his credibility when (1) the prior crime was punishable by death or a prison sentence of more than one year or involved dishonesty or false statements regardless of punishment; (2) less than 10 years had passed since the date of conviction or the date of release, whichever was later; and (3) the probative value of admitting the prior conviction outweighed the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d at 516-17. Here, the defendant does not dispute that his Saline County convictions are admissible under the first two prongs; thus, he only challenges the circuit court's ruling under the third prong of the *Montgomery* balancing test.

¶ 47 The circuit court is not required to explicitly state that it is conducting the *Montgomery* balancing test. *People v. Atkinson*, 186 Ill. 2d 450, 463 (1999). However, the court is expected to balance the probative value of a prior conviction against the prejudicial effect. *People v. McKibbins*, 96 Ill. 2d 176, 187-88 (1983). Likewise, the record should show that the court understood, used its discretion, and considered relevant factors on both sides of the scale. *People v. Jennings*, 279 Ill. App. 3d 406, 411 (1996). While prior convictions for similar crimes may be admissible to impeach credibility, courts should be cautious in admitting prior convictions as impeachment evidence for the same crime as the crime charged. *Atkinson*, 186 Ill. 2d at 463. A court's decision to allow evidence of a prior conviction should not be reversed absent an abuse of discretion. *Jennings*, 279 Ill. App. 3d at 410.

¶ 48 In applying the third prong of the *Montgomery* balancing test, the circuit court should consider the following relevant factors: "(1) whether the prior conviction is veracity related; (2) the recency of the prior conviction; (3) the witness' age and other circumstances surrounding the prior conviction; (4) the length of the witness' criminal record and his conduct subsequent to the prior conviction; (5) the similarity of the prior offense to the instant offense, thus increasing the danger of prejudice; (6) the need for the witness' testimony and the likelihood he would forego his opportunity to testify; and (7) the importance of the witness' credibility in determining the truth." *People v. Robinson*, 299 Ill. App. 3d 426, 441 (1998). "The third part of the test, balancing the probative value of an earlier conviction with its unfairly prejudicial effect, was considered to be the most important feature of the rule." *People v. Barner*, 374 Ill. App. 3d 963, 969 (2007); see also *Montgomery*, 47 Ill. 2d at 517. Importantly, where the similarities are significant between the prior convictions and the charged offense, the admission of the prior convictions may be highly prejudicial and constitute an abuse of discretion. *People v. Williams*, 161 Ill. 2d 1, 39-41 (1994).

¶ 49 *Section 115-7.3 Propensity Evidence*

¶ 50 Our supreme court has identified a constitutional means to admit an earlier sex crime as substantive evidence of propensity. *Donoho*, 204 Ill. 2d at 176. Evidence regarding a defendant's other crimes is normally inadmissible if offered to demonstrate the defendant's bad character or his propensity to commit crime. *People v. Evans*, 373 Ill. App. 3d 948, 958 (2007). However, section 115-7.3 of the Code provides an exception where a defendant is accused of certain sex offenses, evidence of an earlier sex offense "may be considered for its

bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(b) (West 2012). Here, the State filed a notice of intent to admit the defendant's prior convictions as impeachment evidence under *Montgomery*, rather than as propensity evidence under section 115-7.3 of the Code. Ultimately, the defendant's prior convictions were ruled admissible only for impeachment purposes and not to demonstrate propensity. Thus, the court should have conducted the *Montgomery* balancing test.

¶ 51 We first note that neither party specifically mentioned the *Montgomery* balancing test and the relevant factors during the pretrial hearing. The defendant's motion *in limine* and the State's notice of intent to admit the defendant's prior convictions for impeachment purposes both failed to disclose the precise details of the convictions. In addition, only some details regarding the defendant's prior convictions were discussed during the pretrial hearing. Although the State's notice of intent to admit the defendant's convictions as impeachment evidence set out the *Montgomery* balancing test, the State argued as though it was seeking to admit the defendant's prior convictions as propensity evidence pursuant to section 115-7.3 of the Code. In particular, the State asserted that the defendant's Saline County convictions and Hamilton County charges were "closely tied together" and that the details of the Saline County convictions would be admitted through witness testimony. Importantly, in arguing for the admission of the defendant's Saline County convictions as impeachment evidence, the State made no assertions regarding the probative value of the convictions in relation to the defendant's credibility.

¶ 52 After the State finished its argument regarding the admissibility of the defendant's convictions, the following dialogue took place:

"THE COURT: All right. Thank you. I believe 115-7.3 is a relatively new statute, but the statute provides that the evidence is admissible in this particular case, where the defendant is accused of predatory criminal sexual assault of a child. The motion *in limine* is denied, and the evidence will be admitted at trial. The other motion was with regard to prior convictions. What convictions [are] the State intending to use, Mr. State's Attorney? The Saline County conviction, or are there other convictions?"

MR. ROWLAND [Defense Counsel]: Judge, I don't think there are any other convictions, besides this Saline County case.

MR. HOOD [State's Attorney]: The Saline County is the notice of intent of a conviction involving our witness. The second motion for notice of other offenses is not an actual charged case. It's a prior criminal activity that was with a family member of [the defendant's]. In our motion we lay out that the victim, a Stacy Allen, has testified prior in Saline County, and she was a victim of [the defendant] when they were living in the same county, Gallatin County."

It appears from the above transcript that the circuit court had insufficient details regarding the defendant's prior convictions to perform the *Montgomery* balancing test and failed to make any findings on the relevant factors. Additionally, it is unclear whether the court intended to admit the defendant's Saline County convictions as impeachment or propensity evidence. Importantly, if admitted only as impeachment evidence, any discussion of prior convictions should have started with the *Montgomery* balancing test. *People v. McGee*, 286 Ill. App. 3d 786, 791 (1997); see also *People v. Whirl*, 351 Ill. App. 3d 464, 467 (2004)

("The record in this case reveals a complete abdication by the trial court of its role in balancing the probative value and prejudicial effect of defendant's prior convictions."). It is also unclear from the record the number of convictions the court was asked to consider, or actually did consider, before ruling on the admissibility of all of the defendant's prior convictions. See *McGee*, 286 Ill. App. 3d at 791 (court erred where it simply noted that defendant's convictions were within the 10-year time frame of trial without proper consideration of *Montgomery*).

¶ 53 Here, the circuit court should have determined the exact number and dates of each conviction, the sentences imposed, as well as other details that may have been relevant to the admissibility of the defendant's prior convictions. Once determined, the court should have considered the appropriate factors in applying the *Montgomery* balancing test and made specific findings relative to whether the probative value substantially outweighed the danger of unfair prejudice if admitted as impeachment evidence. Thus, we find that the court abused its discretion in admitting the defendant's prior convictions as impeachment evidence without first conducting the *Montgomery* balancing test.

¶ 54 Additionally, even though the circuit court diminished the prejudicial effect by providing the jury with an instruction on the limited purpose of admitting the prior convictions, the details from Saline County elicited at trial—same victim, same multiple sex acts leading to convictions, and a close time period in which the sex acts occurred—were analogous to the Hamilton County charges. Due to these strong similarities, the jury could have reasonably concluded that the defendant had a propensity to commit these types of acts. See *People v. Adams*, 281 Ill. App. 3d 339, 345 (1996) ("The admission of the prior

convictions could have persuaded the jury that 'if he did it before[,] he probably did so this time.' " (quoting *Williams*, 161 Ill. 2d at 38)). Furthermore, taking into account that both A.B.'s and the defendant's credibility was at issue, the probative value, *on the limited issue of credibility*, likely did not substantially outweigh the danger of prejudicial impact upon the jury. Therefore, we cannot find that providing a limiting instruction to the jury was sufficient to avoid reversal where the court failed to conduct the *Montgomery* balancing test and where the elicited details of the convictions were highly prejudicial on the limited issue of the defendant's credibility. See *People v. Boyd*, 366 Ill. App. 3d 84, 94 (2006) ("When the unfair prejudice is excessive, a limiting instruction will not save admissibility of the evidence.").

¶ 55 The State also asserts, without citing to legal authority, that the circuit court should take into account whether a defendant's prior convictions are admissible as proof of propensity to commit a similar crime, pursuant to section 115-7.3 of the Code, in considering the prejudice prong under *Montgomery*. However, as mentioned above, section 115-7.3(d) requires the State to disclose *inter alia* the evidence in advance of trial. 725 ILCS 5/115-7.3(d) (West 2012). Here, the State sought only to admit Allen's testimony as propensity evidence and did not request the court to determine the admissibility of the defendant's prior convictions under section 115-7.3 of the Code. See *People v. Hester*, 271 Ill. App. 3d 954, 959 (1995) ("If evidence of the prior conviction is admissible independently of impeachment purposes *** then the *Montgomery* test becomes inapposite."). Regardless, the record is devoid of any indication that the court considered the balancing test under section 115-7.3(c) of the Code when it denied the defendant's motion *in limine* to exclude the defendant's prior

convictions. 725 ILCS 5/115-7.3(c) (West 2012). Thus, in the instant case, the State's argument is unpersuasive.

¶ 56 Based on the foregoing, we find that the circuit court abused its discretion in admitting the defendant's prior convictions for impeachment purposes without first determining whether the probative value substantially outweighed the prejudicial effect under *Montgomery*. Therefore, we reverse the defendant's convictions and remand for a new trial on that basis.

¶ 57 Next, to avoid confusion on remand, we address the defendant's second claim of error. The defendant acknowledges that the circuit court conducted the balancing test under section 115-7.3(c) of the Code in admitting Allen's testimony as propensity evidence; however, the defendant argues that he was denied a fair trial because the probative value of Allen's testimony did not substantially outweigh the prejudicial effect. Specifically, he asserts that the alleged acts were too remote in time and factually dissimilar to the charged offenses against A.B. The defendant further argues that "when all the factors contained in the statutorily-mandated balancing test are applied to the present case, the result is that the probative value of the evidence *** was outweighed by the resulting prejudice to the defendant." We disagree.

¶ 58 As previously stated, section 115-7.3 of the Code applies to criminal cases involving sexual offenses, such as predatory criminal sexual assault of a child and aggravated criminal sexual abuse, and provides an exception for the admission of other-crimes evidence to show propensity in sex offense cases. 725 ILCS 5/115-7.3(a) (West 2012). Further, evidence of another offense of criminal sexual assault "may be admissible (if that evidence is otherwise

admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(b) (West 2012). The court must weigh the probative value of the prior offense against undue prejudice by considering: (1) the proximity in time to the charged offense; (2) the degree of factual similarity to the charged offense; or (3) other relevant facts and circumstances. 725 ILCS 5/115-7.3(c) (West 2012).

¶ 59 Here, in determining the admissibility of Allen's testimony, the circuit court conducted the balancing test and analyzed the three factors under section 115-7.3(c) of the Code. We review the court's decision to admit other-crimes evidence based on the abuse of discretion standard (*Donoho*, 204 Ill. 2d at 182), and will only find such an abuse when the decision is "arbitrary, fanciful or unreasonable." *People v. Britt*, 265 Ill. App. 3d 129, 147 (1994).

¶ 60 *Proximity in Time and Factual Similarity*

¶ 61 Because the circuit court restricted A.B.'s testimony to the time frame of the Hamilton County offenses, the jury heard A.B. testify that the defendant sexually abused her from February 2003 until the summer of 2005. Allen testified that the defendant sexually abused her from 1991-95. Based on A.B.'s and Allen's testimony, the difference in time from when the defendant ended his sexual abuse of Allen and started his sexual abuse of A.B. was approximately eight years. The record shows that the Hamilton County charges involving A.B. were filed approximately 16 years after the defendant stopped sexually abusing Allen in 1995.

¶ 62 The 16 years that had elapsed since the end of the defendant's sexual abuse of Allen and the charged offenses involving A.B. is not a controlling factor. In fact, our supreme court

has specifically held that " 'admissibility of other-crimes evidence should not, and indeed cannot, be controlled solely by the number of years that have elapsed between the prior offense and the crime charged.' " *Donoho*, 204 Ill. 2d at 183 (quoting *People v. Illgen*, 145 Ill. 2d 353, 370 (1991)). However, appellate and supreme court opinions have affirmed an admission of other-crimes evidence in cases involving a similar time frame. See *Donoho*, 204 Ill. 2d at 185 (court held that while a lapse in 12 to 15 years since the prior offense may lessen its probative value, standing alone, it is insufficient to compel a finding that the circuit court abused its discretion in admitting evidence about it); see also *People v. Davis*, 260 Ill. App. 3d 176, 192 (1994) (court affirmed the admission of other-crimes evidence after 20 years had elapsed).

¶ 63 First, the circuit court found that remoteness in time can be overcome by a showing of factual similarities. Here, we agree with the court that the details of the two victims' sexual abuse were sufficiently similar to justify admission as other-crimes evidence. In particular, Allen and A.B. were both related to the defendant and victims of sexual abuse at a young age. Also, the type of sexual conduct was similar in that the defendant would rub his hand or penis on their vaginas, although his sexual abuse of A.B. progressed to sexual intercourse after some time. Additionally, the sexual abuse of both victims occasionally occurred at the defendant's residence after he created situations to be alone with each of them, although sometimes it occurred while others were present but asleep. Moreover, the sexual abuse persisted for several years until both victims moved away from the defendant.

¶ 64 Next, the circuit court considered the relevance of the testimony and concluded that it was probative on the issue of propensity, pursuant to *People v. Cardamone*, 381 Ill. App. 3d

462 (2008). The court further considered our supreme court's decision in *Donoho*, which upheld the constitutionality of section 115-7.3 of the Code, as well as the legislature's intent to allow admission of this type of other-crimes evidence. *Donoho*, 204 Ill. 2d at 176, 182. Our review of the record reflects that the court weighed the probative value of Allen's testimony against its prejudicial effect and determined that the testimony was admissible to show propensity as other-crimes evidence. However, the court limited Allen's testimony to the specific details and alleged time frame set out in the State's notice of intent. Accordingly, we find that the court did not abuse its discretion in admitting Allen's testimony under section 115-7.3 of the Code.

¶ 65 Lastly, the defendant argues, and the State concedes, that defense counsel was ineffective when he agreed with the State's assertion that he was eligible for a mandatory life sentence based on his previous conviction of predatory criminal sexual assault of a child. Therefore, we need not address this issue further.

¶ 66 CONCLUSION

¶ 67 We find the circuit court abused its discretion in ruling that the defendant's prior convictions were admissible for impeachment purposes without first making the necessary determination under *Montgomery* that the probative value substantially outweighed the prejudicial effect.

¶ 68 Accordingly, we reverse and remand the defendant's convictions and sentences for a new trial consistent with this order. Additionally, we note that the defendant has not challenged the sufficiency of the evidence in this case; thus, there is no double jeopardy impediment to a new trial. See *People v. Patrick*, 233 Ill. 2d 62, 76 (2009).

¶ 69 Reversed and remanded.