

NOTICE
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2018 IL App (5th) 170186-U

NO. 5-17-0186

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-Appellant,)	St. Clair County.
)	
v.)	No. 15-CF-1201
)	
THOMAS FLAKES,)	Honorable
)	Randall W. Kelley,
Defendant-Appellee.)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in prohibiting the State from introducing evidence that when the charged murder was committed, the defendant was on electronic home detention in an unrelated felony case and was in noncompliance with the detention’s conditions.

¶ 2 In October 2015, the State charged the defendant, Thomas Flakes, with the first-degree murder of Darrin Hayes of Belleville. The State later gave notice that at the defendant’s trial, it intended to introduce evidence that when the offense was committed, the defendant was on electronic home detention in an unrelated felony case and was in noncompliance with the detention’s conditions. See 730 ILCS 5/5-8A-1 *et seq.* (West 2014). Following a hearing, the trial court ruled the evidence inadmissible. On appeal, the

State asks that we reverse the trial court's judgment. For the reasons that follow, we affirm.

¶ 3

BACKGROUND

¶ 4 In October 2015, the State charged the defendant with first-degree felony murder, alleging that on February 9, 2014, he shot and killed Hayes during the commission of an armed robbery. See 720 ILCS 5/9-1(a)(3), 18-2(a) (West 2014). We note that February 9, 2014, was a Sunday and that Hayes was apparently murdered inside his apartment on Gateway Industrial Drive in Belleville.

¶ 5 In November 2016, the State gave notice that it intended to impeach the defendant with evidence of his prior felony convictions should he testify at trial. The State advised that the defendant had a prior felony conviction for aggravated robbery (*id.* § 18-1(b)) in St. Clair County case number 14-CF-220 and a prior felony conviction for criminal damage to government supported property (*id.* § 21-1.01) in St. Clair County case number 13-CF-1333.

¶ 6 In March 2017, the defendant filed a motion *in limine*, seeking to bar the State from introducing evidence that on February 9, 2014, he had been under the supervision of the St. Clair County probation department; his authorized movements were restricted by an electronic home monitoring device; and he was not “within range” of his home’s electronic monitor when Hayes was shot and killed. Maintaining that the evidence would inform the jury that the defendant harbored “erstwhile criminality,” the defendant contended that the evidence would severely prejudice the defendant and would tend to confuse and mislead the jury.

¶ 7 On April 13, 2017, in response to the defendant's motion *in limine*, the State filed a notice of intent to introduce other crimes evidence through the testimony of Officer James Schaefer of the St. Clair County probation department. The notice alleged that on February 9, 2014, the defendant had been in an electronic home detention program in 13-CF-1333 under Schaefer's supervision; Schaefer granted the defendant two hours of "movement approval" to attend church; Schaefer advised the defendant that he would need to provide proof that he had attended church; the defendant was out of range of his home's electronic monitor from 11:17 a.m. to 1:11 p.m.; the defendant called Schaefer at 11:28 a.m. advising that he was going to church; the 911 call reporting the shooting at Hayes's apartment was received at 12:53 p.m.; and the defendant failed to provide Schaefer with proof that he had attended church. The notice also alleged that the distance from the defendant's house to Hayes's apartment was 5.7 miles.

¶ 8 In its notice of intent to introduce other crimes evidence, the State maintained that Schaefer's proposed testimony would be admissible to establish that the defendant had the opportunity to murder Hayes while he was out of range of his home's electronic monitor. The State further maintained that the other crimes evidence was "inextricably intertwined" with the murder and would be offered to show the "complete story" of the crime. The State asserted that the probative value of the other crimes evidence was not substantially outweighed by its prejudicial effect on the defendant's right to a fair trial.

¶ 9 On April 20, 2017, the trial court held a hearing on the parties' pretrial pleadings and ruled that the State could anticipate using the defendant's prior felony convictions for impeachment purposes. See *People v. Montgomery*, 47 Ill. 2d 510, 515-19 (1971). The

court then referenced the defendant's motion *in limine* and was informed that the State had recently filed a "parallel pleading" regarding its intent to introduce evidence of the defendant's other crimes. The trial court acknowledged that it had not had the opportunity to review the State's notice of intent, because a copy had not yet been placed in the court file. The court nevertheless expressed skepticism over the State's attempt to introduce the other crimes evidence. Noting that the evidence would undoubtedly be prejudicial, the court compared advising the jury that the defendant was on home detention to "walk[ing] the defendant in in his orange jumpsuit and shackles."

¶ 10 After providing the court with a copy of the notice, the State recited its summary of Schaefer's proposed testimony and argued that pursuant to Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011), the testimony would be admissible to show the defendant's opportunity to commit the charged murder. The State then advised that in addition to Schaefer's testimony, it would present evidence that Shykela Nelson had been the defendant's girlfriend at the time of the murder. The State advised that it would also adduce testimony from Pastor Anderson of the New Antioch Missionary Baptist Church in Belleville and Pastor Anderson's wife, Pamela Anderson.

¶ 11 The State indicated that the Andersons' testimony would establish that on February 9, 2014, between 1:10 p.m. and 1:20 p.m., Nelson had gone to New Antioch, where she met with the Andersons, filled out a welcome card, and obtained a church bulletin. The State further indicated that a New Antioch church bulletin was subsequently found in the defendant's home. Additionally, when the Andersons were later shown a photograph of the defendant, they stated that he had not attended their church on

February 9, 2014. The State suggested that this additional evidence was relevant to show that, with Nelson's assistance, the defendant had attempted to establish a false alibi for the time of the murder. The State claimed that its false-alibi theory "wouldn't make sense" to the jury in the absence of the evidence that the defendant had been on home detention and had told Schaefer that he was going to church.

¶ 12 As it did in its notice, the State argued that the other crimes evidence was also inextricably linked to the murder. The State also emphasized that criminal damage to government supported property is not a violent crime. When the State finished, the trial court indicated that it was still skeptical about "the other crimes part" of the State's argument but tended to view "the idea of this alibi situation" as a separate matter.

¶ 13 In response to the State's arguments, defense counsel contended that the State did not need to introduce the other crimes evidence to establish the defendant's opportunity to commit the charged murder or to provide the jury with a complete story of the crime. Counsel acknowledged, however, that if the defendant were to claim or suggest at trial that he had been at home or church when the offense was committed, he would obviously "open the door to things that would be problematic for him." See *People v. Romero*, 66 Ill. 2d 325, 330 (1977) ("[W]here alibi is interposed as a defense, evidence to disprove the alibi is admissible though it may reveal another offense."). Counsel indicated that he did not anticipate that the defendant would assert an alibi defense. Noting that the defendant's unauthorized movement was in itself a criminal offense (see 730 ILCS 5/5-8A-4.1 (West 2014)), counsel argued that introducing the evidence regarding the defendant's prior conviction and home detention violation would effectively defeat his

presumption of innocence. Counsel emphasized that opportunity was the only “permissible 404(b) usage” that the State had identified in its notice of intent.

¶ 14 In rebuttal, the State maintained that regardless of whether the defendant were to assert an alibi defense at trial, the evidence that he told Schaefer that he was going to church “combined” with evidence that he sent Nelson to New Antioch to get a church bulletin would be admissible to demonstrate his consciousness of guilt. See *People v. Smith*, 154 Ill. App. 3d 837, 841-43, 847-48 (1987). The trial court stated that it would take the matter under advisement, noting that it had “just received” the State’s notice and wanted some time to consider it.

¶ 15 On May 10, 2017, the trial court entered a written order stating the following:

“After considering the State’s Notice of Intent to Introduce Other Crimes Evidence and arguments of counsel: without additional supportive evidence, the probative value of the evidence being attempted to be introduced from Feb[.] 9, 2014[,] is substantially outweighed by the prejudicial effect on Defendant’s right to a fair trial.

State’s Notice of Intent is therefore denied.”

On May 15, 2017, the State filed a certificate of substantial impairment and a timely notice of appeal pursuant to Illinois Supreme Court Rule 604(a)(1) (eff. Mar. 8, 2016).

¶ 16 ANALYSIS

¶ 17 On appeal, the State argues that the trial court erred in denying the State’s notice of intent to introduce other crimes evidence. The State further maintains that the trial court erred in precluding the State from establishing that the defendant had attempted to

construct a false alibi of his church attendance. The defendant counters that the trial court did not abuse its discretion in ruling that the probative value of the other crimes evidence was substantially outweighed by its prejudicial effect. The defendant further observes that the trial court's order "had nothing to do with an alibi" and did "nothing but prevent the State from using evidence of [his] prior conviction and electronic monitoring violation."

We agree with the defendant.

¶ 18 "Evidence is relevant if it tends to prove a fact in controversy or render a matter in issue more or less probable." *People v. Nelson*, 235 Ill. 2d 386, 432 (2009). It is well established that evidence of other crimes is admissible if relevant for any purpose other than to show a defendant's propensity to commit crime. *People v. Chapman*, 2012 IL 111896, ¶ 19. Propensity evidence "overpersuades the jury, which might convict the defendant only because it feels he is a bad person deserving punishment." *People v. Thingvold*, 145 Ill. 2d 441, 452 (1991); see also *People v. Manning*, 182 Ill. 2d 193, 213 (1998) ("Evidence of other crimes is objectionable not because it has little probative value, but rather because it has too much.").

¶ 19 Pursuant to Illinois Rule of Evidence 404(b), evidence of other crimes may be admitted for "purposes[] such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). However, even where relevant, evidence of other crimes should not be admitted if its probative value is substantially outweighed by its prejudicial effect. *People v. Pikes*, 2013 IL 115171, ¶ 11; see also Ill. R. Evid. 403 (eff. Jan. 1, 2011) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger

of unfair prejudice, confusion of the issues, or misleading the jury ***.”). When other crimes evidence is offered, the trial court must therefore establish the purpose for which the evidence is offered and weigh the relevance of the evidence against its prejudicial impact. *Thingvold*, 145 Ill. 2d at 452.

¶ 20 The admissibility of other crimes evidence lies within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Pikes*, 2013 IL 115171, ¶ 12. An abuse of discretion will be found only where the ruling of the trial court is arbitrary, fanciful, unreasonable, or where no reasonable person would take the court’s adopted view. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). Under this deferential standard, we “may not simply substitute [our] judgment for that of the trial court.” *People v. Illgen*, 145 Ill. 2d 353, 371 (1991).

¶ 21 The State argues that although the evidence would reveal that the defendant was on electronic home detention in 13-CF-1333 when Hayes was murdered, Schaefer’s testimony that the defendant had violated the detention’s conditions would be relevant to show that the defendant had the opportunity to murder Hayes. We find this reasoning somewhat circular. Schaefer’s testimony as to the defendant’s opportunity would be relevant only if the evidence of the defendant’s home detention were introduced in the first place. Absent the evidence that the defendant was on electronic home detention, there would be no need to show that he violated the detention’s conditions in order to establish his opportunity. The trial court could have therefore viewed the State’s opportunity argument as a “backdoor attempt” to introduce the other crimes evidence “by manufacturing a relevant purpose for it.” *United States v. Loughry*, 660 F.3d 965, 973

(7th Cir. 2011); see also *People v. Pitts*, 257 Ill. App. 3d 949, 953 (1994) (“Where there is no question as to defendant’s identity, it is reversible error to admit evidence of other crimes for the purpose of identifying defendant.”).

¶ 22 We find equally unavailing the State’s suggestion that the trial court abused its discretion in determining that the other crimes evidence was not inextricably intertwined with the charged murder. Other crimes evidence is inextricably intertwined with a charged offense when the evidence is “an integral and natural part” of the offense’s commission. *People v. Rutledge*, 409 Ill. App. 3d 22, 25 (2011); see also *People v. Garrison*, 146 Ill. App. 3d 592, 593 (1986) (evidence that the defendant was armed with a handgun during the course of the charged burglary was inextricably intertwined with the same). Here, as the defendant notes on appeal, because he is not asserting an alibi defense, the exclusion of the evidence that he violated the conditions of his home detention has no impact on the State’s ability to establish that he shot and killed Hayes during the course of an armed robbery. Moreover, even assuming that the State had urged the trial court to admit the other crimes evidence as part of the “continuing narrative” of the murder (*People v. Adkins*, 239 Ill. 2d 1, 33 (2010)), we would still be unable to say that the trial court’s determination that, without additional supportive evidence, the evidence’s probative value is substantially outweighed by its prejudicial effect was arbitrary, fanciful, or unreasonable. We therefore reject the State’s contention that the trial court abused its discretion in denying the State’s notice of intent to introduce other crimes evidence.

¶ 23 We next address the State’s claim regarding the scope and effect of the trial court’s order. The State maintains that the trial court precluded the admission of any evidence that the defendant had attempted to construct a false alibi of his church attendance. The State argues that we should direct the court to permit the introduction of such evidence. In our view, however, the State construes the trial court’s order too broadly and asks us to issue an advisory opinion on evidence that has yet to be ruled upon. See *In re Luis R.*, 239 Ill. 2d 295, 306 (2010).

¶ 24 “Orders of a trial court must be interpreted from the entire context in which they were entered, with reference to other parts of the record including: the pleadings, motions and issues before the court; the transcript of proceedings before the court; and arguments of counsel.” *In re Marriage of Lehr*, 317 Ill. App. 3d 853, 858 (2000). “Orders must be construed in a reasonable manner to give effect to the apparent intention of the trial court.” *Id.*

¶ 25 Here, citing Schaefer’s proposed testimony, the State’s notice of intent specifically argues that the other crimes evidence is inextricably intertwined with the charged murder and would be relevant to show the defendant’s opportunity to commit the crime. The notice does not mention Nelson and does not indicate that the State intended to use the other crimes evidence to establish that the defendant had attempted to fabricate an alibi with her assistance. The notice does not mention the Andersons, the church bulletin found in the defendant’s home, or the defendant’s consciousness of guilt. The State’s notice of intent to introduce other crimes evidence was filed and argued in conjunction with the defendant’s motion *in limine*, and the documents were treated as “parallel”

pleadings. The defendant's motion *in limine* focuses solely on the evidence that the defendant was on electronic home detention in an unrelated case and was not "within range" of his home at the time of the murder.

¶ 26 At the hearing on the pleadings, the State recited its summary of Schaefer's proposed testimony and argued that the other crimes evidence was admissible on the two specific grounds argued in its notice of intent. Using previously unreferenced facts that did not necessarily implicate the prohibition of other crimes evidence, the State advanced its false-alibi theory for the first time and offered it as an additional reason to grant the notice as opposed to an independent ground upon which to do so. The State argued that its false-alibi theory "wouldn't make sense" to the jury without the evidence that the defendant had been on home detention and had told Schaefer he was going to church. Nevertheless, the State did not claim that the theory could not be advanced without informing the jury that the defendant had been on home detention or that Schaefer was a probation officer. *Cf. People v. Scott*, 108 Ill. App. 3d 607, 613-14 (1982) (observing that the State can introduce evidence of the investigatory procedures that led to a defendant's arrest without eliciting unnecessary prejudicial details). Moreover, the State did not claim that it could not advance the theory without Schaefer's testimony.

¶ 27 Defense counsel challenged the two grounds of admissibility set forth in the State's notice of intent but did not address the State's false-alibi argument. The trial court indicated that it tended to view the State's notice of intent and false-alibi theory as separate matters and that it was primarily concerned with revealing that the defendant

was on home detention at the time of Hayes's murder. The court's order, which was entered three weeks after the hearing, denied the "State's Notice of Intent."

¶ 28 Under the circumstances, we cannot conclude that the trial court precluded the State from establishing that the defendant had attempted to construct a false alibi of church attendance. The issue was not something that the trial court was asked to decide on the parties' pleadings or at the hearing. Construed in context, the trial court's exclusion of "the evidence being attempted to be introduced from Feb[.] 9, 2014[.]" referred only to the other crimes evidence that the State sought to admit in its notice of intent and the defendant sought to bar in his motion *in limine*. We thus agree with the defendant's assertion that the court did "nothing but prevent the State from using evidence of [his] prior conviction and electronic monitoring violation," and we decline the State's invitation to conclude otherwise. When the State appeals from an order suppressing evidence, the reviewing court has no jurisdiction over evidence that was not suppressed. *People v. Johnson*, 208 Ill. 2d 118, 140 (2003). "Such evidence is simply not part of the case which may be reviewed pursuant to Rule 604(a)(1)." *Id.*

¶ 29

CONCLUSION

¶ 30 For the foregoing reasons, the trial court's judgment denying the State's notice of intent to introduce evidence of other crimes is hereby affirmed.

¶ 31 Affirmed.