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APPELLATE COURT, 4TH DIST.

NO. 4-99-0679

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BARTON M. McNEIL, Defendant-Appellant.	)	Appeal from Circuit Court of McLean County No. 98CF633 Honorable G. Michael Prall, Judge Presiding.

ORDER

Defendant, Barton McNeil, was convicted on July 7, 1999 of first degree murder (720 ILCS 5/9-1(a)(1) (West 1998)) after a bench trial in the circuit court of McLean County. He was sentenced on August 11, 1999, to natural life in prison. He argues two points on appeal: (1) the trial court erred in precluding defendant from introducing evidence that a specific third party committed the offense; and (2) his life sentence should be vacated and the case remanded for resentencing because the statute under which he was sentenced, section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1998)), is unconstitutional. We affirm the conviction, vacate the sentence, and remand for resentencing.

The victim in this case, Christina McNeil, three-year-old daughter of defendant, died while in her father's care. Defendant and Christina's mother were divorced and Christina spent the night with defendant on June 15, 1998. Defendant called 911 on the morning of June 16 to report Christina was not

breathing. When paramedics arrived, they found Christina had been dead for several hours. Later that same day, defendant made claims to the Bloomington police department that a third party, specifically his ex-girlfriend, Misook Nowlin, committed the crime. The police returned to defendant's apartment to look for evidence that someone had entered through the window of the bedroom where Christina slept. Murder charges were brought against defendant on June 18.

On appeal, defendant does not contend the evidence was not sufficient to support his conviction but instead challenges the trial court's refusal, after a lengthy offer of proof, to permit evidence that Nowlin had the motive and opportunity to kill and sexually abuse Christina. Defendant maintains this refusal to permit evidence on his behalf prevented him from presenting a full defense to the charges and violated his sixth amendment (U.S. Const., amend. VI) right to offer evidence and testimony of witnesses in his behalf.

An accused may attempt to prove someone else committed the crime with which he is charged (People v. Ward, 101 Ill. 2d 443, 455, 463 N.E.2d 696, 701-02 (1984)), but that right is not without limits. People v. Enis, 139 Ill. 2d 264, 281, 564 N.E.2d 1155, 1161 (1990); People v. Nitti, 312 Ill. 73, 90, 143 N.E. 448, 454 (1924). The rules of evidence still apply. People v. Hughes, 274 Ill. App. 3d 107, 114, 653 N.E.2d 818, 824 (1995). Whether what is offered as evidence will be admitted or excluded depends on whether it tends to make the question of guilt more or less probable; i.e., whether it is relevant. Trial courts may reject offered evidence on the grounds of irrelevancy if it has

little probative value due to remoteness, uncertainty, or its possibly unfair prejudicial nature. Enis, 139 Ill. 2d at 281, 564 N.E.2d at 1161-62.

Evidence someone other than the accused may have committed a crime is relevant and admissible when a close connection is demonstrated between the third person and the commission of the offense. People v. Maberry, 193 Ill. App. 3d 250, 263, 549 N.E.2d 974, 982 (1990). It is properly excluded if it is remote or speculative. People v. Howard, 147 Ill. 2d 103, 143, 588 N.E.2d 1044, 1060 (1991).

The trial court's ruling on the admission of evidence a third party, not the accused, committed the charged offense will not be disturbed absent a clear abuse of discretion even if the reviewing court might have reached a different conclusion. Enis, 139 Ill. 2d at 281, 564 N.E.2d at 1161.

In this case, we find no abuse of discretion. Defendant's proffered evidence began with his suggested motive--a woman scorned. Defendant broke off his relationship with Nowlin shortly before Christina's death. Defendant contended Nowlin was very jealous and possessive in her relationship with defendant. She had taken the breakup very hard and requested her ex-husband to obtain marijuana to plant it in defendant's car to get him into trouble. Nowlin had previously been charged in a domestic violence complaint with defendant as the victim. The trial on this charge was scheduled for only two days after Christina was found dead. Nowlin was going to use defendant as a witness in her own behalf at that trial and the couple argued publicly on the night of June 15 over his refusal to testify for her. After

Christina's death, Nowlin called a friend to tell of the death and asked "You don't think I did it, do you?" and also stated if defendant had not left her, Christina's death would not have happened.

Nowlin and defendant had dinner on the night of June 15 at Avanti's restaurant. Nowlin went back to her apartment after that and a friend of hers came over. They were joined by another friend and the three went out to play billiards. They returned to Nowlin's apartment between 9:30 and 10 p.m. The friends left and Nowlin remained home after asking one of the friends to go to defendant's apartment with her. The friend refused and advised Nowlin not to go either.

Other evidence included the fact Nowlin was the subject of an Illinois Department of Children and Family Services report of abuse to her own daughter in September 1998, three months after Christina's death, in which she beat her daughter with a wooden paper towel bar, held her hand over the girl's mouth and nose, and told her she would kill her. The cause of death for Christina was asphyxiation and suffocation.

Physical evidence of a possible intruder in defendant's apartment included the fact the screen in the only window in the bedroom where Christina's body was found had holes in the corner. Smudges were found both inside and outside the apartment near the window frame. Although attempts were made to obtain fingerprints from the smudges, none were found. Defendant claimed a window fan found in the bedroom was usually in the window. The owner of the apartment complex walks by the sidewalk near the torn screen at least once a week and did not recall a hole in the

screen when he was last there. However, he also stated many tenants remove screens to gain entry when they lock themselves out of their apartments.

There was also testimony from police officers investigating the crime, who stated although they observed holes in the window screen, they also observed undisturbed dust and spider webs containing dead insects surrounding the screen and the window frame. This evidence suggests no intruder entered the apartment through the window.

Nowlin testified she was just joking when she asked her ex-husband to obtain marijuana to get defendant in trouble. She also claimed when she stated the offense would not have occurred if she and defendant had not broken up, she meant she could have protected Christina from defendant.

Taken as a whole, this evidence showed no clear connection between Nowlin and Christina's death. The evidence was not relevant and the trial court did not abuse its discretion in precluding the use of the evidence.

Defendant next contends the statute under which he was sentenced is unconstitutional. He was sentenced pursuant to section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections, which prescribed a mandatory sentence of life imprisonment for any person 17 years or older convicted of murdering a child less than 12 years old. 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1998). In People v. Wooters, 188 Ill. 2d 500, 520, 722 N.E.2d 1102, 1113-14 (1999), the supreme court determined section 5-8-1(a)(1)(c)(ii) then violated the single subject rule and was unconstitutional. Therefore, defendant's sentence should be

vacated and remanded for resentencing. People v Coleman, 311 Ill. App. 3d 467, 477, 724 N.E.2d 967, 975 (2000), appeal denied, 189 Ill. 2d 664, 731 N.E.2d 766 (2000).

For the foregoing reasons, we affirm defendant's conviction for first degree murder, vacate defendant's sentence and remand for resentencing.

Affirmed in part and vacated in part; cause remanded.

KNECHT, J., with STEIGMANN, P.J., and TURNER, J., concurring.