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2012 IL App (3d) 100324-U

Order filed April 11, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellee,)	Whiteside County, Illinois,
)	
v.)	Appeal No. 3-10-0324
)	Circuit No. 09-CF-468
IAN R. VANSTOCKUM,)	
)	
Defendant-Appellant.)	Honorable John Hauptman,
)	Judge Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Wright concurred in part and dissent in part.

ORDER

- ¶ 1 *Held:* The trial court did not abuse its discretion in allowing evidence concerning a co-defendant's guilty plea or a text message sent from one alleged coconspirator to another. Admission of evidence regarding an outstanding warrant for defendant was harmless. Defendant forfeited claims concerning improper testimony regarding a previous jail stay and bloody wrench. The trial court erred as a matter of law in sentencing defendant to an extended term for his aggravated battery conviction.
- ¶ 2 A Whiteside County jury found defendant guilty of the offenses of armed robbery and

aggravated battery. On appeal, defendant claims that the trial court improperly allowed the State to admit evidence creating reversible error. Defendant further claims that the trial court improperly sentenced him to an extended term for aggravated battery.

¶ 3

FACTS

¶ 4 On November 3, 2009, the State filed a two count information charging defendant with the offenses of armed robbery and aggravated battery. Count I alleged that on October 15, 2009, defendant, while armed with a dangerous weapon, a wrench, knowingly took cash and a pizza from Irvin L. Carlson by threatening the imminent use of force. Count II alleged that on October 15, 2009, defendant, while hooded and masked, caused bodily harm to Irvin L. Carlson by striking him on the head with a wrench.

¶ 5 During opening statements, the prosecutor noted that evidence would show that on October 15, 2009, defendant, Mika Peregrine and Tyler Sodaro planned to rob a pizza delivery person. Mika Peregrine ordered a pizza to be delivered to 210 East 12th Street in Sterling, Illinois, by telephoning Pizza Hut while riding in Sodaro's vehicle at about 8:45 p.m. The prosecutor continued, noting that officers learned that defendant lived with Sodaro and that "there was a valid warrant for this Defendant." The prosecutor informed the jury that Peregrine pled guilty to aggravated robbery for her part in this crime and would testify during the trial.

¶ 6 Irvin Carlson testified that on October 15, 2009, at approximately 8:45 p.m., he was working at the Pizza Hut restaurant in Rock Falls when a female caller, who identified herself as "Peregrine," placed an order for a large stuffed crust meat lover's pizza to be delivered to 210 East 12th Street in Sterling, Illinois. After arriving at the location to deliver the pizza, Carlson exited his vehicle with the pizza and began walking toward the house. At that point, a person,

wearing a black hooded jacket with his face covered by a mask or paint, ran toward Carlson with a “white silver object” in his hand and demanded money. As Carlson pulled money from his pocket, the person hit Carlson on the head. Carlson handed the money to the subject and began running away.

¶ 7 The assailant tried to stop Carlson from entering his vehicle, and Carlson shoved the pizza at the subject. Eventually, Carlson was able to enter his vehicle as the person continued to strike him with the silver object. Carlson described being bloodied and injured from the incident and sought emergency medical care at Sterling Hospital.

¶ 8 Dr. Martin Schutte treated Carlson for injuries to his head and leg. Schutte told the jury that Carlson was hit with a hard object, resulting in bruising and cuts which required staples to close the wounds.

¶ 9 Todd Messer, a Sterling police officer, testified that during the investigation of this incident, he spoke with Peregrine at 210 East 12th Street in Sterling, Illinois. Peregrine told him that she ordered a pizza earlier that night using a cellular telephone. Messer collected the cellular telephone from Peregrine’s mother and gave the telephone to Officer Brad Johnson. After retrieving the phone, Messer went to 2205 - 6th Avenue in Sterling, Illinois at 2 or 2:30 a.m. on October 16, 2009, based on information that two possible suspects for the robbery were at that residence. In a discussion held outside the presence of the jury, it was disclosed that before going to the house, Officer Messer knew of the existence of an outstanding warrant for defendant's arrest. Inside the residence, he and other officers located defendant and Tyler Sodaro. When asked what he did next, Messer stated that he coordinated with Officer Johnson and Detective Bielema regarding the investigation as, “At that moment Mr. Vanstockum [defendant] had a

warrant.”

¶ 10 Defense counsel objected to this testimony. Outside the presence of the jury, defense counsel asked the court to instruct the jury to disregard Messer's answer regarding the warrant. Defense counsel argued this information was prejudicial because the prosecutor mentioned the warrant during opening statements and the warrant information was not relevant to whether defendant was innocent or guilty.

¶ 11 The prosecutor acknowledged that the warrant was issued only for a failure to pay or appear and did not constitute proof of other crimes. The State asserted the warrant information was offered only for the purpose of showing the course of the officers investigation: that being, why they went to the residence.

¶ 12 The court found the testimony regarding the outstanding warrant did not prejudice the defense. The court stated that the police “were there for the purpose that Sergeant Messer said they were there. He mentioned that there was a warrant for Mr. Vanstockum’s arrest, and the answer is going to stand.”

¶ 13 After the court’s ruling, the prosecutor resumed direct examination of Messer. Messer testified that he entered and searched Sodaro’s bedroom where he found a Pizza Hut pizza box under the bed. Messer opened the box and found scraps of pizza, which appeared to be from a stuffed crust pizza containing several different types of meat. Hours later, Messer returned to the residence where he and Detective Schmidt collected a wrench and a black Adidas hooded jacket from Sodaro’s bedroom.

¶ 14 On cross-examination, Messer acknowledged that defendant’s outstanding warrant was a failure to pay or appear warrant. Messer reiterated that he collected evidence from Sodaro’s

bedroom and understood that defendant also stayed at the residence. Messer acknowledged that the police did not find a mask at the residence. Messer said that the wrench and the pizza box were sent to the Illinois State Police Crime Lab for analysis, but Messer was not aware of any fingerprints being found on the items.

¶ 15 Brad Johnson, a Sterling police officer, identified State's exhibit 22 as a photograph of a text message, which he observed on a cellular telephone with the number 815-632-7400. He received the cellular telephone from Sergeant Messer as part of the investigation.

¶ 16 Mika Peregrine testified that her permanent residence was located at 210 East 12th Street in Sterling, Illinois, but explained that she was currently in the custody of the Whiteside County jail. Her criminal record includes an adult conviction for battery in Indiana and a juvenile adjudication for unlawful entry of a motor vehicle. Peregrine acknowledged pleading guilty to the offense of aggravated robbery in this case. At that point, defense counsel objected.

¶ 17 Outside the presence of the jury, defense counsel argued that the prosecutor could not offer evidence that a codefendant pled guilty in order to show guilt on the part of defendant. Defense counsel argued that this testimony combined with the comments made in opening statements was a "plan all along to bring in this improper evidence." Defense counsel said that such questioning would require a mistrial. The prosecutor responded that he was not offering this evidence to show defendant's guilt but offering the evidence in relation to the witness's credibility. The court overruled defense counsel's objection and denied defendant's request for a mistrial.

¶ 18 In the presence of the jury, Peregrine testified that she met defendant in August, 2009. On October 15, 2009, Peregrine, defendant and Sodaro were riding in Sodaro's vehicle when

defendant suggested robbing a pizza guy outside the Pizza Hut. Peregrine responded to defendant that they should have a pizza delivered to her house. She called and ordered a large stuffed crust meat lover's pizza from Pizza Hut using Sodaro's cellular telephone, number 815-632-7400. After they arrived at Peregrine's house, she and defendant left Sodaro's vehicle. Defendant did not go inside the house with her. Defendant was wearing her black Adidas coat at the time, which she identified as one of the State's exhibits. When the pizza delivery person arrived, she opened the front door to go outside and pay for the pizza. At that time, she saw defendant walk from the side of the house and approach the pizza delivery person. The delivery person then ran away from defendant. As defendant started to walk away, the delivery man walked back toward the house. Defendant approached the guy again and tried to stop him from entering his car. Peregrine then heard loud thumps, "like something was hitting something." The pizza guy pushed the pizza box toward defendant, entered his vehicle and drove away.

¶ 19 Peregrine claimed she used Sodaro's cellular telephone to call the police, informing them that "a guy had just gotten robbed." She admitted at that time, she did not tell the police that she knew the robber or that she participated in the robbery. Sodaro sent her a text message after the robbery which she identified as State's exhibit 22. Sodaro sent this text message from his grandmother's telephone on the night of the robbery. Eventually, she admitted to the police that she was involved in the robbery and originally lied about her involvement.

¶ 20 On cross-examination, she stated that it was her idea to rob the Pizza Hut delivery guy at her house as opposed to outside the Pizza Hut and Sodaro gave her \$25 to carry out the plan. She testified that Sodaro did not like her boyfriend, Joe Wood, who was also a pizza delivery guy. She acknowledged that while in custody, the prosecutor let her leave jail to attend a funeral and

that the State allowed her to plead to the less serious charge of aggravated robbery in exchange for her testimony against defendant.

¶ 21 After Tyler Sodaro was sworn in and identified himself to the jury, the court advised the jury that Sodaro was charged with a criminal offense and was a codefendant in this case. The court also told the jury that it had entered an order in this case, which granted Sodaro use immunity from prosecution for any incriminating information disclosed during his testimony.

¶ 22 Sodaro testified that he lived with his grandparents, Elbert and Shirley Shaw, at 2205 - 6th Avenue in Sterling, Illinois. He had been friends with defendant for three years. The prosecutor asked Sodaro where defendant resided during the month of October 2009. In response, Sodaro said, "After he [defendant] got out of jail he was staying with me at my grandparent's house." According to Sodaro, defendant stayed in the guest bedroom.

¶ 23 Sodaro noted that on October 15, 2009, defendant, Peregrine and he rode around in his Ford Explorer. He gave Peregrine \$25 and his cellular telephone so she could order a pizza. Between 8:45 and 9 p.m., he left defendant and Peregrine at Peregrine's house on 12th Street and returned to his house because he had purchased a small amount of marijuana and did not want to share it with the others. Sodaro did not recall defendant discussing a robbery while in the vehicle.

¶ 24 Later that night, he saw defendant while he was sitting in his vehicle, parked in his driveway. Defendant got into the vehicle with a pizza box located under defendant's shirt. They went inside the house and went to Sodaro's bedroom. Defendant put the pizza box under Sodaro's bed then pulled a wrench from under defendant's shirt. Defendant placed the wrench behind a tool box in Sodaro's bedroom. Sodaro said that he talked about the wrench with

defendant because it appeared bloody. Defendant told him that “he was using it on a girl” by “inserting it in the girl’s rectum.” Sodaro did not recall telling the police in a taped statement that defendant hit the pizza delivery guy with the wrench. Sodaro claimed to be drunk at the time he originally spoke to the police. He thought he recalled telling a police officer that defendant got the pizza from the pizza delivery guy but did not take any money from the pizza delivery guy. Sodaro testified that later that night he used his grandmother’s cellular telephone, number 815-718-5754, to send text messages to Peregrine as she possessed his cellular telephone. Sodaro recognized State’s exhibit 22 as a photograph of a text message that he sent to Peregrine.

¶ 25 Defense counsel objected to allowing Sodaro to read the content of the message to the jury, claiming the State failed to establish a proper foundation for the exhibit, which defendant claimed constituted hearsay. Outside the presence of the jury, the State argued that the text message constituted a statement by one coconspirator involved in a conspiracy and could be admitted under an exception to the hearsay rule.

¶ 26 The court found that the “State has indeed proven a *prima facie* case [for conspiracy] by a preponderance of the evidence sufficient to trigger the exception to, the coconspirator exception to the hearsay rule.” The court admitted State’s exhibit 22 into evidence.

¶ 27 Before the jury returned to the courtroom, defense counsel argued that the State introduced inadmissible evidence of an outstanding warrant, a previous jail sentence and testimony regarding inserting a wrench into a woman’s rectum resulting in unfair prejudice to defendant justifying a mistrial. With regard to the wrench, the court stated it would instruct the jury that their decision should be based upon the evidence and that the jury would decide the proper weight to be given to the evidence. The court went on to say that the reference to jail was

a “very innocuous comment” which occurred very quickly and “got passed to the next question.” The court did not believe that these issues rose to a level warranting a mistrial.

¶ 28 The prosecutor then continued its questioning of Sodaro regarding State’s exhibit 22. The exhibit showed that the message was from “Gramma” and was received at 10:10 p.m. on October 15, 2010, with the telephone number 815-718-5754 displayed on the screen. The message read, “No piggy yet? Hes probably gonna take his sweet ass time. Haha we got a bloody wrench.” Sodaro said that the reference to piggy was based upon the fact that he previously telephoned Peregrine, who told him about the robbery, and that Peregrine was waiting for the police to come to her residence.

¶ 29 Elbert Shaw, Sodaro’s grandfather, testified that Sodaro lived with him and his wife. Defendant temporarily lived with them for one month. On the night of October 15, 2009, Peregrine, defendant and Sodaro left his house. Sodaro and defendant returned to the house at 9:30 p.m. and went to Sodaro’s bedroom. He did not see them carrying a pizza box into the house, but believed defendant was wearing a dark jacket with a hood that night.

¶ 30 Brian Schmidt, a Sterling police officer, testified that when he spoke to Elbert Shaw about the case, Shaw told him that defendant and Sodaro returned to the house on the night of October 15, 2009, at “around 10:30 p.m.”

¶ 31 Following Schmidt’s testimony, the State rested. Defendant chose not to testify on his own behalf and did not offer any other evidence. The trial court denied defendant’s motion for directed verdict.

¶ 32 During the jury instruction conference, defense counsel tendered an instruction attempting to address the State’s evidence regarding the outstanding warrant. Defense counsel

stated that evidence of other bad acts needed to be limited since the evidence served no purpose. The State objected. Without any further discussion, the court stated that the instruction was refused.

¶ 33 In closing arguments, the prosecutor told the jury that Peregrine explained the plan to rob a pizza delivery guy and defendant carried out the robbery. The prosecutor emphasized the fact defendant was still present in Sodaro's bedroom when police located the pizza box and wrench. The prosecutor referred to the “bloody wrench” found in the investigation which according to Sodaro was placed in the bedroom by defendant.

¶ 34 Defense counsel argued that the State did not present any evidence of fingerprints on either the pizza box or the wrench. Further, defense counsel noted that “if there is blood on that wrench, we know there is no evidence linking that to Mr. Carlson.” Defense counsel pointed out that no one knew whether the pizza box in Sodaro’s room came from Carlson and that neither the wrench nor the pizza box were found in defendant’s guest bedroom. Defense counsel described Peregrine as a “liar.” Defense counsel emphasized Sodaro did not implicate defendant in the planning of or the commission of the robbery. Defense counsel told the jury that it was clear that Carlson was attacked, but that the State failed to prove defendant was the robber.

¶ 35 During deliberations, the jurors submitted three questions to the court. First, the jurors asked what the time the pizza was delivered to Mika’s house. Second, the jurors requested the addresses to the Shaw home and the Peregrine home. Third, the jurors also requested either the distance between these two homes or a map. The court answered these questions by stating that the jurors should consider the testimony and exhibits admitted into evidence by the court and the jurors’ collective recollection of that evidence.

¶ 36 Following deliberations, the jury found defendant guilty of armed robbery and aggravated battery. On January 21, 2010, defendant filed a motion for new trial. On April 16, 2010, after hearing arguments from counsel, the court denied defendant's motion and sentenced him to 30 years' imprisonment for the offense of armed robbery and 10 years' imprisonment for the offense of aggravated battery, to run concurrently. Defendant filed a motion to reconsider his sentence, which the trial court denied on April 22, 2010. Defendant's timely notice of appeal followed.

¶ 37 ANALYSIS

¶ 38 On appeal, defendant requests a new trial claiming the trial court improperly allowed the State to inform the jury that: (1) a codefendant pled guilty in relation to this offense; (2) defendant had an outstanding warrant in another case at the time of this offense; (3) defendant had been in jail prior to this offense; (4) defendant stated that the blood on the wrench resulted from defendant inserting the wrench into a woman's rectum; and (5) a codefendant sent a text message to another codefendant bragging about the crime after the fact. Defendant alternatively argues that the trial court erred in sentencing him to a concurrent, extended term sentence on the offense of aggravated battery where the trial court also sentenced defendant for the offense of armed robbery.

¶ 39 It is within the trial court's discretion to determine whether evidence is admissible in a case. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001) (citing *People v. Hayes*, 139 Ill. 2d 89, 130 (1990)). A trial court's decision as to whether evidence is admissible will not be reversed absent a clear abuse of discretion. *People v. Hayes*, 139 Ill. 2d at 130. An abuse of discretion will be found only where the trial court's decision is "arbitrary, fanciful or unreasonable." *People v. Morgan*, 197 Ill. 2d at 455 (quoting *People v. Illgen*, 145 Ill. 2d 353, 364 (1991)).

¶ 40

A. Peregrine's Guilty Plea

¶ 41 Over defendant's objection, the trial court allowed Peregrine to testify that she pled guilty to aggravated robbery in connection with the robbery of Carlson. Defendant contends, relying primarily upon *People v. Sullivan*, 72 Ill. 2d 36 (1978), that this equates to reversible error. The State responds that *Sullivan* does not support a reversal of defendant's conviction and that the trial court did not abuse its discretion by admitting this evidence.

¶ 42 The *Sullivan* court noted that the fact that a codefendant either confessed or pled guilty in relation to the same crime is not relevant to another codefendant's guilt or innocence. *Id.* at 42. A defendant who is separately tried is entitled to have a jury determine his guilt based upon the evidence presented against him and not according to what has happened in regard to another codefendant. *Id.*

¶ 43 In this case, the trial court instructed the jury that evidence of a witness's prior conviction "may be considered by you only as it may affect the believability of the witness." Our supreme court has held that a party, who calls a witness with a criminal record, is allowed to put forth evidence of the criminal conviction on direct examination and need not allow such damaging, credibility information to be established on cross-examination provided that the jury is instructed that such testimony is not evidence of defendant's guilt. *People v. DeHoyos*, 64 Ill. 2d 128, 131-33 (1976).

¶ 44 Here, the prosecutor did not urge the jury to determine defendant's guilt based upon the fact that his alleged accomplice had already pled guilty. See *Sullivan*, 72 Ill. 2d at 43. It is apparent from this record that the State was attempting to openly discuss the fact that its witness was convicted of this offense before this issue was introduced to weaken her credibility during

cross-examination. Accordingly, we hold the trial court did not abuse its discretion in allowing Peregrine to testify that she pled guilty for her involvement in this crime.

¶ 45 B. Defendant's Warrant

¶ 46 Defendant also contends that the trial court erred in allowing the State to present evidence that he had a pending arrest warrant at the time officers entered Sodaro's grandparent's house and that he recently spent time in jail. Defendant argues that such testimony amounted to other crimes evidence, which was not relevant to the crime charged. Defendant claims that the court compounded this error by failing to give a limiting instruction to the jury. The State responds that the admission of this evidence was innocuous and did not influence the jury as to defendant's guilt.

¶ 47 During Officer Messer's testimony, he explained why he traveled to Sodaro's grandparent's house. Upon arrival there, he observed defendant and Sodaro standing outside the residence smoking a cigarette. When the two saw his squad car, they "ran into the house." Messer then "went to the rear of the residence to make sure that they didn't run out the back or a side exit." As this was transpiring, Officer Johnson and Detective Schmidt arrived on scene and knocked on the front door, then explained to the owner why police were at his residence.

¶ 48 Messer testified that he "coordinated" the effort between himself and the other officers to apprehend defendant. When describing the actions taken by himself and the other officers, he mentioned that, "At that moment Mr. Vanstockum had a warrant." This statement drew an immediate objection from defense counsel and the jury was dismissed from the courtroom. A lengthy discussion and offer of proof took place. Defendant argued that Officer Messer was providing impermissible other crimes evidence. The State argued he was merely detailing the

steps of the investigation and explaining why the officers took defendant into custody when they did. Ultimately, the trial court overruled the objection finding the brief mention of the warrant did not prejudice defendant. The prosecutor agreed not to, and in fact, did not again discuss the warrant during Messer's testimony. Defense counsel, while noting his objection for the record, informed the court of his intention to cross-examine Messer on the fact that the warrant, while valid, "was just a pay or appear warrant."

¶ 49 The steps in an investigation of a crime and the events leading up to an arrest are relevant when necessary and important to a full explanation of the State's case to the trier of fact. *People v. Hayes*, 139 Ill. 2d 89 (1990). However, "evidence of other crimes is not admissible merely to show how the investigation unfolded *unless* such evidence is also relevant to specifically connect the defendant with the crimes for which he is being tried." (Emphasis in original.) *People v. Lewis*, 165 Ill. 2d 305, 346 (1995). There is no evidence in the record specifically connecting defendant's outstanding warrant with the armed robbery and aggravated battery charges. As such, we find the trial court erred in allowing, and not striking, testimony concerning defendant's outstanding warrant. However, we find this error harmless.

¶ 50 Harmless-error analysis is based on the notion that a defendant's interest in an error-free trial must be balanced against societal interests in judicial economy and finality. *People v. Simms*, 121 Ill. 2d 259, 275-76 (1988). The burden of proof is on the State to show beyond a reasonable doubt that the error did not affect the outcome of the proceeding. *People v. McClanahan*, 191 Ill. 2d 127, 139 (2000). In other words, our inquiry is whether the defendant would have been convicted regardless of the error. *People v. Dean*, 175 Ill. 2d 244, 259 (1997). "In determining whether, in absence of the error, the outcome of the trial would have been

different, review is made of the proceedings as a whole, based upon examination of the entire record." *People v. Mullins*, 242 Ill. 2d 1, 23 (2011) (citing *People v. Howard*, 147 Ill. 2d 103, 148 (1991)). After reviewing the record as a whole, we find the error harmless.

¶ 51 Not only did defendant's coconspirator, Peregrine, testify to his involvement in this robbery, but the pizza box and wrench used to strike the victim were found in the very room at which police located defendant following the robbery. The pizza box was from the victim's place of employment and contained remnants of the type of pizza ordered by Peregrine. Sodaro testified that defendant brought the pizza box into the residence and room in which it was found, pulled a wrench from under his shirt and hid the wrench. Given the overwhelming evidence against defendant, we find the error of allowing Messer to testify to the existence of the pay or appear warrant to be harmless.

¶ 52 We acknowledge that our supreme court has stated the "better practice" in handling the admission of other crimes evidence may be for a trial court to instruct the jury at the time the evidence is admitted and at the close of the case of the limited purpose for which the jury may consider the evidence. *People v. Heard*, 187 Ill. 2d 36, 60-61 (1999). While such a practice would have been advisable in this instance, we nevertheless hold failure to do so was harmless beyond a reasonable doubt.

¶ 53 C. Defendant's Jail Stay

¶ 54 Defendant argues "it was error to allow State witness Tyler Shaw-Sodaro to disclose to the jury that defendant had been in jail prior to the commission of the offense in this case." The record reveals that the State asked Tyler where defendant resided during the month of October, 2009. Sodaro replied, "After he got out of jail, he was staying with me at my grandparent's

house." This statement, defendant claims, amounted to improper "other crimes" evidence.

¶ 55 Defendant did not object or move to strike Tyler's statement and makes no allegation on appeal that it amounts to plain error or ineffective assistance of counsel. To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion. *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). However, the State never argues that defendant forfeited this issue. "It is well established that the State may waive waiver." *People v. De La Paz*, 204 Ill. 2d 426, 433 (2003). The State has waived any claim of forfeiture.

¶ 56 Nevertheless, we find any potential error created by Tyler's reference to defendant's previous jail stay does not entitle defendant to a new trial. Our supreme court has unequivocally stated, "If improperly admitted other-crimes evidence was not a material factor in defendant's conviction, reversal is not required." *People v. Adkins*, 239 Ill. 2d 1, 34 (2010). In *Adkins*, our supreme court noted that "the evidence of defendant's guilt was overwhelming" and, as such, found it "highly unlikely that the jury was improperly influenced" by the "brief account" of an improper other-crimes reference. *Id.*

¶ 57 Our review of the record indicates that Tyler's reference to defendant's previous jail stay was relatively benign. The prosecutor did not solicit any reference to a previous jail stay when asking Tyler where defendant resided. Nor did the prosecutor, or defense counsel revisit the remark. As noted in section B above, the evidence of defendant's guilt is overwhelming. To use the words of our supreme court, it is "highly unlikely that the jury was improperly influenced" by Tyler's fleeting reference to defendant's jail stay. *Adkins*, 239 Ill. 2d at 34. "Thus, even if it was error to admit [the statement, defendant] is not entitled to a new trial on this basis." *Id.*

¶ 58 D. The Bloody Wrench

¶ 59 Next, we turn to defendant's argument that the State improperly introduced highly prejudicial testimony that defendant claimed to have inserted the wrench into a female's rectum. While explaining the circumstances surrounding defendant's hiding of the wrench in Sodaro's bedroom, Sodaro noted the wrench appeared bloody. He then explained that defendant accounted for the blood, claiming it came from "inserting it, inserting it in the girl's rectum."

¶ 60 While defendant neither contemporaneously objected to this testimony nor moved to strike it, he did argue below during an oral motion for a mistrial that it was error to allow the statement into evidence and that this error coupled with some other alleged errors required a mistrial. He makes no argument on appeal that Sodaro's testimony amounted to plain error or that failing to object to it rendered his counsel constitutionally ineffective. Once again, the State fails to argue forfeiture and, as such, has waived the right to do so. *De La Paz*, 204 Ill. 2d 426, 433 (2003).

¶ 61 Defendant argues that "the sole purpose" of admitting this evidence was "to prejudice the defendant by arousing anger, hate, and passion in the jury." We disagree. Defendant's response to comments about his possession of a bloody wrench is undoubtedly relevant admissible evidence.

¶ 62 The victim testified that his attacker used a "silver object" during the incident. During his direct testimony, Tyler testified that defendant hid the pizza box under Tyler's bed and wrench behind a tool box in Tyler's bedroom. When asked if he had any conversation with defendant about the wrench, Tyler answered, "Yeah, it, it was bloody." During the course of detailing "the discussion about the fact that it was bloody", Tyler told the jury that defendant accounted for the blood on the wrench by claiming he inserted it into a girl's rectum. Evidence is admissible when

it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. *People v. Gonzalez*, 142 Ill. 2d 481, 487 (1991). Evidence is considered relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence. *People v. Morgan*, 197 Ill. 2d 404, 455-56 (2001).

¶ 63 Defendant did not try to hide the fact that the wrench was bloody. He made no claim to Tyler that the substance on the wrench was anything other than human blood. To the contrary, when questioned about the blood on the wrench, defendant chose to provide an impracticable and far-fetched explanation of how the wrench became bloody. It seems more than unlikely that any juror believed that Tyler accurately quoted defendant or that defendant's response was anything other than a sarcastic response. It is hard to imagine that anyone on the jury would draw the conclusion that this was an admission by defendant of a deviant sexual assault. Regardless, the trial court did not err in allowing Tyler to testify to what defendant said when hiding the bloody weapon used during the armed robbery. The statements, no matter how rhetorical or distasteful, make a fact in consequence more or less probable. It is an acknowledgment by defendant that he had a bloody wrench shortly after the victim was beaten about the head with a similar object. As such, we hold it was not error to allow Tyler to testify to defendant's statement.

¶ 64 E. Text Message

¶ 65 Defendant next contends that Sodaro's text message did not constitute an exception to the hearsay rule as a coconspirator's statement. The State responds by claiming the trial court properly admitted the text message, as the statement evinced an attempt to conceal the weapon used in the offense and, therefore, was made in furtherance of the conspiracy. The text message

stated, "No piggy yet? Hes probably gonna take his sweet ass time. Haha we got a bloody wrench."

¶ 66 “The general rule is that a statement of one co-conspirator is admissible against the others as an admission only if the statement was made during the course of and in furtherance of the conspiracy.” *People v. Byron*, 164 Ill. 2d 279, 290 (1995) (citing *People v. Davis*, 46 Ill. 2d 554 (1970)). The exception allows into evidence declarations made by coconspirator, made in furtherance of the conspiracy, even when those declarations are made out of a defendant's presence. *People v. Columbo*, 118 Ill. App. 3d 882, 945 (1983). "The course of a conspiracy includes subsequent attempts at concealment of the crime where sufficiently proximate in time to the offense." *People v. Thomas*, 178 Ill. 2d 215, 238 (1997). Statements made in furtherance of a conspiracy include those that have the effect of advising, encouraging, aiding or abetting its perpetration. *People v. Kliner*, 185 Ill. 2d 81, 141 (1998)

¶ 67 Defendant argues that since Sodaro sent the message after the robbery occurred which merely bragged about past events without encouraging Peregrine to conceal the wrench or withhold truthful details of the crime when the police arrived, the statement was not made in furtherance of the conspiracy. He further argues that the State failed to establish that a conspiracy existed between the declarant Sodaro, defendant and Peregrine.

¶ 68 Here, the court found the State satisfied the threshold requirement of establishing *prima facie* independent evidence of a conspiracy and the declarant's participation in the conspiracy. See *People v. Ramey*, 151 Ill. 2d 498, 526-27 (1992); *People v. Kabakovich*, 245 Ill. App. 3d 943, 944 (1993). While evidence of a conspiracy can be direct or circumstantial, “such evidence must be sufficient, substantial, and independent of the declarations made in order to admit

statements by a declarant under the coconspirator exception to the hearsay rule.” (Internal quotation marks omitted.) *People v. Ervin*, 297 Ill. App. 3d 586, 592 (1998) (quoting *People v. Duckworth*, 180 Ill. App. 3d 792, 795 (1989)). While Sodaro denied taking part in the conspiracy, Peregrine testified that the plan to rob a pizza delivery man was hatched while all three rode in Sodaro's vehicle. She used Sodaro's phone to place the call for the pizza and he gave her \$25 to pay for the pizza. The police found the bloody wrench, pizza box, Sodaro and defendant all in defendant's bedroom shortly after the robbery. The admissibility of evidence rests within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *People v Lovejoy*, 235 Ill. 2d 97, 135 (2009). Given the evidence of Sodaro's involvement with the conspiracy to rob the delivery man, we cannot say the trial court abused its discretion in admitting this evidence.

¶ 69 We further find that the text message qualified as a coconspirator's statement from Sodaro made during the course of or in furtherance of the conspiracy. It asked whether the police had arrived on the scene yet and discussed the weapon used to beat the victim. It made the point that Sodaro had the wrench and the police did not. It was sent a short time after the crime and almost contemporaneously with defendant's act of hiding the weapon. It was also sent to the phone that one coconspirator used in furtherance of the crime: that being to call Pizza Hut to have the pizza delivered and to call 911. An abuse of discretion occurs only where the trial court's ruling is arbitrary, fanciful, unreasonable or where no reasonable person would take the view adopted by the trial court. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). We cannot say no reasonable person would have concluded that the evidence sufficiently showed Sodaro's involvement in this conspiracy or that the message was not sent in furtherance of the conspiracy.

¶ 70

F. Sentencing

¶ 71 For his armed robbery (720 ILCS 5/18-2(a)(1) (West 2008)) conviction, the court sentenced defendant to 30 years' incarceration. Armed robbery is a Class X offense. 720 ILCS 5/18(b) (West 2010). The court also sentenced defendant to an extended 10-year term of incarceration for his aggravated battery conviction. 720 ILCS 5/12-4(b)(2) (West 2008). Aggravated battery, in this instance, is a Class 3 offense. 720 ILCS 5/12-4(e)(1) (West 2010). The maximum allowable sentence for a Class 3 offense is 5 years' imprisonment. 730 ILCS 5/5-4.5-40(a) (West 2010).

¶ 72 The trial court found that defendant was extended term eligible for his aggravated battery conviction pursuant to section 5-8-2(a)(5) of the Unified Code of Corrections (the Code) (730 ILCS 5/5-8-2(a)(5) (West 2008)) which allows, in certain instances, for the extended term of incarceration not "less than 5 years and not more than 10 years" for conviction of a Class 3 felony.

¶ 73 In *People v. Jordan*, 103 Ill. 2d 192, 206 (1984), our supreme court held that the plain language of section 5-8-2(a) of the Code requires that when a defendant has been convicted of multiple offenses of differing classes, an extended-term sentence may be imposed only on the conviction within the most serious offense. *Id.* at 206. The court reaffirmed this pronouncement in *People v. Thompson*, 209 Ill. 2d 19, 22 (2004).

¶ 74 Like the defendant in *Thompson*, the defendant herein failed to raise this issue in his postsentencing motion. The *Thompson* court reiterated the oft stated principle that "a sentence, or portion thereof, that is not authorized by statute is void." *Id.* at 23. As such, the *Thompson* court held a defendant could attack such a sentence at any time, found the extended-term

sentence on the lesser offense improper, and reduced the sentence "to the maximum nonextended term" available for the lesser offense. *Id.* at 27-29.

¶ 75 The State, herein, concedes that defendant's 10-year sentence for aggravated battery is improper under section 5-8-2(a) of the Code, *Thompson* and *Jordan* and the proper resolution of this issue is for us to reduce defendant's sentence to the maximum allowable for a Class 3 felony; five years. We agree. We reverse and vacate the extended-term portion of defendant's sentence for aggravated battery and reduce his sentence to the maximum nonextended term of five years' imprisonment.

¶ 76 CONCLUSION

¶ 77 For the foregoing reasons, the judgment of the circuit court of Whiteside County is affirmed as it pertains to defendant's convictions, reversed as it pertains to defendant's extended-term sentence for aggravated battery, and modified as indicated above.

¶ 78 Affirmed in part, reversed in part and modified.

¶ 79 JUSTICE WRIGHT, concurring in part and dissenting in part:

¶ 80 I agree with the majority the trial court did not abuse its discretion by admitting evidence related to a co-defendant's guilty plea. Like the majority, I also conclude Officer Messer's statement to the jury regarding the outstanding warrant for defendant's arrest was improper. However, I consider this error to have been compounded by the court's refusal to give the jury a limiting instruction, thereby requiring a new trial.

¶ 81 To minimize the unfairly prejudicial impact of this testimony about defendant's pending arrest warrant, defense counsel offered defense instruction No. 12 to the trial court, stating

evidence of other bad acts should be limited by a jury instruction. After the State objected, and without any further discussion, the court refused to tender that jury instruction.

¶ 82 The failure to give a limiting instruction cannot be viewed as harmless because the State's evidence was not overwhelming for several reasons. First, Sodaro said defendant appeared at his grandfather's house with the wrench and Peregrine stated defendant was wearing her jacket at the time of the offense. Thus, the only witnesses connecting defendant to this crime were co-conspirators Peregrine and Sodaro, who became cooperative after the State promised Sodaro immunity for his testimony.

¶ 83 Second, the victim, Carlson, did not identify defendant as the robber in this case. Third, the State did not link the wrench or pizza box recovered by the police in Sodaro's bedroom either by blood, fingerprint evidence, or DNA evidence to the defendant or the crime. It is unclear from this record whether the wrench recovered by the police was the actual weapon used during the armed robbery, since the State did not offer any proof the rust-colored stain on the wrench was, in fact, either human blood, or the victim's blood.

¶ 84 Finally, I note that it was Sodaro, intending to be humorous, rather than defendant, who sent a text message to Peregrine about a bloody wrench shortly after the crime. Sodaro sent this humorous text message to Peregrine before the police arrived at his house and discovered a wrench, Peregrine's jacket, and a pizza box in Sodaro's bedroom. After this discovery, Sodaro told the officers Sodaro saw defendant with the bloody wrench and asked defendant about the origin of the blood. In addition, Sodaro provided his own alibi to the police which was not corroborated by his grandfather. Sodaro claimed he returned to his grandparents' residence

before the robbery unfolded. Yet, this alibi was discredited by the testimony of Sodaro's grandfather, Elbert Shaw, who testified that he saw Sodaro and defendant return together to his house together at either 9:30 or 10:30 p.m.

¶ 85 After police traced the phone call placing the pizza order to Sodaro's cell phone, Sodaro stated he did not know about the intended robbery and gave Peregrine \$25 to pay for the pizza before leaving Peregrine and defendant. In contrast, Peregrine testified the robbery was discussed when Sodaro was still present.

¶ 86 Moreover, I note that if the defendant's statement to Sodaro about the bloody wrench is partially untrue, the probative value is circumstantial and, at best, minimal. If the explanation Sodaro attributed to defendant about a female's blood on the wrench is true, the statement contradicts the State's theory the blood on the wrench may have belonged to Carlson, the male robbery victim, and involves other-crimes evidence arising out of the insertion of a wrench into a woman's body resulting in a bloody residue.

¶ 87 Other-crimes evidence is generally inadmissible because it "overpersuades a jury, which might convict the defendant only because it feels that defendant is a bad person who deserves punishment." *Id.* at 213-14. Due to the high risk of prejudice when using other-crimes evidence, the erroneous admission of such evidence requires reversal. *Id.*

¶ 88 When evidence of other crimes is involved, the court must weigh its probative value against its prejudicial effect, and may exclude the evidence if the prejudicial effect substantially outweighs the probative effect. *People v. Manning*, 182 Ill. 2d 193, 214 (1998). This statement was highly prejudicial because such a vile concept involving a deviant sex act, idea, or thought

about inserting a wrench into a female's rectum, thereby drawing blood, is unduly offensive, shocking, and unfairly prejudicial without a limiting instruction.

¶ 89 The majority suggests the comment that Sodaro attributed to defendant was incapable of unfairly influencing this jury because it was nothing more than an "impracticable," "far-fetched" and a sarcastic statement about another act which was obviously untrue. The view that this explanation was "impracticable," and hence impossible to carry out, perpetuates the falsehood that such an act directed towards a woman, as purportedly admitted by defendant, must be imaginary, fanciful, and could not possibly be true. I respectfully disagree with this theory because such unspeakable acts do occur against women in our society and are worthy of a juror's belief the statement was either entirely or partially true in substance.

¶ 90 Without a limiting instruction, the jury was free to conclude that if defendant was subject to an outstanding arrest warrant for some offense and also spoke of such an unthinkable misdeed against a female with amusement, he was a bad person who was certainly capable of striking an innocent pizza delivery person over the head for the sport of securing a free pizza and a little extra spending money. Here, the jury was allowed to consider defendant's vulgar conversation about another bad act substantively against defendant without limitation.

¶ 91 Due to the cumulative nature of multiple, highly-prejudicial, evidentiary errors and the additional error in the jury instructions, I would set aside defendant's conviction and sentence and remand the matter for a new trial. Since I would vacate defendant's conviction and sentence, I decline to address defendant's other contention on appeal as to the propriety of his extended term sentence.

¶ 92 For these reasons, I respectfully concur in part and dissent in part.