

No. 1-12-1073

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,)	Cook County
)	
v.)	No. 11 C4 40133
)	
JONATHAN FORD,)	Honorable
)	Noreen Valeria-Love,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Simon and Justice Liu concurred in the judgment.

ORDER

- ¶ 1 *Held:* The State did not commit a discovery violation by tendering photographs the morning of trial where defendant has not established prejudice. Counsel was not ineffective. The evidence was sufficient to support defendant's convictions. The mittimus was corrected.
- ¶ 2 Defendant Jonathan Ford was convicted of two counts of aggravated domestic battery following a bench trial and was sentenced to eight years' imprisonment. He now appeals and argues: (1) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by tendering photographs of the victim the morning of trial; (2) trial counsel was ineffective for failing to request a

continuance when he received the photographs, conceded nonexistent probative facts and failed to impeach the victim with her prior inconsistent testimony; (3) his conviction should be reduced to domestic battery; and (4) his mittimus should be corrected. For the following reasons, we affirm the judgment of the trial court but correct the mittimus.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by way of information with two counts of aggravated domestic battery for strangling Mayra Plascencia on February 14, 2011.

¶ 5 Plascencia testified in February 2011 she lived with defendant, her boyfriend, in a studio apartment at 1028 Washington, in Oak Park. On February 12, 2011, she saw that defendant had been emailing other women and had asked a woman living in Springfield if he could move in with her. She confronted defendant and he became upset. Defendant hit her and told her she should not invade his privacy. Plascencia went to bed. Defendant, who had been drinking, jumped on top of her, hit her in the face, punched her in the back of the head and choked her but did not push his thumbs into her throat. Plascencia did not call the police. She went into the bathroom and vomited as defendant yelled at her for invading his privacy.

¶ 6 The following day, Plascencia told defendant that they should go their separate ways. That night, Plascencia went to bed at about 11:00 p.m. She woke in the early morning hours when she heard defendant throw her phone on the ground. She fixed the phone, which was open and on the floor, and gave it back to defendant.

¶ 7 She told defendant that he needed to leave and defendant started throwing things out of the closet. Defendant threw Plascencia face down into a pile of clothes. He punched her in the back and in the back of the head and kicked her on her side and stomped on her. When

defendant stopped, Plascencia stood up. Defendant then threw Plascencia onto the stairs and tried to hit her in the face but she blocked him. Defendant grabbed her hands and pushed them against the wall and then hit her across the face. Defendant then choked her, squeezing and pushing in her throat with his thumb. Plascencia was having trouble breathing but managed to break away from his grasp about 45 seconds later.

¶ 8 Plascencia told defendant to leave but he said, "[f]uck this, you're going to die tonight." He then pushed her onto the bed and began choking her for another 45 seconds. Plascencia flipped over and defendant put his arm around her neck in a choke hold. Plascencia had trouble breathing. When she broke free again, she grabbed her phone and headed outside, where she called police. Defendant followed her outside and took the phone, throwing it in the snow. He hit Plascencia.

¶ 9 When the police arrived, Plascencia spoke with Officer Collins. She was taken to the apartment where she identified defendant. Plascencia testified that she never learned that defendant was gay and did not speak to defendant about his homosexuality on the night he was arrested. When asked about the photos taken on the night of the incident by Officer Collins, Plascencia stated that the photos accurately depicted her injuries.

¶ 10 Officer Collins testified that he was called to 1028 Washington about 1:35 a.m. on February 14, 2011. He saw Plascencia in front of the building. She was crying and there was blood in the snow where she was standing. She was bruised and had redness around her neck. Officer Ruiz testified that when he walked into the apartment, he saw defendant sitting in a recliner chair. Defendant stated that he had been drinking. Plascencia identified defendant as the offender.

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¶ 11 Defendant testified that he had been previously convicted of two felony burglaries and one felony theft. On February 12, 2011, he and Plascencia had a conversation about breaking up because defendant was homosexual. Defendant told Plascencia that he had cheated on her multiple times and they could not be together anymore because he was living a lie. Defendant apologized to Plascencia but slapped her because she hacked his email account.

¶ 12 The next day, he and Plascencia argued. Defendant apologized to Plascencia and told her she was his best friend. He also told her he was seeing a transgender woman. Plascencia was upset and went to bed. Defendant drank beer.

¶ 13 Later, when he was trying to use Plascencia's phone to communicate with his transgender friend, defendant became frustrated when the phone kept freezing. Defendant threw the phone. Plascencia asked defendant what was going on and he told her he had to get out of there. Plascencia hit defendant so he slapped her and pushed her on top of the clothes in the closet. When she got up, defendant grabbed her by the neck and slapped her with an open hand. He then pressed her against the wall by her neck but did not choke her. He testified that he did not squeeze her neck and did not put his thumb in her throat. He slapped her with an open palm and let her go.

¶ 14 Plascencia called defendant a name and he shoved her onto the bed and grabbed her chin and warned her not to speak to him that way. Defendant released her and Plascencia ran to the door. She asked him if he was done. Defendant replied that he wasn't done breaking things, kicked an air conditioning unit and said something like, "I'll fucking kill you." Plascencia walked outside.

¶ 15 Defendant stated that he followed her outside to see if she wanted her coat or shoes

because she had left without both. Plascencia was on the phone and he grabbed the phone from her. After she hung up, defendant pushed her into the snow and threw some snow in her face. Defendant returned to the apartment. The police arrived shortly thereafter and defendant was arrested.

¶ 16 After hearing all of the evidence, the trial court found defendant guilty of two counts of aggravated domestic battery. Defendant was sentenced to 8 years' imprisonment. It is from this judgment that defendant now appeals. .

¶ 17 ANALYSIS

¶ 18 Defendant first argues that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) when it failed to provide the defense with photographs of the victim's alleged injuries before trial. The prosecutor tendered black and white photographs of Plascencia's injuries one hour before trial and failed to show defense counsel color photographs the prosecutor had in his possession until prompted by the trial court.

¶ 19 In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that the prosecution violates a defendant's constitutional right to due process of law by failing to produce evidence favorable to the accused and material to guilt or punishment. To prove that he was denied due process of law under *Brady*, a defendant must show that: (1) the evidence is favorable because it is exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence was material to guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008). A defendant must show that the favorable evidence could reasonably have put the whole case in such a different light as to undermine confidence in the verdict. *People v. Coleman*, 183 Ill. 2d 366, 393 (1998).

¶ 20 Prior to the start of the trial on September 19, 2011, defense counsel made a motion *in limine* to prevent the State from using photographs of Plascencia. Defense counsel stated that the State had tendered black and white photos of Plascencia taken on the night of the incident only one hour before trial. The State acknowledged that they had received the photos between August 25, 2011 and the trial date, but stated that the photos were tendered to defense counsel the morning of the trial, not one hour before.

¶ 21 The trial court allowed defense counsel to review the photos. Defense counsel indicated that he did not have an objection to four of the photos because the color photos and the black and white photos looked the same. Defense counsel did object to the remaining photos because there was a difference in what could be seen in the color versus black and white photos. The case was passed for defense counsel to speak to defendant. The bench trial began thereafter.

¶ 22 We reject defendant's argument that *Brady* was violated in this case. Although it was not good practice to tender the photos right before the start of trial, the State nevertheless tendered the photos so that defense counsel possessed the photos before the trial began. Defense counsel had the opportunity to review them and consult with defendant about them before the trial began. Defense counsel could have requested a continuance based on the photos but did not.

¶ 23 Even if the late tender of photographs could be considered to be in violation of *Brady*, defendant was not prejudiced by the prosecutor's failure to tender the photographs until the morning of trial and therefore *Brady* was not violated. The record shows that that defense counsel reviewed the photograph and had the opportunity to discuss the photographs with defendant. During trial, defense counsel cross-examined Plascencia using the color photographs and asked her if the photos clearly and accurately depicted the injuries to her neck on the night in

question. Plascencia responded, "yes" and defense counsel moved to admit the photos into evidence.

¶ 24 Defendant also argues that the State violated Illinois Supreme Court Rule 412, which provides,

“(a) Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control: * * * (v) any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused * * *[,]”

(d) The State shall perform its obligations under this rule as soon as practicable following the filing of a motion by defense counsel.” (134 Ill.2d R. 412(a)(v), (d).)

¶ 25 The purpose of Illinois Supreme Court Rule 412 is to afford the accused protection against surprise, unfairness and inadequate protection. *People v. Hinton*, 122 Ill. App. 3d 89 (1984). Compliance with Illinois Supreme Court Rule 412 is mandatory, and is accomplished only if the State notified the defense of the evidence promptly and with due diligence. *People v. Steidl*, 142 Ill. 2d 204 (1991). While compliance with the discovery rules is mandatory, the failure to comply with the rules does not require reversal absent a showing of prejudice. *People v. Hendricks*, 325 Ill. App. 3d 1097, 1102 (2001). A new trial should be granted only if the defendant is prejudiced by the discovery violation and the trial court fails to eliminate the prejudice. *Id.*

¶ 26 Even if the State did not comply with Illinois Supreme Court Rule 412 in this case when

it tendered the photographs of Plascencia's injuries the morning of trial, defendant is entitled to no relief where he did not suffer any prejudice as a result. As discussed, defense counsel reviewed the photograph and had the opportunity to discuss the photographs with defendant. Defense counsel cross-examined the Plascencia using the photographs and offered them into evidence. Consequently, any error was harmless.

¶ 27 Defendant argues that trial counsel was ineffective for failing to: (1) request a continuance when he received photographs taken of the victim after the incident in question on the morning of trial; (2) conceded nonexistent probative facts; and (3) did not impeach the victim with her prior inconsistent testimony.

¶ 28 In determining whether a defendant was denied the effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant such that he was deprived of a fair trial. *Strickland*, 466 U.S. at 687; *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). To establish prejudice, the defendant must show a reasonable probability that, absent counsel's alleged error, the trial's outcome would have been different. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). "A reasonable probability of a different result is not merely a possibility of a different result." *Id.* If the defendant fails to establish either prong, his ineffective assistance claim must fail. *Strickland*, 466 U.S. 668. Where the facts relevant to an ineffective assistance of counsel claim are not disputed, our review is *de novo*. *People v. Bew*, 228 Ill. 2d 122, 127 (2008); *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 29 Defendant faults counsel for failing to request a continuance to conduct further investigation after receiving black and white photographs on the morning of trial depicting the alleged injuries sustained by the victim. Defendant claims that trial counsel had a duty to further investigate after receiving these photographs because they were invaluable to defendant's defense in that they affirmatively rebutted the victim's allegations that she was strangled. Defendant claims that defense counsel could have consulted a medical doctor to opine on the consistency between the victim's testimony and the photographs.

¶ 30 This court has noted the difficulty of resolving ineffective assistance of counsel claims on direct appeal instead of on collateral review when doing so requires consideration of matters outside of the record on appeal. See *People v. Millsap*, 374 Ill. App. 3d 857, 863 (2007) (where a defendant's claim of ineffective assistance of counsel involves matters outside of the record on direct appeal, that claim can be addressed in a proceeding under the Act because a complete record can be made).

¶ 31 In *People v. Durgan*, 346 Ill. App. 3d 1121, 1142 (2004), this court, quoting the United States Supreme Court's decision in *Massaro v. United States*, 538 U.S. 500, 504–05 (2003), explained why it is preferable that an ineffective-assistance-of-counsel claim be brought on collateral review instead of on direct appeal, as follows:

“When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. Under [Strickland], a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was

prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the Strickland analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. See [*Guinan v. United States*, 6 F.3d 468, 473 (7th Cir.1993)] (Easterbrook, J., concurring) ('No matter how odd or deficient trial counsel's performance may seem, that lawyer may have had a reason for acting as he did * * * Or it may turn out that counsel's overall performance was sufficient despite a glaring omission * * * ').” (Internal quotations omitted.)

¶ 32 We cannot ascertain based on the record before us whether it would have been prudent for counsel to request a continuance to obtain the opinion of a medical doctor. We cannot speculate that a doctor would have provided exculpatory testimony based on the photographs. Accordingly, we conclude that the record is not sufficiently complete to allow us to resolve defendant's ineffective assistance of counsel claim. We express no opinion on the merits of defendant's claim but simply find that defendant's claim would be more appropriately addressed in proceedings under the Post Conviction Hearing Act (725 ILCS 5/122–1 *et seq.* (West 2012)), where defendant has the opportunity to present affidavits to support his claim.

¶ 33 Defendant also faults counsel for inexplicably conceding that there was a red mark on Plascencia's neck in the suppressed photos. According to defendant, the photos do not show marks on Plascencia's neck, nor were marks mentioned in the police report. Defendant argues

that counsel was ineffective for essentially arguing defendant's guilt based on nonexistent evidence.

¶ 34 In closing argument, counsel stated, "[i]n the pictures it shows a little red mark, and the officer testified there's a little red mark on her neck." Contrary to defendant's argument here, this statement did not amount to a concession. Rather, defendant used the photos and Officer Collins' testimony that Plascencia had "redness around her neck" to argue "[i]f someone was strangled that hard, there would be fingerprints, there would be more than red marks. There would be bruising. There wasn't any of that." Viewed in context of the closing argument as a whole, it is clear that this comment was used to defendant's advantage based on a strategic decision by defense counsel. A strong presumption exists that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant must overcome the presumption that the challenged action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. Decisions that a counsel makes regarding matters of trial strategy are " 'virtually unchallengeable.' " *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007) (quoting *People v. Palmer*, 162 Ill. 2d 465, 476 (1994)). Therefore, defendant's claim cannot support a claim of ineffective assistance of counsel.

¶ 35 Defendant also argues that counsel was ineffective for failing to impeach Plascencia with her earlier divergent testimony. At the probable cause hearing in this case, Plascencia testified that after defendant strangled her on the stairs, he picked up an air conditioner and threw it a couple of times, finally throwing it at her side. Plascencia stated that it hit her causing bruising all over. Defendant argues that during trial, Plascencia omitted any mention of defendant picking up an air conditioning unit and throwing it against her.

¶ 36 "[T]he decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel." *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). The decisions that counsel makes regarding matters of trial strategy are "virtually unchallengeable." *McGee*, 373 Ill. App. 3d at 835 (2007) (quoting *Palmer*, 162 Ill. 2d 465, 476 (1994)). Counsel's decision not to bring defendant's additional acts of aggression to the attention of the trial court cannot be considered as anything other than trial strategy and therefore cannot stand as a basis for defendant's ineffective assistance claim.

¶ 37 Next, defendant claims that this court should reduce his conviction from aggravated domestic battery to domestic battery where the trial court found evidence of strangulation, not based on the strength of the State's evidence, but rather on the basis of an erroneous interpretation of defendant's testimony. Defendant claims that during its holding, the court compared the testimony of Plascencia and defendant and in doing so relied on testimony from defendant admitting that he had strangled Plascencia, even though defendant had not testified to that fact.

¶ 38 When assessing whether the evidence was sufficient beyond a reasonable doubt to convict defendant, we must ascertain whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). It is not the function of this court to retry the defendant or substitute its judgment for that of the trier of fact. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). The trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony and resolves conflicts or inconsistencies in the evidence. *People v. Naylor*, 229 Ill. 2d 584, 614 (2008). It is fundamental

that a fair bench trial is one based on the consideration of only that evidence introduced at trial and reasonable inferences to be drawn therefrom. *People v. Gonzalez*, 175 Ill. App. 3d 466 (1987). Further, in a bench trial it is presumed that the trial court considered only relevant evidence and that presumption may be rebutted when the record affirmatively shows the contrary. *People v. Bradford*, 187 Ill. App. 3d 903 (1989)

¶ 39 Defendant testified that during the fight he grabbed Plascencia by the neck and pressed her up against the wall. Defendant demonstrated in court how he held Plascencia to the wall. It was described on the record as defendant having his thumb near the middle of Plascencia's throat. Defendant stated that he held her there for about 10 to 12 seconds. Defendant agreed that he was holding Plascencia against the wall by her neck and that he was putting pressure on her. After defendant's testimony, the court discussed the differences between Plascencia's and defendant's testimony about what happened during the fight. The court stated:

"The other difference is with respect to the choking, whether or not he held her with both hands for nearly 45 seconds as testified to by the complainant or whether he did it for one second while slapping her, except that he did on [c]ross-[e]xamination indicate possibly 10 to 12 seconds, which is a long period of time to have your throat—to have you hand around somebody's neck."

¶ 40 Defendant's claim is belied by the record. Although defendant did not actually use the word strangle, he admitted that his hand was around her throat, with his thumb in the middle of her throat. He stated that he held her that way for 10 to 12 seconds and was putting pressure on her.

¶ 41 The trial court is free to accept or reject as much or as little as it pleases of a witness' testimony. *People v. Nelson*, 246 Ill. App. 3d 824, 830 (1993). Any deliberations utilizing evidence based on private speculation of the trial court, untested by cross-examination or the rules of evidence, constitute a denial of due process of law. *Id.* However, it is the function of the trier of fact to determine the inferences to be drawn from the evidence. *People v. Herring*, 324 Ill. App. 3d 458. "When weighing the evidence, the trier of fact is not required to disregard the natural inferences that flow normally from the evidence, nor is it required to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *Id.* The trial court clearly considered the relevant evidence in this case in finding defendant guilty of aggravated domestic battery. Viewed in the light most favorable to the State, the evidence was sufficient to support a conviction for aggravated domestic battery.

¶ 42 Finally, defendant argues that the mittimus incorrectly reflects a conviction and sentence for interfering with reporting a domestic violence. The State agrees that this is incorrect and states that the mittimus should reflect a conviction for two counts of aggravated domestic battery. Pursuant to our authority under Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615(b)(1)), we correct the mittimus accordingly.

¶ 43 CONCLUSION

¶ 44 Based on the foregoing, the judgment of the circuit court is affirmed and the mittimus is corrected.

¶ 45 Affirmed as modified.