

No. 1-14-2033

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. 13 CR 18801
)	
)	
TOM DIAMOND,)	Honorable
)	Catherine M. Haberkorn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not improperly allow prior consistent statements.

¶ 2 Following a bench trial, Defendant Tom Diamond was convicted of one count of hate crime (720 ILCS 5/12-7.1(A) (West 2014)) and was sentenced to one year in prison. The defendant argues that (1) the State erred in allowing the State to elicit prior consistent statements from its sole occurrence witness, Katrina Smith and; (2) alternatively, trial counsel was

1-14-2033

ineffective for failing to object when the State elicited those very statements. For the following reasons, we affirm the decision of the lower court.

¶ 3

BACKGROUND

¶ 4 Katrina Smith testified that on September 7, 2013, at about 7:30 p.m. she was walking on the southbound side of Oketo Street to meet her fiancé for dinner. She was wearing her work uniform, which consisted of white pants, a blue top, white nursing shoes, a stethoscope, and a nursing identification badge. Smith testified that she works for Resurrection Hospital on the weekends but resides in Carbondale, Illinois.

¶ 5 Her fiancé's plans changed and he could no longer meet her for dinner, so she decided to walk to the Taco Burrito King on Harlem Avenue. Smith testified that she was walking on the sidewalk until she encountered a front yard with running sprinklers. Smith did not want to get wet, so she walked into the street to avoid the sprinklers. She saw two men sitting on the porch of a house as she began her transition from the sidewalk to the street. Smith testified that she then heard defendant shout, "Hey, you black nigger you, you must not be from here. You must be from Englewood or from the west side of Chicago." Smith testified that she ignored the defendant and continued to walk. Defendant continued to use racial slurs and shout at her. She then replied that she was not from Chicago, but in fact from Carbondale. She further testified that she told him that she was a nurse at Resurrection Hospital.

¶ 6 After this exchange, defendant walked off of the porch and continued shouting. Smith testified that he then shouted, "Hey you black nigger bitch, you hear me? You must be from Englewood or the west side. And if I see you in this neighborhood again I'm [going to] kill you, I'm [going to] rape you, and I'm [going to] hang you from a tree." Smith testified that she felt

1-14-2033

both scared and threatened, so she called 911. She told the 911 operator what happened and that she feared for her life. Smith did not tell the operator where she was located because she was not familiar with the neighborhood. The dispatcher advised her to return to the hospital so the police could locate her there. Returning to the hospital did not require Smith to pass by defendant's house again, but she did so anyway.

¶ 7 As she began walking back toward the hospital, she encountered defendant again. Smith testified that he then shouted, "You black bitch, what are you [going to] do, try and steal our cars?" She told defendant to leave her alone and that she had called the police. Smith testified that defendant began to approach her quickly so she sped up toward the intersection of Oketo and Talcott. After arriving at the hospital she located a coworker that momentarily stayed with her. The police had not arrived yet, so she called again. She testified that she told the operator that defendant approached her again and continued yelling "racial stuff." Furthermore, she stated that she had lost sight of defendant and it was getting darker.

¶ 8 When the police arrived, Smith got into the police cruiser and pointed out the house where she encountered defendant to Sergeant Scaletta and Officer Timmel. Smith testified that defendant then came out of the side door of his house and she began banging on the police cruiser window to alert the officers. Smith also testified that defendant did not shout anything about her "trying to steal" their cars until after she informed him that she had called the police. Both parties agreed that Sergeant Scaletta would testify that Smith identified defendant. The State rested. The court denied defendant's motion for a directed verdict.

¶ 9 Defendant called Detective Charles Hernandez to testify. Officer Hernandez testified that he interviewed Smith at the police station. He testified that she informed him that she was

1-14-2033

walking to meet her fiancé for dinner. Her fiancé did not show, so she decided to walk to the nearby Taco Burrito King. He testified that she said she noticed sprinklers in a nearby front lawn while walking, so she walked into the street to avoid getting wet. Officer Hernandez testified that Smith told him that as she passed defendant, who was sitting on the porch, defendant shouted “you black nigger bitch, how does it feel to be walking in an all white neighborhood?” Smith also told Hernandez that defendant told her that if he saw her in his neighborhood again, he would rape her and hang her from a tree. After this encounter, he testified that Smith told him that she then ran south and around the corner before calling 911. He also testified that Smith told him that defendant accosted her and she ran south to get away from him. He also testified that he listened to 911 tapes and could hear defendant asking “are you going to steal my car?”

¶ 10 Defendant testified Smith did not accurately relay the events of September 7, 2013. Defendant testified that he was sitting on the porch with his brother, listening to music from a neighboring block party, and drinking beer. Defendant testified that he saw Smith walking toward where his sister’s car was parked and then saw her looking into his sister’s car. He asked her why she was “nosing” around the vehicle. Defendant vehemently denied making any racial slurs or calling Smith any racial epithets. He testified that he did not run after Smith because he cannot run due to a previous back, neck, and hip injury that he had suffered 20 years prior. Furthermore, he testified that he never left the porch. He testified that after she identified herself as a nurse from the nearby hospital, he stated that he believed her and told her to go home. Defendant testified that he could see that she was African American but that it was low visibility due to the waning sunlight.

1-14-2033

¶ 11 On cross-examination, defendant testified that Smith told him that she was from Carbondale and he didn't believe her. He then asked her whether she was from Englewood. He acknowledged that African Americans live in the Englewood community. Defendant testified that he never threatened to kill, rape, or hang Smith, but merely told her to go home for fear that she was going to steal his sister's car. He further testified that Smith got belligerent and called the police, so he went back inside of his house.

¶ 12 After hearing all of the evidence, the court found defendant guilty of both counts and was sentenced to one year imprisonment. Defendant's motion for a new trial was denied. This appeal followed.

¶ 13 ANALYSIS

¶ 14 Defendant alleges that the State denied him the right to a fair trial when it improperly elicited prior consistent statements given by its sole occurrence witness, Katrina Smith. Defendant complains that the admission of these prior consistent statements bolstered Smith's credibility in a close case. Defendant acknowledges that he failed to preserve this issue for appeal by failing to object at trial but urges the court to consider it as plain error.

¶ 15 To preserve an issue for appeal, a defendant "must both contemporaneously object at trial and include the specific alleged error in a written post-trial motion. Failure to raise an issue in a written post-trial motion constitutes a waiver of the issue and it cannot be considered on appeal." *People v. Ramos*, 318 Ill. App. 3d 181 (2000). "By operation of Ill. Sup. Ct. R. 615, an appellate court may review any question not otherwise properly preserved if it believes that plain error affecting a substantial right may have occurred." *Id.* at 326.

1-14-2033

¶ 16 Plain error can occur in two situations. First, “where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence.” *People v. Herron*, 215 Ill. 2d 167, 169 (2005). Second, “where the error is so serious that the defendant was denied a substantial right, and thus a fair trial, a reviewing court may consider a forfeited error in order to preserve the integrity of the judicial process.” *Id.* However, before we embark on determining whether plain error occurred, we must first determine if there was error at all. *People v. Piatkowski*, 225 Ill. 2d 551, 554 (2007).

¶ 17 Generally, testimony of prior consistent statements is inadmissible because it unfairly bolsters the witness's credibility. *People v. Terry*, 312 Ill. App. 3d 984, 985 (2000); *Ramos*, 318 Ill. App. 3d at 187. Though it is noted that “people tend to believe that which is repeated most often, regardless of intrinsic merit, and repetition lends credibility to testimony that might not otherwise deserve it,” *People v. Johnson*, 2012 IL App (1st) 091730, “prior consistent statements are admissible to rebut a charge or an inference that the witness is motivated to testify falsely or that his testimony is of recent fabrication.” *People v. Williams*, 147 Ill. 2d 173, 227 (1991). Furthermore, “such evidence is admissible to show that he told the same story before the motive came into existence or before the time of the alleged fabrication.” *Id.* at 227. Additionally, “if the admission of the prior consistent statement, even if improper, does not implicate a substantial right and if the evidence is not closely balanced, when the error is not preserved, the court need not address it.” *Ramos*, 318 Ill. App. 3d at 187. Some courts have also held that “[p]rior consistent statements may not be admitted merely because a witness has been discredited.” *People v. Bobiek*, 271 Ill. App. 3d 239, 244 (1995); *People v. Johnson*, 2012 IL App (1st) 091730.

1-14-2033

¶ 18 According to defendant, defense counsel called Detective Hernandez as a witness "in part to establish that Smith said Diamond threatened to harm her only if he saw her in the neighborhood again." On direct examination, defense counsel asked general questions about how Hernandez became involved in this investigation. He asked Hernandez if he interviewed Smith and Hernandez responded that Smith gave him information about what happened that day. Defense counsel asked if Smith had told him that she had to walk out of the way of the sprinklers. Hernandez responded that Smith had told him that. Defense counsel then asked if Smith had told him about things that defendant said to her. Hernandez responded "Correct." Defense counsel then asked if Smith told him that defendant "threatened to do some things if he saw her back in the neighborhood." Hernandez responded "yes." Defense counsel asked Hernandez if Smith told him that defendant told Smith that if he saw her again in his neighborhood, that he would rape her and hang her from a tree. Hernandez replied, "Correct." Defense counsel then asked Hernandez if Smith told Hernandez that defendant threatened to kill her. Hernandez replied, "No. He did say, if I see you again, I will rape and hang you." Defense counsel then asked Hernandez if Smith told him anything about the defendant making statements about a car, whether Smith told him that defendant chased her and where she ran to and how the police became involved.

¶ 19 On cross-examination, the State asked Detective Hernandez about what Smith had told him about the incident, including: why she was walking on the street instead of the sidewalk, what defendant said to her the first time and what he said to her the second time, what Smith told defendant, what defendant told Smith he would do to her if he saw her again in the neighborhood and how the police became involved. In response to these questions, Detective Hernandez

1-14-2033

testified that Smith told him that defendant yelled, "[y]ou black nigger bitch, how does it feel to be walking in an all-white neighborhood" and "[n]igger bitch, you hear me, you must be from Englewood." Hernandez also testified that Smith told him that defendant yelled "[i]f I see you again in my neighborhood I'm going to rape you and hang you from a tree."

¶ 20 The cross-examination of Hernandez regarding his interview with Smith did not amount to the improper introduction of Smith's prior consistent statements. The State did not introduce a prior consistent statement made by Smith during Smith's testimony. It was actually defendant who bolstered Smith's testimony by introducing Hernandez's testimony that Smith told him that defendant told her that if defendant saw her in the neighborhood again he would rape her and hang her from a tree. During its questioning on cross-examination, the State was merely placing this particular statement in the context of the rest of the conversation that occurred between defendant and Smith which showed, contrary to the defendant's position, that some of the threats defendant made were immediate. The completeness doctrine allows that "if one party introduces part of an utterance or writing the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the jury." *People v. Williams*, 109 Ill. 2d 327, 334 (1985). Indeed,

"it is well established that where a conversation is related by a witness, the opposing party has a right to bring out all of the conversation on cross-examination. One cannot introduce a portion of a conversation and then bar the opposing party from bringing out the rest of that conversation. The doctrine of completeness permits a party to introduce the remainder of a conversation or writing in order to explain, qualify, or otherwise shed light on that portion of a statement introduced by an opponent so as to correctly convey

its true meaning to the trier of fact." (Internal citations omitted). *In re W.D.*, 194 Ill. App. 3d 686, 702-03 (1990).

¶ 21 Defense counsel made the strategic decision to call Hernandez to testify to the content of his interview with Smith. The fact that this decision did not bode well for defendant because it allowed the State to complete the conversation does not now allow defendant to challenge the result of his introduction of this statement on appeal. A defendant may not raise on appeal the error he invited in the trial court. *People v. Harvey*, 211 Ill. 2d 368, 386 (2004). As such, we find that no error occurred and plain error analysis is unnecessary.

¶ 22 We likewise reject defendant's ineffective assistance of counsel claim based on counsel's failure to object to the State's improper use of Smith's prior consistent statements. If the underlying claim has no merit, no prejudice has resulted to defendant, and his claim of ineffective assistance must fail. *People v. Pitsonbarger*, 205 Ill. 2d 444, 465 (2002).

¶ 23 **CONCLUSION**

¶ 24 Based on the foregoing, we affirm the judgment of the circuit court.

¶ 25 Affirmed.