2017 IL App (3d) 150317-U

Order filed November 13, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0317 Circuit No. 11-CF-497
RICHARD WEST,	)	The Honorable Paul L. Mangieri
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Holdridge and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not err in ruling that defendant testifying that he was trying to stay out of trouble in light of his parole hearing would open the door to the State cross-examining defendant in regard to defendant's prior disciplinary actions or infractions. (2) The prosecutor improperly bolstering the credibility of the State's witnesses based on their status as correctional officers, although improper, was not plain error. (3) The trial court did not improperly consider in aggravation allegations that defendant had been accused of 26 correctional staff assaults and 4 inmate assaults during his incarceration when sentencing defendant.

¶ 2 Defendant, Richard West, was convicted of the aggravated battery (720 ILCS 5/12-3.05(d)(4)(i) (West 2010)) of a correctional officer at the correctional facility where defendant had been imprisoned for over 40 years. After a jury found defendant guilty of aggravated battery of a correctional officer, defendant was sentenced to five years of imprisonment to be served consecutive to the sentence he was currently serving on his prior murder conviction. Defendant appeals his aggravated battery conviction, arguing that: (1) he is entitled to a new trial because he was prevented from putting on a portion of his defense due to the trial court's ruling that his potential testimony that he was trying to stay out of trouble in light of his upcoming parole hearing would open the door for the State to cross-examine defendant in regard to his prior disciplinary actions or infractions that had previously been ruled inadmissible in the defendant's motion *in limine*; (2) he is entitled to a new trial because during closing arguments the prosecutor improperly vouched for the credibility of the State's witnesses based on their status as correctional officers; and (3) he is entitled to a new sentencing hearing because the trial court improperly considered in aggravation that defendant had been accused of 26 correctional staff assaults and 4 inmate assaults during his incarceration, without the trial court having proper evidence of those assaults. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged with committing the aggravated battery of correctional officer Richard Cochran on July 31, 2011. The allegations stemmed from a confrontation between defendant and Cochran that took place at the correctional facility where defendant was serving a sentence for his conviction for a 1975 murder.

¶ 5 A. Motion *in Limine*

¶ 6 Prior to trial, defendant filed a motion *in limine* to bar evidence of any other crimes or bad acts allegedly committed by defendant from being introduced at trial, in particular evidence that defendant was "previously accused of assaulting correctional officers 26 times and four assaults against inmates." After hearing the parties' arguments, the trial court found that any probative value of evidence of the alleged assaults would be "greatly outweigh by the prejudicial impact" because the 26 staff assaults had no connection to Cochran and "almost completely would be in the arena of propensity evidence to show anybody charged with 26 assaults is more likely than not to have committed [the charged assault in this case]." The trial court indicated, "we don't allow that type of evidence."

¶ 7 B. Trial Evidence

¶ 8 Evidence at trial showed that on July 25, 2011, Cochran was working as a control officer in the foyer of the area where defendant resided inside the correctional facility. As a control officer, Cochran was responsible for letting inmates in and out of their cells. Defendant, as part of his inmate job, was responsible for cleaning the showers. To do so, defendant had to retrieve a hose, hose nozzle, and broom from the control room correctional officer.

¶ 9 On July 25, 2011, defendant requested the hose nozzle from Cochran. Both parties agree that Cochran did not give defendant the hose nozzle. Cochran testified that when defendant requested the hose nozzle, he told defendant that no one could be in the foyer area at that time because a nurse was tending to a sick inmate, which required privacy. Cochran testified that he did not threaten defendant or call defendant any names.

¶ 10 Another correctional officer, William Sephus, testified that on July 25, 2011, defendant had misspoke and asked Cochran for the hose, instead of the hose nozzle, so Cochran refused to give defendant the nozzle and called defendant stupid. This led to an argument between

defendant and Cochran, and Cochran ordered defendant to return to lock up in his cell for the rest of the day. According to Sephus, Cochran never told defendant that inmates had to stay out of the foyer because a nurse was there tending to a sick inmate.

¶ 11 Defendant testified that when he asked Cochran for the shower equipment on July 25, 2011, Cochran said he did not know where the nozzle or shower brush were, so defendant went back to his unit. Defendant saw Sephus and relayed what happened. After Sephus spoke with Cochran, defendant again requested the equipment from Cochran. Defendant testified that Cochran did not call him stupid but had called him "a bitch" and threatened to come out of the control center and kick defendant's ass. Defendant returned to his unit. Defendant subsequently filed a grievance against Cochran for threatening him and for the name calling.

¶ 12 A week later, on the morning of July 31, 2011, the correctional officers were lining the inmates up to take them out to the yard. Cochran testified that defendant scowled at him, and Cochran asked defendant what his problem was. Defendant responded, "You, motherfucker." Cochran followed defendant outside, asked for defendant's identification card, and escorted him back inside. According to Cochran, he told defendant that he was going to call a supervisor, and defendant said, "[t]his is bullshit." Cochran again asked defendant for his identification card, and defendant struck Cochran twice in the face with a closed fist. Cochran denied reaching for defendant or threatening defendant during the encounter. Cochran filed an incident report after the encounter, indicating that: defendant came off his wing and was "staring down" Cochran; Cochran asked defendant what was wrong, and defendant said "you, motherfucker"; Cochran went outside and ordered defendant back inside so defendant's problem did not escalate out on the yard, but defendant refused; after another direct order to defendant to go inside, defendant

complied and said, “this is bullshit”; once inside, Cochran asked defendant for his identification card and, at that time, defendant struck Cochran “in the face with a closed fist.”

¶ 13 Sephus testified that on July 31, 2011, he noticed Cochran follow defendant outside and bring him back inside. Cochran asked defendant for his identification card. Defendant complied with Cochran’s request, produced his identification card, and asked what the problem was what this was about. Cochran told defendant, “ ‘you’re done,’ ” and then defendant “hit” Cochran a couple of times. Sephus grabbed defendant and put him on his cell wing. Sephus did not see Cochran make any physical contact with defendant or hear him make any threats to defendant. Sephus testified that his attention had been distracted because he was performing his job of checking inmates in and out of the yard. Sephus did observe defendant first slap Cochran and then punch him.

¶ 14 Lieutenant Craig Jones testified that on July 31, 2011, he was in the yard and observed defendant come outside and Cochran come out behind defendant. Cochran instructed defendant to go back inside. Defendant complied with Cochran’s request. Jones did not observe defendant violate any rules, and Cochran did not tell defendant that he was going to call a supervisor. When Jones followed defendant and Cochran back inside, he saw defendant hit Cochran.

¶ 15 Defendant testified that on his way out to the yard on July 31, 2011. Cochran asked him if he had a problem. Defendant testified that he ignored Cochran and walked out to the yard. Cochran followed defendant out to the yard and requested his identification card. When defendant asked Cochran why Cochran was asking for his identification card when defendant had not done anything, Cochran responded, “because I’m ordering you to give me your ID.” Cochran and defendant walked back inside. Once inside the foyer, Cochran again asked defendant for his identification card. As defendant was handing Cochran his identification card,

defendant complained that Cochran was retaliating against him for filing the grievance against Cochran. Cochran responded by saying, "you like to write" then you can "write some more," as he tried to grab defendant near the collar. Defendant pushed Cochran's hand away. Sephus grabbed defendant and escorted him back to his wing. Defendant testified that he never punched Cochran and never threatened Cochran in any way. Defendant only pushed Cochran's hand away when Cochran went to grab him. According to defendant, Cochran did not hit him but "was attempting to grab" him.

¶ 16 C. Defense's "Open the Door" Inquiry

¶ 17 Outside the presence of the jury, the trial court indicated that a matter had been raised by defendant's attorney in a sidebar during defendant's testimony and should be made a part of the record. The trial court indicated that during the sidebar, defendant's attorney indicated to the trial court that there was a question that he was contemplating asking defendant and wanted to know whether the question would have an impact on the trial court's previous ruling on defendant's motion *in limine*. The trial court instructed defendant's attorney to make the record as to the question he was going to ask defendant. Defendant's attorney stated as follows:

> "Judge, my—my inquiry to the Court was that I wished to ask [defendant] the question of essentially he was just trying to avoid trouble to get to his parole board hearing and I inquired whether or not you believed that would open the door to his conduct—prior conduct that you had previously ruled was inadmissible."

¶ 18 In response, the State argued that if defendant testified that he was "not a trouble maker" and was just trying to get to the point of his parole hearing, then that testimony would open the door "to prior acts of aggression and discipline that he had been involved in that the Court

previously ruled inadmissible." The trial court indicated that those were the arguments that were heard in the sidebar and the court had indicated that "it would agree with the State and it would be of the mind that that [*sic*] question was asked that that would then open the defendant up for cross-examination concerning earlier disciplinary actions or infractions that he may have incurred when [*sic*] were previously ruled inadmissible by this Court in the defendant's motion *in limine*."

¶ 19 D. Closing Arguments

¶ 20 Prior to closing arguments, the court instructed the jury that the parties' closing arguments were not evidence and should not be considered as evidence. The prosecutor argued:

> "One of the other instructions you're going to be given by the Court in this case is that evidence of a defendant's previous conviction of an offense may be considered by you only as it may affect his believability as a witness and it must not be considered as evidence of his guilt. We're not asking you to find him guilty simply because he's a convicted felon. What we are asking is that you use the evidence of prior felony convictions to weigh his credibility. The testimony of Major Steele, Officer Cochran, retired Officer Sephus and Lieutenant Jones, that's credible testimony from the People's perspective, ladies and gentlemen. These are officers with years and years and years of experience. Years. 15 years for Lieutenant Jones, 25 years for Officer Sephus, approximately 14 years for Officer Cochran and almost 30 years for Major Steele. All of these officers have been trained. They are continually trained every year and they have done this job for years at Hill Correctional Center. Those are the types of things you can take into consideration in weighing credibility, ladies and gentlemen."

¶ 21 In response, defendant's attorney argued that Cochran's testimony was not truthful and Sephus's testimony corroborated defendant's testimony of Cochran's pattern of harassment toward defendant. Defendant's attorney argued that defendant acted reasonably in self-defense when Cochran started to grab him.

¶ 22 The jury found defendant guilty of aggravated battery. Defendant filed a motion for new trial, arguing, in part, that the trial court erred in ruling that if defendant had testified about trying to stay out of trouble, the door would be opened to impeachment evidence of his prior alleged assaults against staff and inmates during his incarceration. The trial court denied defendant's motion for new trial.

¶ 23 E. Sentencing

¶ 24 At the sentencing hearing, the trial court indicated that it considered the evidence that was received during trial, information in the Presentence Investigation (PSI) report, and evidence offered by the parties in aggravation and mitigation, as well as Cochran's victim impact statement. The trial court further indicated as follows:

> "The Court can rely upon a number of things in arriving at a sentence. The Court can draw and rely upon some of the information contained in the victim impact statement. Mr. Cochran indicates that he sustained a broken nose. Is that information different or at variance from the evidence that was presented at the time of trial? To a certain extent, it was. *** Is that to say that the Court is saying Officer Cochran is lying? I'm not saying that. I'm just saying that there's evidence. It's his direct testimony. Is it the best evidence? I guess the best evidence would be the radiologist who took a[n] x-ray and said this is consistent with a broken nose, which would be consistent *** with being struck in the face.

Does it mean it did not happen? No. *** It's up to this court to give that evidence the appropriate weight in arriving at a particular sentence.

*** I can rely upon the statement contained in the Pre-Sentence Investigation that this Defendant has not previously been placed on probation. So he is eligible for probation in this particular case. I can rely upon that.

I can also rely upon the information contained in the Pre-Sentence Investigation that indicates that [defendant]'s prior criminal history is one offense. It's a big offense. It's an offense for murder for which [he did] receive an indeterminate sentence of twenty-five to a hundred years.

Can I take into consideration that according to records from the Offender Tracking System of the Illinois Department of Corrections that the Defendant has a history of twenty-six assaults against staff and four assaults against fellow inmates? I can read that. What does it mean to me? It means that he's in the system for twenty-six assaults against staff and four assaults against fellow inmates. Do I know the nature and extent of those? Do I know the details? Do I know the timeliness of those? I don't."

* * *

*** Hill Correctional Center is a medium security facility as compared to, say, Stateville or some of the more maximum facilities. And I certainly can appreciate the argument that [defendant is] setting forth, that if I was such a threat, why would I be at a minimum as compared to a maximum? I understand that, and I think that's a fair argument.

So I've taken all of those factors into consideration.

> Having taken all those factors in consideration, I also have to first look at those statutory factors in aggravation and mitigation in arriving at an appropriate sentence."

¶ 25 The trial court then addressed the relevant factors in aggravation. The trial court found in aggravation that the sentence being imposed was necessary to deter others from committing the same type of offense. The trial court also found in aggravation that defendant had a prior criminal history of "one prior conviction for the offense of murder" that had taken place in 1975. The trial court further found in aggravation that defendant's conduct caused or threatened serious physical harm. The trial court indicated that it did not find the grounds in mitigation argued by defendant's attorney to be present. The trial court sentenced the defendant to five years of imprisonment, to be served consecutive to his current murder sentence.

¶ 26 Defendant filed a motion for the trial court to reconsider its sentence. In the motion to reconsider, defendant argued that: (1) the trial court erred when it considered the victim's impact statement when the statement had not been provided in advance of the sentencing hearing; (2) the sentence was excessive considering the nature of the crime and the characteristics of the defendant; and (3) "[t]he court failed to find mitigating factors present in the case."

¶ 27 At the hearing on the motion to reconsider, the trial court stated:

> "I've also had the opportunity to have reflected upon the evidence that was received throughout the course of the trial and also the evidence that was presented by the parties in the form of aggravation and extenuation and mitigation.
>
> * * *

> The sentence that was imposed in this case was a sentence of five years to the Department of Corrections, which is in the midterm of the range for a Class 2 felony. A Class 2 felony being between three years and seven years.
>
> The Court primarily focused upon the criminal history as an aggravating factor, and also there was evidence concerning previous uncharged misconduct instances. While that's not a controlling factor, the nature and extent of the offense itself, plus the—again, the actual conviction history of [defendant], which was very small but a large offense, was taken into consideration."

¶ 28 In addressing whether defendant's sentence was excessive considering the nature of the crime and the characteristics of the defendant, the trial court found that the sentence was not cruel and unusual concerning the nature of the crime within a correctional facility and that the characteristics of defendant, "quite frankly, did not play all that much into the sentence" in that "[t]he only clear evidence that th[e] Court had before it concerning criminal conduct by [defendant] was the jury's verdict." As to defendant's argument that the trial court failed to find mitigating factors, the trial court stated that it had reviewed the purported mitigating factors at the time of the original sentencing and had stated on the record why it found the factors it did in aggravation and why it did not find any factors in mitigation and, therefore, "the Court will stand on its previous findings." The trial court denied defendant's motion to reconsider.

¶ 29 Defendant appealed.

¶ 30 ANALYSIS

¶ 31 I. Defendant's Alleged Prior Assaults

¶ 32 a. Defendant's Testimony Would Open the Door

¶ 33 Defendant argues that he was prevented from putting on a portion of his defense due to the trial court's erroneous ruling that if he testified that he was trying to stay out of trouble to get to a parole hearing, then he would be opening the door for the State to cross-examine him concerning earlier disciplinary actions or infractions that he may have incurred when evidence of his 26 alleged assaults of correctional center staff and 4 alleged assaults of other inmates had previously been ruled inadmissible in his motion *in limine*. The State argues that defendant's testimony regarding him attempting to avoid trouble would have misled the jury about his character and, therefore, the trial court did not err in ruling that his testimony would have opened the door for the State to rebut defendant's testimony with character evidence of prior assaults.

¶ 34 A trial court's decision regarding the admissibility of evidence is reviewed for an abuse of discretion. *People v. Sanders*, 368 Ill. App. 3d 533, 539 (2006). Although evidentiary rulings are typically reviewed for an abuse of discretion, whether the trial court correctly ruled that, as a matter of law, defendant opened the door to the admission of character evidence or prior bad acts is a purely legal issue that is reviewed *de novo. People v. Villa*, 2011 IL 110777, ¶ 44.

¶ 35 Character evidence offered by the prosecution to show the accused's propensity for violence is generally inadmissible because the danger of unfair prejudice to defendant of being portrayed as a bad person substantially outweighs the probative value of the evidence. *People v. Randle*, 147 Ill. App. 3d 621, 625 (1984); Ill. R. Evid. 404(a) (eff. Jan. 1, 2011) (generally, evidence of person's character or trait of character is not admissible for the purpose of proving an action in conformity with that character on a particular occasion). However, such character evidence may be introduced by the prosecution if the defendant first opens the door by introducing evidence of good character to show he is a quiet and peaceful person. *Randle*, 147 Ill. App. 3d at 625*;* Ill. R. Evid. 404(a)(1) (eff. Jan. 1, 2011) (evidence of a pertinent trait of

character offered by either the accused or the prosecution is admissible in order to rebut character evidence introduced by the other party). In the interest of justice, the prosecution must be allowed to rebut an accused's portrayal of himself as peaceful. *People v. Devine*, 199 Ill. App. 3d 1032, 1037 (1990). Thus, the pivotal question on review is whether the defendant was attempting to mislead the jury by his testimony. *People v. Harris*, 231 Ill. 2d 582, 590 (2008).

¶ 36 In *Harris*, when defendant was asked on direct examination whether he had committed the crimes in question, he testified: "No sir. There is no possible way that I could have committed this crime. I mean people who commit robberies, things like that, have a motive, have a reason for doing things like that. But I am a professional man. I work. I go to college. I went to Robert Morris, ICC, Midstate. I mean, it's no reason—I mean I live a productive life. I live just like any of the 12 jurors, like you live. *I don't commit crimes.*" (Emphasis added.) *Harris*, 231 Ill. 2d at 584-85. The trial court in *Harris* allowed the State to impeach defendant with evidence of his two most recent juvenile adjudications. On appeal in *Harris*, the Illinois Supreme Court determined the "pivotal question" on review was whether the defendant was attempting to mislead the jury about his criminal background when he testified, "I don't commit crimes." *Id.* at 590. The Illinois Supreme Court stated:

> "If he was [attempting to mislead the jury with his testimony], then he 'opened the door' and the trial court was well within its discretion to allow the admission of defendant's prior adjudications for purposes of impeachment. If he was not, then defendant's testimony was not a proper basis for the admission of that evidence." *Id.*

¶ 37 The defendant in *Harris* argued that his answer was merely a present tense statement of how he conducts his life and he did not intend to misstate or falsify his juvenile record. The

Illinois Supreme Court concluded that even if true, "it [was] just as reasonable to construe defendant's answer as a comprehensive denial of *ever* having engaged in criminal activity, which amounts to an outright lie." (Emphasis in original.) *Id*. at 591. Thus, the Illinois Supreme Court held the trial court did not err by permitting the State to impeach the defendant with two prior juvenile adjudications. *Id.*

¶ 38 Here, defendant's proposed testimony was that at the time of his encounter with Cochran he was trying to "avoid trouble" to get to his parole hearing. The trial court ruled that if defendant so testified, then the door would be opened for the State to cross-examine defendant about "earlier disciplinary actions or infractions that [defendant] may have incurred." We acknowledge that defendant's proposed testimony may have, in fact, been to provide evidence of his motive to behave well at the time of the confrontation. Nonetheless, defendant's testimony of his motive to behave well could have misled the jury because it could have been reasonable for jurors to interpret defendant's testimony as indicating that he was a well-behaved and non-confrontational inmate. See *id.* at 590 (the pivotal question on review in determining whether to allow impeachment evidence of a defendant's character is whether the defendant was attempting to mislead the jury by his testimony). Thus, the trial court did not err in ruling that defendant's testimony that he was trying to "avoid trouble to get to his parole hearing" would open the door to him being cross-examined about prior disciplinary actions or infractions.

¶ 39 b. Invited Error

¶ 40 Defendant contends that he was not able to put on his defense because he refrained from testifying after the trial court indicated defendant's proposed testimony would open the door to evidence of his prior disciplinary infractions on cross-examination. First, we do not agree with defendant's contention that the trial court had ruled that "all the prior alleged assaults through

[defendant's] multi-decade term as an inmate could come in[to] [evidence]." The trial court simply ruled that if defendant testified that he was trying to "avoid trouble," then defendant could be cross-examined about earlier disciplinary infractions. In addressing defendant's earlier motion *in limine*, the trial court had ruled that defendant's prior infractions were inadmissible because that evidence was improper evidence of defendant's propensity to commit the alleged aggravated battery at hand. After the sidebar with the attorneys during defendant's testimony, the trial court ruled that if defendant was to testify that he was trying to "avoid trouble" then the door would be opened for the State to cross-examine him about earlier disciplinary infractions. At no point, did the trial court indicate that *all prior alleged assaults* were, in fact, admissible as defendant contends.

¶ 41 Additionally, even if the court had made such a broad ruling that all of defendant's prior alleged assaults were admissible to impeach defendant on cross-examination, defendant forfeited the issue by failing to specifically object to the admission of that particular evidence, and by inviting or acquiescing in its admission, regardless of whether it was improper. *People v. Daniels*, 164 Ill. App. 3d 1055, 1078 (1987) (if a party procures, invites, or acquiesces in the admission of improper evidence, that party cannot claim the admission of that evidence is error). Defendant invited the error by failing to present an adequate offer of proof as to the nature and substance of his anticipated testimony in order to obtain a more specific ruling as to which, if any, of his alleged prior assaults would be allowed into evidence and by acquiescing in the ruling by failing to object to the potential admission of all of his alleged prior assaults. *Cf. People v. Way*, 2017 IL 120023, ¶ 33 (when a defendant asserts that he has not been given the opportunity to present his case because the trial court improperly barred evidence, he must provide an adequate offer of proof of what the excluded evidence would have entailed to notify the trial

court, opposing counsel, and a reviewing court of the nature and substance of the evidence). The invited error doctrine prohibits a party from complaining of an error on appeal, which that party induced the court to make or to which that party consented. *Oldenstedt v. Marshall Erdman and Associates, Inc.*, 381 Ill. App. 3d 1, 14 (2008). We, therefore, need not address the issue of whether the trial court erred in ruling that the State could present evidence of defendant's "history of having been accused 26 times of assaulting correctional center staff and 4 times of assaulting other inmates," because the trial court did not make any such ruling and, even if it had, defendant invited any alleged error.

¶ 42 However, even if defendant had not forfeited his argument and we were to accept defendant's argument and conclude that the trial court had, in fact, erroneously ruled that all of defendant's alleged prior assaults were admissible and the ruling had a chilling effect on defendant's right to exercise his constitutional right to testify on his own behalf, any such error would have been harmless. See *People v. Easley*, 148 Ill. 2d 281, 321 (1992) (while a trial court's order that has the effect of impermissibly precluding a defendant from testifying on his own behalf constitutes a constitutional error, the error does not inevitably require that defendant be granted a new trial where the error is harmless beyond a reasonable doubt). In this case, defendant did, in fact, testify on his own behalf. Defendant's only claim is that he had refrained from further testifying that he was trying to stay out of trouble after what he claims was the trial court's ruling that his testimony would open the door to his alleged prior assaults. The evidence of defendant's guilt in this case was overwhelming where two eyewitnesses and the victim (Cochran) had testified that defendant struck Cochran and defendant's claim of self-defense was not supported by the evidence. Therefore, even if it were error for the trial court to rule that defendant's proposed testimony would have opened the door for the State to introduce all of

defendant's alleged prior assaults when cross-examining defendant, any such error in this case would have been harmless.

¶ 43 II. Prosecutor's Comments in Closing Argument

¶ 44 Defendant also argues that he is entitled to a new trial because during closing arguments, the prosecutor referred to the credibility of the State's witnesses based on their status as correctional officers. Defendant acknowledges that he failed to preserve the issue in the trial court but contends that the issue can be reviewed under the plain error doctrine. Defendant also claims that his counsel's failure to object to the improper comments constituted ineffective assistance of counsel.

¶ 45 A police officer's testimony is to be judged the same as any other witness, with no presumption that a police officer's testimony is more credible than other witnesses' testimony. *People v. Rogers*, 172 Ill. App. 3d 471, 476 (1988). A prosecutor may not argue that a witness is more credible because of his status as a police officer. *People v. Fields*, 258 Ill. App. 3d 912, 921 (1994). Also, it is improper for a prosecutor to express any personal belief in the credibility of witnesses. *Rogers*, 172 Ill. App. 3d at 476.

¶ 46 Here, viewing the prosecutor's comments in the context of the closing arguments, the prosecutor argued that defendant was not credible because he was a felon, and the correctional officers were credible because they were trained correctional officers. The prosecutor's comments were improper. However, the defendant failed to object to the improper comments in the trial court. The plain-error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such a

magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Adams*, 2012 IL 111168, ¶ 21.

¶ 47 In this case, the evidence was not closely balanced as to defendant committing an aggravated battery against Cochran. Two eyewitnesses and Cochran testified that defendant struck Cochran, and the evidence showed defendant knew Cochran was a correctional officer engaged in the performance of his official duties. See 720 ILCS 5/12-3.05(d)(4)(i) (West 2010) (a person commits aggravated battery when, in committing a battery, other than by discharge of a firearm, he or she knows the individual battered to be a correctional institution employee performing his or her official duties). Therefore, the prosecutor's comments did not severely threaten to tip the scales of justice against defendant in order to satisfy the closely balanced prong to support a plain error review. Additionally, the prosecutor's comments do not amount to plain error under the fundamental fairness prong for a plain error review because the error was not of such a magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process. See *Adams*, 2012 IL 111168, ¶ 24 (prosecutor's improper comments in closing arguments that police officers' testimony should be believed because the officers would not risk their credibility, jobs, or freedom by lying on the witness stand did not amount to plain error under the fundamental fairness prong).

¶ 48 Furthermore, while defendant's counsel failed to object to the improper comments, this failure did not constitute ineffective assistance of counsel. To prove ineffective assistance of counsel, a defendant must prove that: (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced defendant in that but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S.

668, 694 (1984). Three witnesses testified that defendant struck correctional officer Cochran, and defendant testified that he slap Cochran's hand away. Even if counsel objected to the prosecutor's improper comments, the outcome of the trial would not have changed.

¶ 49 III. Sentencing

¶ 50 Defendant argues that he is entitled to a new sentencing hearing because the trial court considered the improper factors in aggravation of the "bare allegations or accusation[s]" of 26 prior correctional staff assaults and 4 inmate assaults during his incarceration, which was based on information obtained from defendant's PSI report. Defendant acknowledges that he did not preserve this issue for review because he did not raise it in his posttrial motion. *People v. Blair*, 2015 IL App (4th) 130307, ¶ 38 (failure to raise an issue in a posttrial motion results in a forfeiture of that issue). However, defendant requests that we review this issue under a plain error review. The first step in a plain error review is to determine whether there was error. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 51 The evidence rules are not as rigidly applied during a sentencing hearing as at trial and although evidence of past criminal conduct is often inadmissible at trial, it is relevant information at sentencing. *People v. Jackson*, 149 Ill. 2d 540, 547-48 (1992). If the State wishes to present evidence of an arrest not resulting in a conviction in aggravation at sentencing, the State must provide competent evidence of the underlying facts of that arrest. *Id.* at 548. *People v. Gains*, 21 Ill. App. 3d 839, 846-48 (1974). Such evidence of other criminal conduct should be presented by witnesses, who can be confronted and cross-examined, rather than by hearsay allegations in the presentence report. *Jackson*, 149 Ill. 2d at 548.

¶ 52 In this case, the information regarding defendant's alleged prior assaults was only contained in the PSI report referencing the Illinois Department of Corrections entries for

defendant of 26 prior correctional staff assaults and 4 inmate assaults. However, the record shows that the trial court did not consider the reference in the PSI report to the alleged assaults as a factor in aggravation. While the trial court acknowledged that the information about the 30 alleged assaults was contained in the PSI report, it specifically stated there was no information provided as to the nature and extent of those incidents or the timeliness of those incidents. In setting forth the factors it had weighed in aggravation, the trial court referred to defendant's murder conviction as part of defendant's criminal history but did not refer to the alleged assaults. At the hearing on defendant's motion to reconsider the sentence, the trial court specifically indicated that it had primarily focused upon the criminal history as an aggravating factor. The trial court noted that there "was evidence" concerning previous uncharged misconduct instances but did not indicate that it had relied on the uncharged misconduct as an aggravating factor. Instead, the trial court reiterated that it had stated on the record at the sentencing hearing why it found the factors it did in aggravation. Our review of the record shows that the trial court did not consider the alleged assaults in aggravation when sentencing defendant. Consequently, defendant is not entitled to a new sentencing hearing.

¶ 53 CONCLUSION

¶ 54 The judgment of the circuit court of Knox County is affirmed.

¶ 55 Affirmed.