2017 IL App (1st) 162349-U

No. 1-16-2349

Third Division
September 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 16 MC 6001099
v.	)	
RAYMOND HOUGH,	)	Honorable John D. Turner, Judge, presiding.
Defendant-Appellant.	)	

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for reckless conduct is affirmed where evidence was sufficient to prove his guilt beyond a reasonable doubt, his due process rights were not infringed, the prosecutor's statements did not amount to reversible error, and defendant failed to overcome the presumption of judicial impartiality.

¶ 2 Following a bench trial, defendant, Raymond Hough, was convicted of misdemeanor reckless conduct, assessed a $200 fine, and sentenced to one year of supervision. On appeal, defendant argues that the State failed to prove him guilty beyond a reasonable doubt.

Alternatively, he contends that he was denied his due process rights and that prosecutorial misconduct and judicial bias denied him a fair trial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with reckless conduct for endangering the bodily safety of Rachel Cole after he drove his car in reverse towards her. Defendant represented himself and, after addressing pretrial matters, requested a continuance to appear in another courtroom. The judge responded, "No, it's game time. It's quarter to eleven. This matter was set at nine o'clock. *** Are you ready to proceed today or not?" Defendant stated he was ready.

¶ 5 During opening statements, the State objected when defendant mentioned an insurance claim filed by Rachel. The court ruled that the claim was irrelevant and instructed defendant to move on. Defendant resumed his opening statement, repeating facts he had previously mentioned. The court interrupted with, "You stated that. Anything else?" Defendant continued, again repeating himself. Twice more, the court asked if defendant had anything new to cover before defendant concluded his opening.

¶ 6 The following evidence was adduced at trial. Rachel testified that on March 4, 2016, she and her husband, Maurice Cole, were leaving a shopping center when they noticed a red SUV parked "real close" to their car. The center's parking lot had four rows of parking spaces with driving lanes wide enough for two-way traffic. Specifically, there was one lane of parking immediately in front of the shopping center, a two-lane strip of parking, where the cars parked facing each other, and one additional lane of parking. Rachel had parked her car in the second row directly in front of the store she had visited, with the front end of her car facing away from the store. As the Coles walked to the second row, Rachel spotted a long, white scrape on her car. Rachel called the police and Maurice took pictures of the parked

cars.[1] Defendant exited a store and approached the red SUV. Rachel stood directly behind the red SUV and, believing that defendant was its owner, told him that he had hit her car. Defendant denied any involvement and Rachel told him she had called the police. Defendant responded, "I'm not waiting for any cops," and got into the SUV. As he started his car, Rachel was still standing directly behind the defendant's car, within arm's length, "where the bumper sort of meets and turns," such that she could touch defendant's vehicle. She "kind of came to the side" to tell him he could not leave the scene of an accident. His window was partially open, but he did not respond. Rachel repeated louder that the police were coming.

¶ 7 Defendant began reversing out of the space and Rachel shouted, "Sir, I'm pregnant. I don't—I don't think you want to do this right now. Are you really backing up into me?" Defendant continued reversing prompting Rachel to step back "all the way until [she] was nearly touching the row of cars behind [her]." After completely backing out of the parking space, defendant pulled forward and drove away. The police officers arrived and stopped defendant before he could exit the parking lot.

¶ 8 Rachel conceded that defendant's car was backing up "very slowly" and did not strike her. However, she recalled that her husband pulled her from the path of defendant's car. She stated that had she remained in her original location, defendant's car would have hit her. She believed that defendant could have reversed from his parking space to head in the opposite direction, away from her. She denied hitting defendant's car with her keys or hands. As defendant drove away, Rachel took out her cell phone to take additional photos of his car.[2]

[1] Although not included as part of the record on appeal, Rachel described and the State admitted into evidence several photographs, depicting defendant's license plate, how the two cars were parked closely to each other in the parking lot, damage to Rachel's car, as well as damage to defendant's vehicle.
[2] See fn1.

¶ 9 During cross-examination, defendant attempted to raise the issue of insurance again drawing an objection from the State which the court sustained. The court ruled that insurance was outside the scope of direct examination and commented that Rachel's testimony about the alleged damage was appropriate only to explain her state of mind. In his argument for the insurance claim's relevance, defendant stated that Rachel was banging on his car. The court interrupted to point out this was only defendant's assertion and was contrary to Rachel's testimony. Defendant continued his cross-examination and asked if Rachel had received any information about the damage to her car. The State objected again and the trial court repeated its earlier ruling, adding that whether Rachel was right or wrong about the damage, the insurance claim was irrelevant. Defendant asked whether Rachel had her car repaired and the court stated, before an objection was raised, "Sustained. Don't try that again." The court also interrupted defendant three other times during cross-examination to clarify an exhibit defendant referenced; to clarify if defendant was referring to himself in the third person; and to reprimand the witness and defendant for "haggling" over the truth.

¶ 10 Next, Linda Arechiga testified that she did not personally know the Coles, but worked in the store they had visited earlier that day. According to Arechiga, Rachel returned to the store and related that her car had been hit. After Rachel left, Arechiga looked out the store window at the parking lot and saw defendant exit another store and approach the Coles. Rachel appeared to speak to defendant and Arechiga saw defendant shaking his head. Arechiga then heard Rachel loudly state that the police were on the way. Defendant got into his car which was parked at an angle. Rachel stood behind the car on the driver's side. As defendant drove his car, Arechiga saw Rachel back away in order to avoid being hit. Arechiga heard someone shouting, "There is a person behind you. There is a human behind you. You could hit her."

Arechiga called 9-1-1 because it looked like defendant would not stop his car and she was concerned for Rachel's safety. Arechiga also saw the front end of defendant's car hit the back quarter panel of Rachel's car as he reversed out of the parking space. On cross-examination, Arechiga stated that she did not see defendant's car make contact with Rachel at any time. She could not see Rachel's hands and did not see Rachel "banging on" the car. On redirect, Arechiga testified that there was room for defendant to have reversed away from Rachel to exit the parking lot in the opposite direction than the direction he chose. Defendant's request for re-cross was denied.

¶ 11 Officer Ramirez testified that he responded to the call about a private property accident and learned that one of the parties involved was attempting to leave. He arrived at the shopping center and pulled defendant over. When he requested defendant's license and insurance, defendant stated, "I didn't hit that woman. I don't have to stop." Ramirez requested defendant remain in his car so Ramirez could take Rachel's statement. Defendant complied and a second officer came and stood by the SUV. Ramirez further testified that he observed damage on each of the vehicles. Rachel's car had damage on the rear left bumper and defendant's car had damage on the right rear fender.

¶ 12 Following denial of his motion for directed verdict, defendant asked the court why testimony about damages was allowed in the State's case. The court reiterated that the alleged damage was relevant to Rachel's state of mind but defendant's questions about repairs and insurance claims were irrelevant to the criminal charge. Defendant responded with a summary of other witnesses' testimonies and the State objected. The court then asked defendant what he intended to do next. Defendant replied, "We will call the defendant, Raymond Hough." The court commented in response, "Oh, I got to see this."

¶ 13 Defendant testified that he arrived at the shopping center and parked between two cars. He went into a restaurant for ten minutes. Upon returning to his car, the Coles approached him and claimed that their car had been damaged. Rachel then admitted that she neither saw defendant hit her car nor did she have any witnesses claiming that defendant was responsible. Defendant got in his car and started it. Rachel began shouting at him, "You are not going anywhere. The police are on their way." Defendant responded, "Take my license and information and have the police contact me at home."

¶ 14 Defendant further testified there was never any danger of striking Rachel with his car. Rachel stood about two yards behind his car, leaving enough room for him to back out of the parking space; he monitored Rachel's position using his car's reverse camera, his rear-view mirror, and by turning his head. Before he could leave the parking lot, police officers arrived and ticketed him for reckless conduct. Defendant attempted to testify about Rachel's insurance claim, again prompting an objection from the State that the court sustained. During cross-examination, defendant stated that he had not reversed in Rachel's direction, but that she "was directing herself behind [his] car." The State attempted to ask defendant about the parking lot and the position of his car. Defendant repeatedly stated he did not understand the questions and responded with vague statements. The court admonished defendant, reminding him that on cross-examination leading questions often require a "yes or no" answer rather than a narrative response. After defendant stated he could not say anything other than the fact that his car was parked in a legal spot, the State ended its cross-examination. Defendant called no additional witnesses.

¶ 15 The court found defendant guilty of reckless conduct and commented that it did not matter whether there was damage to the car, whether defendant was allowed to leave, or

whether Rachel voluntarily stood behind defendant's car. The issue before the trial court was whether "the [defendant], in leaving [the parking lot], place[d] another person at risk." The court further commented that a "simple example" of reckless conduct is when a defendant who knows that a minor is standing close to his or her vehicle, nevertheless proceeds to take action that could or does cause injury to the minor.

¶ 16 Defendant filed a post-trial motion seeking reconsideration or new trial. Attached to the motion was a copy of a letter addressed to "Rachel Krakowsky."[3] The letter denied payment for any claim of loss on March 4, 2016, because defendant's insurance company investigated and found damage to Rachel's car, but no correlating damage to defendant's car. The trial court denied defendant's post-trial motions.

¶ 17 II. ANALYSIS

¶ 18 A. Sufficiency of the Evidence

¶ 19 Defendant contends that the State failed to prove him guilty beyond a reasonable doubt. He challenges the State's evidence that there was substantial and unjustifiable risk to Rachel's safety and that he grossly deviated from the reasonable standard of care. In reviewing a challenge to the sufficiency of the evidence we determine 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). In our review, we are mindful that 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 not the function of the reviewing court to retry the defendant or substitute its judgment for that of the

[3] It is unclear from the record why Krakowsky was used as opposed to Cole.

trier of fact. *People v. Collins,* 214 Ill. 2d 206, 217 (2005). We will reverse a conviction only where the evidence is so unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Campbell,* 147 Ill. 2d 363, 374-75 (1992).

¶ 20 Reckless conduct occurs when an individual recklessly performs an act that endangers the safety of another person. 720 ILCS 5/12-5(a) (West 2016). An individual acts recklessly when that individual consciously disregards a substantial and unjustifiable risk that a result will follow, and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in that same situation. 720 ILCS 5/4-6 (West 2016). Another way of describing recklessness is where a defendant intentionally or knowingly performs the offending act with conscious indifference to the consequences of his intentional acts, even without intending to accomplish a particular result. *People v. Fornear*, 283 Ill. App. 3d 171 (1996) (aff'd in part, rev'd in part on other grounds, 176 Ill. 2d 523 (1997)). It does not matter whether the offending act was lawful or unlawful. 720 ILCS 5/12-5 (West 2016). The mental state of recklessness can be inferred from all of the facts and circumstances in the record. *People v. Ford,* 2016 IL App (3d) 130650, ¶ 21 (citing *People v. Gosse*, 119 Ill. App. 3d 733, 738-739 (1983)).

¶ 21 In cases involving motor vehicles, recklessness[4] may be established by the physical condition of the driver, his failure to keep a proper lookout, or his manner of operating the vehicle. See *People v. Mikyska*, 179 Ill. App. 3d 795, 801 (1989); *People v. Gosse*, 119 Ill. App. 3d 733, 739 (1983). In the instant case, there are no allegations that defendant failed to keep a proper lookout or that he was intoxicated or impaired in any manner. The chief

[4] The following cited cases discuss recklessness in reference to charges of reckless conduct or reckless homicide which are defined in separate sections of the Criminal Code, 720 ILCS 5/12-5; 9-3 (West 2016). However, both sections of the Code incorporate the same standard for determining recklessness, 720 ILCS 5/4-6 (West 2016), and the discussion of one is instructive of the other.

complaint is that defendant's manner of driving demonstrated a conscious disregard of the risk of harm to Rachel or a conscious indifference to the potential consequence that Rachel would be hit and seriously injured.

¶ 22 Defendant argues that the risk of harm to Rachel, if any, was justified because he had the right to leave and was protecting himself. He cites *People v. Tumminaro*, 102 Ill. 2d 331 (1984), which discusses the doctrine of necessity as codified in section 7-13 of the Criminal Code of 1961. See also 720 ILCS 5/7-13 (West 2016) (An offense is justifiable if the accused "reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct."). He contends that his leaving the parking lot, in the manner he did, was necessary to avoid being scammed by the "suspicious" and "menacing couple." Even accepting that defendant had a legal right to leave, as we have previously stated, lawful actions may nonetheless be reckless. See 720 ILCS 5/12-5 (West 2016). In any case, we are not persuaded by his characterization of Rachel and her spouse, and even if we were, we could not find a potential financial injury sufficient justification for endangering the physical safety of another.

¶ 23 Defendant next argues that there was no substantial risk of harm to Rachel, given that he could see her and avoid hitting her while he was reversing his car. Common sense dictates that a moving vehicle poses a substantial danger to pedestrians. Although Rachel testified that defendant's vehicle was moving slowly, she also testified that, but for her husband pulling her out of harm's way, she would have been hit by defendant's car. Arechiga's testimony was to the same effect. She testified that, because it looked to her as though defendant would continue driving and hit Rachel, she called 9-1-1 out of her concern for

Rachel's safety. Thus, the court reasonably could have found that defendant's driving created a substantial risk to Rachel's safety and that the risk was unjustifiable.

¶ 24 Additionally, defendant argues that he did not consciously disregard the risk of harm, but Rachel is to blame for ignoring the risk of harm and placing herself in danger. A victim's negligence does not automatically excuse a defendant from criminal liability because "the acts of the defendant and not the victim are those against which the standard of recklessness must be measured." *People v. LaCombe*, 104 Ill. App. 3d 66, 74 (1982). We acknowledge that courts have reversed convictions for reckless homicide where the victim's unexpected conduct was a significant contributing factor to the cause of harm. See *e.g.*, *LaCombe* 104 Ill. App. 3d 66; *People v. Friesen*, 58 Ill. App. 3d 180 (1978). However, these cases are distinguishable.

¶ 25 In *LaCombe*, the defendant's driving in circles on an athletic field with his headlights off did not support a reckless homicide conviction where the passenger was killed after he climbed out of the window, fell off the truck, and was run over. *Lacombe*, 104 Ill. App. 3d 66. In reversing the defendant's conviction, the court stated that even though it condemned the defendant's driving, his manner of driving was not likely the cause of the victim's death. *Id*. at 73. Rather, it was the victim's unanticipated action of climbing out of while defendant was driving that resulted in his death. *Id*. Similarly, in *People v. Friesen*, the court reversed the defendant's conviction for reckless homicide after he struck a pedestrian while driving at night using only his amber parking lights. *Friesen*, 58 Ill. App. 3d 180 (1978). The court found that the defendant was negligent for driving without his proper headlights turned on but held that his negligence did not rise to the level of criminal recklessness under the circumstances. *Id*. at 185-86. The court noted that the hilly and winding neighborhood road

which lacked sidewalks and street lights made it inherently dangerous to pedestrians, even if all cars drove with their headlights on. *Id*. at 185. The defendant also slowly drove into a "blind drop" where the road curved and declined in elevation. *Id*. at 182, 185. The victim was walking in the roadway with her back to oncoming traffic. *Id*. at 182. These conditions, in combination with the defendant's reasonable expectation that few pedestrians would be present on the road close to midnight and that any pedestrian present would abide by the Motor Vehicle Act requiring pedestrians on roads without sidewalks to walk facing oncoming traffic to see approaching cars, led the court to conclude that the defendant's conduct did not constitute an utter disregard for the victim's safety. *Id*. at 186.

¶ 26 In both *LaCombe* and *Friesen*, the courts acknowledged that although the defendant's acts created some risk of harm, the victim's unexpected conduct did also. We note further that in each case the defendant negligent conduct had already commenced prior to any awareness on their part of the victims' contributing conduct in creating the risk of harm. Therefore, the defendants could not be found to have acted recklessly where they could not have chosen to consciously disregard the additional risks at the time they began acting. Here, Rachel's conduct was not unexpected. Although for Rachel to remain positioned behind defendant's vehicle once he began to reverse towards her was by no means prudent, her presence there was neither unknown to him nor was it unanticipated. Defendant was clearly aware of the risk of harm to Rachel, not after, but at the time he began reversing his car. Even so, he chose to act despite the risk.

¶ 27 We find two additional cases to be instructive with respect to the consideration of the victim's conduct. In *People v. Tuell*, the defendant was convicted of reckless driving for accelerating from a stop at an intersection toward a person crossing midblock. 97 Ill. App. 3d

849, 852 (1981). The defendant's actions forced the pedestrian to run out of the way when the defendant's car was within five to eight feet of her. *Id*. The reviewing court determined that the defendant had a clear view of the complainant from the intersection and under normal circumstances the complainant would have had the time to cross the street. *Id*. at 852-853. Therefore, it was the defendant's excessive acceleration, not the complainant's decision to cross midblock, which created the significant risk of harm warranting the conviction for reckless driving.

¶ 28 In *People v. Mikyska*, the defendant was charged with reckless homicide for failing to avoid a collision with another car on the highway. 179 Ill. App. 3d 795, 802 (1989). There, the court reasoned that although it was unusual for another car to be travelling at 20 to 30 miles per hour on the 55-mile-per hour highway, the cause of the accident could not be attributed to the victim's conduct because the defendant clearly saw the slow-moving car and had ample time to avoid the collision. *Id*. In both *Tuell* and *Mikyska*, the victim's conduct, which was apparent to the defendants, did not defeat the reckless driving and reckless homicide charges. Similarly here, defendant clearly saw Rachel standing behind his vehicle and could have altered his course of conduct to avoid endangering her safety. Rachel's conduct does not excuse defendant's actions.

¶ 29 Further, under the particular circumstances of this case, we believe that defendant's actions constituted a gross deviation from the reasonable standard of care. Defendant contends that reasonableness is not a question of whether he had other options available in leaving the parking lot. He urges us to consider Rachel's conduct which he believes, under the law, is relevant to whether recklessness occurred. We disagree. As already discussed, "the acts of the defendant and not the victim are those against which the standard of recklessness

must be measured." *LaCombe*, 104 Ill. App. 3d at 74. In determining the reasonable standard of care for the situation, we find it appropriate to consider what courses of action were available to defendant. Rachel testified that in exiting the parking lot, defendant could have reversed his car in a direction opposite where she was located. On redirect, Arechiga corroborated Rachel's testimony. She stated that she observed defendant as he exited the parking space and that there was room for him to reverse away from Rachel. In our view, reasonable conduct would have been either to await the arrival of the police, who defendant was aware had been called, or as the testimony reveals, to have reversed his car in a direction opposite of where Rachel had been consistently positioned. Given the available options, we do not find his conduct in reversing the car toward Rachel to have been reasonable. Thus, in viewing the evidence in a light favorable to the prosecution, the court could have reasonably found that defendant acted with conscious disregard for the risk of harm to Rachel and demonstrated behavior that was a gross deviation from that of a reasonable person.

¶ 30 Lastly, defendant emphasizes the fact that he was not speeding or driving erratically in leaving the parking lot. He argues that even if he disregarded the risk, he did not grossly deviate from the actions of a reasonable person because he was hyper-vigilant and drove slowly. Thus, defendant argues he could not have acted recklessly. The statute defining reckless conduct does not specify that exceeding the speed limit is a necessary element of the offense. Nevertheless, we acknowledge that speeding is a factor that is often relevant in determining recklessness. However, it is not dispositive. In *Village of Kildeer v. Munyer*, the complainants were in their cars, stopped next to each other at an intersection, and were talking with one another when the defendant approached them in his vehicle. 384 Ill. App. 3d 251, 253 (2008). The defendant drove his vehicle in complainants' direction, causing them to

believe they would be struck, before driving his own vehicle off the roadway to avoid striking them. *Id*. at 263. There were no allegations that the defendant was speeding. *Id*. at 253, 262-63. However, the court found that the evidence sufficiently demonstrated the defendant's willful and wanton disregard for the safety of others. *Id*. at 262.[5] Accordingly, the court found there was sufficient evidence to prove reckless driving. Similarly, here, the fact that defendant was not speeding when he reversed his car is not a fact sufficient to defeat his conviction. See also *Tuell*, 97 Ill. App. 3d at 852. We note in passing that defendant's argument that he was acting hyper-vigilantly is belied by Arechiga's testimony that she saw the front end of defendant's car hit the back quarter panel of Rachel's car while he was reversing out of the parking space.

¶ 31 Defendant's manner of driving presented a substantial risk of harm to Rachel. His actions were not justified, even if he had a legal right to leave. Rachel's actions did not excuse defendant from criminal liability because defendant had a clear view of Rachel standing behind his vehicle before he began driving. Defendant's decision to start reversing despite Rachel's presence constituted a conscious disregard for her safety. Further, his actions were a gross deviation from what we consider would have been reasonable under the circumstances. The fact that defendant drove slowly does not alter the reality that Rachel was forced to move out of his car's path to avoid imminent harm. We find that the evidence viewed in the light most favorable to the prosecution was sufficient to prove defendant's reckless conduct.

[5] Reckless driving occurs when a person drives a vehicle "with a willful or wanton disregard for the safety of persons," 625 ILCS 5/11 503(a) (West 2016). The Criminal Code equates the mental states of "reckless" and "wanton." 720 ILCS 5/4-6 (West 2016) ("An act performed recklessly is performed wantonly"). Thus, a discussion of reckless driving is analogous to reckless conduct.

¶ 32 B. Relevance of the Insurance Claim

¶ 33 Defendant contends that he was denied his due process rights when the court ruled that evidence regarding Rachel's failed insurance claim against him was irrelevant. He challenges the barring of this evidence by citing two constitutional principles: the right to cross-examination and the right to present a defense. Although framed as constitutional arguments, these claims are more fittingly considered as evidentiary issues and we will address them as such. *People v. Thompson*, 75 Ill. App. 3d 901, 903 (1979).

¶ 34 Generally, evidence must be relevant to be admitted. *People v. Williams*, 384 Ill. App. 3d 327, 333 (2008). To establish relevance, a party must: (1) identify the fact that it is seeking to prove; (2) explain how this fact is of consequence to the determination of the action; and (3) show how the evidence makes the fact more or less probable. *People v. Beaman*, 229 Ill. 2d 56, 75-76 (2008). Trial courts may reject evidence as irrelevant if it has little probative value due to its remoteness, uncertainty, or prejudicial nature. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). Absent an abuse of discretion, the appellate court will not disturb a trial court's admissibility ruling. *People v. Hanson*, 238 Ill. 2d 74, 101 (2010). Additionally, a trial court may exercise its discretion to confine the extent of cross-examination to a proper subject matter. *People v. Wilkerson*, 87 Ill. 2d 151, 156 (1981). As with the court's rulings on admissibility, the trial court's limitation of cross-examination will likewise not be disturbed unless there has been a clear abuse of discretion resulting in manifest prejudice to the defendant. *People v. Green*, 339 Ill. App. 3d 443, 455 (2003).

¶ 35 During cross-examination of Rachel, defendant sought to introduce evidence of his insurance carrier's rejection of Rachel's insurance claim. Defendant argues that the rejected claim confirms his version of the events and proves that he acted reasonably in leaving the

scene. We disagree. The court correctly noted that the reckless conduct charge only concerned the manner in which defendant left the parking lot. The denied insurance claim could not aid in establishing what defendant's actions were at the time of the incident, whether his conduct created a substantial and unjustifiable risk to Rachel's safety, or whether defendant consciously disregarded that risk.

¶ 36 Defendant argues, without citation to authority, that an insurance claim is equivalent to a civil action, and thus a proper subject matter for cross-examination. The actual pendency of civil litigation is generally a proper subject matter for cross-examination, however, potential litigation, which is indefinite and questionable, has little probative value of bias. *People v. Martinez*, 120 Ill. App. 3d 305, 308 (1993). We find nothing to suggest that a claim filed with an insurance company equates to civil litigation. Moreover, defendant has not presented a clear theory of how the insurance claim had the potential to influence the facts of the pending criminal charge. Compare *People v. Averhart*, 311 Ill. App. 3d 492 (1992) (credibility of officer accused of framing defendant impeached by prior excessive force complaint filed by defendant against officer); *People v. Pressley*, 160 Ill. App. 3d 858 (1987) (credibility of victim impeached by pending claim under Crime Victim's Compensation, which would compensate victim for injuries sustained in the charged crime). The only case which could be construed as similar involved an employer who filed a criminal complaint against an employee. See *Thompson*, 75 Ill. App. 3d at 903. In *Thompson*, the court found the credibility of the employer was impeachable because the employer intended to file an insurance claim which required the initiation of criminal charges in order to recoup any losses under the insurance policy. *Id*. Unlike the complainant in *Thompson*, Rachel was not required to file the criminal complaint for reckless conduct to proceed on the insurance

claim. Thus, Rachel's insurance claim bore no relationship to the criminal charge against defendant and was not a proper subject matter for impeachment.

¶ 37 Defendant additionally argues that evidence of the denied insurance claim would have impeached Rachel because it tended to show that her testimony was influenced by her anger over her inability to collect on the claim. A defendant in a criminal prosecution may impeach a witness during cross-examination by showing the witness's bias, interest, or motive to testify falsely, but the evidence used must give rise to the inference that the witness has something to gain by her testimony. *People v. Sims*, 192 Ill. 2d 592, 624-25 (2000). Evidence of the denied insurance claim would have served no such purpose here. It is more likely that any ill-will or bias Rachel may have felt toward defendant flowed from the incident itself, and not the denied claim. Moreover, even accepting that Rachel's testimony could be impeached with evidence of the denied claim, the same could not be said of Arichega's eyewitness testimony which corroborated Rachel's version of the facts. The denied claim had no impeachment value and was properly ruled inadmissible.

¶ 38 As a final relevance argument, defendant urges that he was denied his right to present a defense because he had an insurance representative who was present and available to testify but did not do so. Although a defendant has a constitutional right to present witnesses in his defense (see, *e.g.*, *People v. Willis*, 349 Ill. App. 3d 1, 18 (2004)), that right is not unfettered and is subject to the standard rules for the admissibility of evidence. *People v. Carini*, 357 Ill. App. 3d 103, 118 (2005) (citing *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)). Again, the court properly found that the denied insurance claim was irrelevant; thus any testimony from the agent would also have been properly excluded for the same reason. Furthermore,

defendant never attempted to call the insurance representative as a witness making it unclear what court action defendant is challenging.

¶ 39 C. Curative Admissibility

¶ 40 Defendant also challenges the court's suppression of the insurance claim as a denial of due process under the doctrine of curative admissibility. Defendant argues that the State "opened the door" by presenting extensive testimony about the alleged damage to Rachel's car. Defendant argues his conviction turned on the prejudicial effect that Rachel's testimony had on depicting him as fleeing the scene of an accident.

¶ 41 Under the doctrine of curative admissibility, a party may present inadmissible evidence when necessary to cure undue prejudice resulting from an opponent's introduction of similar evidence. *People v. Liner*, 356 Ill. App.3d 284, 292-93 (2005). “The doctrine is limited in scope, is merely protective, and goes only as far as necessary to shield a party from unduly prejudicial inferences raised by the other side.” *Id*. It is not used to introduce inadmissible evidence merely because the opponent brought out some evidence on the same subject. *People v. Manning*, 182 Ill. 2d 193, 216 (1998).

¶ 42 We find defendant's curative admissibility argument unavailing as he has not shown how Rachel's testimony created any prejudice against him. There was no jury in this case to be prejudiced by inadmissible testimony. *People v. Davis*, 260 Ill. App. 3d 176, 192 (1994) (The possibility of prejudice inherent in a jury trial does not exist in a bench trial because it is presumed that the court considers only admissible evidence.). There is also no indication that the trial court was prejudiced and considered the alleged damage when it convicted defendant. The court repeatedly stated that whether there was actual damage to the car was irrelevant to the question of defendant's reckless conduct. Accordingly, we find that the trial

court did not violate defendant's due process rights where defendant's evidence was irrelevant, inadmissible, and the limited doctrine of curative admissibility was inapplicable.

¶ 43 D. Plain Error

¶ 44 Defendant urges this court to reverse his conviction because he was prejudiced by the State's introduction of and repeated reference to Rachel's pregnancy, the State's improper reference to his post-arrest silence, and the court's bias. Defendant did not raise any of these objections at trial and incorrectly argues that his post-trial motion, alone, was sufficient to preserve the issue of the State's introduction of prejudicial and inflammatory evidence for review. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (review forfeited unless objection is made during trial and in a post-trial motion). Defendant concedes he forfeited review of the claimed reference to his post-arrest silence. We find that he has also forfeited review of the alleged judicial bias claims. *Id*. The forfeiture rule is relaxed where the impartiality of a judge is at issue under limited circumstances, none of which are present here. *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009).

¶ 45 Defendant's claims having been forfeited, we review them for plain error. Relief under a plain error review is only available when a clear or obvious error occurred and either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Defendant has the burden of persuasion for establishing plain error. *Naylor*, 229 Ill. 2d at 593. On review, we do not find that the evidence in this case was closely balanced. As discussed earlier, the evidence sufficiently established that defendant was aware of the

risk to Rachel's safety and consciously acted despite the risk. This was not a close case. Thus, we consider whether defendant established that a clear or obvious error occurred. *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010). Absent error, there can be no plain error and the procedural bar is not excused.

¶ 46 1. Prosecutorial Misconduct

¶ 47 Defendant argues that the State improperly introduced and repeatedly referenced Rachel's pregnancy solely to arouse sympathy for Rachel, resulting in undue prejudice against him. On review of a bench trial, we presume that the trial judge considered only properly admitted evidence unless the record affirmatively rebuts that presumption. *Naylor*, 229 Ill. 2d at 603-04. This presumption also extends to any improper remarks by counsel. *People v. White*, 84 Ill. App. 3d 1044, 1049 (1980). The introduction of inflammatory evidence intended to prejudice the trier of fact, alone, is not a reversible error in a bench trial. *People v. Springfield*, 34 Ill. App. 3d 48, 55 (1975). Here, even accepting that Rachel's pregnancy was repeatedly referenced, nothing in the record rebuts the presumption that the trial court only considered admissible evidence. In its ruling, the court made no reference to Rachel's pregnancy. The court explicitly focused only on whether defendant's actions put another person at risk and noted that evidence of the circumstances which brought the parties into the specific situation was irrelevant.

¶ 48 Defendant also argues that the court applied the wrong standard of care because it was swayed by the repeated references to Rachel's pregnancy. We presume that the trial judge knows the law and applies it properly unless the record affirmatively rebuts that presumption. *People v. Hernandez*, 2012 IL App (1st) 092841, ¶ 41. The court used an example of a minor as a hypothetical victim of reckless conduct; however, defendant has presented no

affirmative proof that the court applied a heightened standard of care in reviewing the evidence. We find no error.

¶ 49 Defendant also contends that the State improperly referenced his decision to exercise his constitutional right to remain silent. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). He contends that the State should not have asked Officer Ramirez, "Did [defendant] say anything to you when you learned that information?" and points to the following remarks by the State as improper:

> "[Defendant] stated that he didn't think he hit them. He didn't know, and if Judge, if that's true he should have waited for the police then and told the police I never touched the car. I didn't do anything. I don't know who this person is. He should have remained in his vehicle and waited, but he did the exact opposite. He is the one acting irrationally, the one who does not act how normal people behave."

The State responds that defendant was not under arrest, thus no *Doyle* violation occurred. Even if the prosecutor referenced defendant's post-arrest silence, automatic reversal is not required. See *People v. Dameron*, 196 Ill. 2d 156, 164-66 (2001) (citing cases where a *Doyle* violation amounted to harmless error). Our supreme court has held that "a comment upon a defendant's post-arrest silence, while improper, is not an error of such magnitude as to clearly deprive defendant of a fair trial." *People v. Herrett*, 137 Ill. 2d 195, 215 (1990).

¶ 50 In any case, we do not view this portion of the State's closing argument as a remark on defendant's silence. Rather, the comment focuses on defendant's reasonableness in choosing to leave the parking lot. We note that even if viewed as an impermissible reference to defendant's silence, reversal is not required. The comment created no real indication of guilt and, as discussed above, there was no jury to be prejudiced. And, again, we presume the

court does not consider improper remarks by the State. Further, even if Officer Ramirez's testimony was improperly elicited, absent more, we cannot find that this fleeting and singular reference prejudiced defendant. Defendant has failed to demonstrate any error occurred. Thus, we cannot excuse the procedural bar.

¶ 51 2. Judicial Bias

¶ 52 Defendant contends that he was denied a fair trial because the trial judge's "flippant and intemperate" remarks reflected the judge's bias against defendant as an attorney defending himself. A trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice. *Faria* 402 Ill. App. 3d at 482. Allegations of judicial bias or prejudice must be viewed in context and should be evaluated in terms of the trial judge's specific reaction to the events taking place. *Faria*, 402 Ill. App. 3d at 482; *People v. Jackson*, 205 Ill. 2d 247, 277 (2001).

¶ 53 Defendant lists the following occurrences to support his claims of judicial bias. Defendant's request for a continuance was denied and the court commented that it was "game time." During the pretrial hearing, the court stated, "Counsel, you didn't provide the proper mileage and also cost of the subpoena. That subpoena would be null and void. *** You have been practicing law long enough to know that, right? Have you?" Defendant was told while conducting cross-examination, "Don't try that again." Prior to defendant's testimony, the court commented, "Oh I got to see this." Defendant points to a number of additional comments that he argues shows the court's unwarranted and one-sided impatience.

¶ 54 A judge's display of "displeasure or irritation with an attorney's behavior is not necessarily evidence of judicial bias against the defendant or his counsel." *Sims*, 192 Ill. 2d at 636. The trial court's comments, viewed in the context of the entire record, fail to support

defendant's claim of bias or prejudice against him. The court's remarks and interjections stemmed from defendant's failure to follow protocol, repetition during opening statements, ambiguously posed questions, a misstatement of evidence, disruptive behavior during cross-examination, and persistence in pursuing a line of evidence that court had repeatedly ruled irrelevant. At most, the record shows that the trial judge may have become frustrated with defendant on various occasions during the trial; however, judicial frustration in itself, is not evidence of judicial bias. See, *e.g., People v. Lopez*, 2012 IL App (1st) 101395, ¶ 97.

¶ 55 Defendant also argues that the court's hostility and impatience were only directed towards him. Defendant highlights the court's reference to it being "game time" as an earmark of hostility. We disagree. See *Richardson v. Grundel*, 85 Ill. App. 3d 46, 49 (1980) (use of sporting term such as "Now comes the main event" did not necessarily show a pre-disposition against defendant). Further, the record contains several instances where the court's remarks are directed at the State, the State's witness, or the State and defendant jointly. Therefore, we find that defendant has not overcome his burden of challenging the court's presumption of impartiality and no clear error occurred. Defendant has failed to establish plain error, and again, we must honor the procedural bar.

¶ 56 CONCLUSION

¶ 57 For all of the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 58 Affirmed.