2018 IL App (5th) 150188-U

NO. 5-15-0188

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 14-CF-526
	)	
DANIEL HAMILTON,	)	Honorable
	)	William G. Schwartz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Moore and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: There is sufficient evidence in the record to support the jury's finding of guilt beyond a reasonable doubt of threatening a public official; any error caused by the trial court's failure to properly comply with Illinois Supreme Court Rule 431(b) was harmless; defendant was not improperly impeached with a prior conviction where he opened the door to such questioning; and defense counsel was not ineffective for failing to request a limiting instruction with regard to defendant's prior conviction and for not objecting when the State mentioned the prior conviction on rebuttal.

¶ 2 After a jury trial in the circuit court of Jackson County, defendant, Daniel Hamilton, was convicted of threatening a public official (720 ILCS 5/12-9(a)(1)(i) (West 2012)) and criminal trespass to property (*id.* § 21-3(a)(3)). He was sentenced to 40 months in prison followed by one year of mandatory supervised release. The issues raised

by defendant in this direct appeal are: (1) whether the State proved defendant guilty beyond a reasonable doubt of threatening a public official; (2) whether the circuit court failed to comply with the requirements of Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) so that reversal is required; (3) whether defendant was improperly impeached with a prior conviction; and (4) whether defense counsel was ineffective for failing to request a limiting instruction regarding the admission of defendant's prior conviction for attempted murder and for failing to object when the State mentioned the prior conviction on rebuttal. We affirm.

¶ 3 FACTS

¶ 4 On December 14, 2014, at approximately 7 a.m., there was a disturbance outside the Good Samaritan Homeless Shelter in Carbondale between defendant and a resident of the shelter. Francis Murphy, an employee at the shelter, testified she went outside the shelter to investigate and saw defendant "yelling at a lot of different people." She said defendant "seemed like he was drunk, didn't seem coherent." Murphy asked defendant to leave several times, but he did not. When defendant refused to leave, Murphy called the police.

¶ 5 Evidence was introduced showing that defendant was previously banned from the shelter. A copy of defendant's banned notice, dated November 22, 2010, was introduced into evidence. Murphy reported that the offending party receives a copy of the banned notice. At the time of the incident, Murphy was not sure if the ban was still in effect.

¶ 6 Sergeant Guy Draper and Officers Lee Stewart and Blake Harsy of the Carbondale Police Department responded to the scene. They were in uniform and in marked police

cars. Officer Harsy testified that when he arrived Sergeant Draper was already at the scene talking to defendant. Draper testified that when he first arrived, defendant was calm. The police asked the dispatcher to check whether there were any banned notices on file for defendant and discovered that defendant was banned from the shelter in 2010. The ban was still in effect.

¶ 7 According to Harsy, defendant admitted he was banned from the shelter but said he went anyway because he needed to use the bathroom. Sergeant Draper then explained to defendant that he was going to be placed under arrest for trespassing and placed him in handcuffs. Harsy testified, "As soon as the handcuffs went on, [defendant] said he was going to start acting ignorant." Defendant then "grew increasingly belligerent and verbally aggressing towards me." Harsy's car was equipped with a dash mounted camera that recorded the incident. A copy of the video was introduced into evidence as People's Exhibit 1 and played for the jury.

¶ 8 Harsy testified defendant said he was going to "snipe" Harsy while Harsy was off-duty and that he was going to kill Harsy's family. On the tape, defendant can be heard saying, "You're f***ing with a gang leader" and "a murderer." He told Harsy he would use the Freedom of Information Act to get information about Harsy, his family, his wife, and his child. Harsy, who is not married and does not have a wife and child, testified he took defendant's threats seriously and the threats weighed on him as he did his job, specifically stating:

> "As a police officer, I get threatened a lot. But when he began threatening my family, saying that he was going to use FOIA, Freedom of Information Act, to try

to get information about my family, my mom, my dad, that concerns me more than if somebody that just threatens me."

Harsy testified he believed defendant could find out about his family by filling out a request under the Freedom of Information Act.

¶ 9 Defendant testified he was drunk on the morning in question and that he has a problem with alcohol. Defendant said he was afraid of Harsy because of a prior encounter with him in which Officer Harsy grabbed him by the arm. Defendant admitted he made the statements to Harsy that are recorded on the video, but said he did not mean them. Defendant said he was emotional and belligerent because he was intoxicated.

¶ 10 On cross-examination, defendant denied that he would be able to use the Freedom of Information Act to get information about Harsy. He admitted he was angry during his encounter with Harsy and admitted he made the statements about being a gang leader and a murderer. Defendant denied meaning any of the things he said, said he regretted making those statements, and said he was embarrassed by the way he acted during his encounter with the police.

¶ 11 On redirect, defense counsel asked defendant if he was a gang leader or if he had ever murdered anyone. Defendant responded "no" to both questions. After defendant was excused from the stand, a sidebar was conducted. After the sidebar, the trial court instructed defendant to again take the stand. The State asked defendant whether he had ever been convicted of attempted murder. Defendant admitted that he had been convicted of attempted murder in Pulaski County in 1994.

¶ 12 Prior to trial, defense counsel filed a motion *in limine* to prohibit the State from using defendant's prior conviction for attempted murder, 93-CF-124, for impeachment. The State indicated it would not pursue impeachment of defendant based upon that conviction because "it's outside the ten years." The court granted defendant's motion *in limine.*

¶ 13 On redirect, defense counsel stated, "The question I asked was, Have you killed anyone? Have you murdered anyone? And the answer is what?" Defendant responded, "No, sir." The defense then rested.

¶ 14 A recess was taken during which defense counsel objected as follows:

> "I would object to the Court, there was a side bar during the testimony of [defendant] in which [the prosecutor] had requested that he be able to introduce a conviction that was beyond the 10-year limitation. I objected then and I object for the record officially. The position of the defense is that it's not opening the door for the question, are you a murderer?"

Defense counsel went on to explain that there are different elements required for the offense of attempted murder and murder. The trial court overruled the objection.

¶ 15 During deliberations, the jury sent a note, stating, "Is it true that not reaching 100 percent consensus on any one of the five propositions, does that render a not guilty verdict?" The trial court asked the attorneys whether a reply stating, "Please read the instruction containing the five propositions paying particular attention to the last two paragraphs" would be appropriate. After both attorneys agreed such a reply was

appropriate, the trial court sent that response to the jury. Ultimately, the jury returned a guilty verdict on both counts.

¶ 16 Defense counsel filed a motion for a new trial in which he asserted that the State failed to prove defendant guilty beyond a reasonable doubt and the trial court erred in allowing the State to impeach defendant with his prior conviction for attempted murder. The trial court denied defendant's motion for a new trial and sentenced defendant to 40 months in prison. Defense counsel filed a motion to reconsider sentence, which the trial court also denied. Defendant filed a timely notice of appeal.

¶ 17 ANALYSIS

¶ 18 I. Sufficiency of Evidence

¶ 19 The first issue we are asked to consider is whether the State proved defendant guilty beyond a reasonable doubt of threatening a public official. Defendant argues the State failed to prove him guilty because it failed to establish that he conveyed a threat that placed Officer Harsy or a member of his immediate family in reasonable apprehension of immediate or future bodily harm. Defendant insists there was insufficient evidence to establish that Officer Harsy had a reasonable apprehension of immediate or future harm. We disagree.

¶ 20 In cases where there is a challenge to the sufficiency of evidence to sustain a conviction, the question is whether, after viewing all of the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). In reviewing the sufficiency of the evidence, it is not our job to retry the defendant. *People v. Smith*,

185 Ill. 2d 532, 541 (1999). A reviewing court should not substitute its judgment for that of the jury unless the inference accepted by the jury is either inherently impossible or unreasonable. *People v. Leger*, 149 Ill. 2d 355, 388 (1992). It is the function of the jury to assess the credibility of witnesses, weigh and resolve any conflicts in evidence, and draw reasonable conclusions from the evidence. *People v. Williams*, 193 Ill. 2d 306, 338 (2000).

¶ 21 A person commits the offense of threatening a public official when: (1) he knowingly delivers or conveys, directly or indirectly, to a public official by any means of a communication containing a threat that would place the public official or a member of his immediate family in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint; and (2) the threat was conveyed because of the performance or nonperformance of some public duty, because of hostility of the person making the threat toward the status or position of the public official, or because of any other factor related to the official's public existence. 720 ILCS 5/12-9(a)(1)(i) (West 2012). For purposes of a threat to a police officer, the threat "must contain specific facts indicative of a unique threat to the person, family or property of the officer and not a generalized threat of harm." *Id.* § 12-9(a-5).

¶ 22 Defendant makes much of the fact that he threatened Officer Harsy's wife and children, but Harsy does not have a wife or children. We are aware that the term "immediate family" is defined as "a public official's spouse or child or children." *Id.* § 12-9(b)(2). Therefore, in order for the State to establish defendant's guilt, the State needed to prove Officer Harsy's reasonable apprehension of immediate or future harm.

¶ 23 Defendant does not contest that Officer Harsy was a public official because of his position as a police officer, nor does he contest that he actually made the threats recorded on the tape. The only point in contention is whether Harsy experienced a reasonable apprehension of immediate or future harm because of defendant's threats. Defendant insists Harsy was not in any threat of immediate harm because defendant was already in custody and two other law enforcement officers were present. Defendant also insists Harsy's apprehension of future harm was similarly unreasonable. We disagree.

¶ 24 On the day in question, defendant specifically called Officer Harsy by name, as the two had previous encounters. Defendant wanted to make sure he knew which police department employed Harsy, specifically asking Harsy, "You're at Carbondale, right Harsy?" Defendant threatened to kill Officer Harsy, specifically threatening Harsy by stating, "I will snipe you, off the clock, without the badge." Defendant also told Harsy he would "snipe your ass from long range, Mother F***er." This was not a generalized threat, but a specific threat as to how defendant intended to kill Harsy.

¶ 25 Defendant made repeated threats about killing Harsy. Defendant told Harsy he would find out where he lived via the Freedom of Information Act. Officer Harsy testified he believed it was possible for defendant to obtain such information under that Act. Defendant also made threats towards Harsy's "wife," "kids," "mom," and "daddy." We have reviewed the audiotape of the incident. From the outset, defendant's words are jolting, threatening, intimidating, and menacing. Defendant's repeated threats and profane language show a complete lack of respect for police authority. Our review of the

audiotape completely supports Officer Harsy's testimony that he felt threatened by defendant on the day in question.

¶ 26 In further support of our determination that the State presented sufficient evidence so that the jury could reasonably find defendant guilty, we rely on *People v. Warrington*, 2014 IL App (3d) 110772. In *Warrington*, the reviewing court found the evidence at trial was sufficient to prove the defendant threatened a public official, where, in the course of his arrest, the defendant threatened the arresting officer with bodily harm. Here, Harsy testified he often gets threatened because of his job as a police officer, but said he took defendant's threats more seriously and they "weighed" on his mind. The jury watched the videotaped recording of the incident and, therefore, was in a unique position to determine whether defendant threatened Harsy and whether Harsy's apprehension of harm was reasonable. After viewing the evidence in the light most favorable to the State, we conclude there is more than sufficient evidence in the record to support defendant's conviction.

¶ 27 II. Illinois Supreme Court Rule 431(b)

¶ 28 The next issue raised by defendant is whether the circuit court failed to comply with the requirements of Illinois Supreme Court Rule 431(b) so that reversal is required. Defendant argues that because prospective jurors were asked only whether they understood the four principles outlined in the rule, not whether they understood and accepted the principles, the cause must be reversed and remanded for a new trial. The State concedes that the jurors were not asked if they understood and accepted the principles, but asserts that because the evidence was not closely balanced that error alone

does not threaten to tip the scales of justice, so that defendant's conviction should be affirmed. We agree with the State.

¶ 29 As amended in 2007, Illinois Supreme Court Rule 431(b) codified our supreme court's ruling in *People v. Zehr*, 103 Ill. 2d 472 (1984), and now requires a trial court to instruct a jury that: (1) the defendant is presumed innocent of the charges against him or her; (2) before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) the defendant is not required to offer any evidence on his or her own behalf; and (4) the defendant's decision not to testify cannot be held against him or her. Ill. S. Ct. R. 431(b) (eff. May 1, 2007). It requires a court to "ask each potential juror, individually or in a group, whether that juror understands and accepts [those four] principles." *Id.* The trial court commits error if it fails to ask whether potential jurors both understand and accept each of the enumerated principles in Rule 431(b). *People v. Thompson*, 238 Ill. 2d 598, 607 (2010).

¶ 30 Here, defendant forfeited the issue by failing to make an objection and by failing to raise the issue in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176 (1988). Defendant concedes his forfeiture but argues the issue should nevertheless be reviewed pursuant to the first prong of the plain error doctrine. The first prong allows us to review an unpreserved error where the evidence is closely balanced. *People v. Davis*, 405 Ill. App. 3d 585, 590 (2010).

¶ 31 "When reviewing a claim of error under the first prong of the plain-error doctrine, 'a reviewing court must undertake a commonsense analysis of all the evidence in context' to determine if the evidence is closely balanced." *People v. Mueller*, 2015 IL App (5th)

130013, ¶ 25 (quoting *People v. Belknap*, 2014 IL 117094, ¶ 50). The analysis must be conducted in a qualitative manner, as opposed to being performed quantitatively, and must take into account "the totality of the circumstances." *Belknap*, 2014 IL 117094, ¶¶ 53, 62. We previously discussed the evidence when addressing the first issue in this appeal and concluded that the jury was in a unique position in this case by virtue of being able to watch the entire recorded incident. Our own review of the audiotape fully supports Officer Harsy's testimony that he felt threatened by defendant. Thus, our commonsense, qualitative analysis of the State's evidence, when viewed in the totality of the circumstances, leads us to conclude that the evidence was not closely balanced so that the failure to follow the exact requirements of Rule 431(b) tipped the scales of justice against defendant.

¶ 32 III. Impeachment

¶ 33 The next issue is whether defendant was improperly impeached with a prior conviction. Defendant argues his conviction must be reversed and the cause remanded for a new trial because his credibility was improperly impeached when his prior conviction for attempted murder, which was more than 10 years old, was allowed and the resulting prejudice was magnified by the trial court's failure to provide a limiting instruction. The State replies that defendant opened the door to his violent nature; thus, no error occurred when the prosecutor asked defendant if he had ever been convicted of attempted murder and no limiting instruction was required. Again, we agree with the State.

¶ 34 Evidentiary rulings are typically left to the sound discretion of the trial court. *People v. Jackson*, 232 Ill. 2d 246, 265 (2009). However, whether defendant opened the

door to the admission of his attempted murder conviction is a legal issue, which is reviewed *de novo*. See *People v. Smith*, 233 Ill. 2d 1, 15 (2009). If it is determined that defendant opened the door to a prior conviction, whether or not defendant can be impeached with it is a question which remains within the discretion of the trial court. *People v. Harris*, 231 Ill. 2d 582, 591 (2008).

¶ 35 Pursuant to our supreme court's holding in *People v. Montgomery*, 47 Ill. 2d 510 (1971), the credibility of a witness may be attacked with evidence of a prior conviction where the crime was punishable by imprisonment in excess of one year, or involved dishonesty or a false statement, regardless of the punishment; however, such evidence is inadmissible where the trial judge determines the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice, or, in general, the prior conviction is more than 10 years old. *Id.* at 516. However, an exception to the general rule announced in *Montgomery* exists which permits introduction of a defendant's otherwise inadmissible criminal record where the defendant "opens the door" to such evidence. *People v. Bunch*, 159 Ill. App. 3d 494, 513 (1987).

¶ 36 For example in *Harris*, 231 Ill. 2d at 590-91, our supreme court held the defendant opened the door to admission of his prior juvenile adjudication. In that case, when asked on direct examination whether he committed the crimes in question, the defendant testified as follows:

> " '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.) *Id.* at 584-85.

Thereafter, the trial court allowed the State to impeach the defendant with evidence of his two most recent juvenile adjudications.

¶ 37 In judging whether the trial court abused its discretion, the 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. "If he was, then he 'opened the door' and the trial court was well within its discretion to allow the admission of defendant's prior adjudications for the purposes of impeachment. If he was not, then defendant's testimony was not a proper basis for the admission of that evidence." *Id. Harris* concluded the trial court did not abuse its discretion when it permitted the State to impeach the defendant with two prior juvenile adjudications. *Id.* at 591.

¶ 38 In this case, defense counsel made a motion *in limine* prior to trial to prohibit the use of defendant's conviction for attempted murder. The State said it did not plan on using the conviction, as it was more than 10 years old. However, defendant opened the door when he attempted to mislead the jury about his prior criminal conviction and downplay his violent actions as depicted in the video. Defendant specifically testified he was not a gang leader or a murderer as he stated repeatedly on the tape which was played for the jury. He testified he is typically respectful of the police and did not mean what he stated on the videotape.

¶ 39 After defendant responded "no" on redirect to the question of whether he was a gang leader or a murderer, a sidebar was conducted. After the sidebar, the State asked defendant whether he had ever been convicted of attempted murder, and defendant admitted he had been convicted of attempted murder in 1994 in Pulaski County. The State was attempting to contradict defendant's own testimony and prove defendant was the angry, violent person depicted in the video, not the calm and collected person on the witness stand.

¶ 40 Evidence of a defendant's commission of other crimes is admissible where relevant to prove any material question other than the defendant's propensity to commit other crimes, including *modus operandi*, intent, identity, motive, or absence of mistake. *People v. Kliner*, 185 Ill. 2d 81, 146 (1998); *People v. Gilliam*, 172 Ill. 2d 484, 514 (1996). Here, defendant made numerous threats against Officer Harsy, repeatedly telling Harsy he was going to "snipe" him and "kill" him. In an effort to convince Officer Harsy that he was in fact serious, defendant can be heard on the audiotape taunting and bragging to Harsy that he is both "a gang leader" and "a murderer." In an attempt to minimize the damage caused by the recorded incident, defense counsel specifically asked whether defendant was a "murderer" as he claimed on the day in question. Thus, the defense opened the door.

¶ 41 Any reasonable person would have felt threatened by defendant's explosive outburst on the date in question in which he claimed to be a murderer and had, in fact, been previously convicted of attempted murder. Thus, we agree with the State that the evidence was relevant to show that Harsy was in reasonable apprehension of future harm.

Under the circumstances presented here, we cannot say the trial court abused its discretion in permitting the State to introduce defendant's prior criminal conviction for attempted murder. Because the evidence of defendant's conviction for attempted murder was properly admitted under the open door theory, the trial court did not err in failing to give the jury a limiting instruction.

¶ 42 IV. Ineffective Assistance of Counsel

¶ 43 The final issue is whether defense counsel was ineffective for failing to request a limiting instruction with regard to the admission of defendant's prior conviction for attempted murder and for not objecting when the State mentioned the prior conviction on rebuttal. Defendant contends he received ineffective assistance of counsel because his counsel failed to request a limiting instruction after the State was permitted to bring forth in cross-examination his conviction for attempted murder and because his counsel failed to object to the State's reference to the conviction during rebuttal. Defendant insists the decision not to request a limiting instruction or make an objection cannot be considered trial strategy, making his counsel's performance deficient and denying him a fair trial. The State responds defense counsel was not ineffective for three reasons: (1) the evidence was properly presented substantively, so no limiting instruction should have been given; (2) defendant failed to establish that these two decisions were not valid trial strategies; and (3) defendant was not prejudiced.

¶ 44 In order to establish ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, but for counsel's error, the result of the trial

would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). Judicial scrutiny of an attorney's performance must be deferential, and a reviewing court should not inquire into areas involving the exercise of discretion, judgment, trial tactics, or strategy. *People v. Pecoraro*, 144 Ill. 2d 1, 13 (1991).

¶ 45 As previously set forth, we agree with the State that defendant opened the door to the question about defendant's prior conviction for attempted murder. We also point out that defense counsel made an official objection after he rested, which the trial court overruled. Here, where the jury watched and listened to the highly damaging recorded incident, we do not believe a limiting instruction would have affected the ultimate outcome of the case. Because defendant cannot prove prejudice, we cannot say defendant received ineffective assistance of counsel for not requesting a limiting instruction or failing to object when the State commented on defendant's attempted murder conviction. See *People v. Figueroa*, 341 Ill. App. 3d 665, 672-73 (2003).

¶ 46 Even assuming *arguendo* that the attempted murder conviction was not properly admitted, defense counsel was not ineffective for failing to request a limiting instruction or objecting to the prosecutor's comments. Defense counsel made a motion *in limine* prior to trial with respect to defendant's prior conviction, which indicates he was aware of the potentially prejudicial nature of the evidence. He made an objection for the record after he rested. The decision to object to evidence is a matter of trial strategy that is entitled to great deference and generally does not amount to ineffective assistance. *People v. Fields*, 202 Ill. App. 3d 910, 915 (1990). Defense counsel likely decided not to object in front of

the jury or ask for a limiting instruction in an attempt to not draw any more attention to the prior conviction. Defense counsel's decisions amounted to trial strategy and are not subject to our review. *Id*.

¶ 47 Finally, defendant contends that because the trial court received a note from the jury during deliberations, which indicates that at least some of the jurors struggled with finding that the State had proven all of the elements of the offense, there is a reasonable probability that the outcome of the case would have been different but for defense counsel's alleged errors. However, after careful consideration, we conclude defendant received effective assistance. Any deficiency that may have occurred did not unduly prejudice defendant due to the unique circumstances surrounding this case, namely the recorded incident of the event on which defendant can be heard repeatedly and emphatically threatening to kill Officer Harsy and claiming to be a murderer.

¶ 48 CONCLUSION

¶ 49 For the foregoing reasons, we affirm the judgment of the circuit court of Jackson County.

¶ 50 Affirmed.