

NOTICE
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2018 IL App (5th) 150200-U

NO. 5-15-0200

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Saline County.
)	
v.)	No. 13-CF-181
)	
KENNETH R. WANGLER,)	Honorable
)	Walden E. Morris,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Presiding Justice Barberis and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was not denied the effective assistance of trial counsel when counsel failed to object at trial to the State’s use of defendant’s postarrest silence to create an inference of guilt. Defendant also is not entitled to an additional day of credit for time spent in presentence custody prior to posting bond but is entitled to a \$5 *per diem* credit against his fines for the four days spent in custody prior to sentencing.

¶ 2 Defendant, Kenneth R. Wangler, was convicted after a jury trial of aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)), and was sentenced by the circuit court of Saline County to six years’ imprisonment in the Illinois Department of Corrections, and to one year of mandatory supervised release. Defendant argues on appeal that he was denied his right to the effective assistance of trial counsel when defense counsel failed to

object to the prosecutor's improper use of defendant's postarrest silence to create an inference of guilt. Defendant also contends he is entitled to an additional day of credit for time spent in presentence custody prior to posting bond and his fines should have been offset by a \$5 *per diem* credit for time spent in custody prior to sentencing.

¶ 3 On June 9, 2013, around 1 a.m., Harrisburg police officers responded to a disturbance call at Shagwell's Bar in Harrisburg, Illinois. While responding to the call, the investigating officers received another call pertaining to a second fight out in front of the public aid office next to the bar. One of the officers went to the front of the bar and observed a female lying on the ground with several people tending to her. The victim, 23-year-old Jessica Milligan, had blood all over her face and clothing. Both her nose and mouth were bloody. The people helping her pointed to a vehicle driving westbound down the street. The officer who had observed the victim stopped the vehicle, and discovered inside, defendant and his wife, Robin Wangler. The officer asked defendant what had occurred, defendant said his wife and the victim got into an argument over a pack of cigarettes, and that defendant had stood between the women to keep them separated. Upon arresting defendant, the officer noted fresh blood and wounds on defendant's hands. Defendant's hands were photographed at the police station once he was in custody. The officer who subsequently took the photographs of defendant's hands noted in his report that defendant's hands were bloody, and that defendant had a cut on his right hand. The officer also noted that the hands of defendant's wife were bloody, and her knuckles were reddish. When asked if defendant had an explanation for the injuries to his hands, the officer reported that defendant had said nothing while being

photographed. The officer admitted he did not know how defendant received the injuries to his hands, and he had not asked.

¶ 4 The victim testified that as she was leaving the bar, a waitress was clearing a table, and asked her if she wanted a full package of cigarettes that had been left behind. The victim accepted the cigarettes, and tucked them partially into her shirt. She left the bar and was walking by the front of the public aid office next door, when a car pulled up alongside her. Defendant and his wife jumped out of the vehicle, and started yelling at her about a stolen pack of cigarettes. The victim told them she had not stolen any cigarettes, when one of them struck her, causing her to fall to the ground. She did not know who hit her first, but believed it was defendant's wife. While she was on the ground, the victim believed defendant kicked her twice, causing her to lose consciousness both times. The victim admitted at trial that she did not remember much of what happened that night, as she was drifting in and out of consciousness during the incident.

¶ 5 One of the patrons at the bar, Tracie March, testified that she saw the fight. When she was leaving the bar, she noticed the victim walking outside. She heard a car's brakes screech, and observed defendant and his wife get out of their vehicle, demanding to know what the victim had done with their cigarettes. The victim put her hands up in the air, and told defendant she did not have his cigarettes. March testified that defendant was tugging on the victim's clothes, looking inside for the cigarettes. Defendant then punched the victim hard in the face. The victim went down, but defendant continued punching her, while she lay on the ground. March and two other patrons attempted to pull defendant off of the victim. Fearing that defendant, in his fit of rage, would also

attack them for trying to help the victim, March called 9-1-1. At this point, the victim was trying to crawl away from defendant, as he kicked her. According to March, defendant's wife then started hitting the victim. Hearing the 9-1-1 call, defendant ran back to his car. His wife, however, continued to hit the victim. March was able to shove the wife away from the victim, and the wife then ran off to her car. She and defendant started to drive away when they were stopped by the police.

¶ 6 Defendant's wife testified she was working at the bar on the evening of June 9, 2013. Around midnight, a disturbance occurred in the outdoor seating area of the bar. When she tried to stop the fight, defendant got into the middle of it to break up the fight. In so doing, defendant put one of the men on the ground, scraping his hands on the gravel. When the fight broke out, defendant's wife had placed her cigarettes on a picnic table. When she went to retrieve her cigarettes, she could not find them. She did, however, see the same brand sticking out of the shirt of the victim. The wife then asked the victim if those cigarettes belonged to the wife. The victim denied that the cigarettes belonged to the wife, and the two women began arguing. The wife was told to go home, whereupon she and defendant left the bar.

¶ 7 As they were driving away, defendant's wife noticed the victim walking outside. The wife testified she told defendant to stop the car, and the wife jumped out of the vehicle to confront the victim. The wife started yelling at the victim over the cigarettes. The victim again repeated that she did not have them. The wife pointed to the pack of cigarettes in the victim's shirt and yelled, "those aren't them right there?" When the victim replied "no," the wife hit her. Two other women tried to jump into the fight, and

at that point, defendant intervened, attempting to keep the other women off of his wife. The wife indicated that defendant did not hit or kick the victim. The wife insisted that she alone was the one who caused all of the victim's injuries. The wife further admitted at trial that she had been charged with, and pled guilty to, aggravated battery on a public way, and that she pled guilty to the charge because she was guilty. In exchange for her plea, she was sentenced to probation.

¶ 8 Defendant first argues on appeal that he was denied his right to effective assistance of trial counsel when counsel failed to object to the prosecutor improperly using defendant's postarrest silence to create an inference of guilt. Defendant points out that the State improperly elicited testimony from the officer who photographed defendant's hands when the officer stated that defendant did not provide an exculpatory explanation for his hand injuries when he was under arrest. Defendant further contends that during closing argument, the State relied on defendant's postarrest silence to argue that if he had an exculpatory explanation for the injuries to his hands, he would have provided it at the jail when his hands were being photographed. Defendant therefore believes his conviction should be reversed, and his cause remanded for a new trial.

¶ 9 Illinois law prohibits the use of a defendant's postarrest silence for impeachment purposes, regardless of whether the silence occurred before or after the defendant was given *Miranda* warnings. *People v. Clark*, 335 Ill. App. 3d 758, 763 (2002). Evidence of postarrest silence is inadmissible because it is neither material nor relevant, having no tendency to prove or disprove the charge against a defendant. *Clark*, 335 Ill. App. 3d at 763. A defendant's postarrest silence may only be used for impeachment purposes

(1) when the defendant falsely claims at trial that he provided an exculpatory statement to police following arrest, or (2) where he made a prior inconsistent statement to the police after arrest. *People v. Little*, 223 Ill. App. 3d 264, 274 (1991). Neither of those situations occurred here.

¶ 10 As defendant points out, the State's argument that defendant's hands were injured when he hit the victim was contradicted by evidence supporting the defense theory that defendant's hands were injured in an earlier fight. Evidence in the record confirms that another fight did occur at the bar prior to the one between defendant's wife and the victim. Defendant explained to the police before he was arrested that he did not attack the victim, and only tried to get between his wife and the victim to keep them separated. Under such circumstances, the State's insistence that defendant's silence established his guilt was clearly improper. Defendant acknowledges, however, that his trial counsel failed to raise any objections to the use of his postarrest silence at trial. Trial counsel also failed to raise the issue in a posttrial motion. Nevertheless, defendant believes the complained of errors should be reviewed under the plain error doctrine.

¶ 11 The plain error doctrine may be invoked in criminal cases to review an error which has not been properly preserved for review where the evidence is closely balanced, or where the error is of such magnitude that the defendant was denied a fair trial. *People v. Carlson*, 79 Ill. 2d 564, 576-77 (1980). When the evidence is not closely balanced, any comments upon a defendant's postarrest 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). As more fully explained hereafter, we conclude that the evidence

presented here was not so closely balanced, and therefore the plain error doctrine does not apply.

¶ 12 Defendant's second argument on appeal focuses on the conduct of his defense counsel. Specifically, defendant finds fault with defense counsel's failure to object to the prosecutor improperly using defendant's postarrest silence to create an inference of guilt. Defendant therefore argues that he was denied his right to the effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to deprive the defendant of a fair trial whose result is reliable. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). A defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *People v. Harris*, 225 Ill. 2d 1, 20 (2007).

¶ 13 Although we agree that the prosecutor improperly commented on defendant's postarrest silence, we do not find that defendant was denied effective assistance of counsel by defense counsel's failure to object to such comments. Under the circumstances presented here, defense counsel's shortcomings, when viewed in light of the overwhelming evidence establishing defendant's guilt, did not prejudice defendant. There was eyewitness testimony that defendant hit the victim first, and then began punching and kicking her for allegedly stealing his wife's cigarettes. The victim also testified that defendant accused her of stealing the cigarettes, and then hit and kicked her.

Her inability to completely recall the sequence of events is understandable given that she was falling in and out of consciousness as she was being punched and kicked in the face and head. Defendant's wife was the only one who testified that she alone attacked the victim. She also was the only one who testified that defendant's hands were injured in an earlier altercation. Defense counsel chose to focus on this alternative explanation for defendant's injuries instead of calling more attention to the State's version of the events. Under such circumstances, defense counsel's alleged failure to raise an objection as to the comments made by State did not rise to the level of ineffective assistance of counsel. The lack of objection does not warrant setting aside the judgment of a criminal proceeding where the error had no effect on that judgment given that the evidence was not closely balanced. See *People v. Nitz*, 143 Ill. 2d 82, 109 (1991).

¶ 14 Defendant also argues on appeal that he is entitled to an additional day of credit for time spent in custody on June 13, 2013, prior to posting bond. While it is true that a defendant is entitled to credit if he or she is in custody for any part of a day prior to being sentenced (*People v. Dominguez*, 255 Ill. App. 3d 995, 1005 (1994)), here defendant was not in presentence custody on June 13. The bail bond was issued on June 12, 2013. While it was filed on June 13, the issued date and the filed date are not the same. As the judgment form states, defendant was entitled to receive credit for the time he actually served in custody from June 9, 2013, to June 12, 2013, (plus additional days not at issue here). Defendant is not entitled to an additional day of credit for June 13, when he was not in presentence custody on that day.

¶ 15 Finally, defendant argues that he is entitled to a \$5 *per diem* credit for the time spent in custody prior to sentencing. He contends he was in presentence custody from June 9 until June 13, 2013, for a total of five days. Though his bond was applied toward his fines and fees, he contends he never received the \$5 *per diem* credit toward his fines. A defendant who is incarcerated on aailable offense and who, upon conviction, is assessed a fine, is entitled to a \$5 *per diem* credit against his fines for each day spent in presentence custody. 725 ILCS 5/110-14(a) (West 2012). The State concedes defendant is entitled to a \$5 *per diem* credit for each day defendant spent in custody, but as discussed above, defendant was in custody for only four days, from June 9 to June 12, and therefore is entitled to only a \$20 credit to be applied to his fines and fees.

¶ 16 For the foregoing reasons, the judgment of the circuit court of Saline County is affirmed, absent the \$20 *per diem* credit for presentence custody. Accordingly, defendant is awarded a \$20 credit toward his fines.

¶ 17 Affirmed and remanded with directions.