2019 IL App (2d) 170262-U
No. 2-17-0262
Order filed September 30, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CARL C. WALKER SR., Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 15-CF-1898 Honorable David P. Kliment and James C. Hallock, Judges, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justice Burke concurred in the judgment.
Justice Jorgensen dissented.

ORDER

¶ 1 *Held*: Defendant showed no reversible error in the trial court's denial of a continuance of the trial: although the court arguably abused its discretion in denying a continuance after allowing the State to change the way it would use certain evidence, defendant did not articulate any specific prejudice and the record did not suggest any.

¶ 2 Defendant, Carl C. Walker Sr. appeals from his conviction on three domestic-battery counts. He asserts that the court committed reversible error when, on the day of trial, it denied him a continuance after it allowed the State to dismiss certain charges and instead use the

evidence of those offenses as propensity evidence to prove the remaining counts. We conclude that, although a plausible argument exists for the failure to grant a continuance being error, defendant has failed to show *reversible* error. We therefore affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 13, 2016, a Kane County grand jury indicted defendant on six domestic-battery charges. The first three counts charged batteries that took place on July 16, 2015. Those counts were: (1) defendant committed aggravated domestic battery by knowingly causing bodily harm to S.L. (the mother of his child) by intentionally impeding her breathing (720 ILCS 5/12-3.3(a-5) (West 2014)); (2) defendant committed domestic battery by knowingly causing bodily harm in that he "struck [her] about the head and neck" (720 ILCS 5/12-3.2(a)(l) (West 2014)); and (3) defendant committed domestic battery in that he "knowingly made contact of an insulting or provoking nature with [S.L.], *** in that [he] pushed, struck [*sic*] [her] about the head and neck" (720 ILCS 5/12-3.2(a)(2) (West 2014)). The second three counts—near duplicates of the first three—charged batteries that took place on August 13, 2015: (4) defendant committed aggravated domestic battery by intentionally impeding S.L.'s breathing (720 ILCS 5/12-3.3(a-5) (West 2014)); (5) defendant committed domestic battery by knowingly causing bodily harm in that he "struck [her] about the head and neck" (720 ILCS 5/12-3.2(a)(l) (West 2014)); and (6) defendant committed domestic battery in that he "knowingly made contact of an insulting or provoking nature with [S.L.], *** in that [he] pushed, struck [*sic*] [her] about the head and neck" (720 ILCS 5/12-3.2(a)(2) (West 2014)).

¶ 5 On Thursday, December 8, 2016, with the case set for a jury trial on Monday, December 12, 2016, the State filed a motion seeking to admit evidence of the July 16, 2015, batteries as propensity evidence under section 115-7.4 of the Code of Criminal Procedure of 1963 (Code)

(725 ILCS 5/115-7.4 (West 2016)); if permitted to use the July 16 incident for propensity, it would drop the charges arising from the July 16 incident. The court, Judge David P. Kliment presiding, heard the motion on the day of trial. Prior to the ruling, defense counsel stated that he had discussed the motion with defendant and had concluded that the court's grant of the motion might "affect our preparedness for this trial." He thus objected to the motion:

> "It puts us in a position where we are now—there is essentially new evidence and what I would describe as powerful evidence.
>
> Anytime propensity evidence is made admissible in court, it's extremely powerful and thus why there is [*sic*] so many safeguards, evidentiary safeguards, to not allow it in.
>
> I would argue that the prejudicial nature of allowing *** what was [*sic*] just actual charges against my client *** really shapes the nature of the trial and the focus of the trial by allowing it to be used as propensity evidence."

The court granted the State's motion and, at the State's request, dismissed the three counts relating to the July 16 incident. Defense counsel then moved for a continuance. The following colloquy ensued:

> "[THE STATE]: Judge, I am objecting. The state added Counts 1, 2 and 3 242 days ago. The defendant is clearly aware that there is this other incident out there.
>
> I really don't understand what the difference would be whether the counts were still alive and we went forward by presenting both incidences or the way that we are going to do it now where we are still presenting both incidences.
>
> *** [I]n both scenarios we can make the same arguments, that this *** is the way he commits his acts of domestic violence against the victim. ***
>
> THE COURT: Anything further ***?

[DEFENSE COUNSEL]: Your Honor, just I would disagree in terms of what the state could use them for in terms of putting them in front of a jury. I would suggest that this actually changes the shape of the second charges quite a bit, the second incident, because it allows the state to essentially streamline their case in a more focused manner towards the other charges and puts defense at a disadvantage having it done the weekend before trial, essentially the open court before trial, and then *** finding out that today we are going to be having to essentially defend the later charges in a different way.

***

THE COURT: I don't think that my granting that motion changes the status of this case one bit. These were pending charges that you were preparing for anyway. I am going to deny your request for a continuance and we will send the case up to Judge Hallock for trial today."

¶ 6 The jury trial, with Judge James C. Hallock presiding, started in the afternoon of December 12, 2016, after a morning largely occupied by jury selection. The jury found defendant guilty of the three counts before it.

¶ 7 Defendant filed a posttrial motion contending, among other things, that the court erred in denying his motion for a continuance on the day of trial. He did not specify any prejudice that he had suffered due to the lack of time. At the hearing on the motion, defendant explained why he thought that a continuance was necessary:

"It's our position that if the trial would have proceeded as it was laid out in the indictment up until that morning of trial, the State would not have been able to use the previous counts as propensity evidence against [defendant] and *** the jury would have been able to hear the counts on their own, that there was no motion to be able to have ***

> that evidence used in that way. And that the defense just simply needed more time to prepare for trial to account for the different use of the evidence."

Concerning the continuance, the court ruled than none was necessary, because the same evidence was at issue:

> "The Court finds that defense was on notice *** of these other facts and this other information and that they were going to be presented in one way or the other. I think Judge Kliment's ruling was correct."

The court then denied the motion as a whole and proceeded to the sentencing hearing. The court sentenced defendant to 16 years of imprisonment and 4 years of mandatory supervised release. After the court denied his motion to reconsider the sentence, defendant timely appealed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant asserts that the court erred in denying him a continuance. He argues that the State's late surprise of defense counsel with the motion weighed heavily in favor of the grant of a continuance. He argues that, contrary to what the court concluded, counsel *did* need time to adjust his strategy after the State's late motion. He contends that both judges failed to recognize the "fundamental distinction between defending a case in which certain evidence is being admitted for the purpose of proving a charged offense *** [and] defending a case in which the same evidence is being used [to prove] propensity to commit a different collateral offense." Initially, we were under the impression that defendant *also* asserted that the court erred in allowing the propensity evidence. However, defendant's reply brief explicitly disclaims the intent to make a second claim of error.

¶ 10 When we review a court's refusal of a continuance, we do so under an abuse-of-discretion standard. *People v. Walker*, 232 Ill. 2d 113, 125 (2009). Factors that the court may consider include:

(1) The movant's diligence;

(2) The defendant's right to "a speedy, fair and impartial trial"; and

(3) The interests of justice. *Walker*, 232 Ill. 2d at 125.

Other relevant factors include:

(1) Whether another trial prevented defense counsel from adequately preparing;

(2) The history of the case;

(3) The complexity of the matter;

(4) The seriousness of the charges; and

(5) "[D]ocket management, judicial economy and inconvenience to the parties and witnesses." *Walker*, 232 Ill. 2d at 125-26.

"Where it appears that the refusal of additional time in some manner embarrassed the accused in the preparation of his defense and thereby prejudiced his rights, a resulting conviction will be reversed." *People v. Lewis*, 165 Ill. 2d 305, 327 (1995); see also *Walker*, 232 Ill. 2d at 125 (quoting *Lewis*).

¶ 11 We deem that a fair argument exists that the court abused its discretion by denying the request for the continuance. The State must have concluded that it could gain a strategic advantage by nol-prossing the charges relating to the earlier offense and using the evidence relating to those charges as propensity evidence. The State had, by its calculation, 242 days to contemplate whether prosecuting the early charges was advantageous. After the State concluded that its case would benefit by using the July incident for propensity evidence, defense counsel

then had three days at most to respond to the State's strategic shift. That the facts were the same does not mean that the trial strategy would be the same. Indeed, had the State believed that no strategic difference existed, it would not have asked for dismissal of the charges. Further, the court's comments in denying the continuance suggested that it considered only the similarity in the evidence and did not take into account any changes in strategy that might be required.

¶ 12 However, for any such abuse of discretion to be a basis for reversal, a defendant must show "prejudice[to] his rights." *Lewis*, 165 Ill. 2d at 327. Defendant has properly supported his claim only in half: his argument for the court's abuse of discretion in denying the continuance is properly developed, but he fails to explain how he was in fact prejudiced. When arguing the motion, defense counsel was vague in discussing how the defense might be prejudiced. It is difficult to establish prejudice when the defendant is required to indicate what would have been done differently had the defendant been given the opportunity to contemplate just exactly what would have been done differently. But we have not been apprised what would have been done differently, even in this appeal. We are not allowed to speculate on behalf of a party as to how prejudice occurs. The fact that evidence may be admissible for a purpose other than originally disclosed is not *ipso facto* prejudicial. And the defendant has not presented a *de facto* reason to establish prejudice. The dissent determines prejudice was inherent (and obvious) but does not cite to authority for such a determination. Certainly, having barely more than a weekend to formulate a change in tactics is inconvenient, but—depending on counsel's other commitments—the time could have been sufficient, and there was nothing to establish that it was not. As the trial court correctly recognized, defense counsel did not have to do more research or study more evidence; he simply needed to strategize. If counsel started that process upon receiving the motion, it could have been complete by the Monday morning start of trial.

Moreover, nothing in the record obviously suggests any lack of preparation. Finally, were counsel actually unable to prepare fully, he could have explained the problem to the court at the time or specified how the lack of time had been prejudicial in the posttrial motion. On this record, if counsel were somehow stymied, it is not obvious, as the dissent posits.

¶ 13 The dissent argues that the decision to allow the State to use the July 16, 2015, incident as other-crimes evidence was inconsistent with the requirement of section 115-7.4(c) of the Code of Criminal Procedure (725 ILCS 5/115-7.4(c) (West 2016)) that such use must be disclosed "a reasonable time in advance of trial, or, for good cause shown, during trial." It argues that the prejudice from this violation was "inherent." By so arguing, it implies that the lack of reasonable notice was *de facto* structural error. Compare *People v. Averett*, 237 Ill. 2d 1, 13-14 (2010) (most error in a criminal trial is subject to harmless-error review) with *People v. Thompson*, 238 Ill. 2d 598, 608-09 (2010) (structural error—error that is "systemic, serving to erode the integrity of the judicial process and undermine the fairness of the defendant's trial"—is presumed to be prejudicial). "Structural errors include a complete denial of counsel, denial of self-representation at trial, trial before a biased judge, denial of a public trial, racial discrimination in the selection of a grand jury, and a defective reasonable doubt instruction." *Averett*, 237 Ill. 2d at 13. The error here is not such an error. Our supreme court's holding in *People v. Patrick*, 233 Ill. 2d 62 (2009), and progeny, is informative here. The *Patrick* court held, "[A] trial court's failure to rule on a motion *in limine* on the admissibility of prior convictions when it has sufficient information to make a ruling constitutes an abuse of discretion." *Patrick*, 233 Ill. 2d at 73. In *Averett*, it held that the error from a trial court's blanket policy of refusing to rule in a timely manner on motions *in limine* to bar prior convictions is not structural error; while the error is "serious," it "is not comparable to the errors recognized by the Supreme Court as structural." *Averett*, 237 Ill. 2d at

13. The potential for prejudice associated with a delayed ruling on the admissibility of prior convictions is at least as evident as the potential for prejudice in a case like this one.

¶ 14 Defendant argues that *Walker* is sufficiently factually similar that its outcome is determinative here. We disagree that the case is closely on point. In *Walker*, defense counsel, who was assigned to the defendant's murder case just weeks before trial, told the court on the day of trial that, because she had miscalendared the trial date and had just finished a trial, she was unprepared for trial. *Walker*, 232 Ill. 2d at 117-18. The State's case relied almost entirely on the defendant's written inculpatory statement (*Walker*, 232 Ill. 2d at 121), and the court, in finding the defendant guilty, stated that it relied entirely on that statement (*Walker*, 232 Ill. 2d at 121-22). The defendant's motion to suppress the statement was pending at the start of trial (*Walker*, 232 Ill. 2d at 117), but counsel never argued the motion (*Walker*, 232 Ill. 2d at 118). In reversing, our supreme court held that "the circuit court mechanically denied the continuance without engaging in thoughtful consideration of the specific facts and circumstances presented in this matter." *Walker*, 232 Ill. 2d at 126. Further, it cut counsel off when she explained that she was unprepared, stating that that was " 'irrelevant.' " *Walker*, 232 Ill. 2d at 127. Most importantly, however, the prejudice to the defendant was clear:

> "The *** transcript *** reveal[s] that defense counsel waived opening statement, raised no objections to the State's evidence, and engaged in limited cross-examination of the State's witnesses, which elicited information buttressing the State's case ***. Counsel also failed to move for a directed verdict at the close of the State's evidence, failed to call any witnesses for the defense, failed to present a comprehensive closing argument, and failed to file either a posttrial motion or a notice of appeal. In addition, counsel failed to litigate her previously filed motion to suppress defendant's inculpatory

> statement, which, in the words of the prosecutor, was the key piece of evidence and which *** formed the exclusive basis of defendant's convictions." *Walker*, 232 Ill. 2d at 130.

Here, by contrast, although the court's disposition of the motion to continue was arguably similarly abrupt, we find no indication of any lack of preparation in the record, and defendant does *not* point to any. *Walker* is therefore easily distinguishable.

¶ 15 III. CONCLUSION

¶ 16 As nothing supports a claim that the lack of a continuance prejudiced defendant, we affirm his convictions.

¶ 17 Affirmed.

¶ 18 JUSTICE JORGENSEN, dissenting:

¶ 19 I agree with the majority's assumption that the trial court abused its discretion when, literally on the day of trial, it granted the State's motion to monumentally shift its strategy, while denying defense counsel a continuance so that he could strategically respond to that shift. I diverge with the majority's position concerning prejudice.

¶ 20 Respectfully, I believe that the prejudice to defendant here is inherent and obvious. The majority notes that, whether it was used to support charges or as propensity evidence, the evidence itself had already been disclosed. I disagree, however, that mere disclosure of evidence is controlling. Indeed, section 115-7.4(c) of the Code of Criminal Procedure (725 ILCS 5/115-7.4(c) (West 2016)) allows the use of other-crimes evidence in domestic-violence cases; however, it provides that, when the State "intends to offer evidence under this [s]ection," it must disclose that evidence in a reasonable time in advance of trial, or, for good cause shown, during trial. The statute, therefore, anticipates that, when the State intends to use evidence *in a certain*

way, *i.e.*, as propensity evidence in a domestic-violence case, reasonable notice of that *intent* must be given to the defendant. Indeed, the majority's holding here suggests that all State evidence tendered to the defense in support of a charge is potentially available to be used as propensity evidence and, therefore, that defense counsel must *always* be prepared for the possibility that the State will shuffle the deck on the morning of trial, dismissing certain counts and using the evidence to establish propensity. In my view, if all that mattered was that evidence simply be disclosed, with the intended use of that evidence being immaterial, the statute's requirement for reasonable *notice* of the intent to use it as propensity evidence would be rendered meaningless. Thus, my issue here is *not* with the trial court granting the State's motion to use the evidence for propensity (something that even defendant does not challenge on appeal). Rather, it is with the trial court's denial of a continuance to allow defendant reasonable time to prepare in response to that change. If there was no prejudice inherent in changing the intended use of disclosed evidence, there would be no reason for the statute to require reasonable notice of the intent to use evidence for propensity purposes.

¶ 21 In that vein, I cannot subscribe to the notion that reasonable notice was given here (or good cause shown), such that denying a continuance was not prejudicial. Here, on October 11, 2016, the State affirmatively told the court, in defendant's presence, that it was going to proceed on all six counts. Over defendant's objection, and despite his counsel answering ready for trial, the court granted the State's oral motion for a 60-day continuance. Thereafter, the State apparently calculated that dismissing multiple counts and instead using that evidence to establish propensity would strengthen—not weaken—the likelihood of conviction. During that 60-day period, while defense counsel had no reason to suspect that he would need to be prepared to try a case other than the one to which he had already answered ready, the State had 60 days to

formulate calculations, consider options, weigh the pros and cons, and evaluate the benefits and shortfalls it might face by changing its strategy. In contrast, at best, defense counsel had the weekend prior to the hearing to finalize preparations for the trial he thought he was defending, *i.e.*, a jury trial on all six counts; prepare arguments in objection to the State's newly-served motion; and possibly prepare a new strategy for jury trial on counts 4, 5 and 6 that would address and defend against the newly re-captioned propensity evidence without, of course, the opportunity to discuss the impact of that shift with his client. The majority acknowledges that this might be inconvenient, but it then speculates that, "depending on counsel's other commitments," it could have been sufficient time to simply strategize. The majority suggests that *if* counsel was going to change his strategy and *if* he had started that process upon receiving the motion on Friday, it could have been completed by the Monday morning start of trial. With due respect to my colleagues, this is speculation and it is unfair to defense counsel. Even a public defender has a life outside of his or her job. More importantly, it is unreasonable to speculate that there is no prejudice to a client when defense counsel effectively had only minutes or a few days to consider and adjust his strategy, as compared to the State's two months.

¶ 22 The majority asserts that there is no reversible prejudice because nothing in the record reflects lack of preparation and, were counsel actually unable to fully prepare, he should have explained the problem to the court or specified the prejudice in the posttrial motion. Respectfully, there is evidence in the record suggesting lack of preparation because, on the morning of trial, defense counsel *did not answer that he was ready*. He informed the court that his readiness was dependent on the court's ruling on the State's motion concerning propensity evidence. When the trial court allowed the motion, counsel immediately asked for a date to allow the defense time to prepare based on the new *use* of evidence. Although the majority

dismisses the import of *Walker*, I find it applicable here in the sense that, just as counsel in *Walker* stated that, due to a calendaring mistake, she was not prepared to go to trial, here, counsel said, based on this change in circumstances, he was not prepared for trial. Counsel in *Walker* was not required to articulate specific reasons why her client would be prejudiced by her lack of preparedness; the court nevertheless held that the defendant *was* prejudiced by the court's failure to grant defense counsel a continuance. *Walker*, 232 Ill. 2d at 131. It is true that, after the continuance was denied, counsel in *Walker* effectively did not defend the case, whereas here, nothing in counsel's performance itself reflects a failure to defend. But to require demonstrably poor performance to establish prejudice, in these circumstances, penalizes defendant for his counsel's attempt to do the best he could with no time to prepare or strategize. Setting aside the possibility that we simply do not know what counsel might have done *better* for his client, had he had time to prepare, the message to defense attorneys becomes: when there has been a significant change in the posture of the case and a motion to continue is denied, do *not* do a good job at trial.

¶ 23 I submit that defendant's difficulty in articulating specific prejudice comes down to the fact that prejudice is inherent; there can be no dispute that the change here was a strategic advantage for the State or it would not have made the calculation that it did. By extension, this means that the change was to defendant's disadvantage. I think the trial court did not adequately appreciate that shift here. The prejudice starts when due process and the constitutional right to counsel who is *prepared* to defend his or her client is eroded. See *Walker*, 232 Ill. 3d at 129. As such, the purpose of discovery and the statutory requirement that motions such as these are to be made in a reasonable time before trial are not concepts to be ignored. They ensure that, at a reasonable time before trial, counsel is on notice of the State's evidence and its intent to use that

evidence in a particular manner. I understand the majority's rationale, but I respectfully believe that its decision implicitly encourages sandbagging defense attorneys. It incentivizes the State to make last-minute changes to use evidence for propensity, which has a huge impact on the character and tenor of a defendant's trial (hence, the requirement for reasonable notice), and to argue that the defendant will not be prejudiced because the evidence was previously disclosed. It is the intended *use* of that evidence that matters, and a defendant is prejudiced when, without giving defense counsel time to prepare, that intended use changes. I respectfully dissent.