2019 IL App (3d) 170219-U

Order filed August 30, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0219
v.	)	Circuit No. 17-CM-265
	)	
QUINCY A. WADDELL,	)	Honorable
	)	Edward A. Burmila Jr.,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice Holdridge specially concurred.

ORDER

¶ 1 *Held*: The record does not indicate that the court conducted the *Montgomery* balancing test before it granted the State's motion to admit evidence of defendant's prior convictions, but this error is not reversible plain error.

¶ 2 Defendant, Quincy A. Waddell, appeals from his domestic battery convictions. Defendant argues the circuit court failed to conduct the *Montgomery* balancing test before granting the State's motion to admit evidence of his prior felony convictions. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant by criminal complaint with three counts of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2016)). Defendant waived his right to a jury trial, and the case proceeded to a bench trial.

¶ 5 Immediately before trial, the State made an oral "*Montgomery* motion" to admit evidence of defendant's prior felony convictions in the event that defendant decided to testify. The court deferred ruling on the State's motion until defendant decided whether he wanted to testify.

¶ 6 The State called Zareeta Ellis as its first witness. Ellis had a dating relationship with defendant from November 3, 2016, to January 30, 2017. On January 30, 2017, defendant and Ellis lived together. Earlier in the day, Ellis left to help a friend. She returned home at 8 p.m. and went to bed around 9 p.m. Defendant returned home around 10:30 p.m., entered the bedroom, pulled the comforter off the bed where Ellis was sleeping, and indicated that he wanted to have sexual intercourse. Ellis refused, and defendant went to the living room. While in the living room, defendant sent Ellis a text message that said he intended to move out of the house the next day. Ellis went to the living room to speak with defendant. Defendant did not want to talk, and Ellis went back to bed. Defendant entered the bedroom where he got into an argument with Ellis. During the argument, defendant placed both of his hands on Ellis's neck and began to choke her. Defendant found a heart-shaped candy, threw the candy at Ellis, and started hitting Ellis's head with his fists. At one point, defendant picked up his tablet and hit Ellis in the head. Defendant hit Ellis more than 12 times. The altercation ended when Ellis packed up defendant's belongings and drove him to his sister's house. While in the car, defendant said "he didn't want to do this." Defendant also told Ellis that he "knew [Ellis] was going to call the police, so he was going to make sure it was worth it."

¶ 7 After Ellis dropped defendant off, she went to the hospital because her head was hurting, and she could not hear. After the altercation with defendant, Ellis had a mark on her nose, her ear was discolored and swollen, she had multiple lumps on her head, scratches on the back of her neck and ear, and she could not hear out of her left ear. The State introduced photographs of Ellis's injuries. The photographs were taken approximately 40 minutes after the incident.

¶ 8 Nurse Cheryl Fox testified that she treated Ellis's injuries while Ellis was in the St. Joseph Hospital emergency room. Ellis told Fox that her injuries were the result of a physical altercation, and Fox contacted the police. Fox noted that Ellis was upset and had swelling on the side of her face and neck.

¶ 9 Police officer Phillip Enph testified that he spoke with Ellis at St. Joseph Hospital. Enph observed a cut on Ellis's nose, an abrasion on her ear, and a bump on her head. Ellis seemed "very terrified, very distraught." On cross-examination, Enph said that Ellis told him that defendant returned home around 10:30 p.m. and became enraged. Defendant punched Ellis with his fist and struck her in the head with his hands. Defendant hit Ellis approximately 12 times. Defendant then jumped on the bed and started choking Ellis. Ellis temporarily lost consciousness and when she regained consciousness, defendant asked Ellis to drive him to another location.

¶ 10 Police officer Nathan Holman testified that he arrested defendant on February 1, 2017. Following his arrest, defendant was not cooperative with the booking procedure.

¶ 11 After the State rested, defense counsel made a preemptory objection to the State's use of defendant's prior convictions to impeach defendant arguing they were "more prejudicial than they are probative." The State responded that defendant's felony convictions occurred less than 10 years before the trial and included a 2014 aggravated battery conviction that included a sentence of five years' imprisonment and a 2012 conviction for driving while license was

revoked that included a sentence of two years' imprisonment. The court granted the State's motion to admit defendant's prior convictions for impeachment purposes over defense counsel's objection.

¶ 12 Defendant testified that on January 30, 2017, at 10:30 p.m., he returned to the home that he shared with Ellis. At that time, Ellis was lying down in the bedroom. Ellis seemed angry because defendant was gone when she returned to the house. Defendant left the bedroom and went to the living room where he sent Ellis a text message. In the message, defendant said

> "I was tired of all of the arguing and bickering about nothing. That I had just been released from prison. That I was a grown man that should be able to go and come as I please. So I was going to pack my things and leave *** the next day."

After sending the message, Ellis came out to the living room and argued with defendant about why he "always want to jump and run instead of deal with problems." Defendant went and sat on the stairs. Ellis threw the keys to the house at defendant and told him to leave because she knew that he would be back. Then, Ellis sent defendant a text message that told him to come upstairs. Defendant went upstairs, and he and Ellis continued to argue. When the argument ended, defendant asked Ellis to help him pack his belongings and give him a ride. Defendant denied striking or hitting Ellis with his hands or his tablet. Defendant did not threaten Ellis while they were in the car.

¶ 13 The court found that defendant's version of events did not explain how Ellis incurred the injuries, if Ellis had the injuries before the incident, or why Ellis went to the emergency room after she dropped defendant off. The court said defendant was "a convicted felon, and the law allows [it] to take that into account only as to his believability." The court observed "even looking at all of the facts in this case, it still comes down to a complete issue of credibility, kind

of a he said, she said with a little bit extra of those photographs." The court found Ellis's version of events to be credible, and it found defendant guilty of each of the charged offenses. The court sentenced defendant to 120 days in jail and 18 months' probation. Defendant appeals.

¶ 14 II. ANALYSIS

¶ 15 Defendant argues the court failed to conduct the *Montgomery* balancing test required prior to granting the State's motion to admit evidence of his prior convictions. Although defendant forfeited review of this issue, he argues that the evidence in this case was closely balanced, and therefore, this error is reversible plain error. We find that there is no indication in the record that the court conducted the *Montgomery* balancing test before it granted the State's motion, however, this is not reversible plain error because the evidence was not closely balanced.

¶ 16 To preserve an error for appellate review, defendant must object to the error at trial and raise the error in a posttrial motion. *People v. Belknap*, 2014 IL 117094, ¶ 66. Generally, a defendant's failure to do either of these steps forfeits appellate review of the alleged error. *People v. Sebby*, 2017 IL 119445, ¶ 48. The plain error rule permits review of an otherwise forfeited error "when (1) a clear or obvious error occurred and 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) a clear or obvious error occurred and that 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). The first step of plain error analysis is to determine whether a clear or obvious error occurred. *Id.*

¶ 17 In *People v. Montgomery*, 47 Ill. 2d 510, 516 (1971), the supreme court held evidence of a witness' prior convictions may be admitted to impeach that witness' credibility as long as:

(1) the prior crime was punishable by death or a term of imprisonment exceeding one year, or involved dishonesty or a false statement, regardless of the punishment; (2) less than 10 years passed since the date of conviction or release of the witness from confinement, whichever is later; and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice. The third factor requires the court to balance probative value of the prior conviction against its potential prejudice. *People v. Mullins*, 242 Ill. 2d 1, 14 (2011).

¶ 18 The supreme court has "rejected any notion that the *Montgomery* balancing test is not properly performed unless the trial court explicitly states that it is doing so on the record." *Id.* at 16 (discussing *People v. Atkinson*, 186 Ill. 2d 450, 462 (1999)). In *Atkinson*, 186 Ill. 2d at 462, defense counsel referenced the balancing test in his argument against the admission of defendant's prior convictions. The circuit court then said it "recognized that [it] had to determine whether the probative value of the evidence outweighed its prejudice." *Id.* From these references, the supreme court found that the circuit court was aware of the *Montgomery* balancing test, and it concluded that "there [was] no reason to find that the trial court failed to weigh the probative value of the evidence against its possible prejudicial effect." *Id.* at 463.

¶ 19 In this case, the record contains only one reference to the balancing test. While arguing against the State's motion to admit defendant's prior convictions, defense counsel said the admission of defendant's convictions would be "more prejudicial than they are probative." In contrast to *Atkinson*, the court made no mention of this test when it granted the State's motion. Therefore, the record contains no meaningful indication that the court was aware of and conducted the *Montgomery* balancing test. This does not, however, end our inquiry as we must determine whether this forfeited error is reversible plain error.

¶ 20 Defendant solely argues that the instant error is reversible under the first prong of the plain error analysis. That is, the evidence was so closely balanced that the error threatened to tip the scales of justice against defendant. To determine whether the evidence was "close," we must "evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Sebby*, 2017 IL 119445, ¶ 53. This inquiry "involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id.*

¶ 21 Here, the State charged defendant with three counts of domestic battery. 720 ILCS 5/12-3.2(a)(2) (West 2016). "A person commits domestic battery if he or she knowingly without legal justification by any means; *** [m]akes physical contact of an insulting or provoking nature with any family or household member." *Id.*

¶ 22 At trial, the parties sole dispute was whether defendant made "physical contact of an insulting or provoking nature with" Ellis. Ellis and defendant both testified that they got into an argument on the evening of January 30, 2017. Ellis testified that the couple's argument preceded defendant's physical attack where he choked and hit her. As a result of defendant's blows, Ellis received a mark on her nose, a discolored and swollen ear, multiple lumps on her head, scratches on the back of her neck and ear, and temporary deafness in one ear. Ellis's testimony was largely corroborated by Officer Enph who testified regarding his hospital room interview with Ellis. Enph said that Ellis had told him that defendant hit her approximately 12 times causing injuries to her nose, ear, and head. Nurse Fox also testified regarding the extent of Ellis's injuries. These injuries included swelling on the side of Ellis's face and neck. Fox's observations of Ellis's injuries and demeanor, combined with Ellis's statement that she had been assaulted, prompted

Fox to contact the police. Finally, the State introduced photographs that documented the injuries described by Ellis, Enph, and Fox.

¶ 23 In opposition to the State's evidence, defendant testified that he did not choke or hit Ellis. Defendant's testimony did not indicate how Ellis received the above-described injuries or why Ellis sought medical care in the early morning after their argument.

¶ 24 While this case may appear to be a credibility contest between two individuals who were in a relationship until this incident, the circumstantial evidence corroborates Ellis's version of events—defendant hit her, causing injuries to her head that required medical treatment at the hospital—and establishes it as the more credible version of events. Therefore, we find the evidence in this case was not close, and defendant cannot establish the prejudice needed to reverse this plain error under the first prong.

¶ 25 III. CONCLUSION

¶ 26 The judgment of the circuit court of Will County is affirmed.

¶ 27 Affirmed.

¶ 28 JUSTICE HOLDRIDGE, specially concurring:

¶ 29 I agree with the majority's conclusion that the defendant's case should be affirmed. However, I write separately because I disagree with the majority's analysis.

¶ 30 As the majority notes, the first step in conducting a plain-error analysis is determining whether any error occurred at all. *Supra* ¶ 16. The majority finds that error occurred because the circuit court failed to "mention" the *Montgomery* balancing test when it granted the State's motion, which meant that the record contained "no meaningful indication that the court was aware of and conducted" the proper test. *Supra* ¶ 19. I disagree with the majority's finding of error in this case.

¶ 31 First, I am a little troubled by the majority's acknowledgement that the supreme court has " 'rejected any notion that the *Montgomery* balancing test is not properly performed unless the trial court explicitly states that it is doing so on the record' " but then faults the circuit court in this case for failing to explicitly "mention" the test when it made its ruling on the State's motion. *Supra* ¶¶ 18-19.

¶ 32 In *People v. Williams*, 173 Ill. 2d 48, 83 (1996), our supreme court explained:

> "Contrary to the defendant's argument, there is no reason to suppose that the trial judge failed to weigh the probative value of the impeachment against its possible prejudicial effect. A review of the transcript shows that the judge was fully aware of the *Montgomery* standard and the balancing test it requires. The parties referred to the balancing test in their arguments to the judge on the question whether the defendant could be impeached with the earlier conviction. In similar circumstances, this court has declined to find error when the transcript makes clear that the trial judge was applying the *Montgomery* standard, even though the judge did not expressly articulate it (see *People v. Redd*, 135 Ill. 2d 252, 324-26 (1990)) and the same result must be reached here. Although the trial judge in this case did not explicitly state that he was balancing the opposing interests, there is no reason to suppose that he disregarded the familiar, well-established *Montgomery* standard in determining that the impeachment was proper."

¶ 33 Here, the State notified the circuit court that it had an oral "*Montgomery* motion." When the court addressed the motion, defense counsel argued that the defendant's prior convictions should not be allowed to impeach the defendant because they were "more prejudicial than they

[were] probative." The court then stated that it granted the State's motion to admit the defendant's convictions over defense counsel's objection. It is evident from the record, namely the State's "*Montgomery* motion" and defense counsel's specific objection, that the court was aware of the proper legal standard. Further, there is no evidence of record that the court did anything but apply the law in this case.

¶ 34 Second, the majority misconstrues the supreme court's analysis in *Atkinson*. *Supra* ¶ 19. In *Atkinson*, the defendant argued that the circuit court erred because it failed to conduct the *Montgomery* balancing test. *Atkinson*, 186 Ill. 2d at 462. The supreme court noted that the record demonstrated that defense counsel referred to the balancing test during arguments and the circuit court mentioned the *Montgomery* balancing test numerous times throughout proceedings. *Id.* at 462-63 The supreme court stated, "[i]t [was] clear from the trial judge's comments that he was aware of the *Montgomery* balancing test" and "[t]he trial judge did not err in failing to articulate the factors he considered in his application of the *Montgomery* balancing test." *Id.* at 463. The supreme court concluded that the record showed the circuit court adhered to the *Montgomery* rule.

¶ 35 *Atkinson* follows decades of supreme court precedent and still stands for the notion that the circuit court is not required to explicitly mention or discuss the *Montgomery* balancing test on record. However, in that case, the circuit court *happened* to discuss *Montgomery* and its requirements, but it was not required to do so. The supreme court's mentioning of this fact did not change the requirements under *Montgomery*.

¶ 36 Last, the majority also places an arbitrary amount of weight on the fact that the record "contains only one reference to the balancing test." *Supra* ¶ 19. How many times must the parties mention the balancing test to ensure the court is aware of and employs the applicable legal

standard? No authority from our supreme court dictates that *Montgomery* must be mentioned a certain number of times on record to demonstrate that the circuit court followed the law.

¶ 37 For the foregoing reasons, I would find that no error occurred in this case.