2020 IL App (2d) 170987-U
No. 2-17-0987
Order filed February 28, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARK A. WRIGHT, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 16-CM-1200 Honorable Philip G. Montgomery, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Birkett and Justice Bridges concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction of battery affirmed; any alleged error in admitting victim's out-of-court statements to law enforcement was harmless beyond a reasonable doubt because the jury heard overwhelming evidence that defendant made physical contact with his daughter of an insulting or provoking nature.

¶ 2 After defendant, Mark A. Wright, admitted to the jury that he had rubbed dirt in his daughter's face, the jury acquitted him of one count of domestic battery causing bodily harm (720 ILCS 5/12-3.2(a)(1) (West 2016)), and found him guilty of one count of battery involving physical contact of an insulting or provoking nature (720 ILCS 5/12-3.2(a)(2) (West 2016)). In this direct appeal, defendant asserts that the trial court erred in deeming his daughter R.W. unavailable under

section 115-10.2a(c)(3) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.2a(c)(3) (West 2016)) and thus admitting her hearsay declarations that he had battered her. Because the error, if any, was harmless, we need not resolve this evidentiary issue, and we thus affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by complaint with the two counts of domestic battery on which he was tried. In the State's case-in-chief, Lieutenant Jim Burgh of the De Kalb County Sheriff's Office testified that he had responded to a 911 call in which a passing motorist, a neighbor of defendant's who was driving her son to school, reported that defendant was battering R.W. in the front yard of their residence. R.W. was crying and distraught when Burgh arrived. The back of her clothing was grass-stained. She had dirt on her face and in the corner of her mouth. Then-Deputy Joseph Rood, also of the De Kalb County Sheriff's Office, noted that R.W. smelled of alcohol. He determined that R.W. could not safely drive, so he transported R.W. and her children to her mother's house. There, he took photographs to document her appearance. He stated that one photograph showed dirt lodged in R.W.'s teeth; the evidence photograph, although low resolution, is consistent with that statement.

¶ 5 Defendant was arrested. In an in-custody interview, he admitted that he had scuffled with R.W. She grabbed him by the waist, and he grabbed her wrists. She fell. He grabbed some dirt, said "something about putting it in her filthy mouth," and rubbed the dirt in her mouth.

¶ 6 Defendant chose to testify. He admitted that he had fallen on top of R.W. during a scuffle and had then rubbed dirt in her face. He restated that admission under cross-examination.

¶ 7 R.W. testified for defendant. By her account, she grabbed defendant when she tripped while she was arguing with him. He grabbed some dirt and threw it on the ground, saying,

"[F]ilthy, just like your mouth." R.W. did not remember telling any officer from the sheriff's office that defendant had put dirt into her mouth.

¶ 8 After the defense rested, the State asked the court for leave to introduce certain of R.W.'s prior inconsistent statements as substantive evidence under section 115-10.2a(c)(3) of the Code. Among other things, it sought to use R.W.'s statement to Burgh that defendant had put dirt in her mouth. Section 115-10.2a (725 ILCS 5/115-10.2a (West 2016)) allows, despite the lack of other applicable hearsay exceptions, introduction of hearsay declarations made by unavailable witnesses who are protected persons under section 201 of the Illinois Domestic Violence Act of 1986 (750 ILCS 60/201 (West 2016). 725 ILCS 5/115-10.2a(a) (West 2016). Section 115-10.2a(c)(3) creates a hearsay exception when the declarant is unavailable because he or she "testifies to a lack of memory of the subject matter of [his or her] statement." 725 ILCS 5/115-10.2a(c)(3) (West 2016).) The court, over defendant's objection, admitted as substantive evidence most of the hearsay declarations at issue. Burgh testified in rebuttal that R.W. told him that defendant had forced dirt into her mouth.

¶ 9 The jury rendered its split verdict, and defendant moved for a new trial on multiple grounds, including that the trial court erred when it ruled that R.W. was unavailable under section 115-10.2a(c)(3) of the Code. The court denied the motion and sentenced defendant to 18 months' probation. The court denied defendant's motion for reconsideration of the sentence, defendant timely appealed.

¶ 10 II. ANALYSIS

¶ 11 Defendant argues on appeal that the trial court erred when it determined that R.W. was unavailable under section 115-10.2a(c)(3); he contends that a declarant is unavailable under that section only when he or she testifies to lacking memory of the matter that is the subject of the

hearsay declaration. He argues that, because R.W. "testified that she recalled the events described in her statement to [the officers]," we must conclude that she *did not* testify to a lack of memory of the subject matter of her statement.

¶ 12 In response, the State contends that, even if the court had excluded the statements entirely, the evidence of defendant's guilt would nevertheless have been overwhelming, making any error harmless beyond a reasonable doubt. Defendant replies that the evidence that his contact with R.W. was insulting and provoking was not overwhelming. We agree with the State that the evidence was overwhelming, and we thus need not decide whether the court erred when it admitted R.W.'s statements under section 115-10.2a(c)(3).

¶ 13 A reviewing court need not address the merits of a claim of error when it can conclude that the error, if any, is harmless beyond a reasonable doubt. *People v. Hart*, 214 Ill. 2d 490, 517 (2005). Where harmless-error analysis is proper—that is, in cases such as this one where the error is not structural—the State has the burden of persuading the reviewing court that the error was not prejudicial: "the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." *People v. Herron*, 215 Ill. 2d 167, 181-82 (2005). A reviewing court may conclude that an error in admitting evidence was harmless beyond a reasonable doubt if the evidence that defendant has not challenged overwhelmingly supports the conviction. See *People v. Patterson*, 217 Ill. 2d 407, 428 (2005) (recognizing overwhelming remaining evidence as one of three conditions under which evidentiary error may be harmless beyond a reasonable doubt).

¶ 14 Domestic battery by insulting or provoking contact has four elements: the State must prove that the defendant (1) intentionally or knowingly, (2) and without legal justification, (3) made physical contact of an insulting [or provoking] nature, (4) with a household or family member." See *People v. Pickens*, 354 Ill. App. 3d 904, 914 (2004). Defendant, in his reply, denies that the

evidence that his contact with R.W. was insulting or provoking was overwhelming. He does not argue that the evidence of the other three elements of domestic battery was not overwhelming.

¶ 15 The evidence that defendant's contact was of an insulting or provoking nature was overwhelming. Defendant admitted during trial that he rubbed dirt in R.W.'s face during a scuffle, an admission corroborated not only by his prior consistent admission in an in-custody interview but by evidence that R.W. had dirt in her mouth and grass stains on her clothing. Whether the defendant's contact with R.W. was of an insulting or provoking nature was an issue of fact for the jury to decide. See *People v. Rachel*, 123 Ill. App. 3d 600, 608 (1984). Rubbing dirt in someone's face during a hostile encounter is an unmistakable expression of contempt for that person. Thus, not only could the jury here reasonably conclude that defendant's contact with R.W. was insulting or provoking, such a conclusion was obvious. Defendant argues that R.W.'s testimony was "the best evidence" of whether his contact with her was insulting. We disagree. A reasonable jury need not give any weight to the idea that a defendant would falsely confess to a crime and then exercise his right to testify only to perjure himself by again falsely admitting to that crime.

¶ 16 III. CONCLUSION

¶ 17 For the reasons stated, we affirm defendant's conviction.

¶ 18 Affirmed.