2020 IL App (3d) 170566-U

Order filed May 28, 2020

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2020

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0566
v.	)	Circuit No. 17-CF-123
	)	
MATTHEW H. RICE,	)	Honorable Edward A. Burmila Jr., Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice McDade concurred in part and dissented in part.

ORDER

¶ 1 *Held*: (1) The admission of the victim's written statement, without an opportunity for cross-examination, violated the defendant's constitutional right to confront the witness. (2) The statutory basis for the admission of the victim's written statement is subject to forfeiture. (3) The record did not warrant a posttrial *Krankel* inquiry into the defendant's claims of ineffective assistance of counsel.

¶ 2 The defendant, Matthew H. Rice, appeals from his convictions for aggravated battery, resisting a peace officer, and domestic battery. The defendant raises three issues in this appeal: (1) the Will County circuit court erred in admitting the written statement of the victim, Carmen

Bradley, in place of her live testimony, (2) the admission of Bradley's written statement violated the defendant's constitutional right to confront the witness, and (3) the court failed to conduct a *Krankel* hearing.

¶ 3 I. BACKGROUND

¶ 4 The State charged the defendant, by indictment, with one count of aggravated battery (720 ILCS 5/12-3.05(d)(4) (West 2016)), two counts of resisting a peace officer (*id.* § 31-1(a), (a-7)), and two counts of domestic battery (*id.* § 12-3.2(a)(2)). Count I alleged that the defendant, knowing Julie Larson to be a peace officer performing her official duties, kicked Larson in her leg. Count II alleged that the defendant knowingly resisted Officer Brandie Loschiavo's attempt to place him under arrest by removing his jacket while Loschiavo held his wrist which caused injury to Loschiavo. Count III alleged that the defendant made physical contact of insulting or provoking nature with Bradley, a family or household member, when he shoved his fingers into Bradley's throat. Count IV alleged that the defendant made physical contact of an insulting or provoking nature with Bradley, a family or household member, in that he punched Bradley in her face. Count V alleged that the defendant knowingly resisted Loschiavo while she attempted to place him under arrest in that he tensed his hands and positioned them to prevent handcuffing. The court appointed the public defender to represent the defendant.

¶ 5 Before trial, the State served the defense with its list of witnesses. The list included the victim, Bradley. Bradley's address was listed as 611 Sullivan, University Park. The State served the defense with a report summarizing Bradley's two-page written complaint. During the March 10, 2017, hearing, defense counsel acknowledged receipt of the State's discovery documents.

¶ 6 On the morning of May 2, 2017, before the defendant's jury trial began, the State informed the court and defense that Bradley had not appeared to testify. The State had served

Bradley with a subpoena to testify, and Bradley's friend, Danielle Ho, told the State that Bradley had gotten into a vehicle accident on her way to court. Due to Bradley's absence, the State moved to continue the case. The court denied the motion, and the case proceeded to trial.

¶ 7 The State called Joem Caraballo as its first witness. On January 15, 2017, Caraballo worked as the desk clerk at the Fenton Motel in Joliet. That evening, the defendant asked Caraballo for the key to room 126. Caraballo refused to give the key to the defendant. The defendant became angry and threatened to kill Caraballo. The defendant walked to room 126 and attempted to break down the door. A woman opened the door before the defendant could force his way in. Caraballo called the police, but before the police arrived, Bradley and Ho approached the front desk to ask Caraballo for help. The women appeared nervous, and after speaking to Caraballo, they walked to the parking lot. When the first police officer arrived, Caraballo identified the defendant as the individual who had threatened him. The officer ordered the defendant, who was walking in the parking lot, to stop. The defendant ignored her command. The officer radioed for backup and attempted to place the defendant under arrest. The defendant yelled at the officer and resisted her attempts to place him under arrest. A second officer assisted the first in placing the defendant under arrest.

¶ 8 Ho testified that she was friends with the defendant and Bradley. Bradley and the defendant dated for three years. In January 2017, Ho and Bradley lived in room 126 at the Fenton Motel. The defendant occasionally stayed in the room.

¶ 9 On January 15, 2017, the defendant came to the room to visit and drink alcohol. Initially, the defendant seemed fine. At some point, Bradley became "irritated because she doesn't like [the defendant's] drinking, and she has a big mouth and likes to use it a lot." Bradley yelled at the defendant to leave the room and slapped him in his face. The defendant pushed Bradley onto

the bed. Bradley continued to yell at and hit the defendant. The defendant placed his hands on Bradley's neck, and choked her for a few seconds. Ho thought that the defendant also "slapped her[,] I don't want to say he punched her." Bradley broke free and ran to the bathroom. Bradley stayed in the bathroom for approximately five minutes. Ho stood at the bathroom door and attempted to calm Bradley, and the defendant exited the motel room. When Bradley opened the bathroom door, the defendant knocked on the door to the motel room. Ho did not want to let the defendant into the room, but Bradley opened the door and yelled at the defendant. The defendant reentered the room and followed Bradley into the bathroom. Ho heard a loud noise, went to the bathroom, and saw Bradley lying in the bathtub. Ho assumed that the defendant had pushed Bradley into the bathtub. Ho asked the defendant "why would you do that?" Bradley continued to yell at the defendant and told him to leave. The defendant took the women's cell phones and left the motel room. Bradley and Ho went to the parking lot to find the defendant and retrieve their cell phones. The defendant told Ho that he did not have their cell phones. A police officer arrived as the women continued to search for their cell phones. While two police officers questioned the defendant, the defendant acted "crazy."

¶ 10 At the conclusion of Ho's testimony, the trial recessed for the evening. When the trial resumed, on May 3, 2017, the State said it spoke to Bradley on May 2. Bradley assured the State that she would appear to testify. However, Bradley had not appeared before the trial resumed on May 3. The State said that it could proceed without Bradley but asked that the court issue a warrant. The court issued a warrant for Bradley's arrest and granted the State leave to file a petition for rule to show cause against the subpoenaed witness. The State also moved to admit Bradley's written statement through the testimony of Joliet Police Officer Jeffrey Haiduke. In its offer of proof, Haiduke testified that he interviewed Bradley on January 15, 2017. At the time,

Bradley was too distraught to physically write, and Haiduke transcribed Bradley's oral statement. Bradley made the statement approximately 5 to 10 minutes after the police transported the defendant from the scene. Defense counsel objected to the State's use of Bradley's written statement, saying,

> "The complaining witness in this case is a key witness for two of these charges. The defendant has a right to cross examine the witness as to her state of mind, not just when she was making this statement to the police officer but also when she was in the hotel room and I—the defendant will not be able to do that through the police officer especially because he was just writing down what the victim was allegedly saying."

The court granted the State's motion to use Bradley's written statement in lieu of her live testimony over defense counsel's objection.

¶ 11 After the court called the jury back into the courtroom, the State called Haiduke to testify. Haiduke testified, consistent with the State's offer of proof, that he spoke with Bradley at the scene and recorded her written statement. Haiduke also stated that Bradley and Ho appeared shaken up and timid. Bradley was crying and unable to speak with Haiduke for several minutes. Haiduke read Bradley's written statement to the jury. The statement said:

> "On 1-15, of 2017 at 9:30 p.m. I was located at 2035 West Jefferson, room number 126 when I was physically abused by [the defendant], my boyfriend. The specific areas of physical abuse I suffered are as follows: Areas abused, face and neck, is what she stated. Statements of events leading up to the physical abuse and how inflicted. She stated, we had been arguing all week. He just started going crazy. He yelled at me and started to rip my clothes off, not sexually but to be

mean. Then I tried to get away and he threw me back down on the bed. I got up again and he punched me in the face. He then got on top of me and was shoving his fingers into my throat. Then it says the nature and extent of injuries including the description of pain. She stated, face is sore and my back."

¶ 12 Officer Loschiavo testified that she was the first officer to arrive at the Fenton Motel. There, Loschiavo asked the defendant to come closer to the motel so that she could speak with him about Caraballo's call. The defendant told Loschiavo, "fuck you, I don't have to do shit." Loschiavo grabbed the defendant's right hand and attempted to place him in handcuffs. The defendant pulled his hand away, swore at Loschiavo, and told her not to touch him. Loschiavo radioed for backup, and the defendant began to remove his jacket causing Loschiavo to lose her grip on the defendant's wrist. Loschiavo performed a leg sweep maneuver that forced she and the defendant to the ground. Loschiavo landed on top of the defendant with her hand pinned underneath him. Loschiavo injured her hand and left knee in the fall and suffered swelling and scratches. Loschiavo continued to struggle with the defendant until Sergeant Larson arrived. Larson assisted Loschiavo in placing the defendant in handcuffs. The defendant refused to stand, and the officers carried the defendant out of the street where he was lying. The defendant screamed profanities at the officers as they escorted him to Loschiavo's patrol vehicle. Bradley and Ho, who appeared submissive and scared, asked the defendant for their cell phones.

¶ 13 Sergeant Larson testified that she responded to Loschiavo's call for backup. At the Fenton Motel, Larson saw Loschiavo wrestling with the defendant on the ground. Larson assisted Loschiavo in placing handcuffs on the defendant. The defendant kicked his feet as the officers helped him off the ground. The defendant's foot struck Larson's left shin causing bruising. The defendant swore at the officers and refused to sit in Loschiavo's patrol vehicle.

Bradley and Ho asked the defendant for their cell phones. The women appeared visibly shaken. Bradley told Larson that the defendant punched her in the face, choked her, and shoved her into a bathtub. Larson took photographs of Bradley's face and neck to document her injuries.

¶ 14 The defendant did not testify, and the defense rested without putting on evidence. The jury found the defendant guilty of each of the five charges.

¶ 15 Defense counsel filed a motion for a new trial. The motion argued the court erroneously admitted Bradley's written statement into evidence because "the statement was hearsay and *** the [d]efendant could not cross-examine a document or the officer as to *** Bradley's knowledge of the situation and therefore would be denied his right to confront the witness against him." The motion further contended that the State did not give sufficient advance notice of its intent to use the written statement in lieu of Bradley's testimony, nor did the State provide an address for Bradley apart from the address of the Fenton Motel.

¶ 16 The court denied the motion finding that the State had satisfied the statutory requirements for the admission of the written statement.

¶ 17 Following the court's ruling, the defendant indicated that he intended to hire private counsel or proceed as a self-represented litigant. The defendant explained that he was

> "trying to work on something as to where I could, you know, relieve [defense counsel] as my counsel for ineffective counsel [*sic*] because there were several issues that he didn't address during my trial that I wish he would have object and he didn't object when he was supposed to object.
>
> THE COURT: Well, let me tell you this before we go forward. You're not entitled to like a meaningful relationship with [defense counsel]. You're not going to be buddies, okay? What you're entitled to is his best effort, for in my opinion

he made in this case. All right? Hold on. Listen to what I'm saying. I let you talk. Listen to what I'm saying right now.

The fact that he did not ask the questions that you wanted him to ask, all right, does not mean that he was ineffective as an attorney. There are decisions you make during the trial, during the charge, whether the case goes to trial, if it's a bench trial, a jury trial, if you testify, things of that nature. The tactical decisions in the case are made by the lawyer, whether it's [defense counsel] or F. Lee Bailey. They make the tactical decisions in this case, and he doesn't have to have your concurrence to make those tactical decisions, okay?

Now, you're telling me you don't agree with the decisions that he made. If you want to hire your own attorney, or as you said you want to go *pro se*. Let's say that you hire your own attorney and he comes in here or she comes in here, that does not mean that they're going to do everything that you have to say in the case. Okay?

And if you hire an attorney and that attorney is going to re-argue this motion. Let's say I vacate the ruling that I just made and I reinstate it, give somebody else a chance to look at [defense counsel's] motion, that does not mean that they're going to change it just because you have another lawyer. And if that lawyer comes in here and says, you know what ***? [Defense counsel] was correct. There is nothing here. You won't be able to come back and say well, now I want a third lawyer, I want a fourth lawyer, I want a fifth lawyer until I find somebody that's going to do what I want them to do. Now, hold on a second. I'm not discouraging you. If you want to hire an attorney, I'm going to give you an

opportunity to do that. And if you say you don't want me to rule on this because you want to fire the public defender and argue these post trial motions on your own, you can do that too, but that's a completely different set of circumstances.

So you have to tell me what it is that you're thinking right now. Do you want to hire a lawyer, or you're thinking in the long run you want to do this on your own and you want to fire the Public Defender's Office, you don't want them to be involved in the case anymore?

THE DEFENDANT: I would like to hire a lawyer."

While setting the date for the next hearing, the defendant further complained that defense counsel failed to obtain in discovery video recordings that included Bradley's admission that she falsified the police reports and medical records, and photographs of bite marks to the defendant's face. The defendant acknowledged that counsel "did a good job," but did not secure the evidence mentioned by the defendant. At the end of the hearing, the defendant reiterated his intent to hire private counsel. The court vacated its ruling on the defendant's motion for a new trial and continued the case to allow the defendant to retain private counsel.

¶ 18 At the next hearing, the defendant stated that he remained uncomfortable with defense counsel's representation, but he still was "[t]rying to find out what [his] legal options [were] right now." The court re-explained to the defendant his right to: (1) appointed counsel, but not the attorney of his choice, (2) privately retained counsel of his choice, or (3) represent himself. The defendant responded, "I just want to, you know, go ahead and move forward so I could work on my appeal." Defense counsel continued to represent the defendant, and the court reinstated its denial of counsel's motion for a new trial. The court sentenced the defendant to 54 months' imprisonment for aggravated battery, 36 months' imprisonment for one count of resisting a peace

officer, and 36 months' imprisonment on each of the two domestic battery convictions. The court did not impose a sentence on the count V, resisting a peace officer charge. The court ordered the defendant to serve the sentences concurrently. The defendant filed a notice of appeal.

¶ 19 II. ANALYSIS

¶ 20 A. Confrontation Clause

¶ 21 The defendant argues the court's admission of Bradley's written statement into evidence violated his constitutional right to confront the witness. The defendant specifically contends that Bradley's written statement was testimonial, and therefore, could only be admitted if the State first established that Bradley was unavailable, and the defendant had a prior opportunity to cross-examine her. The State argues Bradley's written statement did not violate the defendant's right to confront the witness because the State satisfied the admission requirements of section 115-10.2a of the Code of Criminal Procedure of 1963 (Code). 725 ILCS 5/115-10.2a (West 2016). The State argues, in the alternative, that if the admission of the statement violated the defendant's right to confront Bradley, that error was harmless beyond a reasonable doubt.

¶ 22 Generally, we review the court's admission of evidence for an abuse of discretion. *People v. Lovejoy*, 235 Ill. 2d 97, 141 (2009). However, sixth amendment claims often present questions of law that are also subject to *de novo* review. *Id.* at 141-42. These questions of law include whether a statement is testimonial or qualified as hearsay. *Id.* In contrast, questions about witness availability for cross-examination are reviewed for an abuse of discretion. *In re Brandon P.*, 2014 IL 116653, ¶ 45.

¶ 23 The sixth amendment of the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const., amend. VI. The United States Supreme Court has described this requirement

as "confrontation plus cross-examination of witnesses." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012). In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the Supreme Court set forth the test that we currently employ to determine if a defendant's sixth amendment right has been violated. *Crawford* holds a witness' testimonial out-of-court statement can only be admitted if: (1) the witness is available for cross-examination, or (2) the defendant had an opportunity to cross-examine her. *Id.* After *Crawford*, the Supreme Court explained that "the basic objective of the Confrontation Clause *** is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial." *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). Thus, the Supreme Court precedent clearly emphasizes that the confrontation clause requires some opportunity for the defendant to cross-examine the witness against him.

¶ 24 In this case, the parties do not dispute that Bradley's written statement to the police that included a request to prosecute the defendant was "testimonial." See *e.g. People v. Sutton*, 233 Ill. 2d 89, 118-19 (2009) (robbery and shooting victim's statement to a police officer while being transported to the hospital was testimonial because it did not address an ongoing emergency). The parties also do not dispute that Bradley was unavailable to testify at trial. This meant that, under *Crawford*, Bradley's written statement could only be admitted if the defendant had a prior opportunity to cross-examine her. We are unable to find a prior opportunity in the record as the State's comments before both days of the trial indicated that Bradley had failed to appear, and Bradley did not testify during any of the pretrial hearings. Therefore, under *Crawford*, the court's admission of Bradley's written statement, without an opportunity to cross-examine Bradley, violated the defendant's constitutional right to confront the witness.

¶ 25 In place of the opportunity to cross-examine requirement, the State argues that Bradley's written statement satisfied the hearsay exception requirements of section 115-10.2a of the Code. In support of its contention, the State cites to its argument at trial that section 115-10.2a "which has been in coexistence with the *Crawford* decision for more than a decade, makes clear the legislature's intent to allow as substantive evidence the out of court statements of declarants who do not actually appear at trial." However, the State's argument fails to consider the evolution of the confrontation clause analysis that occurred after the enactment of section 115-10.2a of the Code.

¶ 26 In 2003, when the legislature enacted section 115-10.2a, it tailored the section to comport with the sixth amendment confrontation clause requirements delineated in *Ohio v. Roberts*, 448 U.S. 56 (1980). *In re Rolandis G.*, 232 Ill. 2d 13, 23 (2008). "Under *Roberts*, it was not a violation of the sixth amendment confrontation clause to admit out-of-court hearsay statements into evidence as long as the statements were found to be reliable, either because the evidence fell within a firmly rooted hearsay exception or because there were other 'particularized guarantees of trustworthiness.' " *Id.* at 24 (quoting *Roberts*, 448 U.S. at 66). However, *Crawford* overturned *Roberts* and promulgated the rule that we applied above. *Id.* (citing *Crawford*, 541 U.S. 36). Since *Crawford*, the legislature has not made a substantive change to section 115-10.2a.[1]

¶ 27 Considering this history, compliance with section 115-10.2a, by itself, is not enough to admit a witness' testimonial out-of-court statement when the witness is unavailable for cross-examination and not subject to a prior cross-examination. See *People v. Burnett*, 2015 IL App (1st) 133610, ¶ 97 (finding that only satisfying the section 115-10.2a hearsay exception is

[1]To date, the only amendment to section 115-10.2a became effective on January 25, 2013, and updated the citation in subsection (c)(6) to cite to "the Criminal Code of 2012." Pub. Act 97-1150, § 635 (eff. Jan. 25, 2013) (amending 725 ILCS 5/115-10.2a).

insufficient to satisfy the requirements of the confrontation clause). This does not, however, end our inquiry as the State also argues that this error is harmless beyond a reasonable doubt.

¶ 28 A confrontation clause violation is subject to the harmless error analysis. *People v. Stechly*, 225 Ill. 2d 246, 304 (2007). "The improper admission of evidence is harmless beyond a reasonable doubt if no reasonable probability exists that the verdict would have been different if the evidence in question had been excluded." *People v. Lindsey*, 2013 IL App (3d) 100625, ¶ 39. To determine if an error is harmless, we may: " '(1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." ' *Id.* (quoting *Rolandis G.*, 232 Ill. 2d at 43).

¶ 29 We note that Bradley's written statement served only to prove the two domestic battery charges and had no direct bearing on the remaining three charges which were committed against the officers Larson and Loschiavo. Count III alleged that the defendant committed an act of domestic battery when he shoved his fingers into Bradley's throat. 720 ILCS 5/12-3.2(a)(1) (West 2016). Count IV alleged that the defendant committed domestic battery when he punched Bradley in her face. *Id.*

¶ 30 Setting aside the improperly admitted written statement, we find that Ho's testimony conclusively established the allegations in count IV. The fact finder reasonably inferred from Ho's testimony and the photographs of Bradley's injuries that the defendant struck Bradley in the face.

¶ 31 However, the evidence, excluding Bradley's written statement, does not prove the allegations in count III beyond a reasonable doubt. Specifically, the only evidence that the

defendant shoved his fingers into Bradley's throat came from Bradley's written statement. Because this statement was erroneously admitted, the evidence in support of count III was partially lacking. Accordingly, the error was not harmless beyond a reasonable doubt, and the defendant's conviction on count III is reversed and remanded for further proceedings. See *Crawford*, 541 U.S. at 69 (reversing and remanding the cause after finding a confrontation clause violation resulting from the defendant's invocation of the marital privilege to prevent his wife from testifying).

¶ 32 B. Statutory Basis for the Admission of Bradley's Written Statement

¶ 33 The defendant argues the court erred when it admitted Bradley's written statement into evidence because the State provided insufficient notice of its intent to introduce the statement and it did not provide a current address for Bradley. See 725 ILCS 5/115-10.2a (West 2016). Based on our finding that the court's admission of Bradley's written statement violated the defendant's right to confront the witness, we need not address this issue as to count III. With regard to the remaining charges, we find that the defendant has forfeited review of this issue as he did not raise this argument in support of his at-trial objection to the statement. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for appellate review, a defendant must raise the issue during the proceedings and in his posttrial motion). The defendant also did not ask for plain error review, and therefore, we must honor his forfeiture. See *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010).

¶ 34 C. Ineffective Assistance of Counsel

¶ 35 The defendant argues that his posttrial complaints about defense counsel's representation necessitated that the court conduct a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). The State argues that remand is not required because, while the defendant raised

questions about counsel's performance, he then expressed an intent to hire private counsel, thus eliminating the need for a *Krankel* inquiry. See *People v. Pecoraro*, 144 Ill. 2d 1, 15 (1991).

¶ 36 We review *de novo* the legal question of whether the circuit court conducted a preliminary *Krankel* inquiry to determine if new counsel needed to be appointed. *People v. Jolly*, 2014 IL 117142, ¶ 28.

¶ 37 When a defendant makes a posttrial complaint about counsel's performance, the court must first examine the factual basis of the claim. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). If the court determines that the claim lacks merit or pertains to matters of trial strategy, then the court need not appoint new counsel and may deny the defendant's motion. *Id.* at 78. If the allegations show possible neglect, the court should appoint new counsel to represent the defendant at the hearing on the defendant's claim of ineffective assistance. *Id.* New counsel "can independently evaluate the defendant's claim and would avoid the conflict of interest that trial counsel would experience if trial counsel had to justify his or her actions contrary to defendant's position." *Id.*

¶ 38 In *Pecoraro*, 144 Ill. 2d at 15, our supreme court held the circuit court was not required to address the defendant's claim of ineffective assistance of counsel, as required by *Krankel*, because the defendant had privately retained counsel. The supreme court noted that unlike *Krankel*, the defendant retained private counsel and did not seek to be represented by a different court-appointed attorney. *Id.*

¶ 39 Here, the defendant made a posttrial complaint about appointed counsel's representation. However, he then indicated that he wanted to retain private counsel. Therefore, at that time, the court did not need to appoint independent counsel to represent the defendant because he was in the process of privately retaining independent counsel to evaluate his ineffective assistance

claims. See *id.* Following a continuance, the defendant appeared with the public defender. The defendant then withdrew his ineffective assistance claims and stated that instead of pursuing his ineffective assistance claims, he wanted to complete the steps needed to perfect his right to appeal. Thus, the record establishes that the defendant's actions did not trigger a *Krankel* inquiry as he first intended to privately retain conflict-free counsel to investigate his claims and subsequently abandoned his claims.

¶ 40 III. CONCLUSION

¶ 41 The portion of the judgment of the circuit court of Will County that convicted the defendant of counts I, II, IV, and V, is affirmed. The judgment entered on count III is reversed, and the cause is remanded for further proceedings on count III alone.

¶ 42 Affirmed in part, reversed in part, and remanded with directions.

¶ 43 JUSTICE McDADE, concurring in part, dissenting in part.

¶ 44 I agree with the decision of the majority to affirm the trial court's decision on Counts I, II, and V and to reverse the decision as to Count III. I believe the same reasoning used to reverse Count III should also result in the reversal of Count IV and I dissent from the contrary conclusion.

¶ 45 The testimony of Danielle Ho was strikingly different in significant respects from the statement that Carmen Bradley gave to Officer Haiduke. According to Ms. Ho, Bradley was the instigator and the aggressor in the first part of the incident and the facilitator of the second part.

¶ 46 In the account she gave to the police officer, Bradley creates the impression that defendant suddenly "just started going crazy. He yelled at me and started to rip my clothes off, not sexually but to be mean. Then I tried to get away and he threw me back down on the bed. I

got up again and he punched me in the face. He then got on top of me and was shoving his fingers into my throat."

¶ 47 In contrast, Ho testified that defendant seemed fine but Bradley got "irritated because she doesn't like [his] drinking, and she has a big mouth and likes to use it a lot." Bradley yelled at defendant and slapped him in his face, apparently throughout the incident. Ho thought defendant also slapped Bradley, but expressly declined to say he had punched her. Bradley broke away and ran into the bathroom and defendant left the motel room. As Bradley opened the bathroom door, defendant knocked on the outer door. Ho wanted to keep him out, but *Bradley* let him in and resumed yelling at him. Finally, although Ho *assumed* defendant knocked Bradley into the tub, she did not know and did not testify that he had. We are provided no explanation of how she got there.

¶ 48 As the majority notes in reversing on Count III, Ho did not corroborate the charge that defendant had shoved his fingers into Bradley's throat. She also did not corroborate the charge that defendant had punched Bradley in the face, and indeed expressly declined to do so in her testimony. This fact, in conjunction with the clear picture of Bradley as the instigator and aggressor in the incident—a picture disputed only by the improperly admitted statement—is sufficient to support reversal on Count IV as well.