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2014 IL App (3d) 120887-U

Order filed December 10, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0887
ALEJANDRO REVELES-CORDOVA,	)	Circuit No. 10-CF-2429
Defendant-Appellant.	)	Honorable Sarah F. Jones, Judge, Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Presiding Justice Lytton and Justice O'Brien concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Trial counsel improperly allowed defendant to testify about his two prior felony convictions which were more than 10 years old at the time of trial.
- ¶ 2 Following a jury trial, defendant Alejandro Reveles-Cordova was found guilty of home invasion, criminal sexual assault, aggravated domestic battery, and violation of an order of protection. On appeal, defendant argues this court should reverse his convictions and remand the matter for a new trial because: (1) his trial counsel was ineffective for allowing defendant to preemptively inform the jury of defendant's prior felony convictions; (2) his trial counsel also

was ineffective for failing to object to “speculative” testimony provided by a police officer; (3) the trial court erroneously sustained the State’s objection to defendant’s testimony that the victim agreed to have sex with him; (4) the court erroneously instructed the jury regarding the offense of aggravated domestic battery; and (5) the trial court erroneously imposed an extended-term sentence for aggravated domestic battery. We reverse and remand the matter for a new trial.

¶ 3

### BACKGROUND

¶ 4

On November 22, 2010, the State charged defendant Alejandro Reveles-Cordova with home invasion (720 ILCS 5/12-11(a)(6) (West 2010)), criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2010)), aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2010)), and violation of an order of protection (720 ILCS 5/12-30(a)(1) (West 2010)).<sup>1</sup> The count charging defendant with the offense of aggravated domestic battery, alleged defendant “without legal justification, made physical contact of an insulting or provoking nature with [J.B.], a family or household member, in that said defendant strangled [J.B.]”

¶ 5

On December 5, 2011, defendant filed a motion *in limine* seeking to prohibit the State from introducing the following convictions for impeachment purposes: a 2003 misdemeanor conviction for retail theft (Cook County case No. 03-40076200), a 2002 felony conviction for burglary (Du Page County case No. 02-CF-1785), and a 2002 felony conviction for obstruction of justice (Du Page County case No. 98-CF-2598). The trial court denied the motion *in limine* with respect to the 2003 retail theft conviction and the 2002 burglary conviction and reserved ruling on the obstruction of justice charge until the State could introduce more information concerning the circumstances of that offense.

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<sup>1</sup> Prior to trial, the State *nolle prosequed* the charges alleging residential burglary and unlawful restraint.

¶ 6 On June 15, 2012, the trial court conducted a hearing on all outstanding pretrial motions. During that hearing, both the prosecutor and defense counsel erroneously asserted that the trial court sought additional information about the burglary conviction. The prosecutor informed the trial court that the burglary conviction involved burglary to a vehicle. Based on that information, the trial court entered a written order that same date, allowing the State to introduce all three prior convictions for impeachment purposes.

¶ 7 The jury trial in this case began on July 23, 2012. J.B. testified she had been in a 15-year relationship with defendant and obtained an order of protection against defendant on October 12, 2010, which remained effective until May 2, 2011.

¶ 8 On November 20, 2010, J.B. arrived home and began preparing for a date she had scheduled that evening. While drying off after her shower, J.B. heard footsteps coming up the stairs to the second floor. J.B. heard someone try to open the locked bedroom door and then heard someone kick the door open. J.B. observed defendant enter the bedroom and appear to search for something in the closet and throughout the bedroom.

¶ 9 Defendant pushed J.B., who was naked, and called her a “b\*\*\*” and a “whore” and accused J.B. of sleeping with someone else. Defendant grabbed a vase of flowers off the dresser and threw it to the ground. Defendant retrieved J.B.’s cell phone off her nightstand and, while looking at it, a text message came through, which upset defendant. Defendant called the phone number associated with the text message and spoke with a person on the other end of the phone.

¶ 10 Defendant pushed J.B., causing her to fall onto an ottoman. Defendant spread J.B.’s legs, pulled out her tampon, and inserted his penis into her vagina. J.B. cried and initially fought with defendant, asking him to stop, but eventually stopped resisting, hoping defendant would leave when he finished. Afterward, defendant stood up, paced around the room, and told J.B. he would

kill her and take their children to Mexico. Defendant pushed J.B. onto the bed. Defendant stood over J.B., placed his hands on her neck and started choking her. J.B. tried to push defendant away, and J.B. felt her body become “weak and warm,” and she could not see anything because things were “going dark.” J.B. stopped fighting defendant because she did not have any more strength. J.B. heard her cell phone ring and defendant released his hands from J.B.’s neck.

¶ 11 J.B. caught her breath and saw that her neighbor, Linda Munoz, was the caller. Defendant asked J.B. what her neighbor wanted and J.B. told defendant that Munoz knew to contact the police if she saw defendant or his truck around J.B.’s house. Defendant forwarded the text message J.B. had received earlier to his phone, set J.B.’s phone down, and left the house. J.B. dressed herself, grabbed her cell phone, and went to her neighbor’s front yard where she called police.

¶ 12 After the police arrived, J.B. went to the hospital for purposes of completing a sexual assault examination. The parties stipulated that J.B.’s hospital exam did not reveal any injuries. Forensic biologist David Turngren testified he conducted a DNA analysis of the vaginal swab obtained from J.B. at the hospital. The DNA from the vaginal swab matched defendant’s DNA.

¶ 13 On cross-examination, J.B. explained the bathroom door was closed, but not locked, and she opened the bathroom door when she heard footsteps on the stairs. J.B. saw defendant kick open the bedroom door. J.B. could not recall telling responding officers that defendant was already in her bedroom when she exited the shower. J.B. denied engaging in occasional sex with defendant after Mother’s Day, 2010.

¶ 14 J.B.’s neighbor, Obelinda Munoz, testified she lived approximately one to two blocks from J.B.’s home. On November 20, 2010, she called J.B. around 8 or 8:15 p.m. to invite J.B. for dinner, but J.B. did not answer the call.

¶ 15 Romeoville Police Officer Christopher Swiatek testified that, when he arrived at J.B.'s home on November 20, 2010, her hair was wet and disheveled, her clothes were in disarray, and J.B. was crying and shaking. Swiatek observed damage to the bedroom door, which appeared to have been kicked open. Swiatek noticed a vase, flowers, and a bloody tampon on the floor of the bedroom. Swiatek called for an ambulance and took custody of J.B.'s cell phone. On cross-examination, Swiatek testified that J.B. told him she was assaulted while laying on her stomach and defendant was already in the bedroom when she exited the bathroom. According to Swiatek, J.B. stated she struggled with defendant, but did not say she had been strangled.

¶ 16 Romeoville Police Officer Brandon Helton testified that on November 20, 2010, he took photographs of the interior and exterior of J.B.'s home. Helton observed the bedroom door frame had missing paint and split wood. Helton also observed rose petals, a vase, and a used tampon on the floor of the bedroom. Helton lifted a latent fingerprint off the vase. According to Helton, the bedroom appeared to show a struggle had occurred because a lamp was knocked over on the nightstand and the bed sheets were disheveled.

¶ 17 Romeoville Police Detective Kelley Henson testified that she responded to Bolingbrook Adventist Hospital on November 20, 2010, where she met with J.B. J.B. indicated to Henson that she had been choked by defendant. Henson tried to locate defendant the following day, but defendant was not arrested until November 27, 2010, by the Berwyn Police Department. On April 4, 2011, Henson collected a sample of defendant's DNA. On cross-examination, Henson testified her police report indicated defendant "grabbed [J.B.] by the throat."

¶ 18 Berwyn Police Sergeant Guy Papa testified that on November 20, 2010, he received defendant's name, address, and description of defendant's vehicle over his radio. Upon arriving at the address with two other officers, Papa observed a vehicle matching the description he was

given pull into the driveway, and a person matching defendant's description exit the vehicle and walk toward the building. Papa activated his overhead lights and pulled behind the vehicle in the driveway. Defendant looked back at the officers and then ran into the apartment building. Papa and the other officers chased defendant through a basement apartment and into an alley. The officers eventually lost sight of defendant and were unable to apprehend him. When asked by the prosecutor whether the person Papa chased that evening was "eventually identified as [defendant]?" Papa responded, "Yes."

¶ 19 The parties stipulated that defendant's fingerprints were located on J.B.'s cell phone and the vase from the bedroom. After the State rested, defendant moved for a directed verdict, which the trial court denied.

¶ 20 Defendant testified on his own behalf. At the beginning of defendant's testimony, defense counsel asked, "You have a conviction for obstructing justice from 1998? You have a conviction for burglary from 2002?" Defendant responded "yes." Defense counsel also asked defendant, "You have a conviction for retail theft from 2003?" to which defendant responded, "Yes." Defendant testified he dated J.B. for 15 years and stated that the couple had two children together. Defendant spoke with J.B. on the phone on November 19, 2010, requesting to come by the house to pick up some of defendant's mother's items. The next day, November 20, 2010, defendant used his keys to enter the house. When he went upstairs to the bedroom, he found the bedroom door was closed. According to defendant, the bedroom door did not lock because the lock was broken previously. Once in the bedroom, defendant spoke with J.B. and engaged in "sexual relations." When asked by defense counsel, "How did that come about?" defendant responded, "We both talked. We came to an agreement to have relations." The prosecutor objected on hearsay grounds, and the trial court sustained the objection. Defendant testified J.B.

did not tell defendant to stop or that she did not want to have sex with him. After having sex, defendant saw J.B.'s phone ringing, so he picked up her phone and discovered a recent text message which caused him to ask if J.B. was seeing someone. Defendant told J.B. to "make her life as I was going to do my life," and he left the house. Defendant denied strangling, choking, slapping, or hitting J.B. while at the house.

¶ 21 On cross-examination, defendant testified he knew the order of protection prohibited defendant from being present at J.B.'s residence. Defendant answered "yes," when asked whether he and J.B. "had sex, that you agreed to have sex, and then had sex together?"

¶ 22 Melissa Enriquez, an investigator for the defense, testified that, during an interview of J.B., J.B. stated she was blow drying her hair when she heard footsteps. In addition, J.B. told Enriquez she was wearing a towel during the encounter with defendant. J.B. also indicated to Enriquez that defendant choked her.

¶ 23 During the conference on jury instructions, the State tendered two non-pattern jury instructions: People's instruction Nos. 18 and 19. People's instruction No. 18 provided: "A person commits the offense of aggravated domestic battery when he knowingly makes physical contact of an insulting or provoking nature by strangling any family or household member." People's instruction No. 19 stated:

"To sustain the charge of aggravated domestic battery, the State must prove the following propositions:

*First Proposition:* That the defendant knowingly made physical contact of an insulting or provoking nature with [J.B.] by strangling her; and

*Second Proposition:* That [J.B.] was then a family or household member to the defendant.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.”

The record on appeal contains an additional People’s proposed non-IPI jury instruction stating, “Strangulation is defined as intentionally impeding the normal breathing or circulation of blood of an individual by applying pressure on the throat or neck of that individual or by blocking the nose or mouth of that individual.” 720 ILCS 5/12-3.3(a-5) (West 2010). This jury instruction has a handwritten notation indicating “not given.” The record does not indicate whether defense counsel objected to this instruction.

¶ 24 The jury returned guilty verdicts on all four counts, including the offense of violation of the order of protection. The trial court denied defendant’s posttrial motion for judgment notwithstanding the verdict and for a new trial. Defendant’s posttrial motion asserted, among other things, the trial court erred when it denied defendant’s motion *in limine* concerning his prior convictions and sustained the State’s objection to defendant’s testimony concerning J.B.’s statements during the alleged assault.

¶ 25 On October 17, 2012, in spite of the jury’s guilty verdict, the State *nolle prosequed* the offense based on the violation of an order of protection prior to sentencing. After a hearing, the court sentenced defendant to serve an 11-year sentence for home invasion, which would run consecutively with a 9-year sentence for criminal sexual assault, which would run concurrently



with the 9-year extended term sentence for aggravated domestic battery. On October 19, 2012, the trial court denied defendant's motion to reconsider sentence. Defendant appeals.

¶ 26

#### ANALYSIS

¶ 27

Defendant raises five arguments on appeal. First, acknowledging forfeiture, defendant contends the trial court erroneously denied defendant's pretrial motion *in limine* seeking to exclude two prior felony convictions which were more than 10 years old at the time of trial. Alternatively, appellate counsel contends trial counsel was ineffective during trial for allowing defendant to preemptively inform the jury of defendant's prior felony convictions during his direct testimony. Second, defendant asserts his trial counsel also was ineffective for failing to object to "speculative" testimony provided by Officer Papa. Third, defendant contends the trial court erroneously sustained the State's objection to defendant's testimony that the victim agreed to have sex with him. Fourth, acknowledging forfeiture, defendant alleges the court erroneously instructed the jury regarding the offense of aggravated domestic battery. Finally, defendant argues, and the State concedes, the trial court erroneously imposed an extended-term sentence for aggravated domestic battery.

¶ 28

#### Impeachment Evidence

¶ 29

On appeal, defendant argues the court improperly denied defendant's pretrial motion *in limine* seeking to exclude the State's use of defendant's prior felony convictions for obstructing justice and burglary because the convictions were more than 10 years old at the time of trial. The State contends defendant forfeited this issue in the trial court. The State argues this court should not excuse defendant's forfeiture because the evidence was not closely balanced.

¶ 30

Acknowledging forfeiture of the issue involving impeachment by prior convictions, defendant argues this court should consider the issue after applying plain error. The plain error

doctrine allows this court to consider an unpreserved error when the evidence is so closely balanced, regardless of the seriousness of the error or when the error is so serious it affected the fairness of defendant's trial. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). The first step in applying plain error is determining whether an error occurred. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 31 Illinois Rule of Evidence 609, which codified *People v. Montgomery*, 47 Ill. 2d. 510 (1971), governs the admissibility of a witness's prior convictions for impeachment purposes. Ill. R. Evid. 609(a) (eff. Jan. 1, 2011). In relevant part, Rule 609(b) provides that evidence of a conviction "is not admissible if a period of more than 10 years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date." Recently, our supreme court held that the 10-year time limit should be calculated in relation to the date of defendant's trial. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008).

¶ 32 Here, the trial court ruled on defendant's motion *in limine* concerning defendant's three prior convictions on June 15, 2012. At the time of this ruling, the trial court's decision was correct since all three of defendant's prior convictions were less than 10 years old. Therefore, we conclude the trial court did not improperly deny defendant's pretrial motion *in limine*. Since the court did not err when it issued its ruling denying defendant's motion *in limine* on June 15, 2012, we conclude, without error, the plain error doctrine does not apply.

¶ 33 Next, we consider defendant's alternative argument that defense counsel provided ineffective assistance by allowing defendant to discuss his two prior felony convictions. To establish a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). In addition, defendant must also establish that defense counsel's

deficient performance resulted in prejudice such that the result of the proceedings would have been different had counsel not acted deficiently. *Id.* at 687.

¶ 34 It is undisputed defense counsel did not renew the motion *in limine* after defendant's two felony convictions passed the 10-year mark, eight days before the beginning of defendant's trial. It is also undisputed that defendant testified in his own defense on July 25, 2012. The record reveals that defense counsel began defendant's direct examination by asking defendant the following questions: "You have a conviction for obstructing justice from 1998? You have a conviction for burglary from 2002?" and "You have a conviction for retail theft from 2003?" Based on *Naylor*, defendant's two prior felony convictions for obstructing justice and burglary were not admissible for impeachment purposes. Therefore, we conclude counsel's performance was deficient because defense counsel affirmatively acted to introduce evidence which would not have been admissible if offered by the State on July 25, 2012, the date of defendant's testimony. Consequently, the error present in the record with regard to the improper introduction of defendant's prior felony convictions is solely attributable to the ineffective assistance of trial counsel and cannot be attributed to the court's pretrial ruling on defendant's motion *in limine*.

¶ 35 Next, we must determine whether counsel's ineffective assistance prejudiced defendant. Consequently, a review of the evidence in this case is in order. J.B.'s testimony indicated she did not consent to the sexual encounter with defendant. Further, the damage to the doorway and considerable disarray of items in the bedroom constituted circumstantial evidence corroborating J.B.'s version of the events. However, certain testimony discredited J.B.'s testimony that defendant strangled her. Specifically, J.B. did not report this detail to police shortly after the incident. In addition, the State did not present any neutral witness who observed any red marks or visible injuries to J.B.'s throat for the jury's consideration. Thus, J.B.'s testimony was not

corroborated with respect to this particular detail necessary to prove an element of the offense of aggravated domestic battery.

¶ 36 In contrast, defendant denied choking or strangling J.B. and testified the physical contact between the couple was consensual. Based on our careful review of the record, we conclude the credibility of the witnesses was a crucial factor underlying the jury's determination of guilt.

¶ 37 Due to the nature of the credibility issues to be weighed by this jury, counsel's deliberate introduction of defendant's testimony concerning defendant's two prior felony convictions is a significant error. The State argues that since defendant's prior misdemeanor retail theft conviction could have been introduced by the State for impeachment purposes, the admission of defendant's two felony convictions for burglary and obstructing justice was harmless and did not prejudice defendant. We disagree. Here, as a result of defense counsel's direct examination, the jury learned that defendant had not one, but three, serious prior convictions. Defense counsel allowed defendant to admit to the jury that his criminal history was longstanding, beginning in 1998, and involved not one, but multiple, prior convictions. Since the jury should not have been privy to the information concerning defendant's pattern of criminal misconduct, we conclude defense counsel's error had a prejudicial impact on defendant's credibility beyond the damage occasioned by evidence of a singular misdemeanor retail theft.

¶ 38 Accordingly, based on our review of the record, we conclude defendant received ineffective assistance of trial counsel. Therefore, we reverse defendant's convictions and remand the matter for a new trial. Based on our resolution of this issue, we elect not to address the remaining issues raised in defendant's appeal.

¶ 39

## CONCLUSION

¶ 40 For the foregoing reasons, the judgment of the circuit court of Will County is reversed and remanded.

¶ 41 Reversed and remanded.