No. 1-09-1979

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DIVISION
March 11, 2011

---

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

---

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 MC5 348 |
| | ) | |
| BRIAN TAMMELING, | ) | Honorable |
| | ) | Peter A. Felice, |
| Defendant-Appellant. | ) | Judge Presiding. |

---

JUSTICE HOWSE delivered the judgment of the court.
Justices Joseph Gordon and Epstein concurred in the judgment.

**O R D E R**

*HELD*: The testimony of the complaining witness was sufficient to sustain defendant's conviction of domestic battery; defendant forfeited review of his allegations that the trial court improperly limited his cross-examination of the State's witnesses and failed to presume him innocent of the charge, by failing to raise them in a posttrial motion.

Following a bench trial, defendant Brian Tammeling was found guilty of domestic battery and sentenced to one year of conditional discharge. On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that he made physical contact of a provoking nature with his nine-year-old daughter. He also contends that the trial court improperly limited his cross-examination of the State's witnesses and, in so doing, assumed the role of an advocate for the prosecution and prejudged his guilt.

At trial, the State presented the testimony of defendant's nine-year-old daughter, M.T., who accused defendant of inappropriately touching her. Before her testimony, M.T. stated that she understood the difference between the truth and a lie, that she would get in trouble for telling a lie, and that she was under oath to tell the truth. She then described the incident on December 14, 2008, which gave rise to this prosecution.

According to M.T., she and her brother, S.T., were visiting defendant at their grandmother's house in Oak Lawn when he called her down to the basement, asked her to sit on his lap, and started rubbing her back. When defendant touched the back of her bra, M.T. told him not to and tried to get up. Defendant put his arms around her stomach and would not let her get up. After M.T. twice told defendant to stop, he did so briefly. Defendant then moved to the front of M.T.'s body, put his hand under her bra,

and started to rub. Defendant was rubbing her chest in a circular motion. When defendant was touching her, he repeatedly said that she had "got boobies."

She did not see him drinking anything, but smelled alcohol on his breath. She felt "grossed out and disappointed." She yelled at him to stop and tried to get away, but he would not let her go. Eventually, she tricked him into releasing her, then ran upstairs and told her grandmother what happened.

On cross-examination, M.T. acknowledged that her mother and defendant were in the midst of a divorce and that she wanted to live with her mother and not defendant. She also stated that defendant was not a good father.

On redirect examination, M.T. explained that she did not want to live with defendant because he only took her to the park once and he never helped with her homework. When asked by the court, M.T. stated that she would not make up a story against defendant because he did not take her to the park often. She also told the court that she discussed this case with her mother, but they did not go over her testimony, and no one told her what to say.

S.T. testified that he was sitting at the kitchen table with his grandmother when his sister, M.T., came up from the basement and said, "Oh, my god, he touched my boobies, grandma." He stated on cross-examination that he initially wanted to live with

defendant, but changed his mind. He explained that he lost touch with defendant after the incident due to an order of protection entered during the pendency of this proceeding, but would like to see him if he sought help for his alcohol problems. He also recalled that defendant took him and his sister fishing, but the trial court sustained the State's objection to defense counsel's questions about whether defendant took M.T. to the park. He acknowledged that his sister said that he was playing with a lighter in the kitchen at the time of the incident.

Defendant testified that his daughter was his best friend and that he would never hurt her. He stated that he called M.T. down to the basement to watch television and denied touching her inappropriately. He added that M.T. often asked him to rub her back while they watched television, but he did not remember doing so on the date in question. He further stated that he took his children to the park "all the time."

When defendant's wife, Debra, was called as an adverse witness, questions regarding the divorce proceedings were objected to and sustained. Debra otherwise testified that she immediately called police when M.T. told her what happened.

In finding defendant guilty of domestic battery, the trial court specifically noted that M.T. was "articulate, very descriptive, a little bit naive," and stated, "I believe her testimony was she relayed to them what her father had just done."

The court did not believe this incident was of a sexual nature but was "convinced beyond a reasonable doubt that [defendant] touched his daughter in an insulting fashion."

Before this court, defendant contends that the State failed to prove beyond a reasonable doubt that he made physical contact of a provoking nature with his daughter. He argues that the testimony of M.T. was "robotic" and "follow[ed] a script," suggesting that it was coached and not credible.

When a defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant question on review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2789 (1979); *People v. Phillips*, 392 Ill. App. 3d 243, 257 (2009). A criminal conviction will not be set aside on review unless the evidence is so unlikely or inadequate that a reasonable doubt of defendant's guilt remains. *People v. Jimerson*, 127 Ill. 2d 12, 43 (1989).

After reviewing the testimony of M.T., we find that the trial court could have concluded from her testimony alone that defendant was proved guilty of domestic battery beyond a reasonable doubt. *People v. Taher,* 329 Ill. App. 3d 1007, 1018 (2002). M.T. testified that when defendant rubbed her back and

then reached under her shirt and bra and touched her "boobs," she was "grossed out and disappointed." She also testified that defendant would not let her go when she yelled at him to stop and after she tricked him into releasing her, she immediately told her grandmother what had happened. Her brother, who was present at the time, corroborated that she came upstairs and said, "Oh, my god, he touched my boobies, grandma."

The portions of her testimony that defendant characterizes as "robotic" and scripted concern M.T.'s allegation that he only took her to the park once, that her brother was playing with a lighter, and her choice of words like "disappointed." These collateral matters do not render M.T.'s testimony as a whole so improbable as to raise a reasonable doubt of defendant's guilt. *People v. Koch,* 248 Ill. App. 3d 584, 598-99 (1993).

Defendant next contends that the trial court improperly limited his cross-examination of the State's witnesses and, in so doing, assumed the role of an advocate for the prosecution and prejudged his guilt. The State responds, and defendant acknowledges, that he has forfeited review of this contention by failing to raise it in a posttrial motion.

Defendant nonetheless maintains that the application of the forfeiture rule is less rigid if the basis for the objection is the trial court's conduct in a bench trial, citing *People v. Heiman,* 286 Ill. App. 3d 102 (1996). He also cites *People v.*

*Crowder,* 174 Ill. App. 3d 939, 941 (1988), for the proposition that, in a bench trial, a posttrial motion is not required to preserve issues for review if they were presented to the trial court. For the reasons that follow, we find defendant's arguments for relaxing the forfeiture rule in this case unavailing.

As the State correctly notes, the filing of a posttrial motion is applicable to both bench and jury trials. *People v. Johnson,* 214 Ill. App. 3d 1087, 1089 (1991). Simply because an objection may have been made during trial does not justify ignoring the clear statutory mandate that the issue be set forth in writing in the motion for a new trial. *Enoch,* 122 Ill. 2d at 187. The less rigid application of forfeiture stems partially from the practical difficulties of objecting to the trial court's conduct in a bench setting (*Heiman,* 286 Ill. App. 3d at 111), but no such difficulties can be associated with raising alleged errors by way of a motion for a new trial (*People v. Miller,* 47 Ill. App. 3d 412, 415 (1977)). Moreover, although defendant argues that the error he raises in this court is attributable to the trial court's conduct, he has not presented an extraordinary or compelling reason to relax the application of forfeiture with respect to the alleged error. *People v. McLaurin,* 235 Ill. 2d 478, 488 (2009).

Recently, in *People v. Faria,* 402 Ill. App. 3d 475, 477-78 (2010). this court declined to relax forfeiture and consider the merits of defendant's claims that the trial court improperly limited counsel's ability to cross-examine the State's witnesses, advocated for the State and prejudged her guilt. We determined that defendant had not presented an extraordinary or compelling reason to relax forfeiture because there was no jury to be influenced by the trial court's conduct in his bench trial, and the record showed that the trial court did not act in counsel's absence or prevent counsel from making an objection. *Faria,* 402 Ill. App. 3d at 478.

Here, as in *Faria*, defendant contends that the trial court improperly limited his cross-examination, advocated for the prosecution and prejudged his guilt. This, however, was also a bench trial, and defendant admits in his reply brief that he "was allowed to pursue and explore the fact that the witness was not credible." Under these circumstances, we decline to relax the forfeiture of defendant's claims regarding the trial court's conduct. *Faria,* 402 Ill. App. 3d at 478.

Defendant has also forfeited plain-error review of the trial court's conduct in his bench trial. Although defendant uses the phrase "plain error" in his reply brief, it is apparent from the remainder of his argument and the record that his contention

actually concerns the scope of cross-examination. *In re Estate of Michalak,* 404 Ill. App. 3d 75, 90 (2010).

In his reply brief, defendant sets forth three conclusory assertions: that the plain-error doctrine provides for appellate review in certain instances; that the doctrine applies where the judge assumes the role of an advocate for the prosecution; and, in applying the doctrine, courts look to whether evidence is closely balanced, whether the error denied defendant a fair trial, and whether substantial rights have been affected. Defendant then submits that the only evidence that a crime occurred was the sole testimony of his daughter, who had a motive to falsify her testimony, that the issues raised on appeal concern his right to present a defense, and that the trial court assumed the role of an advocate for the prosecution by selectively precluding the cross-examination of a child witness and "correcting" his daughter's testimony.

Although we may review plain error arguments raised in a reply brief, the conclusory assertions contained in defendant's brief cannot be deemed adequate legal arguments sufficient to sustain his burden of persuasion for plain error review. *People v. McCoy,* No. 1-08-2551, slip op. at 7-8 (Ill. Oct. 25, 2010). We therefore must honor his procedural default of this issue. *People v. Hillier,* 237 Ill. 2d 539, 545 (2010).

For the reasons stated, we affirm the judgment of the circuit court of Cook County.

Affirmed.