

2011 IL App (2d) 100613-U
No. 2—10—0613
Order filed July 14, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09—CM—1708
)	
AUTUMN RUDEEN,)	Honorable
)	John S. Lowry,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice McLaren concurred in the judgment.

ORDER

Held: (1) Defendant forfeited her contention that the trial court violated Rule 431(b), and in any event the record showed that the court complied with the rule; (2) defendant forfeited her contention that the trial court unduly restricted voir dire, and in any event the court did not abuse its discretion in requiring defendant to ask clear and evenhanded questions; (3) defendant forfeited her objection to the State's closing argument, and in any event the State did not refer to a suppressed statement and any error would have been harmless; (4) the trial court did not abuse its discretion in excluding from defendant's self-defense case the alleged victim's prior bad act, as the act (though disturbing) involved no violence by the victim and thus was unduly prejudicial to the State, and in any event any error was harmless.

¶ 1 After a bench trial, defendant, Autumn Rudeen, was convicted of domestic battery (720 ILCS 5/12—3.2(a)(2) (West 2008)) and sentenced to pay \$423 in fines and costs. Defendant appeals, arguing that (1) the trial court’s conduct of *voir dire* violated Illinois Supreme Court Rule 431(b)(eff. May 1, 2007); (2) the court improperly restricted defendant’s questioning of prospective jurors; (3) in closing argument, the prosecutor improperly referred to a defendant’s statement, which the court had earlier suppressed; and (4) the court improperly excluded evidence relevant to defendant’s claim of self-defense (see 720 ILCS 5/7—1(a) (West 2008)). We affirm.

¶ 2 The information filed against defendant alleged that, on April 12, 2009, she committed domestic battery when she scratched the face of Anthony Navickis. Defendant moved to suppress a statement that she had given Tom Morrison, a Winnebago County sheriff’s deputy, immediately after the incident. After a hearing, the trial court barred the State from introducing the statement in its case-in-chief; if defendant testified, the statement could be used in rebuttal as impeachment.

¶ 3 Shortly before starting *voir dire*, the trial judge told the parties that he would ask prospective jurors whether they would evaluate a police officer’s credibility by the same standards that they would apply to any other witness; if the answer was yes, the parties would not question any panel member on the subject unless the judge permitted it. Defendant’s attorney said that that was “fine.” Turning to *voir dire*, the judge explained that he would question the panel in groups of four and ultimately seat 13 or 14. He initially addressed the 14 panel members together:

¶ 4 “THE COURT: *** [F]irst I’m going to ask each of you whether or not you understand and accept these following principles.

I’ll read these principles out loud first, so please listen carefully. The following principles are as follows: The defendant is presumed innocent. The defendant need not offer evidence on his own—on her own behalf. The defendant’s failure to testify cannot be

considered in any way to reach a verdict, and the State has the burden of proving the defendant guilty beyond a reasonable doubt.

Now, when I call upon each of you, indicate yes whether [*sic*] you understand and accept these principles or no if your answer is no. First, Juror No. 1, Miss Palmeno.

JUROR PALMENO: Yes.”

Questioned individually, the other 13 possible jurors each answered “Yes.”

Defendant did not object to any of the foregoing questioning.

¶ 5 The judge then questioned the first four panel members, concluding by asking them as a group whether they would judge a police officer’s testimony “by the same standards of reasonableness and truthfulness as [they] would any other witness in the case.” They answered, “Yes.” The State questioned the four panel members individually, eliciting from Jessica Otten that she had once been the victim of two thefts within a year and that the police had handled things “[o]verall pretty decent [*sic*].” Defendant’s attorney then questioned the four panel members individually. As pertinent here, he questioned Otten as follows:

¶ 6 “Q. Now can I count on you to keep an open mind and listen to the witnesses and ferret out, discern, what you believe to be the truth?

A. I believe so.

Q. And [the prosecutor] asked you if you’ve had experience with law enforcement?

A. Uh-huh.

Q. And in the context of your experience with law enforcement, did you find them to be perfect in every way?”

¶ 7 At this point, the judge told defendant’s attorney to approach, and a discussion was held off the record. The questioning then continued:

“Q. Was there anything negative about the experience that you had with the law enforcement people in any way?

A. Just one incident.

Q. Okay. Now, the judge has indicated to you—Let me ask you this, Mrs. Otten. If we stopped right now and sent you to the jury room, what would your verdict be in this case?

A. I wouldn't have one.”

¶ 8 The judge again told defendant's attorney to approach, and there was another discussion off the record. Defendant's attorney then asked Otten, “Can I count on you to follow the Court's instructions regarding the burden of proof in this case?” Otten responded, “Yes.” Defendant's attorney questioned her no further. After the first group was examined, both parties accepted all four as jurors. *Voir dire* soon concluded with no further incidents pertinent here.

¶ 9 We summarize the evidence at trial. For the State, Navickis testified on direct examination as follows. He and defendant dated until November 2007 and had a child together, Trentyn. On Easter Sunday, April 12, 2009, at about 12:30 p.m., Navickis went to the Machesney Park police station parking lot to pick up Trentyn. When he returned about six hours later to return Trentyn to defendant, he saw that she and her daughter had arrived. Navickis parked about two spots away. He took Trentyn from the car seat in the back and put the child onto his lap. Navickis started to take off Trentyn's shoes, because defendant had twice taken Trentyn's shoes and not returned them.

¶ 10 Navickis testified that, as he was sitting in the driver's seat and removing Trentyn's shoes, defendant appeared, standing at the window. Defendant suddenly “rip[ped]” Trentyn out of Navickis' hands, got “like nose to nose” with him, and told him that he was “the ugliest MF'er she'[d] ever seen.” Navickis turned his head. Defendant reached out and scratched him in the face. Navickis explained at trial that defendant was holding Trentyn in one hand and “just like reached

out and clawed for the side of [Navickis'] face with the other.” Navickis pulled her hand away and told her that he was going to call the police, which he soon did. Defendant retreated, said “thanks for the shoes,” put Trentyn into her car’s backseat, and walked to the driver’s side of her car. Hoping to retrieve the shoes, Navickis approached and opened the rear passenger-side door of defendant’s car. He saw defendant run toward him, so he backed up and waited for the police to arrive. During the incident, Navickis did not put his hands on defendant, other than to remove her hand from his face. Defendant’s attack left Navickis with red marks on his face but did not draw blood.

¶ 11 On cross-examination, defendant’s attorney asked Navickis whether, a few days after he moved in with defendant, he “took all the door knobs off the doors so she couldn’t lock [him] out of rooms.” The State objected that the alleged incident, which defendant claimed occurred in 2007, was irrelevant. After a sidebar, the judge sustained the objection, explaining that the probative value of the evidence of the 2007 incident was outweighed by the danger of undue prejudice. Navickis then testified that, although he and defendant had lived together, he had moved out after a week.

¶ 12 Navickis testified further that, when the police officer arrived, he first spoke to Navickis. Navickis then heard the officer tell defendant to get into her car. The officer took some photographs of Navickis’ injuries. The photographs were admitted into evidence. Navickis is six feet, six inches tall and weighs approximately 200 pounds, and defendant is about five feet, four inches tall.

¶ 13 The State called Morrison, who testified that, when he spoke to Navickis, he saw that Navickis had several red “claw marks” on the side of his face, each about four or five inches long. Morrison interviewed Navickis, then spoke to defendant, who appeared agitated but uninjured. He then arrested her. Defendant did not object to this testimony. Morrison then testified that he took a written statement from Navickis and photographed his injuries. Morrison did not attempt to talk to defendant’s daughter, and he heard her say nothing that he could understand.

¶ 14 The State rested. At a sidebar, the judge noted that, to support defendant's claim of self-defense, she planned to introduce evidence of Navickis' prior bad acts, including that, in the summer of 2007, Navickis moved into defendant's home and, two days later, "took all the door knobs off the door so she couldn't lock him out of rooms so she could escape his presence." Also, she wanted to introduce evidence that, in June 2008, after Navickis entered defendant's home without her permission, they had a fight, and she obtained an order of protection. Defendant argued that the evidence was relevant to the issue of who was the aggressor on April 12, 2009. The State responded that the incident in the summer of 2007 was too early to be probative of events in 2009. The judge stated that the jury was already aware of the long-standing animosity between defendant and Navickis. He concluded that the 2007 incident was more prejudicial than probative; evidence of that incident would be excluded. However, evidence of the June 2008 incident was admissible.

¶ 14 Defendant first called her daughter, Tyai McDonald, who testified as follows. She was born December 17, 2003. April 12, 2009, was Easter, but McDonald could not recall what she had done that day or whether she had had school that day. At the police station parking lot, she saw Navickis pull in and defendant exit her car and walk about 15 or 20 feet to Navickis' car. When defendant got there, Navickis was standing and holding Trentyn in his arms. Next, defendant and Navickis "started fighting, and then *** Tony punched mommy in the tummy, right in the middle of the stomach." That was the first time that McDonald saw either defendant or Navickis touch the other. After Navickis punched her, defendant "[b]y accident scratched him. She meant to get Trentyn, but she didn't mean to scratch him." Defendant then took Trentyn, entered her car with him, and tried to buckle him into his car seat. Navickis, who had followed her, tried to remove Trentyn. In the process, he "kinda" touched defendant. Defendant called the police. Asked on cross-examination why she thought defendant's scratching of Navickis was an accident, McDonald answered, "Well,

she didn't really mean to, 'cuz [*sic*]—Well she—She tried to grab Trentyn. I don't know what to say.”

¶ 15 Defendant testified as follows. Trentyn was born August 29, 2007. By then, defendant and Navickis were no longer living together, and defendant had custody of Trentyn. In June 2008, defendant was living in her condominium with her two children. One day that month, Navickis came over. He wanted to enter her home, but defendant would not let him. Navickis pushed defendant “into [the] doorway” and entered anyway. Defendant called the police and, in November 2008, she obtained an order of protection. The order expired in November 2008 by the agreement of defendant and Navickis. There was no order of protection in effect on April 12, 2009.

¶ 16 The parties rested. In the course of his closing argument, the prosecutor noted that Morrison had described Navickis' injuries. He continued:

¶ 17 “He also told you how he spoke with the parties, both of them. This wasn't a situation where he just got Anthony's side of the story and then went and arrested the defendant. He spoke both to the defendant and Anthony Navickis before concluding his investigation, and when he was done there that day, he arrested the defendant.”

¶ 18 Defendant did not object to the foregoing remarks.

¶ 19 Defendant argued that McDonald's testimony showed that, after Navickis punched defendant in the stomach, defendant “want[ed] to get the heck away from this guy that's beat[en] her up before, grab[bed] the child, and in the process, g[ot] him on the *** face.” In rebuttal argument, the prosecutor contended that Morrison's testimony that the scratches were four or five inches long refuted defendant's accident theory.

¶ 20 The jury found defendant guilty. The trial court sentenced her to pay \$423 in fines and costs. Defendant filed a postjudgment motion that asserted, in part, that the State had improperly elicited

testimony about the suppressed statement; that the court had improperly restricted defendant's participation in *voir dire*; and that the court had improperly excluded evidence of Navickis' bad acts against defendant. The court denied the motion. Defendant timely appealed.

¶ 21 Defendant argues first that the trial court's conduct of *voir dire* violated Rule 431(b), which reads:

¶ 22 "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 23 As the State notes, defendant forfeited this argument by failing to object to the alleged violation of Rule 431(b). See *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010). Although forfeited issues may be reviewed for plain error, defendant may not avail herself of this exception to the forfeiture rule unless she can first establish that error occurred. *Id.* at 613. She has not done so.

¶ 24 Defendant's claim of error is that the trial judge recited the four principles in Rule 431(b) "but failed to question any perspective [*sic*] juror as to their [*sic*] understanding of those principles." This assertion is simply incorrect. The transcript shows plainly that the trial judge asked each juror

whether he or she “under[stood] and accept[ed] these principles” and allowed each one to say that he or she did not understand or accept the four principles. Further, our own examination of the proceedings reveals no error. By reciting all four of the principles in Rule 431(b) and providing “an opportunity for a response from each potential juror on [his or her] understanding and acceptance of those principles” (*id.* at 607), the judge satisfied the rule.

¶ 25 We turn to defendant’s second claim of error: that the trial court unduly restricted her questioning of prospective jurors during *voir dire*. Again, we agree with the State that defendant forfeited this claim of error by failing to raise a contemporaneous objection. See *id.* at 611; *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Further, defendant’s claim of error, at least as it is supported by any specifics or any citation to the record, relates solely to the questioning of Otten. Yet defendant accepted Otten as a juror, even though she could have excluded her via a peremptory challenge. Defendant thus forfeited any objection to Otten. See *People v. Brooks*, 185 Ill. App. 3d 935, 939 (1989). Since the only purpose of questioning Otten was to help defendant decide whether to accept her as a juror, defendant’s claim of error has been forfeited for this reason as well.

¶ 26 In any event, we see no error. In conducting *voir dire*, the trial court “shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time.” Ill. S. Ct. R. 431(a) (eff. May 21, 2007). The conduct of *voir dire* is within the court’s discretion. *People v. Adkins*, 239 Ill. 2d 1, 18 (2010); *People v. Sanders*, 238 Ill. 2d 391, 403-04 (2010).

¶ 27 Defendant’s claim of error relates in part to when her attorney asked Otten, “If we stopped right now and sent you to the jury room, what would your verdict be in this case?” Otten answered this question, but—for reasons not of record—the trial judge had defendant’s attorney rephrase the question. Asked whether she would follow the court’s instructions on the burden of proof, Otten

said that she would. We cannot say that the trial court abused its discretion in requiring defendant's attorney to rephrase a question that was potentially confusing and also purely hypothetical.

¶ 28 Defendant's claim of error also relates in part to the judge's restriction on her questioning of the prospective jurors on "their perceptions of law enforcement personnel." The sole record citation for this assertion is to defendant's question to Otten about the police officers who had investigated the thefts against her. Defendant's attorney asked Otten whether she had found the officers "to be perfect in every way." The judge spoke to the attorney off the record. The attorney then asked Otten whether there had been anything negative about her experience with the police. She answered him. We see nothing improper about the trial judge's decision to allow defendant's attorney to ask Otten about her experience with the police but to require him to phrase the question in a respectful and evenhanded manner. Therefore, even disregarding forfeiture, we would find no error.

¶ 29 We turn to defendant's third claim of error. Relying on the quoted excerpt from the State's closing argument, defendant asserts that the prosecutor denied her a fair trial by referring twice in his closing argument to her statement to Morrison. Defendant forfeited this contention by failing to object contemporaneously to the alleged impropriety or to include this specific claim of error in her postjudgment motion. See *Enoch*, 122 Ill. 2d at 186. (The motion referred to Morrison's testimony, but not to the State's closing argument.) In any event, we see neither error nor prejudice.

¶ 30 As the State notes, the prosecutor did not refer to the suppressed statement. In the quoted excerpt (and in the State's entire closing argument and rebuttal closing argument), there was no reference to what defendant said to Morrison. The prosecutor told the jury only that, after arriving on the scene, Morrison spoke to both Navickis and defendant, then arrested defendant. Thus, the State fully respected the suppression order. Also, defendant has shown no prejudice. Whatever the

prosecutor said, the jury would probably have inferred or assumed that Morrison said *something* to defendant before arresting her. Moreover, as we shall explain in connection with defendant's final claim of error, the evidence was not closely balanced, so that any error would have been harmless.

¶ 31 Defendant contends fourth and finally that the trial court abused its discretion in excluding evidence of Navickis' prior bad acts toward defendant. She contends that this evidence was relevant to who was the aggressor on April 12, 2009, and thus to defendant's affirmative defense of self-defense. Defendant concedes that the court admitted evidence that Navickis had started a fight with her in June 2008 and that, as a result, she had obtained an order of protection against him. However, she contends that the court abused its discretion in excluding evidence that, in 2007, while Navickis was living with defendant, he removed the doorknobs from all of the doors in her home.

¶ 32 When the defendant raises a claim of self-defense, evidence of the alleged victim's prior bad acts may be admissible as relevant to whether the victim was the aggressor. *People v. Randle*, 147 Ill. App. 3d 621, 625 (1986). However, the evidence may be excluded if the trial court concludes that its probative value is outweighed by the danger of unfair prejudice. *Id.* The trial court's decision to admit or exclude evidence will not be disturbed absent an abuse of discretion. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001).

¶ 33 We cannot say that the trial court abused its discretion in limiting the evidence of Navickis' prior bad acts. The 2007 incident occurred almost two years before defendant's alleged offense. Moreover, although Navickis' removal of the doorknobs was certainly disturbing, it was not itself a violent act, and there is no evidence that it led to violence on his part. It was reasonable to conclude that the probative value of this incident would be outweighed by the danger that it could create undue prejudice in defendant's favor.

¶ 34 Moreover, for several reasons, we conclude that any error was harmless. First, the jurors were informed of the far more probative incident of June 2008. Second, although the trial court did instruct the jury on defendant's self-defense claim, the claim had little chance of success: McDonald, defendant's sole occurrence witness, testified that defendant scratched Navickis by accident as she reached for Trentyn, not out of self-defense. Third, the evidence was not closely balanced, even as to the accident theory: McDonald, who was five years old at the time of the incident and viewed it from a considerable distance, equivocated about what she had seen. Her testimony that defendant made contact with Navickis by accident was severely undermined by the undisputed evidence that the claw marks on Navickis' face measured between four and five inches long. We have no reason to suspect that the 2007 doorknob-removal incident would have affected the jury's verdict.

¶ 35 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 36 Affirmed.