

No. 1-10-1611

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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 CR 12122
)	
RICHARD PETTY,)	Honorable
)	Victoria A. Stewart,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion when it barred the defense from questioning the State's witnesses about defendant's injuries during his residential burglary trial. Defendant's claim of ineffective assistance of counsel must fail when counsel merely abided by the trial court's proper evidentiary ruling.

¶ 2 After a bench trial, defendant Richard Petty was convicted of residential burglary and sentenced, as a Class X offender, to six years in prison. On appeal, defendant contends that he was denied the right to confront the witnesses against him when the trial court barred defense counsel from questioning the State's witnesses about injuries defendant suffered as a result of an

encounter with homeowner Shaun Brown immediately before defendant's arrest. In the alternative, defendant contends that he was denied effective assistance of counsel because counsel failed to impeach the State's witnesses with evidence of the injuries caused by the encounter after they "minimized" the severity of the fight. We affirm.

¶ 3 Defendant was arrested in June 2009 and charged via information with residential burglary. The matter proceeded to a pretrial hearing where defense counsel filed a motion in *limine* seeking to question the witnesses regarding injuries defendant suffered as the result of a fight with Shaun Brown immediately before defendant's arrest. The defense contended that defendant was rendered blind by the fight.

¶ 4 At the hearing on the motion, the defense argued that the struggle between Brown and defendant as Brown attempted to detain defendant went to Brown's character and conduct as well as his motivation to lie. The State responded that it had no objection to questions regarding the fight; rather, its objection was to any discussion of the results of the struggle. The court then inquired how evidence of defendant's injuries was relevant to the case. The defense responded that evidence of defendant's injuries went to Brown's motivation to lie "with respect to his liability" for defendant's injuries. Ultimately, the court determined that the matter of defendant's injuries was not before the court as the instant proceeding was criminal rather than civil and ruled that Brown could be questioned as to bias and motive during cross-examination, but not the nature of defendant's injuries.

¶ 5 At trial, the State presented the testimony of Shaun Brown, his wife Diedre, and his sister Miyoka Davenport. Davenport testified that when she arrived at Brown's house, she saw a broken basement window and defendant emerging from a gangway on the side of the house. As defendant walked toward the rear of the house, Davenport drove into the alley. There, she saw

defendant exiting the back door of the victim's house with a television. Davenport continued to follow defendant and eventually saw him place the television against a backyard fence.

¶ 6 When Brown arrived several minutes later, Davenport described defendant to Brown. She then watched as Brown encountered defendant and defendant tried to run away. After defendant slipped and fell to the ground, Brown held him down until the police arrived.

¶ 7 During cross-examination, Davenport testified that she did not recall stating at a preliminary hearing that she had exited her car to examine the broken basement window or that she observed defendant "come out the back of [Brown's] front door."

¶ 8 Shaun Brown testified that he was in the car when his daughter called to tell him that she had heard banging and breaking glass. He then called Davenport and asked her to check on the house. He stayed on the phone with Davenport until he reached her location. After being informed by Davenport that defendant was the person she had followed, Brown approached defendant and asked whether defendant had broken into his house. Defendant looked at him, pushed him, and began to run away. Defendant then slipped and fell forward, hitting his head. Brown detained defendant until police arrived by standing over defendant. A television that Brown recognized as his was subsequently recovered from the backyard of the house that defendant had been standing in front of when confronted by Brown.

¶ 9 During cross-examination, Brown admitted that defendant struggled to get away. However, he denied striking or kicking defendant in the face.

¶ 10 Diedre Brown testified that as Brown walked up to defendant, defendant in turn came toward Brown. Diedre initially testified that she looked away and when she looked back defendant was on the ground. She then testified that after defendant walked toward Brown, defendant slipped or fell to the ground and Brown held him down until the police arrived. Defendant was later taken away in an ambulance.

¶ 11 During cross-examination, Diedre testified that defendant slipped because it was wet. She denied telling the police that a fight between defendant and Brown had gotten out of hand.

¶ 12 At the end of the State's case, the defense made a motion for a directed finding, which the trial court denied. The defense then rested. Ultimately, the trial court found defendant guilty of residential burglary and sentenced defendant, as a Class X offender, to six years in prison.

¶ 13 On appeal, defendant first contends that he was denied his right to confront the witnesses against him because the trial court barred evidence that defendant was "rendered blind" after a fight with Brown.

¶ 14 Before reaching the merits of defendant's argument, we must address the State's contention that this claim is subject to forfeiture because defendant failed to raise this issue in his posttrial motion. See, e.g., *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 15 Although defendant initially contends that the alleged error, the denial of the right to cross-examine a witness, is a constitutional error warranting a new trial unless it is harmless beyond a reasonable doubt, he argues in his reply brief that this court may reach his constitutional contentions through the serious error prong of plain error review. See *People v. Herron*, 215 Ill. 2d 167, 187 (2005) (to succeed on the second prong, a defendant must prove that there was plain error and that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process).

¶ 16 This court agrees with the State, plain error review is appropriate in this case. *Herron*, 215 Ill. 2d at 181-82 (plain error applies when defendant fails to object, while harmless error applies when a timely objection is made). The plain error doctrine permits this court to address forfeited errors "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *Herron*, 215 Ill. 2d at 186-87. The first step in determining whether the plain error doctrine applies is to determine

whether any error occurred. *People v. Patterson*, 217 Ill. 2d 407, 444 (2005). Absent error, there can be no plain error. *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 17 Defendant contends that he is entitled to a new trial because the trial court improperly precluded him from presenting evidence, through cross-examination, regarding the credibility of the State's witnesses. Specifically, defendant argues that the State's witnesses had motive to lie to ensure that he was convicted, otherwise Brown "could be in trouble" for beating him.

¶ 18 The right to cross-examination is based on a defendant's constitutional right to confront the witnesses against him. See U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. A defendant is given wide latitude in attempting to establish a witness's bias or motive during cross-examination (*People v. Rendak*, 2011 IL App (1st) 082093, ¶ 23 (Sept. 1, 2011)), and cross-examination may concern any matter that explains, modifies, discredits or destroys the witness's testimony on direct examination (*People v. Robinson*, 349 Ill. App. 3d 622, 632 (2004)).

However, the evidence used to impeach a witness must be timely, unequivocal and directly related; it may not be remote or uncertain. *Rendak*, 2011 IL App (1st) 082093, ¶ 23; see also *People v. Leak*, 398 Ill. App. 3d 798, 822 (2010) (while the court does not have the discretion to deny a defendant the right to show a witness's bias, it does have the discretion to bar repetitive or unduly harassing questions). Accordingly, a trial court's restriction of the scope of cross-examination will not be reversed unless there was a clear abuse of discretion that resulted in "manifest prejudice" to the defendant. *Leak*, 398 Ill. App. 3d at 822.

¶ 19 Here, the trial court did not abuse its discretion when it limited cross-examination regarding the injuries suffered by defendant as a result of the altercation between defendant and Brown. This court's review of the record reveals that defendant was given a sufficient opportunity to confront, cross-examine, and test the witnesses' credibility. Specifically, after Brown testified that defendant's head was injured because of a fall and that he stood over

defendant in order to detain defendant, defense counsel cross-examined him about defendant's behavior and whether he struck defendant. Brown admitted that defendant struggled to get away, but denied hitting or kicking defendant in the head. Additionally, Diedre denied, during cross-examination, that she told the arresting officers that a fight between defendant and Brown had gotten out of hand. The trial court was made aware not only that defendant hit his head and struggled to get away, but that defendant was removed from the scene via ambulance. These facts placed before the trial court the issue of Brown and his wife's potential bias regarding the severity of the fight and their credibility as witnesses. *Robinson*, 349 Ill. App. 3d at 632.

Although defendant was not able to cross-examine the witnesses in the manner he desired, there is no constitutional right to a perfect cross-examination. See *People v. Harris*, 123 Ill. 2d 113, 144-45 (1988), quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) ("the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish"). (Emphasis in original.)

¶ 20 Here, the only restriction the trial court placed upon defendant's cross-examination of the witnesses was to bar questions regarding the ultimate result of defendant's injuries. Considering the record before us, this court cannot say the trial court's ruling constituted an abuse of discretion. *Leak*, 398 Ill. App. 3d at 822. Absent error, there can be no plain error (*Williams*, 193 Ill. 2d at 349), and defendant's argument must fail.

¶ 21 In the alternative, defendant contends that defense counsel was ineffective because she failed to impeach the State's witnesses with evidence of defendant's blindness after they "minimized" the seriousness of the fight or present witnesses who could have testified as to the nature of the fight.

¶ 22 To show an attorney's representation was ineffective, a defendant must establish (1) the attorney's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to succeed on an ineffective assistance of counsel claim, a defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy under the circumstances. *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 70 (June 10, 2011). Generally, the cross-examination or impeachment of a witness is considered to be trial strategy and does not support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). An attorney's decision regarding cross-examination is entitled to substantial deference because it is an exercise of her professional judgment. *Pecoraro*, 175 Ill. 2d at 326-27.

¶ 23 Here, we find the witnesses did not open the door to evidence of the extent of defendant's injuries by testifying as to their cause. Although counsel was limited by the scope of the witnesses' direct examinations, she cross-examined the witnesses as to the nature of the struggle and Brown, specifically, as to how he detained defendant and whether he struck defendant in the head. See *People v. Lewis*, 223 Ill. 2d 393, 404 (2006) (scope of cross-examination is generally limited to the subject matter of direct examination and matters affecting a witness's credibility). Additionally, the trial court was made aware an ambulance was called. Defendant does not actually identify other witnesses to the struggle itself and his suggested witnesses, the ambulance personnel, could not have been called to testify without violating the trial court's order regarding evidence of the result of defendant's injuries. As discussed above, the trial court did not abuse its discretion when it barred evidence regarding defendant's injuries and defense counsel is not ineffective simply because she abides by an evidentiary ruling properly made by the trial court. Here, as defendant cannot establish how counsel's performance fell below an objective standard

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of reasonableness, his claim of ineffective assistance must fail. See *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (failure to satisfy either prong of the *Strickland* test defeats an ineffective assistance claim).

¶ 24 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 25 Affirmed.