

No. 1-10-1655

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|----------------------------------|---|------------------------|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the        |
|                                  | ) | Circuit Court of       |
| Plaintiff-Appellee,              | ) | Cook County, Illinois. |
|                                  | ) |                        |
| v.                               | ) | No. 08 CR 13808        |
|                                  | ) |                        |
| MIKELLE MARTIN,                  | ) | Honorable              |
|                                  | ) | Clayton J. Crane,      |
| Defendant-Appellant.             | ) | Judge Presiding.       |

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JUSTICE McBRIDE delivered the judgment of the court.  
Presiding Justice Epstein and Justice Howse concurred in the judgment.<sup>1</sup>

ORDER

HELD: Defendant’s conviction for aggravated criminal sexual assault was upheld where (1) it was an issue of fact whether the victim suffered bodily harm “during” the commission of the offense, as required under the aggravated criminal sexual assault statute; (2) any error in introducing the victim’s prior consistent statement was harmless where the trial court, as finder of fact, did not purport to rely upon that statement in arriving at its decision; and (3) the trial court did not abuse its discretion in allowing evidence of defendant’s previous acts of domestic violence against the victim.

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<sup>1</sup>Justice Joseph Gordon originally authored this order. Justice McBride adopted it following Justice Gordon’s passing

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¶ 1 Defendant Mikelle Martin appeals from his conviction for the aggravated criminal sexual assault of Z.W.

¶ 2 In June 2008, defendant had what he described as an “on again, off again” relationship with Z.W. On the evening of June 21, 2008, defendant accompanied Z.W. back to her apartment. It is undisputed that while they were at Z.W.’s apartment that night, they got into a heated argument during which the defendant started choking her. It is also undisputed that, later that night, the defendant and Z.W. had sexual intercourse. At trial, Z.W. testified for the State that defendant forced her to have sex; defendant, however, testified that they were no longer arguing at that point and their sex was consensual.

¶ 3 Following a bench trial, defendant was convicted of aggravated criminal sexual assault and sentenced to seven years’ imprisonment.<sup>2</sup> Defendant now appeals. For the reasons that follow, we affirm.

#### ¶ 4 I. BACKGROUND

¶ 5 At defendant’s bench trial, the primary witness for the State was the alleged victim, Z.W. Z.W. testified that she first met the defendant in 1994. Her relationship with the defendant began as a friendship and then progressed into “a relationship that we had children.” She stated that she had a total of four children, of which the younger two were fathered by the defendant. She and the defendant first moved in together in 2007, and they lived together “on and off” until the incident that occasioned this prosecution.

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<sup>2</sup> Defendant was also charged with kidnaping, but he was acquitted of that charge and it is not at issue on appeal.

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¶ 6 Counsel for the State asked Z.W. how many times the defendant had been physically aggressive or abusive to her from 2006 to 2008. “Too many times to count,” she replied. She then recounted an incident in 2007 where defendant allegedly placed a gun to her head. She explained that this incident occurred during a time when she and the defendant were “broken up.” She was walking down the street with her children, returning to her home, when defendant approached her and asked if he could come home with her. When she refused and continued walking, he followed her, trying to convince her to change her mind. He then pushed her up against a building and put a gun to her head, saying, “You’re gonna let me go home with you.” Z.W. testified that she was scared and did indeed let him come home with her. Counsel for the defendant made no objection to this testimony by Z.W.

¶ 7 Z.W. testified that after this 2007 incident, she called the police and made a report against the defendant, and he was arrested. However, she subsequently decided not to cooperate with the ensuing prosecution. She also continued having a relationship with the defendant. She explained, “At the time I loved him and we shared children, so I wanted him to be a father to his children. I wanted things to work out somehow. I thought that he would improve his behavior.”

¶ 8 Counsel for the State then directed Z.W. to speak about the events of June 21, 2008. Z.W. stated that on that date, defendant was not living with her, but they were still in communication and they were supposed to “work on our relationship.” She had not seen the defendant since approximately a week prior to that date, on Father’s Day, when he had spent the night at her apartment.

¶ 9 At approximately 8 p.m. on June 21, 2008, Z.W. was on her way to pick up her children

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from her sister's house when she saw the defendant with his uncle, "Boss Man." Z.W. testified that she spoke with the defendant and they mutually agreed that, after she picked up the kids, the two of them would return together to Z.W.'s apartment.

¶ 10 They arrived at her apartment at approximately 10 p.m. Z.W. stated that she put the children to bed, and then she and the defendant sat in the living room and talked. She asked the defendant to tell her why she should trust him and how they were going to fix their relationship. Z.W. testified that during this conversation, the defendant became "aggravated." He began pacing, raising his voice, and telling her that she was stupid and should just accept him the way he was. "It got more aggressive where he was yelling," she said. "He was in my face." She testified that the defendant knocked a cup out of her hand, pushed her up against the wall, and started choking her, with both hands squeezing her neck. She tried to get him off of her by pulling at him, scratching, and hitting.

¶ 11 Z.W. testified that eventually she broke free of the defendant's grasp. She walked to the bathroom and tried to shut the door to get away from him, but he blocked the door, preventing her from closing it. After that, she returned to the living room. It was approximately 11:30 p.m. Z.W. testified that the defendant continued being verbally abusive to her, calling her stupid and a disrespectful bitch. When she stayed silent, he shoved her against the fireplace and began choking her again. She got him off, but he shoved her onto the couch and began choking her a third time. She stated that she believed that she temporarily lost consciousness at that point.

¶ 12 She said that when she regained consciousness, she went to the bathroom to clean herself off. Defendant followed her to the bathroom, saying that he was sorry and that "he didn't mean

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to do that,” and he washed her feet for her. She stated that his demeanor was “nice” and “very apologetic.”

¶ 13 Z.W. stated that she then left the bathroom, returned to the living room, and lay down on the couch. Defendant came beside her, trying to “be affectionate.” Z.W. testified that she told him to leave her alone. However, she said, “He wouldn’t leave me alone. I asked him continuously, leave me alone, I’m tired. \*\*\* He wouldn’t accept no for an answer. He kept touching me, he kept trying to get me to have sex with him.” Defendant then tried to pull her pants down while she attempted to keep them up. She said they were “wrestling, tussling” over the pants. Eventually he managed to pull her pants off. Then, she said, the defendant “got me in a really uncomfortable awkward position where he pinned me down, and he had sex with me.” While this was happening, she “continually” told him, “No, I’m not going to have sex, I do not want to have sex with you” and tried to push him off of her.

¶ 14 Z.W. stated that after defendant finished having sex with her, she was crying and upset, and she told him that he had forced himself on her. According to Z.W., the defendant replied that “if I ever tried to get him to go to jail, that he would kill me and my children.”

¶ 15 At approximately 6:30 a.m., the doorbell rang. Z.W. opined that the person at the door was Clyde Sr., the father of Z.W.’s two older children, Clyde Jr. and Mya. She believed that Clyde Sr. had come to pick up Mya for the weekend, as was his custom. (Clyde Jr. was already staying with him for the summer.) When the doorbell rang, Mya rushed out the door. Z.W. tried to rush out behind her, but the defendant physically blocked the doorway and told her that she was not leaving the apartment.

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¶ 16 Z.W. stated that she spoke with the defendant for 15 to 20 minutes before he would allow her to leave the apartment, ostensibly so that she could purchase cigarettes and call Clyde Sr. about paying her child support. Once she was out of the apartment, she ran to a pay phone two blocks away and called the police. She then returned to her apartment. Shortly thereafter, the police came to the apartment and arrested the defendant. After defendant was arrested, Z.W. arranged for her sister to come to her apartment and take care of her children, and then she went to Holy Cross Hospital.

¶ 17 The State also called three more witnesses: Officer Benito Romera,<sup>3</sup> who responded to Z.W.'s call for help, Detective Bruce Phipps, who conducted an investigative interview with Z.W. on June 22, 2008, and Natividad Castaneda, a registered nurse at Holy Cross Hospital who examined Z.W. on that date.

¶ 18 Officer Romera testified that on June 22, 2008, at 6:30 a.m., he received a call of a domestic disturbance. He and his partner proceeded to Z.W.'s residence, where he spoke with Z.W. Over the hearsay objection of defense counsel, Officer Romero was permitted to testify as to what Z.W. told him. He stated that Z.W. told him that she and the defendant had a verbal altercation, after which he became angry, choked her, and prevented her from leaving the apartment. The defendant then had sex with her without her consent. She was subsequently able to leave the apartment to get cigarettes, whereupon she called 911.

¶ 19 The State then called Detective Phipps to the stand. Detective Phipps stated that, on June

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<sup>3</sup> Although his name appears in the record as Officer Romero, both parties refer to him as Officer Romera. We adopt the parties' spelling.

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22, 2008, he was assigned to investigate Z.W.'s allegations of sexual assault. As part of that investigation, he spoke with Z.W., first at the hospital, and then at the police station that evening. Detective Phipps proceeded to relate what Z.W. told him about the events of the previous night, an account which substantially conformed with her trial testimony. (Defense counsel did not object to this testimony, and its admission is not challenged on appeal.) According to Detective Phipps, Z.W. told him that she and the defendant had an "on again, off again" relationship, but they were "on the outs" at the time. They encountered each other on the evening of June 21, 2008, and Z.W. asked him to come to her apartment to discuss their relationship. Once they arrived at her apartment, Z.W. told Detective Phipps that defendant became argumentative, yelling and swearing at her. Z.W. became frightened and ran to the bathroom, where she smoked a cigarette. She said that when she emerged, the defendant was even more upset; she tried to ignore him, but he grabbed her around the neck. She broke free and ran into the bathroom again. She then emerged a second time and lay on the couch. Defendant yelled at her, telling her that he could kill her, and grabbed her again, choking her. Z.W. told Detective Phipps that she felt that she was going to pass out. At that point, defendant let her go, apologizing and saying that he would "be better." He washed her feet and then started getting "frisky or sexual" with her. When she told him no, he became violent again, throwing her onto the couch. Following a short struggle, he removed her pants, forced her legs over her head, and forced his penis inside of her. Afterwards, she told the defendant that she had to call a different child's father for child support, and she left the apartment.

¶ 20 Detective Phipps also testified that, while he was interviewing Z.W., he observed

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scratches and contusions with minor swelling all around her neck area. He called an evidence photographer to photograph her, and the ensuing photographs were introduced into evidence.

¶ 21 Castaneda, a registered nurse at Holy Cross Hospital, testified that on June 22, 2008, Z.W. came to the hospital with a complaint of an alleged sexual assault. Castaneda was assigned to be her nurse to compile a sexual assault kit. While she was compiling the kit, she observed bruising on the left and right sides of Z.W.'s neck and on her arm. Castaneda turned the physical evidence from that kit, including a vaginal swab, over to the Chicago Police Department. The parties stipulated that semen on Z.W.'s vaginal swab was consistent with the defendant's DNA profile. The State then rested.

¶ 22 Defendant took the stand in his own defense. He stated that he first met Z.W. in 2004 and became her boyfriend on the day he met her. He said that their relationship started "all right," but "down the line it started getting rocky." By June 2008, he had an "on again, off again" relationship with Z.W. Sometimes he was living with Z.W., at other times he was living with his girlfriend Monica Howell (hereinafter Monica), and occasionally he stayed at his grandmother's house.

¶ 23 Defendant testified that on Father's Day (June 15, 2008), he went to Z.W.'s apartment with her, and he stayed there from Sunday until Thursday. On Thursday, he decided that he wanted to go back to Monica's house. However, defendant did not tell Z.W. that he was going to Monica's house. Instead, he told her that he was going to pick up a check and would be back. He then left for Monica's house and did not return.

¶ 24 Defendant stated that on June 21, 2008, Z.W. saw him sitting on the porch of his

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grandmother's house with his uncle and came to speak with him. According to defendant, she was angry with him. She asked him where he had been since Thursday and told him that if he did not go home with her, then he would never see their children again. Defendant then left with her. He stated that he did not want to go home with her "but I knew I had to so I could see my kids."

¶ 25 Defendant testified that they arrived at Z.W.'s apartment at around 10 p.m. They were steadily arguing as they walked up the stairs and entered the apartment. Once they were inside the apartment, she drank vodka and the argument became more heated. According to defendant, they were arguing about his relationship with Monica and his relationship with Z.W. During that argument, Z.W. grabbed him, and he grabbed her, and "We both had like a little domestic dispute at that time."

¶ 26 After a while, defendant said, "everything toned down." Z.W. went into the bathroom, locked the door, and began smoking a cigarette. He knocked on the bathroom door. She opened it and shared her cigarette with him. Defendant estimated that this occurred approximately an hour after they arrived at the apartment.

¶ 27 Defendant stated that Z.W. went to the kitchen and he went to the bedroom to check on the children. The two of them then sat down to watch television in the living room. As they were watching television, they began to argue again. Z.W. took her cup from which she was drinking liquor and poured out its contents on his shirt. Defendant grabbed her by the neck and choked her "for a minute" before letting her go. Z.W. ran to the bathroom and again shut the door.

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¶ 28 According to the defendant, he knocked on the bathroom door, and, after a ten-second pause, she opened the door. He stated that it was about 1 a.m. when this occurred. When she opened the door to let him in, she was looking at the mirror. Defendant stated that he hugged her and apologized. She shared a cigarette with him, and he washed her feet to make up with her.

¶ 29 Defendant testified that the two of them came out of the bathroom and sat on the couch, kissing and hugging. He stated that they were not arguing any more, but that “[e]verything was mellowed out.” He told her that “me and Monica was done.” At this time, the two of them had sexual intercourse. Defendant stated that he did not force sexual activity, he did not pin her down or hold her down in any way, and she did not tell him to stop. It was approximately 5 a.m.

¶ 30 Afterwards, the doorbell rang, and defendant got up to put on clothes. Defendant stated that when he began to get dressed, Z.W. became angry because she believed that he was going to leave the apartment and go back to be with Monica. Z.W. then got dressed and left the apartment. Defendant said that he went to the window to see where she was going and observed that she did not leave the building before returning to her apartment. Upon her return, defendant said, she grabbed the last cigarette and went to the hallway to smoke. Two or three minutes later, police arrived at the apartment and arrested him.

¶ 31 During cross-examination, counsel for the State asked the defendant to elaborate on the events that occurred the second time Z.W. let him into the bathroom in her apartment, and the following colloquy occurred.

“DEFENDANT: She was looking in the mirror with her arms folded, mad. She was mad. She was angry.

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PROSECUTOR: She was mad at you, right?

A. Yeah.

Q. But you don't leave at that point either, do you?

A. Naw. That's my home. I live there. I live there."

¶ 32 Counsel for the State also asked defendant about a statement that he made to Detective Phipps on June 22, 2008, while they were at the police station.

"PROSECUTOR: And when you talked with Detective Phipps, you told Detective Phipps that while you were on the couch, the victim said no, let's not do this because you are just coming here for sex, correct?

DEFENDANT: Yeah. Yeah."

¶ 33 Defendant then called his uncle James "Boss Man" Martin, his sister Diamond Martin, and his girlfriend Monica to testify on his behalf. James stated that in the early evening hours of June 21, 2008, he was sitting on the porch of his mother's residence with the defendant. Z.W. came to the porch and spoke with the defendant. James said that he did not hear them arguing at that time. He saw the defendant leave the porch with Z.W. Twenty to 30 minutes later, the defendant returned to the porch alone. Z.W. followed approximately ten minutes later and argued with the defendant. James stated that Z.W. and the defendant walked to the street corner, where James observed Z.W. arguing, cursing, and pointing her finger at the defendant. Defendant did not return to his grandmother's house that night.

¶ 34 Monica testified that on the evening of June 21, 2008, she and the defendant were at the house of defendant's grandmother. She and defendant's sister Diamond left the house for a

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while and then returned at approximately 9 or 10 p.m. At that time, she saw the defendant and Z.W. standing on the corner arguing. Diamond similarly testified that on the evening of June 21, 2008, she was at her grandmother's house. She left the house around 10 or 11 p.m., and when she returned, she saw the defendant and Z.W. on the street corner, arguing with each other.

¶ 35 The trial court found the defendant guilty of the aggravated criminal sexual assault of Z.W. It is from this judgment that defendant now appeals.

## ¶ 36 II. ANALYSIS

¶ 37 On appeal, defendant raises three contentions of error. First, he contends that his conviction for aggravated criminal sexual assault should be reduced to the lesser included offense of sexual assault because there was no evidence that he used violence "during" the sexual assault. Second, he contends that the trial court erroneously relied on the hearsay testimony of Officer Romera, who testified that Z.W. told him that the defendant choked and sexually assaulted her. Third, he contends that his trial counsel was ineffective for failing to object to Z.W.'s testimony regarding defendant's prior incidents of domestic abuse. We consider these contentions in turn.

### ¶ 38 A. Sufficiency of the Evidence

¶ 39 Defendant first contends that the evidence was insufficient to convict him of aggravated criminal sexual assault, as opposed to the lesser included offense of sexual assault, because, although he choked Z.W. *prior* to having sex with her, he did not use violence *during* the sexual assault itself, as required by the aggravated criminal sexual assault statute. The State contends that the choking of Z.W. was sufficiently close in time to the sexual assault committed by

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defendant to constitute an element of the offense of aggravated criminal sexual assault.

¶ 40 Aggravated criminal sexual assault is defined in section 5/12-14 of the Criminal Code, which provides, in relevant part:

“(a) A person commits aggravated criminal sexual assault if he or she commits criminal sexual assault and any of the following aggravating circumstances exist during the commission of the offense \*\*\*:

\*\*\*

(2) the accused caused bodily harm, except as provided in subsection (a)(10), to the victim \*\*\*.” 720 ILCS 5/12-14(a) (West 2010).

In order to sustain a conviction for aggravated criminal sexual assault under section 12-14(a)(2), a defendant’s acts causing bodily harm must be sufficiently close in time to the sexual acts in order for a court to find that they had been committed during the course of the assault. *People v. Colley*, 188 Ill. App. 3d 817, 820 (1989); *People v. White*, 195 Ill. App. 3d 463 (1990).

¶ 41 In the present case, the trial testimony reflects that once Z.W. and the defendant arrived at Z.W.’s apartment, they got into an argument about their relationship. Z.W. testified that during the course of this argument, defendant repeatedly shoved her and choked her a total of three times. After the third time, Z.W. went to the bathroom to clean herself. Defendant followed her to the bathroom, where he apologized to her and washed her feet. It was after this that defendant sexually assaulted Z.W. Defendant does not dispute that, by shoving and choking Z.W., he caused her bodily harm. However, he contends that these acts were too remote in time from the sexual acts to fall within the ambit of section 12-14(a)(2) so as to support a finding of aggravated

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criminal sexual assault.

¶ 42 We disagree. The rule seems well established that to constitute aggravated criminal sexual assault, the infliction of bodily harm need not occur simultaneously or in an uninterrupted sequence with the actual sexual acts, as long as the period of time between the events is short enough that they can be considered part of a single series of events. *White*, 195 Ill. App. 3d at 467; *Colley*, 188 Ill. App. 3d at 820.

¶ 43 In *White*, the victim and the defendant lived together. *Id.* at 465. While they were together in the kitchen, the defendant struck the victim multiple times and ripped off her nightgown. *Id.* He then gave her permission to go upstairs so that she could put on clothes. *Id.* The victim testified that she was feeling weak and had a difficult time climbing the stairs; she had to rest in between each of the 20 steps. *Id.* When she reached the bedroom, the defendant forced her to have sexual intercourse with him. *Id.*

Defendant was convicted of aggravated criminal sexual assault. *Id.* at 465. On appeal, he challenged his conviction on grounds that the bodily harm was too remote from the sexual assault, because it occurred prior to the sexual assault and in a different location. *Id.* at 466.

The *White* court disagreed, holding that “the period between the beatings and the sexual assault was sufficiently close so that the beatings could be found to have been committed during the commission of the sexual assault.” *Id.* at 467.

¶ 44 A similar fact pattern was present in *Colley*, 188 Ill. App. 3d at 820. In that case, the defendant entered the victim’s home at night and sexually assaulted her in her bedroom. *Id.* at 818. Defendant then demanded that she give him money, and when she refused, he hit her, threw

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her on the bed, and placed a pillow over her face. *Id.* He then ordered her to go downstairs, whereupon he stabbed her with a knife. *Id.* at 819. He was found guilty of aggravated criminal sexual assault under section 12-14(a)(2). *Id.* at 818. On appeal, the defendant argued that the evidence was insufficient to convict him of aggravated criminal sexual assault because the stabbing occurred too long after the sexual acts were completed to be considered part of the same course of conduct. *Id.* at 819. The *Colley* court rejected this argument, stating:

“Here, the evidence showed that the defendant stabbed the victim soon after the sexual acts were completed. Under the instant circumstances, we will not draw a bright line between the ending of the sexual acts and the bodily harm occurring afterward, as that would defeat the statutory purpose of protecting victims from sex offenders. We find that the stab wounds occurred sufficiently close in time to the sexual acts that they can be said to have been committed during the course of the sexual assault.” *Id.* at 820.

See also *People v. Thomas*, 234 Ill. App. 3d 819 (1992) (even though the injuries inflicted upon the victim were not simultaneous with the sexual assault, they came within the ambit of section 12-14(a)(2) because they were “part of an unbroken series of events” that were “very near in time and closely linked to the forced sexual acts.”).

¶ 45 Likewise, in the instant case, the bodily harm that defendant inflicted upon Z.W. by choking her was very near in time and closely linked to the forced sexual acts that he perpetrated upon her later that night. Defendant, however, contends that the instant case is distinguishable from *White*, *Colley*, and *Thomas* because, in between the time where he choked Z.W. and the time that he sexually assaulted her, he apologized to her for choking her and washed her feet. He

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asserts that, as a matter of law, this attempt at reconciliation precludes the choking and the subsequent sexual assault from being considered part of the same course of events. We disagree. Defendant cites no law directly supporting that proposition. At best, defendant's apology could be argued to raise an issue of fact for the trier of fact in this bench trial to resolve as to whether the apology could be deemed to break the pattern of victimization that defendant perpetrated upon Z.W. that evening by choking and later sexually assaulting her, or whether his apology was merely a sequential act in an overall course of conduct leading to and culminating in his sexual assault of Z.W. See *White*, 195 Ill. App. 3d at 467; *Colley*, 188 Ill. App. 3d at 820; see also *Thomas*, 234 Ill. App. 3d at 825.

¶ 46 In this regard, the facts of *Thomas* are instructive. The defendant in *Thomas* forced the victim, his ex-girlfriend, to accompany him to a dance club. *Id.* at 821. There, he slapped her and made her eat a note she had written him a month earlier severing their relationship. *Id.* He then sexually assaulted her and forced her to submit to a sexual act with his companion. *Id.* Following the exit of his companion, defendant placed a fork on a hot plate, and, after a brief interruption by someone else who came to the room, defendant burned the victim with the fork. *Id.* at 825. He next forced the victim to leave the club with him and accompany him first to a store, and then to an apartment. *Id.* at 822. At the apartment, the defendant apologized to the victim for his actions. *Id.* He then sexually assaulted her yet again. *Id.*

¶ 47 On appeal, the defendant challenged his conviction of aggravated criminal sexual assault predicated on the burning of the victim, arguing that the burns were not inflicted "during" the acts of sexual assault as required by section 12-14(a). *Id.* at 824. The *Thomas* court disagreed,

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notwithstanding the fact that the burnings did not occur simultaneously with the sexual assaults and, in fact, defendant apologized to the victim between burning her and sexually assaulting her for the second time. *Id.* at 825. Nor did the court attempt to draw any bright line between the events that occurred before and after defendant apologized to the victim. Rather, the court simply held that the burnings were sufficient to support the defendant's conviction for aggravated criminal sexual assault because they "were part of an unbroken series of events and were both very near in time and closely linked to the forced sexual acts." *Id.*

¶ 48 The two cases cited by the defendant to support his contention that the evidence of aggravation is insufficient, namely, *People v. Potts*, 224 Ill. App. 3d 938, 949 (1992), and *People v. Boyer*, 138 Ill. App. 3d 16 (1985), are distinguishable. Although *Potts* was an aggravated criminal sexual assault case, the *Potts* court reversed defendant's conviction in that case for reasons entirely unrelated to the sufficiency of the evidence in that case, holding that defendant was deprived of a fair trial where one of the jurors failed to disclose relevant information during *voir dire*, namely, that her daughter had been murdered by her (the daughter's) boyfriend, and the juror knew two of the people on the defendant's prospective witness list. *Potts*, 224 Ill. App. 3d at 945, 947.

¶ 49 After holding that defendant was entitled to a new trial on these grounds, the court also noted in *dictum* that the prosecution misstated the law applicable to aggravated criminal sexual assault when it stated during closing arguments, "So bodily harm existed here and all that was relevant is did it exist at the time of the sexual assault." *Id.* at 948. In order to put this statement in context, a brief recitation of the facts in *Potts* is necessary. On the night of the alleged sexual

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assault in *Potts*, the defendant and the complainant went to a party together. *Id.* at 940. During the party, the complainant had a physical altercation with an unrelated third party named Rick, during which multiple witnesses saw them throwing punches at each other. *Id.* at 940, 943.

Subsequently, the defendant and the complainant went to the defendant's house. *Id.* at 940.

There, according to the complainant, the defendant struck the complainant and sexually assaulted her. *Id.* at 940. Under these facts, it was a disputed issue at trial as to whether the scratches and bruises on complainant's body resulted from defendant striking her or from her prior altercation with Rick. Thus, the prosecutor's statement was potentially misleading, in that it would invite the jury to conclude that defendant could be found guilty of aggravated criminal sexual assault as long as bodily harm "exist[ed] at the time of the sexual assault" (*id.* at 948), regardless of whether there was any nexus between that bodily harm and the actions of the defendant. It was this patent misconception that the *Potts* court apparently sought to dispel when it stated in *dictum* that the prosecutor's statement was "imprecise" and further stated, "Upon retrial, any reference to the relevant statute should leave no doubt that for defendant to be convicted of aggravated criminal sexual assault it must be proved that the bodily harm was contemporaneous to the criminal sexual assault." *Id.* at 949. It is this statement upon which defendant in the instant case seeks to rely. However, the *Potts* court did not explicate the meaning of the term "contemporaneous" or discuss the degree and extent to which the bodily harm must be close in time to the sexual acts in order to constitute aggravated criminal sexual assault. Nor did the *Potts* court purport to contradict the language of the statute or the principle, as stated in *Thomas*, *White*, and *Colley*, that the sexual assault need not be simultaneous with the bodily harm in order

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to fall within the ambit of section 12-14(a)(2). *Id.*; see *Thomas*, 234 Ill. App. 3d at 825; *White*, 195 Ill. App. 3d at 467; *Colley*, 188 Ill. App. 3d at 820. Accordingly, there is nothing in *Potts* that compels that it be read as inconsistent with *Thomas*, *White*, and *Colley*, or, for that matter, our decision in the instant case.

¶ 50 *Boyer*, 138 Ill. App. 3d at 19, the second case cited by defendant in this matter, is likewise distinguishable, because, in that case, there was no indication that the defendant inflicted any bodily harm whatsoever upon the victim. Although the victim's mother testified that she saw a bruise upon her daughter's leg, there was no evidence as to who inflicted the bruise or when, and no evidence to connect that bruise in any fashion with the actions of the defendant. *Id.* at 19. Thus, the *Boyer* court found there to be insufficient evidence to convict the defendant of aggravated criminal sexual assault. *Id.* By contrast, in the instant case, it is clear that defendant did, in fact, inflict bodily harm upon Z.W. on the night of the sexual assault, and the defendant does not challenge that such degree of bodily harm would be sufficient to convict him of aggravated criminal sexual assault if it otherwise met the requirements of section 12-14(a)(2). The question in the instant case is not whether defendant inflicted bodily harm upon the victim, but whether that bodily harm is sufficiently linked to his subsequent sexual assault, a question which *Boyer* does not purport to discuss.

¶ 51 Accordingly, we reject defendant's claim that his conviction for aggravated criminal sexual assault must be reduced to the lesser included offense of criminal sexual assault.

¶ 52 B. Testimony of Officer Romera Regarding Z.W.'s Statements

¶ 53 Defendant next contends that his conviction must be reversed because Officer Romera

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was permitted to testify, over defense objection, as to what Z.W. told him about the events that transpired between her and the defendant. Defendant argues that this constituted inadmissible hearsay testimony. The State argues that Officer Romera's testimony was properly admitted to provide context for his arrest of the defendant. The State also contends that, in any case, admission of this testimony did not prejudice the defendant where the trial court did not rely upon it in rendering its finding of guilt.

¶ 54 In a bench trial, the trial judge is presumed to know the law and to consider only competent and admissible evidence. *People v. Eubanks*, 279 Ill. App. 3d 949, 959-60 (1996); *People v. Puhl*, 211 Ill. App. 3d 457, 473 (1991). That presumption is only rebutted where the record affirmatively establishes that the judge actually considered inadmissible evidence. *People v. Gilbert*, 68 Ill. 2d 252, 259 (1977); *Eubanks*, 279 Ill. App. 3d at 959-60 (in bench trial, trial court's admission of prior consistent statements of witness was harmless error); *Puhl*, 211 Ill. App. 3d at 473 (rejecting defendant's argument that trial court's admission of expert testimony in bench trial warranted reversal, stating, "Nothing in the record supports a finding that the trial judge considered the evidence for an improper purpose."). Likewise, in the present case, even assuming for the sake of argument that Officer Romera's testimony was improperly introduced, there is no indication in the record that the trial court relied upon his testimony in rendering its verdict, nor does the defendant point to any such evidence in the record. On the contrary, to the extent that the trial judge commented upon his reasons for his verdict, the evidence is that he relied upon other evidence, since he was explicit in reciting the portions of defendant's testimony that convinced him of the defendant's guilt:

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“The defense in this case is that [Z.W.], based upon other bad acts in her life, didn’t say no on the night in question. \*\*\* So it’s only the two people in that room that can tell me what actually happened on the night in question.

I found the testimony of the defendant to be somewhat telling. \*\*\* Counsel was moving a few of the issues. Why didn’t you leave? His initial argument was the reason he went there was because he wanted to make sure he could see his kids. Well, that argument passed. It never really was what they were arguing about.

Now they are arguing about Monica. They are arguing about his whereabouts after he left for the four-day span at that apartment. \*\*\* There were a series of arguments. We are well past the kids. That’s his only motive at this point. He was real clear in his testimony that’s his only motive.

But then he’s subsequently asked why didn’t I leave, and I am paraphrasing since I wrote it in third person, this is his home, he lives there, he is not leaving. That is so telling in this case as to the issue of who’s in charge in this matter and who ignores the word no. Finding of guilty as to count I.”

It would appear from this statement that the judge premises his finding of guilt upon two specific portions of defendant’s testimony: first, a seeming inconsistency in his story, that he supposedly only agreed to accompany Z.W. to her apartment because he wanted to see his children, but when he arrived there, his argument with Z.W. was entirely unrelated to the children; and second, the attitude that defendant displayed when counsel for the State asked why he did not leave Z.W.’s apartment and he replied, “That’s my home. I live there.” Significantly, the judge makes no

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mention of Officer Romera or his testimony in his explanation of his verdict. Thus, in light of the fact that the trial judge explicitly stated that he was basing his decision on the testimony of the defendant, the admissibility of which is not challenged, and the absence of any affirmative showing to the contrary, it is presumed that the trial judge only considered competent and admissible evidence. *Gilbert*, 68 Ill. 2d at 259; *Eubanks*, 279 Ill. App. 3d at 959-60; *Puhl*, 211 Ill. App. 3d at 473.

¶ 55 C. Testimony Regarding Prior Instances of Domestic Violence

¶ 56 Defendant's final contention is that his trial counsel was ineffective for failing to object to testimony by Z.W. regarding previous occasions of domestic violence committed by defendant against her. The State, on the other hand, contends that Z.W.'s testimony was properly admitted under section 115-7.4 of the Code of Criminal Procedure, which allows the introduction of evidence regarding commission of prior offenses of domestic violence in domestic violence cases.

¶ 57 The defendant in any criminal case has a right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *People v. Jackson*, 205 Ill. 2d 247, 258-59 (2001). In assessing a defendant's claim of ineffectiveness, the critical question is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *People v. Albanese*, 104 Ill. 2d 504, 525 (1984), quoting *Strickland*, 466 U.S. at 686. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was objectively unreasonable under prevailing professional norms and that counsel's performance prejudiced the defendant.

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*Strickland*, 466 U.S. at 687. Where an ineffectiveness claim can be settled on the grounds that defendant was not prejudiced by the complained-of action, the court need not reach the issue of counsel's competence, because if there is no prejudice, the issue of competence becomes irrelevant. *People v. Flores*, 153 Ill. 2d 264, 283 (1992) (citing *Strickland*, 466 U.S. at 697); *People v. Erickson*, 161 Ill. 2d 82, 90 (1994).

¶ 58 In this case, for the reasons that shall be detailed below, the evidence of defendant's prior acts of domestic violence against Z.W. was properly admitted under section 115-7.4 of the Code of Criminal Procedure. Defendant cannot claim that his counsel was ineffective for failing to exclude evidence that he would not be entitled to exclude in light of the statute. See *People v. Albanese*, 104 Ill. 2d 504, 527 (1984). Accordingly, we must reject defendant's ineffective assistance claim.

¶ 59 Section 115-7.4 of the Code of Criminal Procedure provides, in relevant part:

“(a) In a criminal prosecution in which the defendant is accused of an offense of domestic violence as defined in paragraphs (1) and (3) of Section 103 of the Illinois Domestic Violence Act of 1986, evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

- (1) the proximity in time to the charged or predicate offense;
- (2) the degree of factual similarity to the charged or predicate offense; or

(3) other relevant facts and circumstances.” 725 ILCS 5/115-7.4 (West 2008).

This statute provides an exception to the common-law rule that evidence of other crimes is generally not admissible to show the defendant’s propensity to commit crimes. *People v. Dabbs*, 239 Ill. 2d 277, 284-85 (2010). The decision whether to admit evidence under this statute is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Id.* at 290.

¶ 60 With regard to the instant case, we cannot say that the trial court abused its discretion by admitting the challenged testimony, since it was probative of defendant’s propensity to commit acts of domestic violence against Z.W. In this regard, the facts of *Dabbs* are instructive. In *Dabbs*, the defendant was charged with domestic battery of his girlfriend. *Dabbs*, 239 Ill. 2d at 280. Pursuant to section 115-7.4 of the Code of Criminal Procedure, the trial court permitted the State to proffer the testimony of defendant’s ex-wife, who stated that, before she was married to the defendant, there was an incident in which he became very drunk and struck her repeatedly with a belt. *Id.* at 282. The *Dabbs* court found this prior incident of violence to be admissible and affirmed defendant’s conviction. *Id.* at 295. In issuing this ruling, the *Dabbs* court specifically held that section 115-7.4 “permits the trial court to allow admission of evidence of other crimes of domestic violence to establish the propensity of a defendant to commit a crime of domestic violence if the requirements of the statute and of other applicable rules of evidence are met.” *Id.* Similarly, in the present case, the challenged other-crimes evidence would be admissible as propensity evidence against defendant to show his tendency to commit acts of

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violence against Z.W.

¶ 61 Therefore, for the foregoing reasons, we affirm defendant's conviction for the aggravated criminal sexual assault of Z.W.

¶ 62 Affirmed.