

2012 IL App (2d) 100541-U
No. 2-10-0541
Order filed January 13, 20112

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-3391
)	
JONATHAN L. ZINKE,)	Honorable
)	Allen M. Anderson,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justice Zenoff concurred in the judgment.
Justice Bowman specially concurred in the judgment.

ORDER

Held: (1) The State proved defendant guilty beyond a reasonable doubt of attempted first-degree murder, as the victim provided corroborated testimony that defendant threw her into shallow water from a 25-foot height; the fall carried a risk of death sufficient to permit the inference of his intent to kill; (2) the trial court erred in preventing defendant from introducing evidence that the victim was on an antidepressant, but the error was harmless, as other evidence already established that she was impaired by drugs and alcohol and had little memory of the pertinent events; evidence of her depression otherwise was properly excluded, as it would have cast an unduly bad light on her and would have only speculatively supported defendant's implausible theory that she attempted suicide.

¶ 1 Following a jury trial, defendant, Jonathan L. Zinke, was found guilty of attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a) (West 2008)) and sentenced to 18 years' imprisonment. Defendant appeals, contending that (1) the State failed to prove beyond a reasonable doubt that he intended to kill the victim and (2) the trial court erred by restricting his cross-examination of the victim. We affirm.

¶ 2 Defendant was indicted, *inter alia*, for attempted murder and aggravated battery (720 ILCS 5/12-4(b)(8) (West 2008)) as a result of an incident on November 29, 2008. The indictment alleged that defendant dropped Rachel Wharton from a bridge into the Fox River.

¶ 3 At trial, Robert McDowell testified that he lived in an apartment near the river in Aurora. On November 29, 2008, he was awakened at about 3:30 a.m. by yelling outside. He heard a woman's yell turn to a scream. He ran to the window, where he saw a man and a woman struggling or wrestling on a bridge. The woman's left hand hung off into the air over the river and her right hand grabbed at the man's clothes and at the railing. She was "hanging over the rail, hanging on, trying not to fall." Her left foot hung in the air, "trying to fight back to push herself back up from going into the river." Her right leg was over the railing. McDowell went to call 9-1-1. He ran back to the window after hearing a big splash. He saw the woman floating face down in the river while the man was walking slowly away.

¶ 4 Yoraxy Hockett testified that she worked at the Hollywood Casino. On the date in question, she got off work at about 3 a.m. As she was driving down Galena Blvd., she saw a man standing on a bridge. As she got closer, she saw a pair of legs, "just disappearing, going down to the river." The man's hands were over the water; his posture never changed during the incident.

¶ 5 Aurora police officer Larry Flowers responded to the scene. At the riverbank, he saw a woman in the water on her hands and knees, screaming for help. The woman, Wharton, came to the

river's edge, where the water was knee-deep. She appeared disoriented. Flowers asked Wharton how she got into the river, and she replied that her boyfriend threw her in. Sergeant Gerald Marrero also responded to the scene. He saw Wharton, who was trying to stand. She appeared weak, cold, and paranoid. She was crying and disoriented.

¶ 6 Wharton testified that she met defendant in July 2008 and moved into his apartment near the casino in September. In late November, she moved out of defendant's apartment and back into her parents' home.

¶ 7 When Wharton came home from work on November 28, she and defendant went to the Martini Bar, where they drank. They stopped at a store for beer and wine. They ate dinner at defendant's apartment and defendant called his brother, William. Wharton talked to William about the possibility of her and defendant moving closer to where William lived. They agreed that they would talk further about moving "down there."

¶ 8 Wharton eventually left defendant's apartment. Later that night, defendant called her and then came to her house. At about 11 p.m., they returned to the Martini Bar. They drank beer and shots and used cocaine until the bar closed. They left the bar with some others and went to the apartment of a man named Sal to get more cocaine. At Sal's apartment, Wharton and defendant each used another line of cocaine.

¶ 9 At the apartment, defendant got into a discussion with another man about wrestling. Wharton thought it might lead to a fight, so she told defendant it was time to leave and she left. In the elevator, defendant told her that she should never pull him out of a room. She yelled at defendant, saying "This is over," and walked toward the bridge. Defendant grabbed her purse and looked in it, and Wharton called him a "fucking drunk." She heard him say, "Bye, bitch," and felt an arm between her legs. Defendant picked her up and threw her over the railing.

¶ 10 On cross-examination, Wharton only vaguely recalled being at the hospital. She admitted that her drug and alcohol use had been getting “out of hand” at that time. Wharton testified that she had “a lot going on” in her life. Defense counsel then asked her about her relationship with her son. She said she had a “good” relationship, but when counsel asked whether the boy lived with her and whether his custody was being determined “judicially,” the trial court sustained the prosecutor’s objections.

¶ 11 Dr. Kevin Chorvat, who treated Wharton in the emergency room, testified that she had a fairly mild case of hypothermia. She had cocaine and a high level of alcohol in her system. She was kept in the hospital for 24 hours to allow the alcohol to metabolize. The trial court barred testimony about the specific level of alcohol in Wharton’s blood and the fact that she was taking Lexapro, a medication used to treat depression.

¶ 12 Lorenzo Buzo testified that he was in a bar called The Duck when defendant and Wharton arrived around 2 a.m. It was closing time, so defendant, Wharton, Buzo and several others went to Sal’s apartment, where everyone drank. Defendant and Wharton were not fighting when they left the apartment, although Wharton looked upset.

¶ 13 Detective Robert Daniele testified that he questioned Wharton sometime in the afternoon of November 30, 2008. She told him that, on the evening of the 28th, she and defendant had talked about their relationship and the possibility of getting counseling. She had drunk an entire bottle of wine in defendant’s apartment. Daniele also questioned Hockett, who said that she saw a man holding up someone’s legs. She could not tell if he was “helping or hurting” the other person.

¶ 14 The State moved to bar defendant from presenting evidence that Wharton was depressed and suicidal. Defense counsel said that he expected William Zinke, defendant’s brother, to testify that, shortly before the incident on the bridge, he talked to Wharton on the phone. She was upset and

crying. Wharton said she was worried about an outstanding warrant for a parole violation. She thought the violation would cause the Department of Children and Family Services (DCFS) to take her son away. She was worried about the DCFS investigation and said that “she should just die.” Defense counsel asserted that the testimony was critical to defendant’s case, because it would show that Wharton was suicidal on the night in question. The trial court granted the State’s motion and barred the testimony.

¶ 15 Signe Heyob, an emergency room nurse, testified that, when she tried to assess Wharton, Wharton was in restraints. Wharton was quiet and did not want to talk to anyone. She refused to talk to police officers and pulled a blanket over her head.

¶ 16 William Zinke testified that he spoke on the phone with defendant and Wharton on November 28, 2008. Wharton sounded upset, distressed, and distraught. She talked about moving downstate, closer to William.

¶ 17 The jury found defendant guilty on both counts. The trial court denied defendant’s posttrial motion and sentenced him to 18 years’ imprisonment, finding that the aggravated battery count merged with the attempted murder count. Defendant filed a motion to reconsider the sentence, which the trial court denied. Defendant timely appeals.

¶ 18 Defendant first contends that the State failed to prove beyond a reasonable doubt that he intended to kill Wharton. When a defendant challenges on appeal the sufficiency of the evidence to convict him, we ask whether any rational jury could have found the elements of the offense beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is the function of the trier of fact to assess the credibility of the witnesses and the weight to give their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. *People v.*

Sutherland, 223 Ill. 2d 187, 242 (2006). “[W]e will not substitute our judgment for that of the trier of fact on these matters.” *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

¶ 19 To obtain a conviction of attempted murder, the State must prove that the defendant intended to kill the victim. *People v. Ephraim*, 323 Ill. App. 3d 1097, 1110 (2001). The specific intent to kill may be inferred from the circumstances, such as the character of the assault or the use of a deadly weapon. *People v. Jones*, 184 Ill. App. 3d 412, 429 (1989). Such intent may be inferred where a defendant does an act, the direct and natural tendency of which is to destroy another’s life. *People v. Migliore*, 170 Ill. App. 3d 581, 586 (1988). The existence of such intent is a question for the trier of fact. *Id.*

¶ 20 Wharton testified that defendant said, “Bye, bitch,” and proceeded to throw her into the river. From this evidence, which was corroborated to some extent by other eyewitnesses, the jury could reasonably conclude that defendant intended to kill her. Defendant contends, however, that throwing Wharton from a bridge did not have a “direct and natural tendency” to take her life. He argues that the bridge was “only” 25 feet above the water, the State presented no expert testimony that a fall from that height was likely to be fatal, the water was shallow at that point, and the victim survived with only minor injuries. Defendant contends that, if he truly wanted to kill her, he could have beaten her or used a deadly weapon.

¶ 21 Generally, it is not a defense to a charge of attempt that, “because of a misapprehension of the circumstances,” the defendant could not have completed the crime attempted. 720 ILCS 5/8-4(b) (West 2008). However, in extreme cases, a defendant who chooses a method that has virtually no chance of killing the victim may be deemed to lack the intent to kill. See 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.5(a)(4), at 240-41 (2d ed. 2003). However, such is not the case here. The 25-foot height of the bridge was substantial, and the water was apparently shallow. Wharton

could have hit her head on the river bottom and been killed instantly, or rendered unconscious and been carried away by the current. It was merely fortuitous that she escaped with only minor injuries.

¶ 22 As the State points out, the risks inherent in falling into water or falling from a height are considered obvious, even to children. See *Cope v. Doe*, 102 Ill. 2d 278, 286-87 (1984). Moreover, while a fall into deep water presents an obvious hazard, a fall or dive into shallow water can be equally dangerous, although for different reasons. See *Hagy v. McHenry County Conservation District*, 190 Ill. App. 3d 833, 835-37 (1989) (plaintiff paralyzed after diving into shallow creek). Thus, we cannot accept defendant's premise that a 25-foot fall from a bridge into a shallow river could not have killed Wharton and his resulting conclusion that the State failed to prove his intent to kill. See *People v. Wicker*, 4 Ill. App. 3d 990 (1972) (affirming attempted first-degree-murder conviction where defendant was found dangling victim over bridge).

¶ 23 In any event, defendant points to no evidence that a more effective method of killing Wharton was readily available. Nothing in the record shows that defendant had a weapon at his disposal. While he could perhaps have beaten her, the evidence showed that defendant was highly intoxicated, and she might have simply walked away. Further, they were outdoors in a public place, and beating her would have attracted further attention. Although it was 3 a.m., there was apparently foot and vehicle traffic in the area even at that hour; at least two other people witnessed the incident.

¶ 24 The cases defendant cites are distinguishable. In *People v. Jones*, 184 Ill. App. 3d 412 (1989), the defendants actually had a gun and a knife in their possession, but did not use them on the victim. *Id.* at 430. In *People v. Thomas*, 127 Ill. App. 2d 444, 455-56 (1970), the defendant had a knife, but used it only to "pick at" the victim and stab her once in the shoulder. Similarly, in *People v. Garrett*, 216 Ill. App. 3d 348, 354-55 (1991), although the defendant beat the victim

severely, he did not use a knife that he had with him. The common thread in these cases is that the assailants did not use weapons that were at their disposal. The reviewing courts held that this fact negated the intent to kill. Here, as noted, there is no evidence that defendant had a weapon at his disposal.

¶ 25 Citing *People v. Mitchell*, 105 Ill. 2d 1 (1984), defendant argues that a defendant's conduct after an assault may be relevant to his or her intent. In *Mitchell*, although the defendant beat her daughter on two separate days, she did not take advantage of opportunities to "finish the job," instead taking the girl to the hospital. Here, defendant simply walked away. He did not attempt to help Wharton or call for assistance. We do not understand how this proves that he did not intend to kill Wharton.

¶ 26 Defendant's second contention is that the trial court restricted his ability to present his case by barring various pieces of evidence. Defendant's argument on this point is confusing. He argues that several distinct avenues of inquiry were relevant for one or more interrelated purposes but does not always clearly delineate between them. We will attempt to separate the threads of the various arguments and address each in turn.

¶ 27 Defendant contends that he should have been allowed to introduce evidence that: (1) Wharton was taking Lexapro, an antidepressant; (2) Wharton had told William Zinke earlier in the evening that she was concerned about upcoming court dates concerning the custody of her son and a pending probation violation hearing, and that "she wished she would just die and get it over with"; and (3) Wharton had a particularly high level of alcohol in her system. Defendant contends that such evidence either was relevant to show that Wharton's fall from the bridge was a suicide attempt, which she subsequently attempted to cover up by blaming defendant; or was relevant to her perception of events that night.

¶ 28 Every criminal defendant has the right to present a defense and to confront and cross-examine witnesses. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). The confrontation clause of the sixth amendment to the United States Constitution (U.S. Const., amend. VI) guarantees a defendant the right to cross-examine a witness against him for the purpose of showing the witness's bias, interest, or motive to testify falsely. *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *People v. Klepper*, 234 Ill. 2d 337, 355 (2009). However, a trial judge may impose limits on a defense counsel's inquiry into the potential bias of a prosecution witness without offending the defendant's sixth amendment rights. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *Klepper*, 234 Ill. 2d at 355. A trial judge retains wide latitude to impose reasonable limits based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or of little relevance. *Van Arsdall*, 475 U.S. at 679; *Klepper*, 234 Ill. 2d at 355. As the United States Supreme Court observed in *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.)” *People v. Harris*, 123 Ill. 2d 113, 144-45 (1988) (quoting *Fensterer*, 474 U.S. at 20). On review, we need not “isolate the particular limitation on cross-examination” to decide if reversible error occurred. *Klepper*, 234 Ill. 2d at 355-56. Rather, we look to the record as a whole to see whether the fact-finder was made aware of “adequate factors concerning relevant areas of impeachment of a witness.” *Id.* at 356. If so, “no constitutional question arises merely because the defendant has been prohibited on cross-examination from pursuing other areas of inquiry.” *Id.*

¶ 29 Although *Klepper* dealt specifically with restrictions on cross-examining a witness directly, we believe it applies equally to a situation such as this one, where a defendant seeks to introduce impeaching evidence through the testimony of third parties.

¶ 30 Initially, we note that defendant was able to place before the jury substantial evidence impeaching Wharton's testimony. By her own admission, she had been drinking heavily and using cocaine on the night in question. She admitted that her drinking and drug use had gotten "out of hand," and she admitted having a felony conviction for possession of a controlled substance. Several witnesses testified that she appeared confused and disoriented. She admitted on cross-examination that she could not remember substantial portions of the evening's events. Thus, we consider defendant's contentions in the context of whether he was prejudiced because he could not pursue "other areas of inquiry."

¶ 31 We cannot agree that defendant should have been allowed to prove that Wharton was taking Lexapro, an antidepressant. Defendant failed to provide a sufficient record upon which we could conclude that the exclusion of testimony regarding the fact that Wharton was taking Lexapro was error. Although defendant argues that antidepressants such as Lexapro have "chemical effects on the brain," he made no offer of proof, with an expert or otherwise, to show what those asserted chemical effects would be. Specifically, he failed to demonstrate what effect Lexapro, either alone or with alcohol and cocaine, would have on Wharton's ability to perceive and recall the events. There was substantial evidence that Wharton used alcohol and cocaine on the night in question. Thus, without a showing of the particular relevance, evidence that Wharton took Lexapro is cumulative at best.

¶ 32 Defendant further contends that evidence that Wharton was taking Lexapro was relevant to show that she was depressed on the night of the incident. Defendant also wanted to introduce evidence, through the testimony of his brother, William, that Wharton was concerned about an upcoming hearing concerning custody of her son and about a possible probation revocation (defendant offered no details about these proceedings) to show that Wharton was depressed. It is

somewhat incongruous to argue that Wharton's use of an antidepressant would prove that she was depressed. It is more likely that the medication had the desired effect and alleviated her symptoms of depression.

¶ 33 In any event, defendant does not clearly explain why Wharton's upcoming legal proceedings, or her depression generally, were relevant to assessing her credibility as a witness. Defendant argues that Wharton's "loss of custody and the upcoming court hearings concerning her son were critical to evaluating her testimony. [Wharton's] answers to questions pertaining to her losing custody of her son were relevant to determining the accuracy of her memory." We do not follow this logic. Defendant does not explain how details about a court hearing that had not occurred yet were relevant to assessing Wharton's memory of defendant's assault on her. (She had already admitted that her memory of that evening was less than clear.) It seems more likely that defendant wanted to introduce evidence that Wharton faced the loss of custody of her son and the possible revocation of her probation merely to make her look bad in the jury's eyes and limit any sympathy it may have had for her. Thus, the trial court did not abuse its discretion by barring this testimony.

¶ 34 Defendant also argues that evidence of Wharton's alleged depression was relevant to show that her fall from the bridge was a suicide attempt. Even considering the evidence defendant contends was improperly excluded, such a theory is pure speculation. Defendant appears to equate "depressed" with "suicidal." However, he offered no expert evidence that all depressed people are suicidal or, more importantly, that Wharton actually exhibited signs of being suicidal on November 29, 2008. As noted, evidence that she was taking Lexapro to alleviate symptoms of depression does not prove that she was depressed, much less suicidal.¹ We do not view Wharton's statement to

¹Defendant included product information on Lexapro as an appendix to his brief. It lists an

William Zinke, several hours before the incident, that she “wished she would just die” as showing that she was suicidal when she fell from the bridge. Although the trial court allowed defense counsel to argue in closing that Wharton’s fall from the bridge was an accident, counsel expressly disavowed a theory that she jumped on purpose. Such a theory does not account for McDowell’s testimony that Wharton was “trying to fight back to push herself back up from going into the river.” In any event, defendant’s theory—that defendant and Wharton were fighting on the bridge, that she suddenly decided to end the fight by jumping into the river, and that, after surviving, despite being described by several witnesses as confused and disoriented, she immediately decided that a suicide attempt might harm her in her upcoming court proceedings and decided to cover up the suicide attempt by blaming defendant for attempting to murder her—is inherently implausible.

¶ 35 In summary, the trial court did not err by refusing to allow defendant to introduce evidence that Wharton was taking Lexapro. The trial court did not abuse its discretion by barring the remaining evidence defendant sought to introduce. Defendant was allowed to present ample evidence that Wharton was impaired by drugs and alcohol, that she appeared confused and disoriented, and that she could not remember many aspects of the evening’s events. See *Klepper*, 234 Ill. 2d at 356 (if fact-finder was made aware of “adequate factors concerning relevant areas of impeachment of a witness,” “no constitutional question arises merely because the defendant has been prohibited on cross-examination from pursuing other areas of inquiry”). The additional

increased risk of suicidal thinking as a possible side effect for children, adolescents, and young adults, but not for adults such as the 30-year-old Wharton. This information was apparently not before the trial court but, to the extent we can take judicial notice of it, it does not support defendant’s theory that Wharton was suicidal.

evidence would have served only to embarrass Wharton without materially advancing the defense's case. See *Klepper*, 234 Ill. 2d at 355 (trial court may reasonably limit impeachment based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or of little relevance).

¶ 36 The judgment of the circuit court of Kane County is affirmed.

¶ 37 Affirmed.

¶ 38 JUSTICE BOWMAN, specially concurring:

¶ 39 I agree with the majority that the State proved defendant guilty of attempted first-degree murder beyond a reasonable doubt. I write separately because I believe that the trial court erred in preventing defendant from introducing evidence that Wharton was on an antidepressant. I agree with the majority that such evidence would have been cumulative on the issue of Wharton's ability to perceive and recall events given that she had admittedly used alcohol and drugs on the night of the incident. See *supra* ¶ 31. However, the antidepressant evidence was central to one of the theories defendant wished to present at trial, that Wharton jumped over the bridge in a suicide attempt rather than being thrown over by him.

¶ 40 The majority states that defense counsel expressly disavowed a theory that Wharton jumped on purpose. *Supra* ¶ 34. However, defense counsel sought to pursue such a theory, which he explained to the trial court before the ruling on the evidence, and it is only after the trial court barred the evidence relating to depression that counsel changed tactics and abandoned the theory in closing.

¶ 41 The majority also reasons that it does not make sense to argue that Wharton's use of an antidepressant would show that she was depressed. The majority posits that it is more likely that the medication alleviated Wharton's depression. *Supra* ¶¶ 32, 34. The "logic" appears to me to have several flaws. First, if Wharton was prescribed an antidepressant, it would provide

circumstantial evidence that she had an underlying condition of depression. Moreover, just because she was prescribed medication would not automatically dictate that she was no longer depressed, as she could have been noncompliant in taking the medication; it could have failed to alleviate any or all of her symptoms; or it could have had unintended side effects. Indeed, contrary to the majority, I would consider the information that Lexapro has increased risks of suicidal thinking in young adults as additional support to allow Wharton's use of the drug into evidence. See *supra* ¶ 34 n.1. Further, the argument that a depressed person is more likely to attempt suicide than a non-depressed person is rational; I would not label such a theory "pure speculation," as does the majority. See *supra* ¶ 34; *Winger v. Franciscan Medical Center*, 299 Ill. App. 3d 364, 375 (1998) (where patient had severe depression, suicide was foreseeable); cf. *People v. Wheeler*, 226 Ill. 2d 92, 133-34 (2007) (evidence that gang leader also had a motive to kill the victim was properly excluded as speculative, as gang leader had no connection to the crime scene and was in prison at the time of the murder). A party is entitled to present evidence which is relevant to his theory of the case as long as the evidence is not too remote in time or too speculative (see *Wheeler*, 226 Ill. 2d at 132), and here I would hold that the trial court's exclusion of the antidepressant evidence was an abuse of discretion.

¶ 42 That being said, I believe that such error was harmless beyond a reasonable doubt. An evidentiary error is harmless beyond a reasonable doubt if there is no reasonable probability that the jury would have acquitted the defendant without the error. *In re E.H.*, 224 Ill. 2d 172, 180 (2006). Given: the eyewitness testimony that Wharton was hanging onto the railing, trying to push herself back and not fall; the responding officer's testimony that when Wharton came out of the water, she said that defendant had thrown her in; and Wharton's testimony at trial that defendant had picked

her up and thrown her into the river, there is no reasonable probability that the jury's verdict would have been different if the trial court had allowed evidence of the antidepressant.