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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 Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-1610
)	
ROBERT HERNANDEZ,)	Honorable
)	Marmarie J. Kostelny,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant was not denied a fair trial by a witness's nonresponsive answers to questions, and thus showed no plain error or ineffective assistance of counsel: the witness's vague and isolated reference to a possible uncharged theft was insignificant compared to the overwhelming evidence of defendant's guilt of the charged crime, while the witness's other arguable references were cured by sustained objections and instructions to disregard; (2) defendant's multiple convictions in this case were proper, as the parties' sentencing agreement called for the dismissal of counts only in another case.

¶ 2 Following a jury trial, defendant, Robert Hernandez, was convicted of two counts of aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2010)), two counts of domestic battery (720 ILCS 5/12-3.2(a)(1), (a)(2) (West 2010)), and violation of an order of protection (720 ILCS 5/12-30 (West 2010)). He appeals, contending that he was denied a fair trial when the victim

repeatedly gave nonresponsive answers in her testimony, some of which implied that defendant was guilty of uncharged criminal conduct, and that the mittimus should reflect a single conviction. We affirm.

¶ 3 Before trial, the trial court granted the State's motion to admit evidence of several prior incidents of domestic violence defendant allegedly committed against the victim, Samantha Y. At trial, Samantha testified that she and defendant moved in together in March 2007. Defendant had fathered three of her four children. In February 2010, an order of protection was issued barring defendant from any contact with Samantha or her children. On June 23, 2010, Samantha had the order of protection modified so that defendant could have contact with Samantha and her children, but was not allowed to physically or emotionally abuse them. Samantha explained that she and defendant had resumed seeing each other and that she "wanted to do right by the law." She began seeing defendant again because she was having financial problems.

¶ 4 After they left the courthouse on June 23, 2010, defendant went back to Samantha's house. There had been a storm that evening, and defendant went outside to help a neighbor who had a tree fall on his truck. When defendant returned to the house, an argument ensued. Defendant left the house again and returned. The argument resumed. Defendant grabbed Samantha by the face and the back of the head. He put her in a headlock and started jabbing at her with what she thought was a kitchen knife.

¶ 5 The argument continued, with defendant punching and kicking Samantha. When defendant went upstairs to shower, Samantha started packing to leave. She heard one of her daughters and went upstairs to check on her, where another argument with defendant ensued. While defendant was in the shower, Samantha found a wad of money and took it. She started running down the stairs

toward the back door. She heard something, looked behind her, and saw the naked defendant chasing her out of the house.

¶ 6 Samantha could not get to her car, so she ran across the street to where a child was standing. The defense, anticipating that Samantha would testify to what the child said, objected. At a sidebar, the trial court advised the State to avoid such a line of questioning if it could. When the prosecutor asked Samantha, “Without saying anything that anybody else said, what happens as you’re running across the street?” she responded, “I’m running across the street and there’s a man outside and he sees what is occurring.” The trial court sustained defendant’s objection and instructed the jury to disregard the answer. Later, the prosecutor asked, “Was it right around that same time when he went back into the house?” Samantha answered, “Well, actually there was a kid from across the street that ran across to me screaming, ‘Ma’am, Ma’am, stay still.’ ” The trial court sustained the objection and instructed the jury to disregard the last part of the answer.

¶ 7 Samantha testified that the chase ended between two nearby buildings, where defendant punched her in the face twice. Police eventually arrived, and an ambulance transported Samantha to the hospital. At the police station the next morning, Samantha’s injuries were photographed. The photos were admitted into evidence.

¶ 8 Samantha recalled another incident on December 9, 2009, when defendant punched and choked her. Asked if she could breathe while being choked, she responded, “Of course not. He’s a master at it.” The trial court sustained defendant’s objection and instructed the jury to disregard the remark. Samantha said that defendant had left her that evening to be with another woman. Samantha went through defendant’s cell phone and discovered a call from “Megan.” When

Samantha demanded to know who Megan was, defendant began hitting and kicking her. Then he wrapped an extension cord around her neck.

¶ 9 On cross-examination, Samantha admitted falsely telling two assistant State's Attorneys that she received some old bruises in a fight with her sister. She said this to protect defendant and to have the order of protection modified. Defense counsel then asked her if she suspected defendant of having an affair. She responded, "Yes, and I found out that he did have an affair on February 1st. He took \$3,000 of my money and spent it on a stripper." Defense counsel asked her to answer the question. When she insisted that she had, the trial court interjected, instructing her to listen carefully to the questions and not add anything to her answers. However, defense counsel did not ask that the answer be stricken.

¶ 10 Later, defense counsel asked Samantha whether she had confronted defendant in October 2008 about having an affair. As counsel was asking the question, Samantha stated, "And I did not confront him on the 1st, I confronted him on the 24th, and that's when he beat the shit out of me." The trial court sent the jury out and again admonished Samantha to answer the question posed and not volunteer anything. During the remainder of the cross-examination, defense counsel or the court repeatedly instructed Samantha to answer the question posed or to wait until there was a question. Later, Samantha was asked why she did not take her children with her when she left the house but was able to grab a wad of cash as she was leaving. She responded, "I'm naked in my bank account because of Robert Hernandez, so I grabbed the money." On redirect, Samantha clarified that she originally told Audrey Romito that the old bruises came from a fight with her sister when they had actually been inflicted by defendant.

¶ 11 Romito testified that, pursuant to her employment as a domestic-violence counselor, she saw Samantha on June 23, 2010. Samantha exhibited only faint bruising.

¶ 12 Aurora police officer Todd Fanscali testified that he responded to a call of a woman who was running and screaming. He found Samantha in a parking lot, upset and hysterical. She had a hard time catching her breath. He saw red marks around her face and a cut on her chin. He also observed marks and swelling on her upper arms. An ambulance arrived and took Samantha to the hospital.

¶ 13 In closing argument, defense counsel asserted that Samantha was not credible. Counsel asserted that on cross-examination Samantha could not answer questions without getting upset, or “giving a completely different answer from the question that was asked.” Counsel asserted that this showed that Samantha was not being honest. Counsel argued that Samantha had a history of lying and, moreover, was angry with defendant because of his affairs.

¶ 14 The jury found defendant guilty. At sentencing, the parties told the court that they had a sentencing agreement. Defense counsel outlined the agreement as follows. Case No. 08-CM-670, a misdemeanor case against defendant, would be nol-prossed. In the instant case, defendant would be sentenced to six years’ imprisonment, with credit for 495 days served. That sentence would be consecutive to one imposed in No. 10 CF 825. In No. 10-CF-825, defendant would plead guilty to one count of the indictment, for aggravated domestic battery. In exchange for that plea, he would be sentenced to six years’ imprisonment in the instant case. Counsel then stated, “Pursuant to that plea, all remaining charges will be nolle pros’d.” The prosecutor noted her agreement.

¶ 15 The trial court imposed the agreed sentences. Defendant timely appeals.

¶ 16 Defendant first asserts that he was denied a fair trial because Samantha repeatedly refused to answer the questions posed, providing nonresponsive answers that in some cases accused

defendant of uncharged crimes. Defendant acknowledges that his counsel, while successfully objecting to the vast majority of the comments, failed to include the issue in a posttrial motion, thus forfeiting it. See *People v. Young*, 133 Ill. App. 3d 886, 893 (1985). Defendant contends that, to the extent that counsel failed to preserve the issue for review, she was ineffective. Defendant also urges us to review the issue as plain error. However, whether we consider the issue as plain error or view it purely as a question of ineffective assistance of counsel, defendant cannot succeed because he was not denied a fair trial.

¶ 17 The plain-error doctrine permits this court to address unpreserved 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.” *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). The first step in determining whether the plain-error doctrine applies is to determine whether any reversible error occurred. *People v. Patterson*, 217 Ill. 2d 407, 444 (2005).

¶ 18 A claim of ineffective assistance of counsel requires a defendant to establish that his attorney's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Counsel will not be deemed ineffective for failing to raise a meritless issue. See *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 65. Thus, in either case, we first consider whether defendant's proposed issue had merit.

¶ 19 Initially, we agree with the State that defendant exaggerates the impact of Samantha's unsolicited statements. Many of the examples defendant cites were innocuous comments. Whether the man across the street witnessed some of what Samantha had already described, and whether the

neighborhood boy told her to be still, did not likely affect the jury's perception of defendant. Moreover, defense counsel objected to most of the improper remarks. The trial court sustained the objections and instructed the jury to disregard the comments. This alone is usually sufficient to cure any prejudice. See *People v. Keene*, 169 Ill. 2d 1, 20 (1995).

¶ 20 Defendant seems primarily concerned with the statement that he “took \$3,000” of Samantha’s money and “spent it on a stripper” and the subsequent comment that Samantha was “naked in [her] bank account” because of defendant. He argues that these answers implied that he was guilty of theft.

¶ 21 Generally, evidence that a defendant committed offenses other than those for which he is on trial is inadmissible. *People v. Cruz*, 162 Ill. 2d 314, 348 (1994). We note that Samantha’s comments do not necessarily suggest that defendant committed a crime. If, for example, defendant and Samantha maintained a joint bank account, defendant could have “taken” Samantha’s money yet committed no crime because he had an equal right to it. Assuming for the sake of argument that Samantha meant to accuse defendant of theft, the improper remarks did not contribute to the guilty verdict.

¶ 22 Defendant has cited no case holding that he has a constitutional right to have prosecution witnesses limit their answers to the questions asked or to answer in the fewest words possible. Of course, where the nonresponsive answer imparts to the jury improper information, such as the defendant’s prior commission of a crime, the defendant’s rights might be violated. As such claims are relatively rare, Illinois courts have not developed a uniform framework for deciding when a witness’s nonresponsive reference to a defendant’s prior bad acts can be reversible error. Courts

have generally found the error to be harmless where the improper remarks are isolated and the proper evidence of guilt is overwhelming.

¶ 23 In *Keene*, a witness's nonresponsive answer revealed that the defendant had recently been released from prison. The trial court instructed the jury to disregard that portion of the answer. The supreme court held that any "residual harm" resulting from the statement did not rise to the level of a due process violation. *Keene*, 169 Ill. 2d at 20.

¶ 24 In *People v. Phillips*, 186 Ill. App. 3d 668 (1989), a witness being cross-examined mentioned that the defendant had previously sold drugs. On appeal, the court held that any error was harmless because the other evidence against the defendant was overwhelming. In *Young*, 133 Ill. App. 3d at 893, this court held that no plain error occurred when the witness's nonresponsive answers were cumulative of other evidence.

¶ 25 In *People v. Garvey*, 693 F.3d 722 (7th Cir. 2012), the federal appeals court took a similar approach, holding that an isolated statement that the defendant and the witness " 'got together and smoking [*sic*] weed' " was not unduly prejudicial given the trial court's prompt instruction to disregard it. *Id.* at 726; see also *United States v. Zitt*, 714 F.3d 511 (7th Cir. 2013) (brief reference to defendant's jail time harmless where defendant declined trial court's offer to admonish jury that evidence of past crimes was irrelevant and other evidence of defendant's guilt was overwhelming).

¶ 26 Here, too, the vague and isolated reference to a possible theft was insignificant compared to the overwhelming evidence of defendant's guilt. Samantha testified in detail about the prolonged and severe beating defendant administered. Photographs of her injuries were introduced into evidence. Fanscali testified that he arrived at the scene to find Samantha upset and hysterical, with

numerous injuries. An ambulance took her to the hospital. It is highly unlikely that the jury ignored this properly admitted evidence, but was swayed by a veiled reference to a possible theft.

¶ 27 We note that, unlike in most of the cases cited above, defense counsel did not ask that the jury be instructed to disregard the nonresponsive answer. This was likely a matter of trial strategy. The answer came in response to a question whether Samantha suspected defendant of having an affair. The apparent purpose of this line of questioning, as shown by defense counsel's closing argument, was to show that Samantha was angry with defendant and thus had a motive to falsely accuse him. In this context, whether she was angry with him for having an affair or for taking her money was immaterial. In closing, counsel argued that Samantha was so angry that she could not even focus on the questions and answer them properly.

¶ 28 Although other remarks by Samantha arguably accused defendant of uncharged crimes, the trial court promptly sustained defense objections and instructed the jury to disregard the remarks, thus minimizing the prejudice to defendant. See *Keene*, 169 Ill. 2d at 20. Because defendant received a fair trial, he cannot show plain error or that counsel was ineffective for failing to preserve the issue.

¶ 29 Defendant also contends that the mittimus should be amended to reflect a single conviction. He notes the prosecutor's agreement with defense counsel's statement that "all remaining charges will be nolle pros'd." He further notes that only one sentence was imposed in this case, and argues that this meant that all charges other than the most serious charge in this case—aggravated domestic battery—and the one charge to which defendant pleaded guilty in case No. 10-CF-825 were to be dismissed. The State responds that counsel's statement that "pursuant to that plea, all remaining charges will be nolle pros'd," referred only to the other counts in case No. 10-CF-825. Noting that

the “older misdemeanor case” was specifically referred to, the State argues that the failure to mention the other convictions in this case meant that the agreement was that they were not to be dismissed, although no sentences were to be imposed for those convictions.

¶ 30 We agree with the State that the most logical interpretation of the sentencing agreement, as explained by defense counsel, is that the agreement to nol-pros the “remaining charges” referred only to those in case No. 10-CF-825 that were covered by the plea agreement. Counsel specifically referred to dismissing charges “pursuant to that plea” and also mentioned specifically the older misdemeanor case that was to be dismissed, but said nothing about the remaining convictions in this case.

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

¶ 32 Affirmed.