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2013 IL App (3d) 110049-U

Order filed February 15, 2013

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-11-0049
)	Circuit No. 10-CF-475
LAURICE D. GREEN,)	
)	Honorable
)	Daniel J. Rozak,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Wright and Justice Carter concurred in part and dissented in part.

ORDER

¶ 1 *Held:* (1) The trial court erred in admitting defendant's juvenile adjudication as impeachment evidence, but this error was not reversible under the plain error doctrine; (2) the court properly admitted Timothy Houston's juvenile delinquency adjudication as impeachment evidence; (3) defendant's sentence was not an abuse of discretion; and (4) defendant made a *prima facie* showing of gender discrimination during jury selection.

¶ 2 After a jury trial, defendant, Laurice D. Green, was convicted of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2010)) and sentenced to 12 years' imprisonment. On appeal, defendant

argues that the trial court erred when it: (1) admitted his juvenile delinquency adjudication as impeachment evidence; (2) admitted defense witness Timothy Houston's juvenile delinquency adjudication; (3) sentenced defendant to 12 years' imprisonment; and (4) denied defendant's *Batson* challenge motion. We affirm in part and remand in part.

¶ 3

FACTS

¶ 4 Defendant was charged by indictment with criminal sexual assault, and the case proceeded to a jury trial. During jury selection, defendant challenged the State's use of its peremptory challenges. Defendant argued that "the last seven or eight challenges by the State were all females[.]" The trial court found that defendant had raised an inference of discrimination and shifted the burden to the State to offer a gender-neutral explanation. The State provided reasons for using 9 of its 10 peremptory challenges to excuse female jurors, and the court took the matter under advisement.

¶ 5 The following day, the court reversed its ruling that defendant had made a *prima facie* showing of discrimination. The court stated that it had previously looked at the number of men versus the number of women the State had excused, but it did not think that the numbers alone were sufficient to prove a *prima facie* case. The court asked defendant if he had any additional arguments. Defendant responded that the State had used 9 of its 10 challenges to excuse female jurors, and there were two men on the jury for each woman, even though the venire was evenly divided between men and women. Defendant did not see any basis for excusing these jurors apart from their gender. The court denied defendant's motion.

¶ 6 The victim testified that she went to defendant's home on the evening of March 4, 2010. She spent approximately one hour conversing and drinking with Lenell Green, Anthony Alexander, an

unnamed individual, and defendant. Defendant directed the other men to leave the room, and he pulled down his pants and put on a condom. The victim attempted to leave the room, but defendant pulled her away from the door, threw her onto the bed, and removed her boots and pants. The victim screamed and tried to kick defendant. Defendant punched the victim in the face and inserted his penis into her vagina while the victim continued struggling. Defendant continued hitting the victim until she stopped screaming and fighting.

¶ 7 After an undetermined amount of time, defendant called Lenell, Alexander, and another man into the room. Defendant restrained the victim while Lenell sexually assaulted her. Defendant released the victim's arms, and the unnamed individual sexually assaulted her. When the assault ended, the victim screamed hysterically while she tried to find her clothes. Defendant told her to shut up, and Alexander grabbed her purse and took her to a car before she could find her clothes. The victim left the house wearing only her underwear. Alexander drove the victim to an alley where he sexually assaulted her and left her in the cold.

¶ 8 Prior to the presentation of defendant's case-in-chief, the State moved to admit the prior juvenile adjudications of defendant, Timothy Houston, and Larry Parrish as impeachment evidence. Defense counsel stated that he was not prepared to address this issue and deferred to the court's opinion. The court found the evidence admissible, noting that the adjudications were felonies that were less than 10 years old, and the probative value outweighed the prejudicial effect. Defense counsel responded that he did not understand the probative value of the adjudications and reasoned that the case only served to prejudice defendant. The court repeated that the adjudications were for felony offenses and they were relatively recent. Defense counsel requested that the court instruct the jury not to consider the adjudications as substantive evidence. The court agreed, and defendant

began his case-in-chief.

¶ 9 Defendant testified that he was 19 years old. On the night of the incident, he was at home with Lenell, Parrish, Houston, and Destiny Martin. Around 10:15 p.m., Alexander and the victim came to his house. Approximately 30 minutes later, defendant, Alexander, and the victim went to a liquor store, purchased a bottle of brandy, and returned to his home. The group went to the basement bedroom where they were met by Lenell, Parrish, and Houston. Defendant watched as the victim drank three cups of brandy. The victim drank out of the bottle when defendant refused to give her a fourth cup.

¶ 10 After 45 minutes, the victim whispered in defendant's ear that she wanted to have sex. Defendant instructed the others to leave the room. The victim took off her pants, and defendant put on a condom and engaged in sexual intercourse with the victim. Afterwards, defendant instructed Alexander to take the victim home while he went upstairs to wash up. While defendant was upstairs, he heard screaming and returned to the basement with Lenell and Houston. In the basement, he saw Alexander sexually assaulting the victim, and defendant claimed that he stopped the sexual assault. The victim got off the bed and began hitting defendant, Lenell, and Alexander. Approximately five minutes later, the victim left defendant's home with Alexander. At the time, she was wearing only her shirt and underwear. When Alexander returned, defendant noted that he had a couple scratches, and his shirt was torn and bloodstained.

¶ 11 Houston testified that he was 20 years old. On the night of the incident, he was asleep in the basement when he awoke to find defendant, Lenell, Parrish, Alexander, and the victim in the room. The group drank alcohol and talked. Houston left the basement three times. On his last trip upstairs, he heard the victim screaming. Houston returned to the basement to find Alexander sexually

assaulting the victim. After the assault stopped, Houston tried to help the victim find her clothes, but he was unsuccessful, and the victim left the house with Alexander. On cross-examination, Houston stated that it was too cold to go outside barefooted and wearing shorts. During Houston's testimony, the State elicited testimony that he was adjudicated delinquent for possession of a controlled substance in 2007.

¶ 12 In rebuttal, the State offered a certified copy of defendant's 2008 adjudication of juvenile delinquency for the offense of aggravated unlawful use of a weapon.

¶ 13 After closing arguments, the court instructed the jury that evidence of a witness' prior adjudication of criminal delinquency may be considered only as it may affect the believability of the witness and that it could consider evidence of defendant's prior juvenile delinquency adjudication only as it affected his believability as a witness and not as evidence of his guilt of the charged offense. The jury found defendant guilty of criminal sexual assault.

¶ 14 At sentencing, the court stated that it had considered the testimony and evidence presented at trial and during the sentencing hearing, the factors in mitigation and aggravation, and all of the other relevant statutes. In mitigation, the court noted that: "[t]he victim in this case was punched in the face. She was punched elsewhere. She had several physical injuries and marks on and about her body. She was put out in the cold, almost completely naked[.]" The court stated that it had given "very serious and thorough consideration" to defendant's youth and potential for rehabilitation, but noted that defendant had a prior criminal record. The court sentenced defendant to 12 years' imprisonment.

¶ 15 Defendant filed a motion to reduce sentence, arguing that the trial court had not given proper consideration to rehabilitative factors. The court denied the motion, and defendant appealed.

¶ 16

ANALYSIS

¶ 17

I

¶ 18 Defendant argues that he was denied a fair trial because the trial court admitted his juvenile delinquency adjudication as impeachment evidence despite clear prohibition against its admission. See *People v. Montgomery*, 47 Ill. 2d 510 (1971); *People v. Villa*, 2011 IL 110777. Defendant admits that he waived review of this issue, but he argues that the trial court committed reversible plain error. Alternatively, he argues that we should consider this issue because trial counsel's failure to preserve it resulted in ineffective assistance of counsel.

¶ 19 We review the admissibility of defendant's juvenile adjudication *de novo*. *Villa*, 2011 IL 110777. Juvenile adjudications are generally inadmissible against a testifying defendant. *Montgomery*, 47 Ill. 2d 510. A limited exception permits the introduction of a juvenile adjudication where a defendant has opened the door to its admission by stating that he did not commit a prior offense. *People v. Harris*, 231 Ill. 2d 582 (2008).

¶ 20

A. Waiver

¶ 21 We apply the plain error doctrine when error occurred and: (1) the evidence is so closely balanced that the error threatened to tip the scales of justice against defendant; or (2) the error was so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551 (2007).

¶ 22 We agree that the trial court erred in admitting defendant's juvenile adjudication, as such adjudications are generally inadmissible and the record does not show that an exception applied. However, we do not find that the error was reversible because defendant has not established reversible error under either prong of the plain error rule.

¶ 23

1. Closely Balanced Evidence

¶ 24 Defendant has not demonstrated error under the closely balanced prong, because he has not shown prejudice. See *People v. White*, 2011 IL 109689 (concluding that plain error review under the closely balanced evidence prong requires that the defendant show that he was prejudiced). "In determining whether the closely balanced prong has been met, we must make a 'commonsense assessment' of the evidence (citation omitted) within the context of the circumstances of the individual case." *People v. Adams*, 2012 IL 111168, ¶ 22 (quoting *White*, 2011 IL 109689, ¶ 139). In the present case, the evidence was not so closely balanced that the trial court's error prejudiced defendant's trial. The victim testified that defendant hit her in the face to keep her quiet while he sexually assaulted her. She also stated that defendant assisted in restraining the victim while Lenell and an unnamed male assaulted her, and he permitted her to leave the home without her pants or shoes. In contrast, defendant testified that he engaged in consensual sex with the victim. Afterwards, he discovered Alexander sexually assaulting the victim. Five minutes later, the victim left the home with Alexander, and Alexander returned with scratches and a torn shirt. Although defendant's version of events was not logically impossible, we find that it was highly improbable that the victim would voluntarily leave the house with a man who had recently sexually assaulted her.

¶ 25

2. Structural Error

¶ 26 We further find that defendant has not demonstrated error under the second prong of plain error review. Regarding that prong, prejudice to defendant is presumed. *People v. Thompson*, 238 Ill. 2d 598 (2010). However, automatic reversal is only warranted where the error is structural and serves to erode the integrity of the judicial process and undermine the fairness of defendant's trial. *People v. Glasper*, 234 Ill. 2d 173 (2009). The definition applies to only a very limited class of

cases. *Thompson*, 238 Ill. 2d 598.

¶ 27 Here, the trial court's error was not structural as it did not affect the integrity of the judicial process. In particular, we note that defendant's juvenile adjudication was not mentioned during closing arguments. *Cf. Villa*, 2011 IL 110777 (prosecution mentioned defendant's juvenile adjudication twice during closing arguments and twice during its rebuttal argument). We also note that the trial court issued a jury instruction on the limited use for which the jury could consider defendant's juvenile adjudication. Therefore, we conclude that the trial court's error was not reversible plain error.

¶ 28 B. Ineffective Assistance of Counsel

¶ 29 Alternatively, we find that defendant did not establish ineffective assistance of counsel. To establish ineffective assistance of counsel, defendant must show both that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 466 U.S. 668 (1984). Although counsel erred when he did not object to the admission of defendant's juvenile adjudication or raise the issue in a posttrial motion, defendant has not shown that prejudice resulted. As we have noted, the evidence was not closely balanced. For that reason, we find no error.

¶ 30 II

¶ 31 Defendant argues that the trial court erred in admitting Houston's juvenile adjudication because the prejudicial effect outweighed its probative value. The State argues that defendant has forfeited review of this issue by failing to raise it below and failing to request that this court conduct plain error review. In reply, defendant contends that the admission of Houston's adjudication was reversible error under both prongs of the plain error test.

¶ 32 We agree that defendant failed to preserve this issue below, but we conduct plain error review

as defendant may raise this argument in his reply brief. See *People v. Williams*, 193 Ill. 2d 306 (2000). The first step in plain error analysis is to determine whether the trial court erred. See *People v. Herron*, 215 Ill. 2d 167 (2005).

¶ 33 We review the court's decision to admit evidence of a defendant's prior conviction for an abuse of discretion. *People v. McKibbins*, 96 Ill. 2d 176 (1983). Evidence of a witness' juvenile adjudication is generally inadmissible. *Montgomery*, 47 Ill. 2d 510. However, it may be admitted to attack the credibility of a testifying adult witness when its admission is necessary for a fair determination of the issue of guilt or innocence. *Id.* The prior adjudication must have: (1) been for a crime punishable by death or imprisonment in excess of one year, or a crime involving dishonesty or false statement; and (2) occurred less than 10 years since the date of conviction of the prior crime or defendant's release from confinement, whichever is later. *Id.* Evidence of a witness' juvenile conviction shall be excluded where its probative value is outweighed by the danger of unfair prejudice. *Id.*

¶ 34 In the instant case, the State sought admission of Houston's juvenile adjudication to impeach his testimony, and defense counsel objected. The court found that Houston's adjudication was for a recent felony and the probative value outweighed the prejudicial effect of admission. We find no error in the court's reasoning. Therefore, we conclude that the court did not err in admitting Houston's juvenile adjudication as impeachment evidence.

¶ 35

III

¶ 36 Defendant next argues that his sentence was excessive for two reasons: (1) the trial court did not adequately consider his rehabilitative potential; and (2) it considered factors in aggravation that were not supported by the record because it mentioned that the victim was put out in the cold, almost

completely naked, which defendant was not accountable for.

¶ 37 A trial court has wide discretion in sentencing a criminal defendant, and we review the trial court's sentencing decision for an abuse of discretion. *People v. Sweeney*, 2012 IL App (3d) 100781.

¶ 38 We first address whether the trial court failed to adequately consider defendant's potential for rehabilitation. In addressing this issue, we presume that the trial court considered all of the mitigating evidence, absent some indication to the contrary other than the sentence itself. *People v. Thompson*, 222 Ill. 2d 1 (2006). Here, the trial court specifically considered defendant's youth and his potential for rehabilitation before pronouncing his sentence. The record does not otherwise indicate that the court failed to give adequate consideration to defendant's potential for rehabilitation. We find no error.

¶ 39 Next, we consider whether a new sentencing hearing is warranted because the trial court allegedly considered an improper factor in aggravation. Although the court improperly mentioned in considering the factors in mitigation that defendant caused the victim harm by leaving her nearly naked in the cold, this factor did not lead to a greater sentence and does not require a new sentencing hearing. See *People v. Ryan*, 336 Ill. App. 3d 268 (2003) (a new sentencing hearing is not required where the record reveals that the weight placed on an allegedly improper factor was so insignificant that it did not lead to a greater sentence). A review of the record indicates that the brutal nature of the assault weighed most heavily in the court's mind, and was the paramount factor in its sentencing. Additionally, defendant's greater sentence was justified by his prior criminal record and his direct role in two of the sexual assaults. The trial court did not abuse its discretion; therefore, we affirm defendant's sentence.

¶ 40

IV

¶ 41 Defendant argues that the trial court erred when it found that he had not made a *prima facie* showing that the State used its peremptory challenges in a purposefully discriminatory manner against women.

¶ 42 We will not disturb a trial court's determination of whether a *prima facie* showing of discrimination has been alleged, unless it is against the manifest weight of the evidence. *People v. Williams*, 173 Ill. 2d 48 (1996).

¶ 43 In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court established a three-step analysis to determine whether the State used its peremptory challenges to remove venirepersons on the basis of race. See *People v. Easley*, 192 Ill. 2d 307 (2000). First, a defendant must make a *prima facie* showing that the State exercised a peremptory challenge on the basis of race. *Id.* Next, the burden shifts to the State to provide a race-neutral reason for excluding the juror in question. *Id.* Finally, the trial court weighs the evidence and determines if defendant has proved purposeful discrimination. *Id.* This test extends to jurors excused on the basis of their gender. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); see also *People v. Blackwell*, 171 Ill. 2d 338 (1996).

¶ 44 To establish a *prima facie* case of discrimination, a defendant must show that " 'the totality of the relevant facts gives rise to an inference of discriminatory purpose.' " *People v. Harris*, 206 Ill. 2d 1, 27 (2002) (quoting *Batson*, 476 U.S. at 94). The following factors are pertinent in determining whether a defendant has established a *prima facie* case of purposeful gender discrimination:

"(1) gender identity between the party exercising the peremptory challenge and the excluded venirepersons; (2) a pattern of strikes against female venirepersons; (3) a disproportionate use of peremptory challenges against female venirepersons; (4) the level of female

representation in the venire as compared to the jury; (5) the questions and statements of the challenging party during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded female venirepersons were a heterogeneous group sharing gender as their only common characteristic; and (7) the gender of the defendant, victim and witnesses." *People v. Rivera*, 227 Ill. 2d 1, 12-13 (2007).

¶ 45 Here, defendant made a *prima facie* showing of gender discrimination. Defendant argued that the State had used its peremptory challenges to exclude predominantly female jurors and only four of the impaneled jurors were female, while the venire was evenly balanced between the genders. We note that the State used a disproportionate number of peremptory challenges against female venirepersons, and that the excluded persons and the victim were female. These facts gave rise to the inference that the State was using its challenges for a discriminatory purpose.

¶ 46 In light of the circumstances in the present case, we find that defendant established a *prima facie* case of gender discrimination. Therefore, we remand the case to the trial court with directions to consider the State's gender-neutral reasons for its peremptory challenges. If the trial court finds that the State did not discriminate against female jurors, the remaining issues have been resolved by this appeal. However, if the court finds that the State used its peremptory challenges to purposefully discriminate against female jurors, the trial court shall vacate defendant's conviction and sentence and order a new trial.

¶ 47 CONCLUSION

¶ 48 The judgment of the circuit court of Will County is affirmed in part and remanded in part.

¶ 49 Affirmed in part and remanded in part.

¶ 50 PRESIDING JUSTICE WRIGHT, specially concurring in part and dissenting in part.

¶ 51 I agree that defendant made a *prima facie* case concerning the State's potential gender discrimination during jury selection. I also agree the trial court did not abuse its discretion when allowing the State to impeach a defense witness with his prior juvenile delinquency adjudication or when imposing the sentence following defendant's conviction.

¶ 52 In addition, I agree with the majority's conclusion that error occurred when the trial court erroneously allowed the jury to consider defendant's 2008 juvenile adjudication for aggravated unlawful use of a weapon as impeachment evidence. *People v. Montgomery*, 47 Ill. 2d 510, 518 (1971); *People v. Villa*, 2011 IL 110777, ¶ 41. However, I disagree with the majority's conclusion that the evidence in this case was not closely balanced.

¶ 53 As a general rule, evidence is closely balanced when the trial becomes a contest of credibility. *People v. Naylor*, 229 Ill. 2d 584, 608 (2008). For example, in *Naylor*, a *Montgomery* error constituted plain error where the outcome of the trial depended upon which version of events the jury found more credible when defendant's version was partially consistent with the arresting officers' testimony. *Id.* In that case, two police officers testified defendant sold them heroin. *Id.* at 607. In contrast, defendant claimed he did not sell the officers heroin, but he was mistakenly swept up in a drug raid. *Id.* Our supreme court noted that defendant's testimony in that case was credible because it was similar to the officers' versions of the events preceding defendant's arrest. *Id.*

¶ 54 Similarly, the victim's and defendant's version of the events in the case at bar coincide in many respects. Both agree the victim arrived at the Green house, went on a trip to the liquor store, and the victim drank brandy. Both agree that, after some time had passed, the other individuals left the room, leaving defendant and the victim alone. Both defendant and the victim agree sexual intercourse occurred while they were together. Finally, defendant's description of what he observed

on the date in question supports the victim's testimony that Alexander's sexual encounter with the victim was not consensual and violent in nature, although each testified that Alexander's assault occurred at different points in the evening.

¶ 55 Obviously, the victim's testimony was inconsistent with defendant's explanation that their sexual encounter was consensual. Thus, like the trial in *Naylor*, the outcome of this trial depended on which version of events the jury found more credible, his or hers.

¶ 56 I agree with the majority that defendant's testimony, in part, was improbable. The majority finds defendant's version of events highly improbable because defendant testified that the victim voluntarily left the house with Alexander after Alexander sexually assaulted the victim. However, I view these facts differently from the majority and view defendant's testimony with healthy skepticism because defendant testified that he liked the victim, engaged in consensual sex with her, obtained her cell phone number, and attempted to protect her from Alexander's sexual assault by intervening on her behalf, and then inexplicably allowed the person he liked to leave the house with Alexander, whom defendant observed violently assault the victim. However, based on this record, it is difficult to discern whether the jury rejected defendant's version of the events because they were not plausible or whether they rejected his version of the events because of his previous juvenile record. Since the evidence was closely balanced, the court's error requires a new trial.

¶ 57 For the reasons stated, I specially concur in part and dissent in part.

¶ 58 JUSTICE CARTER, specially concurring in part and dissenting in part.

¶ 59 I agree with the majority's conclusion as to the first three issues. However, I write separately as to the second part of the third issue because I believe it was proper for the trial court to consider defendant's conduct of leaving the victim nearly naked in the cold since defendant was part of the

group who had made the victim leave the house in her underwear. In commenting on that matter, the trial court did not specify whether it was referring to the victim being put out of the house, which was conduct that defendant took part in, or whether it was referring to the victim being put out of the car, which was conduct that defendant did not take part in. Thus, I do not believe that the record establishes that the trial court considered an improper factor or improper evidence in sentencing.

¶ 60 I also do not agree with the majority's conclusion and analysis on the fourth issue (the *Batson* issue). The record indicates that upon further consideration, the trial court found that a *prima facie* showing of gender discrimination had not been established by defendant. The trial court explained that it did not feel that the numbers alone were sufficient to prove a *prima facie* case of gender discrimination and that the defense's pattern of excusing male subjects from the jury left the State primarily with female subjects from which to choose. In my opinion, the trial court's ruling in that regard is not against the manifest weight of the evidence and must, therefore, be affirmed on appeal. See *Williams*, 173 Ill. 2d at 67.

¶ 61 For the reasons stated, I specially concur in part and dissent in part from the majority's order.