

2014 IL App (2d) 120780-U
No. 2-12-0780
Order filed March 14, 2014

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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 Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-1975
)	
JAMES RAY POE,)	Honorable
)	Randy Wilt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant did not show plain error or ineffective assistance of counsel as to the admission of evidence of police procedure in conducting interviews, as such evidence was harmless: even if the jury inferred that alibi witnesses' extrajudicial statement was unreliable, that inference could not have affected its view of the witnesses' testimony at trial, as the statement itself was never introduced; (2) the trial court did not abuse its discretion in sentencing defendant to an extended term of 17 years' imprisonment (on an extended-term range of 15-to-30), and thus defense counsel was not ineffective for failing to move to reconsider, as the sentence was justified by its seriousness and defendant's criminal history; (3) defendant was entitled to an additional day of sentencing credit, and we modified the mittimus accordingly.

¶ 2 Following a jury trial in the circuit court of Winnebago County, defendant, James Ray Poe, was found guilty of residential burglary (720 ILCS 5/19-3 (West 2010)) and violation of an order of protection (720 ILCS 5/12-3.4 (West 2010)). At trial, defendant presented alibi testimony from three witnesses, two of whom—Rex and Amy Harbison—were husband and wife. On cross-examination, the State elicited testimony that the Harbisons met with defense counsel’s secretary and signed a statement that Amy had written by hand. Over defendant’s objection, the State called a detective with the Rockford police department as a rebuttal witness to testify about the procedure she employs when interviewing witnesses. Defendant argues on appeal that the detective’s testimony was irrelevant and prejudicial. Defendant further argues that he did not receive effective assistance of counsel during posttrial proceedings and that the sentencing order does not reflect the proper amount of credit for time spent in custody prior to sentencing. We modify the mittimus to reflect one additional day of credit toward defendant’s sentence. In all other respects, we affirm.

¶ 3 At trial, Patricia Larson testified that she had previously been in a romantic relationship with defendant and that they had lived together in defendant’s home, along with Larson’s daughter, Ashley. In June 2011, defendant and Larson decided that Larson and Ashley would move out when Larson was able to secure other housing. Ashley went to stay with her grandmother for the summer. On June 22, 2011, Larson obtained an emergency order of protection against defendant, and defendant was required to move out of the home. Larson was permitted to remain in the home until July 6, 2011. On July 4, 2011, Larson moved to a house located a few blocks away from defendant’s house. On July 6, 2011, Larson obtained a plenary order of protection against defendant. Larson testified that her house had a six-foot-high privacy fence in the back with a padlocked gate and a motion detector near the front porch that activated

an outside light. A few days after Larson moved in, someone removed the light bulb. Larson also noticed that plants were disappearing from the front porch.

¶ 4 During the relevant time frame, Larson was working the third shift at a facility that packaged pharmaceutical products. On July 13, 2011, she worked that shift, which began at 11 p.m. and ended at 7 a.m. on July 14, 2011. She was still in the process of unpacking boxes moved from defendant's home. When she returned home from work on July 14, 2011, she stayed up all day putting things away in Ashley's room. A door leading into the house through the mudroom/laundry room was open to allow ventilation through the screen door (which was closed). The front door was closed but unlocked. At some point Larson took a nap on Ashley's bed. She awoke, somewhat disoriented, in the middle of the night and "caught a flash past the back window going *** toward the gate of the house." Larson went outside to the patio at the back of the house and saw defendant near the gate. When she asked defendant what he was doing, defendant ran past her into the house. As he was running, he shouted, "I needed fish food." He then ran out of the house through the mudroom/laundry room. After defendant left, Larson called 911. It was stipulated that she made the call at 1:30 a.m.

¶ 5 Larson testified that she wore disposable gloves at work and sometimes brought the gloves home with her while she was living with defendant. Defendant was wearing a pair of the gloves when she encountered him at her house. Larson also testified that after defendant ran off she observed that a container of fish food was missing, as was a pack of cigarettes.

¶ 6 Rex Harbison testified for the defense that he had known defendant for about four or five years. They had worked together at a bar that was no longer in business. On July 14, 2011, Rex went tubing on the Kishwaukee River with his wife, Amy Harbison, their daughter, defendant, and some other friends. Asked how long the excursion lasted, Rex stated, "It usually takes about

five or six hours.” They were done at about 6 or 6:30 p.m., at which point they went to Rex’s house so that his wife and daughter could change clothes. Then they went to the home of someone named Matt. Rex was unsure of Matt’s last name. Defendant drove Rex, Amy, and their daughter to Matt’s house. They arrived between 7:15 and 8 p.m. Asked how he knew what time they had arrived, Rex stated, “I wear a watch on me all the time, and we just got back from Walmart to buy hotdogs and marshmallows.” Once at Matt’s house, they “[s]tarted a bond fire [sic], pulled out a couple of four wheelers, set the tents up, [and] had a cook out.” Rex’s daughter went to bed at around 11 p.m. and Amy went to bed around midnight. Rex, Matt, and defendant stayed up and talked. Defendant went to bed at about 1:30 or 1:45 a.m. Rex went to bed at about 2 a.m. Asked how he knew when everyone had gone to bed, Rex replied, “I always wear a watch. I am always checking the time.”

¶ 7 On cross-examination, Rex indicated that he and defendant were good friends and had spent a lot of time together. On August 4, 2011, Rex learned that defendant had been arrested. Rex conceded that he never contacted the police to let them know that defendant could not have committed the crimes for which he was arrested. At that point the following exchange took place between Rex and the prosecutor:

“Q. But on the 28th of October you and your wife, Amy, made some sort of written statement; is that correct?

A. Yes.

Q. Who was present when the statement was made?

A. It was my wife and I.

Q. Just the two of you?

A. Yes.

Q. Did [defense counsel] take the statement from you?

A. I believe his secretary did.

* * *

Q. And your wife and you were together when this statement was given?

A. Yes.

* * *

Q. Who's [*sic*] handwriting—who wrote this statement out?

A. My wife wrote that.

Q. And you just signed what your wife wrote?

A. I was sitting right next to her.

Q. Okay. Were you in [defense counsel's] office when you wrote this?

A. Yes, I was."

¶ 8 The written statement was admitted into evidence but not published to the jury. Nor was there any testimony as to the content of the statement. The statement is not part of the record on appeal.

¶ 9 Amy Harbison testified that on July 14, 2011, she went tubing on the Kishwaukee River with Rex, their daughter, Matt, and defendant. Asked how long the excursion took, Amy replied, "I believe we usually get started around noon. We probably got off the river about 7:00 or 8:00." The group then went to Matt's house and went camping. Amy's daughter went to bed at around 11 p.m. and Amy went to bed at around midnight. Defendant's van was at Matt's house when Amy went to bed and when she woke up the next morning. Defendant gave the Harbisons a ride home.

¶ 10 On cross-examination, Amy indicated that the group arrived at Matt's house at about 7 or 8 p.m. She was aware of the time because she had looked at her cellular telephone. She had also looked at her cellular telephone before going to bed at midnight. It was months later that she learned that defendant had been arrested. Amy recalled going to defense counsel's office to make a statement. She wrote out a statement in defense counsel's office. Rex and Amy were the only ones in the room when Amy prepared the statement. Although she was aware that she could provide an alibi for defendant, she did not contact the police.

¶ 11 Matt James testified that he had known defendant for four or five years. On July 14, 2011, he went on a tubing trip with Rex and Amy Harbison, their daughter, and defendant. The trip took "[c]lose to seven hours." The group then went to James's house for a cookout. The Harbisons' daughter went to sleep at 11 p.m. Amy went to bed between 11:45 p.m. and midnight. James went to bed at 1:45 a.m.

¶ 12 On cross-examination, James admitted that his testimony about when Amy and her daughter had gone to bed was based not on personal recollection but on what Rex had told him. James added, "I just remember the day and what we did that day because [defendant] told me that he was getting in trouble, a cop was at his door the next day." James recalled giving a written statement to defense counsel.

¶ 13 Over defendant's objection, the State called Mary Ogden, a detective with the Rockford police department, as a rebuttal witness. Asked about her procedure for conducting interviews when there were multiple witnesses to a crime, Ogden responded, "It doesn't matter where we are, on the street or in the Public Safety Building or wherever, [sic] we are we always separate everybody and talk to the witnesses individually alone so they are not influenced by other people standing around or whatever." Ogden testified that she had witnesses dictate their statements

and that she would put each statement into writing, review it with the witness, and have the witness initial each paragraph and sign the statement.

¶ 14 After the jury found defendant guilty, defendant filed a *pro se* motion for a new trial. The motion included several allegations that the privately retained attorney who represented defendant at trial had failed to provide the effective assistance of counsel. The trial court appointed the office of the public defender to represent defendant in the posttrial proceedings. Defendant's new attorney filed a motion for a new trial. The trial court heard and denied the motion filed by counsel. Following a sentencing hearing, the trial court imposed an extended-term sentence of 17 years' imprisonment with credit for 344 days in custody prior to sentencing. Defendant's notice of appeal was filed the day he was sentenced. Defendant's attorney did not move to reconsider defendant's sentence.

¶ 15 Defendant first argues that the trial court erred in permitting the State to introduce Ogden's testimony about the methods she uses to interview witnesses. Defendant argues that the testimony was irrelevant. Although defendant objected to this evidence at trial, he did not specifically raise the issue in his motion for a new trial. "A written post-trial motion must set forth with sufficient specificity the errors relied upon for reversal or else such alleged errors are waived on review." *People v. Young*, 248 Ill. App. 3d 491, 503 (1993). To preserve error arising from the admission of evidence, the defendant must specifically identify the particular evidence at issue. *Id.* at 504 (citing *People v. Bailey*, 77 Ill. App. 3d 953, 955-56 (1979)). The general assertion in defendant's posttrial motion that "the [trial] [c]ourt erred in admitting into evidence improper, irrelevant and incompetent evidence offered by the State" does not satisfy this standard.

¶ 16 Defendant argues, however, that the admission of Ogden’s testimony was plain error or, alternatively, that his attorney’s failure to specifically raise the issue in the motion for a new trial represents ineffective assistance of counsel. The plain error rule “permits a reviewing court to consider a forfeited issue where the evidence in a case is so closely balanced that the outcome may have resulted from the error and not the evidence [citation], or where the error is so serious that the defendant was denied a substantial right, and thus a fair hearing [citation].” *People v. Yaworski*, 2011 IL App (2d) 090785, ¶ 5. Defendant contends that the evidence here was closely balanced. Be that as it may, “[t]here can be no plain error unless a *reversible* error has occurred” (emphasis added) (*id.* ¶ 7), and, although the trial objection to Ogden’s testimony should have been sustained, the error in allowing her testimony was harmless and would not have been grounds for reversal even if the issue had been raised in defendant’s motion for a new trial.

¶ 17 It is well settled that “the admission of irrelevant evidence is harmless error if no reasonable probability exists that the verdict would have been different had the irrelevant evidence been excluded.” *People v. Lynn*, 388 Ill. App. 3d 272, 282 (2009). There is no reasonable probability that the verdict rested on Ogden’s testimony. Defendant argues that “Ogden’s testimony detracted from the credibility of the alibi witnesses, and thus bolstered Larson’s credibility.” We disagree. The thrust of Ogden’s testimony was that separating witnesses while they are giving statements prevents them from coordinating their accounts. Although the jury may have inferred that the procedure Ogden described was a desirable safeguard, Ogden did not suggest that witnesses who are interviewed jointly necessarily lack credibility. We note additionally, that even if the jurors inferred that the Harbisons’ statement may have been influenced by the presence of husband and wife together when the statement was made, that inference could not have affected their verdict, given that they were never told what

the statement said. We note that, during closing argument, the State did not even mention Ogden's testimony. We conclude that there is no reasonable probability that Ogden's testimony influenced the jury's view of the credibility of the Harbisons' testimony at trial. Thus, there was no reversible error or plain error. In view of this conclusion, defendant cannot prevail with his argument that posttrial counsel was ineffective because he failed to preserve the error. Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984), which requires a showing that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Because any error in the admission of Ogden's testimony was harmless, the failure to preserve the error (if any) did not result in prejudice within the meaning of *Strickland*.

¶ 18 We next consider defendant's argument that he was deprived of his right to the effective assistance of counsel because posttrial counsel failed to move to reconsider defendant's sentence for residential burglary. According to defendant, posttrial counsel should have argued that the sentence was "manifestly disproportionate to the seriousness of the offense." An attorney's failure to move for reconsideration of a defendant's sentence does not satisfy the prejudice prong of the *Strickland* test unless the sentence was an abuse of discretion. *People v. Price*, 2011 IL App (4th) 100311, ¶¶ 36-37. There was no abuse of discretion here.

¶ 19 In imposing sentence, "the court must consider 'the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education.'" *People v. Martin*, 2012 IL App (1st)

093506, ¶ 48 (quoting *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992)). Considerations bearing on the determination of an appropriate sentence also include “the protection of the public, deterrence, and punishment.” *People v. Chirchirillo*, 393 Ill. App. 3d 916, 927 (2009). Moreover, “[t]he weight to be accorded each factor in aggravation and mitigation in setting a sentence of imprisonment depends on the circumstances of each case” and “[a]s long as the court does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed for the offense.” *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990).

¶ 20 Defendant contends that, because he stole only fish food and cigarettes, did not make a forced entry, was in Larson’s house for only a few seconds, and did not threaten violence, “his actions constituted perhaps the least serious residential burglary possible.” However, the fact that defendant unlawfully entered Larson’s house (1) while (and with knowledge that) Larson was at home and (2) in defiance of an order of protection considerably diminishes the force of his argument.

¶ 21 Defendant also argues that his criminal history does not justify the length of his sentence. Defendant’s criminal history is notable not for the number of crimes he has committed but for the serious nature of the crimes he was previously convicted of. In 1981, defendant, who was then 20 years old, tried to kiss an 18-year old woman with whom he had a casual friendship. When she refused his advances, explaining that she had a boyfriend, defendant raped her. He then forced her to sit naked in a ditch through which several inches of water were flowing. Thereafter, he choked her until she lost consciousness and cut her neck with a folding knife before abandoning her. The victim lost one-third of her blood volume and suffered a stroke and

severed neck muscles as a result of the attack. Defendant was convicted of rape and attempted murder and was sentenced to 30 years' imprisonment for the former offense and 50 years' imprisonment for the latter. Defendant was ultimately released from prison in 2007. Excluding time spent in custody, the residential burglary conviction occurred within 10 years of the rape and attempted murder convictions. Accordingly, he was eligible for an extended term of imprisonment of not less than 15 years and not more than 30 years for residential burglary. 730 ILCS 5/5-4.5-30(a), 5-5-3.2(a)(1) (West 2010). Under the circumstances, we cannot say that it was an abuse of discretion to sentence defendant to a prison term two years longer than the minimum extended term for residential burglary.

¶ 22 Finally, defendant argues that the sentencing order does not reflect the proper credit for time spent in custody prior to sentencing. According to the sentencing order, defendant was entitled to credit for 344 days in custody. Defendant was taken into custody on August 3, 2011, and was sentenced on July 13, 2012. We agree with defendant, as does the State, that he is entitled to credit for 345 days in custody and that the mittimus must be amended accordingly.

¶ 23 For the foregoing reasons, we modify the mittimus to reflect that defendant is entitled to credit for 345 days in custody prior to sentencing. In all other respects, the judgment of the circuit court of Winnebago County is affirmed.

¶ 24 Affirmed as modified.