2016 IL App (1st) 141130-U

SECOND DIVISION
November 22, 2016

No. 1-14-1130



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 13 CR 9685 |
| | ) | |
| DAVID PEREZ, | ) | Honorable |
| | ) | Nicholas R. Ford, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE MASON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Defendant failed to establish plain error where the trial court did not abuse its discretion by admitting evidence of prior inconsistent statements at trial. We order the mittimus corrected.

¶ 2 Following a bench trial, defendant David Perez was convicted of two counts of domestic battery (720 ILCS 5/12-3.2(a)(1), (2) (West 2012)). The trial court merged the counts and sentenced Perez to four years' imprisonment and four years of mandatory supervised release (MSR). On appeal, Perez contends that the trial court abused its discretion by improperly admitting Valdes's prior consistent statements and that his convictions violate the one-act, one-crime rule. We affirm and order the mittimus corrected.

¶ 3 At trial, the victim, Jennifer Valdes, testified that she and Perez have three children together and were living at 2406 West Grenshaw in April 2013. At that time she was pregnant with their third child. Sometime in April 2013, Valdes took one of their sons to Mercy Hospital because he had an ear infection. She tried calling Perez, but a woman answered his cell phone. Valdes left the hospital several hours later and returned home where she had the locks changed due to a recent burglary in her building. That night, Valdes slept in her children's room but was awakened by a noise at the back of her house. Perez later kicked through the closed bedroom door where she slept with her children, causing damage to the door. The State introduced into evidence pictures of the damaged door.

¶ 4 Valdes testified she could not remember what she did after Perez kicked the door open, but Perez did not seem angry. Valdes and Perez argued, but she did not remember if he slapped or punched her in the face. She was unable to call the police because Perez broke her phone. A short time later, Perez fell asleep. The following morning around 8:30 or 9 a.m., Valdes's sister, Crystal, arrived at the residence. Valdes told Perez to leave, so he left with his belongings.

¶ 5 Later that day, Valdes filed a police report. The following week, Valdes went to the domestic violence courthouse to drop the charges against Perez, but a detective informed her that she could not drop the charges. She spoke with a detective and an assistant state's attorney several days later. Assistant State's Attorney (ASA) Patrick Turnock typed Valdes's statement of what occurred with Perez on April 25 and 26, 2013. Valdes signed the bottom of each page of the statement. Although she was initially unsure about whether the statement was in the same condition as when she signed it, after reviewing the statement Valdes stated that it was in essentially the same condition.

¶ 6 Valdes acknowledged telling ASA Turnock that she was 25 years old and born on October 1, 1987, and that that information was truthful. She also acknowledged truthfully telling ASA Turnock that she lived in Chicago and had two children with Perez and at the time was pregnant with their third child. Defense counsel objected on hearsay grounds. The court overruled the objection, and stated, "for them to admit the statement substantively, as statements under the exception 115-10.1 they have to lay a foundation. If she's asserting that she gave somebody information, but not all of it, they have to ascertain what, if any, information she gave and what, if anything, she's saying she didn't give, so they can call their witnesses down the line."

¶ 7 Valdes acknowledged that her statement to ASA Turnock said, "Ms. Valdes said Perez continued to yell at her about the locks so she stopped responding. She said that when she stopped responding, Perez slapped her in the face three times," but she did not recall telling ASA Turnock that. She also acknowledged that her statement said that she put her sons back in their

room when they entered the room where she and Perez were arguing, and later asked one of her sons to get her cell phone. Valdes did not remember telling ASA Turnock that when her son brought her the cell phone, Perez took it and smashed it on the floor. Defense counsel objected to the State asking Valdes whether the statement regarding Perez damaging the cell phone was the truth. The trial court overruled the objection, finding that "the impeachment has been ***laid for purposes of calling the witness [substantively] pursuant to 115-10.1. I'm considering the 'I don't remember' answer being tantamount to refusal to answer."

¶ 8 Valdes did not remember telling ASA Turnock that Perez slapped her and punched her in the jaw on the left side of her face. She denied telling ASA Turnock that police gave her food, drink, and allowed her to use the bathroom and leave when she desired.

¶ 9 Valdes also acknowledged that at a preliminary hearing on May 10, 2013 she testified, "I was proceeding to the back of my house to see how [Perez] got in. And he asked me who did I think I was and why did I change the locks, so that's when he slapped me." She also acknowledged that she previously stated that Perez slapped her three times, took her phone from her son and threw it, and that Perez hit her in the jaw when she refused to answer further questions. She further acknowledged stating that she had bruising on the top of her eye, her teeth were hurting, and she could not eat.

¶ 10 On cross-examination, defense counsel asked, "[Y]ou knew when you went to the police station that you had to tell the police that Mr. Perez struck you, didn't you?" Valdes responded affirmatively. Defense counsel then asked, "And you knew that if you didn't tell them that he struck you, that you would have no case at that time; is that correct?" Valdes again responded

affirmatively. She acknowledged that she did not remember the date that Perez hit her. However, later on redirect she responded, "Yes," when the State asked whether Perez struck her in the face on the night of the argument.

¶ 11 ASA Turnock testified that on May 5, 2013, he interviewed Valdes about the incident on April 26, 2013, and explained to her that he was a prosecutor. He did not observe any "marks or indications that she had been struck." He verified that police treated her well and obtained her consent to type out her statement. After taking her statement, ASA Turnock asked Valdes to read the first page of the statement, and he then read the rest aloud to her to ensure the statement's accuracy. Valdes indicated the statement was true and accurate and signed the bottom of each page.

¶ 12 The State thereafter moved to admit the statement into evidence and have ASA Turnock publish certain portions of it. The defense objected, but the court ruled the statement was admissible under section 115-10.1 of the Code of Criminal Procedure of 1963. (725 ILCS 5/115-10.1 (West 2012)). The court further stated, "I do want to indicate, though, as a matter of clarity, that while she did deny the statement during the course of her initial direct examination, I believe I heard her correctly when she indicated later, after cross-examination and direct examination, she acknowledged that she had been hit. So both within this testimony she said she was struck and was not struck, as it stands now. So I'll allow it in for limited purpose of substantively as it relates to what she said initially." The State later asked ASA Turnock to publish various passages from Valdes's statement, including those in which Valdes alleged Perez slapped her three times, punched her jaw, and smashed her phone.

¶ 13 Chicago police detective Brian Boeddeker testified that he spoke with Valdes on May 4, 2013, at Valdes's residence where he observed a bedroom door off of its hinges with holes in it. He also spoke with Perez at the 9th District lockup. Perez denied striking Valdes, but told Detective Boeddeker that "this is the last time that she does this. She should have got f**ked up. F**k Shorty."

¶ 14 The State called five Chicago police officers to testify to past instances of domestic violence by Perez against Valdes, one of which resulted in a conviction for domestic battery in 2007. The State introduced into evidence a certified copy of that conviction. Defense counsel moved to strike the testimony of all five officers, which the court initially denied. However, the court later narrowed that ruling, and stated it would only consider the domestic battery conviction from 2007.

¶ 15 After the State rested, Perez moved for a directed finding. The trial court granted Perez's motion on counts one and two (aggravated battery), but denied it on counts three and four (domestic battery).

¶ 16 Perez testified that he was with another woman the day of the incident, and Valdes changed the locks so he entered the apartment through a window. Perez punched, not kicked, a hole in the door. He was angry with Valdes for changing the locks and destroying his clothes, so they argued, and he broke her cell phone. The next morning, Valdes asked Perez to leave the apartment. Perez, however, denied striking Valdes. Perez also acknowledged that he pleaded guilty to domestic battery in 2007 for punching Valdes. Perez and Valdes currently live together and arrived at court together.

¶ 17 The State introduced into evidence a certified copy of the prior conviction in rebuttal. Following arguments, the court summarized the evidence it heard from Valdes before stating, "I believe what she told the assistant state's attorney. I believe what she eventually said here in court. That is, she was struck by the defendant." The court found Perez guilty of both counts of domestic battery. At sentencing, the court merged the domestic battery counts and sentenced Perez to four years' imprisonment in the Illinois Department of Corrections and four years of MSR.

¶ 18 On appeal, Perez argues that he was denied a fair trial because the trial court allowed the State to improperly bolster Valdes's testimony with two prior consistent statements. Specifically, Perez contends that Valdes's statement to ASA Turnock and her preliminary hearing testimony were consistent with her ultimate testimony, that Perez struck her, and that the trial court improperly relied substantively on the statement to ASA Turnock. As an initial matter, Perez concedes that he failed to raise this issue in his posttrial motion and asks that we review it for plain error.

¶ 19 The plain-error doctrine permits a reviewing court to consider unpreserved errors when " '(1) the evidence in a criminal case is closely balanced or (2) where the error is so fundamental and of such magnitude that the accused was denied a right to a fair trial.' " *People v. Harvey*, 211 Ill. 2d 368, 387 (2004) (quoting *People v. Byron*, 164 Ill. 2d 279, 293 (1995)). Perez argues that the evidence was closely balanced because the State's case relied solely on Valdes's testimony, which was improperly bolstered by prior consistent statements. Prior to addressing plain error, however, we must first determine whether any error occurred. *People v. Herron*, 215 Ill. 2d 167,

187 (2005). The admissibility of evidence is within the trial court's sound discretion, and we will not overturn a trial court's decision to admit or exclude evidence absent an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 20 Perez contends that Valdes's statements were prior consistent statements used to improperly bolster her credibility. Specifically, Perez argues that Valdes's prior statements were not inconsistent with her overall trial testimony because she ultimately admitted that Perez hit her.

¶ 21 A witness's prior consistent statements are generally inadmissible to corroborate trial testimony because they unfairly bolster the witness's credibility. *People v. Temple*, 2014 IL App (1st) 111653, ¶34. However, under section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2012)), prior inconsistent statements are admissible substantively if (1) the statement is inconsistent with the witness's testimony at trial; (2) the witness is subject to cross-examination regarding the statement; and (3) the statement was made under oath at a trial, hearing or other proceeding, or narrates, describes, or explains an event within the witness's personal knowledge and was signed by the witness. A witness's prior testimony need not directly contradict trial testimony to be deemed inconsistent. *People v. Speed*, 315 Ill. App. 3d 511, 517 (2000). Inconsistent statements include evasive answers, silence, or changes in position. *People v. Flores*, 128 Ill. 2d 66, 87 (1989). Further, a statement may be inconsistent where the witness claims to be unable to recall the matter at trial. *Speed*, 315 Ill. App. 3d at 517 (citing *Flores*, 128 Ill. 2d at 87). Whether testimony is inconsistent is a question within the trial court's discretion. *People v. Deramus*, 2014 IL App (1st) 130995, ¶26.

¶ 22 We first address Perez's contention that Valdes's preliminary hearing testimony was consistent with her testimony at trial. As an initial matter, we note that Perez did not object at trial to the State's introduction of Valdes's preliminary hearing testimony. Consequently, the trial court did not rule on its admissibility and the record does not indicate whether it was admitted substantively. Nevertheless, we find Perez's contention that the testimony was a prior consistent statement unpersuasive. Contrary to Perez's assertion, Valdes's prior testimony from the preliminary hearing was not consistent with her trial testimony. Although Valdes ultimately testified on redirect that Perez struck her on the night in question, that was not her testimony during her direct examination, which was when the prior testimony was introduced. See *Deramus*, 2014 IL App (1st) 130995 (stating that under section 115-10.1, a change in position may be regarded as an inconsistency). Rather, the record reflects that during her direct examination, Valdes repeatedly stated that she did not recall whether Perez struck her, whereas her prior testimony revealed Perez slapped and punched her. *Speed*, 315 Ill. App. 3d at 517 (noting a witness's inability to recall a matter constitutes an inconsistent statement within the meaning of section 115-10.1). Thus, the prior statement was inconsistent with her trial testimony. Valdes also acknowledged that the statement given at the prior hearing was under oath. 725 ILCS 5/115-10.1(a), (c)(1) (West 2012). Additionally, Perez had the opportunity to cross-examine Valdes about the prior testimony, but declined to do so. See, e.g., *People v. Zurita*, 295 Ill. App. 3d 1072, 1078 (1998) (witnesses present at trial were subject to cross-examination on prior inconsistent statements for purposes of section 115-10.1); 725 ILCS 5/115-10.1(b).

Accordingly, because the prior testimony satisfied the requirements of section 115-10.1, we conclude it was admissible substantively.

¶ 23 Next, Perez contends that Valdes's statement to ASA Turnock was consistent with her trial testimony and was therefore erroneously admitted and relied on substantively. Valdes testified that she did not recall telling ASA Turnock that Perez slapped her three times or punched her in the jaw. Although she later answered, "Yes," on redirect when the State asked whether Perez struck her the night of the argument, she did not correct the inconsistency and acknowledge that she told ASA Turnock that Perez slapped her and punched her in the jaw. The prior statement, therefore, was still inconsistent with Valdes's trial testimony. While Perez is correct that prior consistent statements are generally inadmissible because they improperly bolster a witness's testimony (*Temple*, 2014 IL App (1st) 111653, ¶34.), here the record indicates that the prior statement did not bolster the witness's testimony and was instead an inconsistent statement.

¶ 24 Perez contends that we should follow *United States v. McCrady*, 774 F.2d 868 (8th Cir. 1985). But Perez's reliance on *McCrady*, non-binding authority in any event, is misplaced because that case is factually distinguishable. In *McCrady*, the testifying witness was confronted with a prior inconsistent statement made to an assistant United States attorney and then, after having her memory refreshed and remembering making the statement, corrected her trial testimony to conform with her prior statement. 774 F.2d at 873-74. The government subsequently called the assistant United States attorney to testify to what the witness said in her prior statement. *Id.* at 872. The appellate court found that the trial court abused its discretion by

admitting the prior statement because the witness admitted to having made the pretrial statement and admitted to the substance of the prior statement. *Id.* at 874. Thus, the court concluded that the statement was consistent with her trial testimony. *Id.* Here, by contrast, when confronted with her prior statement, Valdes did not acknowledge that she told ASA Turnock that Perez struck her. Therefore, unlike *McCrady*, Valdes's trial testimony remained inconsistent with her prior statement.

¶ 25 Having established that the prior statement to ASA Turnock was inconsistent, we now turn to whether it was admissible substantively under section 115-10.1. Valdes testified about the statement during her direct examination so Perez had the opportunity to cross-examine Valdes about the statement, although we note that he declined to do so. 725 ILCS 5/115-10.1(b); see also, e.g., *People v. Hatchett*, 397 Ill. App. 3d 495, 507 (2009) (noting that defense counsel had the opportunity to fully cross-examine the witness for section 115-10.1 purposes where counsel was on notice that the prior inconsistent statement could be used substantively and counsel cross-examined the witness). Further, the statement was signed by Valdes, described the incident that occurred on April 25 and 26, 2013, and related facts within Valdes's personal knowledge. 725 ILCS 5/115-10.1(c)(2)(A). Thus, the prior statement to ASA Turnock satisfied the requirements of section 115-10.1 and was admissible substantively.

¶ 26 Accordingly, we conclude that the trial court did not abuse its discretion by admitting Valdes's prior testimony from the preliminary hearing and the prior statement to ASA Turnock. Moreover, because the prior statement to ASA Turnock was admissible substantively, it was not error for the trial court to rely on it in determining Perez's guilt. And because the trial court did

not err in admitting Valdes's testimony and statement, there can be no plain error. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2006).

¶ 27 Perez alternatively contends that his trial counsel was ineffective for failing to properly preserve the issue regarding Valdes's prior statements. But because we have concluded that admission of the evidence was proper, Perez cannot demonstrate ineffective assistance of counsel given that there was no error for counsel to preserve.

¶ 28 Perez next contends that his convictions violate the one-act, one-crime rule and requests that this court vacate one of his domestic battery convictions. The State does not agree with Perez's one-act, one-crime analysis, but concedes that the mittimus must be corrected to reflect only one conviction of domestic battery because the court merged the second count with the first count.

¶ 29 We need not address Perez's one-act, one-crime contention, because a review of the record reveals the trial court merged the two counts of domestic battery. At sentencing, the court stated, "For the offense of aggravated domestic battery and domestic battery, two counts on which I find, I'm going to find that they merge and sentence him to a concurrent sentence of four years in Illinois Department of Corrections." Because the court's oral pronouncement controls over the written mittimus, (*People v. Carlisle*, 2015 IL App (1st) 131144, ¶87) and the court orally merged the counts, we order the clerk of the circuit court to correct the mittimus to reflect one conviction for domestic battery resulting in bodily harm (720 ILCS 5/12-3.2(a)(1)). See *e.g.*, *People v. Lee*, 213 Ill. 3d 218, 226-27 (2004) (when multiple convictions are obtained for offenses arising from a single act, a sentence should be imposed on the more serious offense, and

the conviction on the less serious offense should be vacated); see also *People v. Young*, 362 Ill. App. 3d 843, 853 (2005) (concluding an insulting or provoking battery is a less serious offense than battery causing bodily harm).

¶ 30 The judgment of the circuit court of Cook County is affirmed. We order the clerk of the circuit court to correct the mittimus to reflect Perez's conviction for one count of domestic battery resulting in bodily harm.

¶ 31 Affirmed; mittimus corrected.