2016 IL App (2d) 140410-U
No. 2-14-0410
Order filed March 9, 2016



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Kane County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 11-CF-2855 |
| DELBERT COOPER, | ) | Honorable T.Clint Hull, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE BIRKETT delivered the judgment of the court.
Justice Burke concurred in the judgment.
Justice Jorgensen specially concurred.

**ORDER**

¶ 1 *Held*: The trial court did not abuse its discretion in admitting two of defendant's prior convictions for aggravated domestic battery and domestic battery because both sections 115-7.4 and 115-20 of the Code provided for the admissions of these crimes if the probative value of the evidence outweighed the prejudicial effect to the defendant. 725 ILCS 5/115-7.4, 115-20 (West 2012). Here, the probative value of both crimes was not substantially outweighed by its prejudicial effect. The State used both convictions to negate defendant's claim of self-defense and to prove his mental state, among other valid purposes. Also, since these crimes were admitted for proper purposes they did not need to be excluded because they also implicated defendant's character. The State committed no error in its closing argument when it referenced these prior convictions. Finally, we did not address defendant's argument that "extraneous information" reached the jury, because we found the State's closing argument to be proper and contain no such information.

¶ 2 After a jury trial, defendant, Delbert Cooper, was convicted of one count of first degree murder for strangling his girlfriend, Rennee Perry. 720 ILCS 5/9-1(a)(1) (West 2012). He was subsequently sentenced to 45 years' imprisonment. On appeal, defendant argues that his conviction should be reversed and this case remanded for a new trial because he was denied his right to a fair trial. Specifically, defendant contends that the trial court erred in allowing the State to present unfairly prejudicial other-crimes evidence, which was used to show his bad character and propensity to commit violent offenses. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 In September 2012, the State filed a motion to admit evidence of several prior convictions of defendant, including a 2006 aggravated domestic battery conviction and a 2010 domestic battery conviction. The aggravated domestic battery conviction involved defendant choking his cousin until she lost consciousness after he attempted to sexually assault her. The domestic battery stemmed from an incident where defendant spat on Rennee's face in 2010. The trial court ruled that the domestic battery conviction was not admissible because the act of spitting was not similar to the act of choking, and that because the probative value of the evidence was outweighed by its prejudicial effect. It also ruled that two other prior domestic battery convictions were not admissible.

¶ 5 With regard to the 2006 incident where defendant was convicted of choking his young cousin into unconsciousness, the court first found that the difference in time between the prior domestic battery and the first degree murder was six years, which it found was close enough in time to be relevant and probative. Next, it found that there was a strong degree of factual similarity between the 2006 choking incident and the instant offense because both crimes took place inside the victims' residences, the manner in which the offenses were committed was

similar, *i.e.*, defendant choked the victims in both cases. The court also held that other relevant facts and circumstances had been considered: (1) defendant was charged with murder here, and the court was concerned with the fact that the jury could give undue weight to the prior incident; (2) the prior choking incident occurred on only one occasion, so the prejudice to defendant would be minimized since it only involved one act; (3) the choking incident was not more extreme or heinous than the charged conduct here, therefore the jury would not be prejudiced by hearing about more extreme behavior that could unfairly prejudice the jury against defendant; and (4) the victims were different people, therefore it found that the jury would give less weight to the prior incident than if the victim here had been the victim in the 2006 crime. The court then found that after weighing all of the above factors, the probative value of defendant's conviction for aggravated domestic battery was not outweighed by its prejudicial effect to defendant. Accordingly, it granted the State's motion to admit evidence of defendant's prior conviction for aggravated domestic battery. For the following reasons, we affirm.

¶ 6 Defendant later indicated to the trial court that he intended to claim self-defense. In response, the State filed another motion to admit evidence of defendant's prior bad acts in September 2013.[1] In that motion, the State again moved to admit evidence of defendant's 2006

[1] In his brief on appeal, defendant's counsel asserts that the State's motion filed in September 2013 was not made part of the record on appeal, and that he had filed a motion to supplement the record with a copy of the State's motion. The record now contains a supplemental common law record with the State's September 2013 motion in it. However, the original motion can be found on page 232 of the original common law record, located on the first page of volume 2. We caution appellate counsel to more carefully review the record in the future.

aggravated domestic battery conviction (again) and his 2010 conviction for domestic battery as prior bad acts of defendant to establish his "propensity to react with violence to resolve an issue, as opposed to the defendant acting in a fit of passion or self-defense." At a hearing on the motion the trial court ruled that the 2010 spitting incident was now admissible to establish criminal intent and to negate defendant's claim of self-defense, but that it was inadmissible to prove propensity. The trial court acknowledged that it had previously ruled that this conviction was inadmissible because it was unfairly prejudicial, and explained its reasoning as follows:

> "The reason the court found the prejudicial impact to be so great was because Ms. Perry was the victim in both the charged and uncharged conduct and the prior bad act was to be admitted to establish to [*sic*] defendant had the propensity to commit acts of domestic violence *i.e.*, that defendant committed the crime of domestic battery before so he is likely to have committed it again. Under that theory, the court held the probative value was substantially outweighed by prejudicial effect. However, under this analysis, the State will not be allowed to use the prior bad act in [the domestic battery based upon spitting on the victim's face] for propensity. Instead, the State will be restricted to using the prior bad act in [that conviction] to establish intent and to refute the defendant's claim of self-defense. Additionally, prior to the evidence being admitted at trial, at the defendant's request, an I.P.I. jury instruction will be read to the jury informing them that this evidence is being admitted for a limited purpose and should only be considered by them for that limited purpose only. This same instruction will then be read to the jury at the close of the evidence and will be placed in the packet of instructions tendered to the jury for them to read during their deliberations. Based upon all of the above for the

purposes stated above, the court does not find the probative value of the evidence is substantially outweighed by the prejudicial impact."

¶ 7 The court then noted that it had previously ruled that the 2006 conviction based upon defendant's act of choking his cousin until she became unconscious was admissible for its bearing on any matter to which it was relevant, including propensity. It then added that the State could now also argue that that conviction established defendant's criminal intent and negated his claim of self-defense.

¶ 8 At trial it was established that on December 20, 2011, at 4:30 a.m., defendant called 911. He identified himself as Donte Williams, and told the 911 dispatcher that he had cut his finger and was feeling suicidal. When an ambulance pulled up in front of Rennee's apartment defendant was waiting on the sidewalk. He was transported to Rush-Copley Medical Center in Aurora. After receiving several stitches to his finger, defendant was transferred to Provena Mercy Medical Center to receive behavioral health services.

¶ 9 Yvette Strawder, Rennee's mother, testified that Rennee was defendant's girlfriend. Rennee lived in apartment 424A of the Maple Terrace Apartments in Aurora, Illinois. On December 21, 2011, Strawder reported to the police that she had been out of contact with Rennee for two days. That same day, police conducted a welfare check at Rennee's apartment and discovered her body in the bedroom. After learning that defendant had gone to the hospital using the name Donte Williams, Aurora police then went to Provena Mercy Medical Center and arrested him for Rennee's murder.

¶ 10 Aurora police officer Jason Sheldon testified that on December 21, 2011, he was dispatched to Rennee's apartment to do a welfare check on her because her mother reported that she had not heard from Rennee in several days. Sheldon entered the apartment and as he

approached the bedroom he saw clothes on the floor. As he got closer to the bedroom he saw a leg on the floor of the bedroom next to a bed. Sheldon saw a lot of clothes on top of what he believed to be a person. The clothes were tucked into the sides of the body from the buttocks upward. There were clothes on top of the Rennee's head and around her head which were tucked in tight. Sheldon asked Rennee if she was okay and there was no response. He then touched the body, which was cold, and checked for a pulse, but there was none.

¶ 11 On December 22, 2011, defendant gave a videotaped statement to Detective John Munn at the Aurora police station. In his statement, defendant said that he and Rennee had two children together. On December 19, he and Rennee were running errands together and a friend of his, Robert Meeks, was driving them. At some point, Meeks dropped them off in front of Rennee's apartment and they unloaded groceries that had to be brought up to Rennee's fourth floor apartment. Rennee took some of the packages up to her apartment while defendant searched for a cart. While looking for the cart, defendant saw some people using drugs. Defendant said that he had seven dollars with him, so he used the money to purchase drugs from the people. When he went up to Rennee's apartment, she became angry because defendant had taken drugs.

¶ 12 According to defendant, whenever Rennee suspected defendant of using drugs, she threatened him with a knife. This time, she grabbed a knife and asked defendant where he wanted to be cut. Defendant told her that he did not want her to cut him anymore. He said that Rennee was "ready to stab me in my leg or something," so he placed her in a choke hold from behind. Defendant said that Rennee then attempted to stab him by swinging the knife "behind, trying to get me." He grabbed the knife and attempted to poke her in the shoulder area "out of reaction," but the knife hit her in the neck area. Defendant's hand slid off the knife and the blade

cut his finger. He pulled the knife out of Rennee's neck and threw it. Rennee continued to struggle. When she stopped struggling, defendant released her and laid her on the floor. He then wrapped up his hand and went to another apartment building where he purchased drugs using a $100 bill.

¶ 13 Deanna Simmons testified that she last saw Rennee in December 2011. She could not recall the exact date, but she knew that it was in the evening. On that occasion she and her ex-boyfriend, Rico Sago, went to Rennee's apartment because defendant owed Sago some money. Simmons said the apartment looked like a tornado had hit it. Sago asked defendant and Rennee for money. Simmons said that she and Sago were not in Rennee's apartment for more than five minutes when defendant asked them to leave. Defendant told Simmons and Sago to go to DeAnn Jones' apartment on the third floor. When defendant showed up at Jones' apartment later, he looked worried. His finger was cut, and Simmons asked him what happened. Defendant said that he slammed his finger in a door. However, Simmons said that defendant's finger looked like it had been sliced. Simmons saw defendant with a couple of hundred dollar bills. Defendant then paid Sago what he owed him and he also bought all the crack cocaine that Simmons and Sago had on them.

¶ 14 DeAnn Jones testified that she lived in apartment 313A at the Maple Terrace Apartments. She said she knew Rennee and that Rennee lived on the fourth floor with defendant. When asked about the night Rennee died, Jones said that defendant came to her apartment with a cut on his hand. She asked him how he got hurt, and he told her he shut his hand in a door. He was bleeding very badly, and she tried to bandage it up, but it did not work. Jones asked defendant where Rennee was, and defendant said that she was asleep. Jones saw defendant purchase drugs

from Sago and Simmons, and she saw him use the drugs. Defendant stayed at her apartment for an hour or two. Jones said that she never saw Rennee again.

¶ 15 The State presented security camera videotape from the Maple Terrace Apartments that showed the hallway in front of Rennee's apartment and the main entrance to the apartment building from December 19 to 21, 2011. On December 19, Simmons and Sago are seen going inside Rennee's apartment at 8:16 p.m. and leaving at 8:19 p.m. At 8:47 p.m., defendant is seen leaving Rennee's apartment with one of his arms in his shirt and a tissue or something in his hand. At 8:49 p.m. defendant walked back into Rennee's apartment using the key. A minute later, he left the apartment again. At 10:30 p.m. defendant walked back to Rennee's apartment with his arm still in his shirt sleeve. A minute later he entered the apartment again using a key. At 12:20 a.m. defendant was again seen going towards Rennee's apartment. At 12:45 a.m. defendant came out of the apartment with a bag in his hand. Defendant continued to enter and leave the apartment several times up to 4:00 a.m. on December 20, 2011. Another camera captured defendant's image at 4:15 a.m. getting off the elevator on the main floor and sitting by the benches outside the apartment manager's office. Another camera depicted defendant walking toward the front entrance and exiting the building at 4:35 a.m.

¶ 16 Doctor Larry Blum testified that he performed an autopsy on Rennee. He observed a stab wound behind Rennee's left ear that went through her neck into the back of her mouth in a "somewhat downward" direction. Rennee had bruises, scratches, and a superficial cut on her left forehead. There were several abrasions and contusions around her eyes and three bruises on the top of her head. She had markings on her neck that could have been caused by fingernails from someone's hand squeezing her neck. There were petechial hemorrhages on her face and eyelids. She had hemorrhages in her neck muscles on both sides. In Blum's opinion, Rennee died of

asphyxia due to manual strangulation. The knife wound was a secondary contributing factor. Blum could not determine if Rennee was stabbed before or after she was strangled.

¶ 17 R.W., defendant's 19-year-old cousin, testified that in 2006, defendant was living with her family. One night, defendant came into her bedroom and attempted to touch her. R.W. told defendant that she was going to tell her mother. Defendant then placed his hands around her neck and choked her until she lost consciousness. When she woke up she was on the floor in her mother's bedroom covered by sheets and comforters. Defendant was no longer in the house. A certified copy of defendant's conviction for aggravated domestic battery stemming from these events was admitted into evidence.

¶ 18 Aurora police officer David Sheldon testified that on March 16, 2010, he was dispatched to Catholic Charities in Aurora. Once there, he spoke to Rennee, who told him that defendant had spat on her face. When Officer Sheldon and Rennee found defendant, he yelled at Rennee, saying, "[y]ou fucking bitch, you're going to put a domestic on me!"

¶ 19 John Coutre, a Catholic Charities employee, testified that on March 16, 2010, he also saw defendant spit on Rennee's face while they were in a hallway. Rennee walked away without saying anything and sat on a bench. Rennee looked scared and sad as defendant stormed out of the office. A certified copy of defendant's conviction for domestic battery stemming from this incident was admitted into evidence.

¶ 20 In closing argument, the State made the following comments with regard to defendant's prior conviction for aggravated domestic battery that stemmed from choking his cousin into unconsciousness:

> "I also want you, when you are making your determination, to consider the attitudes. Consider the evidence that you heard both of these parties, of the defendant

and of Rennee. Defendant had a history of violence, history of choking, of wrapping people up.

* * *

R.W. told you that she believed the defendant was touching her and she was going to tell her mother. That was the provocation defendant needed to choke her.

* * *

I tell you my argument to you is it is relevant to establish that this defendant, when confronted with someone who is doing something that he doesn't want her to do or taking action that he doesn't want her to take, he reacts in a violent manner and his method of operation in this case is choking. And in the case before was choking.

But you know what? He didn't finish the job back in 2006, did he? Because R.W. survived.

But what did he do in this case? He made sure that Rennee Perry didn't survive."

¶ 21 The State also made the following arguments in closing with regard to defendant's prior conviction of domestic battery for spitting on Rennee's face:

"You know [defendant's] attitude toward Rennee. They were together for four years.

2010, though, in front of other witnesses, [in] front of other people, they are having a visit with their children, he doesn't care. He spits in her face. That's what he thinks of her. Spits in her face. He has no regard for her.

What does Rennee do on the opposite side? What does she do? Does she strike him? Does she reach out in anger? Does she yell at him? Does she curse at him? No.

What does Rennee do? She wipes it away. Who is the aggressor? The defendant is the aggressor.

John Coutre, the counselor who used to work for Catholic Charities, he implicitly by his testimony is showing that this defendant is not acting in a self-defense manner.[2]

* * *

And later when Officer Sheldon brought Rennee Perry over to where the defendant was, what was the defendant's statement to Rennee Perry? Was it, I am sorry? I didn't mean to do it? No. It was f---ing bitch, you are going to put a domestic on me. That's his attitude."

¶ 22 The jury was instructed on first degree murder, self-defense, second degree murder, and involuntary manslaughter. It was also instructed that evidence of defendant's conviction of domestic battery for spitting on Rennee's face could be considered "on the issues of defendant's intent and to negate defendant's claim of self-defense." The jury was further instructed that evidence of defendant's conviction of aggravated domestic battery for choking his cousin could be considered "on any matter to which it is relevant." The jury found defendant guilty of first degree murder. He was subsequently sentenced to a 45-year term of imprisonment. Defendant timely appeals.

¶ 23 II. ANALYSIS

¶ 24 On appeal, defendant argues that he was denied a fair trial when the trial court allowed the State to present unfairly prejudicial other-crimes evidence that was used to show his bad character and propensity to commit violent offenses. Specifically, he is referring to the

[2] Defense counsel objected to this comment, but the court overruled it as argument.

introduction of his 2006 conviction for aggravated battery for choking his cousin into unconsciousness, and his 2010 conviction for battery for spitting in Rennee's face.

¶ 25 Generally, evidence of other-crimes is not admissible for the purpose of showing the defendant's character or propensity to commit crime. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991); Ill. R. Evid. 404(a) (eff. Jan. 1, 2011)). Evidence of other-crimes is admissible, however, where it is relevant to prove *modus operandi*, intent, identity, motive or absence of mistake, or for any other purpose. *Id*. at 364 (citing *People v. McKibbins*, 96 Ill. 2d 176, 182 (1983)); Ill. R. Evid. 404((b) (eff. Jan. 1, 2011). Even if other-crimes evidence is admissible, however, it may be excluded if the evidence is irrelevant, or if the risk of undue prejudice substantially outweighs its probative value. *People v. Dabbs*, 239 Ill. 2d 277, 289-90 (2010); Ill. R. Evid. 403 (eff. Jan. 1, 2011).

¶ 26 Notwithstanding the general prohibition on other-crimes evidence being admitted to show the defendant's character or propensity to commit crime, such evidence is admissible to prove character or propensity as provided in sections 115-7.3, 115-7.4, and 115-20 of the Code of Criminal Procedure of 2012 (Code). 725 ILCS 5/115-7.3, 115-7.4, 115-20 (West 2012); Ill. R. Evid. 404(3)(b) (eff. Jan. 1, 2011).

¶ 27 The admissibility of evidence at trial is within the sound discretion of the trial court, and its discretion may not be reversed on appeal absent a clear abuse of discretion. *Illgen*, 145 Ill. 2d at 364 (1991). An abuse of discretion will be found only where the trial court's decision is arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Id*. Reasonable minds can differ about whether other-crimes evidence is admissible without requiring reversal under the abuse of discretion standard. *People v. Donohoe*, 204 Ill. 2d 159, 186 (2003). The reviewing court "owes some deference to the trial court's

ability to evaluate the impact of the evidence on the jury." *Id*. (quoting *Illgen*, 145 Ill. 2d at 375-76).

¶ 28 A. Prior Conviction of Aggravated Domestic Battery

¶ 29 Defendant argues that the 2006 crime involving the attempted sexual assault and choking of his cousin should not have been admitted into evidence because it had very little probative value to show that, five years later, he did not act in self-defense when he and Rennee struggled with the knife. He claims that the prejudicial impact of such testimony is obvious because it shows extreme bad character. The trial court should not have allowed this crime into evidence due to its prejudicial effect since the 2006 crime: (1) involved an attempted sexual assault, which was not present in this case; (2) involved a different victim; (3) did not involve a weapon; and (4) did not involve a claim of self-defense. Defendant makes several other arguments as to why his conviction for choking his cousin into unconsciousness should not have been admitted into evidence. We will address each argument in turn.

¶ 30 Section 115-7.4 of the Code provides that evidence of defendant's commission of a prior offense of domestic violence is admissible in a later prosecution for first-degree murder involving domestic violence and also may be considered *for any relevant matter* if the probative value of the evidence outweighs the prejudicial effect to the defendant. (Emphasis added.) See 725 ILCS 5/115-7.4(a), (b) (West 2012). In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider: (1) the proximity in time to the charged or predicate offense; (2) the degree of factual similarity to the charged or predicate offense; or (3) other relevant facts and circumstances. 725 ILCS 5/115-7.4(b) (West 2012). When evidence is offered pursuant to this section, proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an expert opinion, except that the

prosecution may offer reputation testimony only after the opposing party has offered that testimony. 725 ILCS 5/115-7.4(d) (West 2012).

¶ 31 A review of the record reflects that the trial court properly weighed the probative value of admitting defendant's conviction for aggravated domestic battery against its prejudicial effect and determined that R.W.' testimony was admissible for its bearing on any matter to which it was relevant, including propensity. First, the trial court's finding that six years between defendant's act of choking his cousin and the instant offense was close enough in time to be relevant and probative was not in error. See *People v. Davis*, 260 Ill. App. 3d 176, 192 (1994) (the admission of other-crimes evidence over 20 years old was proper when such evidence was sufficiently credible and probative). Second, the trial court properly found that there was a strong degree of factual similarity between the 2006 choking incident and the instant offense when both crimes took place inside the victims' residences and the manner in which the offenses were committed was extremely similar, *i.e.*, defendant choked his victims in both cases and then laid them on the floor and covered them up. The court also took into account other facts when determining whether this prior bad act should be admitted into evidence. It said that defendant was charged with murder here, and it was concerned that the jury could give the prior incident undue weight. However, it noted that the 2006 choking incident occurred on only one occasion, so that any prejudice to defendant would be minimized as it involved only one act. It also said that the prior choking incident was not more extreme or heinous than the charged conduct here, so that jury would not be prejudiced by hearing about more extreme behavior that could unfairly prejudice the jury against defendant. Finally, the court noted that the two crimes involved different victims. Therefore, it found that the jury would give less weight to the prior incident than it would have if the victim here had also been the victim of the prior aggravated domestic

battery. We find no abuse of discretion in the trial court's findings as well as its ruling that defendant's conviction for aggravated domestic battery was properly admitted into evidence.

¶ 32 We are not persuaded by defendant's argument that the admission of this prior bad act into evidence was error because the 2006 incident contained some dissimilarities from the instant offense (different victims, the 2006 conviction did not involve a weapon, etc.). The fact remains that although some dissimilarities existed between the crimes, the similarities between them, their proximity in time, and several other relevant factors made the admission of the 2006 aggravated domestic battery more probative than prejudicial.

¶ 33 Defendant also contends that the State used the 2006 crime to argue defendant's bad character, and in its closing arguments it suggested that because Rennee had died, defendant had intended to kill his cousin when he choked her into unconsciousness in 2006. Further, he claims that the State used this evidence to encourage the jury to disregard defendant's claim of self-defense and convict him of murder because he was a violent person, in violation of section 115-7.4(d) of the Code, which prohibits the State from offering reputation testimony unless the opposing party has offered that testimony. 725 ILCS 5/115-7.4 (d) (West 2012).

¶ 34 We have reviewed all of defendant's remaining contentions and find them to be without merit. Here, to the extent that defendant is arguing that the state engaged in improper prosecutorial argument in its closing argument when it argued that defendant intended to kill his cousin when he choked her into unconsciousness, that argument has been forfeited for defendant's failure to object to that portion of the State's closing argument at trial or to raise that issue in his post trial motion. This is true even though the State does not argue forfeiture on appeal. In fact, the State does not even address this portion of defendant's argument in its appellate brief.

¶ 35 The law in Illinois is well-established that absent plain error, both a trial objection and a written post-trial motion raising the issue are required to preserve an alleged error for review. *People v. Enoch*, 122 Ill.2d 176, 198 (1988). However, the rule of waiver is a limitation on the parties and not on the courts, and a reviewing court may ignore the waiver rule to achieve a just result. *People v. Hoskins*, 101 Ill.2d 209, 219 (1984). Given that this is a first degree murder case and defendant's liberty is at stake we choose to address the merits of this issue.

¶ 36 We have reviewed the portion of the State's closing argument to which defendant refers and we find no error. "[A] prosecutor is allowed considerable leeway in making closing and rebuttal arguments, and is entitled to argue the evidence and reasonable inferences drawn from that evidence." *People v. Gutirrez*, 205 Ill.App.3d 231, 261 (1990). Here, R.W. testified that after she threatened to tell her mother that defendant had tried to touch her inappropriately, defendant choked her into unconsciousness. When she woke up she was on the floor in her mother's bedroom covered by sheets and comforters. Defendant told Detective Munn in a taped statement that he had placed Rennee in a choke hold and stabbed her in the neck. After Rennee stopped struggling defendant said he released her and laid her on the floor. Office Sheldon testified that when he found Rennee's body on the floor in the bedroom there were clothes all over her body and clothes were covering her head. Based upon the remarkable similarities between these two crimes the State was entitled to argue that defendant "didn't finish the job back in 2006" because Regina survived as a reasonable inference based upon the evidence admitted at trial.

¶ 37 Defendant also claims that the State used this evidence to encourage the jury to disregard defendant's claim of self-defense and convict him of murder because he was a violent person, in violation of section 115-7.4(d) of the Code, which prohibits the State from offering reputation

testimony unless the opposing party has offered that testimony. 725 ILCS 5/115-7.4 (d) (West 2012).

¶ 38 After a careful review of the State's closing arguments we find that the State did not use the evidence of defendant's prior conviction of aggravated domestic battery to encourage the jury to disregard his self-defense claim. Instead, it used this evidence to rebut defendant's preposterous contention that he acted in self-defense when he put Rennee in a choke hold and then stabbed her in the neck with a knife. The facts surrounding this prior bad act were used to demonstrate to the jury how little it took to provoke defendant's rage and for him to form a criminal intent. Although this evidence may have, and certainly did, implicate the defendant's character, "if the evidence is offered for a purpose which is permissible, then it is not excludable simply because it also implicates the character of the accused." *Illgen*, 145 Ill. 2d at 375. Accordingly, we reject defendant's claim that this evidence, which also revealed defendant's bad character, could not be admitted into evidence because defendant never placed his character in issue at trial.

¶ 39 Our colleague, Justice Jorgensen, believes that the trial court erred in permitting R.W. to testify regarding defendant's motive for choking her into unconsciousness: specifically, that R.W. told defendant that she was going to tell her mother that defendant tried to touch her. Without this contextual evidence, the jury would be left to speculate as to what would provoke defendant to engage in such conduct. It is the jury's function "to assess the credibility of witnesses, weigh the evidence, and draw reasonable inferences from the evidence." *People v. Moss*, 205 Ill. 2d 139, 164 (2001). Here, defendant's motive to strangle R.W. was relevant to show defendant's capacity to form the requisite intent for murder. During closing argument, the State properly limited its argument to the purposes for which the other crimes evidence was

received and the trial court gave a limiting instruction to the jury. These safeguards protected defendant against the danger of unfair prejudice. Finally, we note that defendant never suggested that R.W.'s testimony should be limited as our colleague suggests. Rather, he argued that the admission of the entire 2006 offense was improper.

¶ 40 B. Prior Conviction of Domestic Battery

¶ 41 Defendant also argues that the trial court abused its discretion in allowing his prior conviction of domestic battery, which was based upon spitting on Rennee's face in 2010, into evidence. Specifically, he notes that the trial court initially held that this conviction was not admissible pursuant to section 115-20 of the Code because the act of spitting was not similar to the act of choking, and because the probative value of the evidence was outweighed by the undue prejudice to him. However, after defendant indicated that he would be asserting a self-defense claim, the court found that this conviction was admissible to establish criminal intent and to negate the claim of self-defense. Defendant claims that spitting in Rennee's face did little or nothing to prove that he had not acted in self-defense or that he intended to kill Rennee when he choked her. In addition, defendant alleges that allowing the State to use this evidence to prove intent was substantially the same as allowing the State to use the spitting incident to prove propensity and bad character. Defendant claims that when the theory of self-defense is raised, the relevancy of his prior bad acts of violence "outweighs the prejudicial effect of such convictions only when the defendant clearly puts his character in issue by introducing evidence of his good character to show that he is a peaceful person," citing *People v. Harris*, 224 Ill. App. 3d 649, 653 (1992). Finally, defendant refers to the State's closing argument as proof that the State used this evidence to show defendant's "bad and violent character" and that he had not acted in self-defense.

¶ 42 Section 115-20 of the Code provides that a prior conviction for domestic violence is admissible in a later prosecution for an offense involving domestic violence when the victim is the same person in both instances. 725 ILCS 5/115-20 (West 2012). That prior conviction may be considered for any relevant matter if the probative value of the evidence outweighs the prejudicial effect to the defendant. *Id*. In a criminal case in which evidence is offered under section 115-20 of the Code, proof may be made by specific instances of conduct as evidenced by proof of conviction, testimony as to reputation, or testimony in the form of an expert opinion, except that the prosecution may offer reputation testimony only after the opposing party has offered that testimony. 725 ILCS 5/115-20(e) (West 2012).

¶ 43 We initially note that the case cited by defendant, *People v. Harris*, 224 Ill. App. 3d 649 (1992), does not apply here. In *Harris*, the appellate court held that evidence of defendant's past violent crimes was not admissible in a *battery prosecution* because the probative value was outweighed by the prejudicial impact of the evidence when the defendant did not put his good character into issue. *Id*. at 653. We are perplexed as to why defendant cites to *Harris* in his brief, because immediately after that cite he properly notes that both the Illinois Rules of Evidence and the Code provide that evidence of other-crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith *except as provided by sections 115-7.3, 115-7.4 and 115-20 of the Code*. (Emphasis added) Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); 725 ILCS 5/115-7.3, 115-7.4, 115-20 (West 2012).

¶ 44 Here, we find that the probative value of admitting evidence of this crime was not substantially outweighed by its prejudicial effect. Defendant's act of spitting on Rennee's face occurred only a year before he killed her. Although the spitting incident and Rennee's murder did not have many similarities, other relevant factors existed to demonstrate that its admission

was more probative than prejudicial. Specifically, the fact that defendant decided to claim self-defense here was a very relevant circumstance for the trial court to consider. As the trial court noted, without a claim of self-defense, this conviction would be inadmissible because it would be used to show propensity. However, once defendant claimed self-defense, it was properly admitted to negate his claim of self-defense and to establish defendant's criminal intent.

¶ 45 We disagree with defendant's claim that the act of spitting in Rennee's face did nothing to prove that he had not acted in self-defense or that he intended to kill Rennee when he choked her. Instead, that act of spitting in Rennee's face, and her passive reaction to such an assault, was relevant evidence to rebut defendant's contention that Rennee was the aggressor in December 2011 when he put her in a choke hold and stabbed her in the neck. It was also evidence of defendant's criminal intent.

¶ 46 In *People v. Illgen*, 145 Ill. 2d 353 (1991), a case where the defendant shot and killed his wife, a witness testified that he saw defendant strike the victim on several occasions over a 17-year period. Our supreme court held that evidence of the prior bad acts committed by the defendant against his wife were admissible on the issue of his intent and motive to kill his wife and that the shooting was not an accident. *Id*. at 365. The court reasoned that the prior bad acts were admissible because they tended to establish the defendant's hostility toward his wife, and his inclinations to take out his frustrations upon her. *Id*. at 366-67. Similarly here, evidence that defendant spat in Rennee's face during an argument tended to establish his hostility to her and his inclinations to take out his frustrations on Rennee.

¶ 47 We also reject defendant's contention that the court allowed the State to use the spitting incident to prove propensity and bad character. Here, the State used this prior conviction to demonstrate defendant's intent and to negate his claim of self-defense, as the trial court allowed.

As we have held earlier, "if the evidence is offered for a purpose which is permissible, then it is not excludable simply because it also implicates the character of the accused." *Id.* at 375.

¶ 48 As to defendant's argument that the State improperly used this conviction for domestic battery to show his "bad and violent character" in its closing argument, we will again ignore defendant's waiver of the issue for failing to raise an improper prosecutorial argument claim at trial or in a post-trial motion. We have reviewed the State's comments in closing argument regarding the spitting issue and find that they were proper commentary about defendant and Rennee's actions during that incident. In its closing argument the State referred to the spitting incident and argued that defendant was the aggressor in that case, and not Rennee. Such comments were used to negate defendant claim of self-defense, as properly allowed by the trial court.

¶ 49 C. "Extraneous Information" Given to the Jury

¶ 50 Finally, defendant argues that the State's comments in closing argument about his prior convictions constituted "extraneous information" given to the jury. Therefore, he contends that the burden shifts to the State to show lack of prejudice once a defendant has shown that "extraneous information" that reached the jury was related to something at trial. As support for this proposition he cites to *People v. Collins*, 351 Ill. App. 3d 175, 181 (2004). Defendant claims that it is apparent that the State cannot sustain its burden of demonstrating that he suffered no prejudice given the nature of the prior convictions and the State's subsequent use of the evidence.

¶ 51 Since we have determined that defendant's prior convictions for aggravated domestic battery and domestic battery were properly admitted into evidence and relied upon by the State

in its closing, defendant has not demonstrated that any "extraneous evidence" reached the jury. Therefore, we need not address defendant's arguments with regard to this issue.

¶ 52 III. CONCLUSION

¶ 53 In sum, the trial court did not abuse its discretion in admitting two prior convictions for aggravated domestic battery and domestic battery because both sections 115-7.4 and 115-20 of the Code provided for the admissions of these crimes if the probative value of the evidence outweighed the prejudicial effect to the defendant. 725 ILCS 5/115-7.4, 115-20 (West 2012). Here, the probative value of both crimes was not substantially outweighed by its prejudicial effect. The State used both convictions to negate defendant's claim of self-defense and to prove his mental state. Also, since these crimes were admitted for proper purposes they did not need to be excluded because they also implicated defendant's character. The State committed no error in its closing argument when it referenced these prior convictions. Finally, we need not address defendant's argument that "extraneous information" reached the jury, because we found the State's closing argument to be proper and contain no such information.

¶ 54 Accordingly, the judgment of the circuit court of Kane County is affirmed.

¶ 55 Affirmed.

¶ 56 JUSTICE JORGENSEN, specially concurring:

¶ 57 I agree with the outcome here, but write separately to note my position that the scope of the admitted 2006 other-crimes evidence was excessive. Specifically, the State introduced evidence regarding the 2006 event, wherein defendant and his then 11-year-old cousin were involved in a verbal altercation that escalated to defendant aggressively choking her. The admission of the evidence was correct, to the extent that it included details about the act of choking, where the act occurred, and, as similar to this case, the ritual of placing the victim on

the floor and covering her with clothing and/or bedding.

¶ 58 However, I believe that it was an abuse of discretion to also permit testimony by the young cousin that defendant had touched her inappropriately. This evidence of alleged sexual abuse was highly and unnecessarily prejudicial. The evidence was unnecessary for context. Moreover, given that this case did not involve allegations of sexual abuse, the evidence lacked probative value. The purpose of admitting evidence of the 2006 event would have been amply accomplished without the testimony that the aggressive behavior and choking of defendant's cousin was preceded by child sexual abuse.

¶ 59 In sum, it is my opinion that the prejudice of the testimony of sexual abuse outweighed its probative value and that those details about the 2006 incident should have been excluded. Although the error here is harmless, it should not go unnoticed.