2016 IL App (3d) 150194-U

Order filed March 22, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0194
v.	)	Circuit No. 14-CF-490
	)	
AARON A. BROWN,	)	Honorable Walter D. Braud,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Schmidt concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held*: The trial evidence was sufficient to prove beyond a reasonable doubt that defendant committed the offense of criminal sexual assault. The trial court did not reversibly err in admitting or considering defendant's prior convictions. The trial court did not improperly find that defendant's presumption of innocence was negated by his choice to testify at trial.

¶ 2 Defendant, Aaron A. Brown, appeals his conviction for criminal sexual assault, arguing that: (1) the trial evidence was insufficient to prove him guilty beyond a reasonable doubt; (2) the trial court erred in admitting his prior convictions into evidence; and (3) the trial court

improperly found that the presumption of innocence was negated by defendant's choice to testify at trial. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by information with criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2014)) in that defendant used the threat of force to place his penis inside the vagina of R.A.

¶ 5 At a pretrial hearing, the prosecutor stated, "We also have a motion in limine regarding criminal history which we're going to be putting up obviously, that we're moving on prejudicial, probative." The prosecutor advised the court that the State would probably need a hearing on a rape shield motion and a "general Montgomery motion for criminal history." The trial court replied, "Montgomery disclosure. Okay. Very good." The record does not indicate that such a motion was ever filed or such a hearing was ever held.

¶ 6 Defendant waived his right to a jury trial and a bench trial was held.

¶ 7 At trial, R.A. testified that at the time of the incident, she lived in a house with her son and her sister, Amanda A. On the night of the incident, R.A.'s son was staying elsewhere. R.A. and Amanda went to a bar called Les and Molly's at approximately 11 p.m. R. A. had several mixed drinks and shots. R.A. and Amanda encountered defendant while at the bar. R.A. did not know defendant, but Amanda did. Defendant became "pretty drunk" throughout the night. At one point, defendant got into an argument with another man outside the bar. R.A. was inside and did not know what the argument was about. Amanda told defendant he could sleep on their couch because he was too intoxicated to drive home. R.A. did not want defendant to sleep at their house because she did not want defendant to be in the house when she woke up in the morning. Amanda said she would get defendant out of the house when she woke up and left for

work. A few minutes after 1 a.m., R.A. and Amanda drove home and defendant followed in his car.

¶ 8 When they got home, R.A. put on her pajamas, a large gray t-shirt and old holey yoga pants. Amanda made a bed for defendant on the couch, went into her bedroom, and closed the door. R.A. went upstairs to her room approximately one minute later. When she got to her room, R.A. took off her pants and lay down in bed. R.A. fell asleep but was woken up twice by the sound of defendant falling off the couch. The second time, R.A. went downstairs and told defendant to stay on the couch. He said he was trying.

¶ 9 R.A. went back to her bedroom and fell "in and out of [sleep]." Defendant entered R.A.'s bedroom twice. Each time, defendant called her Amanda, and said "come on." Both times, R.A. told defendant no, led defendant back downstairs to the couch, and explained that she was not Amanda. After the second time, R.A. went upstairs to her son's bedroom to sleep because she did not think defendant knew where it was. Defendant came into R.A.'s son's bedroom, which made R.A. angry. R.A. told defendant to sleep in her son's bedroom. She went back to her bedroom, slammed the door, and "fell asleep hard."

¶ 10 R.A. woke up to the feeling of defendant on her bed. She was lying on her back. She drew her knees up in front of her and repeatedly told defendant "no." Defendant put his hands on R.A.'s legs and said, "Come on, Amanda. Come on." R.A. told defendant to stop because he was so drunk that he did not know who she was or what he was doing. R.A. did not scream, but she continually told defendant "no." R.A. told defendant that she was on her period and was wearing a tampon. Defendant threw R.A.'s legs down and removed her tampon. R.A. then hit defendant in the face.

¶ 11 At some point during the encounter, defendant became undressed and he removed R.A.'s underwear. R.A. was in shock and kept telling defendant to stop. Defendant pushed R.A.'s legs open and placed his penis inside her vagina. R.A. told defendant not to ejaculate inside her because she did not want to become pregnant. Defendant told her that it was too late because he had already finished. R.A. was not certain if he actually had. Defendant then rolled over and passed out.

¶ 12 R.A. put some clothes on and ran downstairs to Amanda's bedroom. R.A. jumped on Amanda's bed and shook her awake. R.A. told Amanda to get defendant out of the house because he had sex with R.A. even though R.A. told him "no." Amanda ran upstairs. R.A. went into the bathroom and took a hot shower with her clothes on. R.A. was crying, in shock, and did not know what to do. While R.A. was taking a shower, Amanda removed defendant from the house and then received a telephone call from the police. R.A. finished her shower and got dressed. She felt angry, and went into the living room and began breaking things.

¶ 13 When the police arrived, R.A. explained what happened. R.A. was crying and confused. The police asked if R.A. wanted to go to the hospital, and she said yes. When R.A. arrived at the hospital, she underwent a sexual assault exam. R.A. remembered having a handprint on her left thigh and scratches on her breast and near her lip. She had vaginal pain from when defendant removed her tampon and from the sexual assault exam.

¶ 14 Pamela Esparza, a sexual assault nurse examiner, testified that she examined R.A. at the hospital the morning of the incident. R.A. arrived at the hospital at approximately 6 a.m. R.A. told Esparza that defendant walked into her bedroom and said something about Amanda, and R.A. repeatedly screamed "no." R.A. told Esparza that she struck defendant in the face repeatedly and defendant hit her in the face as well.

¶ 15 Esparza recalled that R.A. had scratches on her right leg and a bruise on her upper right thigh. R.A. did not remember if the bruise was there prior to the incident or not. Esparza also found what appeared to be fingerprints on R.A.'s left thigh. The fingerprint marks dissipated as the exam was performed such that the doctor was unable to see them later. R.A.'s right knee was swollen. She had a scratch above the right side of her lip, which R.A. believed she received when she was fighting. R.A. also had a scratch on her right breast. Esparza examined R.A.'s vaginal area and found no injuries or trauma. Esparza identified photographs of R.A.'s injuries that she had taken. Esparza noted that the fingerprint marks she saw did not appear in the photographs she took.

¶ 16 Amanda testified that she and R.A. encountered defendant at Les and Molly's on the evening of the incident. Amanda had known defendant for five or six years. R.A. knew of defendant but did not know him. Defendant got into a fight with a man named David at Les and Molly's. Amanda saw them pushing and shoving each other. Amanda and R.A. knew David but did not talk to him that night. R.A. had not been in a relationship with David in the past. Amanda told defendant he could sleep on her couch because she lived nearby. When they returned home, Amanda made a bed for defendant on the couch and then she went to bed herself.

¶ 17 Amanda woke up at approximately 4:30 a.m. when R.A. jumped into bed with her. Amanda did not hear R.A. enter the room. R.A. was crying and told Amanda to "get him out" because R.A. "told him no." Amanda went upstairs and saw defendant lying naked in R.A.'s bed. Amanda told defendant to get up and leave, but he did not move. Amanda slapped defendant in the face a few times to wake him up. When defendant woke up, the first thing he said was: "That's not how it went down." Amanda had not asked him a question. Amanda told defendant to leave. Defendant put on his clothes. Amanda directed him toward the stairs and repeatedly

hit his back. Defendant asked for his cell phone and cigarettes. Amanda told him she did not know where they were and shut the door once defendant was outside.

¶ 18 After Amanda shut the door, R.A. kept asking, "What just happened to me, what just happened?" R.A. was upset and threw a glass dish and a lamp, breaking them. R.A. then took a shower. Amanda asked R.A. what she wanted to do. R.A. said she did not know what to do. Amanda received a telephone call from the police while R.A. was in the shower. The police officer on the phone asked Amanda if she knew defendant, and Amanda replied that she had just kicked him out of her house because he raped her sister. R.A. then got out of the shower.

¶ 19 When the police arrived, R.A. was crying. She was confused and angry when she spoke to the police.

¶ 20 Amanda told Detective Marcella O'Brien that defendant said "[t]hat's not how it went down" after he woke up. Amanda could not recall whether she had told any of the other officers.

¶ 21 Brett Kopf, a Moline police officer, testified that he was sitting in his parked squad car with another officer in a parking lot the morning of the incident. At approximately 5 a.m., defendant approached them and said he wanted to file a battery complaint. Defendant did not appear intoxicated. Defendant said that he was out drinking with Amanda and her sister earlier in the evening. They went back to Amanda's place and defendant had sex with her sister. Defendant did not know Amanda's sister's name. At some point, Amanda and her sister attacked him and he left. Kopf asked him whether he wanted to file a report. Defendant said that he did not want to file a report, but "he wanted the incident documented just in case somebody came back and said he raped somebody." Defendant said he left a cell phone and keys at Amanda's residence and he wanted his property returned.

¶ 22 Kopf obtained Amanda's telephone number from the police dispatch system. He called her and then went to her residence. Amanda met Kopf on the front porch and told him that a nonconsensual sexual act occurred between defendant and R.A. Amanda said they had all been drinking at a bar and she let defendant stay at her house. Amanda said that after R.A. was assaulted, Amanda woke up defendant, slapped him around, and told him to leave. Amanda did not tell Kopf that defendant said "that's not how it went down" after she woke him up.

¶ 23 When Kopf entered the house, R.A. came out of the bathroom. R.A. was crying and her face was red. Kopf talked to R.A. for 10 to 15 minutes. R.A. told Kopf that the third time defendant went into her room, he tried to get her to roll over and she punched him in the face. He then punched her in the face. While Kopf was talking to R.A., she kept crying and repeating that she told defendant to stop. Kopf did not see any visible injuries on R.A. Kopf wrote his report from memory approximately an hour to an hour and a half after he talked to Amanda and R.A.

¶ 24 Detective Marcella O'Brien testified that she investigated R.A.'s sexual assault case. She began her investigation the morning of the incident by interviewing defendant at the Moline police department. When O'Brien walked into the interview room, defendant was sleeping. It took her several minutes to wake him up. The State introduced the audio recording and transcript of defendant's interview with O'Brien into evidence. During the interview, defendant claimed that he first met R.A. on the evening of the incident. Defendant said that he and R.A. had consensual sex.

¶ 25 After interviewing defendant, O'Brien went to the hospital and spoke with R.A. and Amanda. O'Brien took shorthand notes while speaking to R.A. and Amanda and later wrote her report. O'Brien noticed a red mark on R.A.'s leg. O'Brien did not observe any bruising on R.A.'s

face. R.A. told O'Brien that the final time defendant entered her bedroom, he tried to get her to roll over and she hit him. R.A. did not tell O'Brien that she was on her back and pulled her legs up when she saw defendant. R.A. told O'Brien that defendant pulled down R.A.'s yoga pants and underwear and that defendant ejaculated while assaulting her. R.A. told O'Brien that she yelled and screamed during the assault and told defendant to stop.

¶ 26 Amanda told O'Brien that she slapped defendant in the face to wake him up and told him to leave the house. Amanda did not tell O'Brien that defendant said, "That's not how it went down," after he woke up.

¶ 27 Defendant testified that he encountered R.A. and Amanda at Les and Molly's on the evening of the incident. Defendant had known Amanda for about seven years and knew R.A. as well. Defendant frequented Les and Molly's and was in the same social circle as Amanda and R.A. Defendant said he told the police during the videotaped interview that he did not know R.A. before that night because he was "a little bit out of it" at the time. Defendant pointed out that he also told the detective his wrong age when she asked how old he was.

¶ 28 While he was at Les and Molly's, defendant got into an argument with another man because R.A. told defendant that the man would not leave her alone. R.A. said the man was married and she had been sleeping with him for a long time. Defendant thought the man was married to his friend's sister. Defendant stated that he confronted the man:

> "I had said something to him, like, you know, just leave [R.A. and Amanda] alone. He said you want to get Billy bad-ass with me, try to somehow [*sic*] off in front of the ladies? And I, I mean, I do fight. You know, like I'm not a scared of people, you know, and I instantly got in my defense mode so I took my coat off."

¶ 29 Defendant explained that he and the man went outside and the man pulled a switchblade on defendant. R.A. ran inside and yelled to call the police. The police came and put the man in handcuffs. R.A. and Amanda told the police that the man was crazy and they needed to get him out of the bar and away from R.A. Defendant spent approximately $175 at the bar on all three of them that night. Defendant was drunk at the end of the night. He was not able to drive, but he was still coherent. Amanda told defendant that he could sleep at her house so he did not have to drive so far. Defendant followed Amanda and R.A. home in his car.

¶ 30 When they arrived at the house, Amanda put some blankets on the couch for defendant and then she went to bed. Defendant stayed up talking with R.A. for about half an hour. Defendant and R.A. "were hitting it off" and he eventually went up to R.A.'s bedroom with her. Defendant and R.A. got into bed and started talking. Defendant began fondling R.A.'s genitals. R.A. told defendant that she was on her period and defendant removed her tampon. R.A. did not object. R.A. told defendant that he was so drunk that he probably could not remember her name. Defendant could not remember R.A.'s name and he called her "Amanda." R.A. said, "You asshole," and hit his chest playfully. Defendant and R.A. started kissing. Defendant began to have sexual intercourse with R.A. They stopped because defendant was too drunk to ejaculate. R.A. never objected or told defendant no. Defendant never forced R.A.'s legs apart.

¶ 31 Defendant went to sleep. He woke up to Amanda hitting him on the head. Amanda told him to leave. He asked what was going on. Amanda told defendant that R.A. said she tried to tell defendant no. R.A. came over and said nonchalantly, "I did tell you no."

¶ 32 Defendant left the house. He went to a parking lot where the police often park and told them what happened because he wanted his belongings back. One police officer went to the residence. After awhile, the other officer told defendant that they wanted him to go down to the

interview room at the police station. Defendant agreed. Defendant passed out in the interview room while he was waiting for a detective.

¶ 33 On direct examination, defendant admitted that he had a felony conviction for aggravated battery and for battery in 2005. The aggravated battery conviction was for spitting on a police officer. Defendant also had 2007 felony convictions for reckless driving under the influence of alcohol and possession of a stolen motor vehicle. Defense counsel then asked, "Have you been in trouble since then?" Defendant responded that he had convictions for driving on a revoked license and public intoxication. Defense counsel then asked, "No felonies, anything like that?" Defendant said, "No." On cross-examination, defendant admitted that he had a misdemeanor conviction for theft in 2006.

¶ 34 The trial court found defendant guilty of criminal sexual assault. The trial court found R.A. to be a very credible and a believable witness. Noting R.A.'s testimony that she put on a big t-shirt and old yoga pants with holes after arriving home from the bar, the trial court reasoned:

> "She does not look like a person who is about to get it on with somebody she met in a bar. *** It paints the picture of this woman going to bed not to be seen by anyone with whom she is not already intimate like her sister. She's not dressed to take on a man."

¶ 35 The trial court also reasoned: "I'm pretty convinced that drunk young men and maybe drunk old men lose sight of all boundaries and good common sense and listen to their basic instincts and sex is on this man's mind." Additionally, the trial court noted defendant's prior convictions, reasoning:

"I have to take the witnesses as I find them and if the defendant testifies I have to value his testimony and weigh his testimony the same as the others. In that context, I have to remember that the defendant has two felony convictions and a theft conviction. So I have to take into account that his testimony is somewhat not as believable off the bat. I mean, we start out of the gate and the young women have a head start because he's and [*sic*] handicapped himself with these convictions. One of [defendant's] convictions is for an aggravated battery. And I have to take into account that the defendant in discussing the fight at the bar said, well, in so many words, I like to fight, so I took my jacket off and I told this guy basically let's go outside. Who do you think you are? Billy Bad Guy? I think this was the word or something like that. This man is not a stranger to violence in getting what he wants."

¶ 36 At the sentencing hearing, defendant moved the court to set aside its guilty verdict in light of the inconsistencies in the testimony of the State's witnesses. The trial court denied defendant's motion, reasoning:

"I believe that the evidence was more than beyond a reasonable doubt and was plain when you combined the circumstantial evidence with the direct evidence that it could only have happened the way that the victim claimed and that it could not have happened the way that the defendant claimed. Furthermore, the defendant's testimony has to be considered like any other person's testimony. Once he testifies he loses his cloak of innocence and his testimony was incredible ***. It was just so contrary in every way to common sense and didn't add up."

¶ 37 The trial court sentenced defendant to 10 years' imprisonment.

¶ 38 ANALYSIS

¶ 39 I. Sufficiency of the Evidence

¶ 40 On appeal, defendant argues that the evidence at trial was insufficient to prove him guilty beyond a reasonable doubt of criminal sexual assault. To prove that defendant committed the offense of criminal sexual assault, the State was required to establish that defendant: (1) committed an act of sexual penetration; and (2) used force or the threat of force. 720 ILCS 5/11-1.20(a)(1) (West 2014).

¶ 41 Defendant does not dispute that an act of sexual penetration occurred between him and R.A. Instead, defendant's argument is that the evidence presented at trial was insufficient to establish he used force or the threat of force. Viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have found the trial evidence established that defendant used force in committing an act of sexual penetration with R.A.

¶ 42 When presented with a challenge to the sufficiency of the evidence, we consider whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense charged beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). A criminal conviction will only be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Brown*, 2013 IL 114196, ¶ 48.

¶ 43 "[A] reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. [Citation.] Although these determinations by the trier of fact are entitled to deference, they are not conclusive." *Id.* "It is also for the trier of fact to resolve conflicts or inconsistencies in the evidence." *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. "When evidence is merely conflicting, a reviewing court

will not substitute its judgment for the judgment of the trier of fact." *People v. Downin*, 357 Ill. App. 3d 193, 202 (2005).

¶ 44 Here, R.A. testified that defendant forced her legs open, removed her tampon and underwear, and inserted his penis into her vagina. R.A. testified that she repeatedly told defendant "no" before and during the incident. R.A. also slapped defendant in an effort to make him stop. This testimony alone, if credible, was sufficient to find defendant guilty of criminal sexual assault. Significantly, the court found R.A. to be a credible witness.

¶ 45 Defendant challenges this credibility finding by calling our attention to the fact R.A. testified at trial that she hit him only once during the assault but told the nurse who examined her (Esparza) that she hit defendant multiple times and that he hit her as well. Additionally, defendant notes that R.A. testified that she did not scream during the assault but R.A. told Esparza that she screamed and also told Detective O'Brien that she yelled for defendant to stop. These minor inconsistencies, however, do not negate the fact that R.A. consistently stated both prior to and during trial that defendant forced her legs open and inserted his penis into her vagina. R.A. also consistently stated that she told defendant "no" several times during the incident. Amanda (R.A.'s sister), Kopf, Esparza, and O'Brien all testified that R.A. informed them she told defendant to stop during the assault. Thus, R.A.'s statements and testimony with regard to the element of force were never inconsistent.

¶ 46 The minor inconsistencies of which defendant complains do not render R.A.'s testimony so improbable as to raise a reasonable doubt of defendant's guilt. Furthermore, we emphasize that the trier of fact had the opportunity to observe R.A. and hear her testimony. It was the trier of fact's role to resolve any inconsistencies in her testimony and determine the weight to be given. *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 59. Based on its verdict, the trier of fact

found R.A. credible regardless of any minor inconsistencies in her testimony. We will not substitute our judgment on questions involving the credibility of a witness. *Downin*, 357 Ill. App. 3d at 202.

¶ 47 While R.A.'s testimony alone, when viewed in the light most favorable to the State, is sufficient to affirm defendant's conviction, we note that the record also contains evidence corroborating R.A.'s testimony. Esparza testified that R.A. had marks on her leg consistent with fingerprints when Esparza examined R.A. at the hospital. Esparza also testified that R.A. had scratches on her face and breast and that her right knee was swollen. While defendant notes that Officer Kopf did not observe any injuries to R.A. upon arriving at her residence, we initially note that physical evidence is not necessary to prove that defendant assaulted R.A. See *People v. Bowen*, 241 Ill. App. 3d 608, 620 (1993). Moreover, the fact that Kopf did not observe any injuries on R.A. does not automatically invalidate Esparza's testimony. At best, Kopf's failure to observe any injuries on R.A. was an evidentiary inconsistency that was resolved by the trier of fact. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. Lastly, we note that while the fingerprint marks were not depicted in the photographs Esparza took, photographs of the other injuries (facial and breast scratches and a swollen knee) were introduced into evidence.

¶ 48 We also note Amanda's testimony that R.A. jumped into bed with her while crying and saying she "told him no" and to "get him out." When Amanda subsequently woke defendant up, the first thing he said was: "That's not how it went down." Amanda, however, had not asked a question. While defendant asserts that Amanda lied about him making this statement during her trial testimony because she did not tell the police officers about it, we reassert that we view the evidence in the light most favorable to the State. *Collins*, 106 Ill. 2d at 261. In addition to the statement he made to Amanda, defendant offered a similar unprovoked response to Kopf when

asked if defendant wanted to file a battery report against R.A. and Amanda. Specifically, defendant said he did not want to file a report, but "he wanted the incident documented just in case somebody came back and said he raped somebody." Viewing the above statements in the light most favorable to the State, we believe these *unprovoked* statements indicate defendant's consciousness of guilt. "Statements or conduct indicating the defendant's consciousness of guilt may serve as circumstantial evidence supporting a conviction." *People v. Sanchez*, 2013 IL App (2d) 120445, ¶ 35.

¶ 49 Viewing the above facts and circumstances in the light most favorable to the State, we find sufficient evidence was presented at trial to allow the trier of fact to find that defendant used force in committing an act of sexual penetration with R.A. See 720 ILCS 5/11-1.20(a)(1) (West 2014).

¶ 50 In coming to this conclusion, we reject defendant's argument that the following evidence "cast[s] irrefutable doubt on the State's claim that R.A. did not consent": (1) R.A. and Amanda were intoxicated on the evening of the incident; (2) R.A. and Amanda invited defendant to sleep in their home; (3) R.A. repeatedly came downstairs to check on defendant prior to the incident; (4) defendant did not flee after the incident; and (5) defendant went straight to the police after he left the house to seek the return of his property. However, none of these factors contradict R.A.'s consistent statements that she did not consent to having sex with defendant and the corroborating circumstantial evidence. Stated another way, these factors do not render the trial evidence "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Brown*, 2013 IL 114196, ¶ 48.

¶ 51 We also reject defendant's reliance on *People v. Walker*, 154 Ill. App. 3d 616, 626 (1987), in which the court reversed a conviction for aggravated criminal sexual assault. Unlike

in the instant case, there was no evidence in *Walker* that the victim told the defendant to stop or repeatedly said no, the defendant pulled the victim's legs apart, or the victim had documented scratches and swelling after the incident. See *id.* Additionally, the victim in *Walker* gave inconsistent accounts of the kind of force defendant used in committing the sexual assault. *Id*. at 622. In the instant case, while there were minor inconsistencies in R.A.'s accounts of the assault, R.A. consistently stated that she told defendant to stop throughout the assault and slapped him but he proceeded to have intercourse with her anyway.

¶ 52 Lastly, we reject defendant's argument that the trial court relied on "improper considerations" in finding defendant guilty when the court reasoned that: (1) R.A. was "not dressed to take on a man"; and (2) "sex [was] on [defendant's] mind" because he was drunk. While we find the above comments to be improper, we deem them harmless because the *proper* evidence discussed above was sufficient to find defendant guilty beyond a reasonable doubt of criminal sexual assault. An error is harmless and does not warrant reversal where there is no reasonable probability that the verdict would have been different if the error had not been committed. *In re E.H.*, 224 Ill. 2d 172, 180 (2006); *People v. Sims*, 192 Ill. 2d 592, 628 (2000).

¶ 53 II. Admission of Prior Convictions

¶ 54 Next, defendant argues that the trial court erred in: (1) failing to conduct the balancing test required under *People v. Montgomery*, 47 Ill. 2d 510 (1971), before admitting his prior convictions; (2) admitting his prior convictions; and (3) considering his prior convictions as evidence of defendant's guilt.

¶ 55 Upon review, we find that: (1) the trial court was never called upon to conduct a *Montgomery* analysis because there was no pretrial ruling on the admissibility of defendant's prior convictions and defense counsel elicited testimony concerning defendant's prior

convictions on direct examination; (2) defendant invited any error that may have occurred regarding the admission of said convictions; and (3) any error resulting from the improper consideration of prior convictions as evidence of guilt was not plain error.

¶ 56 A. Failure to Conduct *Montgomery* Balancing Test

¶ 57 We first address defendant's arguments that the trial court erred in failing to conduct the required balancing test under *Montgomery*, 47 Ill. 2d 510, before admitting defendant's prior convictions.

¶ 58 In *Montgomery*, our supreme court held that a prior conviction may be admitted to impeach the credibility of a criminal defendant if: "(1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment; (2) less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later; and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice." *People v. Mullins*, 242 Ill. 2d 1, 14 (2011) (citing *Montgomery*, 47 Ill. 2d at 516). The third factor requires the trial court to conduct a balancing test weighing the probative value of the prior conviction against its prejudicial impact. *Id.*

¶ 59 In the instant case, the State did not seek to introduce evidence of defendant's felony convictions to impeach his credibility. Rather, defendant testified *on direct examination* that he had prior convictions for battery, aggravated battery, reckless driving under the influence of alcohol, possession of a stolen motor vehicle, driving on a revoked license, and public intoxication. Because those convictions were not offered by the State to impeach defendant but rather elicited by defense counsel on direct examination, the *Montgomery* balancing test did not apply. *People v. Milligan*, 327 Ill. App. 3d 264, 269 (2002). Once defendant opened the door by

testifying as to some of his prior convictions, it was proper for the State to ask about additional convictions on cross-examination. See *People v. Groel*, 2012 IL App (3d) 090595, ¶ 49.

¶ 60 B. Admission of Prior Convictions

¶ 61 We next address defendant's argument that the trial court erred in admitting his prior convictions.

¶ 62 Because defense counsel elicited testimony regarding defendant's prior convictions during direct examination, defendant procured and invited the admission of such testimony and may not object to its admission on appeal. "When a party procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, that party cannot contest the admission on appeal." *People v. Caffey*, 205 Ill. 2d 52, 114 (2001). Once defendant opened the door by testifying as to some of his prior convictions, it was proper for the State to ask about additional convictions on cross-examination. See *Groel*, 2012 IL App (3d) 090595, ¶ 49 ("In cases where a defendant testifies on direct examination as to some prior convictions but denies the existence of others or fails to testify to all convictions, the State may question a defendant on cross-examination as to the convictions to which a defendant did not testify.").

¶ 63 We recognize that "[t]he rule that a party cannot object on appeal to evidence which was introduced by that party does not apply where a motion to exclude the evidence was presented and denied." *People v. Williams*, 161 Ill. 2d 1, 34 (1994). However, the record in this case does not establish that the admissibility of defendant's prior convictions for impeachment purposes was ruled upon prior to trial. Although the State indicated at one pretrial hearing that it was going to file a "general Montgomery motion for criminal history," no such motion is contained in the record. Additionally, the record contains no transcript of any hearing on a *Montgomery*

motion. Similarly, the record does not indicate that defendant filed a motion *in limine* to exclude his prior convictions.

¶ 64 In coming to this conclusion, we reject defendant's contention that "the only reasonable interpretation" of the record was that the trial court had advised the parties that defendant's prior convictions would be admitted. Specifically, defendant points to the following exchange at a pretrial hearing:

> "MS. GARDNER [Assistant State's Attorney]: *** We also have a motion in limine regarding criminal history which we're going to be putting up obviously, that we're moving on prejudicial, probative.
>
> THE COURT: All right. Ms. Clerk, indicate that there's a probability of the necessity of a hearing on the rape shield and?
>
> MS. GARDNER: Just general Montgomery motion for criminal history.
>
> THE COURT: Montgomery disclosure. Okay. Very good."

¶ 65 Defendant argues that the trial court's "Montgomery disclosure" reference shows that the trial court admitted defendant's prior convictions without a hearing by requiring only a *Montgomery* disclosure and not a *Montgomery* hearing. We reject defendant's strained interpretation of the record. When the trial court said, "Montgomery disclosure," it was merely noting the potential need for a hearing on the State's *Montgomery* motion. We reassert our finding that the record is devoid of any evidence that the State's motion was ever motioned-up and/or ruled upon. Stated another way, no copy of the motion, transcript of a hearing on the motion, or order deciding the motion is contained in the record. "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 66 C. Considering Prior Convictions as Evidence of Guilt

¶ 67 Finally, we address defendant's argument that the trial court erred in considering his prior convictions as evidence of his guilt for the offense charged in the instant case.

¶ 68 Specifically, defendant contends that the trial court improperly considered his aggravated battery conviction as probative of his guilt when the trial court stated during delivery of its ruling:

> "One of [defendant's] convictions is for an aggravated battery. And I have to take into account that the defendant in discussing the fight at the bar said, well, in so many words, I like to fight, so I took my jacket off and I told this guy basically let's go outside. Who do you think you are? Billy Bad Guy? I think this was the word or something like that. This man is not a stranger to violence in getting what he wants."

¶ 69 We find that this issue was forfeited due to defendant's failure to object or raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, defendant requests that we review the issue under the doctrine of plain error. The doctrine of plain error allows us to grant relief for an unpreserved error when: (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error," or (2) "that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 70 Even if we accept defendant's initial assertion that the trial court erred in considering defendant's prior convictions as evidence of guilt, we find that neither prong of plain error analysis applies in the instant case. First, the evidence in this case was not closely balanced.

R.A. testified that defendant forced her to have sex with him after she repeatedly told him to stop. The trial court found R.A. to be a credible witness. R.A.'s behavior after the incident was consistent with someone who had been assaulted rather than someone who had consensual sex, as defendant claimed. R.A. woke Amanda up at approximately 4:30 a.m. R.A. was crying and told Amanda to get defendant out of the house. R.A. then took a shower with her clothes on and broke various objects in her living room. Amanda, Kopf, and O'Brien all testified that R.A. was upset and crying after the incident. Additionally, Esparza testified as to scratches, marks, and swelling she observed while examining R.A., which were consistent with R.A.'s claim that defendant forced her legs open. Finally, we note defendant's unprovoked statements to Amanda and Kopf, along with the fact that the trial court found that defendant's testimony was not credible.

¶ 71 Additionally, defendant has not established that relief is warranted under the second prong of plain error analysis. Our supreme court has equated the second prong of plain error review with structural error. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010) (citing *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)). A "structural error" is "a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *Glasper*, 234 Ill. 2d at 197-98 (quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005)). Structural error has been recognized by the supreme court in only a limited class of cases, including "a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *Thompson*, 238 Ill. 2d at 609. Defendant has cited no

authority supporting his contention that his claimed error has been recognized as structural error. Defendant also fails to tender any argument that the claimed error constitutes structural error.[1]

¶ 72 III. Presumption of Innocence

¶ 73 Finally, defendant contends that the trial court committed reversible error in failing to presume defendant innocent due to his prior convictions. A criminal defendant is presumed innocent "until the point during deliberation when the [trier of fact] concluded that there existed proof of guilt beyond a reasonable doubt." *People v. Keene*, 169 Ill. 2d 1, 26 (1995). Upon review, we find the record belies defendant's contention that the trial court failed to presume him innocent.

¶ 74 In support of his argument, defendant points to the following statement made by the trial court when rendering the guilty verdict:

> "I have to take the witnesses as I find them and if the defendant testifies I have to value his testimony and weigh his testimony the same as the others. In that context, I have to remember that the defendant has two felony convictions and a theft conviction. So I have to take into account that his testimony is somewhat not as believable off the bat. I mean, we start out of the gate and the young women have a head start because he's and [*sic*] handicapped himself with these convictions."

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[1]Defendant has also challenged the trial court's statement: "That's why they call it devil's rum because you make bad choices when you're doing it." As that statement was made at the sentencing hearing, it is irrelevant to any claim that the trial court improperly relied on defendant's prior convictions in finding him guilty of criminal sexual assault.

¶ 75 Defendant contends that this statement shows the trial court was predisposed not to believe defendant because of his prior convictions and the trial court deemed defendant's testimony unbelievable before it even heard it. However, when read in context, the trial court's statement shows that it considered defendant's convictions when assessing defendant's credibility as compared to that of other witnesses who gave contradictory accounts. It was proper for the trial court to consider defendant's prior convictions for impeachment purposes. See *People v. Naylor*, 229 Ill. 2d 584, 594 (2008).

¶ 76 Defendant also points to the following statement made by the trial court upon denying defendant's motion to set aside guilty finding:

> "Furthermore, the defendant's testimony has to be considered like any other person's testimony. Once he testifies he loses his cloak of innocence and his testimony was incredible and by that I don't mean incredible like when we make a basketball shot, I mean incredible like unbelievable. It was just so contrary in every way to common sense and didn't add up. So to a large extent, [defendant], your testimony hurt you. You might well have been better off being silent in the sense that if you can't tell a good story maybe no story's better."

¶ 77 Defendant contends that the above statement is a misstatement of the law and showed the trial court improperly failed to presume defendant innocent at the moment defendant began to testify. When read in a vacuum and in isolation, the trial court's remark that defendant "loses his cloak of innocence" once he testifies can be argued that it is inaccurate and a misstatement of the law. See *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 27 ("The defendant is presumed innocent throughout the course of the trial ***."). The presumption of innocence in criminal cases is a way of saying the State must prove guilt beyond a reasonable doubt and that there are

no inferences against the defendant because of his arrest, charge or presence as a defendant. Michael H. Graham, Graham's Handbook of Illinois Evidence § 303.2, at 142 (10th ed. 2010). That presumption remains with defendant throughout every stage of the trial and during deliberations and is not overcome unless from all the evidence the fact finder is convinced beyond a reasonable doubt that defendant is guilty. Illinois Pattern Jury Instructions, Criminal, No. 2.03 (4th ed. 2000). Every person is presumed innocent until proven guilty. 720 ILCS 5/3-1 (West 2014). Thus, when read in the context of the trial court's overall statement the comment does not show that the trial court failed to presume defendant innocent as soon as he began to testify. The trial court was making a statement after the defendant was found guilty beyond a reasonable doubt. Therefore, the trial court was conveying that defendant's testimony was harmful to his case because it was unbelievable after all the evidence at trial. This was not improper. See *People v. Hart*, 214 Ill. 2d 490, 520 (2005) ("If a defendant chooses to give an explanation for his incriminating situation, he should provide a reasonable story or be judged by its improbabilities.").

¶ 78 CONCLUSION

¶ 79 The judgment of the circuit court of Rock Island County is affirmed.

¶ 80 Affirmed.

¶ 81 JUSTICE McDADE, dissenting.

¶ 82 I respectfully dissent from the majority's decision affirming defendant's conviction of criminal sexual assault. The majority finds that the trial court's "cloak of innocence" statement made during the sentencing hearing did not show that the trial court failed to presume defendant innocent. I would find that this statement showed that the trial court failed to presume defendant innocent throughout the course of the trial and constituted second-prong plain error.

¶ 83 "The defendant is presumed innocent throughout the course of the trial and does not have to prove his innocence, testify, or present any evidence." *Cameron*, 2012 IL App (3d) 110020, ¶ 27. "The court in a bench trial has the duty of hearing, weighing, and evaluating the evidence; but no matter how strong a case is presented by the State, it is fundamental that the court should resolve disputed issues of fact only after hearing all of the evidence with an open mind." *People v. Johnson*, 4 Ill. App. 3d 539, 541 (1972).

¶ 84 The record confirms that the trial court expressly stated: "Once [defendant] testifies he loses his cloak of innocence." Giving this statement its plain meaning, it is apparent that the trial court erroneously deprived defendant of his fundamental due process right to be presumed innocent throughout the course of his trial. Significantly, the record is devoid of any alternative statements from the trial court that would allow us to conclude that the court still afforded defendant this presumption after he testified. While one could simply assume that not only this trial court, but all trial courts, are surely aware of this presumption, such an assumption in the present case would have to be based upon conjecture and speculation. More importantly, however, this assumption is directly contradicted by the trial court's own oral pronouncement. We now turn to whether the trial court's error constituted plain error.

¶ 85 Defendant failed to preserve this claimed error and therefore requests us to apply the doctrine of plain error. The doctrine of plain error allows a reviewing court to address an otherwise forfeited contention of error where a defendant demonstrates that the error was prejudicial. See *Herron*, 215 Ill. 2d at 186-87. To prove that an error was prejudicial, a defendant must show that the evidence at trial was so closely balanced that the error tipped the scales of justice against him. *Id.* at 187. Alternatively, if the error is so serious that it rises to the level of a structural error, prejudice to the defendant is presumed, regardless of the closeness of

the evidence at trial. *Id.*; *Thompson*, 238 Ill. 2d at 608. Structural errors are those systemic errors which erode the integrity of the judicial process and serve to undermine the fairness of a defendant's trial. *Thompson*, 238 Ill. 2d at 613-14.

¶ 86 The United States Supreme Court has consistently held that " '[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' " *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). The Supreme Court in *Taylor* held that the trial court's refusal to give the petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the "Due Process Clause of the Fourteenth Amendment." *Id.* at 490. Unlike *Taylor*, we are not confronted with a failure to instruct the trier of fact as to presumption of innocence. Instead, we are confronted with the trier of fact's *actual* deprivation of this presumption, as evidenced by its own statement. This deprivation so undermined the fairness of defendant's trial that it must be considered structural error under the plain error doctrine.

¶ 87 Accordingly, I would reverse defendant's conviction of criminal sexual assault and remand for a new trial.