

NOTICE
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2016 IL App (5th) 130225-U

NO. 5-13-0225

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 10-CF-1050
)	
RACHAEL HOWARD,)	Honorable
)	Michael N. Cook,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* In a criminal trial where the sole issue was whether the defendant was accountable for the actions of codefendants, the trial court abused its discretion in allowing the jury to see six minutes of a police interrogation video in which officers repeatedly tell the defendant that she is "just as responsible" as codefendants, describe the brutal nature of the offense, and exaggerate the extent of the victim's injuries, but ask the defendant few questions and elicit virtually no relevant responses.

¶ 2 The defendant, Rachael Howard, was convicted of aggravated criminal sexual assault on a theory of accountability. The events giving rise to the charge took place at a neighborhood barbecue, where both the defendant and the victim had been drinking. On appeal, the defendant argues that (1) the court erred by allowing the jury to see a video

recording of her interview with police without editing out many irrelevant and prejudicial statements made by the officers, (2) the court deprived her of a fair trial by excluding the testimony of the victim's treating physician, who would have testified that the victim's blood-alcohol concentration was 0.272, and (3) the mittimus must be amended to give her one additional day of credit for time spent in custody prior to trial. We reverse the defendant's conviction, and we remand for a new trial.

¶ 3 The events underlying the charges against the defendant took place during the evening of November 9, 2010, and the early morning hours of November 10. Ward Noening, the defendant's neighbor, held a barbecue at his home. Several people attended the barbecue, including Noening and his housemate, Richard Hofmeister; the defendant; and the victim of the assault, A.E. At the time, A.E. was staying at the home of her father, who also lived in the neighborhood. The defendant arrived at Noening's house at 10:30 p.m. with Artarius Whales, Joshua Harris, and Delcheva Harris. Although there was conflicting testimony as to when A.E. arrived, most evidence suggested she arrived shortly after the defendant. Hofmeister, A.E., and the defendant drank beer and smoked marijuana brought to the barbecue by the defendant.

¶ 4 Later, A.E. left Noening's home with Hofmeister, who offered to walk her home. In an alley next to the house, the defendant confronted A.E. They argued about a cigarette. The argument quickly turned violent when the defendant punched A.E. in her face. Joshua struck Hofmeister, knocking him to the ground. Delcheva and Artarius began hitting and kicking A.E. She was knocked to the ground and dragged down the

alley. Hofmeister got up and attempted to aid A.E., but Joshua and the defendant chased him away. Hofmeister ran from the scene and attempted to get help.

¶ 5 After Hofmeister left, Delcheva and Artarius sexually assaulted A.E. The defendant was present throughout the assault. She acknowledged in statements to the police that she punched and kicked A.E. multiple times. She further acknowledged that she may have kicked A.E. at least once while the two men were sexually assaulting her. A.E. testified at trial that the defendant kicked her multiple times during the assault and, at one point, held her leg up. After the assault ended, the defendant left with Artarius, Joshua, and Delcheva, and went to her mother's home. She allowed the three men to sleep on the floor of her bedroom.

¶ 6 After being chased from the scene, Hofmeister went to the homes of two different neighbors in an unsuccessful effort to get help. He eventually went to the police station in person and reported the incident to Officer Kristin Hoepfinger. He told her that he and a woman had been assaulted, and he believed that the woman was still being beaten by their assailants. Officers arrived and found A.E. sitting on the ground in the alley. A.E. was crying and incoherent. Her face was bloody and swollen, and she was naked from the waist down.

¶ 7 Officers spoke with Hofmeister, who gave them the defendant's name and told them that she was involved in the assault. At 4:30 in the morning, Detective Matthew Eiskant went to the defendant's mother's home. The defendant's mother, Patti Powers, gave him permission to go upstairs to talk to the defendant. Entering the defendant's room, he found her asleep in her bed with the three men asleep on the floor of her

bedroom. Detective Eiskant arrested all four individuals. Hofmeister was brought to the house. He was able to identify Joshua, Delcheva, and Artarius as the three men involved in the assault.

¶ 8 The defendant waived her *Miranda* rights and was interviewed twice by Detective Eiskant and Detective Beth Ferry, a juvenile detective. Both interviews were recorded. The first interview took place at 5:30 a.m. and lasted approximately one hour. During the interview, the defendant admitted that she punched the victim in the face prior to the sexual assault. However, she denied any further involvement in the crime.

¶ 9 The second interview began at 12:30 p.m. and lasted approximately 30 minutes. During this interview, Eiskant and Ferry told the defendant that there was surveillance video of the attack and that the men had told them what happened. They repeatedly emphasized the brutal nature of the attack, telling her that it was "a horror movie in the city of Belleville," that A.E. was left in the alley "to die like an animal," and that the defendant was lucky that A.E. survived. At one point, Detective Ferry told the defendant that she should be ashamed of herself because she was just as responsible for the assault as the men. The defendant admitted that she punched A.E. in the face three times and kicked her twice. She also admitted that she was present during the sexual assault and that she may have kicked A.E. at least once while she was being raped, but she could not remember.

¶ 10 On November 12, 2010, the State filed a criminal complaint, charging the defendant with aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2010)). She was subsequently indicted for the offense. On February 9, 2012, the defendant filed

a motion *in limine* seeking to exclude "any and all comments or personal opinion[s] by Detective Matt Eiskant and Detective Beth Ferry as to defendant's 'despicability'." She argued that such statements "would be purely prejudicial" with "little to no probative value."

¶ 11 At a final pretrial hearing on September 21, 2012, the court heard argument on the motion *in limine*. The State agreed to redact some of the potentially prejudicial statements made by Detectives Eiskant and Ferry. Thus, statements telling the defendant that all the officers of the Belleville police department knew who she was were edited out, as were statements referring to the defendant and her codefendants as animals and a statement accusing the defendant of leaving A.E. in the alley "to die like an animal." Initially, defense counsel argued that the last six minutes of the video should be redacted in its entirety because the defendant's relevant admissions all come before that time. However, he acknowledged that the two responses made by the defendant in those last six minutes and the questions to which she responded were admissible. He also acknowledged that one of Detective Ferry's statements would be difficult to redact while leaving the pertinent questioning in place. The court permitted most of the last six minutes to be played for the jury over the defendant's objection.

¶ 12 The matter came for trial in September 2012. Hofmeister testified that on the afternoon of November 9, 2010, he arrived home to Ward Noeninger's house at approximately 3:30 or 3:45. A few guests were already there. He first testified that A.E. arrived at approximately 7:30 or 8 p.m. Later, however, he testified that she arrived 5 to 10 minutes after the defendant, who arrived at approximately 10 or 10:30 p.m.

Hofmeister testified that the defendant arrived with three young black men he did not know. He knew the defendant because she was his neighbor. He met A.E. previously, but he did not know her well.

¶ 13 Hofmeister testified that he drank 10 to 12 beers over "a period of probably quite a few hours." He testified that A.E. also drank beer, but he stated that she was not slurring her speech or stumbling and did not appear to be noticeably intoxicated. In addition to drinking beer, Hofmeister testified that some of the people at the barbecue smoked marijuana brought to the house by the defendant.

¶ 14 Hofmeister testified that at around 11:30 p.m., he left the house to walk A.E. halfway home. They left Noeninger's house through a side door and stepped into an alley. As they entered the alley, the defendant approached them. Hofmeister testified that two of the men with her grabbed A.E., and the third man hit Hofmeister, knocking him to the ground. The man who struck Hofmeister was Joshua Harris, although Hofmeister did not know his name at the time. He testified further that the defendant told him to go back to Noeninger's house. He saw the other two men (Delcheva and Artarius) drag A.E. down the alley. Hofmeister testified that Joshua kicked him as he tried to get up. When he was able to get up, Hofmeister heard A.E. screaming. He went down the alley to try to help her. He saw the defendant and all three men standing over A.E. According to Hofmeister, he saw the defendant kick A.E., while two of the men held her down. He did not see the sexual assault.

¶ 15 Hofmeister went to two neighboring houses to ask for help. However, no one answered the door at the first house, and the woman who answered the door at the second

house refused to wake her boyfriend. He ran to the police station and reported the incident to a female police officer.

¶ 16 A.E. testified that at the time of the assault, she was staying with her father, who was a neighbor of Ward Noeninger and Richard Hofmeister. She testified that she arrived at Noeninger's house at approximately 10:30 in the evening. When she arrived, she saw only Noeninger and Hofmeister at the house. A.E. acknowledged that she had "a lot" to drink. She drank five to seven beers during the time she was there—a period she estimated to be an hour and a half—and she had a shot of vodka just before she left. A.E. also acknowledged smoking marijuana shortly before leaving; however, she stated that she smoked only "a puff."

¶ 17 A.E. testified that she left Noeninger's house shortly before midnight. Hofmeister came with her so she would not have to walk alone. When they entered the alley, they were approached by a white woman with dark hair. The woman started a fight with A.E., and A.E. fought back. The last time she saw Hofmeister was during her fistfight with the woman.

¶ 18 A.E. testified that a tall, thin, younger black man approached while she was fighting with the woman. He hit her in the head, and she blacked out. A.E. stated that she was in and out of consciousness during the remainder of her ordeal. When she came to after being knocked out the first time, she was being dragged down the alley. A.E. did not know who was dragging her. She testified that she was dragged to a location near a red garage. She was lying on her back next to the garage. She saw the white woman

with dark hair and two young black men standing over her. All three punched and kicked her. She indicated that there was a third man, but he was some distance down the alley.

¶ 19 A.E. testified that the three individuals who were hitting and kicking her next to the red garage got into an argument, but she did not know what it was about. One of the two men raped her. During the rape, the woman continued to kick her in the head and in the side. She also recalled that the woman held up her leg at one point. She acknowledged, however, that she did not tell police that the woman held her leg. A.E. testified that after the man raped her, she saw the other man standing in front of her. She then blacked out and did not remember anything else that happened until she awoke in the hospital.

¶ 20 Officer Kristin Hoepfinger testified that she left the police station at 1:30 a.m. on November 10, 2010, as her shift was ending. As she left, she saw a man running toward the police station. That man was Richard Hofmeister. Hofmeister told Officer Hoepfinger that he had been assaulted and that a woman was possibly being beaten in an alley between North 5th Street and North 6th Street. Officer Hoepfinger notified dispatch and went to look for the woman herself. When she arrived in the alley described by Hofmeister, she found a woman sitting and leaning against a red shed. The woman was A.E. Officer Hoepfinger testified that A.E. was "fully unclothed from the waist down, and her face was badly beaten." She stated that A.E.'s face was bloody and swollen, and there were abrasions on her body. A.E. was "crying, almost to the point of being incoherent."

¶ 21 A.E. was taken to the hospital emergency room by ambulance. Officer Hoepfinger remained to secure the crime scene until crime scene investigators arrived. Then, she went to the hospital to attempt to interview A.E. However, when she got there, A.E. was still "very incoherent, very upset, [and] in very much pain." Officer Hoepfinger further testified that A.E.'s breath smelled strongly of alcohol.

¶ 22 Detective Matt Eiskant was the lead detective in the investigation. He testified that he first interviewed Richard Hofmeister. Hofmeister told him that the defendant was involved in the attack. Detective Eiskant then went to the home of the defendant's mother, Patti Powers. With Powers's permission, he entered the house and went to the defendant's bedroom. He saw the defendant lying in her bed and three young black men lying on the floor of her bedroom. Eiskant placed all four individuals under arrest. Hofmeister was brought to Powers's home to identify them. He indicated that the three men were the same three men he saw attacking A.E. in the alley.

¶ 23 Detective Eiskant then testified about the recorded interviews with the defendant at the police station. He acknowledged that he and Detective Ferry told the defendant that there was surveillance video of the encounter, even though this was not true. He further acknowledged that he and Detective Ferry told her that all three of the men involved in the crime had made certain statements implicating the defendant, even though they did not make all of the statements. He explained that this was an interrogation technique.

¶ 24 Both interrogation videos were played for the jury. Prior to playing each video, the court informed the jury that the videos contained statements made by individuals

other than the defendant. The court instructed jurors that they could consider the impact these statements had on the defendant, but they could not consider the statements themselves as evidence against her. Only the video of the second interrogation video is at issue in this appeal. Because the question before us involves which portions of the video were admissible, we will set forth the contents of the disputed section in some detail.

¶ 25 The relevant portion of the 29-minute recording begins at 22:58. Detective Eiskant begins describing the attack on A.E. in graphic detail. He tells the defendant, "this thug comes and picks her up, lays her down next to this building, while you are standing in arm's reach, raping her repeatedly. He gets off her. Another guy jumps on. Rapes her. Repeatedly. Another guy gets off. Another guy jumps on. Rapes her repeatedly." At this point, Detective Ferry states, "That's like something you read about in the movies but you don't actually think happens in real life." Detective Eiskant adds, "It's a horror story. That's a horror movie in the city of Belleville." They go on to discuss the victim's injuries. Eiskant tells the defendant that A.E. has been admitted to the hospital "with just fractures throughout her face and body." Detective Ferry tells the defendant, "You are lucky she is alive." She then repeats the statement. For over a minute, neither officer asks a question.

¶ 26 At 24:09, Detective Eiskant asks the defendant, "Do you have anything to say for yourself?" The defendant replies, "I should have called the police." Detective Ferry next asks the defendant, "Why didn't you call the police after that and say 'Hey there's a lady laying there with no pants on in the alley beaten to hell and she's been raped repeatedly.'

Why did you not call the police then?" The defendant explains that she did not call the police because she was scared.

¶ 27 Then, at 24:48, Detective Ferry tells the defendant that she could have walked away, gone outside to smoke a cigarette, called the police, and told them they needed to come right away because the victim might die. Detective Ferry then states, "And you are part responsible for that. You are just as responsible as they are. You ought to be ashamed of yourself because you are just as responsible as they are."

¶ 28 The officers go on to ask the defendant how she could sleep after witnessing a gang rape, but do not elicit any response. At 25:43, after a brief pause, Detective Eiskant asks the defendant about a gray sweatshirt recovered from her bedroom. The defendant indicates that it belonged to one of the three men, but she does not know which. At 26:24, Eiskant and Ferry resume asking the defendant rhetorical questions, such as how she could sleep after what she witnessed and what she and her companions talked about when they got to her house. This type of questioning continues for over a minute, with no responses from the defendant, until Detective Eiskant states that he has no further questions.

¶ 29 After the videos were played, defense counsel cross-examined Detective Eiskant. In response to this questioning, Eiskant acknowledged that he never had any information that A.E.'s injuries might be life-threatening. He testified, however, that he did not know the full extent of A.E.'s injuries while he was conducting the interviews with the defendant. He added that she was beaten up pretty badly.

¶ 30 The defendant argued at trial that A.E.'s ability to accurately recall the timeline of events was impaired due to intoxication. As such, she contended, A.E. was unable to recall accurately whether the defendant hit and kicked her during the rape—as A.E. testified—or only before the rape—as the defendant told police. In support of this theory, the defendant sought to elicit testimony from A.E.'s treating physician that A.E.'s blood-alcohol concentration when she was admitted to the hospital was 0.272. The State moved to exclude this testimony on the grounds that the physician was not disclosed as a witness previously. The defendant argued that the testimony became necessary due to Hofmeister's unanticipated testimony that A.E. did not appear to be intoxicated. The court excluded the testimony.

¶ 31 The jury returned a verdict of guilty. Subsequently, the court denied the defendant's motion for a new trial, sentenced the defendant to 17 years in prison, and denied the defendant's motion to reconsider her sentence. This appeal followed.

¶ 32 The defendant first argues that the court abused its discretion in allowing the jury to view the video recording of her second interrogation without redacting most of the statements made by Detectives Ferry and Eiskant in the final six minutes of the video. She argues that (1) their statements about the circumstances of the offense and the extent of A.E.'s injuries amount to inadmissible lay witness opinion testimony about facts outside of the officers' personal knowledge (see *People v. Crump*, 319 Ill. App. 3d 538, 542 (2001)), (2) Detective Ferry's statement that the defendant was "just as responsible" as the men who committed the sexual assault goes to the ultimate question and, therefore, invades the province of the jury (see *id.*), and (3) the prejudicial effect of the statements

far outweighs their probative value. We agree that the potential prejudice from the statements outweighs their probative value. We also agree that the court's ruling to the contrary constituted an abuse of discretion.

¶ 33 Generally, statements made by police officers during an interrogation are admissible if they are necessary to demonstrate their effect on the defendant or to explain the defendant's response. See *People v. Theis*, 2011 IL App (2d) 091080, ¶ 33 (explaining that an out-of-court statement is admissible if required "to show its effect on the listener's mind or explain the listener's subsequent actions," and noting that the defendant's responses in the interrogation video at issue in that case would have been "nonsensical" if presented without the officer's statements). This is so even when the statements themselves would not be admissible as direct testimony. See *Theis*, 2011 IL App (2d) 091080, ¶¶ 35-37 (making this distinction); *People v. Munoz*, 398 Ill. App. 3d 455, 488 (2010) (same). However, otherwise-admissible evidence should be excluded from a criminal trial unless it is relevant and its prejudicial effect does not substantially outweigh its probative value. *People v. Patterson*, 192 Ill. 2d 93, 114-15 (2000); *People v. Ross*, 395 Ill. App. 3d 660, 678 (2009). Weighing the probative value of evidence against its potential for unfair prejudice is a function of the trial court. As with other evidentiary rulings, this determination is a matter within the discretion of the trial court, and we will reverse its ruling only if we find an abuse of that discretion. *People v. Roman*, 2013 IL App (1st) 110882, ¶ 23 (citing *People v. Johnson*, 208 Ill. 2d 53, 102 (2003)).

¶ 34 The defendant acknowledges that two brief exchanges in the disputed portion of the video were properly admitted, and we agree. At oral argument, the defendant conceded that the two statements she made were admissible. At trial, she also withdrew her opposition to the following statement by Detective Ferry, "Why didn't you call the police after that and say 'Hey there's a lady laying there with no pants on in the alley beaten to hell and she's been raped repeatedly.' Why did you not call the police then?" As discussed previously, Detective Ferry made this statement after the defendant said that she should have called the police. As we also discussed, the defendant offered a response, telling Detective Ferry that she did not call the police because she was scared. Defense counsel acknowledged at a pretrial conference that it would be nearly impossible to redact the statement about A.E.'s condition from the question. We agree that both this exchange (which occurs between 24:09 and 24:48) and the exchange during which Detective Eiskant inquired about the gray sweatshirt (between 25:43 and 26:24) were admissible. However, we cannot reach the same conclusion with respect to the remainder of the disputed portion of the video.

¶ 35 As the defendant correctly points out, she admitted the pertinent facts about her participation in the offense prior to the beginning of the disputed portion of the video. She admitted that she punched and kicked A.E. prior to the rape; she admitted that she was present throughout the rape; and she admitted that she may have kicked A.E. during the rape. With the exception of the two exchanges we have just discussed, the officers elicited no further responses from the defendant. The State acknowledged during oral arguments that the video could have been redacted further, but emphasized that our

standard of review on appeal is abuse of discretion. Having viewed the interrogation video in its entirety, we find that the defendant's responses could be easily understood without the jury hearing several additional minutes of inflammatory statements. As such, we find that the statements have virtually no probative value.

¶ 36 We also agree with the defendant that the potential for unfair prejudice resulting from the statements was high. The officers repeatedly emphasized and exaggerated both the brutal nature of the assault and the extent of the victim's injuries. They told the defendant that each of the three men raped A.E. repeatedly, while the evidence showed that two of the three men raped her once. They told the defendant that A.E. had fractures throughout her body and that she could die from her injuries, neither of which was true. In addition, Detective Ferry told the defendant three times that she was just as responsible for the brutal assault as her codefendants. This, of course, was the ultimate question jurors were called upon to decide.

¶ 37 Jurors were instructed not to consider these statements as substantive evidence against the defendant. However, we do not believe the instruction was sufficient to completely cure the prejudice. As the defendant correctly contends, police officers are viewed as authority figures. As such, their statements are often given substantial weight by jurors. See *Crump*, 319 Ill. App. 3d at 542. In addition, the repetition of many of the statements served to emphasize the statements and enhance their prejudicial impact. In light of our conclusion that the statements had no probative value, this risk of prejudice was unacceptably high. Where highly prejudicial evidence is admitted in error, there is a " 'substantial risk that the jury, despite instructions to the contrary,' " will be influenced

by the evidence in reaching a verdict. *People v. Singletary*, 273 Ill. App. 3d 1076, 1086 (1995) (quoting *Bruton v. United States*, 391 U.S. 123, 126 (1968)). Thus, a limiting instruction is often insufficient to cure the prejudice that results from improperly admitted evidence. See *People v. Thigpen*, 306 Ill. App. 3d 29, 38 (1999); *Singletary*, 273 Ill. App. 3d at 1086.

¶ 38 We acknowledge that abuse of discretion is a deferential standard. See *People v. Anderson*, 367 Ill. App. 3d 653, 663 (2006). However, because the evidence at issue has no probative value and a high potential for prejudice, we must conclude that the court abused its discretion by allowing the jury to see it.

¶ 39 The defendant next argues that the court erred and deprived her of the opportunity to present a defense by excluding the testimony of A.E.'s treating physician related to her blood-alcohol concentration. We note that the evidence at trial overwhelmingly showed that A.E., who testified that she weighed 110 pounds, consumed at least five beers and one shot of vodka while she was at the barbecue. Although A.E. testified that she was only there for a period of an hour and a half, there was some evidence she may have been there longer. However, because we reverse on the basis of the prejudicial impact of the disputed portion of the interrogation video, we need not resolve this contention.

¶ 40 Finally, we note that the defendant argues that she is entitled to credit against her sentence for one additional day in pretrial custody, and the State concedes that she is entitled to an additional day of credit. The record supports this claim. Although the defendant was arrested and taken into custody on November 10, 2010, the mittimus

reflects credit for pretrial incarceration beginning on November 11, 2010. Because we reverse the defendant's conviction, there is no action for this court to take.

¶ 41 For the foregoing reasons, we reverse the defendant's conviction and remand the matter for a new trial.

¶ 42 Reversed and remanded.