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2017 IL App (5th) 140521-U

NO. 5-14-0521

NOTICE
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IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Effingham County.
	)	
v.	)	No. 13-CF-170
	)	
DAVID G. WYCKOFF,	)	Honorable
	)	Kimberly G. Koester,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Presiding Justice Moore and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The record is insufficient to determine whether the defendant's waiver of his right to a jury trial was a knowing and intelligent waiver; therefore, the record does not establish that the waiver was plain error or constituted ineffective assistance of counsel. In a bench trial involving the prosecution of aggravated domestic battery, the defendant failed to establish that he was prejudiced from the circuit court taking judicial notice of the contents of a court file involving a civil order of protection that the victim obtained against the defendant.

¶ 2 After a bench trial, the defendant, David G. Wyckoff, was convicted of aggravated domestic battery (720 ILCS 5/12-3.2(a)(1), 12-3.3(a) (West 2014)), in that he caused great bodily harm to the victim, T.W., while committing the offense of domestic battery. The circuit court sentenced him to four years of probation, three months of periodic

imprisonment in the county jail, and three months of home confinement. This appeal is the defendant's direct appeal from his conviction and sentence. He requests that we grant him a new trial because of two errors that he raises for the first time on appeal, in arguments couched in terms of ineffective assistance of counsel and plain error. The two errors are: (1) that his waiver of his right to a jury trial was not a knowing and intelligent waiver and (2) that during the bench trial the circuit court improperly took judicial notice of the entire court file in a civil case in which T.W. obtained an order of protection against him. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Our background discussion will first focus on the pretrial procedure leading up to the defendant's waiver of his right to a jury trial. We will then discuss the evidence of the offense presented at the bench trial.

¶ 5 The State initially charged the defendant with one count of aggravated domestic battery (count I) by way of an information filed on September 3, 2013. This initial charge of aggravated domestic battery was based on section 12-3.3(a-5) of the Criminal Code of 2012 (720 ILCS 5/12-3.3(a-5) (West 2012)), which required the State to prove that the defendant strangled T.W. while committing the offense of domestic battery. The State alleged that on September 1, 2013, the defendant repeatedly struck T.W. in the head with a rock and grabbed her around the neck, choking her with his hands. The defendant was arrested for the offense on September 1, 2013, and remained in custody until his trial. The information was superseded by a bill of indictment that the State filed on September 18, 2013.

¶ 6 On October 24, 2013, the parties appeared in court for a pretrial hearing, and the defendant's attorney requested a continuance of the jury trial that had been scheduled for November 4, 2013. The defense attorney told the court that they were waiting for a plea offer from the State and that he had talked "at length" with the defendant about his right to a speedy trial. The court rescheduled the jury trial for January 13, 2014.

¶ 7 The parties appeared in court on January 3, 2014, for a pretrial hearing, and the defense attorney told the court that the State and the defendant had "been undergoing back and forth negotiations." He requested another continuance of the jury trial and agreed that the delay would be attributable to the defendant. The court rescheduled the jury trial for February 10, 2014. On January 29, 2014, the court rescheduled the jury trial to March 10, 2014, because the defendant had hired a new attorney.

¶ 8 On February 19, 2014, the defendant's new attorney filed a motion to dismiss the bill of indictment. The motion alleged, among other things, that the bill of indictment did not allege the essential elements of the offense of aggravated domestic battery, including "family or household member." The defense attorney requested the court to vacate the jury trial setting and reset the jury trial for a date after the motion hearing.

¶ 9 On March 5, 2014, the State charged the defendant with five additional counts as follows: count II alleged aggravated battery for striking T.W. in the head with a rock and choking her; count III alleged attempted aggravated criminal sexual assault in that the defendant hit T.W. in the head with a rock and attempted to drag her against her will into a hot tub with the intent of placing his penis in her vagina with force; count IV alleged criminal sexual abuse in that the defendant hit T.W. with a rock and attempted to drag her

against her will into a hot tub with the intent of placing his hands on her breast and genitalia by use of force and for his own sexual gratification; count V alleged aggravated criminal sexual abuse in that the defendant hit T.W. on the head with a rock and attempted to drag her against her will into a hot tub with the intent to place his hands on her breast and genitalia by use of force and for his own gratification; and count VI alleged attempted first-degree murder for repeatedly striking T.W. in the head with a rock and choking her with his hands. As we will explain below, whether the addition of counts II through VI violated the defendant's speedy trial rights is the lynchpin issue concerning whether he made an unknowing and involuntary waiver of his right to a jury trial.

¶ 10 At a March 31, 2014, pretrial hearing, the defendant waived formal arraignment with regard to the new charges and pled not guilty. The court scheduled a jury trial for June 2, 2014. Defense counsel stated that the defendant "understands that the delay is attributable to him in connection with his right to a speedy trial."

¶ 11 The parties appeared in court for a pretrial hearing on May 28, 2014, and the State told the court that they were still "working on an agreement." The defendant's attorney agreed and requested the court to move the jury trial setting to July.

¶ 12 On July 3, 2014, the State filed two additional counts: count VII alleging aggravated battery in that the defendant caused scalp lacerations which required emergency medical treatment when he struck T.W. in the head with a rock, and count VIII alleging aggravated domestic battery in that T.W. was "a family, ex-girlfriend, and/or household member" and that the defendant struck her in the head with a rock

causing scalp lacerations which required emergency medical treatment. Neither count VII nor count VIII alleged that the defendant choked T.W. with his hands.

¶ 13 At a July 3, 2014, pretrial hearing, the defendant waived arraignment on these two new charges and entered a plea of not guilty. The defendant's attorney then presented the court with a waiver of the defendant's right to a jury trial. The circuit court questioned the defendant, determined that he understood the difference between a jury trial and a bench trial and the consequences of the waiver, and accepted the defendant's waiver. After the court's questioning, the defendant's attorney told the court that the waiver was in exchange for the State's agreement to dismiss counts I through VI. Specifically, the attorney stated, "I did explain to [the defendant] both yesterday and again this morning that in consideration for this waiver, the State would be moving to dismiss the other companion charges and it's on that basis that he has approved this procedure." The State subsequently dismissed counts I through VI and told the court that the remaining counts VII and VIII were "essentially a re-pleading of Count I and Count II, just to simplify the issues that are going to be before Your Honor at a stipulated bench trial."

¶ 14 The court scheduled the bench trial for August 2, 2014. Defense counsel did not challenge counts II through VI on speedy trial grounds prior to the defendant waiving his jury trial right in exchange for the dismissal of those counts.

¶ 15 At the bench trial, the defendant's attack of T.W. was not disputed. The defendant stipulated that T.W. would testify that he hit her in the head with an object causing scalp lacerations that required emergency medical treatment. The defendant's defense focused

primarily on the nature of his relationship with T.W.[1] He maintained that his relationship with her was only a casual sexual relationship that, he argued, was insufficient to sustain a conviction of aggravated domestic battery.

¶ 16 T.W., however, testified that the defendant was her ex-boyfriend. She explained that they went to high school together, but they did not socialize during their high school years. She graduated high school in 2011, and, according to T.W., around the end of 2012 or the beginning of 2013, the defendant sent her a message on the Internet website Facebook. They exchanged cellular telephone numbers and began sending text messages to each other. She stated that they sent each other messages back and forth for 10 or 12 hours each day for a period of time, which led them to meeting each other in person sometime in January 2013. At that time, she had broken up with her previous boyfriend around New Year's.

¶ 17 T.W. testified that her relationship with the defendant started out as "a sexual relationship and then it became more after that." According to T.W., around the middle or end of January, the defendant asked her if she wanted to be his girlfriend, and she told him yes. She said that they told each other that they loved each other a "couple of times." She believed that they were "boyfriend and girlfriend" for "[a]round a month." She estimated that, during this period, she saw the defendant at his parents' house, where he lived, between 10 to 20 times. While spending time together, they watched movies and

[1]The defendant also disputed the extent of T.W.'s injuries, but this aspect of the defense is not relevant to the issues raised on appeal.

talked, she watched him play video games, and they had sexual relations. She said that, during the time they were together, she saw the defendant "a few times each week but mostly at night" and that they texted each other multiple times each day.

¶ 18 T.W. testified that she broke up with the defendant the week after Valentine's Day because he was supposed to take her on a date on Valentine's Day, but he spent his money on drugs instead. She also testified that she broke up with the defendant because "he was on drugs and [she] didn't like the way he acted when he was on them." She explained that he used marijuana and K2 and that he became "kind of mean" when he was using the drugs. She ended the relationship by texting him, and he became upset. He texted her back that he wanted to try to figure out why she was breaking up with him, and she told him no. After the breakup, T.W. did not hear from the defendant until June or July when he called her to say that he was in rehab. He texted her again in August when he was home from rehab, but she did not text him back at that time.

¶ 19 The attack occurred during the early morning hours of September 1, 2013. She explained that, in the evening on August 31, 2013, the defendant texted and called her multiple times while she was at work at a McDonald's restaurant. She had to close the restaurant around 12:30 or 1 a.m., and she agreed to meet him at a bowling alley after work.

¶ 20 T.W. was waiting in the parking lot of the bowling alley when a friend dropped the defendant off at the bowling alley around 1:30 a.m. He got into T.W.'s car. He was drunk, crying, and upset that his sister had passed away. She tried to comfort him to "be a good friend." While they talked in her car, she told him that she was in a new relationship

and was engaged. According to T.W., the defendant seemed "a little upset" and stated, "oh, so you broke up with me to be with him."

¶ 21 After they talked for a half hour to 45 minutes, T.W. took the defendant to his parents' house. At the parents' house, he insisted that she get out of the car and walk through the garage to a hot tub in the back yard. He kept asking her to get into the hot tub, but she said no. As she turned her back to him to return to her car, he hit her three times on her head with a hard object that she thought was a rock. He struck the back, top, and side of her head. The next thing she remembered was lying on the ground by the hot tub bleeding. She screamed for help, and the defendant's father came out of the house upon hearing the screaming. He took her inside, and she called her fiancé, who arrived and took her to the hospital. The attack caused three gashes in her head that required 12 staples. She also suffered bruising on her hand, elbow, and face.

¶ 22 During cross-examination, the defendant's attorney asked T.W. about filing a verified petition for an order of protection on September 3, 2013, two days after the attack. She admitted that, in filling out the form for the petition, she wrote that her relationship with the defendant was mostly a sexual-based relationship and that they rarely talked to each other. The defendant's attorney showed T.W. a copy of the petition to refresh her recollection during the cross-examination.

¶ 23 On re-direct, the State asked T.W. whether she obtained an emergency order of protection and a plenary order of protection as a result of her petition. She testified that she did and that the defendant was present in court when she obtained the plenary order. On re-cross, the defendant's attorney asked T.W. whether she testified when she obtained

the orders, and she stated that she answered yes and no questions asked by a judge when she obtained the plenary order of protection.

¶ 24 T.W. was the State's only witness. At the conclusion of its case-in-chief, it asked the circuit court to "take judicial notice of the complete file of 13-OP-98, which involved the [d]efendant" and T.W. The prosecutor asked "[i]f the Court could take judicial notice of the orders entered by the Court, especially the Plenary Order of Protection and any accompanying docket entries made by the different presiding judges in that case." The court took judicial notice as follows: "The Court does have 13-OP-98. I will take judicial notice of that."

¶ 25 During his case-in-chief, the defendant presented the testimony of family members who testified about their familiarity with the defendant's past girlfriends and their lack of familiarity with T.W. or any relationship the defendant had with her. The defendant's aunt testified that she had never heard of T.W. until she "read the name in the paper." The defendant's parents both testified about being unfamiliar with any relationship the defendant had with T.W., other than seeing her at their house on one or two occasions when other friends of the defendant were also present. They never saw the defendant show any affection toward her.

¶ 26 The defendant testified that he knew who T.W. was in high school, but did not have any kind of relationship with her then. He testified that after high school, in the summer of 2012, he got her number from "a buddy" and began texting her to see if she wanted to "hang out." According to the defendant, she did not agree to do so at that time. He testified that in the middle of January 2013, he got a text from her. They subsequently

met and had sexual intercourse for the first time at his parents' house that evening. In describing this occasion, the defendant testified that she picked him up after she got off work and drove them to her house so she could take a shower. He waited in the car with a blanket over himself because she did not want anyone to see him. Then they drove to his parents' house, where they went into his bedroom. According to the defendant, they did not exchange any words of affection, and she told him, "don't get attached."

¶ 27 The defendant testified that they had sexual relations at his parents' house on two additional occasions. During this time, he never had any contact with her family members, and she never invited him to her house. The defendant claimed that they never exchanged any words of affection. He testified that he never saw her anywhere but at his parents' house, except on two occasions when she gave him a ride. He stated that in addition to the three times they had sexual relations, there were two other occasions when she came to his parents' house when he also had other friends visiting.

¶ 28 He denied texting T.W. 10 to 12 hours per day during their relationship. He stated that he texted her "once in a while" to see if she wanted to "hang out," but she would not text back so he assumed she was working when he texted. He denied asking her to be his girlfriend or that she asked him to be her boyfriend. He stated that they never watched movies together and that they played video games together only on one occasion. He admitted to texting her from the rehab facility after they had parted ways, but stated that he texted several people to tell them he was getting clean.

¶ 29 The defendant testified that, in the evening of August 31, 2013, he called T.W. when he was drinking alcohol and smoking K2. He testified that he was "having a fit"

and needed someone to talk to. He wanted to talk to T.W. about issues he was having regarding the recent death of his sister. He testified that when they met that evening, during their conversation, T.W. told him that she had become engaged, but he did not remember how he responded. He stated, "I don't think I was upset because I had no reason to be." He testified that he was not angry. He did not deny hitting T.W. as she described in her testimony. Instead, he explained that he had smoked additional K2 when they got to his house that night and that he did not recall anything after that.

¶ 30 At the conclusion of the bench trial, the defendant argued that his relationship with T.W. was not sufficiently intimate to qualify as a "dating relationship" which the State is required to prove to sustain a conviction of aggravated domestic battery. The trial court disagreed with the defendant, found that a dating relationship had existed between the defendant and T.W. prior to the attack, and found that the State proved him guilty of aggravated domestic battery. The defendant now appeals his conviction and sentence.

¶ 31 ANALYSIS

¶ 32 The defendant raises two arguments on appeal: (1) that his waiver of his right to a jury trial was not a knowing and voluntary waiver and (2) that during the bench trial the circuit court improperly took judicial notice of the entire court file in the civil case involving the order of protection that T.W. obtained against him. The defendant did not raise either issue in the lower court proceedings. He raises them for the first time on appeal, asking us to consider the errors under the plain error rule and as a claim of ineffective assistance of counsel. It is in this context that we must review the record and determine whether it supports the defendant's arguments.

¶ 33 "The plain-error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Wilmington*, 2013 IL 112938, ¶ 31. "Under both prongs of the plain-error doctrine, the burden of persuasion remains with [the] defendant." *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 34 To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 700 (1984), *i.e.*, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). "Further, in order for a defendant to establish that he suffered prejudice, he must show a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different." *People v. Burt*, 205 Ill. 2d 28, 39 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "Because a defendant must establish both a deficiency in counsel's performance and prejudice resulting from the alleged deficiency, failure to establish either proposition will be fatal to the claim." *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996).

¶ 35 I

¶ 36 Waiver of the Right to a Jury Trial

¶ 37 The first argument the defendant raises on appeal is that his waiver of his right to a jury trial was not a knowing, intelligent, and voluntary waiver. Specifically, he argues that he agreed to waive the right only in exchange for the State's dismissal of counts II through VI. He argues that the State added those counts after the expiration of the speedy trial clock on those counts. Because the dismissed counts were untimely, the defendant argues, the State could not have convicted him of those charges. As a result, he concludes that his waiver in exchange for the State's dismissal of the invalid charges was not a knowing, intelligent, and voluntary waiver.

¶ 38 As noted above, the defendant raises this issue as plain error, specifically the second prong of the plain error rule in which prejudice is presumed because a fundamental right is involved. Alternatively, he raises the issue as a claim of ineffective assistance of counsel, arguing that his counsel's performance was deficient because he did not challenge the timeliness of counts II through VI prior to his waiver. Before considering the defendant's claim as either plain error or ineffective assistance of counsel, we must first determine whether the record supports a conclusion that any error occurred when he waived his right to a jury trial. *People v. Henderson*, 2016 IL App (1st) 142259, ¶ 197.

¶ 39 A criminal defendant's right to a jury trial is guaranteed by both the federal and state constitutions (U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §§ 8, 13), but a defendant may knowingly and voluntarily waive that right (*People v. Bannister*, 232 Ill.

2d 52, 65 (2008)). Section 103-6 of the Code of Criminal Procedure of 1963 provides that, except for minor offenses only punishable by fines, a jury waiver is valid only where the right to a jury trial is "understandingly waived by defendant in open court." 725 ILCS 5/103-6 (West 2014).

¶ 40 There are no specific admonishments or advice that the court must provide before accepting a jury trial waiver. *Bannister*, 232 Ill. 2d at 66. The effectiveness of a defendant's waiver depends on the particular facts and circumstances of each case. *Id*. A signed jury waiver alone is not sufficient to demonstrate an understanding jury waiver. *People v. Smith*, 106 Ill. 2d 327, 334 (1985). However, a signed waiver, viewed in light of other circumstances, can "lessen[ ] the probability that the waiver was not made knowingly." (Internal quotation marks omitted.) *People v. Stokes*, 281 Ill. App. 3d 972, 978 (1996).

¶ 41 Here, we note that the record includes the defendant's written waiver of his right to a jury trial. Prior to accepting the waiver, the circuit court first determined that the defendant had the ability to read and write English. In addition, the court also determined that the defendant knew the difference between a jury trial and a bench trial; the defendant stated that in a bench trial, "I'm being tried by a judge instead of a jury." The court asked the defendant whether it was his desire to give up his right to a jury trial, and the defendant stated that it was his desire. The defendant acknowledged that no one threatened him or promised him anything. Thus, the record before us shows that the defendant was aware that his case would be decided by a judge rather than a jury. In *People v. Church*, 2017 IL App (5th) 140575, ¶ 39, this court analyzed a jury trial waiver

under the plain error rule and held that a defendant knowingly and voluntarily waived his right to a jury trial because, in part, the record showed that the "defendant was well aware his case would be decided by a judge rather than a jury."

¶ 42 However, in *Church*, the court also focused on a benefit the defendant received as a result of his waiver. The defendant argued that the waiver was not knowing and voluntary because he waived his right to a jury trial in exchange for the dismissal of a count of which he could not be convicted. *Id.* ¶ 32. The court, however, noted that although the defendant could not have been "convicted" of both charges, a conflicted jury could have found the defendant guilty of one or both charges. *Id.* ¶ 36. Accordingly, the court concluded that the defendant's chances of an acquittal were better facing only one charge rather than two. As a result, he received a benefit from the dismissal in exchange for the waiver even though he could not be "convicted" of the dismissed charge. *Id.*

¶ 43 The *Church* court also noted that, even if the defendant had received no benefit from the dismissal, he failed to establish that he would not have waived the jury trial without the State dropping the dismissed charge. *Id.* ¶ 37. At the time of the waiver, the prosecutor stated that the dismissal was only " '*part* of the consideration' " the defendant relied on in waiving his right to a jury trial. (Emphasis in original.) *Id.* The court also noted that the defendant filed an unsuccessful motion for a change of venue, so the defendant may have considered a bench trial more advantageous than a jury trial. *Id.* ¶ 38.

¶ 44 The present case is similar to *Church* in that the record establishes that the defendant knew that his case would be tried by a judge rather than a jury as a result of his waiver. However, the present case is distinguishable from *Church* in that the record does

not establish that the dismissals of counts II through VI were only "part of the consideration" for the waiver. At the time the defendant waived his right to a jury trial, his attorney stated, "I did explain to [the defendant] both yesterday and again this morning that in consideration for this waiver, the State would be moving to dismiss the other companion charges and *it's on that basis that he has approved this procedure*." (Emphasis added.) The State did not object to that characterization. Therefore, the record indicates that the defendant waived his right to a jury trial *only* because the State agreed to dismiss counts II through VI.

¶ 45 In addition, we believe *Church* is distinguishable because the dismissed charge in *Church* was not an invalid charge under speedy trial grounds or other grounds. In the present case, unlike *Church*, if the dismissed charges were untimely on speedy trial grounds, then the charges were invalid and we cannot say that the defendant, nonetheless, benefited from their dismissal in consideration for his jury trial waiver.

¶ 46 In serious criminal cases, a defendant's right to a jury trial is a "fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). "[W]hether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 278 (1942).

¶ 47 Here, the record suggests that the defendant waived his fundamental right to a jury trial solely on the State's representation that it would bestow a benefit to him by dismissing counts II through VI. Nothing in the record suggests that the dismissal of the charges was only part of the consideration. We agree with the defendant that if the dismissed charges were untimely under the speedy trial statute, then we cannot say that the defendant's waiver of his fundamental right was a knowing, intelligent act done with sufficient awareness of the relevant circumstances. We believe this is true even though the record shows that the defendant understood that his case would be tried by a judge rather than a jury because of his waiver. Accordingly, we must review the record to determine whether counts II through VI were untimely under speedy trial principles.

¶ 48 The defendant was arrested on September 1, 2013, and remained in custody until sentencing. Therefore, the State had 120 days beginning from the date of the defendant's arrest to try the defendant on the initial aggravated domestic battery charge. 725 ILCS 5/103-5(a) (West 2014). Prior to trial, the defendant moved to continue his trial dates several times. These delays were attributable to him and extended the speedy trial clock. However, even if delay is attributable to a defendant on the original charge, that delay is not always attributable to the defendant on subsequently filed charges. *People v. Woodrum*, 223 Ill. 2d 286, 299 (2006).

¶ 49 In *People v. Williams*, 94 Ill. App. 3d 241, 248-49 (1981), the court stated the rule as follows:

> "Where new and additional charges arise from the same facts as did the original charges and the State had knowledge of these facts at the commencement

> of the prosecution, the time within which trial is to begin on the new and additional charges is subject to the same statutory limitation that is applied to the original charges. *Continuances obtained in connection with the trial of the original charges cannot be attributed to defendants with respect to the new and additional charges because these new and additional charges were not before the court when those continuances were obtained*." (Emphasis added.)

¶ 50 The supreme court has clarified that this rule is applicable only when the initial and subsequent charges are subject to compulsory joinder. *People v. Williams*, 204 Ill. 2d 191, 207 (2003). The purpose of this rule is to prevent "trial by ambush." *Id.* Therefore, the supreme court has also clarified that in order for the rule set forth in *Williams* to apply, there must be "new and additional" charges. In *People v. Phipps*, 238 Ill. 2d 54, 68 (2010), the court held that an aggravated driving under the influence charge was not a "new and additional" charge to a reckless homicide charge for speedy trial purposes. The court noted that the "critical point for [its] speedy trial analysis" is "whether the original indictment gave [the] defendant adequate notice to prepare his defense to the subsequent charge." *Id*. at 69. The court reasoned that the original charging instrument alleging reckless homicide gave the defendant adequate notice of aggravated driving under the influence, so the defendant's ability to prepare for the additional charge was not hindered. *Id*. There was no danger of a "trial by ambush." *Id*. at 69-70. Analysis of this issue "involves a comparison of the charges contained in the indictments." *Woodrum*, 223 Ill. 2d at 300.

¶ 51 In the present case, we believe that the rationale for the rule stated in *Williams* does not apply with respect to count II because count II was not a "new and additional" charge for speedy trial purposes. Count I alleged aggravated domestic battery, and the subsequent charge, count II, alleged aggravated battery. Both charges alleged the same facts and required the State to prove that the defendant knowingly and without legal justification caused bodily harm to T.W. The only difference between the two offenses is that count I required the State to prove T.W.'s status as a family or household member. 720 ILCS 5/12-3.2(a)(1) (West 2012). This additional element in count I would not have hindered the defendant's ability to prepare for a defense of aggravated battery as alleged in count II. The defendant could proceed to trial on count II with adequate preparation instead of being forced to agree to further delay as a result of the new charge. *Phipps*, 238 Ill. 2d at 68. The addition of count II would not cause a change in discovery, witnesses, or the evidence to be presented at the trial. *Williams*, 204 Ill. 2d at 201. In fact, we note that the defendant did proceed to trial, without objection, on count VII, which was a re-allegation of the aggravated battery charge contained in count II. Under such circumstances, "the rationale for declining to attribute to the defendant delays in connection with the original charges does not apply." *Phipps*, 238 Ill. 2d at 68.

¶ 52 Accordingly, in the present case, we conclude that count II was not a "new and additional" charge for purposes of the defendant's speedy trial argument. *Woodrum*, 223 Ill. 2d at 301; *Phipps*, 238 Ill. 2d at 70. Because count II was not new and additional for speedy trial purposes, any delays attributable to the defendant for the aggravated domestic battery charge were also attributable to him for the aggravated battery charge.

Phipps, 238 Ill. 2d at 70. Therefore, the addition of count II did not violate the defendant's speedy trial rights.

¶ 53 Furthermore, we note separately that, although the State dismissed count II as part of its agreement for the defendant's jury trial waiver, at the time it dismissed count II, it had already re-alleged count II as count VII. The dismissal of count VII was *not* part of the State's agreement with the defendant. By agreement, count VII remained after the defendant waived his right to a jury trial. Therefore, we agree with the State that the dismissal of the aggravated battery charge alleged in count II was not a substantive part of the defendant's agreement to waive his right to a jury trial. As a result, the circumstances surrounding the dismissal of count II do not support the defendant's argument that his jury trial waiver was invalid.

¶ 54 Although count II is irrelevant for speedy trial purposes, we believe that counts III through VI were "new and additional" charges for speedy trial purposes. They alleged new and more serious offenses, with different intent elements that the State would have to prove. Count I would not have given the defendant adequate notice to prepare his defense to counts III through VI. *Id.* at 69; *People v. Izquierdo-Flores*, 367 Ill. App. 3d 377, 384 (2006) (a subsequent first-degree murder charge added a "new and additional" charge to a case involving an initial charge of second-degree murder because the new charge placed a new burden on the defendant to prove the existence of a statutory mitigating factor). Therefore, if the compulsory joinder rule applies to counts III through VI, then the reasoning of *Williams* concerning the defendant's speedy trial rights does

apply. For this reason, we must analyze counts III through VI in light of compulsory joinder principles and determine whether they were untimely for speedy trial purposes.

¶ 55 Compulsory Joinder Rule

¶ 56 The compulsory joinder statute is found in section 3-3 of the Criminal Code of 2012 (Criminal Code) and states, "If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution *** if they are based on the same act." 720 ILCS 5/3-3(b) (West 2014). Therefore, under the compulsory joinder rule, multiple charges against a defendant must be joined in a single prosecution if the following three conditions are satisfied: (1) the multiple charges are known to the prosecutor when the prosecution begins; (2) the charges are within the jurisdiction of a single court; and (3) the charges are based upon the same act. *People v. Moody*, 2016 IL App (1st) 130071, ¶ 27.

¶ 57 In the present case, there is no issue with respect the second element of compulsory joinder. Instead, the first and third elements of compulsory joinder are at issue. We must determine whether counts III through VI were based upon the same act as count I and, if so, whether the record establishes that the new and additional charges were known to the prosecutor when the prosecution began.

¶ 58 Charges Based Upon the Same Act

¶ 59 The third element of the compulsory joinder rule requires that the charges be "based on the same act." 720 ILCS 5/3-3(b) (West 2014). On appeal, neither party suggests that there is any factual issue with respect to whether the charges are based upon

the same act, and neither party suggests that there are facts outside the record that are relevant to this issue. Instead, the defendant asks us to compare the charging instruments and conclude that the charges are based on the same act. Likewise, the State also asks us to compare the charging instruments but conclude that the charges are not based on the same act. See also *People v. Schram*, 283 Ill. App. 3d 1056, 1066 (1996), where the court compared indictments to determine whether they alleged offenses that were based on the same act under section 3-3(b).

¶ 60 Whether the charges at issue are based upon the same act is question of law when, as here, none of the relevant facts are in dispute. *People v. McGee*, 2015 IL App (1st) 130367, ¶ 28. In addition, our analysis necessarily involves the interpretation of the statutory language of section 3-3(b) of the Criminal Code. 720 ILCS 5/3-3(b) (West 2014). The interpretation of a statute also presents a question of law. *People v. McFadden*, 2016 IL 117424, ¶ 26.

¶ 61 In construing section 3-3(b), we note that the legislature intended for the compulsory joinder statute "to prevent the exaggeration of criminality for a given 'act,' from which separate offenses might arise." *People v. Limauge*, 89 Ill. App. 2d 307, 309 (1967). However, the comments of the drafting committee "make it clear that this provision was *not* meant to require joinder of separate offenses resulting from the same '*conduct*' [citation] which is defined as 'an act *or a series of acts*.' [Citation.]" (Emphasis added.) *People v. Griffin*, 36 Ill. 2d 430, 433-34 (1967). The legislature could have enhanced the legislative purpose of the statute by using the word "conduct," but it chose not to do so, using the word "act" instead. *Limauge*, 89 Ill. App. 2d at 309. Therefore,

there is no requirement of joinder where multiple offenses arise from a "series of related acts" in the course of a single incident. *People v. Gooden*, 189 Ill. 2d 209, 219 (2000). The offenses must arise from a single act.[2]

¶ 62 Independent, overt acts that constitute different offenses are not required to be joined because they are not offenses based on the same act. *Id.* For example, if a defendant drove at an excessive rate of speed, ran through three successive red lights, and drove on the wrong side of the road, the defendant has committed offenses based on separate acts for purposes of the compulsory joinder statute. *Griffin*, 36 Ill. 2d at 433. However, if a charge of reckless driving is brought based upon the act of running a stop sign, then a later charge of running the stop sign would be subject to compulsory joinder as the two charges are based on the same act. *Id.*

¶ 63 In *Gooden*, the State charged the defendant with home invasion and sexual assault. The court held that because the charges were based on separate acts, the compulsory joinder statute did not require the State to prosecute both offenses in the same proceeding. *Gooden*, 189 Ill. 2d at 220. The offenses in that case arose when the defendant entered his ex-wife's home armed with a shotgun. *Id.* at 212. Once inside, he argued with her, the argument escalated, and he struck her with the shotgun. *Id.* The argument continued, and he again beat her with his fists and the gun. *Id.* at 212-13. He

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[2]We note that "elements-based analyses of issues such as the one act, one crime doctrine and double jeopardy are independent of the separate issue of whether multiple offenses are based on the same act for compulsory joinder." *People v. Hunter*, 2013 IL 114100, ¶ 22.

later took out a knife, had her remove her clothing, and performed an act of intercourse on her. *Id*. at 213.

¶ 64 The State initially charged the defendant with home invasion, alleging that he knowingly entered the dwelling of his ex-wife without authority and intentionally caused injury to her by striking her in the head with a gun. *Id*. at 212. The State subsequently filed an amended information that added additional charges of aggravated criminal sexual assault. *Id*. at 214. The defendant argued that the addition of the new charges violated the speedy trial statute because of the application of the compulsory joinder statute. *Id*. The trial court and the appellate court ruled that the new charges were based on separate acts from the home invasion charge and were not required to have been joined. *Id*. at 215. The supreme court agreed, holding that "because the State was not required to join the offenses in this case, there is no reason to apply the speedy-trial term applicable to the home invasion charge to the sexual assault charges." *Id*. at 220.

¶ 65 In contrast, *Hunter* involved a case in which the supreme court held that two charges stemmed from the same act. In that case, police officers recovered cannabis and handguns from a vestibule near the defendant. *Hunter*, 2013 IL 114100, ¶ 3. The State initially charged the defendant with possession of cannabis with intent to deliver, and it did not bring any charges relating to the handguns. *Id.* ¶ 5. Later, the State brought additional charges relating to the handguns. *Id.* ¶ 6. The defendant argued that the compulsory joinder statute applied to the additional gun charges and, therefore, the additional charges violated the speedy trial statute. *Id.* ¶ 7.

¶ 66 On appeal, the supreme court analyzed the issue of whether the defendant's alleged possession of cannabis and possession of the recovered handguns were based on the same act under the compulsory joinder statute. *Id.* ¶ 13. The appellate court had held, "The criminal act of the defendant here of constructively possessing both the cannabis and the handguns, as the State alleges, cannot be divided into multiple distinct and overt acts." *People v. Hunter*, 2012 IL App (1st) 092681, ¶ 29. The supreme court agreed, stating that "[the] defendant simultaneously possessed the cannabis and two handguns." *Hunter*, 2013 IL 114100, ¶ 27. Therefore, the defendant "committed a single physical act within the meaning of the compulsory joinder statute." *Id.*

¶ 67 Here, the State initially charged the defendant (count I) with aggravated domestic battery based on the following acts: he repeatedly struck T.W. in the head with a rock and grabbed her around the neck, choking her with his hands. Counts III through VI (and their corresponding acts) were alleged as follows: count III–attempted aggravated criminal sexual assault (he hit T.W. on the top of the head with a rock and attempted to drag her against her will into a hot tub); count IV–attempted criminal sexual abuse (he hit T.W. on the top of the head with a rock and attempted to drag her against her will into a hot tub); count V–attempted aggravated criminal sexual abuse (he hit T.W. on the top of the head with a rock and attempted to drag her against her will into a hot tub); and count VI–attempted first-degree murder (he repeatedly struck T.W. in the head with a rock and grabbed her around the neck, choking her with his hands).

¶ 68 In count VI, the State alleged identical criminal acts as alleged in count I, *i.e.*, repeatedly striking T.W. in the head with a rock and choking her with his hands.

Therefore, count VI is "based on the same act" for purposes of the compulsory joinder rule.

¶ 69 Whether counts III, IV, and V are also based on the same act as count I is a closer call. However, we believe that they are, based on the way the State charged the offenses. Counts III, IV, and V allege that the defendant took a "substantial step" in committing three alleged sex offenses by hitting T.W. on top of the head with a rock and attempting to drag her against her will into a hot tub. The substantial step of hitting T.W. in the head with the rock was the identical act alleged in count I. In addition, the act of hitting T.W. in the head with a rock, by itself, constitutes a substantial step toward committing the crimes alleged in counts III, IV, and V because the act is " 'strongly corroborative of the actor's criminal purpose.' " *People v. Jiles*, 364 Ill. App. 3d 320, 333 (2006) (quoting Model Penal Code § 5.01(2), at 74 (1985)).

¶ 70 Counts I, III, IV, and V all allege the same act as a crucial part of the offense and therefore, are based, at least in part, on the exact same act, hitting with a rock. Although counts III, IV, and V also allege that the defendant attempted to drag T.W. into the hot tub against her will, the substantial step as alleged by the State in counts III, IV, and V first began when the defendant hit T.W. in the head with the rock, not when he attempted to drag her. Had the State alleged that the substantial step taken by the defendant in counts III, IV, and V began when he attempted to drag T.W. into the hot tub, as opposed to hitting her with a rock, our analysis might be different. However, it chose to charge the defendant with attempt by alleging that the substantial step began with the exact same act as alleged in count I.

¶ 71 For these reasons, we believe that the record establishes that the third element of compulsory joinder is met. Counts III through VI are "based on the same act," *i.e.*, hitting T.W. in the head with a rock, as the aggravated domestic battery charge for purposes of the compulsory joinder rule.

¶ 72 Whether the Multiple Charges Were Known to the Prosecutor When the Prosecution Began

¶ 73 Our analysis does not end with the third element of compulsory joinder, because the record must establish that all three elements are met in order for the defendant's argument to prevail. The first element of the compulsory joinder rule requires that the multiple charges must be known to the prosecutor when the prosecution began. If we cannot determine from the record whether the prosecution knew of counts III through VI when the prosecution began, then we cannot conclude that the counts were untimely filed. Therefore, we must analyze the record to determine what it reveals about the prosecution's "knowledge" when it filed count I.

¶ 74 In *People v. Luciano*, 2013 IL App (2d) 110792, ¶ 72, the court interpreted the "knowledge" requirement for compulsory joinder, concluding that " 'knowledge' provides a fairly high threshold to trigger compulsory joinder." *Id*. The court stated that the term "is related to the prosecutor's confidence that he or she can secure the defendant's conviction of the crime charged." *Id*. ¶ 74. In addition, the *Luciano* court held that "discretion *** should be considered when evaluating the State's knowledge of the evidence and facts for purposes of determining whether a later charge was subject to compulsory joinder with the original charge." *Id*. ¶ 75. The court concluded that

“knowledge” under the statute “means the conscious awareness of evidence that is sufficient to give the State a reasonable chance to secure a conviction.” *Id.* ¶ 78. The court added: “When the State has that awareness necessarily defies universal definition, and thus it must be determined on a case-by-case basis. Likewise, when the State has only a suspicion of the defendant’s involvement in an offense is a similarly fuzzy concept that must also be determined case by case.” *Id.*

¶ 75 *People v. Ursery*, 364 Ill. App. 3d 680 (2006), provides an example of where the court distinguished between the State having “knowledge” as opposed to having only a “suspicion” for purposes of applying the compulsory joinder rule. In that case, following the shooting death of the victim, the defendant was arrested and charged with aggravated discharge of a firearm and aggravated unlawful use of a weapon. *Id.* at 684-85. The State based these initial charges on the defendant’s statement that he shot the victim twice in self-defense. *Id.* at 864. However, at the time the State charged the defendant with the weapons offenses, it had knowledge of other evidence that indicated that the defendant shot at the victim multiple times, more than twice, and in rapid succession. *Id.* at 861-62. Approximately one month after the defendant’s arrest, while in the county jail, the defendant bragged to his cellmate that he used gloves in the deliberate shooting of the victim so he could not be tied to the crime. *Id.* at 685. With this additional information, the State charged the defendant with, and he was subsequently convicted of, murder. *Id.*

¶ 76 On appeal, the *Ursery* court addressed the issue of whether the State failed to timely prosecute the murder charge in the context of a claim of ineffective assistance of counsel. *Id.* at 688. This issue required the court to analyze the State’s knowledge of the

murder charge for purposes of applying the compulsory joinder statute. The court noted that at the time the State initially charged the defendant with the weapons offenses, it had enough evidence to suspect that he intended to kill the victim. *Id.* at 690. However, at that point, the State was not required to join the murder charge to the weapons charges because the State's suspicion was not knowledge for purposes of the statute. *Id.* The court held that the State had knowledge of the murder charge for purposes of the statute when it learned that the defendant had bragged to his cellmate about killing the victim and planning the offense to not leave evidence. *Id.* The court, therefore, concluded that the murder charge was not subject to compulsory joinder with the weapons charges and that the prosecution of the murder charge was not untimely or in violation of the defendant's speedy trial rights. *Id.*

¶ 77 In the present case, as noted above, the attempted murder charge (count VI) alleged the same act as count I, *i.e.*, that the defendant "repeatedly struck [T.W.] in the head with a rock and grabbed [T.W.] around the neck choking her with his hands." This charge, however, also alleged that the defendant committed the acts with the intent to commit murder. Count VI, therefore, includes an intent element that is not included in count I. The record does not establish whether the State became aware of any additional evidence of the defendant's intent to commit murder following the initial filing of the aggravated domestic battery charge. Therefore, the record does not establish the knowledge element of the compulsory joinder rule with respect to count VI.

¶ 78 In his brief, the defendant notes the police report that is attached to the presentencing report in the record was available to the State before the beginning of the

prosecution. He argues that the report establishes that the State was aware of an attempted murder charge from the beginning of the prosecution. Specifically, the police report includes statements T.W. gave to an investigating police officer at the hospital on the night of the attack. The report states that T.W. told the officer that the defendant attempted to talk her into getting into his parents' hot tub, but she refused. When she turned to walk away, the report continues, the defendant hit her in the head with a rock four to five times, got on top of her, and choked her with sufficient pressure to shut off her air supply. She tried to defend herself until the defendant's father came out of the back door to find out what all the noise was about.

¶ 79 The police report states that, at the hospital, T.W. told the investigating officer that she believed that the defendant planned on trying to drown her if she had gotten into the hot tub. She and her mother expressed their desire that the defendant be charged with attempted murder. According to the police report, the investigating officer told her that the charge would be up to the State's Attorney, but that they would discuss it.

¶ 80 We believe that whether the State had knowledge of an attempted murder charge at the time it began the prosecution in this case cannot be determined from the police report or any other part of the record before us. If the State did not learn of any additional evidence prior to filing the attempted murder charge, then, by necessity, it would have known of the charge at the time it filed the aggravated domestic battery charge. If so, the compulsory joinder rule applies, and the filing of the attempted murder charge was untimely under the speedy trial statute. However, if the State became aware of additional evidence relevant to the attempted murder charge after it filed count I, then an issue arises

concerning whether the State merely had suspicion of the attempted murder charge prior to acquiring this additional evidence or whether it, nonetheless, had knowledge of the attempted murder charge for compulsory joinder purposes prior to learning of the additional evidence.

¶ 81 As the court stated in *Luciano*, the answer to the question of when the State has awareness of the additional charges versus only a suspicion is a "fuzzy concept" that must be determined on a case-by-case basis. *Luciano*, 2013 IL App (2d) 110792, ¶ 78. Because of the context in which this issue has arisen in the present case, *i.e.*, for the first time on appeal, the record is insufficient to answer this question with respect to the attempted murder charge. Accordingly, we cannot determine, as the defendant maintains in his argument, that the attempted murder charge was untimely under the speedy trial statute.

¶ 82 Likewise, counts III, IV, and V alleged charges of attempted aggravated criminal sexual assault and abuse. They alleged that the defendant "performed a substantial step toward the commission" of those offenses "in that the defendant hit [T.W.] on top of the head with a rock and attempted to drag [T.W.] against her will into a hot tub" with the intent to commit the alleged sexual acts. Nothing in the police report indicates that the defendant attempted to drag T.W. into the hot tub against her will. The report stated that T.W. told the officer that the defendant attempted to *talk* her into the hot tub before attacking her. In addition, nothing in the police report indicates that the defendant had an intent to place his hands on T.W.'s breasts or genitalia or commit an act of sexual penetration during the attack.

¶ 83 Accordingly, nothing in the record establishes what the State knew about counts III, IV, and V when the prosecution began. We cannot determine from the record whether the State became aware of additional evidence relevant to the defendant's intent to commit the sex crimes or became aware of evidence that the defendant attempted to drag T.W. into the hot tub against her will after it filed count I. If so, depending on what that additional evidence is, counts III, IV, and V might not be subject to the compulsory joinder rule, and the defendant would have benefited from their dismissal in exchange for his waiver of his right to a jury trial. Alternatively, if the State did not become aware of any additional evidence relevant to counts III, IV, and V after the filing of count I, then the State cannot claim a lack of knowledge of counts III, IV, and V at the time it filed count I. The record is insufficient for us to make a determination with respect to the State's knowledge of these counts.

¶ 84 As noted above, the defendant has raised the issue concerning his waiver of his right to a jury trial and, in turn, application of the compulsory joinder statute, in the context of an ineffective assistance of counsel argument. In *People v. Veach*, 2017 IL 120649, ¶ 1, the supreme court recently addressed "a growing practice in the appellate court of declining to consider ineffective assistance of counsel claims on direct review." The supreme court rejected the idea that ineffective assistance of counsel claims are "better made" in collateral proceedings. *Id.* ¶ 39. Instead, the supreme court held that "ineffective assistance of counsel claims may sometimes be better suited to collateral proceedings but only when the record is incomplete or inadequate for resolving the

claim." *Id.* ¶ 46. The supreme court directed reviewing courts to "carefully consider each ineffective assistance of counsel claim on a case-by-case basis." *Id.* ¶ 48.

¶ 85 In the present case, for the reasons we have detailed above, we believe that the record is inadequate for us to resolve the defendant's ineffective assistance of counsel claim. Therefore, his claim cannot be addressed on direct review. However, even though we find that the defendant has, on this record, failed to prove ineffective assistance of counsel in conjunction with his waiver of his right to a jury trial, we note that the defendant may raise this issue under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)), which will allow "both [the] defendant and the State an opportunity to develop a factual record bearing precisely on the issue." (Internal quotation marks omitted.) *People v. Bew*, 228 Ill. 2d 122, 135 (2008).

¶ 86 The defendant also raises this issue under the plain error rule. However, as we stated at the beginning of our analysis above, before considering the defendant's claim as plain error, we must first determine whether any error occurred. *Henderson*, 2016 IL App (1st) 142259, ¶ 197. For the reasons we have stated, the record before us is insufficient for us to conclude that any error occurred, but the defendant has the opportunity to develop a factual record under the Post-Conviction Hearing Act.

¶ 87 II

¶ 88 Judicial Notice of Court File of the Civil Order of Protection Proceeding

¶ 89 The next issue the defendant raises on appeal is that the circuit court improperly took judicial notice of the entire court file of the civil case in which T.W. obtained an order of protection against him because of the attack. He asks us to review this issue

under the first prong of the plain error rule, which allows review of errors not previously challenged when the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant. *Wilmington*, 2013 IL 112938, ¶ 31. Alternatively, he argues that his attorney's failure to object to the judicial notice in the proceedings below amounted to ineffective assistance of counsel.

¶ 90 In an ineffective assistance of counsel claim and under the first prong of the plain error rule, the defendant must establish prejudice. *People v. White*, 2011 IL 109689, ¶ 133 (ineffective assistance of counsel and the first prong of plain error review share the requirement that the defendant show that he was prejudiced). Here, as explained in detail below, the defendant cannot establish prejudice from the circuit court taking judicial notice of the civil order of protection case. Because the defendant cannot establish prejudice, we need not decide whether an error occurred when the court took judicial notice of the file. *Id.* ¶ 134 ("Even if we were to assume, *arguendo*, there was error in the admission of evidence ***, the evidence against [the] defendant is such that he cannot show prejudice for purposes of either analysis.").

¶ 91 As we stated above, much of the evidence presented at the bench trial focused on the nature of the defendant and T.W.'s relationship. The defendant based his defense, in large part, on the assertion that his relationship with T.W. was merely a brief, casual, sexual-based relationship that, he asserted, was not sufficiently intimate to sustain a conviction of aggravated domestic battery.

¶ 92 During the bench trial, the first mention of the civil order of protection case came during the defendant's cross-examination of T.W.; his attorney asked her about the

verified petition for order of protection that she filed in the civil case. The attorney questioned T.W. about what she wrote in her petition, eliciting testimony that she wrote that her relationship with the defendant was mostly a sexual-based relationship. The defense attorney showed T.W. a copy of her petition to refresh her recollection during his cross-examination. On re-direct, T.W. testified that she first got an emergency order of protection against the defendant and later got a plenary order of protection and that the defendant was in the courtroom when she got the plenary order. On re-cross, the defendant's attorney asked T.W. whether she testified at the hearing on the plenary order, and she responded that she answered questions asked by the trial judge.

¶ 93 At the conclusion of its case-in-chief, the State asked the court to take judicial notice of the order of protection case as follows:

> "I would just ask that the Court take judicial notice of the complete file of 13-OP-98, which involved the Defendant, David Wyckoff. The Petitioner in that case was our last witness, [T.W.]. If the Court could take judicial notice of the orders entered by the Court, especially the Plenary Order of Protection and any accompanying docket entries made by the different presiding judges in that case."

¶ 94 In response, the court stated that it had the file and that it would "take judicial notice of that." At the conclusion of the State's case-in-chief, the defendant made an oral motion for a finding in his favor, noting that the State was required to prove that T.W. was a "family or household member" of his. He emphasized that T.W. wrote in her petition for the order of protection that her relationship with the defendant was mostly sexual-based and that she and the defendant rarely talked or saw each other.

¶ 95 In response, the State noted, in part, that when T.W. obtained the order of protection, she had to present evidence that they were ex-boyfriend and ex-girlfriend, that the defendant did not really contest the order of protection, and that the court found that the required relationship existed.

¶ 96 In denying the defendant's oral motion for a finding in his favor at the close of the State's case-in-chief, the court relied on T.W.'s testimony at the trial concerning the nature of the relationship. The circuit court then mentioned the civil order of protection case as follows:

> "I do note 13-OP-98, which I guess I want to address at this point. The statements referred to by [the defendant's attorney] and acknowledged by the victim is [*sic*] in the last paragraph of her verified Petition for an Emergency Order of Protection. It is all lumped into one particular paragraph that is distinguished from the rest of the statement which describes the incident that she is complaining of and was present in front of the Court on that date. And for the record, this was September 1, 2013.
>
> The language quoted here by [the defendant's attorney] begins, 'The relationship lasted about a month and a half at the end of 2012 beginning of 2013. We rarely talked or saw each other. It was a mostly sexual[-]based relationship. I had not spoken to [the defendant] in quite a few months. He randomly contacted me at the beginning of August. I hadn't spoke to him for two weeks before the incident. ***'

The comments made by [T.W.] in that paragraph seems to confuse and overlap the definition of the relationship and the period of time that had passed since the relationship had terminated. The case law is very clear that it does not matter if at the time of the alleged incident whether or not they were dating. It only requires that there had been a relationship. It is clear that at the time of the alleged incident, the parties were not dating. They had broke up for quite a period of time."

¶ 97 At the end of the bench trial, during closing argument, the prosecution referred to the order of protection case as follows:

> "And the final thing that kind of holds up and supports the State's argument really is the Order of Protection entered by the Court back in September. [The defendant] was a party to that proceeding. At that point the Court found them to be ex-boyfriend-ex-girlfriend when granting the Plenary Order of Protection.
>
> Again I know there is no collateral estoppel issue here, but I think the fact that there was an OP, both parties were present. It doesn't appear like there was a whole lot of argument over the Plenary Order of Protection."

¶ 98 At the conclusion of the bench trial, the circuit court found the defendant guilty of aggravated domestic battery. In announcing its ruling, the court stated that it had considered the evidence presented at the trial, arguments of counsel, and the order of protection case. The court described all of the evidence presented at the trial which supported its finding that the defendant and T.W. had been in a dating relationship that, in turn, supported a conviction of aggravated domestic battery. In its ruling, the court

primarily discussed T.W.'s and the defendant's testimony. After discussing the trial testimony, as an afterthought, the circuit court discussed the order of protection case as follows:

> "Therefore, I am finding–oh, and I also want to make for the record in addition to all the evidence that I've found here today and made of record, in 13-OP-98, I have had a Petition for Emergency Order of Protection where by a judge, Judge Sanders, specifically found that based on that verified petition that a relationship existed between these parties and that that was a relationship that was protected by the Illinois Domestic Violence Act and then a second judge, Judge, I believe it was Judge Eder, found on a date after that, in fact, a relationship did exist between the two of you that was found on September 23, 2013, when [the defendant] was present in the courtroom. And according to the docket entry in that case which again I took judicial notice had no objection to the entry of an Illinois Domestic Violence Act."

¶ 99 Turning to the issue of whether the defendant suffered any prejudice from the judicial notice, we note that, pursuant to sections 12-3.2 and 12-3.3 of the Criminal Code, the charge of aggravated domestic battery required the State to prove that the defendant caused great bodily harm to a "family or household member." 720 ILCS 5/12-3.2, 12-3.3 (West 2012). The Criminal Code defines the terms "family or household member" to include "persons who have or have had a dating or engagement relationship." 720 ILCS 5/12-0.1 (West 2012). The definition states, "neither a casual acquaintanceship nor

ordinary fraternization between 2 individuals in business or social contexts shall be deemed to constitute a dating relationship." *Id*.

¶ 100 In *People v. Irvine*, 379 Ill. App. 3d 116, 123 (2008), the court held that the evidence was sufficient to establish a dating relationship where the victim testified that she considered herself and the defendant to be ex-boyfriend and ex-girlfriend, that their relationship lasted a month and a half, and that they had a sexual relationship up to and including the day of the altercation. On appeal, the court rejected the defendant's argument that the evidence did not establish that the relationship was either serious enough or intimate enough to constitute a serious courtship. *Id*. The court stated, "six weeks of dating coupled with sexual intercourse is neither a casual acquaintanceship nor ordinary fraternization between two individuals in a business or a social context." *Id*. at 125.

¶ 101 In the present case, in making its finding that a dating relationship existed, the circuit court extensively discussed the evidence presented at the trial. The court emphasized that the two most important witnesses were T.W. and the defendant. The defendant's own testimony established that he knew who T.W. was from high school, although he had never socialized with her during high school. Sometime after high school, he sought her companionship by acquiring her telephone number from "a buddy." He admitted to placing an unsolicited call to T.W., and months later, she agreed to meet him. At the time, the defendant was not seeing another girl, and T.W. had broken up with her previous boyfriend.

¶ 102 T.W. and the defendant's relationship was short term, approximately 30 days. It involved sexual relations beginning with their first meeting and, by the defendant's admission, on at least two additional occasions in the 30-day period. In addition, the defendant admitted that T.W. was at his parents' house on at least two other occasions when other friends were present. The circuit court observed, "so there was a relationship where [they] were together with friends in the home." Although the defendant attempted to describe his relationship with T.W. as a casual one, the court found it significant that, on the night of the battery, the defendant admitted that he sought out T.W. for intimate conversation when he was having emotional difficulty about the death of his sister. Also, the court noted, "The only explanation other than the K-2 that you've given here for me today for you becoming so upset and distraught on that evening could be that you had romantic or feelings for [T.W.] that led directly to your actions that you took."

¶ 103 Therefore, under the record before us, a trier of fact could believe the defendant's testimony and still find that his relationship with T.W., although short in duration, was more than a casual acquaintanceship or ordinary fraternization between two individuals in social contexts. Furthermore, in making its finding, the circuit court found T.W.'s testimony to be credible, particularly when she testified that they both said "I love you" to each other. Under these facts, both the defendant's and T.W.'s testimony overwhelmingly established a relationship of the type "in which problems of abuse might arise." *People v. Taylor*, 381 Ill. App. 3d 251, 259 (2008).

¶ 104 Although the circuit court discussed the civil order of protection case at the end of its ruling, the court's reason for finding a dating relationship existed was the testimony of

T.W. and the defendant, who, the court found, were "the two most important witnesses." The court mentioned the order of protection case only as an afterthought after thoroughly discussing the trial testimony that supported its findings. Therefore, based on record before us, the circuit court's judicial notice of the order of protection case file was not prejudicial. Because the judicial notice was not prejudicial, we reject the defendant's argument under the plain error rule and under an ineffective assistance of counsel theory.

¶ 105 CONCLUSION

¶ 106 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 107 Affirmed.