2018 IL App (2d) 160789-U
No. 2-16-0789
Order filed October 26, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES BELL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 14-CF-1216 Honorable David P. Kliment, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in admitting expert testimony without explicitly qualifying the witness as an expert, as the witness testified to his knowledge, skill, and experience that qualified him as such, and in any event any error was harmless, as the court implicitly qualified the witness and the testimony did not contribute to defendant's conviction.

¶ 2 Following a bench trial, defendant, James Bell, was convicted of one count of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2014)) and two counts of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2014)). The two counts of domestic battery merged with the aggravated domestic battery, and defendant was ultimately sentenced to seven years'

imprisonment. In this timely appeal, defendant claims that he was denied a fair trial when the only evidence concerning the recency of the victim's injuries came from a radiologist whom the court never qualified as an expert witness. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The State alleged in the aggravated-domestic-battery count that defendant "knowingly caused great bodily harm to Vicki Bell, a family or household member of the defendant, in that he pushed Vicki Bell causing her to fall which fractured her pelvis."

¶ 5 Evidence presented at trial revealed that Vicki, defendant's long-time girlfriend, lived with him in an apartment in Elgin. Sharing the apartment with them was Shawn Baldwin, whom defendant considered a son, and Demetrius Bell, Vicki's son.

¶ 6 At around 3:50 p.m. on June 12, 2014, Vicki returned home from work and saw defendant sitting outside the apartment building with three other people. The group, which included Baldwin and Christina Ripke, a woman Baldwin was seeing, were drinking. According to defendant and Ripke, Vicki saw them and left. Vicki testified that she went into the apartment but left a short time later to take a girlfriend shopping. While Vicki was out, she called Baldwin's wife to tell her that Baldwin was with Ripke.

¶ 7 When Vicki returned home, defendant confronted her inside the apartment about calling Baldwin's wife. Vicki admitted that she had made the call, and defendant became angry. Ripke, who had several felony convictions, heard the couple arguing and went inside. Defendant and Vicki continued to argue, and Vicki went to the back bedroom. Ripke, who left at that point, never saw defendant push, strike, choke, or throw Vicki. Once outside, Ripke did not hear any more arguing.

¶ 8 Vicki denied that Ripke was inside the apartment. She stated that defendant, who was in the bathroom with her, pushed her into the bathtub, slapped her across the face twice, and told her to leave. When Vicki fell into the bathtub, part of the shower curtain was pulled from the shower-curtain rod, and several rings from which the shower curtain had hung were broken. Photographs admitted at trial showed this damage.

¶ 9 After Vicki got out of the bathtub, she went to the dining room to retrieve her purse. Defendant came up behind her, put her in a choke hold, dragged her to the couch, and threw her down. Defendant then placed his hands on her throat, told her that he was going to kill her, and slapped her a few times. Baldwin, who did not testify, came inside the apartment and pulled defendant off of Vicki. Vicki got up to leave, and defendant chased her around the apartment, grabbed her by the hair, and "slung" her backward across the kitchen. Vicki hit her head on the dishwasher and landed on the floor.

¶ 10 Vicki, who was in great pain, testified that she could not move. She stated that the left side of her pelvis hurt. Baldwin picked Vicki up and eventually carried her to the back bedroom.

¶ 11 Defendant, who, at six feet six inches tall and weighing 320 pounds, was much larger than Vicki, admitted at an earlier court proceeding and at trial that he pushed Vicki. However, defendant claimed that Vicki did not fall because of the push; Vicki told defendant after he pushed her that she was leaving and defendant encouraged her to do so. Defendant stated that Vicki left the apartment again and returned perhaps one to two hours later.

¶ 12 When the police arrived, Baldwin and defendant were "[g]enerally uncooperative." After defendant, who believed that Vicki was not at home, told the police that Vicki was not there, they phoned Vicki and learned that she was in the bedroom. Emergency technicians carried Vicki out of the apartment on a stretcher.

¶ 13 At the hospital, Dr. Soriya Pok-Todd, an emergency-room doctor, examined Vicki. Vicki, who told Pok-Todd that she had been thrown into a cabinet, complained of left hip and groin pain, and Pok-Todd observed that Vicki could not move. Pok-Todd ordered an X ray and a CT (computed tomography) scan. Pok-Todd's review of the results of those procedures revealed that Vicki had superior and inferior rami fractures in addition to a sacral fracture. Defendant objected to this testimony, claiming that it lacked a proper foundation because Pok-Todd did not indicate what she observed, when she observed it, and when she reviewed the X ray and CT scan. The trial court overruled the objection. Photographs taken of Vicki at the hospital showed redness around her neck and bruising on her arms.

¶ 14 The State called Dr. Brian Schwartz as a witness. Schwartz testified that he received his bachelor's degree in zoology from the University of Wisconsin; obtained his medical degree from Chicago Medical School; and completed a residency program in diagnostic radiology and a post-residency program in interventional radiology at the University of Illinois. In June 2014, he worked for Associated Imaging Specialists, which provided radiology services for the hospital where Vicki was taken.

¶ 15 When the State asked Schwartz if he reviewed Vicki's X ray, defendant objected for a lack of foundation. The court overruled the objection. The State then asked Schwartz what he observed on the X ray of Vicki's femur, left hip, and pelvis; defendant raised the same objection; and the court again overruled that objection. Schwartz continued that the film showed fractures to Vicki's superior and inferior rami. Schwartz described the "bones" as "severely broken with multiple fragments."

¶ 16 Schwartz also testified that the CT scan showed the same fractures and swelling in the soft tissue along the left side of Vicki's hip and pelvis, in addition to a small fracture of the sacrum, which is the bone in the back of the pelvis. The following exchange was then had:

> "[ASSISTANT STATE'S ATTORNEY]: Based on your review of the CT scan and the X ray, would you say that these injuries to [Vicki's] pelvis that you observed were chronic or acute?
>
> [DEFENSE COUNSEL]: Objection, your Honor, as to foundation.
>
> THE COURT: Overruled."

Schwartz continued that the fractures were acute, meaning new fractures, and that the CT scan clearly showed this. Supporting his opinion was the fact that blood and swelling, which are not observed with healing injuries, were seen around the fractures. On cross-examination, Schwartz was not asked about his credentials.

¶ 17 During closing argument, the State mentioned that Schwartz testified that Vicki's injuries were "fresh." Defendant did not comment on Schwartz's qualifications or his conclusion that Vicki's fractures were new. In rebuttal, the State argued that the medical testimony corroborated Vicki's.

¶ 18 In finding defendant guilty, the court observed that the photographs corroborated Vicki's testimony that defendant pushed her into the bathtub and grabbed her around her neck. The court found defendant incredible, noting that "the only thing that [defendant] said that I believe is that he was there." Although the court mentioned that Vicki suffered fractures because of defendant's conduct, it never indicated that it considered Schwartz's testimony with regard to the recency of Vicki's fractures.

¶ 19 Defendant filed a posttrial motion, arguing, among other things, that the court erred in allowing into evidence over objection Schwartz's medical testimony, as the State failed to provide a proper foundation and properly qualify Schwartz as an expert. The court denied the motion. In doing so, the court commented that "[it] believed both [doctors] were competent to testify to the matters that they testified to."

¶ 20 II. ANALYSIS

¶ 21 At issue in this appeal is whether defendant was denied a fair trial when the only evidence concerning the recency of the victim's injuries came from Schwartz, whom the court never qualified as an expert witness. Before addressing that issue, we consider the State's claim that defendant has forfeited review of the issue. To preserve an issue for review, a defendant must both object at trial and include the issue in a written posttrial motion. *People v. Enoch*, 122 Ill.2d 176, 186 (1988). Although the State essentially agrees that defendant raised the alleged error in his posttrial motion, it claims that his objection at trial to a lack of foundation was insufficient. That is, the State claims that, instead of objecting to a lack of foundation, defendant should have alerted the court to the fact that he contested Schwartz's qualifications to render his opinion. Our supreme court has recognized that a lack of foundation is the proper objection to raise when a party challenges an expert witness's qualifications to render an opinion. See *People v. Bush*, 214 Ill. 2d 318, 335 (2005). Accordingly, we find the State's forfeiture argument unfounded. We reach this conclusion despite the fact that, when defendant objected for a lack of foundation during Pok-Todd's testimony, defendant elaborated that Pok-Todd failed to indicate what she observed, when she observed it, and when she reviewed the X ray and CT scan.

¶ 22 Turning to the merits, Illinois Rule of Evidence 702 (eff. Jan. 1, 2011) provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the

evidence or to determine a fact in issue, a witness *qualified as an expert* by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." (Emphasis added.) The party seeking to have an expert testify bears the burden of establishing the expert's qualifications to render an opinion. *People v. Park*, 72 Ill. 2d 203, 209 (1978). "The decision as to whether an expert scientific witness is qualified to testify in a subject area *** remains in the sound discretion of the trial court." *In re Commitment of Simons,* 213 Ill. 2d 523, 530-31 (2004). The trial court "abuses its discretion when its ruling 'is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶ 23 (quoting *People v. Caffey*, 205 Ill. 2d 52, 89 (2001)).

¶ 23 Defendant contends that lacking in this case, and necessary for the admission of expert testimony, was the State's specific verbal request that Schwartz be considered an expert in the field of radiology. Although it is true that, "[b]efore rendering an expert opinion, a witness must be qualified as an expert by the court" (*O'Brien v. Meyer*, 196 Ill. App. 3d 457, 461 (1989)), we cannot conclude that that requires an articulated request that the witness be considered an expert in a particular field. Not only does the plain language of Rule 702, to which we must defer (see *Lambert v. Coonrod*, 2012 IL App (4th) 110518, ¶¶ 18, 25), not contain such a requirement, but the evidence revealed that Schwartz was qualified to give his opinion on what the X ray and CT scan showed. That is, Schwartz testified to his science background, including where he obtained his medical degree and completed specialized training in radiology, before he gave his detailed interpretation of the X ray and CT scan. Given that Schwartz's education, training, and current employment qualified him as an expert in radiology, the court did not err in admitting his testimony.

¶ 24 Illustrative of this point is *People v. Novak*, 163 Ill. 2d 93 (1994), *abrogated on other grounds by People v. Kolton*, 219 Ill. 2d 353 (2006). There, the defendant, a baseball coach, sexually assaulted a 10-year-old boy under the guise that the defendant was improving the boy's baseball skills. *Id.* at 97. At trial, the State called two witnesses who "were not being called as experts, but as lay witnesses 'who have a familiarity in the field of strength training and exercising.' " *Id.* at 99. The trial court admitted these witnesses' testimony, which the defendant claimed on appeal was erroneous. *Id.* at 98. Our supreme court determined that, while the witnesses should not have been allowed to testify as lay witnesses, they were qualified to render expert opinions, even though the State never asked that the witnesses be declared experts. See *id.* at 104.

¶ 25 Here, as in *Novak*, although Schwartz was never officially qualified as an expert by the court, as the State never verbalized such a request, he nonetheless was qualified to render his opinion concerning what Vicki's X ray and CT scan showed.

¶ 26 Moreover, even if the court erred in admitting the testimony without declaring Schwartz an expert in radiology, the error was harmless. When a court makes an evidentiary error, the error will not support reversal if it is harmless beyond a reasonable doubt. See *People v. Boston*, 2016 IL App (1st) 133497, ¶ 57. There are three approaches to determining whether an error is harmless, two of which are whether the error contributed to the defendant's conviction and whether the other evidence in the case overwhelmingly supported the defendant's conviction. *People v. Lerma*, 2016 IL 118496, ¶ 33.

¶ 27 Here, the error was harmless because it did not contribute to defendant's conviction. As noted, defendant was convicted following a bench trial, not a jury trial. When defendant objected for a lack of foundation, meaning, as defendant has argued, that the State had not properly

qualified Schwartz as an expert, the court overruled the objection, thus implicitly finding that Schwartz was properly qualified to give an expert opinion. In closing argument, although the State mentioned the "fresh[ness]" of Vicki's injuries, it did not rely on that fact to any great extent. When the court found defendant guilty of aggravated domestic battery in that he knowingly pushed Vicki, causing her to fracture her pelvis, it did not rely on any opinion Schwartz gave at trial. Further, the other evidence overwhelmingly supported defendant's conviction. Defendant and Vicki were the only two people who testified about what transpired between the two of them that night. The court found defendant completely incredible, and as to Vicki, the court found that her version of events were corroborated by photographs and Pok-Todd's medical testimony.

¶ 28 Defendant contends that the evidence, aside from Schwartz's testimony, was insufficient to prove him guilty, because the other evidence "only show[ed] that [Vicki] incurred serious injuries" and "d[id] not establish when or how those injuries occurred, or more specifically, that the injuries were caused by defendant." We disagree. The evidence revealed that defendant, who was much larger than Vicki, pushed her, a fact to which defendant admitted. Later that night, Vicki went to the hospital, where Pok-Todd, who examined her, indicated that Vicki could not move and suffered several fractures. To say that something or someone other than defendant harmed Vicki would be sheer speculation that we will not accept. *People v. Walker*, 2016 IL App (2d) 140566, ¶ 12 ("It is possible, of course, that the telephone was used without defendant's knowledge or that defendant provided the telephone to a third party for an innocent purpose. The trier of fact was not obligated, however, to elevate the possibility to a reasonable doubt."). We also note that Schwartz's testimony did not establish when precisely Vicki was injured or whether defendant caused her injuries. Thus, the admission of that testimony was harmless.

¶ 29 All of that said, we recognize that it is neither difficult nor overly burdensome to require the party seeking to admit expert testimony to ask the court to have the witness qualified as an expert in a particular field. However, requiring a party to make a specific articulation of that request would improperly put form over substance in a case like this, where a radiologist was asked to render an opinion on exactly what he was trained to interpret, *i.e.*, X rays and CT scans.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the judgment of the circuit court of Kane County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 32 Affirmed.