2019 IL App (2d) 160854-U
No. 2-16-0854
Order filed August 26, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN S. KRUEGER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 15-DV-187 Honorable Jeffrey S. MacKay, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court properly denied defendant's motion to suppress his statements, as defendant was not in custody when he made them; (2) defendant showed no plain error in the trial court's exclusion of certain impeachment evidence: as the evidence would not have affected the outcome, any error was harmless and thus was not reversible.

¶ 2 After a bench trial, defendant, John S. Krueger, was convicted of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2014)) and aggravated assault (*id.* § 12-2(c)(1)) and sentenced to a year of probation on each offense. On appeal, he argues that (1) the trial court erred in denying his motion to quash his arrest and suppress statements that he made to police officers who questioned

him at his home and (2) the court improperly restricted his impeachment of the complaining witness. We affirm.

¶ 3 The charges against defendant were based on his alleged attack on Lisa Martinez in their Carol Stream apartment on the evening of February 10, 2015. On February 11, 2015, three police officers went to the apartment and spoke to him. Defendant's motion to quash and suppress contended that the questioning violated his *Miranda* rights, as he had been in custody at the time and had not been given the required warnings.

¶ 4 At the hearing on the motion, the first witness, Officer Steve Cadle, testified on direct examination as follows. On the morning of February 11, 2015, at the police station, Martinez told him that she and defendant had had an altercation the previous evening. She asked for help in retrieving possessions from the apartment. She and Cadle drove there separately. In the building's parking lot, Cadle met Officers Petragallo and Loverde. All three were in full uniform. Martinez told them that she did not see defendant's car and thus did not believe that he was home.

¶ 5 Cadle testified that Martinez and the officers entered the building. Martinez waited in the foyer as the officers approached her first-floor apartment and knocked on the door. After two minutes, there had been no response, so at the officers' request, Martinez unlocked the door. The officers entered as she remained outside. As Cadle walked down the entryway leading to the living room, he saw defendant coming out of a hallway about 10 feet away.

¶ 6 Cadle testified that he asked defendant whether he could talk to him about the previous evening's incident. Defendant said yes. He sat down on an ottoman. Cadle stood in the middle of the living room about six to eight feet away. The other officers stood near Cadle. Almost all the questioning took place in the living room. Cadle and defendant went into the kitchen and soon returned to the living room, where Cadle took defendant into custody.

¶ 7 Cadle testified that the entire encounter with defendant lasted about 15 minutes and that he did most of the questioning. He never gave defendant *Miranda* warnings. He never told him either that he was free to leave or that he was not free to leave.

¶ 8 Cadle testified on cross-examination as follows. At first, defendant told the officers that he "didn't lay a finger" on Martinez. Cadle agreed with defense counsel that the officers kept "asking [defendant] the same questions over and over again." Defendant's story changed as time went on. Cadle could not recall talking to defendant about whether he was on any prescription medicines, but defendant did disclose "some type of an anxiety disorder."

¶ 9 Cadle did not recall when the officers arrived at the apartment, but his report stated that defendant was taken to the station at 12:16 p.m. Cadle never told defendant that he did not have to answer any of the questions and never told him that he could talk to an attorney or have one present. Defendant was not read his *Miranda* rights. He said nothing after he was handcuffed.

¶ 10 On redirect, Cadle testified that he did not tell defendant to sit on the ottoman; defendant sat there of his own choosing. Cadle was closer to defendant than were the other officers. The officers never stood over defendant or raised their voices while questioning him.

¶ 11 Officer Tony Petragallo testified on direct examination as follows. When the officers entered the apartment, defendant appeared about 18 feet away. After they asked to talk with him, defendant sat down on a couch about 10 feet from the door. Petragallo stood to the left of the other officers, about six to eight feet from defendant. About 20 minutes elapsed from questioning to arrest.

¶ 12 Petragallo testified on cross-examination that he questioned defendant briefly, but not about the incident. He saw that defendant was upset because Martinez was expecting a baby soon, and he tried to calm defendant down. Loverde also did some questioning. Petragallo never

informed defendant of his rights, such as the right to an attorney. He did not hear Loverde do so. Petragallo was not sure when the officers arrived at the apartment, but he agreed that they handcuffed and transported defendant at 12:16 p.m. Asked how long they had spent in the apartment, Petragallo said about 20 minutes.

¶ 13 The State rested. Defendant testified on direct examination as follows. He was 22 years old. Before February 11, 2015, he had never been arrested or ticketed by the police. That day, he was let off work at 10 a.m. because he was having an anxiety attack. He arrived home about 10:30. About 35 minutes later, he heard knocking on the door and approached. The door opened. Cadle asked him whether he was John Krueger; he said yes. The officers entered the living room. Defendant sat on a small bench that was part of a chair. Cadle stood to his left, Petragallo to his right, and Loverde between the other officers. Cadle was closest to the entry door. He was within arm's reach of defendant; Loverede was about 10 feet away; and Petragallo was about 6 feet away.

¶ 14 Defendant testified that Cadle started the questioning. He estimated that Cadle's questioning took a total of 45 minutes. Cadle asked defendant what had happened. Defendant answered, but Cadle kept asking him the same question "at least 100 times." Cadle also asked defendant about his emotional state, because he could see that defendant was getting "anxious, really upset." After some of defendant's answers, Cadle asked him "[A]re you sure?" and noted that he seemed upset and fidgety. Cadle and Loverde asked defendant whether he took anxiety medicine, and he said that he did. Petragallo questioned defendant for about 5 or 10 minutes, asking the same questions as had Cadle. Loverde asked defendant about his emotional state and then questioned him for a few minutes more.

¶ 15 Defendant testified that the officers never offered to stop the questioning, even after noting his anxiety problem. Cadle never told defendant that he had a right to stop the questioning. Defendant did not feel that he did, as he felt "trapped" because the officers were surrounding him and he was getting questioned by all of them.

¶ 16 Defendant testified that, after questioning him in the living room, the officers asked him to go to the kitchen and demonstrate what had happened the previous evening. The officers stood around him. He lacked access to any exit from the apartment. The officers and defendant returned to the living room, where he sat down and they questioned him for at least 10 minutes.

¶ 17 Defendant testified on cross-examination as follows. After the door opened, Cadle asked him whether the officers could come in and talk with him. He said yes. When he sat down, Cadle stood between him and the front door. Although Cadle's questioning felt as though it lasted an hour, defendant conceded that it lasted either "roughly" 30 to 35 minutes or "a little bit longer." During the questioning, neither Cadle nor Petragallo ever raised his voice and Loverde raised her voice slightly once.

¶ 18 Defendant rested. After hearing arguments, the court stated as follows. The witnesses had all been estimating the length of the questioning. But even accepting defendant's estimate of 35 minutes, this was not "a horribly long time to interview someone in their own apartment." The officers had all been armed, but that is customary for patrol officers and not inherently coercive. Here, the weapons were never displayed. The officers did not physically touch defendant and, with one brief exception, they never raised their voices. Defendant did suffer from an anxiety disorder, but without "some expert testimony" the court could not say that it was so severe that it made him unable to tell the officers to leave or discontinue the interview.

¶ 19 The court noted that defendant had never been told of his rights. He had, however, agreed to let the officers into the apartment and ask him about the alleged incident. At that point, nothing the officers had done was so coercive as to imply to defendant that he had no choice but to talk to them. Defendant was interviewed for no more than 35 minutes in "the comfortable and well-known surroundings of his own apartment," which was very different from the police station.

¶ 20 The court concluded:

> "[T]aking all of the circumstances together—the non-display of a weapon, the no physical touching, the use of a commanding tone that was not employed in this particular case, the threatening manner of the police officers—I don't believe that any of that, even taken together, would be of such a degree that the defendant's will would be overborne. And therefore I don't find that he was in custody for purposes of Miranda."

¶ 21 After the court denied his motion, the cause proceeded to a bench trial. The State first called Martinez, who testified on direct examination as follows. On February 10, 2015, she had been dating defendant for about a year. She was living with her son and defendant and was eight months pregnant. At about 9 p.m., she and defendant had an argument. She went to take a shower, leaving her cell phone charging in the bedroom. When she finished, she returned to the bedroom. Defendant complained that she had scheduled an appointment with her therapist instead of just talking to him. She told him to go into the other room. He did.

¶ 22 Martinez testified further that she started packing some things for a visit to her parents that night. Defendant returned, grabbed her phone, and went into the hallway. She went there and tried to take the phone back, but he held it out of her reach. Martinez gave up and turned around to return to the bedroom. At that point, defendant pushed her, and she landed flat on her stomach. She got up and said that she was going into the bedroom because he was scaring her. Defendant

replied, " 'You want to see scary,' " and he went into the kitchen and took out a steak knife. He held the knife about two inches from her face and asked her, " 'Is this scary enough?' "

¶ 23 Martinez testified that after the confrontation she entered her son's room, packed some of his things, woke him, and left in a hurry for her parents' home. The first thing the next morning, about 10 a.m., she went to the police station.

¶ 24 Martinez testified that on January 27, 2015, when she and defendant were residing in his father's home, they had an argument. Martinez went into her son's room and sat on the floor; defendant followed her in and insisted on talking to her. She asked him to leave. He climbed onto her and lay across her so that she felt that she was suffocating. Eventually he got off her. She got up and took her son to leave the room. Defendant put his hands around her neck, choking her and twisting her neck. Martinez and defendant moved into their apartment during the first week in February 2015 and had another argument. She went to her son's room. He followed her and refused to leave. He kneed her in the stomach and punched her in the nose. Martinez did not report either of these incidents to the police. She was too scared: defendant had told her that, if she told anyone or went to the police, he would kill her and her son.

¶ 25 Defendant's attorney asked Martinez whether, before she started dating defendant, she had been married to a man named Gustavo. The State objected that the question was irrelevant. Defendant responded that it went to Martinez's motive to lie; he intended to elicit that before Martinez started dating defendant she had divorced Gustavo and that shortly after February 11, 2015, she remarried Gustavo. The court sustained the objection, stating that Martinez's prior relationship with Gustavo was not relevant to her relationship with defendant or her credibility.

¶ 26 The cross-examination continued as follows. On February 11, 2015, Martinez never told the police that defendant had threatened to kill her if she reported the earlier attacks. The evening

before, after defendant attacked her, she did not call the police; defendant had taken her cell phone. She did not drive to the police station but instead went to her mother's house.

¶ 27 Martinez testified that, even though defendant had attacked her on January 27, 2015, she moved in with him a few days later. On February 11, she texted him several times that she did not want him to get in trouble and wanted to drop the charges. At the station, she told the police that defendant had pushed her and then held the knife to her, not that he had pulled out the knife first and then pushed her.

¶ 28 Defendant asked Martinez whether, sometime after February 10, 2015, she had the judgment dissolving her marriage vacated and remarried her former husband. The State objected, and the court sustained the objection.

¶ 29 Martinez testified on redirect that she moved in with defendant early in February because she was scared of defendant and did not feel that she had any other choice. At her mother's house, she did not call the police; she did not know what to do and just wanted to rest. The next morning, she went to the police.

¶ 30 Cadle testified on direct examination as follows. On February 11, 2015, Martinez spoke to him. She was accompanied by her mother and was upset and emotional. Martinez wanted to report the incident and asked about getting an order of protection. Cadle drove to defendant's apartment and spoke to him. At first, defendant said that he had been in a verbal argument with Martinez, but he denied that it was at all physical and also denied that he had had a knife at the time. Later, however, he admitted having pushed Martinez to the floor and having held a knife, but he said that he had the knife only because he was making a sandwich.

¶ 31 On cross-examination, defendant's attorney asked Cadle, "And when you were speaking with [defendant], he wasn't free to leave, right?" Cadle responded, "At that time, no." He then

testified that he had not read defendant his *Miranda* rights. Defendant's attorney then made an oral motion to suppress defendant's statements to the police. The court pointed out that it had already heard a motion to suppress and had ruled that the statements were admissible. Defendant's attorney, who was not the attorney who had represented him on the motion, apologized and continued the cross-examination. Cadle testified that defendant had been compliant during the questioning and that the police did not ask him to make a written statement.

¶ 32 The State rested. Defendant testified on direct examination as follows. On February 10, 2015, he came home at about 6 p.m. At 8:30 or 9, shortly after Martinez had arrived and as she was putting her son to bed, defendant was in the kitchen, making a sandwich for lunch the next day. He was using a butter knife. Defendant finished and started watching television. Martinez took a shower and went to the bedroom. Defendant returned to the kitchen to make another sandwich, because it was late and he was hungry. Martinez came in and said that she was going to her mother's house that night. They got into an argument over paying for their new TV. Martinez became angry and returned to the bedroom to talk on her phone to her mother. Defendant never hit or pushed her. He never took her phone.

¶ 33 Defendant testified that on February 11, 2015, he was ill at work and left early. He got home about 11 and was by himself. The officers arrived and asked to talk to him. They questioned him and put him under arrest. At the time, he was taking anti-anxiety medicine because of his severe panic disorder.

¶ 34 Defendant testified on cross-examination that he did not tell Cadle that, when Martinez got close to him, he pushed her. He did tell Cadle that he was making a sandwich while Martinez was in the shower but also made another one afterward.

¶ 35 In finding defendant guilty of the charges, the judge explained as follows. Cadle had testified that when Martinez spoke to him she was upset and asked about an order of protection. Defendant gave Cadle two different versions of the incident, first denying that he had pushed Martinez or used a knife but then admitting pushing her and holding a knife to make a sandwich. At trial, defendant contradicted his second statement to Cadle, testifying that he never pushed Martinez. He also specified that he had been holding a butter knife; the judge saw this testimony as a way to "minimize" what had happened.

¶ 36 The judge stated, "Frankly, I don't find the Defendant credible. He's given at least three stories ****. I don't find his testimony credible at all." The evidence of defendant's two previous attacks on Martinez helped to prove his intent and motive here, but even without this evidence, defendant had been proved guilty beyond a reasonable doubt.

¶ 37 Defendant was sentenced to 12 months' probation on each offense. He filed a postjudgment motion that raised two issues: whether he had been proved guilty beyond a reasonable doubt and whether his sentence was excessive. The court denied the motion. Defendant timely appealed.

¶ 38 On appeal, defendant contends first that the trial court erred in denying his motion to quash his arrest and suppress his statements to the officers. Defendant observes that he was not given any *Miranda* warnings or otherwise advised of his rights before or during the questioning. The trial court held that the warnings were not required, because *Miranda* applies only to custodial interrogation and defendant was not in custody at the time. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *People v. Slater*, 228 Ill. 2d 137, 149 (2008). Defendant contends that the court erred in holding that, in view of all the circumstances, he was not in custody.

¶ 39 Defendant acknowledges that he forfeited this claim of error by failing to raise it in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186-88 (1988). The State requests that we dispose of the issue on this ground. However, given the importance of defendant's admissions and the possibility that trial counsel's failure to preserve the issue might implicate concerns of ineffective assistance, we elect to address defendant's claim.

¶ 40 In reviewing a trial court's ruling on a motion to suppress, we accept the court's findings of fact unless they are against the manifest weight of the evidence, but we decide *de novo* the ultimate legal question of whether suppression was proper. *Slater*, 228 Ill. 2d at 149; *People v. Nicholas*, 218 Ill. 2d 104, 116 (2005).

¶ 41 Whether a defendant was in custody during questioning depends on whether, under all of the circumstances, a reasonable person would have felt that he or she was not free to terminate the interrogation and leave. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *Slater*, 228 Ill. 2d at 150. Courts have specified several pertinent circumstances, including (1) the location, time, length, mood, and mode of the questioning; (2) the number of police officers present; (3) the presence or absence of the person's family or friends; (4) any indicia of a formal arrest procedure, such as a show of weapons, force, physical restraint, booking, or fingerprinting; (5) how the person arrived at the place of questioning; and (6) the person's age, intelligence, and mental makeup. *Slater*, 228 Ill. 2d at 150. Another factor is whether the defendant had reason to believe that he or she was the focus of a criminal investigation. *Stansbury v. California*, 511 U.S. 318, 325 (1994).

¶ 42 Defendant argues that several factors militate in favor of finding that he was in custody during the questioning. Specifically, he notes, he had no friends or family present; the officers stood near him and took turns questioning him; their questions implied that they believed he was

guilty; and they knew that he was young and suffered from an anxiety disorder. Defendant asserts that under these circumstances a reasonable person would not have felt free to end the encounter.

¶ 43 The State responds that most of the pertinent factors weigh in favor of the trial court's decision. The State notes that defendant allowed the officers in; that they questioned him in his home; that they never touched him, displayed their weapons, or (with one brief exception) raised their voices; and that the questioning lasted 35 minutes at the most.

¶ 44 The State cites *People v. Vasquez*, 393 Ill. App. 3d 185 (2009). There, the defendant had been involved in a one-car accident and taken to a hospital emergency room (ER), where police officers spoke to her briefly. At first, she said that she had not been driving, as she had been too drunk. After the officers told her that a witness had said that the driver was wearing the same clothing that she was, she said that she had taken the wheel at some point and might have been driving when the accident occurred. *Id.* at 186-87.

¶ 45 From the ER, the defendant was moved to the intensive care unit (ICU). By then, she had been ticketed for driving under the influence of alcohol (DUI). Two officers entered her room, got her parents to leave, and said that they wanted to question her. The officers were not in uniform but had their guns in their holsters. *Id.* at 187. One officer read the defendant *Miranda* warnings and asked her whether she understood them and had any questions; she shook her head " 'no.' ", and the officer did not know whether that meant that she had no questions or that she did not understand. *Id.* at 188. The questioning lasted about 35 minutes and, unbeknownst to the defendant, was videotaped. About 25 minutes into the interview, the defendant told the officers that she did not want to talk anymore. The officers let her take a break but soon resumed questioning her. *Id.*

¶ 46 After she was charged with aggravated DUI and reckless homicide, the defendant moved to suppress the statements that she had made in the ER and the ICU. The trial court declined to suppress the ER statements but did suppress the ICU statements, holding that the defendant had been in custody at the time and that the officers had not sufficiently informed her of her *Miranda* rights or ascertained that she had knowingly and voluntarily waived them. The court emphasized the hurriedness of the warnings and the ambiguity of the defendant's response; the officers' failure to tell her that the questioning would be videotaped; and their failure to end the questioning after the defendant attempted to stop it. *Id.* at 188-89.

¶ 47 We reversed the suppression of the ICU statements. We acknowledged that two factors militated in favor of finding that the defendant had been in custody: she was questioned after the police asked her parents to leave the room, and she was almost certainly aware by then that she was the focus of a criminal investigation. *Id.* at 190.

¶ 48 Nonetheless, we held that other factors outweighed these. The first was that, although the ICU room was not as familiar or friendly as a person's own home, it was also much less inherently coercive than a police station. *Id.* at 190-91. The second factor was the mood and tone of the questioning: the officers did not question the defendant aggressively, employ a hostile tone, or tell her that she had to answer their questions. *Id.* at 192. Third, the questioning lasted only about 35 minutes, "not atypical of noncustodial interviews." *Id.* Fourth, there were no indicia of a formal arrest, such as posting guards, booking, or fingerprinting. *Id.* Finally, the defendant's age, intelligence, and mental makeup did not cut strongly either way: although she was only 23 years old, there was no indication that she suffered from any intellectual or emotional problems that would have affected her perception of whether she was free to terminate the questioning. Despite having gone through a traumatic incident, she appeared lucid. *Id.* at 193.

¶ 49 Although each case must turn on its own facts, we agree with the State that the similarities between *Vasquez* and this case support affirming. Here, defendant was questioned in his own home, a more familiar and less coercive setting than the ICU room in *Vasquez*. The questioning took place after 10:30 a.m., neither late in the evening nor early in the morning. It did not last more than 35 minutes. Although the officers did repeatedly ask defendant the same question and implied that they suspected defendant of a crime, they maintained a calm tone of voice, did not touch defendant or stand over him, and did not display their weapons. Also, although three officers were present, Cadle asked almost all of the questions that were potentially incriminating. Petragallo asked only about defendant's emotional well-being. (Although defendant contradicted Petragallo on this point, the court could believe Petragallo instead.) See *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 42 (one factor in finding of no custody was that, although four officers were present during questioning, only two asked questions and one of these asked the majority). Finally, although defendant did have an anxiety disorder and told the officers about it, he was cooperative and, as far as the testimony shows, answered their questions lucidly. We hold that the court properly denied defendant's motion to suppress.

¶ 50 We turn to defendant's second contention on appeal: that the court erred in barring him from cross-examining Martinez about her alleged remarriage to Gustavo shortly after defendant was arrested. Defendant argues that the court's ruling infringed on his sixth-amendment right to confront Martinez by adducing evidence of her bias and motive to testify falsely,

¶ 51 Defendant concedes that he forfeited this contention by failing to raise it in his posttrial motion and requests that we address the matter as plain error. However, we need not decide whether the court's ruling was improper, because we conclude that any error was harmless and thus was not reversible.

¶ 52 The judge was the trier of fact, and he explained his finding of guilt at some length. He credited not only Martinez's testimony but also Cadle's testimony about defendant's admissions to the police. The judge stated that he did not find defendant credible at all. Thus, although this case turned on witness credibility, the judge did not see the credibility contest as a close one.

¶ 53 There is no reason to think that the admission of the allegedly impeaching evidence would have affected this calculus of credibility. The probative value of the evidence was dubious at best: that Martinez remarried Gustavo shortly after February 11, 2015, did not imply a motive to fabricate the events of February 10, 2015. Further, Martinez's credibility was enhanced by Cadle's testimony that she was visibly upset when she and her mother met with Cadle and that she asked about obtaining an order of protection. Finally, given that the judge did not consider the evidence sufficiently probative to be legally relevant in the first place, it is unreasonable to suggest that he would have found the same evidence so persuasive as to upset his conclusion that the State's witnesses were very credible and defendant was not credible at all. Defendant's second contention of error fails.

¶ 54 Based on the foregoing, we affirm the judgment of the circuit court of Du Page County.

¶ 55 Affirmed.