2012 IL App (1st) 110243

THIRD DIVISION
November 30, 2012

No. 1-11-0243

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 22741
	)	
MARIA GARCIA-OLVERA,	)	The Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE SALONE delivered the judgment of the court.
Justices Neville and Steele concurred in the judgment.

O R D E R

Held: Trial court did not err in admitting IPI Criminal 4th 3.06–3.07 without the bracketed phrase, or in admitting and allowing the jury to view gruesome photographs of the victim's injuries. Defendant's trial counsel was not ineffective, and the trial court did not abuse its discretion in imposing a 42-year sentence for the offense of heinous battery.

¶ 1 Defendant, Maria Garcia-Olvera, was convicted by a jury of heinous battery and sentenced to 42-years imprisonment. She appeals her conviction and sentence. Defendant first contends that the trial court erred in failing to instruct the jury with Illinois Pattern Jury Instructions, Criminal, No. 3.06–3.07 (4th ed. 2000) (IPI Criminal 4th No. 3.06–3.07) including the bracketed phrase, and that this error deprived defendant of a fair trial by preventing her from presenting a complete defense. Defendant next contends that she was denied a fair trial when the trial court admitted gruesome photos of the victim's injuries which served to inflame and prejudice the jury. Lastly, defendant contends that her 42-year sentence is excessive. For the following reasons, we affirm.

¶ 2 **BACKGROUND**

¶ 3 Defendant was tried with co-defendant, Ofelia Garcia (Garcia), before separate juries. Garcia is defendant's ex-mother-in-law. The charges stemmed from an attack in which three juvenile co-defendants were recruited by Garcia and aided by defendant and Linda Dirzo (Dirzo) to throw sulfuric acid on the victim, Esperanza Medina. The main evidence against defendant included the testimony of the three juveniles—Mariela Duran, Jose Avila, and Jennifer Ruiz—as well as a statement defendant gave to police after her arrest. All three juveniles entered plea agreements with the State where they agreed to cooperate and testify against both defendants in exchange for a juvenile adjudication of heinous battery.

¶ 4 At trial, the State called Gustavo Alvarez (Alvarez) to testify. Alvarez testified that he had a relationship with Garcia from 1975 until 2007. Alvarez also testified that toward the end of his relationship with Garcia, he had an affair with defendant. Alvarez's relationship with

defendant began in 2006 and continued until October 2007, when he informed Garcia of the affair. In November 2007, Alvarez moved out of the home he shared with Garcia and into an apartment with Esperanza Medina. When Alvarez left Garcia, he did not inform her of his whereabouts and stopped supporting her financially. He also had no further contact with defendant.

¶ 5 Approximately a month after Alvarez moved out, Garcia telephoned him at Esperanza's apartment and asked him to move back in with her. Alvarez refused. Garcia later sought the services of Private Detective Paulino Villarreal to locate Esperanza.

¶ 6 Detective Villarreal testified that he and his wife met with Garcia and Dirzo on December 22, 2007, and Garcia indicated that she wanted Esperanza and Alvarez followed, but "primarily Esperanza." Garcia stated that she needed to locate Esperanza because they owned property together that needed to be sold. Garcia also stated that Esperanza could be found near Fullerton and Milwaukee and that Alvarez was Esperanza's acquaintance. In addition, she provided a phone number where Esperanza could be reached. Detective Villarreal undertook to locate Esperanza; however, he refused to turn over her whereabouts when Garcia did not tender payment in full.

¶ 7 In June 2008, Alvarez and Esperanza went on a two week vacation to Mexico where Esperanza met Alvarez’s family.

¶ 8 Jose Avila (Avila) testified that in July 2008, he attended defendant’s birthday party where Garcia approached him stating that she had a lot of problems because her husband went to Mexico with a woman. Garcia then asked Avila if he would do a job for her. When asked what

kind of job, Garcia asked him if he would rob someone for her and stated that she would pay him well. Before he left the party, Avila told Garcia he would try to look for someone for her.

¶ 9 On Sunday, July 27, 2008, approximately a day or two after the party, defendant called Avila and stated that he was to sleep over at her house that night so that he could wake up early in the morning and do the job for her mother-in-law. Avila testified that he stayed at defendant's house that night and she woke him early in the morning to head to the job. As Avila followed defendant out the back door, defendant told him to grab the baseball bat laying in the yard, which he did.

¶ 10 The State called Mariela Duran (Duran) to testify. Duran is the ex-girlfriend of defendant's son, Armando Alvarez. Duran testified that two days before the attack, defendant called her and stated that her mother-in-law, Garcia, had a cleaning job for Duran. This was not unusual as Duran testified that defendant knew she was looking for work. The next day, both Duran and her friend Jennifer Ruiz (Ruiz) went to Garcia's house believing she had a cleaning job for them. While at Garcia's house, both Duran and Ruiz testified that Garcia told them she wanted to hurt someone—a woman Garcia suspected was messing around with or talking to her husband. Duran testified that she asked Garcia if she could leave or make a phone call, but Garcia refused and told Duran that she should stay at her house and her friend would take them to the job in the morning.

¶ 11 Both Duran and Ruiz testified that while at Garcia's house, they first learned of Garcia's plan to attack Esperanza. Garcia told the teens her friend would give Duran a bottle to splash on Esperanza and that they should take her bag to make it look like a robbery. Garcia also told

Duran to be careful with the bottle because its contents might burn. Duran testified that she told Garcia no; however, Garcia stated that she knew where Duran's family lived and she knew Duran's sister. Duran also testified that she and Ruiz attempted to leave, but Ofelia stopped them and told them they would be staying the night at her house.

¶ 12 The morning of the attack, Garcia woke Duran and Ruiz, gave them clothes to put on, and told them to hurry up because her friend was outside waiting for them. Duran testified that she recognized the car waiting in the parking lot as belonging to defendant. Both Duran and Ruiz left Garcia's house and got into defendant's car. Avila was sitting in the back seat. Duran testified that when she got into the car, she asked defendant what was going on, but defendant did not respond.

¶ 13 Defendant drove Duran, Ruiz, and Avila from Garcia's house in Cicero to the city of Chicago. Defendant asked the teens if they were hungry and stopped to buy them food. She told them to get out of the car near a bus stop and wait. Avila and Ruiz testified that defendant told them she was dropping them off because she had to go to work and a lady named Linda would pick them up. About twenty minutes later, a gray truck pulled up and a woman later identified to be Dirzo waived for them to come over. All three teens got in her car.

¶ 14 Duran testified that when she got in the car, Dirzo had a big bottle of bleach or Clorox by her side. She drove two or three blocks, gave Duran the bottle then stopped and screamed, "get out, there she is." As Duran got out of the car, Dirzo yelled, "don't forget about the purse." Duran testified that she began jogging toward Esperanza with the bottle in her hand. As she approached her, she saw Avila running towards them with the bat in his hand. Duran testified

that she thought Avila was going to hurt her and Ruiz if she did not do what Garcia and Dirzo told her to do.

¶ 15 All three teens testified that as Esperanza bent down to put her bag in her car, Duran opened the bottle Dirzo had given her and splashed its contents on Esperanza's chest. Avila approached and slipped on the spilled liquid as he hit Esperanza on her back with the bat. Duran then splashed Esperanza again and grabbed her purse while Ruiz observed from a distance. All three teens testified that Esperanza was screaming and crying as they ran toward Dirzo's car parked about a block away.

¶ 16 Duran testified that when they got back in the car, Dirzo used her phone to call someone. Ruiz testified that while Dirzo was on the phone, she said everything turned out good. While in the car, both Duran and Avila noticed their skin burning as they had inadvertently spilled the liquid on themselves. Avila testified that he asked Dirzo to get him some water for his burns, but she said no, he had to wait until they got back to Garcia's house.

¶ 17 Dirzo drove the teens from the Logan Square area of Chicago to Garcia's house in Cicero. Once inside, Dirzo recounted the attack with Garcia while they both laughed. Garcia then called the teens into the kitchen and gave Jose and Duran eggs to put on their burns. Duran testified that she and Jennifer went to the bathroom to tend to Duran's burns when she heard Dirzo tell Garcia that she heard Esperanza crying loud and screaming.

¶ 18 Both Duran and Ruiz testified that Garcia tried giving them money for their role in the attack, but they refused to take it. Duran testified that she left Garcia's house and went home. When she arrived home, her sister told her that their parents went to the police to report her

missing. When her parents returned, Duran told them she was at a friend's house and burned herself while cleaning with chemicals. Her mother called an ambulance and the Cicero police came to her house. Duran testified that she initially lied to the police and the hospital staff about how she received her burns.

¶ 19 Ruiz testified that two days after the attack, Garcia and defendant came to her house. Garcia told Ruiz not to tell anyone she was involved in the attack because she was too old and didn't want to spend the rest of her days in jail.

¶ 20 Three days after the attack, Duran saw Garcia and Dirzo near her home. Duran testified that they told her she better leave the state and if she gets caught, no one will believe her. Duran went to California approximately two days later and was eventually arrested by the San Joaquin County police. While in police custody, Duran gave a video-taped statement before she was transported back to Chicago. Duran eventually signed a plea agreement, providing her testimony in exchange for a sentence in which she would remain at an Illinois youth center until her 21st birthday.

¶ 21 While in custody, Duran wrote a total of four letters to defendant and her family stating that she knew defendant was innocent and had nothing to do with the attack, and felt bad defendant was in jail.

¶ 22 Ruiz was arrested on August 27, 2008 and later signed a plea agreement, providing her testimony in exchange for a sentence of juvenile probation.

¶ 23 At the close of Duran's testimony, the defense moved *in limine* to bar the admission or publication of photographs taken of Esperanza's injuries. The trial court ruled that all of the

fourteen photographs could be admitted, but chose five to publish to the jury. In doing so, the court looked at each photograph individually and determined, "they were admissible even though they show extreme injury because the allegation in this case and the charge, heinous battery, requires disfigurement, one of the counts." The court noted that it allowed the publication of five photographs because "[i]n each of those circumstances, the probative weight outweighs any prejudicial value that they may have. In addition, those that I did not allow to be published . . . were duplicative of other shots that had been taken or were of no evidentiary value."

¶ 24 Defendant was brought in for questioning on November 7, 2008, and interviewed by detectives. Detective Pagan served as translator during the interview because defendant did not speak or read English. He spent some of his childhood in Puerto Rico and is fluent in Spanish; however, he had no formal training or classes since childhood. Detective Pagan testified that after being *Mirandized*, defendant agreed to talk to the detectives about the attack. Present were detectives Pagan and McGovern as well as Assistant State's Attorney (ASA) DiBenedetto. Detective Pagan testified that ASA DiBenedetto asked the questions while he translated them to defendant and then translated her answers back to ASA DiBenedetto, who wrote them down.

¶ 25 Detective DiBenedetto testified that on November 8, 2012, at approximately 5:09 a.m., defendant gave a statement to police. Over defense counsel's objection, ASA DiBenedetto read the statement to the jury. At a side bar on the issue, defense counsel argued the statement was not Defendant's and it was the record of Detective Pagan, not defendant.

¶ 26 According to the statement, Garcia began complaining to defendant about Esperanza seeing Alvarez in June 2008. Garcia was enraged because she believed Alvarez took Esperanza

to Mexico. As a result, Garcia and defendant went to look for Esperanza a few times, always in the early morning. On one of the trips to Esperanza's neighborhood, Garcia offered defendant $5,000 or $6,000 to cut Esperanza's face, but defendant refused. Garcia responded by making fun of defendant for refusing. On a Monday morning in July, Garcia called defendant and stated that she needed defendant to take Avila to Esperanza and that Avila was going to hit her with a bar to make it look like a robbery. She also told defendant two girls were going to go with Avila, one to take Esperanza's bag and the other to throw battery acid on her.

¶ 27 The statement further alleged that Garcia asked defendant to take the teens to Esperanza because her arm was hurting and defendant agreed. Garcia told defendant to take the teens near Logan Square where they had gone to look for Esperanza in the past. The morning of the attack, defendant took the teens to the Logan Square area and bought them a milk drink and a tamale, then left because she was late for work. Later that day, defendant went to Garcia's house and told Garcia that what she did was wrong and that she should let Alvarez be with someone else if he wanted to. Garcia responded, "the bitch deserved it."

¶ 28 On cross-examination, both Detective Pagan and ASA DiBenedetto acknowledged that the police station had equipment available for audio and video recording, but they did not record defendant's statement. ASA DiBenedetto did not give defendant the option of writing out her own statement or recording it by video or audio. He also acknowledged that the statement was not written down word for word the way defendant stated it. Defendant made one correction to the statement when Detective Pagan read it to her—inserting Garcia where ASA DiBenedetto originally wrote Maria—and then signed each page.

¶ 29 The parties stipulated to certain phone call records related to three phone numbers. Dawn Friloux, an intelligence analyst, testified about analyzing those records. Friloux testified that the records showed 19 calls between a phone number attributed to defendant and one attributed to Dirzo between 10:55 and 11:35 p.m. on July 27, 2008. They also showed 13 calls between phone numbers attributed to defendant, Dirzo, and Garcia between 5:01 a.m and 8:33 a.m. on July 28, the day of the attack. However, Friloux acknowledged that she did not know the identity of the callers, she could not ascertain the call's content, nor was she certain as to which calls were actually answered.

¶ 30 Defendant did not testify at trial. The defense presented two stipulations. The parties stipulated that Jose told Detective McGovern that on the morning of the attack, Dirzo told him to grab the baseball bat from the back seat of her car in case Esperanza refused to give up her purse. They also stipulated that after Duran was arrested, the San Joaquin police videotaped her custodial statement. Following the stipulations, the defense played Duran's videotaped statement and rested.

¶ 31 At closing argument, defense counsel argued that the handwritten statement was controlled by ASA DiBenedetto, not defendant. He characterized it as a statement written in a language defendant can't read or write and from the mouth of someone other than the defendant that she was told to sign. He argued defendant was not given a choice as to how she wanted to record her statement and noted that she was in custody for over 24-hours before the statement was given.

¶ 32 The jury found defendant guilty of heinous battery. At the sentencing hearing, in mitigation, defense counsel argued defendant supported her five children on a factory worker's salary, she was not the architect of the attack, and she had no serious criminal history. The state argued that defendant must be held accountable for the actions that occurred and Duran would not have gotten to the city of Chicago to throw acid on Esperanza if it were not for defendant's actions. Ultimately, the trial judge sentenced defendant to 42-years imprisonment. Defendant's Motion to Reconsider Sentence and Motion for a New Trial were denied.

¶ 33 **ANALYSIS**

¶ 34 Jury Instructions

¶ 35 Defendant contends she was deprived of her right to present a complete defense and to a fair trial when the trial court allowed the admission of IPI Criminal 4th No. 3.06–3.07 without the bracketed phrase, which would have allowed the jury to consider whether defendant made the statement introduced against her at trial.

¶ 36 IPI Criminal 4th, No. 3.06–3.07 provides,

> "You have before you evidence that the defendant made a statement relating to the offense charged in the indictment. It is for you to determine [whether the defendant made the statement, and, if so,] what weight should be given to the statement. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made." IPI Criminal 4th No. 3.06–3.07.

The instruction given to the jury in this case omitted the above bracketed phrase.

¶ 37 Initially, we note that defendant has waived this issue because she did not object to the instruction as given, tender a version that included the bracketed phrase, or raise the issue in her post-trial motion. Generally, a defendant forfeits review of any supposed jury instruction error if she does not object to the instruction or offer an alternative at trial, and does not raise the issue in a post-trial motion. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Nevertheless, defendant urges this court to consider the issue pursuant to the plain error doctrine.

¶ 38 Supreme Court Rule 451(c) provides that substantial defects in criminal jury instructions "are not waived by failure to make timely objections thereto if the interests of justice require." (eff. July 1, 2006). Rule 451(c) has been deemed "coextensive with the plain-error clause of Supreme Court Rule 615(a), and the two rules are construed identically. *Piatkowski*, 225 Ill. 2d at 564. Under Supreme Court Rule 615(a), any error that does not affect substantial rights shall be disregarded on appeal, but "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999).

> "[T]he plain-error doctrine allows the reviewing court to consider unpreserved errors when 1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or 2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial

> and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565.

Under both prongs of the plain-error doctrine, the burden of persuasion remains with the defendant. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). The Supreme Court noted that before invoking plain-error, it is appropriate for the court of review to consider whether any error occurred in the first place. *People v. Harris*, 225 Ill. 2d 1, 24 (2007). Whether the jury instructions as a whole accurately conveyed to the jury the applicable law is reviewed *de novo*. *People v. Turman*, 2011 IL App (1st) 091019.

¶ 39 Defendant is correct in asserting that she is entitled to have the jury instructed on any set of facts which, if believed by the jury, would support her theory of the case. *People v. Lee*, 151 Ill. App. 3d 510, 530 (1986). In addition, the committee notes following IPI Criminal 4th 3.06–3.07 state that the bracketed phrase should be deleted *only* when the defendant admits to making all the material statements attributed to him. (Emphasis added.) However, this court has consistently held that IPI Criminal 4th 3.06–3.07 is proper without the bracketed phrase where the defendant presented no evidence that he denied making the statement. *People v. Echols*, 382 Ill. App. 3d 309, 318 (1st Dist. 2008), *People v. Ramos*, 318 Ill. App. 3d 181, 188 (1st Dist. 2000), *People v. Moore*, 294 Ill. App. 3d 410, 417 (2nd Dist. 1998), *People v. Garner*, 248 Ill. App. 3d 985, 993 (1st Dist. 1993), *People v. Jefferson*, 152 Ill. App. 3d 351, 354 (2nd Dist. 1987), *People v. Fleming*, 103 Ill. App. 3d 194, 198 (1981). These cases have reasoned that to hold otherwise would confuse the jury by making it decide an issue improperly before the court. *Ramos*, 318 Ill. App. 3d at 188.

¶ 40 Instead, defendant argues that this court should follow the decision in *People v. Richmond*, 341 Ill. App. 3d 39 (1st Dist. 2003). In *Richmond*, this court held that the trial court erred when it overruled the defendant's objection to the admission of IPI Criminal 4th 3.06–3.07 without the bracketed phrase. *Id.* at 52. In that case, the defendant's signed statement was entered into evidence at trial. *Id.* at 50. The defendant did not testify or present any witnesses on his behalf. *Id.* at 44. Defense counsel cross-examined the Assistant State's Attorney about whether he had videotaped the statement or given the defendant the option of writing out the statement himself or having the statement tape-recorded. *Id.* at 50. Defense counsel also cross-examined a police detective about whether the defendant's statement was tape-recorded, video-recorded, or recorded by a court reporter. *Id.* at 50-51. In closing argument, defense counsel argued the defendant did not make the statement attributed to him. *Id.* at 51. The jury was given IPI Criminal 4th 3.06–3.07 without the bracketed phrase, over defense counsel's objection. *Id.* On appeal, this court found that the trial court erred in failing to give the instruction without the bracketed phrase, because the defendant was entitled to have the jury instructed on his theory of the case where there was some foundation for the instruction in evidence. *Id.* at 52. The court determined that the cross-examination of the Assistant State's Attorney and the police detective regarding the defendant's alleged statement could support the inference that the defendant's statement was fabricated. *Id.* The court stated that the bracketed phrase should have been included in the instruction because, although "the inference drawn by defense counsel rested on a thin foundation, it contained enough vitality for presentation to the jury." *Id.* Nevertheless, the court determined that the error was harmless because the evidence of defendant's

guilt was overwhelming, and had the jury been properly instructed, the result of trial would not have been different. *Id.* at 53.

¶ 41 Justice Hoffman wrote a concurrence wherein he agreed with the majority in regards to the result, but disagreed that it was error to give the instruction without the bracketed phrase. *Id.* at 54 (Hoffman, J., specially concurring). The concurrence noted consistent case law such as *Ramos*, *Moore*, *Garner*, and *Fleming*, that has held the instruction sufficient without the bracketed phrase when the defendant presented no evidence that he did not make the statement. *Id.* at 55 (Hoffman, J., specially concurring). Despite an acknowledgment that the established case law should not be read to stand for the proposition that the defendant must take the stand to deny making the statement attributed to him, the concurrence concluded that the innuendoes and insinuations elicited on cross-examination were nothing more than speculation and not sufficient to entitle a defendant to an instruction containing the bracketed phrase. *Id.* (Hoffman, J., specially concurring).

¶ 42 Five years after *Richmond* was decided, in *People v. Echols* the court considered this same issue—whether the trial court erred by omitting the bracketed phrase in IPI Criminal 4th 3.06–3.07. *Echols*, 382 Ill. App. 3d at 315. In *Echols*, the defendant was on trial for residential burglary and the state presented evidence of an incriminating statement the defendant gave to police. *Id.* at 312. On cross-examination, defense counsel elicited the fact that the detective did not have the defendant memorialize his statement in writing or on videotape. *Id.* The defendant did not testify and did not present any other evidence that he denied making the statement. *Id.* at 318. On appeal, the defendant argued that based on *Richmond*, he was entitled to the bracketed phrase in IPI Criminal 4th 3.06–3.07. *Id.* at 315. In its analysis, the court acknowledged the *Richmond* majority's conclusion

that the cross-examination in that case was enough to support the giving of the instruction at issue including the bracketed phrase, but found its analysis contrary to established case law. *Id.* at 317-18. The court declined to follow *Richmond* and instead followed consistent case law which held that when the defendant does not present any evidence that he did not make the statement, the bracketed phrase in the instruction is properly omitted. *Id.* at 318. Ultimately, the *Echols* court concluded that the cross-examination of the detective was not sufficient to amount to evidence that the defendant did not make the statement and found no error. *Id.*

¶ 43 We agree with *Echols* and established case law. In the present case, on cross-examination defense counsel elicited the fact that the police station where defendant was interviewed had equipment available for audio and video recording, but they did not record defendant's statement. It was also established that defendant was not given the option of writing out her own statement or recording it, and that ASA DiBenedetto did not write the statement word for word as defendant stated it. Finally, at closing argument defense counsel argued the content of the handwritten statement was controlled by ASA DiBenedetto, not defendant. Similar to *Echols*, in the present case defendant did not testify or present any witnesses on her behalf. We do not find the cross-examination of Detective Pagan and ASA DiBenedetto sufficient to amount to evidence that the defendant did not make the statement. The jury heard defense counsel's cross-examination of Detective Pagan and ASA DiBenedetto regarding defendant's statement and the inferences drawn therefrom. It was then for the jury to determine what weight should be given to the statement. We find no error in the instruction as given; therefore, without error, there can be no plain error. *People v. Herron*, 215 Ill. 2d 167, 184-85 (2005).

¶ 44 Photographs of the Victim's Injuries

¶ 45 Defendant next contends that she was denied a fair trial when the trial court allowed five photographs depicting Esperanza's injuries to be admitted into evidence and published to the jury. Defendant contends that allowing the jury to see graphic photographs of Esperanza's injuries only served to inflame and prejudice the jury where the question of permanent disfigurement was neither at issue nor in question.

¶ 46 We first note that this issue was not preserved for review and, therefore waived. As such, defendant asks this court to consider the issue pursuant to the plain-error doctrine. In analyzing this issue for error, we utilize an abuse of discretion standard of review. *People v. Shum*, 117 Ill. 2d 317, 353 (1987). A trial court abuses its discretion only when 1) its decision is arbitrary, fanciful, or unreasonable, or 2) no reasonable person would take the view adopted by the court. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). Photographs are admissible, and may be shown to the jury, if they are relevant to prove facts at issue, unless the prejudicial nature of the photographs outweigh their probative value. *People v. Heard*, 187 Ill. 2d 36, 77 (1999). "If photographs could aid the jury in understanding the testimony, they may be admitted, even if cumulative of that testimony." *People v. Chapman*, 194 Ill. 2d 186, 220 (2000) (citing *Heard*, 187 Ill. 2d at 77). Even if the photographs are gruesome and inflammatory, they may be admitted if sufficiently probative. See *People v. Simms*, 143 Ill. 2d 154 (1991) (the court did not abuse its discretion by admitting photographs of the victim's partially naked body, of stab wounds in the victim's neck, and of bloodstains in the victim's apartment because they were probative of the defendant's mental state); *People v. Armstrong*, 183 Ill. 2d 130 (1998) (photographs that showed the shattered pieces of the victim's skull were properly

admitted to the jury); *People v. Anderson*, 237 Ill. App. 3d 621 (5th Dist. 1992) (the trial court did not err in allowing crime scene and autopsy photos to be submitted to the jury).

¶ 47 In the present case, the photographs of Esperanza's injuries were relevant and admissible. These photographs depict Esperanza's extensive injuries after being doused with sulfuric acid and were relevant to establish the nature and extent of those injuries, and the manner in which they were inflicted. To sustain a conviction for heinous battery, the State must prove,

> "A person who, in committing a battery, knowingly causes severe and permanent disability, great bodily harm or disfigurement by means of a caustic or flammable substance, a poisonous gas, a deadly biological or chemical contaminant or agent, a radioactive substance, or a bomb or explosive compound commits heinous battery." 720 ILCS 5/12-4.1(a) (West 2008).

The State submitted fourteen photographs and five were published to the jury.

¶ 48 Defendant contends that because Esperanza appeared in court and testified concerning her injuries and treatment, permanent disfigurement was not at issue and, therefore, allowing the jury to view the gruesome photographs only served to inflame the jurors' passions and prejudice them against her. Defendant argues the gruesome photographs were irrelevant to the only issue before the court—whether defendant knew of Garcia's plan to throw acid on Esperanza when she drove the teens to the city of Chicago. We disagree.

¶ 49 The State is not precluded from proving every element of the charged offense and every fact relevant to that proof, even if the defendant is willing to stipulate to certain facts. *People v. Bounds*,

171 Ill. 2d 1, 46 (1995). Here, defendant offered no stipulation regarding Esperanza's injuries or permanent disfigurement, but even if we accept defendant's contention that she did not dispute the nature of the injuries, the photographs were properly considered relevant. The photographs challenged by defendant provided evidence of the victim's "permanent disability, great bodily harm or disfigurement" an element required to prove the offense of heinous battery. 720 ILCS 5/12-4.1(a) (West 2008).

¶ 50 Moreover, it would be unfair to the State to exclude evidence of the victim's physical disfigurement without actually linking the defendant's actions to the result; here, the photographs do just that. The photographs informed the jury of the nature and extent of Esperanza's injuries more accurately than her testimony and physical presence in court years after the attack. Many of Esperanza's injuries were on areas of her body not visible to the jury, and the disfigurement that was visible had changed over time because of her extensive surgeries and skin grafts.

¶ 51 The trial court deliberately weighed the probative value against the prejudicial effect of the State's fourteen offered photographs, allowing only five to be published. The trial court allowed the five photographs because they showed different injuries to Esperanza: Exhibit 7 showed the acid burns on her back; Exhibit 9 showed her post-op skin transplant; Exhibit 10 showed the acid burns of her face; Exhibit 11 showed the burns to her chest; and Exhibit 15 showed the post-op burns on her right arm. In allowing the photographs to be published to the jury, the court determined that the jury was entitled to see the extent and severity of the damage done by the acid attack as it appeared immediately following the attack. The court stated, "I have to say that in my view in light of the charge I have to allow them to be shown and I don't think just showing the victim here today

obviously after many surgeries would have adequately explained the nature of the original injury[.]" The trial court ruled the photographs were necessary evidence to allow the State to prove the elements of heinous battery.

¶ 52 Defendant argues that *People v. Garlick*, 46 Ill. App. 3d 216 (1977), is instructive. In *Garlick*, the appellate court reversed the defendant's conviction because a single "gruesome, color photograph of the deceased's massive head wound" went to the jury. *Garlick*, 46 Ill. App. 3d at 224. In doing so, this court found the photograph served no purpose other than "to inflame and prejudice the jury in the grossest manner possible." *Garlick*, 46 Ill. App. 3d at 224. *Garlick* is easily distinguishable from the present case. In *Garlick*, the defendant was only arguing insanity, as he had admitted guilt. *Id.* Therefore, the photograph was not admitted to show the manner in which the murder had been committed. *Id.* Unlike *Garlick*, at issue in this case is the manner in which Esperanza was injured. Therefore, we find *Garlick* inapposite.

¶ 53 We reject defendant's contention that the photographs of Esperanza's injuries were unfairly prejudicial. Although the photographs were graphic in their depiction of the injuries, they were relevant to the elements of the crime charged—heinous battery. The prejudicial effect of the photographs did not outweigh their probative value; therefore, we hold that the trial court did not abuse its discretion in admitting and allowing the jury to view photographs of Esperanza's injuries. Accordingly, we find no error, and without error, there can be no plain error. *Herron*, 215 Ill. 2d at 184-85.

¶ 54 Ineffective Assistance of Counsel

¶ 55 Defendant next contends her trial counsel was ineffective, 1) for failing to object to the introduction of IPI Criminal 4th 3.06–3.07 without the bracketed phrase, and 2) for failing to preserve the erroneous introduction of graphic photographs for review.

¶ 56 The Illinois Supreme Court has held that, to determine whether a defendant was denied his or her right to effective assistance of counsel, an appellate court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 688 (1984). *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). Under *Strickland*, a defendant must prove 1) counsel's performance was deficient, and 2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 690-91. Under the first prong, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). The second prong requires the defendant to establish that, absent counsel's deficiency, the result of the proceeding would probably have been different. *Albanese*, 104 Ill. 2d at 525.

¶ 57 As we have already determined in this opinion, the issues defense counsel failed to preserve are without merit. As such, counsel's performance does not fall below an objective standard of reasonableness as required. In addition, the Illinois Supreme Court has found that on a claim of ineffective assistance of counsel for failing to properly preserve issues for review, the defendant's rights are protected by Supreme Court Rule 615(a), which allows a court to review unpreserved claims of plain error that could reasonably have affected the verdict. *People v. Coleman*, 158 Ill. 2d 319, 349 (1994). Because we have already determined that no error occurred with respect to the unpreserved errors in this case, we decline to find ineffective assistance of counsel.

¶ 58 Excessive Sentence

¶ 59 Lastly, defendant contends that her 42-year sentence imposed by the trial court was excessive. Defendant acknowledges that the sentencing range for heinous battery is 6 to 45 years imprisonment, but claims that given her minor role in the offense and the substantial mitigating evidence illustrating her strong rehabilitative potential, her sentence is excessive. In support of her argument, defendant notes that in addition to her minor role in the offense, she had almost no criminal background and was supporting five children on a factory worker's salary up until her incarceration.

¶ 60 The trial court's sentencing determination is entitled to great deference given that the trial court is generally in a better position than the reviewing court to determine the appropriate sentence and to balance the need to protect society with the rehabilitation potential of the defendant. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). As the reviewing court, we cannot substitute our judgement for that of the sentencing court merely because we would have weighed the factors differently. *Id.* However, even where the sentence imposed is within the statutory range, it may be deemed excessive and the result of an abuse of discretion where the sentence is greatly at variance with the spirt and purpose of the law, or manifestly disproportionate to the nature of the offense. *Id.* at 210. The trial court's decision will not be disturbed absent an abuse of discretion. *People v. Streit*, 142 Ill. 2d 13, 19 (1991).

¶ 61 Defendant argues that because she was the least culpable individual involved in the attack, her sentence is not proportionate to her role in the offense, nor was it reflective of the substantial mitigation evidence demonstrating her rehabilitative potential. However, the lack of aggravating factors does not automatically require the sentencing court to impose the minimum sentence. *People*

v. Redmond, 265 Ill. App. 3d 292, 307 (1st Dist. 1994). In fact, a defendant's lack of a prior record is not necessarily the most persuasive consideration at sentencing. *People v. Moore*, 229 Ill. App. 3d 66, 79 (1st Dist. 1992). The seriousness of the crime has been called the most important factor to be considered in imposing sentence. *Id.*

¶ 62 Prior to imposing defendant's sentence in the present case, the trial court spoke at length about how it arrived at the sentence. Specifically, the trial court stated,

> "The main connection between the juveniles that actually committed the offense or did the acts in this case and the victim was the woman who sits here in this courtroom here today.
>
> * * *
>
> Her actions, her conduct, the facts of the crime itself, the evidence that was offered at trial, the victim impact statement, the statutory factors in aggravation and mitigation, the arguments of the attorneys here today, all cry for justice.
>
> I'm not sure that the number of years ever provides justice, but in this court's view in a case of this magnitude and of this seriousness, justice will come in the form of a hard sentence."

The court also emphasized the fact that Defendant took the juveniles to the scene, and they were people that her son knew. The court stated,

> "I said in the sentencing of the co-defendant that they're certainly not victims, the juveniles in this case, but I just don't really think that they

> could have possibly understood the magnitude of their actions or what effect of this liquid would be on the face of Ms. Medina.
>
> *** Both the defendant and her co-defendant failed to allow these young people to understand the magnitude of their acts."

¶ 63 Defendant relies on *People v. Cooper*, 283 Ill. App. 3d 86 (1996), as support for a reduction in her sentence. However, in *Cooper*, the defendant was sentenced to the maximum allowed and the reviewing court found that the trial court did not properly balance the dual purposes of incarceration, retribution and rehabilitation. *Cooper*, 283 Ill. App. at 95. In the present case, defendant was not sentenced to the maximum allowed under the statute, and the record shows that the sentencing court considered the aggravating and mitigating factors. Therefore, we find *Cooper* distinguishable.

¶ 64 This court feels that the sentence imposed in this case is a harsh one and while this court may not have imposed a sentence of 42-years imprisonment, the question for this court is whether the trial court abused its discretion. Based on the rules of law that this court must follow, we cannot reduce the sentence in this case. We find that the trial court did not abuse its discretion. For the foregoing reasons, we affirm defendant's sentence.

¶ 65 **CONCLUSION**

¶ 66 The trial court did not err in admitting IPI Criminal 4th 3.06–3.07 without the bracketed phrase where defendant presented no evidence that she did not make the statement attributed her at trial. The trial court also did not err in admitting and allowing the jury to view gruesome photographs of the victim's injuries, and because we have determined that no error occurred, we find no evidence of ineffective assistance of counsel. Lastly, we uphold defendant's 42-year sentence,

finding that the trial court did not abuse its discretion because it weighed mitigating factors with the seriousness of the crime.

¶ 67 Affirmed.