SECOND DIVISION
April 16, 2013

No. 1-11-3110
2012 IL App (1st) 113110-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 11 CR 6380
	)	
CAROLYN WRIGHT,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Quinn and Simon concurred in the judgment.

ORDER

Held: Defendant's contention that trial court erroneously admitted prior-bad-act evidence was forfeit because defendant failed to object during trial and did not argue for plain-error review on appeal. Defendant's contention that jury instruction was improper did not rise to level of plain error and defendant's trial counsel was not ineffective for failing to object to jury instruction.

¶1 Defendant Carolyn Wright was found guilty by a jury of attempted first-degree murder and aggravated battery. On appeal, defendant contends that the trial court should not have allowed the jury to hear other-crimes evidence, and that the jury instruction about the other-crimes evidence was defective. We affirm.

¶2 On April 3, 2011, the victim Brandy Bolden was leaving a party at her friend Lino Williams' house when she ran into defendant. Williams was defendant's ex-boyfriend, and they

had ended their relationship the previous November. The victim recognized defendant because Williams had introduced the victim to defendant a few months before the breakup.

¶3 Defendant greeted the victim, and the victim offered defendant a ride home. The two got into the victim's car, and defendant directed the victim to the area near 102nd and Union. After parking the car, the defendant and the victim talked for about two hours. When the victim said that she had to leave, however, defendant suddenly punched the victim in the face. The defendant attacked the victim and eventually pulled her from the car and beat her in the middle of the street. When the victim asked why defendant was attacking her, defendant stated, "I saw you all dancing. I saw you all dancing." The victim took this to mean that defendant had seen the victim dancing with Williams at the party.

¶4 Defendant released her hold on the victim but then drew a knife. Defendant stabbed the victim in the chest twice, then several times in the arms, face, and upper back. Finally, defendant pulled the victim's head back and cut her throat twice.

¶5 Defendant was interrupted by the arrival on the scene of witness Cornelius Brantley, who happened to be passing by in his car. When Brantley saw defendant cut the victim's throat, he ran towards them and shouted for defendant to stop. Defendant shoved the victim to the ground and fled.

¶6 Brantley called an ambulance and the victim was taken to the hospital. Despite her wounds, she survived. Detectives interviewed the victim two days later while she was still in the hospital and heavily medicated. At that time, she stated that she could not recall the name of the woman who attacked her, though she was able to provide some other information and to say that she had previously been introduced to the woman by Williams. On April 8, 2011, however, the

victim picked defendant out of a photo spread, and then identified her in a lineup four days later. Brantley identified defendant in a lineup that same day.

¶7 At trial, both Brantley and the victim recounted their experiences on the night of the attack and during the subsequent investigation. Williams testified about an incident that occurred in December 2010, about four months before the attack and about a month after he and the victim had broken up. According to Williams, defendant came to his house uninvited and complained that Williams had been calling her phone. Williams denied that he had been calling her and told defendant to leave. After walking back into his house, however, Williams heard something strike his basement window. When he went outside, defendant was standing in front of his unlocked gate. Williams again told her to leave, but when he attempted to close and lock the gate defendant cut him on the forehead with a butcher knife. Williams struck defendant with a rake and she fled.

¶8 Defendant testified in her own defense and raised an alibi defense. Defendant claimed that she could not have committed the crime because she had gone to a party that day in Dolton, Illinois, and had stayed overnight. She claimed that two friends could vouch for her whereabouts, but neither testified. Defendant also conceded that she and Williams had gotten into a fight in December 2010, but claimed that she had not stabbed him. Rather, defendant said that she had thrown a snowball at Williams after he insulted her. Williams hit defendant with a rake, and defendant then threw a nearby lamp at him. The lamp struck Williams in the forehead.

¶9 At the end of the trial, the jury received a limiting instruction regarding the December 2010 incident. The limiting instruction tracked verbatim Illinois Pattern Instruction (Criminal) 3.14, with the exception of a portion of the instruction that instructs the jury that "[i]t is for you to determine [whether the defendant[s]] [(was) (were)] involved in [(that) (those)] [(offense)

(offenses) (conduct)] and, if so, what weight should be give to this evidence on the issue[s] of _____."

¶ 10 The jury found defendant guilty of attempted first-degree murder and aggravated battery, and she was sentenced to 19 years in prison. Defendant timely appealed.

¶ 11 The first issue on appeal is whether the jury should have heard the evidence about the December 2010 altercation with Williams. Prior to trial, both the State and defendant filed motions *in limine* regarding this evidence, with the defense arguing that it should be excluded under Illinois Supreme Court Rule of Evidence 404(b) (eff. Jan. 1, 2011). The trial court determined that the State could have Williams testify about the incident. The trial court ruled:

> "[F]irst of all, I have to see if it fits within the category and material and relevant for the purposes that are articulated for identity and lack of mistake, lack of accident.
>
> I find that it would be material and relevant for that purpose. Again, I have do [sic] the balancing test and after performing the balancing test to see if it's overly prejudicial and outweighs its probative value, I find that it is not overly prejudic[ial] and does not outweigh its probative value."

The State then clarified that it sought only to introduce the evidence in order to show intent, absence of mistake, and motive. The trial court stated that this did not change its ruling.

¶ 12 Although there is a significant question whether the trial court's ruling was proper under Rule 404(b), we need not reach that question because defendant has forfeited review of this issue. It is well settled that

> "A party must make a timely objection to preserve an issue for appellate review. Timeliness requires that objections to evidence be made at the time the evidence

> is offered or as soon as grounds for the objection become apparent. A party who, prior to trial, unsuccessfully moves to bar certain evidence, must object again to the evidence when it is offered." *Spurgeon v. Mruz*, 358 Ill. App. 3d 358, 360-361 (2005).

The problem here is that although defendant filed a motion *in limine* prior to trial to bar the use of the December 2010 altercation and also raised the issue in her posttrial motion, defendant failed to object to Williams' testimony at trial.

¶ 13 There is a significant amount of confusion in our criminal case law regarding whether a motion *in limine* is by itself sufficient to preserve an issue for appeal. In *People v. Hudson*, 157 Ill. 2d 401, 435-36 (1993), the supreme court stated that an issue is preserved if a defendant (1) *either* raises the issue in a motion *in limine* or objects at trial, and (2) raises the issue in a posttrial motion. For this proposition, however, *Hudson* relied only on *People v. Boclair*, 129 Ill. 2d 458, 476 (1989), which while discussing the preservation of an issue in the case merely stated without citation or further reasoning that "[a] motion *in limine* or an objection at trial would have preserved the issue, provided that it was also raised in a post-trial motion." *Id.* As we have previously noted (see *People v. Mason*, 274 Ill. App. 3d 715, 721 (1995)), *Hudson* is also inconsistent with other supreme court pronouncements on the subject. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (requiring the issue to be raised as an objection at trial and in a posttrial motion in order to be preserved for appeal). In fact, *Hudson* is directly opposed to a later supreme court holding on the same issue. See *Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002) ("The denial of a motion *in limine* does not in itself preserve an objection to disputed evidence that is introduced later at trial. When a motion *in limine* is denied, a contemporaneous

objection to the evidence at the time it is offered is required to preserve the issue for review." (Internal quotation marks omitted.)).

¶ 14 Criminal cases after *Hudson* are inconsistent, with some cases insisting that a motion *in limine* is sufficient to preserve an issue while others find that it is not. Compare, *e.g.*, *People v. Cruzado*, 299 Ill. App. 3d 131, 140 (1998) (sufficient), with *People v. Rodriguez*, 275 Ill. App. 3d 274, 286 (1995) (insufficient). Despite its conflict with other supreme court precedent, however, *Hudson* has never been expressly overruled by the supreme court and we have continued to apply its rule as recently as this past year. See *People v. Korzenewski*, 2012 IL App (4th) 101026, ¶¶ 7-9; *People v. Maldonado*, 398 Ill. App. 3d 401, 415-16 (2010); see also *People v. Belknap*, 396 Ill. App. 3d 183, 208 (2009) (noting the conflict between *Hudson* and *Simmons*).

¶ 15 But the supreme court has never reiterated the *Hudson* rule, and based on *Simmons* the supreme court appears to have implicitly rejected it. Although *Simmons* was a civil case, the principles of a motion *in limine* are the same regardless of whether it is brought in a criminal or civil context. See generally *Cunningham v. Millers General Insurance Co.*, 227 Ill. App. 3d 201, 205-06 (1992) (discussing the procedures and reasons for motions *in limine*); see also *id.* at 206 ("The rule is well established that the denial of a motion in limine does not preserve an objection to disputed evidence later introduced at trial. The moving party remains obligated to contemporaneously object when the evidence is offered, or the objection will be waived."). We are accordingly bound to follow *Simmons* because it is the supreme court's most recent pronouncement on the subject.

¶ 16 The inconsistent nature of our case law on this issue creates difficulties for practitioners and judges, but as we have noted many times before, this problem could have been avoided had defense counsel simply objected at trial. See, *e.g*, *Maldonado*, 398 Ill. App. 3d at 416

("[A]ttorneys should still be vigilant in objecting during trial."). Indeed, the fundamental problem with motions *in limine* is that "a court rules on it in a vacuum, before hearing the full evidence at trial that may justify admission or require exclusion." *Cunningham*, 227 Ill. App. 3d at 205. Such motions and any resulting orders are therefore merely interlocutory, and they "remain subject to reconsideration by the court throughout the trial." *Id.* And it is precisely because motions *in limine* are only preliminary that it is crucial to object at trial. Only when the evidence is actually offered does the trial court have all the information necessary to determine whether the evidence should be admitted or excluded. See, *e.g.*, *Korzenewski*, 2012 IL App (4th) 101026, ¶¶ 14 ("An *in limine* ruling is interlocutory in nature. That issue, and any others defendant has, must be presented at trial to give the trial court the opportunity to address the issue in view of the developing record, that is, at a time when the court could consider anew its ruling at the most meaningful time.") It is often impossible to predict before trial what the basis for admitting or excluding evidence might be, so it is crucial that counsel object to the evidence at trial, rather than only *in limine*, in order to properly raise the issue and preserve it for appeal. Because a party must both object at trial and raise the issue in a posttrial motion in order to preserve an issue for review, defendant's failure to object means that she has forfeited the issue here.

¶ 17 Forfeited issues may be reviewed under the plain-error doctrine, but defendant has not argued for plain-error review. Defendant bears the burden of demonstrating that error is reversible under the plain-error doctrine (see *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). But "[a] defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion," and "when a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review." *People v. Hillier*, 237 Ill.

2d 539, 546 (2010). Regardless of what we may think of the trial court's decision to admit evidence of the December 2010 incident under Rule 404(b), defendant has completely forfeited review of this issue by failing to preserve it at trial and by failing to argue for plain-error review on appeal. We accordingly will not consider this issue.

¶ 18 The second issue on appeal is whether the jury was properly instructed about the other-crimes evidence. Illinois Pattern Instruction (Criminal) 3.14 is the instruction that should be given whenever other-crimes evidence is introduced at trial, and it reads:

> "[1] Evidence has been received that the defendant[s] [(has) (have)] been involved in [(an offense) (offenses) (conduct)] other than [(that) (those)] charged in the [(indictment) (information) (complaint)].
>
> [2] This evidence has been received on the issue[s] of the [(defendant's) (defendants')] [(identification) (presence) (intent) (motive) (design) (knowledge) (_____)] and may be considered by you only for that limited purpose.
>
> [3] It is for you to determine [whether the defendant[s] [(was) (were)] involved in [(that) (those)] [(offense) (offenses) (conduct)] and, if so,] what weight should be given to this evidence on the issue[s] of _____."

¶ 19 In this case, the trial court omitted the third part of the instruction. Citing the committee comments, defendant argues that the omitted portion of the instruction must be given unless "the defense concedes that the defendant performed the conduct or committed the offense that is the subject of this instruction." See IPI (Criminal) 3.14, Committee Note. Defendant contends that the subject of the instruction was not merely the December 2010 incident, but specifically the version of events as recounted by Williams. Defendant argues that the critical fact in Williams' account was that defendant attacked him with a large knife that resembled the knife used to

attack the victim. Noting that she specifically denied that she attacked Williams with a knife, defendant contends that she did not concede that the offense occurred and that therefore the third part of the instruction should have been given.

¶20 But as was the case with the first issue on appeal, defendant has forfeited this issue. Defendant concedes that her trial counsel failed to object to the instruction when the trial court gave it to the jury and also failed to include this issue in her posttrial motion. In contrast to the first issue, however, defendant argues that we should review this issue either under the plain-error doctrine or as ineffective assistance of counsel.

¶21 "Plain-error review is appropriate under either of two circumstances: (1) when 'a clear or obvious error occurred 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) when 'a clear or obvious error occurred 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.' " *People v. Eppinger*, 2013 IL 114121, ¶ 18. Although the first step in plain-error analysis is ordinarily determining whether an error occurred (*People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)), "[w]hen it is clear that the alleged error would not have affected the outcome of the case, a court of review need not engage in the meaningless endeavor of determining whether error occurred." *People v. White*, 2011 IL 109689, ¶ 148.

¶22 In this case, defendant argues only that the jury instruction was reversible under the second prong of the plain-error doctrine.[1] Second-prong errors, however, are coextensive with structural errors (*Eppinger*, 2013 IL 114121, ¶ 19), which are "a very limited class of cases" that includes "a complete denial of counsel, trial before a biased judge, racial discrimination in the

[1] Defendant does not argue that any jury-instruction error is reversible under the first prong of the doctrine, so we do not consider that issue. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *People v. Thompson*, 238 Ill. 2d 598, 609 (2010). We are aware of no cases holding that instructional error of this kind constitutes a structural error, and indeed defense counsel conceded at oral argument that she was asking us be the first court to recognize this type of error as a structural one. We decline to do so. The supreme court has stated that "a jury instruction error rises to the level of plain error only when it 'creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.' " *People v. Herron*, 215 Ill. 2d 167, 193 (2005). Importantly, the supreme court has indicated that jury-instruction errors should be considered under the first-prong of the plain-error doctrine rather than the second: "The seriousness of the risk depends upon the quantum of evidence presented by the State against the defendant. The defendant need not prove that the error in the instruction actually misled the jury. If the defendant carries the burden of persuasion and convinces a reviewing court that there was error *and that the evidence was closely balanced*, the case is not cloaked with a presumption of prejudice. The error is actually prejudicial, not presumptively prejudicial." (Emphasis added.) *Id.*

¶23 Because a defendant must prove that a jury-instruction error was prejudicial, such an error cannot be considered a structural error requiring automatic reversal. Accordingly, even if there was an error in this case, it is not reversible under the second prong of the plain-error doctrine.

¶24 The only remaining question is whether defendant's trial counsel was ineffective for failing to object to the jury instruction. To succeed on an ineffective assistance of counsel claim, "the defendant must show counsel's performance was deficient and that the deficient

performance resulted in prejudice. [Citations.] More specifically, a defendant must prove that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *People v. Hughes*, 2012 IL 112817, ¶ 44.

¶25 The problem here is that even had defendant's trial counsel objected and asked the trial court to give the third portion of the instruction (and assuming that the trial court had agreed to do so), there is not a reasonable probability that it would have changed the outcome of the trial. The third part of the instruction merely would have told the jury that it should determine whether the December 2010 altercation with Williams occurred and what weight it should be given. But there was no real dispute at trial that the event occurred, and the only significant difference between Williams' and defendant's accounts of the incident was whether defendant struck Williams in his forehead with a knife or a lamp. More importantly, this incident was collateral to the main question at trial, which was whether defendant was the person who attacked the victim. But defendant was identified as the perpetrator by not only Brantley but also by the victim, who had met defendant prior to the incident and who had spent at least an hour conversing with her at close range prior to the attack. The central issue at trial was whether the victim and Brantley had correctly identified the victim as the assailant. The December 2010 altercation with Williams had very little if anything to do with that issue, so we cannot see how the result of the trial would have been different had the jury received the third part of the other-crimes instruction. We accordingly cannot say that defendant's trial counsel was ineffective for failing to object to the instruction.

¶26 Affirmed.