2013 IL App (2d) 111087-U
No. 2-11-1087
Order filed March 21 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-1929
ANTHONY L. DAVIS,	)	Honorable Allen M. Anderson,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: Defendant showed no plain error in the admission of defendant's postoffense threats: although the admission was error, the error was not reversible, as the record did not affirmatively rebut the presumption that the trial court did not rely on the threats, and without reversible error there could be no plain error.

¶ 2 Defendant, Anthony L. Davis, was involved in a fight at a bar, where the owner was punched in the face and one of the bar's windows was broken. Because of these acts, defendant was charged with aggravated battery (720 ILCS 5/12-4(b)(8) (West 2008)) and criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2008)). At his bench trial, an arresting officer testified that defendant said

that he was going to "bond[] out from jail" and " 'get that bitch,' " meaning that he was going to "shoot her." Defendant objected to the admission of these statements, but the trial court overruled the objection. Defendant was convicted of both offenses and sentenced to consecutive terms totaling 78 months' imprisonment. Defendant never filed a posttrial motion challenging the admission of the statements he made to the officer. However, on appeal defendant argues that, under the plain-error doctrine, he is entitled to a new trial, as the admission of those statements was improper and induced the court to find him guilty of aggravated battery. For the reasons that follow, we hold that no plain error occurred. Thus, we affirm.

¶ 3 Evidence presented at defendant's trial revealed that, on July 11, 2008, at around 8:30 p.m., defendant was at an Aurora bar known as Miss Lee's Social Club. Defendant was playing pool with his girlfriend, Donna Rice, when Rice started throwing the pool balls. Shari Pounds, who was at the bar that night and is the niece of the bar owner, Lee Goblet, confronted Rice about her actions. Rice and defendant were asked to leave, and a physical fight soon started, with many patrons of the bar, including defendant, joining in.

¶ 4 According to Pounds, Goblet, and Monica Brozell, a patron of the bar that night, defendant punched Goblet in the face with a closed fist during the melee. Defendant denied hitting Goblet in the face, and Wallace Hunter, an eyewitness defendant called at trial, could not see whether defendant hit Goblet or not.

¶ 5 When the police arrived, defendant was escorted to the hospital. While there, defendant spoke to Officer Joseph Howe. Officer Howe testified that, during his conversation with defendant, defendant first told the officer that he did not "have to say shit," then he advised the officer that he

wished that he would just die, and finally he said that when he "bond[ed] out from jail" he was going to " 'get that bitch.' " As to these final statements, the following exchange was had:

"[MS. WASCHER (Assistant State's Attorney)]: Did the Defendant at the hospital say anything to you about Miss Lee's?

[OFFICER HOWE]: Yes.

[MS. WASCHER]: What did he say about Miss Lee's?

[MS. YETTER (Assistant Public Defender)]: Again I'm going to object.

THE COURT: Overruled.

[OFFICER HOWE]: He stated that after bonding out from jail that he would return to Miss Lee's and that he would 'get that bitch,' which I believe was directed at—

[MS. YETTER]: Your Honor, I'm going to object to what the officer believed. I'm also going to renew my objection as to the statement.

THE COURT: Overruled as to the statement. It will be sustained as to the officer's conclusions or assumptions. I'm just interested in what was said. If you don't know, then say so.

[MS. WASCHER]: Did he say anything other than the words 'get that bitch?'

[OFFICER HOWE]: Yes.

[MS. WASCHER]: What else did he say?

[OFFICER HOWE]: He said that he was going to shoot her."

¶ 6 At the end of Officer Howe's testimony, the court asked a few questions. That colloquy proceeded as follows:

"[THE COURT]: Your testimony was that you spoke with the Defendant after the Miranda rights. He said he didn't have to talk to you, [you] put a leg shackle on [him], he stood up, lunged at you? He then said, 'I want to die,' and what else? I didn't hear what you said.

[OFFICER HOWE]: He stated he wanted to die and that he wanted to bleed out, or something to that effect.

[THE COURT]: Bleed out?

[OFFICER HOWE]: Yes.

[THE COURT]: B-l-e-e-d?

[OFFICER HOWE]: Yes.

[THE COURT]: And then the question about what he had to say about Miss Lee. I wasn't clear with the objections and the argument, but how is it that this was about Miss Lee? Did he use the phrase or mention her by name?

[OFFICER HOWE]: He stated that he would return to that business or return there and stated that he would shoot her.

[THE COURT]: Was there anything specifically said about the location, the people or the event?"

¶ 7 After Officer Howe refreshed his memory by reviewing his police report, the exchange continued as follows:

"[THE COURT]: What is it that was specific about that?

[OFFICER HOWE]: He stated that he was going to return to Miss Lee's and shoot her, or 'shoot that bitch,' as he referred to her."

¶ 8 Neither the State nor defendant had any questions for Officer Howe based on the questions the court posed. When defendant testified, he denied ever saying that he was going to return to the bar and "kill her" or "shoot that bitch."

¶ 9 In finding defendant guilty, the court did not mention any of the statements defendant made to Officer Howe. Rather, after noting that the scene at the bar was rather chaotic, as described by the witnesses, the court simply found that "there was contact made by the Defendant on Miss Goblet, Miss Lee Ella Goblet, and it did cause bodily harm."

¶ 10 After he was found guilty, defendant filed a posttrial motion. Nowhere in this motion did defendant contend that it was improper to elicit from Officer Howe, or for the trial court to consider, the statements defendant made about "getting" or "shooting" "that bitch." The trial court denied the motion, defendant was sentenced, and defendant moved the court to reconsider his sentence. The trial court denied that motion, and defendant timely appealed.

¶ 11 At issue in this appeal is whether, under the plain-error rule, defendant is entitled to a new trial because the statements defendant made to Officer Howe were improperly admitted and swayed the court to find defendant guilty of aggravated battery. In addressing that issue, we begin by noting that, in order to raise on appeal an alleged error that arises during trial, a defendant must make an objection to that error when it happens at trial and raise that error in a written posttrial motion. *People v. Burton*, 2012 IL App (2d) 110769, ¶ 12. Here, although defendant objected to the statements at trial, he did not raise any issue regarding the statements in a written posttrial motion. Thus, as defendant concedes, he has forfeited his claim.

¶ 12 Nevertheless, defendant urges us to review the issue under the plain-error rule (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). Plain error is a limited and narrow exception to the general rule of

forfeiture. *People v. Hampton*, 149 Ill. 2d 71, 100 (1992). To obtain relief under the plain-error rule, a defendant must first show that an error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). If an error occurred, the court then considers whether the error is reversible. *Burton*, 2012 IL App (2d) 110769, ¶¶ 14-15. If the error is not reversible, a reviewing court need not go any further, because, without reversible error, the defendant cannot invoke the plain-error rule. See *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). On the other hand, if reversible error is identified, a defendant may obtain relief if the error complained of meets either prong of the two-pronged plain-error rule. See *id* at 602-03. That is, the defendant, who bears the burden of persuasion, must establish that "either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 187 (2005). We review *de novo* whether a forfeited claim is reviewable as plain error. *Burton*, 2012 IL App (2d) 110769, ¶ 13.

¶ 13 With these principles in mind, we first consider whether the admission of the statements defendant made to Officer Howe constituted error at all. *Naylor*, 229 Ill. 2d at 593. Evidence of crimes, wrongs, or acts committed by the defendant, aside from the crime for which the defendant is being tried, is inadmissible if the conduct is relevant solely to establish the defendant's propensity to commit an offense such as the one charged. *People v. Bobo*, 375 Ill. App. 3d 966, 971 (2007). However, evidence of other crimes or bad acts is admissible to establish various things other than a propensity to commit crime. *People v. Moser*, 356 Ill. App. 3d 900, 913 (2005). For example, such other-acts evidence is admissible to show:

> " '[m]odus operandi, motive, knowledge, intent, absence of mistake or accident, [the] defendant's state of mind, absence of an innocent mind frame or the presence of criminal

> intent, circumstances or context of [the] defendant's arrest, placement of [the] defendant in proximity to the time and place of the crime, identification of the weapon used in a crime, consciousness of guilt, to show a common design, scheme or plan, circumstances of a crime charged that would otherwise be unclear, whether a crime charged was actually committed, opportunity or preparation, a defendant's dislike or attitude toward the victim, to explain an otherwise implausible fact relating to the crime charged, to contradict on rebuttal a defendant's denials, to disprove a defense of entrapment and to disprove an alibi defense.' " *Id.* (quoting *People v. Millighan*, 265 Ill. App. 3d 967, 972-73 (1994)).

That said, even other-acts evidence that is relevant for a proper purpose is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. *People v. Walker*, 211 Ill. 2d 317, 337-38 (2004).

¶ 14 Whether to admit other-acts evidence lies within the sound discretion of the trial court. *People v. Robinson*, 167 Ill. 2d 53, 63 (1995). An abuse of that discretion occurs only when the ruling is arbitrary, fanciful, or unreasonable. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 15 The State claims that the statements defendant made to Officer Howe were admissible because they "were relevant to the incident that occurred earlier in the evening at Miss Goblet's bar," "corroborated the testimony of the witnesses who had testified about defendant's behavior and his reactions at the bar earlier in the evening," and "showed [defendant's] continuing state of mind." We disagree.

¶ 16 Instructive on our position is *People v. Knight*, 309 Ill. App. 3d 224 (1999). There, the defendant and his girlfriend got into an argument about the girlfriend's sexual activity with her previous boyfriend. *Id.* at 225. Defendant was angered about this and battered the girlfriend. *Id.*

At the defendant's trial for domestic battery, the girlfriend testified that, more than six weeks after the incident occurred, the defendant approached the girlfriend and stated " 'that if [she] ever slept with one of [the defendant's] friends again, [the defendant] would break [the girlfriend's] legs and kill [her], and [the defendant] had already busted his [*sic*] legs.' " *Id*. A jury found the defendant guilty, and the defendant appealed, arguing, as he did in the trial court, that the trial court abused its discretion in admitting into evidence the statement the defendant made to his girlfriend about breaking her legs and killing her if she slept with one of the defendant's friends. *Id.* at 226-27.

¶ 17 Finding that the statement was improperly admitted, this court reversed the defendant's conviction and remanded the cause for a new trial. *Id.* at 229. In reaching that conclusion, this court determined that the statement was most likely considered by the jury as showing the defendant's propensity to commit crime. *Id.* at 228. That is, the statement, which concerned possible future acts, "differ[ed] substantially" from the crime with which the defendant was charged and could not establish a jealous nature on the defendant's part, as any connection between the crime and the defendant's threatening statement was too tenuous. *Id.* at 227-28.

¶ 18 Here, similar to *Knight*, the defendant made statements about returning to the bar and harming " 'that bitch.' " Although Officer Howe might have believed that defendant's statements concerned Goblet, defendant never said that Goblet was the woman he wanted to "shoot" or "get." Assuming he made those statements, defendant could have been referring to Rice, Pounds, or Brozell, or even some other female patron involved in the fight. In any event, as in *Knight*, defendant's threats about possible future acts that differed substantially from the crime with which he was charged shed light on relatively little except that defendant has a propensity to commit crime.

Id. at 228. Because of that, we determine that the trial court abused its discretion in admitting into evidence the statements defendant made to Officer Howe.

¶ 19 All of that said, having found that there was error does not end our inquiry into whether defendant's failure to preserve his claim in the trial court warrants our review of his claim here. Rather, even though we have determined that it was error for the court to admit the statements defendant made to Officer Howe, we next must consider whether the error amounts to reversible error and, if so, whether it falls within either prong of the plain-error rule. See *Naylor*, 229 Ill. 2d at 593 (noting that, when a defendant does not establish plain error, the result is that the forfeiture of the defendant's claim must be honored).

¶ 20 In addressing whether the error is reversible, we note that defendant was convicted following a bench trial, not a jury trial. This is important, because, unlike in a case where inadmissible evidence is presented to a jury, " 'a reviewing court presumes that the trial court considered only admissible evidence and disregarded inadmissible evidence in reaching its conclusion.' " *Burton*, 2012 IL App (2d) 110769 ¶ 15 (quoting *Naylor*, 229 Ill. 2d at 603). Thus, for purposes of our review, "[u]nless the record affirmatively rebuts that presumption, any error related to inadmissible evidence is not reversible." *Id.*

¶ 21 Here, the trial court admitted Officer Howe's testimony regarding statements defendant made to the officer at the hospital when those statements clearly were not admissible. While it is true that the trial court then asked Officer Howe to clarify defendant's statements, this does not mean that the presumption that the trial court considered only admissible evidence was rebutted. In asking for clarification, the trial court indicated that it did not hear the officer's testimony and that the court was not clear about the testimony because of the objection and argument. The record does not

affirmatively show that the trial court relied on the inadmissible statements in finding defendant guilty. Rather, when the trial court found defendant guilty, the court focused on the circumstances of the fight itself, observing that the scene was chaotic, and then found that defendant hit Goblet. The trial court at no time indicated when it found defendant guilty that it considered in any way what defendant said to Officer Howe at the hospital later that night. Accordingly, because we must presume that the trial court considered only admissible evidence in finding defendant guilty and the record does not *affirmatively* rebut this presumption, we determine that defendant has failed to establish reversible error. Because there is no reversible error, the plain-error rule does not apply. *Id*. ¶ 18.

¶ 22 For these reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 23 Affirmed.