2017 IL App (2d) 141121-U
No. 2-14-1121
Order filed May 8, 2017



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Boone County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 14-CF-62 |
| ERNESTO RODRIGUEZ, | ) | Honorable Robert Tobin, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justice Hutchinson concurred in the judgment.
Justice Birkett specially concurred.

ORDER

¶ 1 *Held*: Trial court erred holding that defendant's prior conviction of aggravated battery, which it initially held was inadmissible, could be admitted in domestic battery trial if defendant presented evidence concerning the alleged victim's propensity for violence; State's contention that this issue was not properly preserved was not well founded.

¶ 2 I. INTRODUCTION

¶ 3 Following a jury trial in the circuit court of Boone County, defendant, Ernesto Rodriguez, was convicted of two counts of domestic battery and one count of criminal damage to property. He now appeals, arguing that trial court erred by conditioning the admission of evidence of the

alleged victim's propensity for violence on the admission of a prior conviction the trial court had previously determined was unfairly prejudicial. We reverse and remand for a new trial.

¶ 4 II. BACKGROUND

¶ 5 The sole issue in this appeal concerns the trial court's decision to allow the State to present defendant's 2005 conviction of aggravated battery to the jury if defendant introduced evidence of the victim's alleged previous aggressive acts toward defendant (*Lynch* material) in accordance with *People v. Lynch*, 104 Ill. 2d 194 (1984). We will confine our discussion of the facts to those relevant to this issue.

¶ 6 Defendant was arrested following an incident that is alleged to have occurred on March 20, 2014. The alleged victim, Lela Marshall, testified that she and defendant had been dating for about three years. They did not live together. On March 29, 2014, at approximately 5 p.m., she went to defendant's apartment (which was in the basement of defendant's mother's house). She entered the apartment. Defendant appeared intoxicated and stated he had been "drinking and doing coke." Marshall stated that she was leaving, and defendant said that she was "not fucking going anywhere." He shoved Marshall onto the couch and took her car keys from her pocket. He then took her glasses off and threw them across the room. Defendant placed his arm around her neck and pushed her against a wall. Marshall saw a shadow on the wall that appeared to be the outline of a gun. She turned a bit and was able to see a black gun pointed at her forehead (it was later determined that the gun was not real). Defendant led Marshall to the sofa, where he punched her in the face and head-butted her. He also dug his fingernail into her forehead.

¶ 7 Marshall further testified that shortly thereafter, someone knocked on the basement door. It was defendant's mother and a female neighbor. They told defendant to let Marshall go, and defendant slammed the door. They returned with the neighbor's son, who told defendant to let

Marshall go. Defendant agreed. As Marshall walked toward the door, defendant kicked the back of her legs several times. Marshall testified that the incident lasted about an hour.

¶ 8 Defendant testified, conversely, that Marshall was his ex-girlfriend. On the day of the incident, Marshall was upset. Defendant did not know she was coming to his apartment. He heard Marshall pounding on his door (he was playing loud music). He opened the door, and she "busted through." Marshall started arguing with defendant, and it appeared to defendant that she wanted to strike him. He told her to leave, and she refused, stating she wanted to talk with defendant. Defendant testified that Marshall grabbed at his shirt, breaking a rosary he was wearing beneath it. She saw the gun on the couch and froze. Defendant picked it up to show her it was not real. She grabbed it from him, pointed it at him, and pulled the trigger twice. She then tried to strike him with the gun. Defendant acknowledged that he hit Marshall on the forehead with his left hand as he was trying to keep her from hitting him with the gun. He further acknowledged grabbing and throwing Marshall's glasses because he was upset that she had broken his rosary. Marshall finally left. Defendant fell asleep on the couch and was awakened when the police pepper-sprayed him.

¶ 9 After defendant testified, he sought to introduce the testimony of two individuals: Guadalupe Rodriguez (his mother) and Jordan Horvath. Defendant's mother would purportedly testify that Marshall had acted aggressively towards defendant on several prior occasions. Horvath purportedly would testify that defendant was in Horvath's car on the day before the incident. Marshall damaged Horvath's car at this time.

¶ 10 The trial court initially denied defendant leave to present this testimony, finding that defendant should have brought forward the *Lynch* material prior to trial in a motion *in limine*. The court noted that, because it was first raised during trial, the trial would have to be delayed in

order to hold a hearing on its admissibility and to allow the State to prepare a rebuttal, including assembling witnesses of its own on the subject. The trial court emphasized, "We have a jury sitting there," and "[t]his all could have been handled well in advance." However, the trial court then stated that it would consider delaying the trial and gave defense counsel an opportunity to consult with her client. After doing so, defense counsel requested that the trial be continued so that defendant could present the *Lynch* material. She emphasized that defendant "believes it is crucial to his defense." The State expressed that it wished the trial to go forward. It requested that if defendant was allowed to present the *Lynch* material, it be allowed to rebut by presenting defendant's 2005 aggravated battery conviction, which involved a different victim. Defense counsel stated that these were separate issues and that conviction had already been excluded. The trial court disagreed and ruled, "If you want to do *Lynch* material, it comes in." Defense counsel then requested another opportunity to consult with her client. After doing so, defense counsel reported to the court that defendant had "decided to forego the *Lynch* materials based on what I guess would be my fault." The trial then continued.

¶ 11 Defendant was convicted, and this appeal followed.

¶ 12 III. ANALYSIS

¶ 13 On appeal, defendant argues that it was error for the court to condition the admissibility of the *Lynch* material on the admission of defendant's 2005 conviction. Generally, we review evidentiary rulings for an abuse of discretion. *People v. Davis*, 254 Ill. App. 3d 651, 660 (1993). However, when the issue is whether the trial court applied the correct legal standard, the *de novo* standard of review applies. *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 26. Furthermore, the failure to follow the law constitutes an abuse of discretion. *Cable America, Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 24 (2009). Here, we hold that the trial court erred as a

matter of law in admitting defendant's 2005 conviction pursuant to *Lynch*, 104 Ill. 2d 194, if defendant persisted in his desire to present evidence of the victim's aggressiveness towards him.

¶ 14 In *Lynch*, 104 Ill. 2d 194, our supreme court held that evidence of a purported victim's "aggressive and violent character" could be relevant to a self-defense claim in two ways. *Id*. at 199-200; see also Ill. R. Evid. 404(b) (eff. January 1, 2011). First, if known to the defendant, it could affect the defendant's "perceptions of and reactions to the victim's behavior." *Id* at 200. Second, the supreme court explained, "evidence of the victim's propensity for violence tends to support the defendant's version of the facts where there are conflicting accounts of what happened." *Id*. In this case, the evidence defendant sought to introduce was relevant in both ways. Evidence of Marshall's alleged violent or aggressive acts toward defendant would obviously be known to defendant and could affect his perceptions of what was occurring during the incident that formed the basis of the charges in the instant case. Further, if Marshall had behaved in such a manner toward defendant at a prior time, it tends to confirm defendant's versions of what occurred on March 20, 2014. This evidence was properly admissible pursuant to *Lynch*. *Id*.

¶ 15 Furthermore, the trial court properly excluded defendant's 2005 aggravated battery conviction involving another individual in accordance with the principals announced in *Montgomery*, 47 Ill. 2d 510, and its progeny. See also Ill. R. Evid. 403 (eff. January 1, 2011). As codified, these principles are expressed thusly: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ill. R. Evid. 403 (eff. January 1, 2011).

Prior to trial, defendant filed a motion to bar the State from using this conviction. The State did not object, and the trial court granted this request.

¶ 16 Additionally, it is true that evidence of a defendant's past aggressive behavior may be admissible in certain circumstances when a self-defense theory is raised. *People v. Devine*, 199 Ill. App. 3d 1032, 1036 (1990); *People v. Randle*, 147 Ill. App. 3d 621, 625 (1986). The admissibility of such evidence is limited in a similar fashion as evidence is excluded under *Montgomery*, as the Third District explained in *People v. Harris*, 224 Ill. App. 3d 649, 650 (1992):

> "It is well settled that when a theory of self-defense is raised in battery case, evidence of the peaceful or violent character of either the accused or the victim may be relevant as circumstantial evidence to show which party was the initial aggressor. [Citation.] Evidence of specific instances of conduct probative of the violent character of either party may be admissible. [Citation.] However, because of the inflammatory nature of such evidence, it must first be determined whether the danger of undue prejudice outweighs the relevance of the evidence. [Citation.]" *People v. Harris*, 224 Ill. App. 3d 649, 650 (1992).

While the *Harris* court did not expressly mention *Montgomery*, the last sentence in the passage set forth above is clearly the *Montgomery* balancing test. See *e.g.*, *People v. Walker*, 157 Ill. App. 3d 133, 137 (1987) ("*Montgomery* requires the court to balance the probative value of the evidence against the danger of unfair prejudice."). Thus, before the 2005 conviction was admitted, the trial court would have had to make a similar inquiry as it did when considering its admissibility pursuant to *Montgomery*. There is no indication in the record that the trial court did so.

¶ 17 Furthermore, in *Harris*, 224 Ill. App. 3d at 653, the Third District stated, "We hold that when the theory of self-defense is raised the relevancy of the defendant's prior convictions for crimes of violence outweighs the prejudicial effect of such convictions only when the defendant clearly puts his character in issue by introducing evidence of his good character to show that he is a peaceful person." Similarly, in *Randle*, 147 Ill. App. 3d at 625, this court held state, "Such evidence of bad character may be introduced by the prosecution only if the defendant first opens the door by introducing evidence of good character to show that he is a quiet and peaceful person." See also *People v. Cervantes*, 2014 IL App (3d) 120745, ¶ 34 ("The case law makes it clear prior bad acts by the accused are inadmissible in a self-defense case *unless* the defense introduces some affirmative evidence of defendant's peaceful character." (emphasis in original)). Defendant, in this case, did not open that door, so the 2005 conviction would not have been admissible for that purpose. When the trial court ruled that the 2005 conviction was admissible to rebut evidence of *the victim's* aggressiveness, it violated this principle of law.

¶ 18 Before closing, we acknowledge the State's argument that this issue was not properly preserved because defendant declined to pursue a *Lynch* hearing. However, the record indicates that it was the State that requested the trial go forward without a *Lynch* hearing. In fact, defendant requested that the case be continued so that the *Lynch* material could be presented. The trial court stated that a *Lynch* hearing could be held on the following Tuesday and the trial continued the following Thursday. The trial court further added that if the jurors were not able to proceed in this manner, it would declare a mistrial, with any delay being attributable to defendant. The State's Attorney then asked for a break to consult with his superiors. After doing so, the State indicated that it "want[ed] to just go ahead with the trial rather than delay it." It was at this point that the State requested permission to introduce defendant's 2005 conviction

to rebut the *Lynch* material. Thus, the course taken by the trial court was actually done at the State's behest, and it was the State that advocated going forward without holding a *Lynch* hearing. It is axiomatic that a party "may not request to proceed in one manner and later contend on appeal that the course of action was in error." *People v. Harding*, 2012 IL App (1st) 101011, ¶ 17. Thus, the State's claim of waiver is not well-founded.

¶ 19 Moreover, we find it of no moment that defendant did not persist in seeking a *Lynch* hearing after the trial court made its ruling allowing the admission of defendant's 2005 conviction. It would be anomalous—and an affront to judicial efficiency—to require a defendant to pursue the admission of evidence that the defendant had no intention of actually using given the conditions set by the trial court. The law does not require a party to engage in a futile, useless act. See *Forest Preserve District of Du Page County v. First National Bank of Franklin Park*, 401 Ill. App. 3d 966, 996 (2010) ("Having no grounds for a dismissal, it would have been a waste of the parties' and the trial court's resources for the defendants to move for such a dismissal. The law does not require the doing of a futile act, and the failure to seek a particular remedy will not prejudice a litigant where that remedy would not have been granted."); *Miller v. Illinois Department of Public Aid*, 69 Ill. App. 3d 477, 484 (1979) (finding appellant need not have exhausted administrative remedies before bringing action in circuit court, observing "We find nothing in the record or statute to suggest that plaintiff's resort to the administrative remedies would be anything more than an exercise in futility."). We also point out that nothing that would have come out at a *Lynch* hearing would have been relevant to the admissibility of the 2005 conviction. The hearing would have concerned evidence of the victim's aggressiveness toward defendant. Only evidence of defendant's good character would have justified the admission of the 2005 conviction. *Harris*, 224 Ill. App. 3d at 653; *Randle*, 147 Ill. App. 3d at

625. Defendant offered no such evidence. Thus, regardless of what might have occurred in the *Lynch* hearing, the trial court's ruling would have been incorrect, and, correlatively, not knowing what would have transpired in the hearing does not hamper our review. Hence, that defendant did not pursue a *Lynch* hearing after the trial court conditioned the admission of *Lynch* material on the admission of defendant's 2005 conviction does not result in the forfeiture of this issue.

¶ 20 In sum, we hold that the trial court erred in determining that the State could introduce defendant's 2005 conviction if defendant introduced evidence of the alleged victim's prior aggressive acts toward him. Quite simply, this was not a proper purpose for which to admit this conviction. In accordance with *Harris* and *Randle*, the conviction could be admitted only if defendant introduced evidence of his good character. Accordingly, we reverse defendant's conviction and remand for a new trial. As the evidence of defendant's guilt—when viewed in the light most favorable to the State—was sufficient in the first trial, double jeopardy does not bar a retrial. *People v. Alfaro*, 386 Ill. App. 3d 271, 315 (2008).

¶ 21 Reversed and remanded.

¶ 22 JUSTICE BIRKETT, specially concurring:

¶ 23 I agree with my colleagues that the trial court erred in ruling that if defendant presented *Lynch* evidence the State would be allowed to introduce defendant's 2005 aggravated battery conviction in rebuttal. I write separately to address defendant's argument that "the trial court's finding that the defendant was required to present *Lynch* evidence in a motion *in limine* was erroneous." It is also not clear that the 2005 conviction would be inadmissible on retrial.

¶ 24 On April 21, 2014, the trial court directed "both sides—as reasonable as possible, try to get their Motions *in limine* on file." The court stressed that "with it being a domestic" that there may be a need for "extensive argument or [an] evidentiary hearing" regarding "any prior bad

acts" the State sought to admit. Both sides did file motions *in limine*. The State sought, pursuant to section 115-7.4 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-7.4 (West 2014)), to admit defendant's 2008 domestic battery conviction for grabbing his mother, Guadalupe Rodriguez, by the neck. The trial court granted this motion.

¶ 25 Defendant filed a motion *in limine* to bar the use of his prior convictions to impeach his testimony pursuant to *People v. Montgomery*, 47 Ill. 2d 510 (1971); (Illinois Rule of Evidence 609 (eff. Jan. 1, 2011)). On April 29, 2014, the trial court considered defendant's *Montgomery* motion. The State said there were only two convictions that qualified within the last ten years, an aggravated battery in 2005 and an aggravated DUI in 2011. The trial court indicated it would allow the 2011 aggravated DUI, and stated it would exclude the 2005 aggravated battery conviction because it was "pretty similar in nature" to the current charged offense, which should avoid any prejudice to the defendant. The State responded, "[t]hat's fine, judge." In the 2005 case, defendant pleaded guilty in Winnebago County to aggravated battery for causing great bodily harm to Jenny Pellegrino by cutting her neck with a knife.

¶ 26 Prior to trial the State tried to discover the subject matter of Jordan Horvath's testimony, who defendant had disclosed as a witness. On July 18, 2014, the State filed a motion for additional disclosure, requesting that the trial court, at the very least, order defense counsel to furnish a summary of Horvath's potential testimony. At the hearing on the motion, the assistant State's attorney told the court that he had no idea what Horvath would have to say, as he was not a witness to the alleged offense. Defense counsel argued that when she requested information from the State regarding their conversations with witnesses, the trial court ruled that she was not entitled to that information, and as with the State, her discussion with witnesses should be viewed as work product. The State countered that they had already furnished statements of the

victim and the defense "knows exactly what she claimed happened." The trial court commented that in looking at Illinois Supreme Court Rule 413(d) (eff. July 1, 1982), under defenses, the State is entitled to the names and last known addresses of defense witnesses, together with relevant written or recorded statements or memoranda summarizing their oral statements. Defense counsel indicated that she had no written "memorandum." The trial court commented that the discovery rules in criminal cases are different from civil cases, where "there is definitely not trial by surprise." The court continued, "[f]elony tries to work itself out somewhere in between but still it's not the level of disclosure that civil court is." Ultimately, the trial court ruled that in the absence of any written material summarizing oral statements, the State had a right to know the witnesses' last known address.

¶ 27 The subject matter of Horvath's testimony was raised for the first time after defendant's trial testimony was concluded. The trial court was understandably perturbed. It asked defense counsel why this subject, which required a hearing to determine admissibility, was "not brought in a motion *in limine* before this?" Defense counsel argued that "there is no requirement that I have to bring in [*sic*] a motion *in limine* asking to bring in evidence related to *Lynch-Gosset*." Defense counsel also stated that "it is not admissible until my client has testified." The State agreed with the trial court that the issue should have been dealt with pretrial.

¶ 28 Following a recess, the trial court again expressed its disappointment that the *Lynch* issue had not been dealt with pretrial in a motion *in limine*. The trial court stated, "State would have the ability to not only cross-examine but also call other witnesses to show not only the peacefulness of the victim, but the aggression on [*sic*] prior offenses of the accused." It said that it would conduct a thorough *Lynch* hearing under Illinois Rule of Evidence 404 (eff. Jan. 1, 2011) and give the State three or four days to compile witnesses on the issue. It then asked the

State, "Mr. Watson, would you be seeking to show not only the peacefulness of the victim but also the prior aggressiveness of the defendant?" The State responded, "I would, judge, yes. Yes." Next, the trial court noted that it had another trial scheduled for the next day that involved both counsels. The court commented, "[y]ou guys both have another speedy trial going on tomorrow. Clearly, this is something that was known beforehand, could have been brought up beforehand and was not." As the majority points out, at this point the court ruled that it would not allow "any *Lynch* material" because it should have been brought forward earlier. The court noted, "we got a jury waiting."

¶ 29 Defense counsel asked the trial court, "[y]our honor, where exactly does it say that I was required to give notice (referring to Illinois Rules of Evidence 403 and 404)?" The trial court reminded defense counsel that "[a]ll I said is that this is something that should have been handled as part of a motion *in limine* primarily so we don't have a jury waiting." The trial court said the *Lynch* issue was "clearly an ambush issue" but then said, "I'm not making a ruling" and gave counsel time to speak to her client about the option of sending the jury home until the following Wednesday. The defense elected to continue the case because defendant believed the *Lynch* evidence was "crucial to his defense."

¶ 30 The assistant State's attorney was granted a recess to speak to his supervisor. The State elected to "just go ahead with the trial rather than delay it." The State registered an objection to photographs that the defense had just disclosed purporting to show dents in Horvath's car, allegedly caused by the victim. The State also suggested that "since we are taken by surprise" the 2005 aggravated battery to Jenny Pellegrino would be "proper rebuttal given the lack of notice." Defense counsel reminded the trial court that the 2005 conviction had been addressed in pretrial motions and she did not believe that Illinois Rule of Evidence 404 (eff. Jan. 1, 2011)

"would allow that to be brought in." As the majority states, the trial court erroneously conditioned the admissibility of defendant's *Lynch* evidence on the admission in rebuttal of defendant's 2005 conviction.

¶ 31 The trial court was of the mistaken view that if defendant presented evidence of violent acts committed by the victim, that would open the door to evidence of defendant's prior violent acts. As the majority states, this was error. Such evidence is only admissible "when the defendant clearly puts his character in issue by introducing evidence of his good character to show that he is a peaceful person." *People v. Harris*, 224 Ill. App. 3d 649, 652 (1992). One of the benefits of a motion *in limine* is they provide the opportunity to more fully research and consider evidentiary issues without disrupting and inconveniencing jurors and witnesses. Defendant argues that trial counsel complied with the discovery requirement in Supreme Court Rule 413 (eff. July 1, 1982) and that the trial court erred in finding that defendant was required to present the *Lynch* evidence in a motion *in limine*. Here, while the trial court did not order defendant to disclose the subject matter of Horvath's testimony, it had the discretion to do so. Rule 413(e) provides:

> "Upon a showing of materiality, and if the request is reasonable, the court in its discretion may require disclosure to the State of relevant material and information not covered by this rule." Illinois Supreme Court Rule 413(e) (eff. July 1, 1982).

Clearly, the subject matter of Horvath's testimony is relevant.

¶ 32 Defendant argues that the trial court had no authority to order defendant to present *Lynch* evidence in a motion *in limine*. I disagree. A trial court has inherent authority to control its docket and to manage the admissibility of evidence by inviting or directing the parties to file motions *in limine* regarding contested evidentiary issues. Trial courts are required to make

preliminary determinations on questions of fact and questions of law before evidence is received by the trier of fact. See Ill. R. Evid. 104 (preliminary questions) (eff. Jan. 1, 2011). "Motions *in limine* are encouraged in criminal cases to exclude extraneous matters." *People v. Holman*, 257 Ill. App. 3d 1031, 1033 (1994). Just as a trial court may insist on an explanation for a party's failure to comply with a discovery request, a trial court can insist on an explanation for a party's failure to comply with a directive to file timely motions *in limine*. The trial court concluded that counsel's decision to forego a motion *in limine* on the *Lynch* issue was motivated by the desire to gain a tactical advantage. That may be true, but the remedy to simply allow the State to introduce the 2005 aggravated battery conviction in rebuttal was error (*supra* ¶ 17). The appropriate remedy would have been, as the trial court proposed, to continue the case for a *Lynch* hearing and to give the State time to gather rebuttal evidence.

¶ 33 My colleagues contend that "nothing that would have come out at a *Lynch* hearing would have been relevant to the admissibility of the 2005 convictions." (*Supra* ¶ 19). I am not convinced that this view is correct. It appears that the trial court believed that the 2005 conviction involved domestic violence. If this is in fact the case, which from the record we have no way of knowing, the 2005 conviction may be relevant and admissible on retrial, premised of course on a proper balancing pursuant to section 115-7.4 of the Code (725 ILCS 5/115-7.4 (West 2014)) (evidence in domestic violence cases). The trial court barred the 2005 conviction for impeachment purposes under *Montgomery*. Under a *Montgomery* analysis, similarity of the prior offense is a factor to be considered which favors excluding the prior offense. Under section 115-7.4 of the Code, the "degree of factual similarity to the charged or predicate offense" will support admission of the prior offense on any subject matter to which it is relevant, including propensity. *People v. Dabbs*, 239 Ill. 2d 277, 289-394 (2010). Evidence of defendant's propensity to commit

acts of domestic violence would clearly rebut *Lynch* evidence suggesting that the victim was the initial aggressor. To the extent that *Harris* and the other cases cited by the majority conflict with this view, they are no longer controlling as they were decided before the enactment of section 115-7.4 of the Code (725 ILCS 5/115-7.4 (West 2014)). On remand, I trust that the defense and the State will file appropriate motions *in limine* on these issues.