2013 IL App (4th) 120001-U

NO. 4-12-0001

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 25, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
BYRON A. WARD,	)	No. 05CF1395
Defendant-Appellant.	)	
	)	Honorable
	)	Charles McRae Leonhard,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's decision denying defendant postconviction relief after an evidentiary hearing is not manifestly erroneous.

¶ 2 Defendant, Byron A. Ward, who is serving terms of imprisonment for intimidation (720 ILCS 5/12-6(a)(1) (West 2004)), unlawful restraint (720 ILCS 5/10-3(a) (West 2004)), and domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2004)), appeals from a judgment in which the trial court denied him postconviction relief after hearing evidence in the third stage of the postconviction proceeding. Because we do not find the judgment to be manifestly erroneous, we affirm it.

¶ 3 I. BACKGROUND

¶ 4 A. The Charges

¶ 5 The indictment, filed on August 11, 2005, had three counts.

¶ 6 Count I charged that on July 19, 2005, defendant committed the offense of

intimidation (720 ILCS 5/12-6(a)(1) (West 2004)) in that, "with the intent to cause Leslie Lee to perform an act, namely: fleeing from a security guard," he threatened to beat her.

¶ 7 Count II charged that on July 18 and 19, 2005, defendant committed the offense of unlawful restraint (720 ILCS 5/10-3(a) (West 2004)) in that he "physically prevented Leslie Lee from leaving her apartment."

¶ 8 Count III charged that on July 18 and 19, 2005, defendant committed domestic battery while having a prior conviction of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2004)) in that he inflicted bodily harm upon Lee by repeatedly punching her.

¶ 9 B. The State's Notice of Its Intent To Present Evidence Under Section 115-20

¶ 10 On October 25, 2005, the State served on defense counsel, and filed with the trial court, a notice of its intent to present evidence under section 115-20 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-20 (West 2004)). Section 115-20(a) provided:

> "Evidence of a prior conviction of a defendant for domestic battery, aggravated battery committed against a family or household member as defined in Section 112A-3 [(725 ILCS 5/112A-3 (West 2004))], stalking, aggravated stalking, or violation of an order of protection is admissible in a later criminal prosecution for any of these types of offenses when the victim is the same person who was the victim of the previous offense that resulted in conviction of the defendant."
>
> 725 ILCS 5/115-20(a) (West 2004).

Subsection (d) (725 ILCS 5/115-20(d) (West 2004)) required the State to disclose such evidence at

a reasonable time in advance of trial. According to the notice that the State sent to the appointed defense counsel, John Taylor, the State "intend[ed] to offer evidence of Defendant's prior conviction for Aggravated Domestic Battery in violation of 720 ILCS 5/12-3.3 in the form of testimony from Leslie Lee, as set forth in the attached reports and discovery in Champaign County Case number 05 CF 895."

¶ 11 C. An Oral Motion *In Limine* By Taylor

¶ 12 On November 2, 2005, immediately before jury selection, Taylor made an oral motion *in limine* to exclude the "subject matter" of the State's notice pursuant to section 115-20. After hearing arguments, the trial court granted the motion in part and denied it in part. The court excluded the prior conviction of domestic battery because the court did not think the jury would be able to perform the mental gymnastics of disregarding the prior conviction for purposes of count I (intimidation) and count II (unlawful restraint) while considering it for purposes of count III (domestic battery).

¶ 13 The trial court ruled, however, that the prior domestic battery itself, as distinct from the conviction therefor, was admissible under the common-law rules of evidence, for two reasons. First, for purposes of the count of intimidation, it was relevant to Lee's state of mind, to show her perception or assessment of the threat that defendant had made to her. Second, the prior battery was relevant to explain her delay in reporting the latest alleged battery to the police. The previous beating, one might infer, had made her afraid and reluctant to cross defendant.

¶ 14 After so ruling, the trial court agreed to consider Taylor's objection as continuing so that he would not have to risk making a bad impression on the jury by persistently objecting throughout the trial. See *Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002) ("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.)).

¶ 15 D. The Jury Trial (November 2 and 3, 2005)

¶ 16 1. *The Testimony of Leslie M. Lee*

¶ 17 Leslie M. Lee, age 33, testified that in July 2005 she lived in Woodstone Apartments, apartment No. 84, in Urbana. The apartment was in her name, and she paid the bills. Defendant, whom she had known for some four years, lived with her.

¶ 18 The evening of July 18, 2005, she returned to her apartment after working a shift as a telemarketer at Americall Group. Around 10:30 or 11 p.m., she and defendant walked from her apartment to apartment No. 40, about a block away, to visit some relatives of defendant and to drink. That night at the party, she had a couple of beers and shared a cognac with defendant.

¶ 19 Lee and a cousin of defendant's went to buy more beer and cognac, and when they returned, a young man was there at apartment No. 40. Lee did not know this young man's actual name as opposed to his nickname, but about a month earlier, he asked her if she would go out with him. She declined because, as she explained to him at that time, she had a boyfriend "in jail" and she was "waiting on him."

¶ 20 On the present occasion, in apartment No. 40, this young man approached her again and began talking to her. She told him, " ['L]eave me alone, get away from me. Are you crazy, trying to get me killed?['] "

¶ 21 Eventually, the young man left apartment No. 40, and a cousin of defendant's asked defendant if he knew who that man was. Defendant answered, " ['Y]es, I was locked up with him not too long ago ***.['] " The cousin said, " ['H]e was hitting on your old lady.['] " Defendant

expressed surprise but then shrugged off this news, saying, " ['D]on't worry about it, everything's okay, it'll be cool, just come on and let's enjoy ourselves.['] "

¶ 22 After a couple of hours of drinking, defendant's mood darkened. He and Lee were sitting on some steps. She was seated between his legs. He shoved her from behind and said, " ['G]et up and go home, bitch.['] " She rose to her feet and just stood there, afraid to walk away. She explained at trial: " [I]f I would have tried to walk away, from past experiences, I have been hit, pushed, kicked, knocked down."

¶ 23 He told her: " ['B]itch, did you hear me? Take your ass home. Go the fuck home.['] " But he had the only set of keys to her apartment. After calling her more names and asking her if she were deaf, he sprang up from the stairs, walked her to the door, and shoved her outside. Then he stepped out of apartment No. 40, behind her, and told her, " ['B]itch, go home, what the fuck you waiting on?['] "

¶ 24 He then sat down on a chair on the walkway, and she merely stood still. He declared to her that he henceforth was " [']a free agent,['] " and after berating her further, he threw her keys at her. They landed at her feet, and she stooped to pick them up. And then he was standing over her. He was 6 feet 2 inches tall to her 5 feet 2 inches. He told her, " [']Bitch, take your ass home. Bitch, is you stupid? Are you deaf? What the fuck is wrong with you, bitch? I told you to go.['] "

¶ 25 They climbed a set of stairs, heading toward Lee's apartment, and a man who was passing by stopped to talk with defendant. She kept walking. Moments later, defendant called out to her and asked her where she was going. She "sat down on *** a raised level of bricks." He ran up to her and punched her in the face, and she fell backward. He straddled her and pummeled her all over her face and stomach. He also picked up "a chunk of rock" and hit her on the forehead with

it. She was screaming for him to stop.

¶ 26 Eventually, he got off her. She "balled up" and stayed on the ground. She had defecated in her pants. He grabbed her by the feet and "jerked [her] around until he finally got [her] to [her] feet," and then he started pulling her in the direction of her apartment. She did not want to accompany him into her apartment. She held onto the edge of a wall until he knocked her fingers loose.

¶ 27 There are security cameras at Woodstone Apartments, and at approximately 1:30 a.m. on July 19, 2005, one of the cameras filmed defendant and Lee. The videotape, People's exhibit No. 1, was played for the jury, and it showed defendant putting Lee in a "wrestling hold," picking her up, and carrying or dragging her as far as he could until she managed to "get hunkered down again." At one point in the film, he backtracks to retrieve her shoes, brings them back over to her, and puts them on her feet.

¶ 28 When the two of them finally arrived at Lee's apartment, she refused to go in with him. He tried to persuade her to come in. A neighbor, Iris Sessions (who did not testify in the trial), came out of her apartment and said to Lee, " 'Oh my God,' " and " 'No, you need some help, what's going on here?' " Defendant responded, " ['N]o, she don't need no help, she's okay, come on, baby, let's go in the house, let's go in the house.['] "

¶ 29 Lee insisted on sitting outside, in her soiled pants. Sessions and defendant sat outside with her. About five hours later, around 6 a.m., defendant went into Lee's apartment, lay down on the floor, and fell asleep. Lee went into her apartment about a half-hour later, took a shower, and lay down on the couch, a few feet away from defendant. Sessions returned to her own apartment the same time Lee went inside her apartment.

¶ 30 Around 9 a.m. on July 19, 2005, Shaheed Terry, the security guard at Woodstone Apartments, knocked on the door of Lee's apartment. Defendant answered the door. The prosecutor asked Lee:

> "Q. Do you know, did you learn why Shaheed was there?
>
> A. Yes.
>
> Q. Why was he there?
>
> A. Because Byron had had an altercation with one of the neighbor guys."

¶ 31 Terry left and then returned about 15 or 20 minutes later. Again defendant was the one who answered the door.

¶ 32 Terry returned a third time, around noon or 12:30 p.m., and said that defendant and Lee had to come to a meeting at 4 p.m. in the office of Woodstone Apartments. Defendant remarked to Lee, " 'See, I told you, these motherfuckers out to get me, why they always hitting on me. See, they all want to fuck you, that's why they all eyes on you and what we do.' "

¶ 33 At 3:30 p.m., Lee attempted to go to the scheduled meeting ahead of defendant, by herself. She ran out of her apartment as quickly as she could. Sessions and a couple of other women were standing outside, and Sessions said to Lee, " ['C]ome here, are you okay?['] " Lee tried to hurry along, but defendant caught up with her, and, tugging on her hand, he pleaded, " ['B]aby, don't do this, no, don't go in there. You could at least—why you got your face—or your hair all out of your face? They're going to see, they're going to see.['] " He "walked [her] all the way around the whole building, and got [her] to go into the house."

¶ 34 Back in the apartment, he had her put makeup on and comb her hair so that it would

cover her face, and then the two of them left the apartment together and headed for the office. Along the way, they encountered Terry, who asked them if they were going to the meeting. Defendant answered yes.

¶ 35 As they descended a stairway on their way to the office, defendant saw some police cars. He turned around, grabbed Lee by the arm, and dragged her back through the apartment complex. As he did so, he told her: " 'See, I told you, you was against me, they all against me, what the fuck, why the police here, bitch? You better bring your ass on home because I'm not going to jail for just whipping your ass, bitch, bring your ass on, I'll fuck you up out here, come on.' "

¶ 36 The prosecutor asked Lee:

> "Q. Okay. When the defendant threatened to beat you again, did you take him seriously?
>
> A. Yes.
>
> Q. Leslie, back in May of 2005—or back in the spring of 2005, Byron beat you then as well, correct?
>
> A. Yes, in the middle of—well, walking up and down the street on 1410 Romine in broad daylight.
>
> Q. Okay. And as a result—well, in that beating did he again repeatedly strike you about your face and your body?
>
> A. My face, my body, he took his belt off, he beat me with his belt, he drug me up and down the street by my hair."

¶ 37 On this present occasion, after defendant "pulled [Lee] through Woodstone," to get away from the police cars, he saw a man he knew standing near a burgundy car. He told this man,

" [']I need a ride, I need you to take me and my wife over to my grandma's house.' " (Lee actually was not married to defendant, as she noted at this point in her testimony.) The man gave them a ride to defendant's grandmother's house. An hour or so later, defendant's mother and her friend arrived and picked the two of them up and took them to defendant's mother's apartment, in the Skelton Building, in Champaign.

¶ 38 Defendant's mother was Mary Robinson, and he and Lee stayed in Robinson's apartment from July 19 to 26, 2005. He did not allow Lee to leave the apartment without him. He did not allow her to go back to Woodstone Apartments to get any of her belongings. Instead, he took her to the Salvation Army "and picked out a shirt there, and a pair of jeans there." She washed out her socks and underwear every night.

¶ 39 During the first three or four days of their sojourn in Robinson's apartment, defendant did not allow Lee to go to work. Thereafter, he allowed her to go to work, at Americall, but he kept a close eye on her. The prosecutor asked Lee:

"Q. And how did you get to work?

A. He would pay somebody to drive me to work.

Q. Okay.

A. Well, drive him and I to work. He was always in the car, and he would pay somebody to drive him, to come pick me up.

Q. How many days were you at work before you ultimately reported this case?

A. I'd say about four.

Q. Why didn't you run out of the building when you were at

work?

A. Because I never knew when he was outside. He'd come on the floor, and two or three times a day I've seen him looking through windows. I've gone on breaks, I was told not to speak with anyone. I was on no-talk, he called it. He let me keep my cell phone, he kept count of my minutes. If someone walked up to me that appeared to be a male, he would call me and say bitch, didn't I tell you not to talk? He's been chased out of the building several times. He's been asked repeatedly not to come onto the floor."

¶ 40 Finally, defendant relaxed his vigilance, or something else claimed his attention. On July 27, 2005, he allowed Lee to ride to work on the bus, by herself. She decided this was the day when she would do something, when she would seek help. She left work early with Sessions and went to Sessions's apartment, at Woodstone (because defendant still had the key to her own apartment), and later that day, Lee talked with the police. A police officer took some photographs of her injuries—what was left of them after a week.

¶ 41 The photographs, People's exhibit Nos. 2 to 7, are in the record. The injuries are not easy to see in these photographs, but a faint crease on her forehead, above her right eye, appears to underline a knot, and there appears to be a faint red bruise on the inside of her raised upper arm.

¶ 42 The prosecutor asked Lee:

"Q. Your arm[pit] is unshaven in that picture, correct?

A. Correct.

Q. Okay. Was it common for you to not shave your armpits?

A. My common practice, I love to shave my armpits and my legs, and my body, you know, and all my pubic hairs, but Byron did not allow me to. I was not to shave unless he said I could, which was basically never. I was not to shower or bathe without his say-so, normally which I showered with him. If I tried to get in the bathtub without him, that meant I had been with someone else. I had to wear the underwear that he said I had to wear, I could not wear clothes on my own. He picked out my clothes."

¶ 43 The prosecutor asked:

"Q. Okay. Leslie you've made mistakes in your life; is that correct?

A. Yep, a lot of them.

Q. Back in '97 you were convicted of theft; is that correct?

A. Yes, sir.

Q. And in 2002 you were convicted of unlawful possession of a controlled substance; is that correct?

A. Yes."

¶ 44 On cross-examination, Taylor brought out the various opportunities Lee had to summon help, or to call the police, from the early morning of July 19, 2005, to July 27, 2005. She could have called out to people passing by as she sat outside her apartment for five hours; she could have asked Sessions to call the police; she could have asked any of her 75 coworkers at Americall for help; she could have called the police on a telephone at Americall or on her own cell phone.

¶ 45 Taylor asked Lee if she drank with defendant at apartment No. 40. She answered: "Yes, I had a couple of beers and shared, drank a glass of cognac with him, yes." He further asked:

"Q. That evening were you taking any medication at all, Leslie?

A. No, Byron wouldn't allow me to take my medication.

Q. And you weren't using any, what I would call illegal drugs at all?

A. No, I was not."

¶ 46 2. *The Testimony of Shaheed Terry*

¶ 47 The security guard at Woodstone Apartments, Shaheed Terry, testified that when he saw Lee on July 19, 2005, she had makeup on, and her hair was combed over her face.

¶ 48 As he, defendant, and Lee were walking to the office, which was about 30 or 40 feet from Lee's apartment, Lee and defendant were holding hands and talking and laughing. When the three of them drew near the office, Terry saw some Urbana police cars. The prosecutor asked Terry:

"Q. Do you know if Byron and Leslie saw the police cars?

A. Yeah.

Q. How did you know that?

A. Because they said, the police, and they turned around and was walking off the property. And I went down there and told Morris [(the building supervisor)], I said 'Morris, they ain't coming to the meeting, because they done left.' And we looked in the camera and seen them walking off the property."

¶ 49 A week or two later, Sessions came to Terry and asked him to unlock Lee's apartment so that Lee could get in.

¶ 50 Later that same day, an Urbana police officer, Adam Chacon, came to Woodstone Apartments, and Terry talked with him. Terry denied telling Chacon that "it appeared that Ward was still controlling Leslie Lee's movements."

¶ 51 3. *The Testimony of Adam Chacon*

¶ 52 Chacon testified he was a patrol supervisor for the Urbana police department and that on July 27, 2005, at 7:10 p.m., he was dispatched to Woodstone Apartments. Harold D. Hazen was the primary investigating officer, so Chacon spoke with Lee only briefly. He remembered feeling a lump on her scalp.

¶ 53 Chacon also spoke with Terry. The prosecutor asked Chacon:

> "Q. During your conversation with Mr. Terry, did he describe an incident where he was walking with Byron and Leslie Lee?
>
> A. Yes.
>
> Q. And did he say to you that it appeared Ward was still controlling Lee's movements?
>
> A. At one point, yes."

¶ 54 Taylor objected, and the trial court gave a limiting instruction to the jury, explaining that the jury could consider Terry's statement to Chacon (as recounted by Chacon) only as it related to Terry's believability as a witness and not for the truth of the statement.

¶ 55 4. *The Testimony of Harold D. Hazen*

¶ 56 Hazen testified he was a night shift patrolman for the Urbana police department and

that on July 27, 2005, he met with Lee. She was "hard to get a statement from, because she was just very anxious, and she seemed very scared."

¶ 57 Lee described to Hazen an incident, and as a result of her description, he looked at her to see if he could observe any injuries on her person. He testified: "She showed me some bruising underneath her left arm, and she showed me a bump above her right eyebrow on her forehead area. She tried to show me one or two lumps on her head under her hair, and it seemed like she had lumps under her hair." He took the photographs labeled as People's exhibit Nos. 2 to 7.

¶ 58 Hazen next went to Americall, where the Champaign police, at his request, already had taken defendant into custody. Hazen drove defendant to the Champaign County jail. The prosecutor asked Hazen:

> "Q. Okay. And did you speak to him at the jail?
>
> A. Yes, I did. I read him the Miranda warnings and attempted to interview him about the situation.
>
> Q. What did you say to him, and what did he say to you?
>
> A. Well, basically, I asked him, I informed him why he was arrested, and I asked him if he wanted to talk to me about it. He asked a lot of questions about the whereabouts of Leslie Lee. He wanted to know what she had told me. I, of course, tried to avoid telling him exactly what she told me, and I tried to get information from him. He basically shut down, and said he didn't want to talk about it."

¶ 59 5. *The Testimony of Robert Yonlisky*

¶ 60 Robert Yonlisky testified he was a Champaign police officer and that on July 27, 2005, at 8:50 p.m., he received a dispatch to proceed to Americall, to assist an Urbana police officer in locating defendant. Yonlisky was told to look for someone in a blue truck.

¶ 61 Upon arriving at Americall, he pulled around to the west side of the building and saw a blue truck with two occupants. He could not recall the number of people standing around the truck. Defendant was one of the occupants of the truck.

¶ 62 6. *The Testimony of Mary Robinson*

¶ 63 The State rested, and defendant called Mary Robinson, age 55. She testified she was defendant's mother and that, through her son, she had known Lee for three years.

¶ 64 One evening, around July 18, 2005, Robinson received a telephone call from defendant. He asked her, " [']Momma, can you pick me up?['] " Robinson and her friend picked up defendant and Lee from Robinson's mother's house and brought them to Robinson's apartment. Defendant did not force Lee into the car. Robinson did not notice anything unusual about Lee. She did not see any injuries on her. She did not see defendant restraining Lee in any way. In fact, Lee went to work during the seven-day period when she and defendant stayed with Robinson.

¶ 65 Robinson testified: "I made them comfortable, and I went and bought groceries and everything, and made sure she was welcome there and everything. It was just—it was nothing unusual, you know."

¶ 66 On cross-examination, the prosecutor asked Robinson:

> "Q. [Defendant] didn't ask your permission to stay at your place?
>
> A. He called me and told me to pick him up. I thought he was

just visiting, but when he got there he needed some place to stay, so I let him stay there, let them stay there."

¶ 67 Neither defendant nor Lee brought a suitcase, but Lee "had [Robinson's] nephew to go pick up some clothes at [Lee's] apartment."

¶ 68 The prosecutor asked Robinson:

"Q. Your son is 30 years old; is that true?

A. He's 35 years old.

Q. Thirty-five years old. And your testimony, under oath, is that it is not unusual for your 35 year old son and his girlfriend to give you a call, come to your house, and need somewhere to stay for a week?

A. No, it's not.

Q. Without any suitcases?

A. Right, because—

Q. That is not unusual?

A. Because she stayed with me when he was in jail.

Q. Okay, and when was that?

A. That was—

MR. TAYLOR: Judge, Judge, Judge, Judge, may we approach?

THE COURT: All right.

(Off-the-record side bar discussion.)

THE COURT: We'll show the objection is sustained, the answer is stricken. Ladies and gentlemen, there's been some reference here by the witness to the effect that her son was in jail at some point. Here, too, that is simply irrelevant to anything before the court, and should not be considered by you in any way in arriving at a verdict. Please disregard the answer. The court will direct that it be stricken. Thank you."

¶ 69 Robinson telephoned Hazen several times, but he did not want to meet with her. She wanted to explain to him that he had no case because "nothing [had] happened" in her apartment. She testified: "They got along real nice at my house and everything, and I would never allow anything to go on in my house."

¶ 70 7. *The Prosecutor's Closing Argument*

¶ 71 During closing arguments, the prosecutor told the jury:

"The problem with domestic violence cases is usually twofold. First of all victims of domestic violence are not always what the average person would consider to be a model citizen. Leslie Lee is not a model citizen. She took the stand, and she's admitted to you that she's been convicted of crimes. She has admitted to you that she has made many mistakes in her life. That doesn't mean she is not a citizen who should be afforded the protection of the law. The second problem with domestic violence cases, is that by nature they occur between people who are in intimate relationships, who are often alone, who

> aren't in the presence of other people all the time, and therefore you are often left with a situation, and essentially that's true in this case, where the only witnesses to the battery and to the restraint, and to the intimidation, direct witnesses, are the two parties involved. So the problem for the prosecutors, and the problem for the criminal justice system is, how do you prove someone guilty of domestic battery when essentially you have a situation where you have one party telling one story, and that's it?
>
> I'll read to you another instruction that addresses this issue. Circumstantial evidence is the proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of the defendant."

The prosecutor then recounted the circumstantial evidence.

¶ 72 8. *The Guilty Verdicts*

¶ 73 During deliberations, the jury sent out a note requesting to see the videotape again (that is, People's exhibit No. 1, the footage from the security camera at Woodstone Apartments). With the agreement of counsel, the trial court brought the jury back into the courtroom, and after viewing the videotape again, the jury returned to the deliberation room.

¶ 74 The jury found defendant guilty of all three counts: intimidation, unlawful restraint, and domestic battery.

¶ 75 D. The Sentences

¶ 76 After the guilty verdicts but before sentencing, defendant sent two letters to the trial

court, complaining of Taylor's performance. On December 9, 2005, the court held a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), in which the court made inquiries of defendant. At the conclusion of the *Krankel* hearing, the court vacated the appointment of the public defender's office and appointed Walter Ding to represent defendant.

¶ 77 On April 4, 2006, the trial court denied a posttrial motion filed by Ding, and the court sentenced defendant to 10 years' imprisonment for count I (intimidation), 3 years' imprisonment for count II (unlawful restraint), and 6 years' imprisonment for count III (domestic battery). The sentence on count III was to run consecutively to the sentence on count I but concurrently with the sentence on count II.

¶ 78 E. The Direct Appeal

¶ 79 On direct appeal, defendant made two arguments. His first argument was that Taylor had rendered ineffective assistance in five ways: (1) failing to confer with defendant at the county jail before trial, (2) failing to review the pretrial discovery with defendant, (3) failing to discuss possible witnesses with defendant, (4) failing to move for the exclusion of evidence that defendant had an altercation with a neighbor at Woodstone Apartments, and (5) failing to call defendant to testify at trial. *People v. Ward*, No. 4-06-0371, slip order at 7 (Feb. 20, 2008) (unpublished order under Supreme Court Rule 23). His second argument was that he was entitled to additional presentence credit under section 5-8-7(b) of the Unified Code of Corrections (730 ILCS 5/5-8-7(b) (West 2004)). *Id.* at 8.

¶ 80 We found merit in the second argument but no merit in the first argument. *Id.* Consequently, we modified the trial court's judgment so as to allow 20 additional days of presentence credit, and we affirmed the judgment as modified. *Id.*

¶ 81 F. The Postconviction Proceeding

¶ 82 1. *The Petition*

¶ 83 On July 11, 2008, defendant filed, *pro se*, a petition for postconviction relief. The trial court appointed Randall Rosenbaum to represent him in the postconviction proceeding, and on January 9, 2009, Rosenbaum filed an amended petition for postconviction relief, alleging that Taylor, Ding, and counsel on direct appeal had rendered ineffective assistance in various ways.

¶ 84 It is unnecessary to list the allegations in the amended petition. The State does not suggest that any of the arguments that defendant makes in this appeal are beyond the scope of the amended petition.

¶ 85 2. *The State's Motion To Dismiss the Amended Petition*

¶ 86 On February 13, 2009, the State filed a motion to dismiss the amended petition for postconviction relief. In addition to arguing that defendant had failed to make a substantial showing of any constitutional violation, the State argued *res judicata* and procedural forfeiture. The State cited *People v. Tenner*, 206 Ill. 2d 381, 392 (2002), which held: "Any issues which were decided on direct appeal are barred by *res judicata*; any issues which could have been raised on direct appeal are defaulted."

¶ 87 On March 5, 2010, the trial court denied the State's motion for dismissal.

¶ 88 3. *The Evidentiary Hearing*

¶ 89 On July 23, 2010, the trial court held an evidentiary hearing on the amended petition for postconviction relief. It is unnecessary to recount everything the witnesses said in this hearing. Instead, we will summarize only enough of the testimony so as to provide a context for the arguments that defendant makes in his appellate brief.

¶ 90 a. Defendant's Testimony

¶ 91 Defendant testified that, in July 2005, Lee "was taking medication for bipolar" and that she was taking this medication "off and on, because she was doing drugs," specifically cocaine. When Lee was off her medication, she would "just blow out," as if she were "crazy" or "losing her mind." She would curse and get "violent" and "real aggressive." That was how she was acting in the middle of July 2005. Defendant testified: "She just wasn't herself. She was just—I mean, if she didn't get [cocaine], she would do just anything to get it, and you know, try to aggravate me, and stuff like that."

¶ 92 However, because of the alcohol that defendant consumed during the night of July 18 and 19, 2005, he could recall only part of what happened that night.

¶ 93 b. Taylor's Testimony

¶ 94 (i.) *"Blind Luck Strategy"*

¶ 95 Taylor testified that one of his strategies in the jury trial was to challenge Lee's credibility by highlighting all the opportunities she had, from July 19 to 27, 2005, to call the police or otherwise to get help.

¶ 96 The other strategy, Taylor testified, was his "blind luck strategy": from talking with defendant, Taylor was unsure that Lee would show up for trial. It would have been lucky for the defense if she did not show up.

¶ 97 (ii.) *His Philosophy on When To Object and When Not To Object*

¶ 98 Taylor testified:

> "I'm very consistent and have been through all my years. I'm not an objector. I'm not an aggressive objector for this reason. I never

object to anything that doesn't hurt me. I never object to something that, to object to it would bring it even greater importance in front of the jury. You know, ask for a cautionary. To stand and yell, object, and have the judge give [a] cautionary is one good way to make jurors remember what the harmful hearsay was or whatever."

¶ 99 (iii.) *His Decision Not To Pursue Lee's Substance Abuse and Mental-Health Problems*

¶ 100 The prosecutor asked Taylor:

"Q. Why did [you] not ask Leslie Lee about any substance abuse or mental health issues?

A. Byron told me about it. In October his mom told me about it. And I'm sure, because I know Byron, he would have asked me to cross-examine her on that when she was on the stand. And for some reason my gut told me that was not a good way to go. Now this is looking at it five years back, okay? And probably what I thought was, she was coming across as a good witness, and the jury will see that as trying to put her down or bringing her down and stuff. You know, a lot of people got substance abuse problems and mental health problems, you know, a lot of jurors do these days. And they don't like it when you try to pull down a witness because of a mental health problem, or gosh golly, it seems like everybody has got a drinking or alcohol problem these days, or mental health issue. It's sort of like a

low shot to the gut, you know."

¶ 101 c. Rosenbaum's Request That the Trial Court Take Judicial Notice of a Mental-Health Case Involving Lee

¶ 102 At the conclusion of the evidentiary hearing, Rosenbaum requested the trial court to take judicial notice of a mental-health proceeding, In re Leslie Lee, Champaign County case No. 06-MH-48. Rosenbaum acknowledged that this mental-health proceeding occurred after defendant's trial. Nevertheless, he argued "it does at this point in time corroborate mental health issues."

¶ 103 The prosecutor objected on the ground of irrelevancy, and the trial court said that "[t]he offer and the objection [would] be taken with the case."

¶ 104 4. *The Trial Court's Decision Denying Postconviction Relief*

¶ 105 In a conscientious and well-reasoned decision, 13 pages in length, the trial court concluded that defendant had failed to establish any substantial denial of a constitutional right and that, in any event, he had failed to show prejudice from the alleged instances of deficient performance by Taylor, Ding, and counsel on direct appeal.

¶ 106 This appeal followed.

¶ 107 II. ANALYSIS

¶ 108 A. Standard of Review

¶ 109 In the third stage of a postconviction proceeding, the defendant has the burden of making "a substantial showing of a deprivation of constitutional rights." *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). What is a "substantial showing"? "Substantial" can mean "not imaginary or illusory," and it also can mean "considerable in quantity" or "significantly great." Merriam-Webster's Collegiate Dictionary 1170 (10th ed. 2000). It would seem, then, that a "substantial

showing" is a showing that is real and weighty as opposed to illusory and trivial.

¶ 110 The trial court decides whether the defendant has made a substantial showing of a deprivation of constitutional rights, and we defer to that decision unless we find it to be "manifestly erroneous." *Coleman*, 206 Ill. 2d at 277. To be "manifest," the error must be more than arguable. "Manifest error" is error that is "clearly evident, plain, and indisputable." (Internal quotation marks omitted.) *Id.*

¶ 111 Therefore, in this appeal, we ask whether the trial court made a clearly evident, plain, and indisputable error by deciding that defendant failed to make a substantial showing of ineffective assistance of counsel. Specifically, we ask whether it is beyond reasonable dispute that defendant made a substantial showing—a real and weighty showing—of the two elements in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Those two elements are (1) deficient performance by defense counsel and (2) resulting prejudice to the defense. *Id.*

¶ 112 Deficient performance is performance that falls outside "the wide range of reasonable professional assistance" (*id.* at 689), despite the "heavy measure of deference" we give to "counsel's judgments" (*id.* at 691).

¶ 113 Prejudice is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome" (*id.* at 694): a less demanding standard than more-likely-than-not probability (*id.* at 693-94). "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694.

¶ 114 In sum, defendant had to make a substantial showing that professionally unreasonable

performance by Taylor made the guilty verdicts unreliable. And not only that, but it must be clear and beyond reasonable dispute that defendant made this substantial showing.

¶ 115 B. *Res Judicata* and Forfeiture

¶ 116 On direct appeal, defendant made one of the arguments that he makes now, namely, that Taylor rendered ineffective assistance by failing to move for the exclusion of evidence that defendant had gotten into an altercation with a neighbor at Woodstone Apartments. *Ward*, slip order at 7. We found no merit in that argument. *Id.* at 8. *Res judicata* bars issues that were decided on direct appeal. *Tenner*, 206 Ill. 2d at 392.

¶ 117 Also, at the time defendant filed his direct appeal, the record gave him the means of raising most, if not all, the other claims of ineffective assistance of trial counsel that he raises in this postconviction proceeding. Any issues that could have been raised, but were not raised, on direct appeal are forfeited. *Id.*

¶ 118 Nevertheless, defendant alleges, in this postconviction proceeding, that his counsel on direct appeal rendered ineffective assistance by failing to raise, or by arguing inadequately, his claims of ineffective assistance of trial counsel. Because case law recognizes an exception to the doctrine of forfeiture "where the alleged forfeiture stems from the incompetence of appellate counsel," the simplest and most straightforward way of approaching this appeal is to address defendant's claims on their merits—keeping in mind, of course, our deferential standard of review. *People v. Newbolds*, 364 Ill. App. 3d 672, 676 (2006).

¶ 119 C. Variances

¶ 120 It appears there are variances between counts I and II of the indictment and the evidence presented at trial. Count I, the count of intimidation, alleges that, by threatening to beat

Lee, defendant caused her to "perform an act, namely: fleeing from a security guard" (Terry). Actually, defendant did not cause Lee to flee from Terry; he caused her to flee from the Urbana police cars.

¶ 121 Likewise, the evidence varied from count II, charging unlawful restraint. In that count, the State alleged that defendant "physically prevented Leslie Lee from leaving her apartment." There does not appear to be any evidence that defendant restrained Lee *within* her apartment, although there is evidence that he restrained her at various places *outside* her apartment.

¶ 122 The trial court found no prejudice from the variance between the evidence and count II, and defendant does not raise either variance in this appeal. We do not mean to imply any criticism or to suggest that the variances would have been worth raising. We merely want to note the variances so as not to appear to be ignoring them or glossing them over.

¶ 123 D. Not Impeaching Lee With Evidence That She Was Addicted to Narcotics

¶ 124 Defendant faults Taylor for failing to "impeach Ms. Lee with her substance abuse *** problems." He quotes *People v. Pitchford*, 314 Ill. App. 3d 72, 80 (2000): "It is well settled that narcotics addiction has an important bearing upon the credibility of a witness, and counsel may use legitimate methods to attack the credibility of such a witness." (Internal quotation marks omitted.)

¶ 125 Even so, it is unclear that Taylor used professionally unreasonable judgment by refraining from asking Lee what the State already had asked her. In its case in chief, the State preemptively brought out Lee's history of substance abuse by eliciting testimony from her that, in 2002, she was convicted of unlawful possession of a controlled substance. See *Strickland*, 466 U.S. at 691; *Coleman*, 206 Ill. 2d at 277.

¶ 126 E. Not Impeaching Lee With Evidence of Her Mental-Health Problems

¶ 127 Defendant also blames Taylor failing to "impeach Ms. Lee with her *** mental health problems." He quotes *People v. Flowers*, 371 Ill. App. 3d 326, 330 (2007): " 'The mental health history of a witness is relevant as it relates to credibility, and is thus a permissible area of impeachment.' "

¶ 128 But defendant leaves out the second half of that sentence from *Flowers*: "The mental health history of a witness is relevant as it relates to credibility, and it is thus a permissible area of impeachment, *but before such evidence may be introduced, its relevance must be established*." (Emphasis added.) *Id.* So, contrary to defendant's apparent assumption, Taylor could not have impeached Lee with the mere fact that she had "mental health problems" in the abstract. Her mental-health problems would have been relevant and admissible for impeachment only if they might have affected her perceptions, memory, or ability to testify accurately and truthfully. See *People v. Helton*, 153 Ill. App. 3d 726, 734 (1987).

¶ 129 The record before us appears to contain no evidence that Lee actually had any mental-health problems in 2005, let alone that they affected her ability to perceive and recall objective events. It is true that, in the postconviction hearing, defendant testified that Lee was "bipolar," but we are unaware that defendant has any psychological expertise.

¶ 130 Even if defendant were correct that Lee had a bipolar disorder, we do not know if her bipolar disorder was severe enough to possibly impair her perception of reality. See *Helton*, 153 Ill. App. 3d at 734. In his testimony in the postconviction hearing, defendant said that Lee became aggressive and obnoxious when she was off her medication, not that she became delusional.

¶ 131 Nevertheless, defendant argues that, by eliciting from Lee the testimony that defendant "wouldn't allow [her] to take [her] medication," the State "opened the door to the defense

challenging Ms. Lee's credibility with her *** mental health problems." Defendant is mistaken. It was defense counsel (Taylor), not the prosecutor, who asked Lee:

"Q. That evening were you taking any medication at all, Leslie?

A. No, Byron wouldn't allow me to take my medication."

Lee never said specifically what medication defendant forbade her to take.

¶ 132 Granted, in the third-stage evidentiary hearing, postconviction counsel, Randall Rosenbaum, requested the trial court to take judicial notice of In re Lee, Champaign County case No. 06-MH-48, "which was a mental health proceeding." Obviously, though—as Rosenbaum noted—it would have been impossible for Taylor to use Champaign County case No. 06-MH-48 to impeach Lee in defendant's jury trial in November 2005, because Champaign County case No. 06-MH-48 did not yet exist at that time.

¶ 133 F. Failing To Object to Lee's Testimony That Defendant Had Been in Jail

¶ 134 Defendant criticizes Taylor for failing to object to Lee's testimony that defendant had been in jail. The difficulty, though, for Taylor was that the prosecutor's question gave him no warning that Lee would testify to defendant's previous incarceration. Lee divulged this inadmissible information even though the prosecutor's question did not call for it. The prosecutor asked her:

"Q. Okay. So what did you [and defendant] do, continue to hang out at the party?

A. His cousin asked him, did he know who that guy was, and he said yes, I was locked up with him not too long ago, and he said well—Walter, his cousin, proceeded to tell him that he was hitting on

your old lady."

¶ 135 It is true that Taylor could have objected after the answer, and could have requested a curative instruction, but he "may at times have considered silence preferable to the emphasis which objections, motions to strike, or instructions to disregard give to otherwise objectionable matters." *People v. Lewis*, 88 Ill. 2d 129, 154-55 (1981). See also *People v. Gentry*, 351 Ill. App. 3d 872, 882 (2004). This is not to say it is reasonable *always* to refrain from objecting so as to avoid emphasizing the objectionable material, but if it is a first-time, fleeting reference, the prudent response might be to just let it pass.

¶ 136 Besides, even if it was professionally unreasonable for Taylor not to object to Lee's testimony that defendant had been in jail, Taylor *did* object *later*, when Mary Robinson gratuitously testified, during the prosecutor's cross-examination that defendant had been in jail. The prosecutor asked Robinson:

"Q. Your son is 30 years old; is that true?

A. He's 35 years old.

Q. Thirty-five years old. And your testimony, under oath, is that it was not unusual for your 35 year old son and his girlfriend to give you a call, come to your house, and need somewhere to stay for a week?

A. No, it's not.

Q. Without any suitcases?

A. Right, because—

Q. That is not unusual?

A. Because she stayed with me when he was in jail.

Q. Okay, and when was that?

A. That was—

MR. TAYLOR: Judge, Judge, Judge, Judge, may we approach?

(Off-the-record side bar discussion.)

THE COURT: We'll show the objection is sustained, the answer is stricken. Ladies and gentlemen, there's been some reference here by the witness to the effect that her son was in jail at some point. Here, too, that is simply irrelevant to anything before the court, and should not be considered by you in any way at arriving at a verdict. Please disregard the answer. The court will direct that it be stricken. Thank you."

¶ 137 Because the trial court instructed the jury that when arriving at a verdict, it should disregard, as irrelevant, the fact that defendant had been in jail, we assume the jury complied; we assume the jury dutifully disregarded that fact when arriving at its verdict. "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Strickland*, 466 U.S. at 695. Although the human weaknesses of the decisionmaker "may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry," the prejudice inquiry assumes a decisionmaker that adheres strictly to the trial court's instructions. *Id.*

¶ 138 G. Failing To Object to Lee's Testimony That Defendant Had Been in an Altercation With a Neighbor

¶ 139 Defendant accuses Taylor of ineffective assistance in failing to object to Lee's testimony that defendant "had been *** involved in an altercation with a neighbor which by implication subjected him to the possibility of arrest." Defendant argues it was "unreasonable and not sound trial strategy" to refrain from objecting to such propensity evidence. See *People v. Donoho*, 204 Ill. 2d 159, 170 (2003).

¶ 140 We are uncertain, though, that an "altercation" with a neighbor is propensity evidence. An altercation is a heated argument. It is not necessarily a crime or even a bad act to get into a heated argument with someone. We do not perceive any implication that defendant was subject to the possibility of arrest for this altercation. We are aware of no reason to suppose that the police cars, which defendant saw on his way to the meeting, had anything to do with the altercation between defendant and the neighbor. The purpose of the planned meeting in the office might have been merely to investigate the reason for the altercation and to prevent it from escalating into a bad act.

¶ 141 H. Failing To Object to a *Doyle* Violation

¶ 142 Defendant finds fault with Taylor for not objecting to Hazen's "gratuitous, unsolicited testimony concerning defendant's exercise of *Miranda* rights." The prosecutor asked Hazen:

"Q. Okay. And did you speak to [defendant] at the jail?

A. Yes, I did. I read him the Miranda warnings and attempted to interview him about the situation.

Q. What did you say to him, and what did he say to you?

A. Well, basically I asked him, I informed him why he was

> arrested, and I asked him if he wanted to talk to me about it. He asked a lot of questions about the whereabouts of Leslie Lee. He wanted to know what she had told me. I, of course, tried to avoid telling him exactly what she told me, and I tried to get information from him. He basically shut down, and he said he didn't want to talk about it."

¶ 143 In *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), the Supreme Court held that, because *Miranda* warnings implied that "silence [would] carry no penalty," it would be "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." More broadly, the Supreme Court has interpreted *Doyle* as "bar[ring] the use against a criminal defendant of silence maintained after receipt of governmental assurances [that the defendant has the right to remain silent]." *Anderson v. Charles*, 447 U.S. 404, 408 (1980). " [T]he thrust of the rule in *Doyle* is that a defendant should not be penalized for his silence where *Miranda* warnings induced it." *People v. King*, 384 Ill. App. 3d 601, 610 (2008).

¶ 144 As *Miranda* itself says, a defendant may, in "any manner, at any time prior to or *during questioning*," invoke the right to remain silent. (Emphasis added.) *Miranda*, 384 U.S. at 473-74. If, after receiving *Miranda* warnings, the defendant chooses to speak, he thereafter can invoke his right to remain silent by expressing affirmatively that he does not wish to say anything further. *People v. Hart*, 214 Ill. 2d 490, 516 (2005); *People v. Patterson*, 217 Ill. 2d 407, 445 (2005) ("Once the right to remain silent has been waived, it can be invoked only by a defendant's positive assertion that he wants to remain silent.").

¶ 145 By asking Hazen "a lot of questions about the whereabouts of Leslie Lee" and by

asking Hazen what Lee had told him, defendant waived his right to remain silent. He subsequently invoked that right, however, by a positive assertion: he told Hazen he "didn't want to talk about it," after which he said nothing further—and "it," in this context, apparently refers to the whole incident in question. *Doyle* forbade the State from using that silence against defendant.

¶ 146 By not objecting, however, Taylor avoided highlighting this isolated reference. See *Hart*, 214 Ill. 2d at 518; *Lewis*, 88 Ill. 2d at 154-55. Not objecting can be a reasonable tactical decision if the disadvantage of focusing the jury's attention on the objectionable material arguably would outweigh the advantage of an objection. *Gentry*, 351 Ill. App. 3d at 882.

¶ 147 Defendant disputes, though, that the reference was isolated. He complains that, during closing arguments, the prosecutor commented on his silence. The prosecutor asked the jury: "So the problem for the prosecutors, and the problem for the criminal justice system is, how do you prove someone guilty of domestic battery when essentially you have a situation where you have one party telling one story, and that's it?"

¶ 148 If this was a reference to defendant's silence, it was, at the most, an oblique reference. The prosecutor did not say or imply that the jury should hold defendant's silence against him. Instead, the prosecutor commented on the lack of any eyewitness testimony corroborating Lee's account. That there was only "one story" was a "problem for the prosecutors," not for defendant. The prosecutor was introducing a naysayer into his argument. He was playing the devil's advocate against the prosecution. He essentially was asking, "How can the State possibly prove, beyond a reasonable doubt, that defendant committed domestic battery, intimidation, and unlawful restraint when all we have is Lee's word for it that he did so, considering that Lee is hardly a model citizen?" The answer, the prosecutor suggested, was circumstantial evidence. Circumstantial evidence

corroborated Lee's account.

¶ 149 The circumstantial evidence against defendant is indeed strong. He was videotaped dragging Lee around in a headlock. He fled, or made a hasty exit, at the sight of police cars. He and Lee suddenly decamped to his mother's apartment, without a suitcase, and stayed there for a week. Photographs show a knot on Lee's forehead and a bruise on her arm. Two police officers testified to seeing injuries on her. Defendant was arrested near Americall, a circumstance that tends to corroborate Lee's testimony that he had kept her under close surveillance there in the hope of dissuading her from going to the police. Therefore, even if it was professionally unreasonable of Taylor not to object to the *Doyle* violation, we find no reasonable probability that this omission affected the outcome of the trial. See *People v. Nitz*, 143 Ill. 2d 82, 109 (1991). Or, more precisely, we do not find this reasonable probability to be clear and indisputable. See *Coleman*, 206 Ill. 2d at 277.

¶ 150 I. Failing To Object to Evidence That Defendant Was a "Violent and Controlling Individual"

¶ 151 Defendant says: "Due to trial counsel's deficient performance, the jury heard significant evidence that [defendant] was generally a controlling and violent individual." Defendant appears to overlook, however, that Taylor made an oral motion *in limine* to exclude evidence that defendant previously was convicted of domestic violence against Lee. The trial court granted the motion in part and denied it in part. The court excluded evidence of the previous conviction of domestic battery, because the court did not think the jury would be able to disregard the conviction for purposes of the counts of intimidation and unlawful restraint while considering it for purposes of the count of domestic battery.

¶ 152 The trial court held, however, that, under the rules of evidence, defendant's prior battery of Lee (as distinct from his conviction therefor) was admissible for two reasons. First, it was relevant, for purposes of the intimidation count, to show Lee's perception of the threat that defendant posed to her. Second, it was relevant to explain Lee's weeklong delay in calling the police. So, it was not because of any "deficient performance" by Taylor that the jury heard evidence of defendant's prior acts of violence toward Lee; rather, it was because—over Taylor's objection—the court found these prior acts of violence to be admissible.

¶ 153 As for defendant's close control of Lee—forbidding her to shave her armpits, for example, or to take a shower without him—such evidence had a purpose other than to show that defendant was a bad person. See *People v. Illgen*, 145 Ill. 2d 353, 365 (1991); *People v. White*, 257 Ill. App. 3d 405, 416 (1993). His practice of keeping Lee under close control is relevant to why it took her a week to go to the police. Arguably, she was so accustomed to his controlling her life, down to the smallest details, that her initiative was weakened; she was reluctant to defy him. She had lived under his all-encompassing tyranny for so long that going to the police was a momentous step for her, a difficult and terrifying thing to do. Given this relevance, Taylor could have reasonably judged it would be futile to object to evidence of the control that defendant had exercised over Lee. See *Strickland*, 466 U.S. at 691 (a "heavy measure of deference to counsel's judgments").

¶ 154 J. Taking Taylor's Words Too Far

¶ 155 Defendant argues: "Where trial counsel utilized a 'blind luck strategy,' relied on his 'gut' to make important strategic decisions, and relied on unyielding devotion to thirty years of a personal policy of not objecting, Mr. Ward established that he was deprived of the constitutional right to effective assistance of counsel."

¶ 156 1. *Blind-Luck Strategy*

¶ 157 Granted, as the trial court said, a blind-luck strategy is no strategy at all. But Taylor did more than rely on luck. His strategy was to challenge Lee's credibility by highlighting the ample opportunities she had to call the police during the week after the alleged battery. This was a sound strategy, probably the best one available for the defense.

¶ 158 2. *His Reliance on His "Gut"*

¶ 159 According to Taylor's testimony in the postconviction hearing, his "gut" must have told him not to impeach Lee with her substance abuse and mental-health problems, because she made a good impression in the witness stand and the danger was too great that the jury would take offense. Defendant denigrates this method of following one's "gut"— but " [i]nstinct is among a trial lawyer's most important assets." *Remy v. Graham*, No. 06-CV-3637 (JG), 2007 WL 496442 at *6 (E.D.N.Y. 2007). Taylor's instincts told him that enough was said about Lee's abuse of illegal substances when the prosecutor elicited from her, on direct examination, that she had been convicted of unlawful possession of a controlled substance. The most that Taylor thereafter dared to do, apropos this subject, was to gesture toward that previous conviction by asking Lee, on cross-examination, if she were taking any illegal drugs the night of the alleged battery. By requiring Lee to repeat, on cross-examination, that she had been convicted of unlawful possession of a controlled substance, Taylor might have come across as taunting her. Defendant seems to take the view that just because a defense counsel *can* do something, he or she *should* do it. On the contrary, just because a course of action is authorized, it does not necessarily follow it would be a good idea.

¶ 160 3. *"Unyielding Devotion" to a "Policy of Not Objecting"*

¶ 161 Actually, Taylor did not testify he had a policy of *never* objecting; rather, he testified

he had a policy of refraining from unnecessary or trivial objections.

¶ 162 Taylor was not exactly a wallflower in the trial. He objected 15 times, by our count, in addition to moving for a mistrial on the ground that the prosecutor had asked Lee if defendant were arrested for the previous battery (a question Lee did not have an opportunity to answer). Also, he made an oral motion *in limine* before the trial.

¶ 163 III. CONCLUSION

¶ 164 For the foregoing reasons, we affirm the trial court's judgment, and we award the State $50 in costs.

¶ 165 Affirmed.