

No. 1-15-1750

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 13 CR 321
	)	
RUBEN MYERS,	)	Honorable
	)	Joseph Kazmierski, Jr. and
Defendant-Appellant.	)	Domenica A. Stephenson,
	)	Judges Presiding.

JUSTICE MASON delivered the judgment of the court.  
Justices Pucinski and Hyman concurred in the judgment.

**ORDER**

¶ 1 *Held:* (i) Evidence was sufficient to convict defendant of armed robbery and aggravated battery; (ii) trial court did not err in admitting prior testimony of unavailable witnesses where defendant had adequate opportunity to cross-examine them at prior hearing; (iii) trial court did not err in barring orthopedic surgeon from testifying as to victim’s alleged psychiatric disorders about which surgeon had no personal knowledge.

¶ 2 After a jury trial, defendant Ruben Myers was convicted of the armed robbery and aggravated battery of Jose Olvera. The evidence showed that Myers lured Olvera to a location where other men beat him and took his property. Myers argues that the trial court abused its discretion in (i) admitting a videotaped evidence deposition of Olvera, who died before trial; (ii)

admitting the prior sworn testimony of Alvaro Rodriguez, a witness whom the court found unavailable for trial; and (iii) excluding testimony from an orthopedic surgeon regarding Olvera's alleged past psychiatric disorders. He also argues that the evidence was insufficient to convict him. Finding no error, we affirm.

¶ 3

### BACKGROUND

¶ 4

We draw the facts regarding the incident from Olvera's sworn testimony in an earlier case, *People v. Ruben Meyers*, No. 13-CR-322, involving a victim of another robbery allegedly perpetrated by Myers, Esquiel Luna (the Luna case).

¶ 5

On September 4, 2012, around noon, Olvera went to Miska's Liquor to purchase lottery tickets. As he was leaving, Myers approached him, accompanied by two other men. Olvera recognized Myers, having seen him at Miska's Liquor once before, but did not know his name. Myers asked if Olvera needed any hubcaps for his truck. Olvera agreed to look at them.

¶ 6

At Myers' direction, Olvera followed him to the street corner. Myers suddenly pushed Olvera. Olvera fell to the ground and Myers' two companions began beating him. They kicked him and hit him with a wooden board. Myers watched the beating with his arms crossed over his chest. He did not participate, but he made no effort to help Olvera, nor did he tell his companions to stop. Myers watched the beating for the next several minutes and then left. Olvera recalled that there were numerous bystanders watching the beating. According to Olvera, the area was "packed."

¶ 7

Olvera estimated that the beating lasted about a half hour. He eventually lost consciousness. When he came to, he found that his assailants were gone and that he was missing a gold bracelet, a ring, and \$125 in cash. By that time, police and paramedics were present on

the scene. Olvera gave police a description of Myers, describing him as a 32-year-old “white Mexican,” around 6’2” and 202 pounds.<sup>1</sup>

¶ 8           Michelle Reilly, a paramedic with the Chicago police department, responded to the scene and found Olvera alert and able to answer questions; she did not smell alcohol or notice any signs of intoxication. Officer Daniel Simons, another responder, noted in his police report that Olvera was intoxicated.

¶ 9           Olvera was taken to Mount Sinai Hospital, where he was treated for a six-centimeter laceration on his head that required 13 staples, as well as a laceration on his right leg and multiple bruises on his chest, abdomen, back, legs, and elbows. Olvera had had a liver transplant several months before the beating, which required surgical repair following the incident. Olvera denied that he had been drinking the day of the attack, and a blood test conducted at 3:05 p.m. tested negative for alcohol. Dr. Amardeep Singh, an emergency room physician who treated Olvera, testified that head trauma can cause symptoms similar to intoxication, such as confusion and altered memory.

¶ 10           A notation in Olvera’s trauma evaluation history form, most likely entered by Olvera’s treating physician, indicated that Olvera’s assailants had “force-fed him drugs.” Dr. Singh did not run a toxicology or drug screen on Olvera because the results would not have been relevant to acute emergency room care.

¶ 11           After the incident, Olvera conducted his own investigation and found that the person who approached him outside Miska’s Liquor was nicknamed “Polaco.” He relayed this information to Detective Anthony Pulcanio, who investigated further and learned that “Polaco” was Myers’

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<sup>1</sup> Olvera’s testimony during the earlier trial regarding talking to the police was confusing. He denied several times speaking to the police at all, but also alluded to making a statement to police about the incident. During this trial, other testimony made clear that Olvera did speak to police.

nickname. On November 27, 2012, Detective Pulcanio called Olvera to the police station to view an in-person lineup. Olvera “immediately and without hesitation” picked Myers and said, “That’s him.” He was visibly shaken and crying.

¶ 12 On the same day, Detective Pulcanio interviewed two employees at Miska’s Liquor: Caroline Ocasio and Rodriguez. Both Ocasio and Rodriguez told Detective Pulcanio that in early September, a man they knew as “Polaco” entered the store and asked them if they wanted to buy a gold bracelet. They each identified Myers as “Polaco” in a photo array. They also told Detective Pulcanio that they would not appear in court and testify because they were afraid of retaliation.

¶ 13 After the State subpoenaed Ocasio for trial, she testified that she had memory problems because of heroin and crack cocaine usage; she claimed not to recall that “Polaco” tried to sell her a bracelet or that she spoke with Detective Pulcanio. She was impeached with her statements to Detective Pulciano.

¶ 14 The State was not able to locate Rodriguez to testify and over Myers’ objection, the court allowed the State to use Rodriguez’s testimony from the Luna case. In his earlier testimony, Rodriguez likewise claimed not to recall that “Polaco” tried to sell him a bracelet. Rodriguez admitted that Polaco was a regular customer at Miska’s. He also admitted that he spoke with Detective Pulcanio and identified Myers as “Polaco” in a photo array. Finally, he admitted telling the detective he feared retaliation.

¶ 15 The defense called Veronica Hernandez, who lived across the street from Miska’s Liquors. In the early afternoon of September 4, 2012, Hernandez was having a garage sale at her house when she heard someone screaming for help. Initially, she “thought it was just someone playing around,” but as the screams “kept on going and going,” she realized they were serious.

Upon walking to the front of her house, she saw a man on the ground and two others beating him with a long stick or piece of wood. She did not recognize any of them. There were bystanders watching the beating and not intervening (she could not recall how many), but she did not see Myers. She explained that she knows Myers from the neighborhood but is not friends with him, “just \*\*\* hi and bye.”

¶ 16 Hernandez yelled at the attackers to “let him go, leave him alone.” As she advanced toward them, they ran away. She reached the victim, who said, “They robbed me, they robbed me.” Hernandez told Olvera to lie down because his head was bleeding. She stayed with him until paramedics arrived. She did not see Myers at any point. She acknowledged she was not present when the beating began, but she estimated it was less than a minute from when she first heard screams to when she saw the two men beating Olvera.

¶ 17 Myers was charged with attempted first degree murder, armed robbery, and aggravated battery of Olvera. The jury found Myers guilty of armed robbery and aggravated battery, but not guilty of attempted murder. He was later sentenced to 12 years for armed robbery and 5 years for aggravated battery, to run concurrently. Myers timely appealed.

¶ 18 ANALYSIS

¶ 19 Myers argues that the evidence was insufficient to prove his guilt beyond a reasonable doubt. He also argues that the trial court abused its discretion in (i) admitting Olvera’s videotaped deposition, (ii) admitting Rodriguez’s prior testimony, and (iii) barring the defense from cross-examining Dr. Alfonso Mejia, an orthopedic surgeon and hand surgeon, about Olvera’s alleged psychiatric disorders. We consider these contentions in turn.

¶ 20 Sufficiency of the Evidence

¶ 21 When reviewing the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). Rather, we must determine “ ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” (Emphasis in original.) *People v. Jackson*, 232 Ill. 2d 246, 280 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 22 A single credible eyewitness identification is enough to sustain a conviction. *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23; *People v. Moore*, 2016 IL App (1st) 133814, ¶ 55. Olvera positively identified Myers at an in-person lineup conducted by Detective Pulcanio, and again at the Luna trial. It is undisputed that Olvera had sufficient opportunity to view Myers, because Myers approached and spoke to him in broad daylight, Olvera recognized Myers as someone he had seen before, and they walked together to the street corner. It is also undisputed that Olvera “immediately and without hesitation” identified Myers at a lineup less than three months after the assault.

¶ 23 Myers nevertheless argues that the evidence was insufficient to convict him because there was no physical evidence or video footage linking him to the scene of the crime. But under the circumstances, the State was not required to present corroborating physical evidence, much less video footage of the assault. *Herron*, 2012 IL App (1st) 090663, ¶ 23; *Moore*, 2016 IL App (1st) 133814, ¶ 56.

¶ 24 Myers also argues that Olvera’s credibility was questionable because he apparently told a treating physician that his assailants force-fed him drugs. He therefore asserts that Hernandez, who did not see Myers at the scene, was much more “compelling and credible.” But Hernandez arrived at the end of what was, according to Olvera, a long beating. It is entirely plausible that

she came after Myers left the scene. The jury also could have concluded that Hernandez's attention was focused on the brutal assault taking place, rather than assessing whether she recognized any bystanders. Notably, at trial, she was unable even to estimate how many bystanders were present.

¶ 25 More importantly, it is the jury's role to assess the credibility of witnesses and, in particular, to determine " 'how flaws in part of the testimony impact the credibility of the whole.' " *People v. Gray*, 2017 IL 120958, ¶ 47 (quoting *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004)). To the extent that Olvera's testimony is in conflict with Hernandez's, the jury chose to believe Olvera, and we do not find his identification of Myers so incredible or unworthy of belief as to overturn that determination. See *Cunningham*, 212 Ill. 2d at 284 (affirming conviction based on finding that questionable parts of officer's testimony did not "make the whole unworthy of belief"). Accordingly, we find the evidence was sufficient to convict Myers of armed robbery and aggravated battery against Olvera.

¶ 26 Olvera's Deposition

¶ 27 Myers next argues that the trial court erred in admitting Olvera's evidence deposition because he did not have adequate opportunity to cross-examine Olvera before Olvera became ill. The transcript of Olvera's evidence deposition was not included in the record, but it is attached to the State's brief. Normally, we would not allow supplementation of the record in this manner (*People v. Wright*, 2013 IL App (1st) 103232, ¶ 38 ("Inclusion of evidence in an appendix is an improper supplementation of the record with information *de hors* the record.")), but given that Myers asks us to review whether admission of the evidence deposition at his trial was error, we will consider it since the issue would otherwise be forfeited. *People v. Urdiales*, 225 Ill. 2d 354, 419 (2007) (appellant bears burden of providing reviewing court a sufficient record to review

claims of error; any gaps in the record resolved against appellant).

¶ 28 We review the trial court’s decision to admit the deposition for an abuse of discretion, which occurs “only where the trial court’s ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.” (Internal quotation marks omitted.) *People v. Sutherland*, 223 Ill. 2d 187, 272-73 (2006); see also *People v. Boston*, 2018 IL App (1st) 140369, ¶ 55 (abuse of discretion standard applies to both constitutional and evidentiary challenges to admission of prior testimony).

¶ 29 As noted, in the earlier prosecution, Myers was charged with the armed robbery of Luna. On September 20, 2013, during a bench trial before Judge Joseph Kazmierski, Jr., Olvera testified to his encounter with Myers as other-crimes evidence. Myers was found not guilty. Olvera’s testimony in the Luna case was admitted in the present trial, and Myers does not contest its admission on appeal.

¶ 30 Meanwhile, on September 18, 2013, the State filed a motion to take a videotaped evidence deposition of Olvera in the present case, alleging that Olvera had terminal cancer and there was a substantial possibility that he would die before trial. The trial court granted the State’s motion, and Olvera’s evidence deposition was taken on September 20, the same date he testified in the Luna case. Olvera’s testimony during direct examination was, for all practical purposes, consistent with the testimony he had just given in the Luna case. At the outset of cross-examination, Myers’ counsel told Olvera he only needed to question him for “probably ten or fifteen minutes” and gave him an opportunity to take a break before cross-examination commenced. Twenty minutes into the defense’s cross-examination, Olvera began experiencing chest pains and was transported to the hospital via ambulance. Olvera died in early October and his deposition was never completed.

¶ 31           Nine months later, on July 11, 2014, Myers moved to bar Olvera’s deposition because his counsel’s cross-examination was cut short by Olvera’s illness. In response, the State argued that Myers forfeited any objection because he did not timely object to stopping the deposition and made no effort to re-convene it before Olvera’s death. The State also argued that Myers had sufficient opportunity to cross-examine Olvera at the deposition and at the Luna trial. After viewing the deposition videotape, the trial court, per Judge Kazmierski, denied Myers’ motion to bar the deposition, based on the court’s finding that Myers had the opportunity for “substantial cross-examination.”

¶ 32           Testimony of a witness at a prior hearing may be admitted into evidence when (i) the witness is unavailable at trial and (ii) the defendant had an adequate opportunity to cross-examine the witness at the prior hearing. *People v. Torres*, 2012 IL 111302, ¶ 53; Ill. R. Evid. 804 (eff. Jan. 1, 2011). The latter requirement is both an evidentiary and a constitutional prerequisite. *Torres*, 2012 IL 111302, ¶ 52; see *Crawford v. Washington*, 541 U.S. 36, 59 (2004). In determining whether the defendant had an adequate opportunity to cross-examine the witness, pertinent considerations include (i) the “motive and focus” of cross-examination at the prior hearing, (ii) whether cross-examination was unlimited, (iii) what counsel knew while conducting the cross-examination, and (iv) any restrictions on cross-examination, both “overt and covert.” *Torres*, 2012 IL 111302, ¶¶ 57-64.

¶ 33           Myers argues that given his lawyer’s inability to complete the cross-examination of Olvera during his deposition, the trial court’s decision to admit the evidence deposition at trial constituted an abuse of discretion and violated his right of confrontation. In particular, Myers argues that his attorney did not have the opportunity to explore how Olvera learned that Myers’

nickname was “Polaco,” a critical fact that led police to identify him as the perpetrator of the assault.

¶ 34 We have examined the transcript of Olvera’s evidence deposition appended to the State’s brief. We agree with the trial court’s assessment that defense counsel had the opportunity to conduct substantial cross-examination before Olvera became ill. In particular, although counsel explored Olvera’s identification of Myers as his assailant and the fact that he had seen him on prior occasions, counsel never once asked about Olvera’s discovery that Myers’ nickname was “Polaco.” Likewise, it is also significant that the evidence deposition was taken on the same day Olvera testified in the Luna case. During cross-examination of Olvera during the Luna trial, defense counsel (the same attorney representing Myers in this case) made no inquiry regarding how Olvera came to learn that Myers’ nickname was “Polaco.” These failures refute Myers’ claim here that the inability to inquire on that subject was “critical” and should have precluded admission of the evidence deposition. Further, given that Myers does not contest the admission of Olvera’s consistent testimony from the Luna trial, it follows that admission of the truncated evidence deposition at the trial in this case was largely cumulative and, therefore, harmless. Accordingly, we find no basis to reverse on this ground.

¶ 35 **Rodriguez’s Testimony**

¶ 36 Myers next argues that the State failed to show that Rodriguez was unavailable for trial and, therefore, the trial court abused its discretion in admitting Rodriguez’s prior testimony from the Luna trial.

¶ 37 On March 11, 2014, Rodriguez testified for the State in the Luna trial. Trial in the present case was set for February 2, 2015. On January 27, 2015, the State moved to declare Rodriguez an unavailable witness and to admit his testimony from the Luna trial. In support, the

State alleged that it had just learned that earlier in January Rodriguez had moved to Mexico and did not intend to return to the United States.

¶ 38 The trial court held a hearing on the State's motion on January 30. Julissa Carriche testified that she had been Rodriguez's girlfriend for five years. When Carriche learned that Rodriguez was cheating on her, she "kicked him out of the house" (in counsel's words). On January 5, she drove Rodriguez to the airport, where he took a flight to Mexico. He gave away some of his possessions and took the rest with him; he left nothing at Carriche's house. She did not know his address in Mexico and had not had any contact with him since he left.

¶ 39 Alexandra Castaneda, an investigator for the Cook County State's Attorney's office, testified that on January 22, she went to Rodriguez's workplace and spoke to his manager. The manager told her that Rodriguez quit his job "a few weeks prior," saying that he was leaving to go live in Mexico. Castaneda also learned from an Immigration and Customs Enforcement agent that on January 5, Rodriguez took a flight from Chicago O'Hare Airport to Monterrey, Mexico, under the alias "Osvaldo Rodriguez Torres." (Carriche testified that Rodriguez sometimes went by the name "Osvaldo Rodriguez," and he also had a second last name of Torres.)

¶ 40 Based on this testimony, the trial court granted the State's motion, finding that Rodriguez was unavailable for trial and that his prior testimony could therefore be admitted under Supreme Court Rule 804.

¶ 41 As discussed above, a witness's prior testimony is admissible where the witness is unavailable for trial and the defense had adequate opportunity for cross-examination at the prior hearing. *Torres*, 2012 IL 111302, ¶ 53; Ill. R. Evid. 804(b)(1) (eff. Jan. 1, 2011). Myers does not dispute that he had adequate opportunity to cross-examine Rodriguez, but contends that the State failed to show he was unavailable. We disagree. The foregoing testimony provides ample

grounds for the conclusion that Rodriguez had left the jurisdiction and was therefore unavailable for trial.

¶ 42 Myers argues that the State did not conclusively prove that Rodriguez went to Mexico, since Carriche did not personally observe him board the plane and did not speak with him once he reached Mexico. But this inference is reasonable given the circumstances of Rodriguez's departure and Carriche's statement that their relationship was "[t]otally over." Moreover, Carriche's testimony was corroborated by Rodriguez's manager, who stated that Rodriguez quit his job in anticipation of returning to Mexico, and the ICE agent who reported that Rodriguez boarded a flight to Mexico on the same day Carriche brought him to the airport.

¶ 43 With regard to this corroborating evidence, Myers argues that the ICE agent's report is "highly suspect and unreliable" because Rodriguez and Torres are "common Hispanic names." Myers also argues that the State acted in an "offensive and grossly negligent" manner by not ascertaining the name of Rodriguez's manager. We disagree on both points. Though Rodriguez and Torres may be common names, the specific alias "Osvaldo Rodriguez Torres" is not. Moreover, Myers fails to articulate what difference it would have made if Castaneda had ascertained the name of Rodriguez's manager.

¶ 44 Myers also argues that the State failed to make a good-faith effort to secure Rodriguez's presence for trial. See *Torres*, 2012 IL 111302, ¶ 54 ("[A] witness is not 'unavailable' for purposes of the \*\*\* exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial." (Internal quotation marks omitted; emphasis in original.)). He points out that the State apparently did not attempt to contact Rodriguez until January 22, 2015, 11 days before trial was scheduled to start. The State argues, and we agree, that since Rodriguez appeared for trial in the Luna case less than a year

earlier, the prosecution had no reason to believe that he would suddenly become unavailable before trial in the present case. Moreover, the evidence shows that the State attempted to contact him at both his work and home addresses and also investigated Carriche's claim that he took a flight to Mexico on January 5, 2015.

¶ 45 Thus, keeping in mind we review the trial court's decision for an abuse of discretion (*Sutherland*, 223 Ill. 2d at 272-73; *Boston*, 2018 IL App (1st) 140369, ¶ 55), we find no error in its finding that Rodriguez was unavailable.

¶ 46 Dr. Mejia's Testimony

¶ 47 One of the State's witnesses was Dr. Mejia, an orthopedic surgeon and hand surgeon who treated Olvera from November 2012 to July 2013 for a wrist fracture that he sustained in the robbery. Prior to Dr. Mejia's testimony, the State moved to bar the defense from cross-examining Dr. Mejia about a notation in his November 1, 2012 report stating that Olvera had a past history of psychological disorders.

¶ 48 The court conducted an *in camera* examination of Dr. Mejia. Dr. Mejia stated that he treated Olvera only for the physical injury to his wrist, not for psychological disorders. He did not know what psychological disorders Olvera might have had, when he had them, or who diagnosed them. He did not know how the information about Olvera's psychological disorders was reported, although he speculated it was probably through the patient intake questionnaire.

¶ 49 Dr. Mejia's November 1 report contained a list of medications that Olvera was taking. Defense counsel asked Dr. Mejia whether any of those medications were used to treat psychological disorders. Dr. Mejia replied that, as an orthopedic surgeon, he was not familiar enough to say with any degree of medical certainty.

¶ 50 The court then granted the State’s motion to bar the defense from cross-examining Dr. Mejia about Olvera’s psychological disorders, finding that “[i]t’s just too speculative.”

¶ 51 Myers now argues that this ruling was an abuse of discretion. See *People v. Palmer*, 2017 IL App (1st) 151253, ¶ 25 (“A trial court is afforded broad discretion to limit the scope of cross-examination, and its restriction of cross-examination will not be reversed absent an abuse of that discretion”). But Myers forfeited this issue by failing to raise it in his posttrial motion (*People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010) (to preserve error for review, defendant must both object at trial and raise claim of error in posttrial motion)), and he does not argue plain error. “A defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion.” *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).<sup>2</sup>

¶ 52 In any event, we find no error in the trial court’s ruling. See *People v. Brant*, 394 Ill. App. 3d 663, 677 (2009) (in the absence of error, there can be no plain error). Dr. Mejia’s *in camera* testimony made clear that he had no personal knowledge regarding Olvera’s reported psychological disorders and could not even state with certainty how that information came to be included in the medical record. Thus, his testimony had virtually no probative value and would only have invited speculation by the jury that Olvera had an unspecified disorder that might have impacted his credibility. Under these circumstances, we find no error in barring cross-examination of Dr. Mejia on this issue. See Ill. R. Evid. 403 (eff. Jan. 1, 2011) (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”).

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<sup>2</sup> The State argued against plain error review in its brief. Myers has not filed a reply brief.

¶ 53

CONCLUSION

¶ 54

For the foregoing reasons, we find that (i) the evidence was sufficient to convict Myers of armed robbery and aggravated battery; (ii) the trial court did not abuse its discretion in admitting the prior testimony of Olvera and Rodriguez; and (iii) the trial court did not abuse its discretion in barring Dr. Mejia from testifying about Olvera's alleged psychological disorders of which he had no personal knowledge.

¶ 55

Affirmed.