

NOTICE

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2012 IL App (5th) 110097-U
NO. 5-11-0097
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Madison County.
)	
v.)	No. 06-CF-330
)	
SUSAN MISSEY,)	Honorable
)	Richard L. Tognarelli,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE DONOVAN delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

- ¶ 1 *Held:* The defendant failed to establish prejudice as a result of any of the alleged acts of substandard performance by her trial counsel. Under the one-act, one-crime doctrine, it was error to enter convictions on both counts of aggravated battery. The judgment is affirmed in part and reversed in part, and the cause is remanded with directions.
- ¶ 2 Following a jury trial in the circuit court of Madison County, the defendant, Susan Missey, was found guilty of aggravated battery with great bodily harm (720 ILCS 5/12-4(a) (West 2004)) and aggravated battery with a weapon (720 ILCS 5/12-4(b)(1) (West 2004)), and she was sentenced to 12 months' probation. On appeal, the defendant contends that she should be granted a new trial because she was denied effective assistance of counsel. The defendant also contends that under the one-act, one-crime doctrine, it was error to enter convictions on both counts of aggravated battery where the charged offenses were based on the same physical act. We affirm in part, reverse in part, and remand with directions.
- ¶ 3 On October 28, 2005, the defendant and her stepmother, Katherine Freeze, became

involved in an argument outside the home of the girlfriend of Freeze's son. The defendant approached Freeze and hit her in the head with a wooden handle, causing physical injuries to Freeze. The defendant left the scene, but was subsequently arrested. On February 8, 2006, the State filed an information that charged the defendant with aggravated battery. In April 2010, the State filed an amended information that charged the defendant with two counts of aggravated battery. Count I alleged that on October 28, 2005, the defendant, in committing a battery, knowingly and without legal justification, caused great bodily harm to Katherine Freeze, in that the defendant hit Katherine Freeze about the head with a bludgeon in violation of section 12-4(a) of the Criminal Code of 1961 (720 ILCS 5/12-4(a) (West 2004)). Count II alleged that on October 28, 2005, the defendant, in committing a battery and by use of a deadly weapon, a bludgeon, knowingly and without legal justification, caused bodily harm to Katherine Freeze, in that she hit Katherine Freeze about the head with a bludgeon in violation of section 12-4(b)(1) of the Criminal Code of 1961 (720 ILCS 5/12-4(b)(1) (West 2004)). The defendant did not file affirmative defenses. The case was tried before a Madison County jury in November 2010.

¶4 During the defendant's brief opening statement, the defendant's attorney asked the jury to be very attentive to the evidence. He asked them to focus in particular on the issue of great bodily harm and to focus on the participants. He then said: "We are going to ask you to keep in mind a concept called legal justification. We will talk more about that as we have—". At that point, the State's attorney interrupted defense counsel with an objection and requested a sidebar. A sidebar discussion was held outside the presence of the jury but was not recorded. The trial court later made a record of what had occurred during the sidebar. During this sidebar discussion, the State objected to defense counsel's comment on legal justification because the defendant had not filed the affirmative defense, and the defendant's attorney agreed he would not mention it further in his opening statement. Following the

sidebar discussion, the defendant's attorney resumed his opening statement. He again asked the jury to pay attention to testimony of all witnesses, particularly the victim, and to keep an open mind until all of the evidence was presented.

¶ 5 Billy Hayes, a volunteer firefighter for the State Park Fire Department, was the State's first witness. Hayes testified that on October 28, 2005, he was working at the firehouse when he noticed a car pull into a driveway directly across the street. Hayes saw the driver, whom he identified as the defendant, park her car next to another car. There was a male passenger in the defendant's car, and there were two women in the other car. Hayes did not recognize anyone other than the defendant. Hayes stated that the defendant emerged from her car and began yelling at the female driver in the other car. Both women then began to scream at each other. He could not hear what they were arguing about. Hayes testified that he saw the defendant pick up what looked like a shovel handle from the ground and strike the other woman in the head as she tried to turn away. He did not see the other woman provoke the defendant before the defendant hit her. Hayes stated that he told the defendant to stop or she would be going to jail. He testified that he saw the defendant strike the other woman with the handle four or five times, and that the defendant walked away when the other woman dropped to her knees. Hayes saw the defendant's male passenger take the club from the defendant and throw it down. The defendant and the man returned to the defendant's car and the defendant drove away. Hayes called "911." He stayed with the injured woman until the medics arrived. Hayes testified that he told the police officer what he had seen. During cross-examination, Hayes was asked about inconsistencies between his trial testimony and the statement he gave to a police officer on the day of the occurrence. Hayes stated that he told the officer that he saw the defendant strike the victim four or five times, not one time, and that the defendant obtained the club from the yard and not from her car. He said that testimony to the contrary would be wrong.

¶ 6 Katherine Freeze testified that the defendant was her stepdaughter. Freeze noted that she and the defendant's father, Richard Waltermann, had been married for 13 years, that they divorced in February 2004, and that Richard passed away on October 4, 2005. Freeze testified on October 28, 2005, she went to get her son, Joseph, from his girlfriend's home. Freeze stated that her former mother-in-law, Sandy Waltermann, and her former brother-in-law, Eddie Waltermann, accompanied her. The group was going to pick up a report of the autopsy that was done to determine Richard Waltermann's cause of death. Freeze recalled that she had parked in the driveway and was waiting for Joseph, when she observed a big white car pull into the driveway and park alongside her car. Freeze watched the defendant get out of the white car and approach her car. Freeze recalled that she and the defendant exchanged words, but she had no memory of what was said. Freeze was asked if she tried to provoke the defendant into a fight. She stated that she had no memory of doing so. Freeze recalled being hit in the head with a stick that the defendant was holding. Freeze did not know whether she was hit more than once. She noted that the stick looked like a tool handle of some kind. When the State's attorney showed Freeze a photograph of a stick that had been seized at the scene, she admitted that she could not identify it, with any certainty, as the one used in the attack on her. Freeze testified that the next thing she remembered was sitting in her car and noticing that blood was coming out of her ear. She remembered that she talked with a police officer before she was placed in an ambulance and taken to Gateway Hospital. Freeze stated that she was transferred from Gateway Hospital to St. Anthony's Hospital. She was treated at St. Anthony's for four days and then discharged to her home. Freeze testified that she endured a continuous headache throughout the first 16 days after her discharge, and that she had headaches on and off for the next few months. Freeze noted that her mother-in-law passed away in February 2006 and that her brother-in-law was not in the car at the time of the attack.

¶7 During cross-examination, Freeze testified that she had no recollection of any disputes with the defendant around the time of the incident. Freeze stated that she was not aware that the defendant had accused her of trying to abduct the defendant's children. She said that her son, Joseph, might have mentioned something about the defendant's allegation, but she had no specific memory of it. Freeze testified that the only visible injury she noticed was blood coming from her ear. She stated that she no longer has headaches like those she had in the first few months following the attack.

¶8 Scott Gurley, a deputy with the Madison County's sheriff's office, was dispatched at approximately 1 p.m. on October 28, 2005, to investigate a possible battery. Deputy Gurley testified that when he arrived at the scene, the victim was sitting in a car and she was being evaluated by the medics. He noted that the defendant was not there. Deputy Hurley initially interviewed a firefighter named Billy Hayes. Deputy Hurley stated that Hayes reported that the defendant and the victim were arguing and that the defendant hit the victim with a wooden handle. Deputy Gurley stated that he took statements from everyone at the scene. Some witnesses directed him to the wooden handle that had been used to strike the victim. It was on the ground near a tree. Deputy Gurley seized the wooden handle as evidence. Deputy Gurley identified the wooden handle and it was shown to the jury.

¶9 During cross-examination, Deputy Gurley admitted that he did not see any injuries to the victim when he interviewed her at the scene. Deputy Gurley stated that when he interviewed witnesses at the scene, he was told that the defendant had the wooden handle in her hand when she exited her vehicle. He said that if someone testified during trial that the defendant picked up the handle from the ground as she approached the victim's car, that testimony would be contrary to what he was told by witnesses at the scene. Deputy Gurley testified that the wooden handle that he seized had not been tested for fingerprints.

¶10 John Zabrowski, M.D., a diagnostic radiologist, was on duty at Gateway Hospital on

October 28, 2005, and he reviewed and interpreted a CT scan that was done on Katherine Freeze that afternoon. Dr. Zabrowski testified that the CT scan revealed a large bruise on the left side of the head and an acute bleed of the dura on the right side of the brain near the right temporal lobe. Dr. Zabrowski testified that the bruise on the left side of the head was indicative of a direct trauma to that area, and that the subdural hemorrhage near the right temporal lobe was indicative of a contrecoup injury. Dr. Zabrowski explained that a contrecoup injury can occur when the force of an impact to the left side of the head causes the right frontal lobe of the brain to bounce into the skull. Dr. Zabrowski stated that a subdural hemorrhage is a significant injury because continued bleeding can lead to increased pressure on the brain and create a potentially life-threatening situation. Dr. Zabrowski testified that the presence of bright red blood in the right subdural hemorrhage indicated that the subdural bleeding was less than 72 hours old. During cross-examination, Dr. Zabrowski acknowledged that he could not identify the exact time when the subdural bleeding started, and that he could only state that the hemorrhage was less than 72 hours old. Dr. Zabrowski stated that a subdural hemorrhage is most often associated with trauma resulting from a fall, an auto accident, or a direct blow to the head. He testified that people who take blood thinners can develop them spontaneously. He did not know if Katherine Freeze was taking blood thinners in October 2005.

¶ 11 The defendant appeared as a witness in her defense. The defendant stated that she was a cardiology technician and that she was the mother of four children. She noted that in October 2005, she had two children. After eliciting this brief biographical information about the defendant, the defendant's attorney asked the defendant whether there had been any events in the family on or before October 27, 2005, that might have led to a situation where someone would try to abduct her children. The State immediately objected and requested a sidebar conference. The sidebar conference was not recorded, but at the close of the

evidence, the court and the parties made a record outside the jury's presence of what had occurred during the conference. The court recalled that during the sidebar, the defendant's attorney stated that he believed that the assistant State's attorney had opened the door to the questions when, during her opening statement, she mentioned that the jury would hear testimony regarding an abduction; that the assistant State's attorney denied making any statement about a child abduction during her opening remarks; that the court did not recall the assistant State's attorney mention a child abduction; and that the defendant's attorney decided to move on and not question the defendant further about the alleged child abduction. Following the conference, the defendant's attorney announced he had no more questions for the defendant.

¶ 12 During cross-examination, the defendant testified that she went to the Madison County sheriff's department on October 31, 2005, to report an attempted child abduction. The report was taken by Lieutenant Morris. The defendant stated that she told Lieutenant Morris that someone had attempted to abduct her son on October 27, 2005. The defendant acknowledged that she did not report the attempted child abduction until October 31, 2005, because she was afraid she would be arrested if she came to the police station. The defendant was asked whether she told Lieutenant Morris that she had just been informed of the attempted abduction, and she testified that she could not recall what she told him.

¶ 13 On appeal, the defendant contends that she was denied effective assistance of counsel where her lawyer asserted in his opening statement that justifiable use of force would be an issue, yet after the trial court sustained the State's hearsay objection to the defendant's testimony regarding an alleged attempted abduction of her children by the complainant, he presented no further evidence to support the defense, and he made no offer of proof to establish that the abduction evidence was offered not for the truth of the matter asserted, but to establish the defendant's knowledge, state of mind, and intent.

¶ 14 To succeed on a claim of ineffective assistance of counsel, a defendant must show that her counsel's performance fell below an objective standard of reasonableness, and that but for counsel's substandard performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504, 527, 473 N.E.2d 1246, 1256 (1984). Because both prongs of the *Strickland* test must be met, a reviewing court need not consider whether counsel was professionally deficient if the prejudice prong is resolved adversely to the defendant. *Albanese*, 104 Ill. 2d at 527, 473 N.E.2d at 1256; *People v. Hillenbrand*, 121 Ill. 2d 537, 556-57, 521 N.E.2d 900, 908 (1988).

¶ 15 After reviewing the record, we find that the defendant has failed to establish the prejudice prong of *Strickland*. Section 7-1(a) of the Criminal Code of 1961 provides in pertinent part that a person is justified in the use of force which is intended to cause death or great bodily harm against another only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or to prevent the commission of a forcible felony. 720 ILCS 5/7-1(a) (West 2004). To establish the defense of another, a defendant must believe that a danger exists that requires the use of force applied, the belief must be objectively reasonable, and the use of force must actually be necessary. *People v. Robinson*, 375 Ill. App. 3d 320, 335, 872 N.E.2d 1061, 1075 (2007). In addition, imminent harm is also a necessary element to establish defense of another. 720 ILCS 5/7-1(a) (West 2004). Imminent harm refers to a present or immediate threat that is reasonably probable. *Robinson*, 375 Ill. App. 3d at 336, 872 N.E.2d at 1076.

¶ 16 In this case, the only evidence touching on "defense of another" was scant testimony about an alleged attempted abduction of the defendant's children by or at the bidding of the victim, Katherine Freeze. According to the defendant's own testimony, this alleged abduction attempt occurred on October 27, 2005, the day before the aggravated battery, and

yet she did not report it to the police until October 31, 2005, four days after the alleged abduction attempt and three days after the attack on Katherine Freeze. There is no evidence from which to find or infer that the defendant's children were in imminent danger of bodily harm or being abducted on October 28, 2005, when the defendant hit Katherine Freeze in the head with a wooden handle. There is no evidence from which to find or infer that the defendant could have reasonably believed that the attack on Katherine Freeze was necessary to defend her children from imminent harm. In this case, the defendant's attorney could have reasonably concluded that the defense of another was not justified by the evidence and that it would be unwise and unsound to pursue it. Contrary to the defendant's characterization of her attorney's opening statement, the defendant's attorney did not tell the jury that he would provide a "legal justification" defense. This is not a case such as *People v. Ortiz*, 224 Ill. App. 3d 1065, 586 N.E.2d 1384 (1992), where the defendant was unfairly prejudiced because defense counsel made a blatant and unequivocal statement that he would produce exculpatory evidence and then failed to deliver on his promise.

¶ 17 The record shows that the defendant's attorney adequately tested the credibility and reliability of the State's witnesses and that he challenged the sufficiency of the medical evidence to establish great bodily harm during cross-examination. We find that the defendant's attorney subjected the prosecution's case to meaningful adversarial testing and that the evidence of guilt was substantial. The defendant has not established prejudice as a result of any alleged deficiency in her attorney's performance. The point is without merit.

¶ 18 Next, the defendant contends that under the one-act, one-crime doctrine, it was error to enter convictions on both counts of aggravated battery where the charged offenses were based on the same physical act. The defendant asks this court to vacate one of the aggravated battery convictions, but she takes no position on which count should be vacated. The State agrees that the one-act, one-crime doctrine precludes the defendant from being convicted of

both counts of aggravated battery, but argues that this case must be remanded to the trial court for a determination of which count of aggravated battery is more serious.

¶ 19 In this case, the State alleged and proceeded to trial on the theory that the defendant's attack as a whole caused great bodily harm to the victim. The State did not charge or attempt to prove that each blow to the victim's head was a separate act that would support a separate conviction. The one-act, one-crime doctrine was violated when the trial court convicted the defendant on both counts of aggravated battery and failed to merge the counts or otherwise indicate on the record that the judgment of conviction was based on only one count. *People v. Crespo*, 203 Ill. 2d 335, 788 N.E.2d 1117 (2001).

¶ 20 In accordance with the one-act, one-crime doctrine, the defendant's conviction on the less serious offense should be vacated and the defendant should be sentenced on the more serious offense. *People v. Artis*, 232 Ill. 2d 156, 170, 902 N.E.2d 677, 686 (2009). In this case, as correctly noted by the State, aggravated battery with a weapon and aggravated battery with great bodily harm are Class 3 felonies carrying identical punishments and both require proof of the same mental states. Given these circumstances, we cannot determine which is the more serious offense, and so we are remanding the matter to the trial court for that determination. *Artis*, 232 Ill. 2d at 170, 902 N.E.2d at 686. On remand, the trial court is directed to determine to which count of aggravated battery is more serious and thereafter to vacate the defendant's conviction on the less serious count and to correct the sentencing order.

¶ 21 Accordingly, the judgment of the circuit court is affirmed in part and reversed in part, and the cause is remanded with directions.

¶ 22 Affirmed in part and reversed in part; cause remanded with directions.