



¶ 3 Defendant's arrest and prosecution arose out of a March 2011 argument between defendant and his girlfriend Michelle Wintersmith during which police officers intervened. Defendant was subsequently charged with, *inter alia*, obstructing a peace officer in that he grabbed an officer's arm to prevent the arrest of Wintersmith, and resisting a peace officer in that he refused to put his hands behind his back in order to be handcuffed.

¶ 4 The matter proceeded to a jury trial. During opening argument, trial counsel stated that when Wintersmith was arrested, defendant, who was surprised, made "incidental contact" with one of the officers and, as a result, left the apartment unconscious and in handcuffs.

¶ 5 Officer Michael Pantoja testified that when he arrived to investigate a domestic disturbance, he encountered Wintersmith outside her apartment. This was the second time that day that officers responded to that apartment. Wintersmith stated that defendant, her boyfriend, was taking her tires. At some point officer Renzy arrived. When defendant opened the door to the apartment, Wintersmith invited the officers inside.

¶ 6 Once inside, Pantoja spoke to defendant, who asserted that the tires were his. When neither defendant nor Wintersmith could provide proof of ownership, Pantoja stated that the tires had to stay in the apartment until the issue could be settled. Defendant and Wintersmith began to argue and Wintersmith pushed defendant in the chest, causing him to fall backward. Pantoja informed Wintersmith that she was under arrest for domestic battery. As he attempted to place Wintersmith in custody, defendant grabbed his right arm and stated that defendant did not want Wintersmith arrested. After a few seconds, Renzy stepped in and blocked defendant's further attempts to interfere. Pantoja handcuffed Wintersmith and began to escort her outside. However, defendant reached forward and grabbed the chain portion of the handcuffs.

¶ 7 Pantoja testified that, at this point, he was afraid for both Wintersmith and himself, because he thought defendant might be trying to grab his gun, so he began to try and push defendant away with his elbow and forearm. Renzy again assisted and defendant's hold on the handcuffs was broken. Pantoja then secured Wintersmith in his squad car. When Pantoja attempted to get back inside the building, he realized the door had locked behind him. He became frantic because he could hear Renzy yelling "stop resisting." Pantoja called for backup and began ringing all the doorbells. When he was finally buzzed inside and went upstairs, he discovered defendant had been handcuffed and was "laying [sic] on the couch not moving as if he was sleeping." Although defendant was unresponsive, Pantoja believed that defendant was "playing possum." Ultimately, Pantoja and Renzy carried defendant downstairs and secured him in a squad car.

¶ 8 Officer Renzy testified consistently with Pantoja that Wintersmith invited them inside the apartment where defendant was present. Both Wintersmith and defendant seemed to be intoxicated and began to argue about tires. Wintersmith then pushed defendant in the chest and he fell onto the couch. When Pantoja informed Wintersmith that she was under arrest and attempted to place her in handcuffs, defendant stood up, pushed Renzy in the chest, and reached toward Pantoja's right arm. When Renzy attempted to create space between defendant and Pantoja and Wintersmith, defendant responded by grabbing his right arm. Ultimately, the officers were able to place Wintersmith in handcuffs and began escorting her from the apartment.

¶ 9 At this point defendant began to yell obscenities. As the officers reached the doorway, defendant pushed Renzy. Renzy positioned his arm in order to make space between defendant, and the officers and Wintersmith. Renzy also informed defendant that he was under arrest and

told him to place his hands behind his back. Renzy repeated this command three times. Defendant refused to comply and continued to yell obscenities. Renzy then took control of defendant's right arm in order to start putting defendant's hands behind his back. Defendant responded by tensing up his muscles and refusing to put his hands behind his back. The two men began to struggle. After telling defendant to put his hands behind his back, Renzy began to yell "stop resisting." Renzy felt that he might be attacked, so he used some defensive techniques such as striking defendant in the shoulder in order to gain control of defendant. Ultimately, he was able to handcuff defendant. Defendant's eyes were open when he was placed in handcuffs; however, defendant then stopped responding, so he had to be carried downstairs.

¶ 10 Michelle Brunsting, Wintersmith's neighbor, testified that from where she was standing across the hall she could see into Wintersmith's apartment through an open door. At one point, she moved to the open door of the apartment and saw a police officer grab Wintersmith's arm causing Wintersmith to fall on defendant. Another officer pushed defendant down and handcuffed him as he argued with the officer. It was at this point that Brunsting saw the officer hit defendant on the back of the head, after which she ran downstairs to get her phone. When she returned, defendant looked "out of it" and his face and nose were bloody. Four police officers then carried defendant down the stairs, leaving blood on the walls and the banister.

¶ 11 Michelle Wintersmith, who was engaged to defendant at the time of trial, testified that she called the police because she and defendant were arguing. When officers arrived, they said either defendant or Wintersmith would have to leave the apartment. Wintersmith left, but when she returned, defendant would not let her inside so she called the police again.

¶ 12 When officers arrived, defendant would not open the door, so the officers kicked it in. Once inside defendant and Wintersmith continued to argue. When she pointed her finger at defendant and told him to "get out of [her] face," an officer twisted her arm and arrested her. The officer used so much force when he put the handcuffs on that she was "slammed" into defendant. Defendant then fell backward onto an officer. She did not see defendant strike the officers; rather, defendant asked the officers not to arrest her. She also heard defendant say that he did not want to press charges. At this point, one of the officers began yelling, struck defendant and began to put handcuffs on him. The officer hit defendant while he was handcuffed. Wintersmith later saw approximately six officers carry defendant from the building. She could tell from the way that defendant's head was hanging that he was unconscious.

¶ 13 Pantoja testified in rebuttal that the door to the apartment was closed when he arrived and that he entered it after he knocked and the door was opened. He denied kicking the door in. Upon arrival at the police station, defendant was "still acting like he was sleeping," so Pantoja called for paramedics. When paramedics arrived and offered defendant medical attention, defendant refused and stated that he had been acting as if he was unresponsive. Defendant had a cut on his head but was not bleeding profusely.

¶ 14 During closing argument, trial counsel argued that although defendant was upset when officers arrested Wintersmith, he merely grabbed Pantoja by the arm. Similarly, when Renzy placed defendant in handcuffs, defendant did not try to punch the officer or harm the officer in any way. Instead, defendant merely stiffened up. The defense further argued that defendant, when faced with two armed officers, was not the aggressor in the situation, but was "severely subdued" by officers and carried out of the apartment. The defense finally argued that

Wintersmith testified that the entire chain of events occurred because defendant fell into one of the officers. Ultimately, although the defense admitted that one "inappropriate" move started this sequence of events, the officers were not harmed, and, consequently, the defense urged that the jury find defendant not guilty as to all charges.

¶ 15 The trial court then instructed the jury including, *inter alia*, that neither opening statements nor closing arguments are evidence, and that the evidence that the jury should consider consisted only of the testimony of the witnesses and exhibits received by the court. The jury found defendant guilty of obstructing a peace officer and resisting a peace officer. Defendant was sentenced to 364 days in jail.

¶ 16 On appeal, defendant contends that he was denied the effective assistance of trial counsel by counsel's concession that he physically interfered with the officers as they attempted to arrest him and Wintersmith. He argues that these concessions damaged his defense because they conflicted with the testimony of two witnesses who testified that his objections to being arrested were strictly verbal.

¶ 17 To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, a reasonable probability exists that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To establish deficient performance, the defendant must overcome the strong presumption that counsel's actions or inactions were sound trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). We review the reasonableness of counsel's strategy from his perspective at the time the decision was made and not with hindsight. *Strickland*, 466 U.S. at 689. To establish prejudice, the defendant must

show a reasonable probability that, absent counsel's alleged error, the trial's outcome would have been different. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). "A reasonable probability of a different result is not merely a possibility of a different result." *Id.*

¶ 18 If the defendant fails to establish either prong, his ineffective assistance claim must fail. *Strickland*, 466 U.S. at 687. "If it is easier, a court may proceed directly to the second prong of *Strickland* and dismiss an ineffective assistance claim on the ground that it lacks sufficient prejudice, without first determining whether counsel's performance was deficient." *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 70.

¶ 19 Here, defendant contends that he was prejudiced by trial counsel's concessions during opening statement that there was incidental contact between defendant and the officers, and counsel's assertion during closing argument that this minimal contact between the distressed defendant and the officers resulted in no injury to the officers whereas defendant was severely subdued. In other words, defendant contends that absent counsel's concessions that he protested the arrests physically the result of his trial would have been different. We disagree.

¶ 20 Our supreme court has concluded that it is not "*per se* ineffectiveness whenever the defense attorney concedes his client's guilt to offenses in which there is overwhelming evidence of that guilt but fails to show on the record consent by defendant." *People v. Johnson*, 128 Ill. 2d 253, 269 (1989). Compare *People v. Hattery*, 109 Ill. 2d 449, 464-65 (1985) (finding defendant was denied the effective assistance of counsel when defense counsel conceded defendant's guilt and then put forth no theory of defense, did not present any evidence, and failed to make a closing statement), with *People v. Shatner*, 174 Ill. 2d 133, 145-48 (1996) (although defense counsel conceded defendant's guilt to a robbery during which the victim was killed, counsel's

performance was not deficient when counsel presented opening and closing argument, cross-examined the majority of the State's witnesses, objected, moved for a mistrial, and attempted to convince the jury that defendant's minimal participation in the crime justified a conviction for robbery rather than felony murder). Here, although trial counsel conceded that defendant may have touched the officers and stiffened up when he was being handcuffed, counsel attempted to explain it within the context of the encounter.

¶ 21 Specifically, counsel focused on defendant's heightened emotions and distress when officers placed Wintersmith under arrest and the fact the officers escaped the encounter unharmed and defendant was carried out of the apartment unconscious. Although trial counsel's strategy of admitting that defendant may have acted inappropriately in an attempt to arouse the jury's sympathy was risky, this court cannot say that this was a completely unreasonable strategy. *Perry*, 224 Ill. 2d at 341-42. However, even if this court were to accept defendant's contention that trial counsel's concessions were objectively unreasonable, defendant's claim of ineffective assistance must fail because he cannot establish he was prejudiced.

¶ 22 In the case at bar, defendant cannot demonstrate prejudice when the evidence at trial established that defendant grabbed Pantoja's right arm, pushed Renzy in the chest, grabbed the chain portion of the handcuffs restraining Wintersmith, refused to comply with instructions to place his hands behind his back, and engaged in a struggle with Renzy as he was being placed in handcuffs. Thus, the State established that defendant both obstructed and resisted the officers. See 720 ILCS 5/31-1(a) (West 2010) (anyone who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity commits a Class A misdemeanor).

¶ 23 Although defendant contends that absent counsel's concessions, the jury would have acquitted him based upon the testimony of defense witnesses indicating that he only verbally opposed the officers and submitted to being handcuffed without a struggle, he bases this conclusion on the assumption that the jury would have disregarded the entirety of the officers' testimony. Accordingly, we reject defendant's speculative assertion that the outcome of the trial would have been different had counsel not conceded that defendant stiffened his hands and engaged in some minimal contact with the officers. See *People v. Bew*, 228 Ill. 2d 122, 135 (2008) ("*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice").

¶ 24 Therefore, because defendant has failed to show a reasonable probability that, absent counsel's alleged errors, the outcome of his trial would have been different (*Evans*, 209 Ill. 2d at 220), his claim of ineffective assistance of counsel must fail (see *Strickland*, 466 U.S. at 687).

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.