FOURTH DIVISION
January 5, 2017

No. 1-14-1442

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 14512
	)	
BELTON SMITH,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial counsel presented meaningful adversarial challenge to State's case, as required by *Cronic*, by zealously presenting an insanity defense against overwhelming evidence of guilt.

¶ 2 Following a bench trial, defendant Belton Smith was convicted of aggravated criminal sexual assault and home invasion and sentenced to consecutive prison terms of 21 and 6 years. On appeal, he contends that trial counsel deprived him of his right to the meaningful assistance of counsel, as required by *United States v. Cronic*, 466 U.S. 648 (1984), by presenting a legally invalid defense of insanity. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with committing aggravated criminal sexual assault and home invasion against M.G. on or about July 6, 2007.

¶ 4 The Public Defender filed pre-trial motions including a motion to suppress post-arrest statements that was denied in December 2008 following an evidentiary hearing. In a July 2009 discovery answer, counsel stated that defendant "will rely upon the State's inability to prove him guilty beyond a reasonable doubt." As the case progressed, counsel told the court that he was attempting to employ an expert for a possible affirmative defense, and then told the court that he had employed an expert.

¶ 5 In August 2010, at defense counsel's behest, the court ordered a behavioral clinical examination (BCX) of defendant's sanity. In September 2010, the court received the BCX report of psychiatrist Dr. Monica Argumendo stating that she examined defendant in August 2010 and found him legally sane at the time of the offense, with "no indication that he suffered from a mental disease or defect which would have caused him to lack substantial capacity to appreciate the criminality of his conduct at that time."

¶ 6 Also in September 2010, defense counsel amended his discovery answer to disclose a possible affirmative defense of involuntary intoxication or drugged condition, and to list consulting pharmacist Dr. James O'Donnell as a possible witness.

¶ 7 In January 2011, the State filed a motion *in limine* to bar the defense from presenting a defense of involuntary intoxication or drugged condition. The State noted that voluntary intoxication is not a valid defense under the Criminal Code. See 720 ILCS 5/6-3 (West 2014). The State noted Dr. O'Donnell's opinion that defendant was involuntarily intoxicated by prescription medication at the time of the incident, and the defense disclosure of an affirmative

defense of involuntary intoxication. The State argued that involuntary intoxication is generally not a defense to sex crimes, which are general-intent offenses. The State observed that Dr. O'Donnell was a pharmacist with no psychiatric training and contrasted his opinion with Dr. Argumendo's psychiatric opinion of sanity. The State also noted that Dr. O'Donnell's opinion was based on defendant's uncorroborated report of taking an overdose of Dilaudid with alcohol, which was admittedly contrary to the prescription and thus arguably voluntary.

¶ 8 Defense counsel responded to the motion *in limine*, noting that involuntary intoxication is generally a valid defense and arguing that it is a valid defense to general-intent as well as specific-intent offenses. Counsel argued that whether defendant was involuntarily intoxicated is a question of fact that should be presented to a jury and that Dr. O'Donnell's opinion is sufficient under the "slight evidence" standard to instruct a jury on involuntary intoxication.

¶ 9 The court granted the State's motion *in limine* in February 2011. The court found that Dr. O'Donnell was a pharmacist unqualified to opine on mental issues, and that a voluntary overdose results in voluntary intoxication. The court noted that it could revise its decision if presented with more information.

¶ 10 In March 2011, defense counsel requested, and the court ordered, a new BCX of defendant's sanity. In May 2011, the court received the BCX report of psychiatrist Dr. Nishad Nadkarni stating that he examined defendant in April 2011 and found him legally sane at the time of the offense as he "was not suffering from any mental disease or defect that would have substantially impaired his capacity to appreciate the criminality of the alleged act."

¶ 11 In June 2011, private counsel appeared for defendant and the Public Defender withdrew. Counsel told the court repeatedly that he and defendant were working with psychologist Dr.

Michael Stone, and the parties represented to the court that defense counsel had provided the State copies of Dr. Stone's report, notes, and materials from his examinations and testing of defendant.

¶ 12 In September 2012, the State filed a motion *in limine* to bar the defenses of voluntary or involuntary intoxication or drugged condition. Noting that its earlier motion *in limine* had been granted, the State argued that counsel intended to call Dr. Stone as an expert witness regarding defendant's mental state at the time of the offense. The State raised the same arguments against Dr. Stone's opinion as it did against Dr. O'Donnell's opinion, including that defendant's admitted overdose of Dilaudid with alcohol was arguably voluntary.

¶ 13 Defense counsel responded to the motion *in limine*, stating that the defense was not asserting voluntary intoxication but insanity, supported by the psychological opinion of Dr. Stone. Counsel argued that the defense is not precluded from calling an expert witness simply because a State expert witness has a contrary opinion.

¶ 14 In February 2013, following arguments by the parties, the court granted the motion *in limine* in part. The court found that Dr. Stone could testify to defendant's mental state due to trauma but not due to prescription drugs, as a psychologist is not qualified to opine on the effect of drugs on one's mental state. The court stated that Dr. Stone's testimony would be stricken if it did not link his opinion of defendant's mental state to a diagnosis of a mental disease or defect.

¶ 15 In March 2013, the defense filed a discovery answer stating that defendant "will rely upon the State's inability to prove him guilty beyond a reasonable doubt as well as the affirmative defense of insanity." The answer listed Dr. Stone as a potential witness.

¶ 16 At the commencement of trial in May 2013, the State renewed its motion *in limine*, noting that defense counsel had tendered Dr. Stone's revised opinion but arguing that it still did not include a diagnosis of a mental disease or defect. Defense counsel argued that the revised opinion includes "several mental defects." The court granted the motion, stating that the court's "opinion today is the same as it was."

¶ 17 At trial, M.G. testified that he was home alone on the morning in question when defendant, a neighbor, phoned and asked to come over to show him something. After M.G. admitted defendant to his home, defendant immediately attacked him, grabbing him by the neck and choking him. Defendant forced M.G. to the floor, bouncing him off the wall repeatedly and tearing his shirt as they struggled. Defendant ordered M.G. to perform oral sex, threatening to kill him. As M.G. did so, he saw that defendant was holding a camera. After the sexual assault, defendant demanded money from M.G. When he produced only a $2 bill, defendant demanded that M.G. don his wife's nightshirt so M.G. could withdraw money from an automated teller. Defendant led M.G. from his home, keeping a grip on him. When they met a neighbor, M.G. fled as soon as defendant let go of him, screaming "call the police" as he ran. M.G. fled to a nearby gasoline station where he phoned 911 and then his wife. M.G. named defendant as his attacker to the responding officers, and an ambulance took him to a hospital where he was examined and evidence was collected including a sexual assault kit, photographs of his cuts and bruises from struggling with defendant, and the nightshirt. The police later photographed M.G.'s home, including his torn shirt. On cross-examination, M.G. testified that defendant's wife and two of his children died in a road accident less than a month before the attack.

¶ 18 The neighbor, who knew M.G. and defendant, testified that she saw defendant leading M.G. by the arm from his home. M.G. was wearing a woman's nightshirt, and he was pale and disheveled with blood on his face. Defendant told the neighbor that he was taking M.G. to a doctor, while M.G. said nothing. As soon as defendant let go of M.G.'s arm, he fled, screaming "call the police." The neighbor phoned M.G.'s wife, then went to a nearby gasoline station where she saw M.G. being placed in an ambulance. On cross-examination, defense counsel attempted to elicit from the neighbor whether defendant exhibited "bizarre or unusual behavior."

¶ 19 M.G.'s wife testified that, immediately after the neighbor phoned her on the morning in question, she called their home and M.G.'s cellphone but he did not answer. M.G. then phoned her from the gasoline station, describing what had happened and asking her to meet him at the hospital. When she saw him at the hospital, he had cuts and bruises that he did not have earlier that day. She identified the nightshirt as hers and noted that it had holes and brownish stains that were not present when she wore it the previous night.

¶ 20 Police officers testified to M.G.'s injuries and disheveled condition at the gasoline station, that M.G. named defendant as his assailant, and that a search of defendant's home found a camera under sheets in the laundry room and a $2 bill.

¶ 21 The parties stipulated to the collection of, and chain of custody for, the sexual assault kit. A swab from M.G.'s mouth contained defendant's DNA, with a profile that would occur in unrelated persons at a rate of about one in 36 quadrillion black persons, one in 190 quadrillion white persons, or one in 13 quadrillion Hispanic persons.

¶ 22 Counsel moved unsuccessfully for a directed finding.

¶ 23 Dr. Michael Stone was called by the defense. After lengthy examination by the defense and State including redirect examination, and arguments where the State contested Dr. Stone's expertise in forensic clinical psychology, the court found Dr. Stone to be an expert in forensic clinical psychology. Dr. Stone testified that he diagnosed defendant with agitated depression and borderline personality disorder that would predispose him to "occasional dissociative or psychotic-like episodes" when under stress. Dr. Stone opined that he was in such an episode during his attack on M.G. due to the recent deaths in his family, compounded by reduced inhibitions from taking Dilaudid with alcohol. Dr. Stone concluded that defendant could not "conform his behavior to the requirements of the law when he assaulted" M.G.

¶ 24 On cross-examination, Dr. Stone described insanity as an inability to "appreciate his criminality and conform his behavior to the requirements of the law" and testified that defendant was legally insane due to a psychotic episode at the time of his assault on M.G. Dr. Stone's conclusions were based on interviewing and testing defendant over a total of about three hours, interviewing his mother, and reviewing his records. Dr. Stone did not confront defendant with inconsistencies in his accounts of the incident, nor with his polygraph test results indicating deception, nor with his role in the road accident that killed his wife and two of his children. Dr. Stone admitted that his knowledge of Dilaudid was "cursory" and that he did not know the recommended dose except that defendant admitted to taking an overdose with alcohol. Dr. Stone testified that defendant's sexual assault of M.G. was "bizarre" because it was atypical for defendant. When asked where in his report he discussed defendant's sexual preference or history, he replied that it was in his notes rather than his report. Dr. Stone admitted that his report did not state that defendant suffered a mental disease or defect rendering him legally insane.

¶ 25 On redirect examination, Dr. Stone testified that defendant's interaction with the neighbor while he led defendant from his home was bizarre, "as are a lot of aspects of this." Dr. Stone testified that his opinion "here on this stand" at trial was that defendant's borderline personality disorder and agitated depression, combined with stress, resulted in a psychotic episode at the time he assaulted M.G. that rendered him unable to "conform his behavior due to the mental defect *** to the norms and requirements of the law."

¶ 26 Dr. Nishad Nadkarni testified in rebuttal that he interviewed defendant for about an hour in 2011 after reviewing records including Dr. Argumendo's BCX report. Defendant had admitted being counseled as a child for hyperactivity, and moderate drug and alcohol use, but denied any symptoms of any major mental illness and had no history of psychiatric treatment. Defendant told Dr. Nadkarni of the fatal road accident but did not mention any other source of trauma. In interviewing defendant, Dr. Nadkarni saw no signs of psychiatric or cognitive impairment. In describing the incident to Dr. Nadkarni, defendant said that he was sad and angry due to the deaths in his family, had taken prescription medication and alcohol, and an argument arose with M.G. in which defendant "wasn't being reasonable" but denied any sexual assault. Dr. Nadkarni confronted defendant with his accounts of the incident and polygraph results, testifying that defendant's changing accounts indicated that he appreciated the criminality of his actions. Dr. Nadkarni opined that defendant was not suffering any major mental illness and thus never had a psychotic episode on the day in question or otherwise. Regarding combining Dilaudid with alcohol, Dr. Nadkarni explained that one would either pass out or be fully coherent and functioning depending on whether one had developed a tolerance. (Defense counsel's objection to this testimony was sustained.) Dr. Nadkarni opined that various aspects of defendant's

behavior during the incident, including phoning M.G. to ensure he was home alone, bringing a camera to his home, demanding money from him, and attempting to bring him to an automated teller, indicated organized rather than disorganized thinking. He characterized defendant's behavior in the incident as sadistic rather than bizarre and concluded that defendant was sane at the time of the incident.

¶ 27 On cross-examination, Dr. Nadkarni testified that he found sadism, or at least anti-social tendencies, in defendant's extensive criminal record. He admitted that neither he nor Dr. Argumendo diagnosed defendant with anti-social personality disorder and explained that anti-social personality disorder is not deemed a mental disease or defect. Dr. Nadkarni considered, but did not find, post-traumatic stress, noting that defendant did not exhibit the requisite anxiety. When asked about Dr. Stone's finding of stress and trauma, Dr. Nadkarni found it to be unfounded and added that Dr. Stone's objective testing revealed anti-social personality disorder though he did not diagnose it. On re-direct examination, Dr. Nadkarni testified that a diagnosis of anti-social personality disorder would strengthen his opinion that defendant was sane.

¶ 28 In closing argument, the State argued in detail the evidence that defendant attacked and sexually assaulted M.G. in his own home. Defense counsel admitted that defendant assaulted M.G. but attributed his actions, in Dr. Stone's opinion, to borderline personality disorder, depression, and post-traumatic stress from his childhood and the recent deaths in his family, compounded by being "completely disoriented" by Dilaudid and alcohol into a "psychotic episode *** that made him incapable of conforming his actions to the requirements of the law due to a mental defect." Counsel argued that Dr. Stone's conclusions were credible and based on extensive testing and examination, while arguing discrepancies in the BCX reports of Drs.

Nadkarni and Argumendo. Counsel asked the court to find defendant not guilty by reason of insanity. In rebuttal, the State acknowledged that the court admitted Dr. Stone's psychological expert testimony but argued discrepancies in his testimony, including on the key point of whether defendant had a mental disease or defect "that would prevent him from understanding the criminality of what he was doing" at the time of the offenses, and argued that Dr. Nadkarni's opinion of sanity was credible.

¶ 29 The court found defendant guilty as charged. The court stated that, beyond counsel's concession that defendant assaulted M.G., the evidence proved that he did. As to insanity, the court stated that it considered the testimony of Drs. Stone and Nadkarni, noting that both spent a relatively short time with defendant years after the incident. The court found "it was thoroughly clear [Dr. Stone] had not tendered an opinion that would have been valuable to this court prior to getting on the stand," then gave a "calculated opinion as to the defendant's insanity." Thus, the court did not find defendant insane at the time of the offenses.

¶ 30 Defense counsel filed a post-trial motion alleging (1) insufficiency of the evidence of guilt and the State evidence rebutting insanity, and (2) arguing that the court erred in (a) denying the suppression motion, (b) granting the State motion *in limine*, and (c) allowing State examination of the effects of Dilaudid when the defense was barred from such an examination. Following brief argument, the motion was denied.

¶ 31 At the sentencing hearing, the State and defense presented evidence and argument in aggravation and mitigation, including a defense argument that defendant's traumatic loss and intoxication on Dilaudid and alcohol at the time of the incident should be considered in

mitigation. The court sentenced defendant to consecutive prison terms of 21 and 6 years, a defense motion to reconsider the sentence was denied, and this appeal followed.

¶ 32 On appeal, defendant contends that trial counsel deprived him of his right to the meaningful assistance of counsel, as required by *Cronic*, by presenting a legally invalid defense of insanity; that is, one based on an outdated standard or test for insanity.

¶ 33 Counsel must subject the State's case to meaningful adversarial testing, and prejudice is presumed when he fails to do so. *People v. Cherry*, 2016 IL 118728, ¶¶ 23, 25, citing *Cronic*. Prejudice is presumed only when "counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing." (Emphasis added.) *Cronic* at 659. "[T]the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' " *Cronic* at 656, quoting *Anders v. California*, 386 U.S. 738, 743 (1967). "When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred." *Cronic* at 656. *Cronic* does not apply unless counsel's failure was complete; that is, counsel failed to oppose the prosecution throughout the proceeding. *Cherry*, ¶ 26. Stated another way, counsel's representation must not be merely incompetent but must sink to the level of being no representation at all. *Id*. Thus, *Cronic* does not apply where counsel mounts a partial defense. *Id*. The defendant bears the burden of showing that counsel did not engage in meaningful adversarial testing. *Cronic* at 658, 666.

¶ 34 A defendant is insane, and thus "not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct." 720 ILCS 5/6-2(a) (West 2014). Before 1995, insanity

was defined as lacking "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Pub. Act 89-404 (eff. Aug. 20, 1995).

¶ 35 Here, we find that defendant has failed to meet the high bar for showing that trial counsel failed to subject the State's case to meaningful adversarial testing. Counsel acted as defendant's advocate, zealously opposing the State before, during, and after trial. Counsel prepared and presented a coherent defense theory – a defense of insanity – that survived hotly-contested State motions *in limine*. At trial, in furtherance of that theory, he cross-examined State witnesses, called an expert witness, and cross-examined the State's rebuttal expert witness. Notably, counsel was successful in presenting his witness, Dr. Stone, as an expert in forensic clinical psychology over the State's objection. Counsel argued in closing that the court should find his expert more credible than the State's expert and find defendant not guilty. We find that defendant's contention, that counsel presented and argued an outdated definition of insanity, constitutes a claim of demonstrable error or incompetence by counsel, which as stated above does not rise to the level of a *Cronic* claim. We shall not address the merits of this misdirected claim beyond noting that Dr. Stone testified that defendant was insane in that he could not "appreciate his criminality and conform his behavior to the requirements of the law," which is consistent with the present as well as the former definition of insanity. Thus, the record shows that Dr. Stone's testimony did address the current definition of insanity.

¶ 36 We find enlightening our supreme court's only two decisions finding a *Cronic* failure of meaningful adversarial testing. In *People v. Morris*, 209 Ill. 2d 137 (2004), defense counsel admitted a defendant's guilt in argument to the jury, in furtherance of arguing jury nullification based on sympathy or compassion. Our supreme court found that presenting such a "minimal,

nonlegal defense" was not *per se* ineffectiveness. *Id*. at 184. When the circumstances of the case render other defense strategies unavailable, presenting a non-legal defense is a minimal but constitutionally acceptable strategy. *Id*. at 183-84. Counsel in *Morris* ran afoul of *Cronic* not by conceding guilt in furtherance of a minimal defense but by introducing "extensive and inflammatory evidence" of an unrelated murder by the defendant that undermined counsel's appeal for jury sympathy. *Id*. at 187-88. In *People v. Hattery*, 109 Ill. 2d 449 (1985), counsel made an unequivocal concession of a defendant's guilt of first degree murder in arguments to the jury while arguing that the jury should find the defendant undeserving of the death penalty. Our supreme court found such an argument "totally at odds with defendant's earlier plea of not guilty." *Id*. at 464. Here, unlike nullification in *Morris*, insanity is a legal defense expressly recognized by our Criminal Code. Similarly, admitting that defendant committed the offenses charged while presenting an insanity defense is wholly compatible with a not-guilty plea, unlike *Hattery*. The contention that counsel presented and argued an outdated formulation of the insanity defense – that he labored under a "misapprehension of the law of insanity" as defendant argues – is a contention that a legal defense of insanity was poorly or incompetently presented, which we conclude is not a valid *Cronic* claim.

¶ 37 Accordingly, the judgment of the circuit court is affirmed.

¶ 38 Affirmed.