

2017 IL App (1st) 150829-U
No. 1-15-0829
Order filed September 22, 2017

Sixth Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 14 CR 12422
)	
STACEY POWELL,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

Held: We affirm defendant's conviction for attempted robbery over his contention that trial counsel provided ineffective assistance where counsel allegedly elicited an element of the offense on cross-examination that the State had failed to prove.

¶ 1 Following a bench trial, defendant Stacey Powell was convicted of attempted robbery (720 ILCS 5/8-4(a), 18-1(a) (West 2014)) and sentenced to 30 months' imprisonment. On appeal, he argues he received ineffective assistance of counsel where defense counsel elicited

testimony that provided a critical element of the State's case that the State had not already proven. We affirm.

¶ 2 Defendant was charged by indictment with one count of attempted robbery wherein "he, with the intent to commit the offense of robbery, did any act, to wit: reached for Luis Gonzalez's pockets while demanding money, by use of force or by threatening the imminent use of force, which constituted a substantial step toward the commission of robbery." At trial, the following evidence was presented.

¶ 3 Luis Gonzalez, through a Spanish interpreter, testified that, on July 4, 2014, he was selling corn and shaved ice from an "elote cart" in the area of 63rd and Marshfield. Gonzalez observed a man, identified in court as defendant, approach his cart. Defendant began throwing things, including spoons and cups, and stated, "I want money right now." Gonzalez was taking care of customers but defendant made them go away. In response, Gonzalez walked away from his cart because he did not want defendant to beat him up. He testified, defendant "wanted to push me, but I walked away." When asked whether he gave defendant money, Gonzalez stated "I did not want to give him, I wanted to walk away backwards, back, back, back." Defendant repeated, "right now, I want the money." Defendant then grabbed a knife Gonzalez used to cut the corn and began cutting corn and eating it. Defendant threw corn on the ground and told others that the corn was free. Gonzalez was six to seven feet away from defendant and did not want to get any closer to him because he had a knife in his hand.

¶ 4 A person from a nearby store called police and told Gonzalez not to get close to defendant. Defendant disappeared into an alley and, when he came back, police were present.

Gonzalez testified that defendant “came back, and he was going to attack me.” Gonzalez pointed out defendant to the police and spoke to an officer at the scene.

¶ 5 On cross-examination, Gonzalez stated that, on the day of the incident, he had made \$90. He kept about \$40 in his pocket and another \$40 in his cart. The following exchange occurred between defense counsel and Gonzalez:

“Q. You testified here today that at no time did the defendant push you or put his hands on you; is that correct?

A. No, he only pushed me, and he said, ‘I want the money right now.’

Q. He never went into your pockets, though, did he?

A. No.

Q. However, when you spoke with Officer Donahue on July 4, 2014, at approximately 1618 in the afternoon, you told him that you were struggling with the defendant?

A. No, no, I was not struggling with him. When he pushed me, I walked away and moved to the side right away.

Q. You also told Officer Donahue at that same interview that he attempted – the person doing this robbery attempted to reach into your pockets?

A. Yes, he did try, and that’s when I walked away.

* * *

Q. During the course of this confrontation with the offender, he was not very close to you, wasn’t he?

A. He was not that close. It was a little far, but I did not know because I was so scared.

Q. Well, at one point you said he put his hands on you to push you, correct?

A. Yes, he pushed me.

Q. And at another point you claim he tried to enter into your pockets, correct?

A. He went like this real fast to grab something and I walked away (indicating).”

¶ 6 Gonzalez testified that he did not begin to lose sight of defendant until defendant began “pushing the cart, [trying] to take it away.” He also admitted that he spoke very little English. Further, Gonzalez admitted defendant was wearing a black t-shirt, but stated “now I don’t even remember how he was dressed.”

¶ 7 Chicago police officer Donahue testified that, on the date of the incident, he was working with a partner and was flagged down by a churro vendor in the area of 63rd and Marshfield. Donahue encountered Gonzalez but was unable to communicate with him because Gonzalez did not speak English. Other bystanders told Donahue that an individual came up to Gonzalez, started pushing him, and attempted to reach into his pockets while demanding money. At the scene, an individual, identified in court as defendant, approached Donahue and said, “[y]eah, that was me, I did that.” Gonzalez then pointed at defendant, and Donahue requested a Spanish interpreter to come to the scene. Defendant was belligerent and yelling, so Donahue detained him until he could figure out what was going on. He observed a disheveled cart with items thrown about and Gonzalez appearing to be “scared and in need of assistance.”

¶ 8 Defendant testified that, on the day of the incident, he was at his family’s house for a barbecue. Defendant left the barbecue to buy lighter fluid and charcoal from the corner store. He

never made it to the store, but when he was nearby, a police officer grabbed him. Defendant testified there were 10 to 20 other African-Americans at the scene, including some with dreadlocks similar to himself. There also was a crowd of “kids” that were running as defendant approached the scene. He also observed police officers buying corn from Gonzalez.

¶ 9 Defendant testified, “[t]he officer told me to come here, and I felt like I was getting questioned and put into custody for something I didn’t do, so I became belligerent, so he just put me in handcuffs and put me in the backseat.” He testified that he was wearing a white t-shirt, gray jeans, and gold boots the day of the incident. He denied making a statement to police and further denied seeing Gonzalez being robbed. Defendant also denied trying to rob Gonzalez of food or money and denied having any contact with him whatsoever.

¶ 10 In rebuttal, Detective Kamien testified that, on the day of the incident, he was assigned to investigate a theft in the area of 63rd and Marshfield. Kamien met with a man, identified in court as defendant, in the holding facility of the 7th District station. He provided defendant with his *Miranda* rights, and defendant agreed to speak with him. Defendant told Kamien that he was present at 63rd and Marshfield purchasing corn product from a street vendor.

¶ 11 The trial court found defendant guilty of attempted robbery. It found the State’s witnesses to be “credible and compelling beyond a reasonable doubt.” It noted Gonzalez was a “frail older man” who was “terrified by things that happened to him on the street.” Further, Gonzalez “did not engage the person trying to rob him, he tried to get away.” The court found “there’s a huge language barrier” and Gonzalez did not need to describe the offender because he was pointing him out at the scene. Further, defendant “agreed he was the person who did it as well.”

¶ 12 The trial court denied defendant's written motion for a new trial and sentenced him to 30 months' imprisonment. Defendant filed a timely notice of appeal.

¶ 13 On appeal, defendant argues he received ineffective assistance of counsel where defense counsel elicited testimony that provided a critical element of the State's case that the State had not already proven. Specifically, he contends Gonzalez did not establish the element of force and, only upon cross-examination by defense counsel, was any testimony regarding force presented.

¶ 14 A defendant has a constitutional right to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). "Effective assistance [of counsel] amounts to competent, not necessarily perfect, representation." *People v. Garcia*, 405 Ill. App. 3d 608, 617 (2010). In order to establish that counsel is ineffective, the defendant must show both that (1) counsel's representation was deficient and (2) that deficiency prejudiced the defendant. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010) (citing *Strickland*, 466 U.S. at 694).

¶ 15 "In demonstrating, under the first Strickland prong, that his counsel's performance was deficient, a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct might be considered sound trial strategy." *People v. Houston*, 226 Ill. 2d 135, 144 (2007). Matters of trial strategy are generally immune from ineffective assistance of counsel claims. *People v. Smith*, 195 Ill. 2d 179, 188 (2000).

¶ 16 "[T]he prejudice prong of Strickland is not simply an 'outcome-determinative' test but, rather, may be satisfied if [the] defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Jackson*, 205 Ill. 2d 247, 259 (2001). The defendant must establish both prongs in order to

prevail on an ineffective assistance of counsel claim. *People v. Randall*, 2016 IL App (1st) 143371, ¶ 58. “That is, if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel’s performance was deficient.” *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 17 To sustain the conviction for attempted robbery, the State must prove the defendant, with the intent to commit robbery, performed any act constituting a substantial step toward taking property from the person or presence of another by the use of force or by threatening the imminent use of force. 720 ILCS 5/8-4(a), 18-1(a) (West 2014). “ ‘[T]he degree of force necessary to constitute robbery must be such that the power of the owner to retain his property is overcome, either by actual violence physically applied, or by putting him in such fear as to overpower his will.’ ” (Internal quotation marks omitted.) *People v. Hicks*, 2015 IL App (1st) 120035, ¶ 29 (quoting *People v. Bowel*, 111 Ill. 2d 58, 63 (1986)). “Generally, where a victim observes a weapon, a sufficient threat of force exists.” *People v. Dennis*, 181 Ill. 2d 87, 102 (1998).

¶ 18 Defendant argues counsel was ineffective where he elicited the only evidence of force or threat of the use of force in the entire case on cross-examination of Gonzalez. Specifically, he points to counsel’s question of “at no time did the defendant push you or put his hands on you; is that correct?,” to which Gonzalez responded, “[n]o, he only pushed me, and he said, ‘I want the money right now.’ ” Further, he highlights counsel’s question when he asked Gonzalez if he told Donahue that he was “struggling” with defendant, to which Gonzalez responded, “[n]o, no I was not struggling with him. When he pushed me, I walked away and moved to the side right away.” Finally, defendant points to counsel’s questions about whether defendant attempted to reach into

Gonzalez's pockets, to which Gonzalez responded, "[y]es, he did try, and that's when I walked away," and "[h]e went like this real fast to grab something and I walked away (indicating)." These questions, according to defendant, show defense counsel was ineffective for eliciting testimony on the element of force that the State had not previously introduced. However, we reject defendant's argument that he was prejudiced by these alleged errors because Gonzalez testified to and established the element of force or threatening the use of force previously on direct examination.

¶ 19 Gonzalez testified that defendant approached his elote cart and began throwing things, including spoons and cups. Defendant stated, "I want money right now," prompting Gonzalez to walk away. Defendant repeated, "right now, I want the money." He then took Gonzalez's knife, used it to cut corn, and began to eat the corn. Gonzalez was six to seven feet away from defendant and did not want to get any closer to him because he had a knife in his hand. Given Gonzalez's testimony describing defendant's actions, we find the element of threatening the imminent use of force was established. See *People v. Cooksey*, 309 Ill. App. 3d 839, 849 (1999) ("threat of force is proven where the fear of the victim was of such a nature that reason and common experience would induce a person to part with his property for the sake of his person").

¶ 20 Moreover, Gonzalez walked away because he did not want to get beaten up and asserted that defendant "wanted to push me, but I walked away." This threat of force coupled with the demand for money caused Gonzalez to leave his cart and walk away from defendant in order to remain safe. See *Hicks*, 2015 IL App (1st) 120035, ¶ 29. The State therefore introduced testimony about the threatening the imminent use of force element on direct examination of Gonzalez, and defendant cannot show prejudice from defense counsel's questioning on cross-

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examination that touches upon the element of force. Because we find no prejudice from the allegedly improper cross-examination, we need not determine whether counsel's performance was deficient. See *Graham*, 206 Ill. 2d at 476.

¶ 21 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.