2017 IL App (4th) 150861-U

NO. 4-15-0861

FILED
October 25, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
DWAYNE S. TESCH,	)	No. 15CF104
Defendant-Appellant.	)	
	)	Honorable
	)	Charles M. Feeney III,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding defendant's assistance of counsel was not ineffective.

¶ 2 In July 2015, the State charged defendant, Dwayne S. Tesch, with domestic battery, alleging he knowingly made physical contact of an insulting or provoking nature by shoving the victim, S.T., into a wall. The matter proceeded to a jury trial in September 2015, where defendant was convicted of domestic battery. In October 2015, the trial court sentenced defendant to 50 months in the Illinois Department of Corrections.

¶ 3 On appeal, defendant argues he was denied effective assistance of counsel due to his trial counsel's failure to request a self-defense instruction. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In July 2015, the State charged defendant by information with a Class 2 felony

domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2014).

¶ 6 In September 2015, the trial commenced with the State calling four witnesses; the first being defendant's mother. She began her description of the incident as follows:

> "I think everybody just got out of control with their anger issues, and Dwayne and S.T. had a confrontation, and everybody got out of control. And I got mad, and I called the cops. Probably shouldn't have but —"

¶ 7 On direct examination Barbara Tesch related hearing the defendant upset and apparently throwing his sister's mobile phone against the wall. She said her daughter then entered defendant's room and the two of them appeared to be arguing, from the sounds she was able to hear. At first, she said she heard "scuffling around" and she got up from bed and "apparently [S.T.] tripped - - well, they were arguing and it looked to me like he pushed her, but I don't think he did."

¶ 8 During her testimony she denied seeing her son push S.T., but acknowledged making a written statement to police, which the State used both to refresh her recollection and as a prior inconsistent statement under section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2014)). According to her trial testimony, she could not say whether "it was a push, shove[,] or a hit," but she agreed her written statement said defendant pushed S.T. into the bathroom.

¶ 9 On cross-examination, defendant's mother said she did not see the incident but heard screaming from defendant and victim and heard something hit the wall.

¶ 10 The next witness, Bradley Wallett, the victim's boyfriend, said the victim was upset because defendant broke her phone. He said after that, the victim went to the living room

where she found defendant's phone and broke it by slamming it on a table in defendant's room. After breaking the phone, defendant pushed the victim into the bathroom and the victim hollered. Upon hearing the scream, Wallett ran to the bathroom where he saw defendant with his hands on the victim's shoulders. Wallett then grabbed S.T. to separate defendant and the victim.

¶ 11 Much like the testimony of defendant's mother, Wallett's attention had to be directed to a handwritten statement he previously gave to the police wherein he acknowledged having seen the defendant grabbing S.T. and pushing her. He agreed, however, S.T. had not touched defendant before he pushed her.

¶ 12 On cross-examination, defense counsel elicited testimony that S.T. was angry about her phone being broken before entering defendant's room.

¶ 13 Both handwritten statements were admitted into evidence as prior inconsistent statements.

¶ 14 The victim, S.T., defendant's16-year-old sister, was then called to testify. She said she allowed defendant to use her phone because he could not find his own. Defendant gave the undamaged phone back to S.T. and then asked to borrow the phone again and S.T. obliged. While defendant was using the phone the second time, she heard what she thought was her phone hitting the wall in defendant's bedroom. When defendant gave S.T.'s phone back to her, it was broken. The victim found defendant's phone in the living room, walked into defendant's room, and slammed it on the table. Defendant then approached her, grabbed both her arms on the bicep area and pushed her into the bathroom. Her boyfriend and mother then entered the bathroom and broke it up. The police were called and both defendant's mother and sister testified he made threats to kill them if the police were called. On cross-examination, S.T. admitted being angry that her phone was broken and slamming defendant's phone down to teach him a lesson, but she

denied initiating any contact with defendant. She also said she did not touch him first, if at all, since she was not that upset with defendant until he pushed her into the bathroom.

¶ 15 The final witness for the State was Deputy Marc Wright, who said he arrived on the scene after being called to the trailer for a fight between a male and a female. Upon arrival he spoke with defendant's mother, the victim, and defendant. Deputy Wright said defendant, who smelled of alcohol at 8:40 in the morning, was agitated, sweating, and still yelling when he arrived on the scene. He told of how defendant picked up a handful of rocks while Deputy Wright was speaking to him, threatened his mother for calling the police, and threw the rocks at her legs and feet.

¶ 16 Deputy Wright said at that point he requested the witnesses write out their statements on blank statement forms he provided and he left the scene after arresting defendant.

¶ 17 On cross-examination, defense counsel elicited statements that defendant made to the deputy, saying he was "in self-defense or defending himself against his sister." Using his police report to refresh his recollection, Deputy Wright related defendant's comment as "he was holding back [S.T.] in self-defense."

¶ 18 The State rested and defendant elected not to testify or offer any other evidence.

¶ 19 The jury convicted defendant, and the trial court sentenced him as stated. This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 Defendant argues he received ineffective assistance of counsel because his lawyer argued self-defense but failed to tender a self-defense instruction. We disagree.

¶ 22 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v.*

Henderson, 2013 IL 114040, ¶ 11, 989 N.E.2d 192. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687). As the *Evans* court noted, effective assistance of counsel refers to competent, but not necessarily perfect, representation. *Evans*, 209 Ill. 2d at 219, 808 N.E.2d at 953 (citing *People v. Stewart*, 104 Ill. 2d 463, 491-92, 473 N.E.2d 1227, 1240 (1984)). Mistakes in trial strategy or tactics do not necessarily render counsel's representation defective. See *People v. Kyse*, 220 Ill. App. 3d 971, 974, 581 N.E.2d 285, 287 (1991) (defense counsel's decision not to tender an affirmative defense of voluntary intoxication was a trial tactic). To establish the second prong of *Strickland*, "[a] defendant establishes prejudice by showing that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 229 Ill. 2d 1, 4, 890 N.E.2d 424, 426 (2008). The Supreme Court in *Houston* went on to define a "reasonable probability" as a probability which would be sufficient to undermine confidence in the outcome of the trial. *Houston*, 229 Ill. 2d at 4, 890 N.E.2d at 426. "A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness." *People v. Simpson*, 2015 IL 116512, ¶ 35, 25 N.E.3d 601.

¶ 23 Defendant argues the deficient performance by trial counsel was his failure to submit a jury instruction on self-defense, citing *People v. Goods*, 2016 IL App (1st) 140511, 62 N.E.3d 1168. In *Goods*, the court held, "where a defendant shows that his counsel argues a theory of the case, such as an affirmative defense, but then fails to ensure that the jury is properly

instructed on that theory, his counsel's failure cannot be deemed trial strategy and defendant has satisfied the first prong under *Strickland*." *Goods*, 2016 IL App (1st) 140511, ¶ 57, 62 N.E.3d 1168. To address the first prong of *Strickland*, we must determine whether a self-defense theory was presented at trial and if an instruction was warranted.

¶ 24 Raising the issue of self-defense in this case requires the defendant to acknowledge committing the act which constituted the offense of battery, but also present some amount of evidence of justification. See *People v. Hawkins*, 88 Ill. App. 3d 178, 182, 410 N.E.2d 309, 313 (1980) (explaining the defense of self-defense presupposes that the accused committed the act and invokes the defense as a justification); see also *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 59, 28 N.E.3d 923.

¶ 25 Here, prior to the commencement of trial, the defense filed no affirmative defense of self-defense. Although defense counsel mentioned in his opening statement he believed the evidence would show the victim to be the aggressor, none of the four witnesses called by the State ever testified to that fact. In each instance, although they sought to equivocate at trial, the State's witnesses were consistent in their representation of defendant as the first person to use force. Although it is clear that there was a heated argument taking place between the 36-year-old defendant and his 16-year-old sister, the witnesses said it was defendant who pushed S.T. into the bathroom, after which they may both have had hands upon the other. This evidence came either from the witnesses at trial or from their statements admitted as substantive evidence under the prior inconsistent statement statute.

¶ 26 In fact, when defendant's counsel sought to get S.T. to acknowledge the possibility she perhaps touched him first, her response was, "Oh, I know I didn't touch him first." She knew this to be the case because she "wasn't that mad when I — when he pushed me in the

bathroom. That's when I was really ticked off."

¶ 27 Defendant called no witnesses and did not testify. The only reference to "self-defense" was during the cross examination of Deputy Wright where defendant's counsel elicited the following response:

> "Told me that he and his sister basically got in an argument over a phone, that he had thrown that phone and then said he was in self-defense or defending himself against his sister."

Counsel then marked the police report as an exhibit and sought to refresh the recollection of Deputy Wright regarding exactly what was said. After an objection and discussion outside the presence of the jury, defendant's counsel was permitted to ask Deputy Wright to review his report. He then testified to what he specifically recalled the defendant saying: "He said he was holding [S.T.] back in self-defense."

¶ 28 While the defense is not required to present any evidence at trial, to argue an affirmative defense of self-defense, the defendant must establish a *prima facie* case of self-defense. *Lewis*, 2015 IL App (1st) 122411, ¶ 56, 28 N.E.3d 923.

> " '[T]he defendant must establish some evidence of *each* of the following elements: (1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of force applied; and (6) his beliefs were objectively reasonable.' " (Emphasis in original.) *Lewis*, 2015 IL App (1st) 122411, ¶ 56, 28 N.E.3d 923 (quoting *People v. Jeffries*, 164 Ill. 2d 104, 127-28,

646 N.E.2d 587, 598 (1995)).

¶ 29 In this case, defendant questioned witnesses about the victim's aggressive nature and her anger on the day in question due to her phone being broken. The defense elicited testimony from Deputy Wright, wherein Deputy Wright said defendant told him he was holding the victim in self-defense. Despite this testimony, the defense failed to establish the basic element of the affirmative defense, that is, admitting the commission of the act but showing justification.

¶ 30 The information alleged defendant pushed the victim, but defendant in his statement said he was merely holding her back. Additionally, the conclusory and self-serving statement regarding his use of self-defense is insufficient to meet the requirement that he show an "objectively reasonable" need to use force.

¶ 31 Defendant contends the simple statement he was "holding her back in self-defense" is sufficient to meet his obligation to establish some evidence of each of the six elements listed above. The determination of whether there is sufficient evidence in the record to warrant giving the jury a particular instruction is a question of law to be reviewed *de novo.* *Lewis*, 2015 IL App (1st) 122411, ¶ 56, 28 N.E.3d 923 (citing *People v. Washington*, 2012 IL 110283, ¶ 19, 962 N.E.2d 902).

¶ 32 In *People v. Chatman*, 381 Ill.App.3d 890, 903-04, 886 N.E.2d, 1265, 1276-77 (2008), the Second District reversed and remanded for new trial a defendant convicted of aggravated domestic battery and domestic battery, where the trial court provided "initial aggressor" instructions to the jury over the defendant's objection. The Appellate Court found such instructions were in error where the evidence did not warrant instructing the jury on self-defense because the defendant never admitted committing the acts alleged. *Chatman*, 381 Ill.

App. 3d at 900, 886 N.E.2d at 1274.

¶ 33 The *Chatman* court noted " 'the raising of such a defense necessarily constitutes an admission by the defendant that he committed the crime for which he is being prosecuted.' " *Chatman*, 381 Ill. App. 3d at 897, 886 N.E.2d at 1272 (quoting *People v. Raess*, 146 Ill. App. 3d 384, 391, 496 N.E.2d 1186, 1190 (1986)). Thus, "[r]aising the issue of self-defense requires as its *sine qua non* that defendant had admitted [the battery] as the basis for a reasonable belief that the exertion of such force was necessary. [Citations.] No instruction on self-defense *** is applicable to an act that a defendant denies committing." (Internal quotation marks omitted.) *Chatman*, 381 Ill. App. 3d at 897, 886 N.E.2d at 1272.

¶ 34 Here, no evidence suggests defendant pushed S.T. in self-defense. All of the witnesses testified defendant pushed [S.T.] first, after which an argument ensued. Defendant's statement to the police was not that he pushed S.T. in self-defense but that he was "holding her back" in self-defense. He denied the commission of the charged offense.

¶ 35 Having failed to establish one of the necessary elements for self-defense, defendant was not entitled to a self-defense instruction. As a result, we need not consider whether any of the other elements were present. *Lewis*, 2015 IL App (1st) 122411, ¶ 56, 28 N.E.3d 923. Self-defense was never properly raised before the trial court and accordingly, the failure to request the instruction was not deficient. Defendant fails under the first prong of the *Strickland* test, and thus, this court does not need to look to the second (prejudice). *Strickland*, 466 U.S. at 697.

¶ 36 Assuming *arguendo* defendant was able to show ineffectiveness under the first *Strickland* prong, he likewise fails under the second (prejudice) in that he fails to show "but for" trial counsel's error, the result would have a reasonable probability of being different. *Strickland*,

466 U.S. at 697.

¶ 37 Here, the trier of fact had numerous opportunities to consider defendant's attempt at a self-defense claim and chose to reject it by finding him guilty. During their testimony, both Barbara Tesch, defendant's mother, and Bradley Wallet reluctantly testified S.T. was pushed by defendant. It was clear from her testimony the mother sought to minimize the nature of the conflict by the time of trial.

¶ 38 The victim, S.T., appeared reluctant to describe defendant as the aggressor, but ultimately acknowledged it was he who pushed her into the bathroom. The jury heard defendant's counsel attempt to paint her as "a hot head," who was "seeing red," and perhaps was not sure about the sequence; however, she remained steadfast in her testimony that defendant was the first person to make physical contact. As the only true eyewitness to the event, the jury must have found her credible. Absent the testimony of any defense witnesses, her testimony was uncontradicted.

¶ 39 Defendant's counsel was permitted to inquire several times of each witness whether the victim initiated the altercation; all without objection by the State. He also characterized the victim as the aggressor both in his opening statement and closing argument.

¶ 40 The record affords this court no basis to find there was a "reasonable probability" the outcome of the trial would have been different with a self-defense instruction. A court of review should be reluctant to substitute its judgment for the trier of fact. *Village of Bull Valley v. Winterpacht*, 2012 IL App (2d) 101192 ¶ 12, 968 N.E.2d 160.

¶ 41 The jurors saw and heard the witnesses and made credibility determinations not available to this court. In spite of repeated references to the victim as the aggressor, the jury concluded otherwise.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we affirm. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 44 Affirmed.