2018 IL App (1st) 160822-U

No. 1-16-0822

October 24, 2018

Third Division

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).

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. 15 CR 60093
	)	
SHELLY RILEY,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for aggravated battery over her contention that her trial counsel was ineffective for failing to: plead the affirmative defense of self-defense; and make a closing argument.

¶ 2 Following a bench trial, defendant Shelly Riley was convicted of aggravated battery (720 ILCS 5/12-3.05(d)(1) (West 2014)) and sentenced to two years' probation. On appeal, defendant argues that her trial counsel was ineffective for failing to: present an affirmative defense of self defense that was supported by the evidence; and make a closing argument. We affirm.

¶ 3 Defendant was charged by indictment with three counts of aggravated battery (720 ILCS 5/12-3.05(a)(1), (a)(4), (d)(1) (West 2014)), stemming from a January 25, 2015, incident during which she allegedly shoved Francis Devine. Count 1 alleged that defendant battered Devine, an individual over the age of 60, and caused her great bodily harm. Count 2 alleged that defendant battered Devine, whom she knew to be over the age of 60. Count 3 alleged that defendant battered Devine and caused her great bodily harm.

¶ 4 Defendant retained private counsel. Prior to trial, counsel informed the court that he would not elect any affirmative defense. Defendant waived her right to a jury and the case proceeded to a bench trial.

¶ 5 Frances Devine testified that she is 75 years old and resides at a Chicago Housing Authority (CHA) senior complex. She explained that the complex is comprised of three buildings, all of which are residences for seniors. Devine testified that, while she resides in only one of the buildings, she has access to all three. Devine visits the other two buildings to either eat lunch or watch movies. Although Devine's understanding was that she was not required to show identification to enter the other buildings, she acknowledged that, in her experience, some security guards had asked her to show a form of identification to gain entrance.

¶ 6 On January 25, 2015, Devine attempted to enter one of the other buildings in the complex. Upon entering the building, defendant, who was working as a security guard, asked Devine for identification. Devine replied that she was told she did not need to show any identification and told defendant that she wanted to use the restroom. When Devine attempted to enter the building, defendant placed herself in front of Devine, blocking the path. Devine, who moves with the aid of a walker, then "played a trick" on defendant by acting as though she were

leaving the building. As Devine pretended to walk out, defendant returned to her position at the security station. Devine then made another attempt to enter the building and defendant again placed herself in front of Devine's path. Devine explained that, whenever she changed directions in an attempt to get past defendant, defendant would mirror her movements and continue to block her. Defendant then "got her hands up and pushed" Devine's shoulders, causing her to fall down and hit her head. Devine testified that, prior to the fall, she would have headaches and feel dizzy. She explained that these symptoms got worse after she fell and hit her head.

¶ 7 On cross-examination, Devine testified that she had seen defendant working as a security guard prior to this occasion. She acknowledged that she did not show any identification to defendant. Devine visited St. Joseph's Hospital the day after her encounter with defendant.

¶ 8 On redirect examination, Devine testified that she also visited a neurologist at St. Joseph's in April of 2015.

¶ 9 The State played a video recording of the incident in open court. The video footage is from a fixed camera that captures the length of a hallway. The video begins with defendant, at the far entrance of the hallway, standing in front of Devine, blocking her path. Devine turns around and walks away, leaving defendant standing at the entrance. A short time later, Devine walks around the corner and down the hallway. Defendant appears a few feet behind Devine, in pursuit. As Devine continues walking in the hallway, defendant picks up her pace to overtake her and Devine does the same. As defendant catches up with Devine, she reaches out and grabs Devine's walker. The walker angles to the right and makes contact with the wall. Defendant moves the walker to the side and steps in front of Devine, who then pushes her walker into defendant twice. Defendant raises her right arm and places her palm on the wall forming a

barrier. Devine abandons her walker and attempts to get past defendant, but defendant continues to block her path. Devine grabs at defendant's outstretched arm and tries, unsuccessfully, to pull it down from the wall. Devine attempts to pass defendant on the other side and defendant moves to block her. Devine has her hands raised chest high and they appear to make contact with defendant. Defendant grabs Devine's hands and pushes them back. Devine falls backward, striking her head on the walker before hitting the ground.

¶ 10 The parties stipulated that, if called, Dr. Irini Yao, of St. Joseph's hospital, would testify that she treated Devine on January 26, 2015, for a head injury and a headache. The parties also stipulated that, if called, Dr. Siresha Chalavad, a neurologist at St. Joseph's hospital, would testify that, on April 10, 2015, she treated Devine, who was complaining of pain and imbalance. Chalavad would further testify that, after an MRI, she diagnosed Devine with postconcussion syndrome. The State then rested.

¶ 11 Defendant moved for a directed verdict, arguing that she was performing her duties as a security guard and that the State failed to show that Devine suffered great bodily harm. The court agreed that the State failed to prove great bodily harm and dismissed counts 1 and 3. The court denied defendant's motion as to count 2.

¶ 12 Defendant testified that she has a prior conviction for possession of a controlled substance. She further testified that, on January 25, 2015, she had been employed as a security guard for four months. She explained that non-residents seeking entrance to the building were required to show a state issued identification or a driver's license. That afternoon, Devine, who walked with the aid of a walker, attempted to enter the building. Defendant testified that Devine "appeared to be" over the age of 60, although she did not know that for a fact. Defendant asked

Devine to see her identification and she refused. Devine walked toward the exit and defendant returned to her security station. Devine then turned and "skirted around" the security booth in an attempt to enter the building. Defendant opened the door to her security booth and stopped Devine by grabbing her walker. Devine then started to "run into" and "push" defendant with her walker in an attempt to get past. Defendant testified that Devine had snow on her shoes and, as Devine was pushing defendant, she slipped and fell. Defendant denied pushing Devine.

¶ 13 On cross-examination, defendant acknowledged that she had seen Devine in the building complex on previous occasions. Defendant denied knowing that Devine was a resident. Defendant conceded that security officers should not push senior citizens. She denied that Devine told her she needed to use the washroom.

¶ 14 After the close of evidence, both parties waived closing argument. The court found defendant guilty of aggravated battery. In announcing its decision, the court stated that the video depicted circumstances that it was "sure" defendant found frustrating. The court concluded that those circumstances, while frustrating, "couldn't have been answered by shoving, which [defendant] absolutely did." The court further stated that "any rational person watching that video would have to acknowledge that [defendant's behavior] was inconsistent with her position, was inconsistent with the way one would interact with somebody who was over the age of 65, really anyone." The court found that defendant "clearly" committed a battery and that "it would have been clear to anyone," including defendant, that the victim was over the age of 60.

¶ 15 Prior to sentencing, defendant filed a motion for a new trial, which the court denied. Subsequently, defendant filed an ARDC complaint against her trial counsel. As a result, her

counsel asked for, and the court granted, leave to withdraw. The court appointed a public defender to represent defendant. The court then sentenced defendant to two years' probation.

¶ 16 On appeal, defendant argues that her trial counsel was ineffective for failing to plead the affirmative defense of self-defense, which was supported by the evidence. She also argues that her trial counsel was ineffective for failing to make a closing argument. She requests that this court reverse her conviction and remand for a new trial.

¶ 17 We evaluate claims of ineffective assistance of counsel under the two-prong approach set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). See *People v. Givens,* 237 Ill. 2d 311, 330-31 (2010). To prevail, a defendant must first demonstrate that her counsel's performance, objectively measured against prevailing professional norms, was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment. *Strickland,* 466 U.S. at 687; see also *People v. Jackson*, 205 Ill. 2d 247, 259 (2001). In so doing, the defendant "must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *People v. Coleman,* 183 Ill. 2d 366, 397 (1998). Second, the defendant must show she was prejudiced by counsel's deficient performance, which means that that there must be a reasonable probability that, but for defense counsel's deficient performance, the result of the proceeding would have been different. *People v. Brown,* 2015 IL App (1st) 122940, ¶ 47. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Failure to establish either prong precludes a finding of ineffective assistance of counsel. *People v. Henderson,* 2013 IL 114040, ¶ 11.

¶ 18 Defendant first argues that her trial counsel was ineffective because he did not plead or argue that her use of force was justified as it was necessary to defend against Devine's unlawful

use of force. See 720 ILCS 5/7-1(a) (West 2014). The State responds that self-defense was not available to defendant because (1) she testified at trial that she did not shove Devine; and (2) her shove was excessive. The State also argues that, based on the court's statements during oral pronouncements, there is no reasonable probability that the outcome of her trial would have been different had she presented her affirmative defense. We first address whether defendant's trial counsel was deficient when he failed to present the affirmative defense of self-defense.

¶ 19 Decisions that involve matters of trial strategy typically will not sustain a claim of ineffective assistance, as they are presumed to be sound. *People v. Sanchez*, 2014 IL App (1st) 120514, ¶ 30. Courts have found that counsel's decision not to raise self-defense can be a matter of sound trial strategy. *Id.* ¶ 31. Thus, to succeed on a claim that counsel was ineffective for failing to raise self-defense, a defendant must establish that counsel's decision not to do so was unsound. See *People v. Ramey*, 152 Ill. 2d 41, 54–55 (1992). That is, the defendant must establish that no reasonably effective defense attorney, when confronted with the circumstances of the defendant's trial, would engage in similar conduct. *People v. Fletcher*, 335 Ill. App. 3d 447, 453 (2002).

¶ 20 In order for a claim of self-defense to be proper, there must be 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) the person actually and subjectively believed a danger existed which required the use of the force applied; and (6) her beliefs were objectively reasonable. *People v. Washington*, 2012 IL 110283, ¶ 35.

¶ 21 In this case, defendant denied that she pushed Devine, instead testifying that Devine was pushing her, which caused her to slip on snow that Devine had tracked in from outside. This court has noted that "long-standing Illinois case law" (*People v. Lewis*, 2015 IL App (1st) 122411, ¶ 58) has held that "[r]aising the issue of self-defense requires as its *sine qua non* that defendant has admitted" the use of force (*People v. Salas*, 2011 IL App (1st) 091880, ¶ 84 (quoting *People v. Lahori*, 13 Ill. App. 3d 572, 577 (1973)). Defendant admitted to no such thing. She now concedes, for the first time, that the surveillance video depicts her pushing Devine and that her trial counsel should have raised the issue of self-defense, regardless of her testimony. While defendant, with the benefit of hindsight, now questions her counsel's trial strategy, this court must "evaluate the conduct from counsel's perspective at the time." *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (quoting *Strickland*, 466 U.S. at 689). Given the circumstances of defendant's trial, we cannot say that no reasonably effective defense attorney would have engaged in similar conduct. Therefore, we do not find defense counsel deficient for failing to present a theory of self-defense.

¶ 22 Defendant also argues that her trial counsel was ineffective for failing to make a closing argument. She contends that by not presenting a closing argument, defense counsel squandered the last clear chance to persuade the trier of fact that her use of force was justified.

¶ 23 We note that, in raising this argument, defendant assumes that she was entitled to a theory that she acted in self-defense, and, therefore, her counsel was ineffective for failing to present that defense in a closing argument. We have already concluded that defense counsel was not deficient for failing to raise such a theory. To the extent that defendant's argument is

independent of that claim, we find that counsel was not deficient for failing to make a closing argument.

¶ 24 The record shows that the State waived both its opening statement and closing argument, but reserved its rebuttal. Counsel's opening statement asked the court to find that defendant's activity was "sanctioned and not a criminal activity." At the close of the State's evidence, counsel moved for a directed finding. During argument, counsel highlighted Devine's admission that she did not show defendant her ID and then attempted to "trick" defendant and sneak past the security desk. Counsel asked, "What was my client doing other than performing her duties as a security guard for the Chicago Housing Authority? What was she supposed to do?" After defendant testified, there was no new argument to be made as no new information was presented favorable to counsel's theory. Rather, defendant's testimony included elements favorable to the State. First, defendant admitted that it would have been inappropriate to push a senior resident. She also denied pushing Devine and insisted that she slipped, which was contradicted by the surveillance video. Thus, by waiving closing argument, defense counsel denied the prosecution an opportunity for rebuttal, which the State could have used to highlight these elements of defendant's testimony. See *People v. Carter,* 132 Ill. App. 3d 523, 530 (1985) (noting that by waiving closing argument, the prosecution was denied the opportunity for any rebuttal which may have proved more damaging than any defense). Given these circumstances, we cannot say that no reasonably effective defense attorney would engage in similar conduct, *i.e.*, waive closing argument. *People v. Fletcher*, 335 Ill. App. 3d 447, 453 (2002).

¶ 25 In reaching this conclusion, we are not persuaded by defendant's reliance on *People v. Wilson*, 392 Ill. App. 3d 189 (2009), for the proposition that "[i]t is a rare case where waiver of

closing argument would be considered sound strategy." Here, unlike *Wilson*, defendant was not tried by a jury and the prosecutor did not make a closing argument. Thus, the court's observation that "it would be a rare case in which choosing not to make a closing argument in a *jury trial* would be sound trial strategy" is irrelevant in this case. *Wilson*, 392 Ill. App, 3d at 200 (emphasis added).

¶ 26 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.