2018 IL App (2d) 160449-U
No. 2-16-0449
Order filed August 2, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MOHAMMED BENBOUZIYANE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 15-CF-1971 Honorable David P. Kliment, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was not ineffective for failing to move *in limine* to exclude a statement: the trial court overruled counsel's trial objection to the statement, and defendant offered no specific reason why a motion *in limine* would have been more likely to succeed; in any event, given the strength of the State's evidence, there was no reasonable probability that the exclusion of the statement would have affected the outcome.

¶ 2 Following a jury trial, defendant, Mohammed Benbouziyane, was convicted of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2014)) and unlawful restraint (720 ILCS 5/10-3(a) (West 2014)) and sentenced to 30 months' probation. He appeals, contending that his counsel was

ineffective for failing to move pretrial to bar a statement defendant made while in custody but prior to receiving *Miranda* warnings. We affirm.

¶ 3 At trial, Stephanie Carpenter testified that, on the evening of December 4, 2015, she was conversing with Aric Casey on her patio when she heard a woman scream, " 'Help, he's going to kill me.' " Carpenter asked if she needed help and the woman responded, " 'Yes, call police.' " As Carpenter called 911, the woman again screamed, " '[H]e's going to kill me.' " Casey jumped the back fence and ran to the woman's driveway. Carpenter continued to observe the neighbors' house, where she saw a taller person "hunching almost cowering over" a shorter person.

¶ 4 Casey testified that he encountered a man and a woman in the driveway. Casey told the man, whom he identified as defendant, to get away from the woman. Defendant told Casey to mind his own business and that he wanted the cell phone that the woman was holding. Casey told the woman to get in her car and lock the doors. The man went inside the house for a moment, then came back out and began pacing.

¶ 5 Tina O. testified that defendant was her boyfriend. On December 4, 2015, she worked until 4:30 p.m. She stopped at Target, then at her mother's house, where she had a conversation that upset her. When she arrived home, she saw defendant sitting on the sofa watching television. She complained about the conversation she had had with her mother, but defendant did not respond, so she became more upset.

¶ 6 Defendant kept telling her to calm down, which upset her even more. She began to prepare dinner, getting out a black knife. She was upset that defendant was still watching television, so she grabbed the knife and stabbed the television. She began knocking over other things in the house, stating that she would be better off dead.

¶ 7 Tina continued in this vein, saying that it would be nice not to wake up the next day. She started to leave the house and defendant tried to prevent her from leaving. Tina had tried to commit suicide before, and she believed that defendant was worried that she was going to do so again.

¶ 8 Tina started out the door. However, as she was attempting to leave, defendant reached her and prevented her from leaving. He sat on the floor, grabbed her, and held her down, trying to calm her down as he did so. She partially broke free and started to crawl out the door with defendant holding her legs. She kicked defendant numerous times and finally broke free. She got outside, but defendant caught her again. He wrapped his arms around her, saying that he would not let her go. Defendant again pulled her down from behind and held her in front of him. Tina began punching defendant. She broke free and kicked him hard. She got in her car and tried to start it, but defendant reached across her and removed the keys from the ignition. As she was sitting in the car, a man came running up. Later the police arrived.

¶ 9 Tina acknowledged that her testimony differed from what she had told the police on the night of the incident. She did not tell the officers what had really happened, because she was threatening to harm herself and the last time she did so she was sent to the Elgin Mental Health Center and she did not want to go back there.

¶ 10 She recognized the written statement she gave on the night of the incident, with her signature on it. In the statement, she wrote that defendant was drunk and that she asked him to leave. However, he grabbed a knife and stabbed the television twice. He pushed her, slapped her, held her on the sofa, grabbed her phone, and prevented her from leaving. As she retook the phone and ran outside, defendant held her at the door. Defendant continued to hit and push her in the bushes. She finally broke free and ran to the car, but defendant grabbed the keys from the

ignition. Tina locked the car doors and a man came to help. Defendant took the keys and ran away, but she did not know where he went. During the altercation, Tina defended herself by hitting and kicking defendant.

¶ 11 Kane County deputy sheriff Amy Johnson testified that she responded to the scene on December 4, 2015. She found the house in disarray. Tina was calm when Johnson spoke to her, but it appeared that she had been crying earlier.

¶ 12 According to Johnson, Tina told her the following. Tina had asked defendant to leave because he was drunk, but he refused. Defendant grabbed her with both hands and threw her on the floor, causing her lip to swell. Defendant also grabbed her by the hair and dragged her into the kitchen. She could not call 911, because he had taken her cell phone.

¶ 13 When defendant reached for a cigarette, Tina grabbed her phone and ran out the front door. However, defendant stopped her on the front lawn. At that point, she saw a neighbor approaching. Defendant grabbed Tina by the arms and told her that she was not leaving. Defendant told the neighbor to mind his own business and, at some point, defendant ran away through the back yard.

¶ 14 Johnson did not see defendant in the house. She observed that Tina had recent injuries to her lower lip, small bruises on her armpits, and a small scratch near her left elbow. Johnson later learned that two other officers had found defendant at a gas station and brought him back to the house.

¶ 15 Johnson testified that, when she told defendant why he was being arrested, he responded "[w]ithout being coaxed" that he had just gotten off work and had not yet been home that evening. Defense counsel objected on the basis that Johnson was about to testify to statements defendant made while in custody. The court overruled the objection. Johnson then clarified that

she "just asked him what happened" and that defendant "stated he was not even at home at that time, and he had just gotten back from work." Johnson concluded that defendant was drunk. At the station, Johnson asked defendant if he was willing to speak to her, and he responded, "absolutely not."

¶ 16 Aurora police officer Ray Morris testified that he responded to a December 21, 2013, incident involving defendant and Tina. Tina said that defendant was drunk, agitated, and argumentative. He had pushed her onto a sofa several times and tried to get her car keys away from her. He also had kicked items on the floor and broken a vase.

¶ 17 Janette Leveille testified for the defense that she was a physician's assistant and that Tina was her patient. In June 2015, she prescribed Prozac, which is used to treat depression, and lamotrigine, which is used as a mood stabilizer in treating bipolar disorder. Tina told Leveille that she had run out of medication since her June appointment and, accordingly, had not been taking them. Based on Tina's symptoms, Leveille restarted her prescription for lamotrigine.

¶ 18 The jury found defendant guilty of domestic battery, based on physical contact, and unlawful restraint. The court sentenced him to 30 months' probation. Defendant timely appeals.

¶ 19 Defendant contends that his counsel was ineffective for failing to file a motion *in limine* to bar Johnson's testimony about defendant's statement that he was not home at the time of the incident. He contends that the statement was made while he was in custody but before he received *Miranda* warnings. The statement, while exculpatory, undermined his theory of defense that he participated in the altercation but that Tina was the aggressor and he restrained her only to prevent her from harming herself.

¶ 20 A defendant is entitled to the effective assistance of counsel at trial. *People v. Simms*, 192 Ill. 2d 348, 361 (2000). To establish a claim of ineffective assistance of counsel, a defendant

must satisfy the two-pronged *Strickland* test. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). First, a defendant must show that his counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment. To establish a deficiency, the defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *Id.*

¶ 21 Second, a defendant must establish prejudice by demonstrating that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the proceeding's outcome. *Id.* at 362. Where, as here, the claim of ineffective assistance was not raised in the trial court, our review is *de novo. People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24.

¶ 22 Under *Miranda*, statements a defendant makes during a custodial interrogation are inadmissible unless preceded by the defendant's knowing and intelligent waiver of his or her rights to remain silent and to have an attorney present. *People v. Jordan*, 2011 IL App (4th) 100629, ¶ 16. Defendant contends that his statement to Johnson that he was not home at the time of the incident was the result of improper custodial interrogation and that counsel was ineffective for failing to file a pretrial motion to suppress it.

¶ 23 In response, the State makes several arguments from which we distill the following. Defense counsel objected contemporaneously to the challenged testimony. The trial court overruled the objection, but that ruling was correct because general questions such as "what happened" are generally not considered interrogation requiring *Miranda* warnings. Moreover, defendant cites no authority for his implicit contention that forgoing a motion *in limine* in favor of a contemporaneous objection at trial was an unreasonable strategic choice.

¶ 24 As the State points out, defense counsel raised at trial the precise objection that defendant now champions. The trial court overruled the objection, but defendant does not take issue with the court's ruling. Rather, defendant contends that counsel should have raised the issue in the form of a motion *in limine* to exclude the evidence. However, defendant does not explain how a motion *in limine* would likely have produced a better result than a trial objection.

¶ 25 Citing *People v. Peterson*, 372 Ill. App. 3d 1010 (2007), and *People v. Laspisa*, 243 Ill. App. 3d 777 (1993), the State argues that general questions such as "what happened" are not considered interrogation. However, as defendant points out, in neither of those cases was the defendant in custody at the relevant time. In his reply brief, defendant cites *Rhode Island v. Innis*, 446 U.S. 291 (1980), which defined "interrogation" as "words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." (Emphasis in original.) *Id.* at 302. Thus, *Innis* does not lead inexorably to the conclusion that Johnson should have known that her open-ended question was likely to produce an incriminating response.

¶ 26 Our review of defense counsel's performance is highly deferential and we generally presume that counsel's decisions are the product of sound trial strategy. *People v. Ramsey*, 2017 IL App (1st) 160977, ¶ 35. Whether to file a pretrial motion is a strategic decision to which we typically defer. *People v. Johnson*, 372 Ill. App. 3d 772, 777 (2007). To establish prejudice resulting from counsel's failure to file such a motion, a defendant must show a reasonable probability that (1) the motion would have been granted and (2) the outcome of the trial would have been different had the evidence been excluded. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005); *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 70.

¶ 27 Here, defendant cannot show that it is reasonably probable that a motion raising the same issue would have been granted. In his reply brief, defendant speculates that a "pretrial motion could have provided the trial court with a more detailed and comprehensive argument against admission of the statements," but he does not suggest what additional argument could have been presented.

¶ 28 The trial court was aware of the facts surrounding the question and defendant's answer when it ruled on the objection, and defendant does not explain specifically how filing a pretrial motion would have changed the court's ruling. Indeed, the trial court likely needed to hear the trial testimony regarding the specific circumstances to make an informed ruling.

¶ 29 In any event, defendant cannot demonstrate a reasonable probability that the outcome of the trial would have been different had the evidence been excluded. He argues that the evidence was critical because it undercut his theory of defense. However, defendant's statement that he was not home was equally inconsistent with the State's theory of the case. Clearly, the State did not introduce the statement for its truth. Its only apparent relevance was to show defendant's consciousness of guilt. See *People v. McQueen*, 115 Ill. App. 3d 833, 837 (1983) (defendant's false exculpatory statement is admissible to establish consciousness of guilt).

¶ 30 Aside from this, the evidence of defendant's guilt was strong. Tina's contemporaneous statement to police was logical and coherent. It was consistent with her injuries and the other physical evidence the police observed. Moreover, Carpenter and Casey corroborated that statement in significant respects. Carpenter said that she heard a woman scream, " 'Help, he's going to kill me.' " She saw a taller person hovering over a shorter person. When Casey arrived, he observed defendant behaving belligerently.

¶ 31 By contrast, Tina's trial testimony was far-fetched. To believe her trial testimony, the jury would have had to accept that, although she was in the middle of a manic episode and was suicidal, to avoid being sent to a mental health facility, she had the presence of mind to concoct a story blaming defendant for the incident and matching the eyewitnesses' testimony and the physical evidence.

¶ 32 The judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 33 Affirmed.