2018 IL App (4th) 160671-U

NO. 4-16-0671

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 5, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
RAYMOND McBRIDE,	)	No. 15CF1016
Defendant-Appellant.	)	
	)	Honorable
	)	Rudolph M. Braud Jr.,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding defense counsel did not provide ineffective assistance at defendant's jury trial.

¶ 2 In April 2016, a jury found defendant, Raymond McBride, guilty of aggravated battery. In September 2016, the trial court sentenced him to eight years in prison.

¶ 3 On appeal, defendant argues he is entitled to a new trial because defense counsel was ineffective. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In November 2015, the State charged defendant by information with one count of aggravated battery (720 ILCS 5/12-3.05(d)(4) (West 2014)), alleging he, in committing a battery, intentionally made physical contact of an insulting or provoking nature to a correctional officer, Connie McLaughlin, in that he threw liquid on her, knowing her to be a correctional officer, and the incident occurred while she was engaged in her official duties. Defendant pleaded not guilty.

¶ 6 Prior to trial, the State filed a notice of intent to impeach defendant with his prior convictions if he decided to testify. The State indicated defendant had prior convictions for obstructing justice, theft, robbery, possession of a controlled substance, and aggravated battery. Defense counsel filed a motion *in limine*, arguing if the State was permitted to impeach defendant with his prior convictions for robbery and/or aggravated battery, the jury would consider those convictions as propensity evidence. Defense counsel also pointed out defendant's prior conviction for aggravated battery was the same crime as his current charge. The State later withdrew its request in regard to defendant's aggravated-battery conviction. The trial court denied defendant's motion *in limine* and permitted the State to mention defendant's convictions, with the exception of the aggravated-battery conviction.

¶ 7 In April 2016, defendant's jury trial commenced. Ryan Patton, a correctional officer with the Sangamon County sheriff's department, testified defendant was an inmate in the Sangamon County jail on October 20, 2015. At approximately 2 p.m., Patton heard a radio transmission from Officer Connie McLaughlin. Upon seeing her, Patton noticed she was "upset" and her uniform was wet. Patton and other officers removed defendant from his cell. At that time, defendant was "physically upset" and angry and indicated he was going to get McLaughlin back for disciplining him.

¶ 8 On cross-examination, Patton stated he came into contact with inmates on a daily basis. He agreed it was not uncommon for inmates to undergo disciplinary matters. He also agreed defendant was upset because he was being disciplined for being in a jail fight.

¶ 9 Correctional Officer Jeremy Ball testified he responded to the incident involving Officer McLaughlin. He found her to be "upset" and noticed her uniform was wet. While Ball and other officers removed defendant from his cell, defendant was "upset" and "angry" and

stated he was " 'going to get' " McLaughlin. On cross-examination, Ball stated he was unsure if defendant was being disciplined for the jail fight.

¶ 10 John Kirby, a sergeant with the Sangamon County sheriff's department, testified he responded to the incident in question. He stated McLaughlin was "upset," "mad," and "aggravated" because defendant had tossed liquid on her. Defendant was "agitated" and made comments indicating he wanted to hurt McLaughlin.

¶ 11 On cross-examination, Kirby acknowledged defendant's cell had a water supply. When asked whether defendant was visibly agitated because he was being disciplined for being in the jail fight, Kirby stated he was unsure why McLaughlin was disciplining defendant.

¶ 12 Officer McLaughlin testified the cell doors are solid with a small window and a slot for food. She stated part of her duties required her to tell inmates about their disciplinary hearings. While explaining the disciplinary findings to defendant that would require him to stay in disciplinary segregation, defendant claimed he did not understand. When she provided further information, defendant became "more and more agitated." McLaughlin provided him with a paper copy and walked away. She then "felt a liquid come out the crack of the door and hit [her] arm." McLaughlin stated the incident was "upsetting" and "unnerving." McLaughlin continued to walk away, and defendant said, " 'This is bullshit. Bullshit, McLaughlin. You're fucked up, McLaughlin. I don't agree with this.' " After McLaughlin went to another cell and then walked back toward defendant's cell, the food slot "flew open." Defendant's arm came out and he threw liquid from a Styrofoam cup. Defendant then reached out and shut the door. At that time, defendant said, " 'Fuck you, McLaughlin. I'll get you again. Walk by here.' " McLaughlin stated she was "infuriated" because she did not know what the fluid was.

¶ 13 The State played video footage of the incident for the jury. When McLaughlin

walks toward defendant's cell the second time, the food slot opens, she stops abruptly before reaching the cell, and then reacts by stepping back. She continues to another cell and, shortly thereafter, the food slot closes.

¶ 14 On cross-examination, McLaughlin acknowledged defendant had been known to be prescribed psychotropic medication during his time in jail. She agreed defendant could be "cantankerous" and "highly emotional" and had "behavioral instability." She agreed defendant was upset for being disciplined for a jail fight, although no criminal charges were filed. She also stated she did not receive any injuries as a result of the incident.

¶ 15 Defendant exercised his right not to testify. Following closing arguments, the jury found defendant guilty. Thereafter, defense counsel filed a motion to vacate the judgment or for a new trial, arguing, *inter alia*, the State failed to prove him guilty beyond a reasonable doubt. The trial court denied the motion. In September 2016, the court sentenced defendant to eight years in prison. Defense counsel filed a motion to reconsider the sentence, which the court denied. This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Defendant argues defense counsel was ineffective for eliciting evidence he was in a fight in jail and for failing to object to the testimony of three witnesses who told the jury that he threatened McLaughlin after the alleged battery. We disagree.

¶ 18 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. Veach*, 2017 IL 120649, ¶ 29, 89 N.E.3d 366. 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 "counsel's performance 'fell below an objective standard of reasonableness.' " *People v. Valdez*, 2016 IL 119860, ¶ 14, 67 N.E.3d 233 (quoting *Strickland*, 466 U.S. at 688). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 19 A. Defendant's Involvement in a Jail Fight

¶ 20 Defendant argues defense counsel erred by introducing evidence he had been involved in a fight with another inmate, which prejudiced his defense.

¶ 21 A strong presumption exists that counsel's action or inaction was the product of sound trial strategy. *People v. Davis*, 2014 IL App (4th) 121040, ¶ 19, 22 N.E.3d 1167. Moreover, "a mistake in trial strategy or an error in judgment by defense counsel will not alone render representation constitutionally defective." *People v. Peterson*, 2017 IL 120331, ¶ 80, 106 N.E.3d 944. Instead, a reviewing court is to be "highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344, 864 N.E.2d 196, 216 (2007).

¶ 22 In his opening statement to the jury, defense counsel noted McLaughlin was performing her assigned duties by delivering disciplinary news to defendant "in reference to a jail scuffle that he had been involved in." Counsel stated defendant was "upset" and threw water in McLaughlin's direction. However, counsel argued throwing liquid was insufficient to

demonstrate defendant knowingly or intentionally made contact of an insulting or provoking nature with McLaughlin.

¶ 23 During the trial, defense counsel cross-examined Patton and McLaughlin, and both of them agreed defendant was upset because he was being disciplined for being in a jail fight. Also on cross-examination, Officer Ball and Sergeant Kirby stated they were unsure if defendant was being disciplined for the fight.

¶ 24 In his closing argument, defense counsel referred to the video of the incident and questioned whether McLaughlin "was truly insulted or provoked." Counsel contended McLaughlin did not react the first time defendant threw water in between the door and "continues about her business" without acting "like she's insulted or provoked." It was only after defendant opened the food slot and "indiscriminately" threw water at her a second time that she radioed other officers. Counsel opined there was a reasonable probability that defendant "was trying to throw water out in just a general area to get her attention because he was pissed off and he wanted to talk to her or argue with her about it some more." Counsel claimed the State's evidence failed to prove beyond a reasonable doubt that defendant intended to make contact of an insulting or provoking nature.

¶ 25 In claiming defense counsel acted unreasonably in informing the jury defendant had been in a jail fight, appellate counsel relies in large part on the First District's decision in *People v. Phillips*, 227 Ill. App. 3d 581, 592 N.E.2d 233 (1992). In that case, the State charged the defendant with armed robbery after he allegedly stole a woman's purse at gunpoint. *Phillips*, 227 Ill. App. 3d at 581-82, 592 N.E.2d at 234. The victim later identified the defendant as the robber in a photo array and a lineup. *Phillips*, 227 Ill. App. 3d at 582, 592 N.E.2d at 234. At trial, a police detective stated he interviewed a suspect, Carl Curry, and, based on that

conversation, he obtained a photo of the defendant. *Phillips*, 227 Ill. App. 3d at 583, 592 N.E.2d at 235. On cross-examination, defense counsel asked the detective if Curry mentioned knowing who might have robbed the victim, and the detective stated Curry named the defendant. *Phillips*, 227 Ill. App. 3d at 584, 592 N.E.2d at 236. When the detective asked Curry why he thought the defendant could be the perpetrator, Curry said he and the defendant had been arrested in Chicago for robbery. *Phillips*, 227 Ill. App. 3d at 584, 592 N.E.2d at 236.

¶ 26 On appeal, the defendant argued his defense counsel was ineffective for eliciting hearsay testimony from the detective with regard to the defendant's prior criminal record and identification by Curry as the likely armed robber. *Phillips*, 227 Ill. App. 3d at 586, 592 N.E.2d at 237. The appellate court disagreed with the State's argument that defense counsel's actions constituted sound trial strategy, finding the detective's testimony "devastating" enough to warrant a mistrial. *Phillips*, 227 Ill. App. 3d at 589, 592 N.E.2d at 239. The court found counsel ineffective, reversed the defendant's conviction, and remanded for a new trial. *Phillips*, 227 Ill. App. 3d at 590, 592 N.E.2d at 239-40.

¶ 27 We find *Phillips* distinguishable from the facts in this case. In *Phillips*, defense counsel elicited testimony from the detective that a suspect named the defendant as the armed robber because they had both been arrested previously for robbery. Here, defense counsel elicited testimony that defendant had been in a jail fight. By doing so, counsel provided a full factual background as to why defendant was upset, angry, and emotional and which, as counsel suggested, led him to attempt to "get [McLaughlin's] attention" or "to create a mess." It also kept the jury from speculating defendant was being disciplined for some other unspecified conduct of a more serious or prejudicial nature. Defense counsel also attempted to diminish the impact of the punishment by having Officer Patton say it was not uncommon for prisoners to

undergo punishment. In contrast to *Phillips*, where the suspect suggested the defendant committed armed robbery because he had committed a prior robbery, the jury here could conclude the evidence of a jail fight was not the same as throwing liquid on a correctional officer. In addition, it gave contextual background to explain defendant's agitation and perhaps corroborate counsel's claim he was merely throwing water out of his cell in general frustration with no intent. Clearly, the defense strategy was to argue whether defendant's actions were "insulting" or "provoking." Thus, defense counsel's performance was not objectively unreasonable, and defendant's claim of ineffective assistance of counsel fails.

¶ 28 B. Defendant's Threats to McLaughlin

¶ 29 Defendant also argues defense counsel acted unreasonably by not objecting to testimony offered by three State witnesses who told the jury he threatened McLaughlin after the alleged assault. Defendant argues counsel's failure to object was prejudicial.

¶ 30 "Defense counsel's failure to object to testimony may be a matter of sound trial strategy, and does not necessarily establish deficient performance." *Evans*, 209 Ill. 2d at 221, 808 N.E.2d at 954; see also *People v. Pecoraro*, 144 Ill. 2d 1, 13, 578 N.E.2d 942, 947 (1991) ("As a general rule, trial strategy encompasses decisions such as what matters to object to and when to object."). Trial "counsel cannot be ineffective for failing to object if there was no error to object to." *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 24, 965 N.E.2d 1275.

¶ 31 In the case *sub judice*, Officer Patton said defendant made statements after being removed from his cell and said he was going to get McLaughlin back for what she did to him. Officer Ball testified defendant was "upset" and "angry" and stated he was " 'going to get' " McLaughlin. Sergeant Kirby stated defendant was agitated and made comments indicating he wanted to hurt McLaughlin. Appellate counsel argues the threats were made after the battery

took place and did not have a relationship to defendant's state of mind at the time of the battery. Thus, appellate counsel contends defendant's trial attorney should have objected to their introduction.

¶ 32 Here, had defense counsel objected, the trial court could have properly overruled the objection under either the "present state of mind" or "spontaneous declaration" exceptions to the hearsay rule. See Ill. R. Evid. 803(2), (3) (eff. Apr. 26, 2012) (stating excited utterances and statements of a declarant's state of mind are exceptions to the hearsay rule); *People v. Gacho*, 122 Ill. 2d 221, 240, 522 N.E.2d 1146, 1155 (1988) (stating spontaneous declarations are admissible when three requirements are met: " '(1) an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) absence of time to fabricate; and (3) the statement must relate to the circumstances of the occurrence.' [citation]"); *People v. Lawler*, 142 Ill. 2d 548, 559, 568 N.E.2d 895, 900 (1991) (noting "[a]n out-of-court statement of a declarant is admissible when that statement tends to show the declarant's state of mind at the time of the utterance").

¶ 33 The statements were spontaneous and unsolicited, made immediately after a sufficiently exciting or disturbing event with no time to reflect or fabricate, and were descriptive of defendant's state of mind at that moment. The fact they came immediately after the throwing of the water would go more to weight than admissibility. Counsel's objection, had one been made, would not have prevented the statements from being admitted. More importantly, they also lent credence to counsel's claim defendant was generally upset.

¶ 34 We also find defendant cannot establish the prejudice prong under the facts of this case. In considering the prejudice prong under *Strickland*, defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

Evans, 209 Ill. 2d at 219-20, 808 N.E.2d at 953. The unrebutted evidence indicated defendant threw liquid out of a foam cup through the food slot while saying, " 'Fuck you, McLaughlin. I'll get you again. Walk by here.' " The video showed McLaughlin walking toward the cell door, the food slot opening, something coming out of the slot, and McLaughlin's immediate reaction. McLaughlin testified she was "infuriated" because she did not know the composition of the liquid. The jury was well aware defendant was angry from McLaughlin's testimony and, even if defense counsel had been successful in keeping the threats from the jury, the evidence was so overwhelming defendant intentionally made contact of an insulting or provoking nature that the result of the proceeding would not have been different. Thus, his ineffective assistance of counsel claim is without merit.

¶ 35 III. CONCLUSION

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

¶ 37 Affirmed.