2019 IL App (4th) 170314-U

NO. 4-17-0314

FILED
August 15, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Clark County
CHARLES E. WALLACE,	)	No. 16CF82
Defendant-Appellant.	)	
	)	Honorable
	)	Tracy W. Resch,
	)	Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial counsel did not render ineffective assistance by failing to (a) move to suppress defendant's statement made during police interview, (b) request redaction of video, or (c) advocate at defendant's sentencing hearing.

(2) The trial court did not fail to analyze the probative value against the prejudicial effect of the other-crimes evidence.

¶ 2 In March 2017, a jury convicted defendant, Charles E. Wallace, of one count of arson, a Class 2 felony (720 ILCS 5/20-1(a)(1) (West 2014)), and the trial court sentenced him to seven years in prison. Defendant appeals, arguing his counsel was ineffective for failing to (1) file a motion to suppress his confession made after he purportedly invoked his rights to counsel and to remain silent, (2) object to irrelevant portions of the recorded interview or to insist on the redaction or editing of the video, and (3) advocate or participate in his sentencing

hearing. Defendant also claims the court failed to conduct an analysis of the other-crimes evidence to determine admissibility. For the reasons that follow, we find no error and affirm.

¶ 3 I. BACKGROUND

¶ 4 In the fall of 2016, Marshall police officer Josh Dudley investigated a possible arson at a house located at 410 South 8th Street in Marshall. On October 26, 2016, a chair cushion sitting on the front porch was reportedly set on fire and as a result, some of the nearby siding on the house melted. The resident, Trinaty Klein, advised police he believed defendant was responsible. Klein also advised police about other recent incidents of property damage including a smashed windshield on his truck, spray paint on the side of the house, another attempted arson in the yard of the house, and a smashed windshield on his wife's vehicle. During his investigation, Dudley learned that defendant leased a home from Terry Stephen, Klein's employer. Based on Klein's suspicions of defendant's involvement, Dudley interviewed defendant.

¶ 5 On November 20, 2016, Dudley spoke with defendant at his residence. Because defendant admitted committing each of the above acts, Dudley asked defendant to ride to the police station with him for a formal interview. Defendant agreed and voluntarily rode with Dudley in his police car without handcuffs and without being arrested. At the police station, Dudley read defendant his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)) and conducted a video- and audio-recorded interview. This interview was published to the jury. The contents of the interview will be discussed in our analysis below. As a result of defendant's interview, the State charged defendant with one count of arson (720 ILCS 5/20-1(a)(1) (West 2014)), a Class 2 felony, for knowingly damaging the residence at 410 South 8th Street by fire on October 26 or 27, 2016.

¶ 6 On March 13, 2017, the State filed a motion *in limine*, requesting the admission of other-crimes evidence. Specifically, the State sought to introduce evidence of other crimes or bad acts that arguably comprised an entire narrative of the conflicts among defendant, Stephen, and Klein. The State argued these other crimes should be admitted at trial for the purpose of proving motive, intent, opportunity, plan, and absence of mistake or accident. According to the State, defendant's spree consisted of the following: (1) on September 20, 2016, a truck owned by Stephen but driven by Klein was vandalized (a broken windshield) while parked overnight at 410 South 8th Street; (2) on October 23, 2016, a vehicle owned by Klein's wife was vandalized (a broken windshield and rear window) while parked overnight at 410 South 8th Street; (3) on November 1, 2016, the side of the residence at 410 South 8th Street was spray painted; and (4) on November 18, 2016, the front yard and fence at 410 South 8th Street was set on fire sometime overnight or during the early morning hours. Some of these acts occurred before the charged offense and some occurred after.

¶ 7 After considering the evidence and arguments of counsel, the trial court granted the State's motion, finding these other crimes "fit squarely within [] Rule 404(b)" (Ill. R. Evid. 404(b) (eff. Jan. 1, 2011)), and therefore would be admissible for limited purposes.

¶ 8 At trial, Klein testified about the four incidents mentioned above as well as the fire on his porch (the charged offense) that had been set during the overnight or early morning hours of October 26 or 27, 2016. The State presented Klein with photographs of the damage from each of the five incidents. Klein said not only had the windows of each vehicle been damaged as described but each had a small pile of charcoal on the hood of the vehicle. The charcoal had been lit, leaving small burn marks on the vehicles.

¶ 9 Klein testified he confronted defendant about the incidents, asking defendant "what his problem with [Klein] was[.]" Klein said defendant said "something about [Klein] going into [defendant's] house and taking stuff[.]" Klein denied taking anything from defendant's house and told the police about their conversation. Klein said, after the first fire, Stephen and the police installed "deer cams," but they "were unable to catch anything on footage." Klein testified that no further acts of vandalism had occurred since November 18, 2016.

¶ 10 On cross-examination, Klein admitted he did not see who started the fires. Counsel also inquired about the broken windows on Klein's vehicles, again asking Klein to admit he had not witnessed the vandalism.

¶ 11 Marshall police officer Josh Dudley testified he responded to each incident of vandalism at Klein's residence. After speaking with Klein, Dudley went to defendant's residence at 509 South 9th Street in Marshall—a house defendant rented from Stephen. Defendant invited Dudley inside and they spoke about the vandalism incidents. Initially, defendant denied any involvement. Dudley did not believe defendant and told him they had cameras outside of Klein's residence. Dudley asked defendant if he thought he would be seen on the footage if they retrieved the film from the camera. Defendant said yes, he " 'probably would be on there.' " Dudley said he then went through each incident and asked if defendant had anything to do with it. Dudley said defendant "started saying 'yes.' " Defendant admitted to doing each act so Dudley asked defendant to accompany him to the police station for an interview "to get his side of the story."

¶ 12 The video recording of the interview was played in its entirety (approximately 23 minutes) for the jury. The State rested; defendant presented no evidence. After deliberations, the jury found defendant guilty of arson.

¶ 13 On April 17, 2017, the trial court conducted a sentencing hearing. The court first acknowledged receipt of the presentence investigation report (PSI). Neither party suggested changes to the report. Klein and his wife testified about the emotional effects this vandalism had on them. Defendant's counsel did not cross-examine either of the State's witnesses or present any evidence in mitigation. Defendant chose not to make a statement in allocution. The State made oral recommendations to the court in terms of sentencing. Defendant's counsel stated: "Your Honor, in speaking to [defendant], he's indicating he has no recommendation for the court." The court sentenced defendant to seven years in prison, the maximum sentence as recommended by the State. The court relied on defendant's criminal history and his "self-described" status as a "junkie." In the PSI, defendant advised he had been a drug addict "as long as he can remember." The court explained that defendant's delusion that Klein or Stephen had harmed him were unstoppable short of his arrest. The court stated: "He has excused his behavior on the basis of his delusions."

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 A. Ineffective Assistance of Counsel

¶ 17 The assistance that defendant received from his defense counsel was ineffective only if (1) counsel's performance was less than reasonable by prevailing professional standards and (2) there is a reasonable probability that, but for the deficiencies in counsel's performance,

the result of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81.

¶ 18 1. *Failure to File Motion to Suppress*

¶ 19 The first of the above elements, the substandard-performance element, is accompanied by a "strong presumption" that counsel's conduct was the result of sound trial strategy, not incompetence. *People v. Pecoraro*, 175 Ill. 2d 294, 319-20 (1997). "[T]he decision whether to file a motion to suppress is generally 'a matter of trial strategy, which is entitled to great deference.' " *People v. Bew*, 228 Ill. 2d 122, 128 (2008) (quoting *People v. White*, 221 Ill. 2d 1, 21 (2006)).

¶ 20 Counsel's failure to file a motion to suppress defendant's incriminating statements could not reasonably have been the result of a tactical or strategic decision. The best evidence the State had connecting defendant to this crime was his admission. Without the admission, the jury would have had only Klein's testimony that he suspected defendant had started the fire. However, Klein did not witness defendant doing it or doing any of the other acts of vandalism. To offer *any* sort of defense at trial, counsel would have needed the exclusion of defendant's confession. Given the lack of evidence against defendant, counsel should have argued the possibilities that the confession was obtained despite defendant's assertion of his right to counsel, assertion of his right to remain silent, or his ability to understand his rights. By making no effort to exclude the confession, counsel provided an objectively unreasonable level of representation.

¶ 21 However, to succeed on a claim of ineffective assistance, defendant must also demonstrate prejudice. "[W]here an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must

demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *People v. Henderson*, 2013 IL 114040, ¶ 15.

¶ 22 Despite our finding that counsel should have filed a motion to suppress, we find that defendant is unable to demonstrate prejudice. He claims counsel should have challenged the admission of his incriminating statements on the grounds they were taken in violation of his constitutional rights. He argues it was clear he had requested counsel *and* asserted his right to remain silent during the interview. We disagree.

¶ 23 Our review of the recorded interview, whether characterized as a custodial interrogation or an informal interview, revealed defendant asserted neither constitutional right. When Dudley entered the interview room, defendant was standing doing toe touches, counting each out loud. Dudley asked if defendant wanted water, but he declined, indicating instead he wanted to go to the hospital because he had not eaten anything. Nevertheless, he declined Dudley's offer for food. Defendant agreed to a "quick interview" before Dudley would call an ambulance. By this time, defendant was sitting on the floor and assuring Dudley he would be okay. Defendant said he had "to loosen up." Dudley asked defendant to sit in a chair and he would "make this as quick as possible." Defendant said: "Oh go ahead and start 'cause I've got to do these;" he started doing sit-ups, counting each out loud. Dudley asked defendant to acknowledge that the interview room was being audio- and video-recorded. Defendant did not respond until Dudley asked again. Dudley told defendant: "I'm going to read you your rights, ok? Before you answer any questions or make any statement, you must fully understand your rights." Dudley read the statement of rights while defendant continued his sit-ups. There was no indication during this process that defendant asserted any right to counsel. When the topic of the

possibility of an appointed attorney was mentioned, defendant made a sound. However, the sound may have been a grunt or a count from the sit-ups. It was difficult to identify. This court did not hear defendant say any coherent word or phrase. Dudley continued reading, without acknowledging the sound.

¶ 24 As Dudley finished reading the statement of rights, the following exchange occurred:

> "Q. [OFFICER DUDLEY]: In waiving my right to remain silent, I wish to state that no promises or threats have been made to me, no persuasion or coercion has been used against me. Ok?
>
> A. Remain silent.
>
> Q. Does that all make sense to you?
>
> A. Yep.
>
> Q. Alright. What is today?
>
> A. Uh—Saturday, that's all I know."

¶ 25 When considering defendant's statement within the context of this interview, we find "remain silent" cannot reasonably be interpreted as an assertion of his right. Defendant seemed to be merely repeating this phrase from Dudley's recent statement, as if he had to make a choice between two alternatives and chose "remain silent." Dudley then asked defendant to "answer these real quick," as defendant finished his sit-ups and moved to a chair. Dudley began the interview by asking defendant about his intentions in starting the fire. He said: "your intention was not to hurt anybody was it?" Defendant said he was "[j]ust trying to scare the fucker into staying out of my fucking house." The interview continued for approximately 15 minutes with defendant explaining how he started the fire, admitting he had started the fire in the

yard, admitting he had spray painted the house, and explaining he was trying to get revenge on Klein and Stephen for trying to force him out of his house.

¶ 26 At the end of the interview, Dudley asked defendant to sign the statement of rights. The following exchange occurred:

"Q. Here's a pen for you.

A. [Defendant is reading the statement.] Where do I sign at?

Q. Just on the bottom line.

A. No I ain't signing that. [He reads from the page.] I ain't making no statement without first counseling. Counseling ain't going to do me no good.

Q. Charlie, when I first read you the rights the first time, I asked if you understood them and you said yes.

A. Yeah, you read my rights here, right? Not down at the house.

Q. I didn't start—that's why I read them here before we started the interview.

A. So you didn't hear that down at the house.

Q. No.

A. Ok that's right.

Q. Ok, but everything we talked about in here, I heard.

A. Tell the motherfucker if he stays away from my house, I won't go back over there. Now, he comes in my house again, I ain't responsible for my actions.

Q. I understand that, but you've already told me that you set the fire.

A. Yep.

Q. I have to arrest you on the arson—

A. Well ok.

Q. —and the criminal damage but as far as what else was said in the house [Dudley shrugs his shoulders.]

A. Well ok. I fucked—well no, I didn't fuck up.

Q. Anything that we said in the house um—I didn't read you your rights. Ok?

A. But here—

Q. But here—

A. I didn't admit nothing. I just listened to ya and did part of my workout.

Q. Well, in here, you admitted that you set the fire.

A. Oh, I did?

Q. You did.

A. Well, you got it on record. Ok. [shrugs] Whatever. I don't care. Ok. [he starts to sign.] Fuck it. They fucked me and—I don't give a fuck."

¶ 27 Dudley continued asking defendant questions about the tool he used on Klein's vehicles to break the windows, where he purchased the spray paint, and what he used to start the fire on the porch. He then arrested defendant. As Dudley was placing defendant in handcuffs, defendant threatened to hurt Klein "bodily" upon his release.

¶ 28 This court's review of the recorded interview indicates a motion to suppress would not have been granted on the grounds defendant asserted his right to counsel and/or to remain silent. As we noted earlier, this court does not interpret the sound defendant made as an assertion of his right to counsel. "*Miranda*'s 'in any manner' language directs that an assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity."

People v. Krueger, 82 Ill. 2d 305, 311 (1980) (quoting *Miranda*, 384 U.S. at 444-45 (if a suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning."). However, defendant's grunt could not reasonably be considered by any person as a request for counsel. See *Krueger*, 82 Ill. 2d at 312 (the officers did not violate defendant's *Miranda* rights, for, in this instance, a more positive indication or manifestation of a desire for an attorney was required than was made here).

¶ 29 Likewise, defendant's "remain silent" comment did not, in fact, constitute his desire to do so. Within seconds, he told Dudley he understood his rights, he sat in a chair, and answered all of Dudley's questions and provided his own commentary.

¶ 30 As noted, based on the totality of the circumstances as reflected by the record before us, we cannot agree with defendant's argument that had counsel filed a motion to suppress, it would have been meritorious. Assuming, at the hearing on a motion to suppress, the trial court would have watched the recording of defendant's interview and considered Dudley's testimony regarding his investigation, it is highly unlikely the court would have granted the motion. The record demonstrates defendant freely, knowingly, and voluntarily confessed to his actions after waiving his constitutional rights.

¶ 31 2. *Failure to Edit Recorded Interview*

¶ 32 Defendant next contends his counsel was ineffective for failing to redact the video to exclude the threatening comments defendant made after the interview concluded and as defendant was being placed under arrest. Defendant refers to the following comments:

> "Q. [OFFICER DUDLEY]: Do you want to put your coat on before I take you [to jail]?

A. [DEFENDANT]: Yeah. I want to mail this letter. [Defendant puts on his hat.] He took my other hat motherfucker. Fucking cocksucker. I'm going to fuck him up when I get out. This ain't over. He thinks because I go to fucking jail it's over. He's fucking wrong. I've been in this business too god damn long. I've been a criminal too god damn long. Fucking cocksucker. I'm going to fuck him up. I ain't gonna touch none of his stuff. I'm gonna hurt him bodily. You wanna use that against me, I don't give a fuck. It's recorded. I don't give a fuck."

¶ 33 It is true counsel should have requested that the video be edited to remove defendant's arguably irrelevant statements threatening bodily harm, bragging about his own criminal history, and promising future harm to the victim. Any reasonable jury would consider these statements only negatively against defendant. There could be no positive impact for these statements.

¶ 34 However, again, defendant cannot demonstrate prejudice. These particular statements made after the interview concluded were merely cumulative of other statements defendant made during the interview. For example, defendant stated during his interview, he was "about ready to take a baseball bat to him and get it over with" because Klein had "got into the house and got into [his] personal letters[.]" Defendant told Dudley: "Lucky you come down when you did cause I was going to burn his car tonight."

¶ 35 Given the substance of the entire interview, the jury's consideration of the statements made after the interview concluded would not likely have changed the outcome of the trial. Defendant cannot demonstrate that the statements he made at the end of the recording bolstered the State's case anymore than any other statement he made during the substantive

interview. Considering the entire contents of the video presented to the jury, we conclude counsel's complained-of conduct did not prejudice defendant.

¶ 36 3. *Failure to Participate in Sentencing Hearing*

¶ 37 Defendant also contends his counsel failed to present mitigating evidence or otherwise participate in the sentencing hearing, effectively depriving him of his right to counsel. At the sentencing hearing, neither party suggested changes to the PSI. In aggravation, the State presented the testimony of the Kleins, who each testified as to the emotional effect the vandalism had on their lives. Defendant's counsel presented no evidence in mitigation. The State recommended the maximum sentence of seven years. Counsel had no recommendation, telling the court that after "speaking to [defendant], he's indicating he has no recommendation for the court." Defendant indicated, and the court recognized, defendant did not want to make a statement in allocution.

¶ 38 Because the trial court saw defendant indicating he did not want to make a statement and because counsel told the court he had consulted with defendant about a potential sentencing recommendation, counsel's conduct cannot be characterized as not advocating for defendant or not participating in the hearing. The court indicated it was well aware of defendant's mental-health and substance-abuse issues as set forth in the PSI. Counsel cannot be deemed ineffective for failing to point out this known information. Our supreme court has stated: "Defense counsel cannot be faulted for failing to introduce mitigation evidence that was already contained in the report." *People v. Griffin*, 178 Ill. 2d 65, 87 (1997). Again, on this claim, defendant fails to demonstrate counsel was ineffective.

¶ 39 B. Other-Crimes Evidence

¶ 40 Defendant also complains the trial court erred by failing to analyze the probative value versus the prejudicial effect of the other-crimes evidence before allowing the introduction of these other acts. These other acts were the subject of the State's motion *in limine*. The State asked it be allowed to introduce evidence at trial that defendant engaged in the prior and subsequent acts of vandalism against the Klein's and Stephen's property. The State argued these other acts would be introduced to prove motive, opportunity, intent, preparation, plan, identity, or absence of mistake or accident. The State noted defendant's interview provided details on these other crimes.

¶ 41 At the hearing, after considering the respective arguments and over defendant's objection, the trial court granted the State's motion allowing the evidence, finding these other crimes "fit squarely within [] Rule 404(b)" (Ill. R. Evid. 404(b) (eff. Jan. 1, 2011)). The court agreed to instruct the jury on the limited purpose upon which it could consider the evidence. See Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000).

¶ 42 The State initially contends defendant forfeited review of this issue by failing to file a posttrial motion. As a general rule, an allegation of error is forfeited for the purpose of review where the defendant fails to file a motion for a new trial. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, at the reviewing court's discretion, we may except this rule when the defendant brought the alleged error in some manner to the attention of the trial court. See *People v. Maness*, 184 Ill. App. 3d 149, 152 (1989). Here, defendant objected to the admission of the other-crimes evidence during the hearing on the State's motion *in limine*. Defendant argued the admission of these other crimes would constitute improper mini-trials on each act. Because defendant raised an objection for the trial court's consideration, we will review the merits of his argument on appeal. *Maness*, 184 Ill. App. 3d at 152.

¶ 43 At the hearing on the State's motion *in limine*, the trial court considered the parties' arguments and ultimately granted the State's motion, finding as follows:

> "If, indeed, the State has made the representation and the court accepts that it's true, that [defendant] admitted each of these ancillary events, then the evidence with respect to these ancillary events can be coherently presented.
>
> In other words, I recognize that as a practical matter, [defense counsel] is raising the problem that occurs when you have a trial on one charge but you're introducing evidence on other events that may constitute a crime. You can have kind of trials within a trial. In some instances that can be a problem because it can frankly be distracting and confusing for a jury and substantially lengthen the presentation of evidence in the case that's going to trial.
>
> In this particular case, it would appear that the evidence the State intends to present will be limited, it will be fairly coherent evidence and will not take up an undue amount of time or be unduly distracting to the jury. The State is not saying and is not requesting to say and will not be permitted to argue that because [defendant]—because these other events occurred, which [defendant] has admitted, he is guilty of the charge in this case.
>
> They are admitted solely as evidence being offered as to motive, opportunity, intent, preparation, plan, knowledge, identity, and the absence of mistake or accident. By pleading not guilty and requiring the State to prove a specific intent crime beyond a reasonable doubt, all of those purposes become relevant."

¶ 44 Defendant claims the trial court failed to conduct the required balancing test and committed reversible error by allowing the admissibility of the other-crimes evidence. We disagree.

¶ 45 Here, as in *People v. Abernathy*, 402 Ill. App. 3d 736, 750 (2010), in ruling on the State's motion, the trial court did not explicitly state it had engaged in the required balancing test, but we believe the record showed the court implicitly did so. The court's failure to use specific terms like "weighing" or "prejudicial effect" does not constitute error. In *Abernathy*, we concluded "[d]espite the court's failure to specifically articulate that it engaged in the balancing process, we find no error." *Id.* See also *People v. Davis*, 319 Ill. App. 3d 572, 575 (2001) (the record showed that the trial court conducted the required balancing test without specifically articulating it). It is clear from the trial court's comments it, in fact, weighed the probative value against the prejudicial effect before determining the evidence fit squarely within the provisions of Rule 404(b). We find no error with respect to the court's analysis of the evidence.

¶ 46 Turning to the trial court's ultimate decision to allow the evidence, we remind defendant we will reverse the trial court's decision to admit other-crimes evidence only if we find an abuse of discretion. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). An abuse of discretion has occurred when the trial court's decision is arbitrary, fanciful, or unreasonable or when no reasonable person would take the position adopted by the trial court. *Id.*

¶ 47 Throughout defendant's interview, he mentioned the multiple ways he had tried to retaliate or exact revenge against Klein and Stephen. These other acts were so intertwined with the facts of the case being tried, they would be admissible under the continuing-narrative exception.

¶ 48 In *People v. Thompson*, 359 Ill. App. 3d 947, 951 (2005), this court explained the continuing-narrative exception to the rule against other-crimes evidence, as follows:

> "This court has specifically recognized evidence of another crime is admissible if it is part of a continuing narrative of the event giving rise to the offense or, in other words, intertwined with the offense charged. [Citations.] As this court has explained, '[w]hen facts concerning uncharged criminal conduct are all part of a continuing narrative which concerns the circumstances attending the entire transaction, they do not concern separate, distinct, and unconnected crimes.' [Citation.]."

Here, defendant admitted to committing four other acts of vandalism against the Kleins and Stephen both before and after the charged offense. However, all five events occurred within a matter of a few weeks. Excluding the evidence of the other four offenses would not only completely eviscerate the substance of defendant's recorded statement, but it would leave the jury confused about the context of the fire on the porch. That is, the other-crimes evidence " 'set the stage for the confrontation' between the victim and the defendant, and without this testimony, the victim's version of events 'might appear improbable because of the absence of any motive' on the defendant's ***." *People v. Carter*, 362 Ill. App. 3d 1180, 1190-91 (2005).

¶ 49 We find the trial court admitted the other-crimes evidence for the limited purpose as explained after conducting a proper analysis of the question of admissibility. Further, the court appropriately instructed the jury to limit its consideration of this evidence. Thus, under these circumstances, we find no error.

¶ 50 III. CONCLUSION

¶ 51 For the reasons stated, we affirm the trial court's judgment.

¶ 52 Affirmed.