2020 IL App (2d) 180870-U
No. 2-18-0870
Order filed December 24, 2020

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 18-CF-1203
GABRIEL ALMAZAN,	)	Honorable Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hudson and Brennan concurred in the judgment.

ORDER

¶ 1 *Held*: At defendant's trial on domestic battery charges, defense counsel was not ineffective for failing to seek an instruction on self-defense; counsel proceeded on the reasonable theory that defendant's girlfriend received her injuries by accidentally falling during her physical struggle with defendant while she was trying to retrieve her cell phone; seeking a self-defense instruction would have been inconsistent with the theory that defendant did not intentionally injure his girlfriend.

¶ 2 Defendant, Gabriel Almazan, appeals from his conviction of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2018)) in the circuit court of Lake County, contending that his trial counsel was ineffective for failing to request a jury instruction on self-defense. Because counsel pursued

a reasonable trial strategy that defendant did not commit domestic battery, counsel was not ineffective for failing to request a self-defense instruction. Accordingly, we affirm

¶ 3 I. BACKGROUND

¶ 4 Defendant was tried by a jury on one count of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2018)), one count of theft (720 ILCS 5/16-1(a)(1)(A) (West 2018)), and one count of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2018)).

¶ 5 At trial, the alleged victim, Elitania Martinez, testified that, on May 18, 2018, she went to a party with her friend Joann Cordova. While at the party, Martinez consumed alcoholic beverages. In the early morning hours of May 19, 2018, Cordova and Martinez left the party and went to Cordova's house. Already at the house was Cordova's husband and defendant, who was Martinez's boyfriend.

¶ 6 After Cordova's husband went to bed, she left to pick her daughter up from work. Defendant and Martinez remained at the house. While Cordova was gone, Martinez went outside to smoke a cigarette. As she was talking on her cellphone, defendant asked to whom she was talking. Martinez replied nobody.

¶ 7 Defendant then grabbed Martinez's phone and began to look at it. According to Martinez, she lunged at defendant to get her phone back, and the situation "escalated." Defendant ran to his truck, and Martinez followed, still trying to get her phone. According to Martinez, she continued to lunge at defendant and hit him a few times. Defendant, in turn, was pushing Martinez off him and trying to get in his truck. According to Martinez, as he did so, Martinez fell backward, striking her face against a nearby car.

¶ 8 After she fell, defendant tried to help her up, but she "kind of lost it" and hit defendant with a bottle. Defendant told her to get away from him. Because Martinez was angry about defendant

taking her phone, she ripped off his chain and threw it on the grass. After looking for the chain, defendant drove away with Martinez's phone.

¶ 9 Martinez testified that, when Cordova returned, she took Martinez to a nearby hospital emergency room. Martinez recalled speaking to police officers at the hospital. She remembered speaking with Deputy Joseph Halek of the Lake County Sheriff's Department. She did not recall speaking to a female officer. The State played for the jury a portion of the video footage recorded on Halek's body camera while he interviewed Martinez. In the footage, Martinez stated that defendant had gotten on top of her and punched her with a closed fist. Martinez acknowledged making the recorded statements. However, she testified that defendant did not in fact get on top of her or punch her in the face. She agreed to file charges only because she was angry about defendant taking her phone and because she suffered the injury to her nose just before she was to take a vacation to Las Vegas. When asked if defendant initiated the incident, Martinez said yes, by taking her phone. According to Martinez, the entire incident could have been avoided had defendant returned the phone when she demanded it. Martinez confirmed that, later on the day of the incident, defendant returned her phone by dropping it off at Martinez's sister's home.

¶ 10 Cordova testified that, when she returned with her daughter, she saw Martinez in the driveway, bleeding from her nose. Cordova asked what happened, and Martinez replied, "We got into it." Cordova drove Martinez to the emergency room.

¶ 11 Dr. David Hill, an emergency room physician, treated Martinez. She had a laceration across the bridge of her nose, and Dr. Hill applied seven sutures to close the wound. An X-ray revealed that Martinez's nose was fractured. Dr. Hill opined that, though the injuries were consistent with being punched with a closed fist, they could have been caused by other forms of

trauma such as a fall. According to Dr. Hill, Martinez did not tell him she had fallen, but that she had been punched in the nose.

¶ 12 Officer Ariel Goldberg of the Grayslake Police Department responded to the emergency room to investigate a report of a possible domestic battery. Officer Goldberg met with Martinez and took a written statement. According to Officer Goldberg, Martinez stated that she had been punched in the face with a closed fist. Martinez offered no other cause for her injury.

¶ 13 Deputy Halek testified that he responded to the emergency room because it was determined that the incident had occurred within unincorporated Grayslake. After arriving, he obtained Martinez's written statement from Officer Goldberg. In that statement, Martinez wrote that defendant had gotten on top of her and hit her in the face.

¶ 14 When Deputy Halek met with Martinez, he observed the injury to her nose, along with scratches on her face and an abrasion on one of her shoulders. She appeared to have been drinking but was not intoxicated. Deputy Halek's body camera recorded his interview with Martinez.

¶ 15 Sergeant John Hall was a correctional officer with the Lake County Sheriff's Department. He identified recordings of two phone calls involving defendant at the jail. One conversation was with Martinez. Martinez told defendant that he had hit and attacked her. She added that she had not put defendant in jail but rather it all started because he had taken her phone. In the other recording, defendant told an unidentified woman that Martinez had broken his chain and hit him with a bottle so he hit her and left. He added that it was all fun and games until you punch someone in the face.

¶ 16 Defendant offered no evidence. In closing argument, defense counsel contended that defendant did not commit a battery. Counsel did not seek a self-defense instruction.

¶ 17 During deliberations, the jury asked the trial court for audio clips or transcripts of the recorded phone calls and a legal definition of reasonable doubt. The State informed the court that the recordings of the phone calls were not currently playable but that the State was working on a solution. The court advised the jury that it would not define reasonable doubt and that technical difficulties prevented it from providing the recordings. Afterward, the State informed the court that it was able to provide playable recordings. However, before the recordings could be provided to the jury, it returned its verdicts. The jury found defendant not guilty of theft or aggravated domestic battery but found him guilty of domestic battery. The court sentenced defendant to five years in prison; defendant, in turn, filed this timely appeal.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant contends that his trial counsel was ineffective for failing to request a jury instruction on self-defense.

¶ 20 To determine whether a defendant was denied his right to effective assistance of counsel, we apply a two-prong test. A defendant must show, first, that counsel's performance fell below an objective standard of reasonableness (*Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)) and, second, that he was prejudiced such that there is a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding would have been different (*Strickland*, 466 U.S. at 694). A reasonable probability is one sufficient to undermine confidence in the outcome; counsel's deficient performance must have rendered the result of the proceeding unreliable or fundamentally unfair. *People v. Enis*, 194 Ill. 2d 361, 376 (2009). To prevail on a claim of ineffective assistance, a defendant must satisfy both *Strickland* prongs. *Enis*, 194 Ill. 2d at 377.

¶ 21 The failure to request a self-defense instruction constitutes ineffective assistance of counsel when such failure was not the result of trial strategy. *People v. Gill*, 355 Ill. App. 3d 805, 811 (2005). Further, it is well settled in Illinois that counsel's choice of jury instructions, and his decision to rely on one theory of defense to the exclusion of another, is a matter of trial strategy. *People v. Falco*, 2014 IL App (1st) 111797, ¶ 16. Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence, and are thus generally immune from claims of ineffective assistance of counsel. *Falco*, 2014 IL App (1st) 111797, ¶ 16 (citing *Enis*, 194 Ill. 2d at 378). However, the failure to request a particular jury instruction may be grounds for a finding of ineffective assistance of counsel if the instruction was so critical to the defense that its omission denied the defendant his right to a fair trial. *Falco*, 2014 IL App (1st) 111797, ¶ 16. For example, where defense counsel argues a theory of defense but then fails to offer an instruction on that theory, the failure cannot be called trial strategy and shows ineffective assistance. *People v. White*, 2011 IL App (1st) 092852, ¶ 65.

¶ 22 Here, defense counsel opted to proceed under a theory that defendant did not batter Martinez. Rather, counsel argued that Martinez suffered her injury as a result of accidentally falling. Some evidence supported that theory, as Martinez denied that defendant punched her in the nose and claimed instead that she was injured when she fell against a vehicle while trying to get her phone from defendant. Dr. Hill admitted that Martinez's injury could have resulted from a fall. Although several witnesses testified that Martinez told them that defendant punched her in the nose, she denied that these statements were true and explained that she made them because she was extremely angry with defendant for taking her phone and because she injured her nose just before a planned vacation. There was certainly enough evidence for defense counsel to reasonably argue that defendant did not batter Martinez. That defendant's counsel was ultimately

unsuccessful in his argument does not mean that he performed unreasonably and rendered ineffective assistance. See *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007).

¶ 23 Counsel having presented a reasonable theory that defendant did not commit the charged conduct, it would not have been sound trial strategy for counsel to request an instruction on self-defense. Indeed, notwithstanding that there was some evidence to support self-defense, a self-defense instruction would have been entirely inconsistent with counsel's chosen theory. See *White*, 2011 IL App (1st) 092852, ¶ 70 (even if there is enough evidence to support a self-defense instruction, it would be incompatible with a theory that the defendant did not commit the charged act); see also *Gill*, 355 Ill. App. 3d at 811. Because defense counsel's theory that defendant did not batter Martinez was a sound trial strategy, counsel was not ineffective for failing to request a self-defense instruction.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 26 Affirmed.