2016 IL App (1st) 141705-U

SIXTH DIVISION
Order filed: September 2, 2016

No. 1-14-1705

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. 13 C6 60415
	)	
JULIAN McCLEMORE,	)	Honorable
	)	Michele McDowell Pitman,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction of aggravated battery is affirmed where: (1) the evidence was sufficient to show that the defendant made physical contact with a police officer in an insulting or provoking nature; and (2) defense counsel was not ineffective due to his failure to peremptorily challenge a prospective juror.

¶ 2 Following a jury trial in the circuit court of Cook County, the defendant, Julian McClemore, was convicted of aggravated battery and sentenced to 30 months of felony probation and 5 days of community service with the Sheriff's Work Alternative Program (SWAP). On

appeal, the defendant argues that the evidence was insufficient to prove his guilt beyond a reasonable doubt and that he was denied effective assistance of counsel. For the following reasons, we affirm.

¶ 3 On April 18, 2013, the defendant was charged by information with multiple counts of aggravated battery (720 ILCS 5/12-3.05(d)(4)(i)-(iii) (West 2012)), based upon a physical altercation he and his girlfriend, Tyeisha Windom, had with Markham police officer Kenneth Muldrow, which occurred on March 8, 2013. The State ultimately dropped all counts except one, which alleged that the defendant knowingly made physical contact of an insulting or provoking nature with Officer Muldrow and that he knew that Officer Muldrow was a peace officer.

¶ 4 On April 1, 2014, before the trial commenced, the circuit court conducted the *voir dire* examination of prospective jurors. Out of the presence of the prospective jurors, the court informed the parties that, for the purposes of preemptory challenges, it did not permit "back striking," stating:

> "You each get seven challenges. I pick [juries] in panels of four. I do not allow any back striking. Once I tender you the cards, if you accept that panel and I tender them to the State or vice versa if they excuse somebody when I give you the panel back to complete the panel you only get the new person. You don't get to revisit the jurors you have already accepted."

¶ 5 During *voir dire*, the circuit court first explained the charge brought against the defendant as well as trial procedure, and then asked the prospective jurors general questions relating to their ability to sit as jurors. Only the response of one juror on the second panel, S.R., is relevant to this appeal. The following colloquy occurred between the court and S.R.:

"[THE COURT:] Do you have any family members or friends who are either a lawyer, a Judge or police a [*sic*] officer?

* * *

[S.R.:] I work with lawyers everyday, and my mother and about a half a dozen cousins and uncles are Chicago police.

[THE COURT:] Do they ever speak to you about their work?

[S.R.:] Yes.

[THE COURT:] Let me ask you this, do you think anything has ever been said to you in a way that would influence you if you're juror [*sic*] on this case?

[S.R.:] I would like to say no.

[THE COURT:] When you say [']talk to you about their work[', in what way?

[S.R.:] Well, my mother especially in detail. I mean, she's been a cop for—she's retired now, but my whole life.

[THE COURT:] Your mother was a Chicago police officer?

[S.R.:] Yes.

[THE COURT:] And do you think, again, if she said something about her work that it would be a negative influence on you for a jury or a positive?

[S.R.:] Well, she had a similar case like this actually.

[THE COURT:] Where she was battered as a police officer?

[S.R.:] She was hit by a car by somebody, and they turned around and tried suing her so it was—

[THE COURT:] Let me ask you this, the things that you say your mother and family members may have said to you, are you saying you would bring those in the trial, or would you be able to—

[S.R.:] No. I would try not to. I can't say I wouldn't think of things, you know, as things are being brought up. I would try not to.

[THE COURT:] You would try not to?

[S.R.:] Yes.

[THE COURT:] But what I am saying is, do you feel that this would influence you if you're a juror?

[S.R.:] It may.

* * *

[THE COURT:] If police officers testify in this case, [S.R.], would you be able to assess their credibility the same or different than that of an ordinary citizen?

[S.R.:] The same.

[THE COURT:] If the State proves the defendant guilty beyond a reasonable doubt, can you return a verdict back in court of guilty?

[S.R.:] Yes.

[THE COURT:] If the State fails to prove the defendant guilty beyond a reasonable doubt, can you return a verdict back in court of not guilty?

[S.R.:] Yes.

* * *

[THE COURT:] Can you tell us any reason as to why you cannot sit on this jury and be fair and impartial to both sides?

[S.R.:] No."

¶ 6 Thereafter, out of the presence of the potential jurors, the parties began selecting the jury panels to sit at the defendant's trial. The parties and the circuit court stated, in pertinent part, as follows:

"THE COURT: *** Tendering the second panel, [I.R.], [N.R.], [S.R.], and [T.M.] Tendering that panel to the defense. Any motions for cause?

MR. PORTER [defense counsel]: I'm sorry, Judge, [I.R.], [T.M.], Mitchell and Perez[?]

THE COURT: Yes.

MS. SULLIVAN [assistant State's Attorney]: No, [I.R.], [N.R.], [S.R.], and [T.M.]

THE COURT: Right. Mitchell is not in it yet.

MR. PORTER: We are fine with that.

THE COURT: Counsel for the State?"

The State struck T.M. for cause and peremptorily struck N.R. The court tendered Mitchell in place of T.M. and Perez in place of N.R. The State peremptorily struck Perez and the court tendered Sobotka to replace him. The State then accepted the second panel. In response, the court stated, "[g]iving it to the defense." Defense counsel moved to peremptorily strike S.R. The parties disputed whether defense counsel had previously accepted the second panel, and thus agreed to S.R. as a juror. The court determined that defense counsel had already accepted the original second panel and that "[t]he only new one in there would be *** Sabotka." Therefore, the court held that S.R. could not be peremptorily stricken. The parties then moved on to select the third panel of jurors.

¶ 7 On April 2 and 3, 2014, the case proceeded to a jury trial where the following evidence was adduced.

¶ 8 Jeanette Williams, a Pace bus driver, testified that, at approximately 3:44 p.m. on March 8, 2013, she was driving along one of her routes. She stopped at 159th Street and Kedzie Avenue, where the defendant and Windom boarded the bus. According to Williams, Windom paid her fare, but the defendant's bus card was damaged and would not go through the fare box. To accommodate the defendant, Williams requested that he pay 85 cents instead of the regular price, $2. The defendant refused, stating, "[b]***, I'm not giving you s***," and began walking to the back of the bus. Williams stated that, as the defendant was making his way to the back of the bus, Windom, who was standing next to the fare box, pointed a finger in her face and threatened to "beat [her] a***" for confronting the defendant. Windom then joined the defendant at the rear of the bus. Because Williams felt threatened, she pushed the panic button, which contacted the police, and pulled the bus over to wait for their arrival. While the defendant and Windom were sitting at the back of the bus, they screamed that they would "beat [Williams'] a***," and the defendant demanded, "[b]*** drive this bus."

¶ 9 Williams further testified that Officer Muldrow arrived in a "white police car" and that he was wearing his uniform and badge. When Officer Muldrow boarded the bus, Williams told him what had occurred and identified the defendant and Windom. According to Williams, Officer Muldrow asked the defendant and Windom to "step off the bus," but they refused, "cussing and screaming still." Eventually, the defendant and Windom followed Officer Muldrow outside, and, as they were walking off of the bus, they continued to threaten Williams, who remained on the bus. Williams observed Officer Muldrow ask the defendant and Windom for their identification once the three of them were outside. The defendant and Windom refused, and Windom began

"[c]lawing" and "[s]winging at" Officer Muldrow's face and upper body. Williams testified that, as Officer Muldrow was attempting to hold back Windom, the defendant began punching Officer Muldrow on the back of the head and on his shoulders. At that time, Williams exited the bus in order to call the police for backup.

¶ 10 Williams stated that, less than a minute after she called the police, Officer Harlen Lewis arrived at the scene. By that time, there was "blood every where" because Officer Muldrow's face and hands were bleeding. Williams observed a "big tuss[le]" as Officer Lewis attempted to restrain the defendant. The officers eventually placed the defendant and Windom in handcuffs.

¶ 11 Roberta Kellogg, a bus passenger who was standing next to Williams on the day of the incident, testified and corroborated Williams' testimony that the defendant hit Officer Muldrow on the back while Windom was attacking Officer Muldrow. She added that, while the defendant was hitting Officer Muldrow with both open hands and closed fists, he was saying, "[l]et my girlfriend go. Stop hitting my girlfriend." According to Kellogg, however, Officer Muldrow did not hit Windom; rather, he was attempting to "place her in a position where *** she couldn't resist."

¶ 12 Officer Muldrow testified that, on March 8, 2013, he received an assignment regarding a disturbance on a Pace bus. Accordingly, he drove—in a marked squad car—to 159th Street and Spaulding Avenue in Markham, where he saw the bus parked. Officer Muldrow stated that he got on the bus and spoke with Williams, who directed him to the rear of the bus, where the defendant and Windom were sitting. When Officer Muldrow walked towards the defendant and Windom, they were yelling obscenities at Williams, "being very loud and belligerent[,] *** and indicating that they [were] not getting off the bus." According to Officer Muldrow, the defendant stated that he would not get off of the bus unless "some type of force" was used. Officer Muldrow asked them

to step off of the bus to talk to him, using "a calm voice to get them to calm down." Eventually, the defendant and Windom walked off of the bus with him, and Williams followed.

¶ 13 Officer Muldrow stated that, once they were outside, Windom continued to threaten, point and wave her hands at Williams. Officer Muldrow stepped between Williams and Windom, and asked the defendant and Windom for their identification. The defendant and Windom refused, and began yelling at him. According to Officer Muldrow, Windom then turned toward Williams, so he placed his hands on her shoulder and said, "[m]a'am pay attention and talk to me." In response, Windom started scratching his face and neck, kicking his shins, and "swinging and hitting and slapping" him. Officer Muldrow stated that, as he attempted to take Windom into custody, the defendant "got in front of" him and began swinging at him (without making contact), warning him that Windom was taking "some type of medication." As he continued to "deal[] with [Windom] in front of [him]," he felt the defendant hitting his back. He stated that he did not actually see the defendant hitting him, but he "felt very bothered" by the defendant's strikes.

¶ 14 Officer Muldrow further testified that, at some point, he heard sirens and Officer Lewis' voice. Officer Lewis was commanding the defendant to "put [his] hands down" and "[s]tep back." In response, the defendant attempted to reach for his cell phone. After telling the defendant to "put it down" approximately twice, Officer Lewis warned the defendant that he was going to take him into custody and the two of them began struggling. According to Officer Muldrow, once Officer Lewis got the defendant on the ground, he went to assist Officer Lewis and the defendant was handcuffed.

¶ 15 Officer Muldrow stated that he immediately visited the emergency room, having sustained injuries to his jaw, neck, and left thumb. He was at the hospital for approximately four hours. Officer Muldrow then returned to the police station and drafted his report about the incident. He

admitted that, although he mentioned Windom attacking him in his report, he did not write that the defendant was hitting him or describe any injuries to his head or back. Officer Muldrow stated that, during an interview on March 8, 2013, Investigator Nicole Wilkins informed him that there were witnesses who had observed the defendant striking him. Although Officer Muldrow stated that it was an "oversight" that he did not mention the defendant's attack in his report, he also explained that Investigator Wilkins advised him to "brief[ly]" summarize the events and that she would include all of the details in her report.

¶ 16 Officer Lewis testified that, on the day of the incident, he was on patrol when he was dispatched to assist Officer Muldrow. When he arrived at the scene, he saw Officer Muldrow struggling with Windom, while the defendant was punching the upper portion of Officer Muldrow's back in a "rapid motion" with both of his fists. When Officer Lewis approached and demanded that the defendant stop, a struggle ensued, but he managed to apprehend the defendant.

¶ 17 The State rested and the defendant filed a motion for directed verdict, which the circuit court denied. The defense called Vickie Bradley, an employee at the Division of Transportation Authority who manages the reduced fare and ride-free programs. Bradley testified that the defendant was a member of the ride-free program and that his pass was valid until the end of June 2014; thus, it was valid on the date of the incident. She also stated that bus drivers have discretion to allow customers to ride although their passes may read "invalid."

¶ 18 The defense next called Windom, who testified that she was engaged to the defendant. Windom stated that, on March 8, 2013, the defendant was merely "trying to explain to" Williams why he did not have to pay his fare although his card was reading "invalid." She denied that she and the defendant threatened Williams or Officer Muldrow. According to Windom, when she and the defendant exited the bus, Officer Muldrow told them that they were under arrest, began

"pushing [them] towards his car," and punched Windom in the eye. Thereafter, Windom hit Officer Muldrow back and the two of them began "tussling." Windom stated that the defendant was only "trying to break *** up" the fight between her and Officer Muldrow; although the defendant "put his hands on" Officer Muldrow, he did not hit him. She admitted that she pled guilty to aggravated battery based upon her participation in the incident.

¶ 19 The defendant testified on his own behalf. He denied saying anything to Williams after he moved to the rear of the bus without paying his fare. The defendant also denied saying anything to Officer Muldrow after he was asked to exit the bus. He explained that he was only trying to separate Officer Muldrow and Windom—he did not hit or punch Officer Muldrow. Both the defendant and Windom testified that Williams requested that the defendant pay the full fare and that Officer Muldrow did not ask to see their identification or bus passes.

¶ 20 During the State's rebuttal, the parties stipulated that, if Investigator Wilkins was called to testify, she would state that, on March 9, 2013, the defendant told her that he "did curse out the bus driver, and that [he] wanted to apologize to her because [he has] anger issues."

¶ 21 Following closing arguments, the jury found the defendant guilty of aggravated battery.

¶ 22 On April 10, 2014, the defendant filed a post-trial motion for a new trial, which contained broad allegations that the State failed to prove him guilty beyond a reasonable doubt and that he did not receive a fair and impartial trial. At the sentencing hearing in May 2014, the circuit court denied the motion. After hearing evidence in aggravation and mitigation, and noting that it had reviewed the pre-sentence investigation report, the court sentenced the defendant to 30 months of felony probation with 5 days of community service with the SWAP. This appeal followed.

¶ 23 When presented with a challenge to the sufficiency of the evidence, we review the evidence "in the light most favorable to the prosecution to decide whether any rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt." *People v. Price*, 2011 IL App (4th) 100311, ¶ 16. We must draw all reasonable inferences from the record in favor of the prosecution. *Id.* This standard remains the same even if the evidence is circumstantial. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000). Additionally, a reviewing court will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 24 In order to prove a defendant guilty of aggravated battery, the State must first establish that a battery occurred. 720 ILCS 5/12-3.05(d) (West 2012). A defendant "commits battery if he *** knowingly without legal justification by any means *** makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3(a)(2) (West 2012). In determining whether the defendant's contact was insulting or provoking, the trier of fact may consider "the context in which [his] contact occurred." *People v. Fultz*, 2012 IL App (2d) 101101, ¶ 49; see also *People v. Wrencher*, 2011 IL App (4th) 080619, ¶ 55 ("[t]he victim does not have to testify [that] he *** was provoked; the trier of fact can make that inference from the victim's reaction at the time"). Battery may be enhanced to aggravated battery if the State establishes that the defendant knew that the victim was a police officer. 720 ILCS 5/12-3.05(d)(4) (West 2012).

¶ 25 On appeal, the defendant does not dispute that he was aware that Officer Muldrow was a police officer performing his official duties on the day of the crime; rather, he argues that the evidence did not establish beyond a reasonable doubt that his physical contact with Officer Muldrow was insulting or provoking. The defendant supports this argument by pointing out that, even though Officer Muldrow testified that he was "bothered" by the defendant striking his back, Officer Muldrow never turned around to see what was going on and did not otherwise respond to being hit from behind. He also emphasizes that Officer Muldrow failed to mention that the

defendant hit him in the police report, which was written on the day of the incident. According to the defendant, being "bothered" does not rise to the level of being provoked or insulted. Additionally, he contends that Officer Muldrow's lack of reaction to his behavior indicates that his physical contact with Officer Muldrow was not insulting or provoking in nature. We disagree.

¶ 26 Here, three witnesses—Williams, Kellogg, and Officer Lewis—testified that they observed the defendant hitting Officer Muldrow on the back and Officer Muldrow testified that he "felt very bothered" by it. Although the defendant and Windom denied that the defendant hit Officer Muldrow, the testimony of Williams, Kellogg, and Officers Lewis and Muldrow is sufficient to sustain the defendant's conviction. *Fultz*, 2012 IL App (2d) 101101, ¶ 45 ("[t]he testimony of a single credible witness, even if it is contradicted by the defendant, may be sufficient to sustain a conviction"). The defendant's argument that Officer Muldrow's testimony—that he was merely "bothered" by the defendant's physical contact—does not establish provocation or insult fails because Officer Muldrow was not required to specifically testify that he was insulted or provoked by the defendant's actions. *Fultz*, 2012 IL App (2d) 101101, ¶ 49; *Wrencher*, 2011 IL App (4th) 080619, ¶ 55.

¶ 27 Officer Muldrow's testimony coupled with the context of the battery could have led the jury to reasonably conclude that the defendant's acts of striking Officer Muldrow were of an insulting and provoking nature. The evidence established that the defendant was punching and hitting Officer Muldrow from behind while Officer Muldrow was preoccupied defending himself from Windom's attack and attempting to place her in custody. Courts have held that behavior was insulting or provoking in less extreme instances. See *People v. DeRosario*, 397 Ill. App. 3d 332, 332-34 (2009) (contact was found to be insulting or provoking when the defendant's "right knee touched [the victim's] back through [a] chair, and his left knee touched her hip" because it occurred

in the context of a failed relationship and the room was not crowded); *People v. Peck*, 260 Ill. App. 3d 812, 814-15 (1994) (where spitting in a police officer's face "clearly amount[ed] to insulting or provoking contact").

¶ 28 In addition, we are not persuaded by the defendant's contention that Officer Muldrow's lack of reaction—*i.e.*, not turning around when the defendant was hitting him and not mentioning the defendant's attack in his police report—indicates that he was not insulted or provoked. Officer Muldrow could not react to the defendant because he was preoccupied with Windom—he testified that he was struggling with her face-to-face and was trying not to hurt her because the defendant had warned him that she was on medication. Additionally, Officer Muldrow's failure to include the defendant's attack in his police report is of no import because the jury could have reasonably inferred, based upon the other evidence presented at trial, that he was nonetheless provoked or insulted by the defendant's contact under the circumstances. We thus find that the evidence was sufficient to prove the defendant guilty of aggravated battery beyond a reasonable doubt.

¶ 29 The defendant's second assignment of error is that he was denied effective assistance of counsel when his trial attorney failed to timely exercise an available peremptory challenge to S.R. The defendant does not take issue with the circuit court's refusal to allow him to "back-strike" prospective jurors. See *People v. Moss*, 108 Ill. 2d 270, 276 (1985) (holding that a circuit court's "prohibition against back-striking was a permissible limitation upon [the] defendant's peremptory right" where, "prior to initiating *voir dire*, [the court] expressly notified both parties of its prohibition against back-striking, and *** questioned *** each of the prospective jurors" in detail). Instead, he argues that, because defense counsel was "confus[ed]" while selecting the second panel of jurors, counsel failed to strike S.R. at the proper time and thus permitted a biased juror to sit at his trial. According to the defendant, S.R. had a "clear bias" against him because her

mother and other members of her family were police officers, "her mother had been a victim of a battery while on duty," and "S.R. stated that all of this could influence her as a juror." He also asserts that Windom's violent attack on Officer Muldrow "dominat[ed] the trial," and thus "it is impossible to see how S.R. could give [the defendant] a fair trial." We disagree.

¶ 30 "Effective assistance [of counsel] amounts to competent, not necessarily perfect, representation." *People v. Garcia*, 405 Ill. App. 3d 608, 617 (2010). In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), the United States Supreme Court established a two-prong test for evaluating ineffective-assistance-of-counsel claims, which Illinois courts adopted in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim that his counsel was ineffective, a defendant must show that: (1) his counsel's performance "fell below an objective standard of reasonableness;" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Metcalfe*, 202 Ill. 2d 544, 560 (2002). Both prongs of the *Strickland* test must be satisfied; if a defendant does not satisfy one prong, his ineffective-assistance-of-counsel claim cannot prevail. *People v. Colon*, 225 Ill. 2d 125, 135 (2007).

¶ 31 Here, it is unnecessary for us to consider whether defense counsel's performance was deficient—*i.e.*, whether the first prong of the *Strickland* test has been satisfied—because we find that the defendant has not satisfied the second prong. See *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011) (if a defendant's ineffective-assistance-of-counsel claim cannot prevail because there is no prejudice, this court need not consider whether counsel's performance was deficient).

¶ 32 To establish that counsel was ineffective under the second prong, the defendant must show that he suffered prejudice due to his attorney's performance. *Metcalfe*, 202 Ill. 2d at 562. "[T]he prejudice prong of *Strickland* is not simply an 'outcome-determinative' test but, rather, may be

satisfied if [the] defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Jackson*, 205 Ill. 2d 247, 259 (2001); see also *People v. Evans*, 209 Ill. 2d 194, 220 (2004) ("a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair").

¶ 33 After reviewing the record in this case, we find that the defendant was not prejudiced by S.R. serving as a juror at his trial because the evidence was sufficient to prove his guilt beyond a reasonable doubt and S.R.'s responses during *voir dire* did not indicate that she was biased. *Metcalfe* is instructive. In *Metcalfe*, the supreme court stated that:

> "[because] the evidence was more than sufficient to prove [the] defendant guilty beyond a reasonable doubt *** [and] there [was] absolutely no evidence that [a juror's] bias *** was directed at [the] defendant ***[,] *** we cannot say that the result of the proceedings would have been different if [that juror] had not served as a juror at [the] defendant's trial." *Metcalfe*, 202 Ill. 2d at 562-63.

¶ 34 Similar to *Metcalfe*, the evidence in this case was "more than sufficient" to prove the defendant guilty beyond a reasonable doubt. *Metcalfe*, 202 Ill. 2d at 562-63. As described above, in addition to Officer Muldrow's testimony, three witnesses also testified that they observed the defendant hitting Officer Muldrow, a uniformed police officer, from behind, while Officer Muldrow was preoccupied with Windom. Furthermore, S.R.'s responses during *voir dire*, viewed in their entirety, do not indicate that she was biased. See *People v. Manning*, 241 Ill. 2d 319, 334 (2011) ("[t]he entire *voir dire* of [a prospective juror] should be considered in evaluating whether and to what extent [the juror] exhibited bias against [the] defendant"). Although S.R. stated that

having police officers in her family "may" influence her as a juror, she also stated that she would "try not to" let the stories told to her by her family members affect her during the trial. Additionally, she believed that she would be able to assess the credibility of police officers' testimony the same as that of an ordinary citizen. S.R. further affirmed that she could be fair and impartial, and would return a verdict of "not guilty" if the State failed to prove the defendant guilty beyond a reasonable doubt. Accordingly, the defendant has failed to show that the result of the proceedings would have been different if S.R. had not served as a juror at his trial and his ineffective-assistance-of-counsel claim fails.

¶ 35 For the foregoing reasons, we affirm the defendant's conviction of aggravated battery.

¶ 36 Affirmed.