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FIRST DIVISION  
FILED: JUNE 27, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 C6 61423
	)	
TYON FULWYLEY,	)	Honorable
	)	Brian Flaherty,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOFFMAN delivered the judgment of the court.  
Presiding Justice Hall and Justice Rochford concurred in the  
judgment.

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**O R D E R**

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HELD: Defendant did not receive ineffective assistance of counsel where trial counsel's decision to present the testimony of a particular witness was a matter of trial strategy and her representation did not fall below an objective standard of reasonableness.

Following a bench trial, defendant Tyon Fulwyley was convicted of aggravated battery and sentenced to five years in prison. On appeal, defendant contends that he received ineffective assistance of counsel where his attorney introduced prejudicial evidence which resulted in his conviction. Specifically, defendant argues that trial counsel should not have

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introduced the testimony of a doctor who treated him during the week leading up to the battery. For the reasons that follow, we affirm.

Defendant's conviction arose from an August 11, 2008, attack on Tracie Browning, a patient care companion at Ingalls Hospital in Harvey, Illinois. At the time, defendant was a patient at the hospital, recovering from an August 3, 2008, stab wound to the heart and subsequent heart surgery.

At trial, Browning testified that her duty as a care companion was to watch patients to make sure they were safe and did not hurt themselves. On the day in question, she was assigned to watch defendant, whom she had not met before. At the beginning of her shift with defendant, his mother was in the room. After defendant's mother left, he became agitated and started to get out of control. He tried to show Browning his "private," but Browning told him she did not want to see it and looked away. Browning related that defendant kept getting out of bed, and that when she told him he could not do that, he responded that she could not tell him what to do. When defendant still would not listen to her, Browning summoned a nurse's assistant to the room to talk with him. After the nurse's assistant stopped in defendant's room several times, he called hospital security. Security personnel put defendant in soft cloth restraints.

After defendant was placed in the soft restraints, he calmed down for about 10 minutes, but then started trying to get out of bed again. Browning told him to relax and reminded him he should not move like that because he was attached to a tube. Defendant responded, "You can't tell me what to do. Who are you? Who the 'f' are you?" Defendant tried to remove his IV, said, "I'm going to get up out of this," and started biting through his restraints. Browning left the room and went to the nurse's station down the hall to get assistance.

Browning testified that when she returned to defendant's room, "out of nowhere" he hit her in the face. Defendant had gotten out of bed and attacked her, hitting her in the nose about five times. As defendant repeatedly hit her face, he said, "I told you, bitch, I was going to get you." Browning tried to get away but defendant circled her and continued to hit her. Defendant said, "Where you go, 'B'? You ain't going nowhere. Where you going?" Eventually, Browning got away, ran down the hall, and got help.

Browning was taken to the hospital's emergency room for treatment. Her nose was broken in three places, her face was swollen near her eye, and she had a cut on her nose. Browning received nine stitches in her nose and, on a later date, had surgery on her nose as well. After the State rested, defendant made a motion for a directed finding. He argued that the State

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had not shown his behavior was intentional or knowing. The trial court denied the motion.

Defendant's first witness was Dr. Timothy Field, a vascular and thoracic surgeon at Ingalls Hospital. Dr. Field testified that on August 3, 2008, defendant arrived at the emergency room with a stab wound to his heart. Defendant was clinically dead when Dr. Field saw him, and had to be revived and resuscitated. Before Dr. Field was able to surgically close the hole in his heart, defendant lost well over two liters of blood, which Dr. Field described as "probably [ ] his entire vascular volume." Dr. Field testified that there was a loss of oxygen to defendant's brain for more than five minutes, which caused a condition called anoxic encephalopathy. He explained that when a person's brain cells are deprived of oxygen, the cells become sick. If oxygen is restored within a reasonable period of time, most of the cells will heal, but some may not. The residual damage to the cells is what is referred to as anoxic encephalopathy.

Dr. Field testified that while at Ingalls hospital, defendant suffered from some "blank spots" due to the oxygen deprivation to his brain. For example, defendant had trouble remembering doctors' or nurses' names, did not know why he was in the hospital, had some time frames that "were out of whack," and thought George Bush was president. Defendant also slurred his speech, mixed up words when he spoke, and had disconjugate gaze,

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which meant his eyes looked outward. Dr. Field explained that "blank spots" could last forever, could cause a person not to be able to identify another person, and could cause a person to be alarmed by someone he or she did not recognize.

Dr. Field testified that defendant was in the intensive care unit for four days, during which time he was on a ventilator and was sedated. After that point, he was taken off the ventilator and sedation, and was only given Vicodin for pain. According to Dr. Field, sedation and pain medication, alone or combined, could cause a patient to have hallucinations. Neurological tests performed on defendant revealed that most of his deficits, in particular his motor strength and ability to speak, were improving each day.

On cross-examination, Dr. Field agreed that defendant suffered less and less from anoxic encephalopathy as each day went by. By August 11, 2008, the day of the attack on Browning, he was coherent and had improved "miraculously." However, defendant still did not recall being stabbed, did not know how he ended up in the hospital, and had trouble feeding himself. Dr. Field acknowledged that defendant was uncooperative and disagreeable on more than one occasion while he was at the hospital. Dr. Field stated that Vicodin, which defendant was taking for pain, had not impaired his ability to function, and in general, causes patients to become more docile, not angry or hostile.

Dr. Field agreed on cross-examination that there is a difference between a person's cognitive abilities and knowing right from wrong. He stated that to his knowledge, on August 11, 2008, defendant was not suffering from any hallucinations. Dr. Field stated that he talked with defendant about the incident with Browning the next morning. When he asked defendant what happened, defendant replied, "I hit a nurse, and I'm in big trouble." Defendant also related that he was mad because there were people in his room and he could not leave the hospital. When asked whether defendant was aware of what he had done and why he had done it, Dr. Field replied, "That's what I gathered from what he said to me."

Defendant's mother, Annette Smith, testified that during defendant's stay in the hospital, she visited him every day. When he slept, he would keep moving, twisting, and turning. When she would wake him up, he would become agitated and swing at her for five or six minutes and not calm down until he recognized her. Smith stated that defendant was unable to recognize other people in his family and did not know where he was. Smith testified that Browning told her defendant was in restraints because he was agitated and swinging, and because she was afraid of him. Smith also stated that during the time she was in the room with defendant and Browning, she removed his restraints and he did not try to attack Browning.

In closing, defense counsel asserted that due to the oxygen deprivation to defendant's brain, he suffered cognitive limitations that prevented him from being able to fully identify people and experienced "blank spots" that affected his voluntary behavior. Counsel argued that defendant was heavily medicated with Vicodin, which could have caused him to be hallucinating. Counsel concluded that defendant's actions were not intentional or knowing, but rather, were involuntary consequences of his medical condition and medication.

Following closing arguments, the trial court found defendant guilty. The court subsequently sentenced defendant to five years in prison.

On appeal, defendant contends that he received ineffective assistance of counsel because his attorney introduced prejudicial evidence which resulted in his conviction. He argues that counsel was ineffective for calling Dr. Field, who contradicted, rather than supported, the defense theory that anoxic encephalopathy and pain medications caused defendant to attack Browning unintentionally. Defendant asserts that counsel's introduction of Dr. Field's testimony did not constitute sound trial strategy. Defendant further argues that Dr. Field's testimony prejudiced him, because it eliminated the question whether he had the requisite intent to commit aggravated battery.

The standard for a claim of ineffective assistance of counsel has two prongs: deficient performance and prejudice.

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*Strickland v. Washington*, 466 U.S. 668, 685 (1984). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. In order to establish this prong, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Second, a defendant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The prejudice prong may be satisfied by a showing 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). If a case may be disposed of on one *Strickland* prong, this court need not review the other. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008).

In making his arguments, defendant relies primarily on *People v. Moore*, 356 Ill. App. 3d 117 (2005). In *Moore*, this court found that defense counsel had provided ineffective assistance where, during cross-examination of two different State witnesses, he elicited incriminating hearsay testimony against his own client. *Moore*, 356 Ill. App. 3d at 122-27. Defense

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counsel in *Moore* persisted in eliciting the hearsay testimony even after the trial court called a sidebar to discuss its concerns with counsel's line of questioning. *Moore*, 356 Ill. App. 3d at 126. In our view, *Moore* is distinguishable from the instant case. Here, defense counsel elicited testimony from Dr. Field that supported the defense theory. On direct and redirect examination, Dr. Field testified that defendant suffered from "blank spots" due to anoxic encephalopathy, and that such a condition could cause a patient not to be able to identify another person and to be alarmed by someone he or she did not recognize. Counsel also elicited testimony from Dr. Field that defendant was on medication that could cause hallucinations.

In contrast to *Moore*, in the instant case it was the prosecutor who elicited Dr. Field's testimony that Vicodin generally causes people to become more docile, not angry or hostile; that to his knowledge, on the day of the attack, defendant was not suffering from any hallucinations; that defendant was mad because there were people in his room and he could not leave the hospital; and that defendant told him he hit a nurse and was in big trouble. Defense counsel did not elicit this testimony. Accordingly, *Moore* is inapposite.

In general, the decision whether to present a particular witness is a matter of trial strategy that will not support a claim of ineffective assistance of counsel. *People v. English*, 403 Ill. App. 3d 121, 138 (2010). In the instant case, defense

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counsel, faced with strong evidence against her client, pursued a trial strategy of convincing the court that defendant's actions were not intentional or knowing. As part of her strategy, she called a witness who had first-hand knowledge of defendant's mental functioning around the time he attacked Browning. We are unwilling to find that counsel's decision to call Dr. Field was unreasonable simply because he was not an unimpeachable witness. A defendant is entitled to reasonable, not perfect, representation, and the fact that counsel's chosen strategy proves unsuccessful does not establish a claim of ineffective assistance. *People v. Fuller*, 205 Ill. 2d 308, 331 (2002).

Defendant has not overcome the strong presumption that counsel's decision to present Dr. Field as a witness was the product of sound trial strategy. Because defendant has failed to establish that trial counsel's performance was deficient, we need not consider whether prejudice resulted from counsel's actions.

For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

Affirmed.