

2011 Il App (2d) 100417-U
No. 2-10-0417
Order filed November 17, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
Plaintiff-Appellee,)	of Kendall County.
v.)	
DAMIEN T. HARVEY,)	No. 09-CM-1156
Defendant-Appellant.)	Honorable
	Linda Abrahamson,
	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: The Bystander's Report was insufficient to allow review of defendant's ineffective assistance of counsel claim.

¶ 1 Defendant, Damien T. Harvey, appeals from his conviction of domestic battery (720 ILCS 5/12-3-2(a)(2) (West 2010)) following a bench trial in the circuit court of Kendall County. We affirm.

¶ 2 On September 22, 2009, defendant was charged with the offense of domestic battery in that he "knowingly and without legal justification made physical contact of [a] provoking nature with Kimberly M. McDermott, a family member of defendant, in that said defendant pushed his finger

upon [the] nose of Kimberly M. McDermott.” Defendant was represented by John J. Kemmerer, an assistant public defender. Parallel proceedings on an order of protection filed by Kimberly against defendant were conducted by the court under the same case number as the misdemeanor domestic battery case.

¶ 3 According to the Bystander’s Report (which pertained solely to the criminal proceedings), a bench trial on the domestic battery charge commenced on February 5, 2010. Kimberly was the State’s first witness. She testified that she and defendant had been in a dating relationship and had one child. Kimberly testified that she was currently nine months pregnant with defendant’s second child. She and defendant lived together in Plano, Illinois, with their child and Kimberly’s children. Kimberly testified that she and defendant argued during the afternoon of September 21, 2009. According to Kimberly, the argument took place in the living room, outside on the porch, and then back inside the living room. Kimberly testified that defendant backed her against the couch with his body so that she had to sit down on the couch. According to Kimberly, at that point, defendant “took his finger and pushed it onto her nose.” She testified that she was upset and angry when this happened. Kimberly testified that defendant threatened to kill her, stating, “[Y]ou will be dead and I will be in jail.” On cross-examination, Kimberly stated that the argument was over a video game. She stated that she had no marks as a result of the contact defendant made with her face. Kimberly further testified that when defendant tried to “close” her out of the house during the argument, she went back inside to get her three children. She also testified that she did not threaten defendant in any way. In response to questions about whether she called the State’s Attorney’s office to get the charge dropped, Kimberly denied making up any of the allegations or talking to the State’s Attorney’s office when defendant was not present.

¶ 4 According to the Bystander's Report, the State's next witness was Kimberly's 18-year-old daughter, Brittany McDermott. Brittany testified that she was upstairs when she heard Kimberly and defendant arguing. She testified that Kimberly yelled at defendant that he needed to leave the house. According to Brittany, defendant said to Kimberly, "[Y]ou better get outta my face or I'll be in jail and you'll be dead." Brittany testified that she came part of the way down the stairs and saw Kimberly and defendant in the living room. Brittany testified that she saw defendant use his body weight to push Kimberly into the couch. According to Brittany, defendant then "muffed" Kimberly in the face. Brittany stated that "muffing" meant that defendant "took his finger and pushed [Kimberly] on the face with such force that Brittany was able to see [Kimberly's] head get pushed back." Brittany testified that Kimberly then spit in defendant's face. The Bystander's Report contains the following paragraph concerning defense counsel's cross-examination of Brittany:

"On cross-examination, [c]ounsel for [d]efendant attempted to introduce two documents into evidence. The first document was Brittany's written statement to the police, noting that there was no mention of any physical contact between [defendant] and Kimberly. The second document Narrative Report [*sic*] of Plano Police Deputy Brian Rolls. Officer Rolls' conversation with Brittany as noted in his narrative made no mention of any physical contact between [defendant] and Kimberly. Counsel for defendant was able to cross-examine Brittany as to there being no mention of physical contact in either report, but both documents were not allowed into evidence because it was during the prosecutor's case in chief."

¶ 5 The Bystander's Report states that the State's next witnesses were officers from the Plano police department who testified that they spoke with Kimberly, Brittany, and defendant on the day

of the incident. They testified that Kimberly was upset when they spoke with her, but they did not observe any marks on her.

The State rested, and the trial court denied defendant's motion for a directed finding.

¶ 6 Defendant was the only witness to testify in the defense case. Defendant testified that he was in the living room playing Xbox 360 when Kimberly got upset and they had an argument about "possible infidelities over the internet." Defendant testified that he and Kimberly had a "verbal altercation" after she turned off his game and took the headset for the game off his head. According to defendant, Kimberly was "irate." Defendant stated that Brittany and the other children were in "the other room." According to defendant, he never touched Kimberly on that date. He heard Kimberly call the police from the garage. He then heard her call someone "and talk about dropping the case." Defendant testified that sometime after his arrest, but before trial, Kimberly stated she was sorry, and "she didn't mean to do it and was trying to make it right," referring to getting the case dropped. Defendant testified that Kimberly had no marks on her the night of the incident. On cross-examination, defendant acknowledged that the headset incident could have happened on a different day.

¶ 7 Following closing arguments, the trial court found defendant guilty of domestic battery. According to the Bystander's Report, the court found that defendant and Kimberly were both yelling and screaming, and that headphones may have been broken. The court also found that defendant and Kimberly exchanged harsh words and Kimberly may have spit in defendant's face. With respect to Brittany's testimony, the Bystander's Report states that the court made the following findings:

"The judge looked to the testimony of Kimberly's daughter, Brittany, and found her credible. The court found Brittany's testimony that [defendant's and Kimberly's] bellies were touching to be credible. The court pointed out that [it] found Brittany's testimony especially

credible since Brittany not only stated the [d]efendant ‘muffed’ [Kimberly] in the face, that she saw [Kimberly’s] head go back as [defendant] pushed her in the nose, but that she spontaneously offered that [Kimberly] then spit in defendant’s face as a result.”

¶ 8 The trial court entered a conviction and sentenced defendant to 12 months’ probation and ordered him to complete domestic violence counseling.

¶ 9 The common law record shows that assistant public defender Kemmerer filed a notice of motion and a “motion to reconsider guilty finding at bench trial” on behalf of defendant. Both documents were file stamped on February 25, 2010. The common law record also shows that on February 26, 2010, the court entered an order in the order of protection proceeding setting a date for a hearing on a plenary order and noting that defendant “requests continuance to get attorney.” On March 5, 2010, the hearing on the plenary order of protection was again continued because defendant was without “his attorney today. Defendant represents to court that his attorney can be here for hearing on 3/19/10 at 1 p.m.” On March 19, 2010, private attorney David R. Jordan filed an appearance on behalf of defendant. The record reflects that a hearing on the plenary order of protection occurred that day. Also on March 19, 2010, the trial court entered an order denying defendant’s motion to reconsider the guilty finding in the domestic battery case. At the top of the order, assistant public defender Kemmerer was listed as defendant’s attorney. Kemmerer filed a notice of filing and a notice of appeal on defendant’s behalf in the domestic battery case on April 16, 2010.

¶ 10 In this appeal, defendant raises one issue. He contends that he was denied effective assistance of counsel because defense counsel Kemmerer failed to impeach Brittany with her prior statements to the police. We first address the State’s forfeiture arguments, which are twofold: (1)

the issue should have been raised in an amended posttrial motion, and (2) defendant forfeited any plain error argument when he failed to argue plain error in his opening brief.

¶ 11 Kemmerer did not raise the issue of his own ineffectiveness in the motion to reconsider the finding of guilty. However, trial counsel's failure to assert his own ineffective representation in a posttrial motion does not forfeit the issue on appeal. *People v. Lawton*, 212 Ill. 2d 285, 296 (2004). To support its forfeiture argument, the State contends that attorney Jordan took over the defense of the domestic battery case and could have filed an amended posttrial motion alleging attorney Kemmerer's ineffective assistance. The State argues that the failure to file an amended posttrial motion forfeited the argument that attorney Kemmerer rendered ineffective assistance of counsel.

¶ 12 The record does not support the State's contention that Jordan represented defendant in the domestic battery case. Two separate cases—the domestic battery and the order of protection—proceeded simultaneously under the criminal misdemeanor case number. Kemmerer represented defendant in the domestic battery case through the filing of the notice of appeal. It is obvious that defendant did not immediately have representation on the order of protection, because on February 26, 2010, the court noted in its order continuing the matter for a plenary hearing on defendant's motion that defendant requested time to obtain an attorney. The court then continued the hearing on the plenary order of protection again to March 19, 2010, upon defendant's representation that his attorney would be available on that date. On March 19, 2010, Jordan filed an appearance, and the hearing on the plenary order obviously took place, because the court entered an order granting the plenary order of protection. The most rational inference to be drawn from this record is that Jordan appeared and defended defendant at the March 19, 2010, hearing on the plenary order of protection. The record does not reflect that Jordan ever represented defendant on the

criminal charge, because he did not substitute his appearance for the public defender, and the public defender's office never withdrew. Consequently, we cannot conclude that defendant forfeited his ineffective assistance of counsel argument.

¶ 13 Similarly, we hold that defendant did not forfeit the claim of plain error for failure to raise it in his opening brief. Because the State has the burden to raise the forfeiture issue in its appellee's brief, it would be unfair to require a defendant to assert plain error in his opening brief. *People v. Williams*, 193 Ill. 2d 306, 348 (2000).

¶ 14 We now address defendant's contention that Kemmerer rendered ineffective assistance of counsel. Defendant asserts that his counsel should have done two things in order properly to impeach Kimberly with her prior statements to the police: (1) call the officers in the defense case, and (2) introduce the statements as substantive evidence in the defense case.

¶ 15 Ineffective assistance of counsel claims are governed by the familiar standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Under the two-prong *Strickland* test, "a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 226 Ill. 2d 135, 144 (2007). As defendant bears the burden of proof under both prongs, failure to satisfy one defeats the claim. *Strickland*, 466 U.S. at 697; *People v. Richardson*, 189 Ill. 2d 401, 411 (2000).

¶ 16 To establish deficient performance under the first *Strickland* prong, a defendant must overcome the strong presumption that the attorney's conduct was based on sound trial strategy under the circumstances. *Houston*, 226 Ill. 2d at 144. "A reviewing court will not review trial counsel's

conduct that involves an exercise of judgment, discretion, strategy, or trial tactics.” *People v. Whitamore*, 241 Ill. App. 3d 519, 525 (1993).

¶ 17 To establish prejudice under the second *Strickland* prong, defendant must show that the reasonable probability of a different result is “a probability sufficient to undermine confidence in the outcome.” *Houston*, 226 Ill. 2d at 144.

¶ 18 Defendant’s argument rests upon his interpretation of the Bystander’s Report’s recitation of Brittany’s testimony. He concludes that defense counsel did not impeach Brittany with her prior inconsistent statements to the police: “Although defense counsel apparently tried to discredit Brittany’s testimony with her prior inconsistent statement [*sic*] during his cross-examination of her, he failed to perfect the impeachment by calling the police officers to testify.” Defendant relies on three cases. In *People v. Williams*, 329 Ill. App. 3d 846 (1998), the appellate court held that defense counsel rendered ineffective assistance where he asked the State’s key witnesses on cross-examination about their prior statements to the police, obtained ambiguous answers, and did not call the police officers to complete impeachment. *Williams*, 329 Ill. App. 3d at 855-857. In *People v. Skinner*, 220 Ill. App. 3d 479 (1991), defense counsel was ineffective for failing to cross-examine a key State witness on his failure to inform police that he saw the defendant leaving the victim’s residence after the burglary. *Skinner*, 220 Ill. App. 3d at 484. In *People v. Vera*, 277 Ill. App. 3d 130 (1995), defense counsel’s performance fell below an objective standard of reasonableness where he failed to lay a foundation for admission of an impeaching tape recording. *Vera*, 277 Ill. App. 3d at 138. These cases are distinguishable, because in all of them the record was sufficient for appellate review. Here, it is not.

¶ 19 It is clear from the Bystander’s Report that defense counsel was unable to introduce the reports containing Brittany’s prior inconsistent statements into evidence during his cross-

examination; however, it is not clear that he failed to impeach Brittany. The operative sentence in the Bystander's Report is the following:

“Counsel for defendant was able to cross-examine Brittany as to there being no mention of physical contact in either report, but both documents were not allowed into evidence because it was during the prosecutor's case in chief.”

The first half of this sentence is inconclusive as to what occurred. “Counsel for defendant was able to cross-examine Brittany as to there being no mention of physical contact in either report” could mean that defense counsel successfully cross-examined Brittany by getting her to admit that she gave prior inconsistent statements, in which case there would be no need to complete impeachment by calling the officers in the defense case, or to introduce the statements as substantive evidence. Or, “able to cross-examine Brittany” could mean that defense counsel was allowed by the court to ask her whether she gave prior inconsistent statements. Under either interpretation, we do not know whether Brittany admitted or denied giving the prior inconsistent statements. Without knowing, we cannot agree with defendant that his counsel was ineffective for failure to impeach the witness. Defendant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the judgment of the trial court was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Here, the Bystander's Report is insufficient to support defendant's claims of error. Accordingly, we affirm the judgment of the circuit court of Kendall County.

¶ 20 Affirmed.

