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2011 IL App (3d) 090578-U

Order filed August 17, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-09-0578
)	Circuit No. 09-CM-761
)	
WENDY PODGORNYY,)	Honorable
)	Marilee Viola,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

- ¶ 1 Held: (1) Trial counsel was not ineffective for failing to raise a self-defense affirmative defense; (2) we decline to review the case under the presumption that defense counsel raised self-defense; and (3) the defendant waived review of the sentencing issue.
- ¶ 2 Following a jury trial, the defendant, Wendy Podgorny, was convicted of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2008)) and criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2008)). The trial court sentenced her to two concurrent terms of 12 months' conditional

discharge. The defendant appeals, arguing that: (1) trial counsel's failure to seek a self-defense instruction constituted ineffective assistance of counsel; (2) the defendant was not proved guilty beyond a reasonable doubt of domestic battery because the State did not disprove that she acted in self-defense; and (3) the court abused its discretion in sentencing her to conditional discharge for criminal damage to property.

¶ 3

FACTS

¶ 4 On March 9, 2009, the defendant was charged by information with domestic battery and criminal damage to property. The information alleged that the defendant struck her sister-in-law, Karlee Ball, about her body and knowingly damaged her cellular phone.

¶ 5 At trial, Ball testified that the defendant was her husband's sister and that she had known her for 12 years. Their relationship became strained in July 2008 when the defendant moved into a home owned by defendant's mother and brother. At the time of the defendant's move, Ball assisted in caring for her brother-in-law, who was a quadriplegic. Ball was compensated for the hours she spent assisting her brother-in-law by the Department of Human Services. Ball alleged that sometime after becoming her brother-in-law's caretaker, she entered into a temporary agreement with the defendant, whereby the defendant would assist with the caretaking duties until she found a job. This arrangement lasted until Ball and the defendant disagreed about the number of hours that each was getting paid for. The defendant later informed Ball that the arrangement was not working out and that she was no longer welcome in the house.

¶ 6 On March 6, 2009, Ball returned to the defendant's residence to check on her mother-in-law, who had a doctor's appointment later in the day. Initially, Ball did not see the defendant, so she began helping her mother-in-law get dressed. Later, the defendant stepped into the room and

confronted Ball. The defendant purportedly told Ball that she did not work there anymore and instructed her mother to choose which caretaker she wanted. The defendant's mother put her head in her hands and refused to make Ball leave. The defendant allegedly became enraged by her mother's refusal to take sides. The defendant began yelling and shaking her finger at her mother and told her to choose between them or lose a daughter. Ball stated that she then got out her cellular phone and tried to call her husband to come and take her mother-in-law to the doctor. She denied attempting to strike the defendant with her phone. Ball alleged that the defendant grabbed her phone from her hand and then twisted it in half. Ball stated that when she reached down to pick up the phone pieces, the defendant hit her in the face.

¶ 7 Following her altercation with the defendant, Ball returned to her home and contacted the police. The police asked that Ball come to the station, where her injury, a bruise above her eye, was documented.

¶ 8 The State next called the arresting officer to the stand. The officer noted that Ball was visibly upset when she arrived at the police station, that she had a bruise above her right eye, and that her phone was in four to five pieces. After Ball left the station, the officer contacted the defendant and requested that she come in for questioning. The officer noted that the defendant was cooperative during the first part of the interview; however, she became hostile when he explained that she was going to be arrested for domestic battery.

¶ 9 The defendant testified that Ball was taunting and belittling her and that she had asked Ball to "please just leave." The defendant alleged that at the time of the incident, Ball was holding her phone as if she was going to strike her. However, the defendant admitted that Ball never struck her, because she was able to stop her. The defendant also denied that she struck

Ball, and she stated that Ball's injuries were due to her striking herself in the head while the two women struggled over the phone. The defendant testified that Ball's phone snapped in half and the release of force caused Ball to punch herself in the eye, causing the bruising.

¶ 10 At the close of the case, the jury found the defendant guilty of domestic violence and criminal damage to property. During the sentencing hearing, the defendant had a verbal outburst in the courtroom, which prompted the court to threaten her with contempt. The court told the defendant that her conduct was inappropriate, and that her behavior had been an issue since her arrest. Further, the court indicated that the defendant had not realized the seriousness of the offenses she had been found guilty of and that she had anger management problems throughout the case. The court then sentenced the defendant to 12 months' conditional discharge for domestic battery and a concurrent 12-month term of conditional discharge for criminal damage to property.

¶ 11 Following sentencing, the defendant filed a motion for judgment NOV and a new trial. The motion alleged that the State had failed to prove the defendant guilty beyond a reasonable doubt because its two witnesses provided conflicting testimony, the defendant's testimony conflicted with that of the complaining witness, and the jury failed to consider the bias of the complaining witness. The court denied the defendant's motion. The defendant appealed.

¶ 12 ANALYSIS

¶ 13 I. Ineffective Assistance of Counsel

¶ 14 The defendant first argues that she received ineffective assistance of counsel because her trial counsel did not pursue a self-defense jury instruction despite the fact that he elicited facts suggesting that she had acted in self-defense. In particular, the defendant emphasizes her

testimony that she grabbed the phone to protect herself. As a result, she asserts that no tactical explanation existed for her trial counsel's decision not to raise self-defense.

¶ 15 To prevail on an ineffective assistance of counsel claim, a defendant must establish both that her "counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to 'deprive the defendant of a fair trial[.]'" *People v. Albanese*, 104 Ill. 2d 504, 525 (1984) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Decisions involving judgment, strategy, or trial tactics will not support a claim of ineffective assistance. *People v. Hoekstra*, 371 Ill. App. 3d 720 (2007).

¶ 16 We are not persuaded by the defendant's arguments. The defendant contends that she did not receive a defense because self-defense was not raised. However, defendant's testimony and defense counsel's closing argument demonstrate that the defendant pursued an innocence defense. Furthermore, the decision to raise an affirmative defense is not one of the matters that the defendant had the ultimate right to decide. *People v. Ramey*, 152 Ill. 2d 41 (1992). Rather, it is a matter of trial strategy, and it was left to trial counsel to choose the appropriate defense for the case. *Id.*; *People v. Gallardo*, 112 Ill. App. 3d 764 (1983) (it is within the discretion of trial counsel to argue that the State failed to prove the defendant guilty beyond a reasonable doubt in place of raising self-defense). Consequently, we find that the defendant received effective assistance of counsel and counsel's decision to argue that the State did not prove the defendant guilty beyond a reasonable doubt in place of a self-defense affirmative defense was a matter of trial strategy.

¶ 17

II. Proof Beyond a Reasonable Doubt

¶ 18 The defendant next contends that the State failed to prove her guilty beyond a reasonable doubt because it did not disprove that she acted in self-defense. She argues that if trial counsel had raised a self-defense affirmative defense, the burden of proof would have shifted to the State to disprove self-defense beyond a reasonable doubt.

¶ 19 We initially note that if an affirmative defense is raised, the State has the burden to disprove it beyond a reasonable doubt. *People v. Ortiz*, 65 Ill. App. 3d 525 (1978). However, raising an affirmative defense requires that it be disclosed to the prosecution within a reasonable time by filing a written motion before a hearing or trial. Ill. S. Ct. R. 413(d) (eff. July 1, 1982). Furthermore, as a court of review, we will not retry the defendant in a challenge to the sufficiency of the evidence. We will only set aside a conviction when the evidence raised a reasonable doubt of the defendant's guilt. *People v. Minniweather*, 301 Ill. App. 3d 574 (1998).

¶ 20 We find that the defendant's argument is entirely speculative and is based on the presumption that defense counsel had raised self-defense. However, the record is void of any facts indicating that defense counsel raised or attempted to raise an affirmative defense. Therefore, the burden of proof was never shifted to the State, and we find that the State proved beyond a reasonable doubt that the defendant was guilty of the charged offenses.

¶ 21

III. Sentencing

¶ 22 Finally, the defendant argues that her sentence of 12 months' conditional discharge for the offense of criminal damage to property was an abuse of discretion. The defendant contends that this sentence was excessive and was likely derived from the court's consideration of matters outside of the record. The defendant specifically alleges that the court improperly considered her

conduct and the court's own suspicions about her mental health in rendering its sentence. As a result, she urges us to reduce her sentence for criminal damage to property pursuant to Illinois Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999).

¶ 23 The determination and imposition of a sentence involves considerable judicial discretion, and we will not reverse a trial court's sentence unless we find that the court abused its discretion. *People v. La Pointe*, 88 Ill. 2d 482 (1981). However, a court's sentencing discretion is limited by the Illinois Constitution which mandates that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." *People v. Perruquet*, 68 Ill. 2d 149, 154-55 (1977) (quoting Ill. Const. 1970, art. I, § 11).

¶ 24 Criminal damage to property is a Class A misdemeanor (720 ILCS 5/21–1(2) (West 2008)). Such offenses carry a possible sentence of up to two years' conditional discharge or less than one year of imprisonment. 730 ILCS 5/5–4.5–55(d) (West 2008).

¶ 25 We initially note that the defendant waived review of her sentencing issue. The defendant did not file a written postsentencing motion that contested the court's sentencing errors. *People v. Enoch*, 122 Ill. 2d 176 (1988). Nonetheless, the defendant urges us to review her sentence for plain error. See Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). However, to conduct a plain error analysis, we must first find that the trial court erred. *People v. Walker*, 232 Ill. 2d 113 (2009).

¶ 26 Here, there was no error. The court's sentence was within the statutory sentencing range and was less than the maximum sentence. Furthermore, the court had the discretion to consider the defendant's character in its sentencing decision. See *People v. Lykins*, 77 Ill. 2d 35 (1979).

Therefore, we find that the trial court did not err in sentencing the defendant to 12 months' conditional discharge for criminal damage property and any discussion of plain error is rendered moot.

¶ 27

CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 29 Affirmed.