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No. 3–08–0359

Order filed February 9, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	No. 06–CF–2591
)	
FRANK WORMLEY, JR.,)	Honorable
)	Robert P. Livas,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices McDade and O’Brien concurred in the judgment.

ORDER

Held: Trial court did not err by failing to raise a question concerning defendant’s fitness. Defendant’s trial counsel did not provide ineffective assistance by failing to raise the issue of defendant’s fitness or by failing to raise an insanity defense on defendant’s behalf. Defendant has not proved that his trial attorney provided ineffective assistance under the *Strickland* test. Judgment of Will County circuit court affirmed.

A jury found defendant, Frank Wormley, Jr., guilty of aggravated battery (720 ILCS 5/12-4(b)(18) (West 2006)), and battery (720 ILCS 5/12--3(a)(2) (West 2006)). The trial court sentenced defendant to concurrent probation terms of two years and one year, respectively, for these offenses. On appeal, defendant argues that his trial counsel provided ineffective assistance by failing to do the following: (1) raise a question concerning his fitness to plead, to stand trial, and to be sentenced; (2) assert an insanity defense based on evidence that he was experiencing *delirium tremens* (DT's) at the time of the offenses; and (3) argue that evidence of defendant's DT's raised a reasonable doubt concerning the mental state elements of the offenses. Additionally, defendant contends that the trial court erred by failing to raise a question about his fitness. We affirm.

I. BACKGROUND

On October 12, 2006, the State charged defendant with having committed three offenses on October 8, 2006. At the time of the offenses, defendant was incarcerated in the Will County jail for driving under the influence. The State alleged that defendant committed: (1) two counts of aggravated battery by knowingly making physical contact of an insulting and provoking nature with two correctional officers, Eric Gabrielson and Anthony Adams; and (2) one count of battery by knowingly making physical contact of an insulting and provoking nature with a cellmate, Matthew Thom.

On November 9, 2006, through defendant's court-appointed counsel, defendant entered a plea of not guilty and demanded a jury trial. However, on December 13, 2006, the prosecutor indicated to the court that the parties had reached an agreement on a guilty plea. After the court explained the charges to defendant, the court asked him if he wanted to withdraw his plea of not

guilty and enter a guilty plea. Defendant said, "No." Defense counsel emphasized to defendant that the court was asking if he wished to plead guilty. Defendant insisted that he now wanted to plead not guilty.

After further questioning from the court and defense counsel, defendant changed his plea back to guilty. Following the State's recitation of the factual basis for the guilty plea, the court again asked defendant if he wished to plead guilty. Defendant then asserted that he was not guilty. The court noted that defendant did not seem to know whether he wished to plead guilty or not guilty and stated that it rejected defendant's plea and would revisit the issue after the holidays.

At a hearing on January 3, 2007, defense counsel submitted that the State had extended another plea offer to defendant and that defendant wished to hire private counsel. However, a series of subsequent proceedings before the trial began showed that: (1) defendant did not engage a private attorney; and (2) the issue of defendant's plea was not raised thereafter.

The matter was again set for trial. At a subsequent proceeding, defendant waived his right to a jury trial and the matter was set for a bench trial. Later, however, defendant insisted on a jury trial, and a jury was selected.

At trial, Thom testified that he was in a holding cell in the Will County jail at the time of the incident in question. He was placed in the cell sometime shortly after midnight. The cell was already occupied by two other cellmates. Defendant came into the cell about a half hour or 45 minutes after Thom. There were two bunk beds and two "floor seats" in the cell. Thom and defendant were next to each other on the floor seats.

Thom said that, initially, defendant appeared to act normally. Eventually, Thom fell asleep. During the early morning hours, Thom awakened twice to use the toilet in the cell. Each of these times, defendant was rocking back and forth on the floor, and appeared not to have slept. The second time Thom used the toilet, defendant took Thom's sleeping mat and blanket. When Thom asked defendant to return the items, defendant complied. At some point during this period, defendant had taken another cellmate's mat and blanket also, but had returned the items. Thom described this behavior as "strange."

Thom testified that defendant then asked his cellmates to call someone to help both him and them. Thom did not understand what defendant was talking about. One of the cellmates asked, "[W]hat[,] are you crazy?"

According to Thom, he and the other two cellmates ate breakfast, but defendant did not eat. Thom said that as a guard walked by the cell, defendant yelled at the guard, "[L]et me out of here, book me in." Thom testified, "[T]he officer called in on the radio at that point to remove [defendant]." Thom said that after the guard called on the radio, the sequence of events that followed happened very quickly.

Thom stated that several guards entered the cell and ordered all of the cellmates to leave. As Thom attempted to exit the cell, defendant grabbed Thom around the waist from behind for "[a] couple seconds." A guard helped to pull Thom free from defendant's grasp. Thom then was escorted to another cell. Later, Thom saw defendant being wheeled away on a gurney in restraints. According to Thom, defendant "said we're next."

Daniel Lopez testified that he was a correctional officer at the jail during the incident in question. Lopez received a radio call from another officer that there was a problem in

defendant's cell. Lopez and another officer went to the cell and ordered defendant to come out. When defendant refused, Lopez ordered the other cellmates to come out of the cell. Defendant was seated near the toilet wrapped in a bed mat. By this time a third officer had arrived. As Lopez approached, defendant stood and grabbed Thom around the upper body with his arm. The officers ordered defendant to let go of Thom, but defendant refused. An officer pulled Thom away from defendant, and defendant lunged toward Adams, swinging his arms. Lopez shot defendant with a taser, which immobilized defendant with an electrical shock for five seconds through two probes that penetrated the skin of defendant's chest. As defendant fell to the floor, he hit his head against a bed, which lacerated his head. After five seconds, defendant got up. The officers who testified stated that it was very unusual that defendant got up immediately after being shocked with a taser.

Lopez activated the taser a second time. Defendant fell to the floor again. As the other officers attempted to handcuff defendant, one of the officers called to Lopez that defendant had grabbed him by the wrist. Lopez attempted to activate the taser a third time, but it was ineffective because one of the probes had come out of defendant's chest. Consequently, one of the officers sprayed defendant in the face with pepper spray.

After the officers handcuffed defendant, Lopez radioed for the nursing staff to treat defendant for the injury to his head, as well as the effects of the taser and the pepper spray. Lopez testified that defendant was calm while the medical staff treated him. The medical staff called for an ambulance to take defendant to the hospital. As the officers were putting defendant on the gurney to take him to the ambulance, defendant tried to kick them.

Gabrielson testified that he was one of the officers who accompanied Lopez to defendant's cell. Gabrielson testified similarly to Lopez's testimony. Gabrielson described his initial observations of defendant by saying, "He was acting erratic. His eyes were glazed. He was fidgeting." Gabrielson thought defendant possibly had a medical problem.

Additionally, Gabrielson stated that when defendant was on the cell floor face down, Gabrielson and other officers tried to handcuff defendant. As Gabrielson was attempting to grasp defendant's left arm, defendant grabbed Gabrielson's right wrist with defendant's left hand and pulled it under defendant's chest. While ordering defendant to stop resisting, Gabrielson applied three knee strikes to defendant's left torso, which caused defendant to release Gabrielson's wrist.

During the officers' attempt to handcuff defendant, Gabrielson saw defendant grab Adams's wrist. Adams applied pepper spray to defendant's face, and defendant released Adams's wrist. Eventually, the officers were able to handcuff defendant. Lopez and Gabrielson accompanied defendant in the ambulance to the hospital. Adams testified similarly to the testimony of the other officers.

The only evidence defendant presented was the testimony of the emergency room doctor who treated defendant. The doctor testified that defendant suffered small lacerations above each eye, which required stitches. In addition to giving defendant a local anesthetic while the doctor applied the stitches, the doctor gave defendant a mild sedative to help calm him down.

During discovery, the State had obtained defendant's medical records from the hospital. The medical records indicated that defendant was admitted to the hospital for five days after the incident at the jail and while defendant was in the hospital, he was diagnosed as suffering from alcohol withdrawal in the form of DT's, and the medical staff treated him accordingly. The

medical records contain multiple references to defendant's hallucinations, paranoia, tremors, agitation, confusion, and disorientation. Signs of defendant's hallucinations included talking to persons who were not present in the room or whom he believed were just outside his hospital window. Defendant told medical staff that he feared the guards at the jail because he knew too much about their actions and that he saw something at the jail that he should not have seen. The medical staff took these statements as signs of defendant's paranoia. The record shows that during opening and closing arguments, defense counsel did not present any arguments concerning either defendant's medical condition or his mental state.

At the conclusion of the trial, the jury found defendant: (1) guilty of aggravated battery concerning Adams; (2) not guilty of aggravated battery concerning Gabrielson; and (3) guilty of battery concerning Thom. During the sentencing hearing, the court asked defendant if he was suffering from some form of withdrawal during the incident. Defendant answered that the withdrawal could have been from medication he was taking following knee surgery. When the court asked defendant what the medication was, defendant answered that he was not sure. The court then said, "I think we all look at the incident itself from the conduct that was portrayed during the course of the trial, and it looks like you were suffering some sort of withdrawal, some reaction when this incident began." The court imposed sentence, and defendant appealed.

II. ANALYSIS

A. Fitness

Defendant contends that his trial counsel provided ineffective assistance by failing to raise a question concerning his fitness to plead, to stand trial, and to be sentenced. Similarly, defendant submits that the trial court erred by failing to raise a question concerning his fitness.

Defendant asserts that indications of his unfitness were: (1) the medical evidence that he was suffering from DT's; (2) his uncertainty concerning whether he wished to plead guilty or not guilty; and (3) his uncertainty concerning whether he wished to have a jury trial or a bench trial.

To prevail in an ineffective assistance claim, a defendant must show both that: (1) counsel's performance was objectively unreasonable under prevailing professional norms; and (2) there was a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984).

"A defendant is presumed to be fit to stand trial or to plead, and be sentenced. A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense." 725 ILCS 5/104--10 (West 2008).

"The issue of the defendant's fitness for trial, to plead, or to be sentenced may be raised by the defense, the State or the Court at any appropriate time before a plea is entered or before, during, or after trial. When a bona fide doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further." 725 ILCS 5/104--11(a) (West 2008).

For a defendant to establish that counsel's failure to request a fitness hearing prejudiced him under *Strickland*, the defendant must show that facts existed at the trial that would have raised a *bona fide* doubt of the defendant's ability to comprehend the nature and purpose of the proceedings against him or to assist in his defense. *People v. Harris*, 206 Ill. 2d 293 (2002). A defendant is entitled to relief only if he shows that the trial court would have ordered a fitness

hearing if it had been apprised of the evidence raised on appeal. *Harris*, 206 Ill. 2d 293. To determine whether there was a *bona fide* doubt of a defendant's fitness, a court may consider the defendant's irrational behavior, his demeanor in the trial court, and any prior medical opinion regarding the defendant's competence. *Harris*, 206 Ill. 2d 293.

In this case, contrary to defendant's assertion, the record does not show that he was suffering from DT's during the proceedings in the trial court. Although defendant changed his mind multiple times concerning both his plea and his right to a jury trial, these vacillating decisions did not amount to irrational behavior in the courtroom. See *Harris*, 206 Ill. 2d 293. Moreover, these changes of mind did not raise a *bona fide* doubt of defendant's ability either to comprehend the nature and purpose of the proceedings against him or to assist in his defense. See *Harris*, 206 Ill. 2d 293. Furthermore, defendant has not shown that his case was prejudiced, under the *Strickland* test, by trial counsel's failure to raise a question concerning his fitness.

Consequently, we rule that the trial court did not err by failing to raise a question concerning defendant's fitness. Likewise, we hold that defendant's trial counsel did not provide ineffective assistance by failing to raise the issue of defendant's fitness.

B. Insanity Defense

Defendant argues that trial counsel provided ineffective assistance by failing to assert an insanity defense based on evidence that he was experiencing DT's at the time of the offenses.

The statute articulating the insanity defense in Illinois states that "[a] person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct." 720 ILCS 5/6--2(a) (West 2008). Generally, a defendant who is voluntarily under the influence of

intoxicants at the time of the crime will not be relieved of criminal responsibility under the insanity defense. *People v. Free*, 94 Ill. 2d 378 (1983). A defendant's voluntary intoxication precludes the use of the insanity defense unless a mental disease or defect is traceable to the habitual or chronic use of drugs or alcohol and results in a settled or fixed permanent form of insanity. *Free*, 94 Ill. 2d 378.

In this case, the medical records obtained by the State during discovery show that defendant was suffering from DT's, and was treated for this condition, during his extended stay at the hospital. However, the record does not include medical evidence or testimony indicating whether defendant was suffering from DT's at the time he arrived at the hospital for emergency treatment or when he committed the offenses in question.

Moreover, the record does not show that defendant was suffering from a settled or fixed permanent form of insanity at the time of the offenses resulting from habitual or chronic use of drugs or alcohol. See *Free*, 94 Ill. 2d 378. Thus, the record does not indicate that an insanity defense would have been available to defendant. As a result, defense counsel did not prejudice defendant's case by failing to raise such a defense. Therefore, we rule that defendant's trial attorney did not provide ineffective assistance by failing to raise an insanity defense on defendant's behalf. See *Strickland*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052; *Albanese*, 104 Ill. 2d 504.

C. Mental State

Defendant contends that trial counsel provided ineffective assistance by failing to argue that evidence of defendant's DT's raised a reasonable doubt concerning the mental state elements of the offenses.

In the instant case, regarding both battery and aggravated battery, defendant was charged with knowingly making physical contact of an insulting and provoking nature. See 720 ILCS 5/12--3(a)(2), 12--4(b)(18) (West 2006). Thus, the mental state element of each crime was "knowingly." At the time of the offenses, this mental state was defined as follows:

"A person knows, or acts knowingly or with knowledge of:

(a) The nature or attendant circumstances of his conduct, described by the statute defining the offense, when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists.

(b) The result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct." 720 ILCS 5/4--5 (West 2006).

As we noted above regarding defendant's insanity defense argument, the record does not include medical evidence or testimony indicating whether defendant was suffering from DT's at the time he committed the offenses in question. Even though the record shows that defendant exhibited unusual behavior while in the jail cell, given the record in this case, we conclude that a reasonable jury could have found that defendant was consciously aware that: (1) he made physical contact with the victims; and (2) the physical contact was of an insulting and provoking nature. Defendant has not shown that his case was prejudiced, under the *Strickland* test, by defense counsel's failure to argue that evidence of defendant's DT's raised a reasonable doubt concerning the mental state elements of the offenses. See *Strickland*, 466 U.S. 668, 80 L. Ed. 2d

674, 104 S. Ct. 2052; *Albanese*, 104 Ill. 2d 504. Therefore, we hold that, regarding this argument, defendant has not proved that his trial attorney provided ineffective assistance.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Will County circuit court.

Affirmed.