

NOTICE
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2011 IL App (4th) 100587-U

Filed 10/25/11

NO. 4-10-0587

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
MICHAEL J. LUDWICK,)	No. 08CF279
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* Where any appeal in this case would be frivolous, we grant the motion to withdraw as counsel filed by the office of the State Appellate Defender (OSAD). We agreed no colorable argument could be raised as to whether (1) the State failed to prove defendant guilty beyond a reasonable doubt, (2) clear and convincing evidence existed on the defense of insanity, (3) defense counsel provided ineffective assistance by failing to suppress his written statement that was admitted at trial, or (4) the trial court abused its discretion in sentencing defendant.

¶ 2 In April 2010, a jury found defendant, Michael J. Ludwick, guilty of aggravated battery. In June 2010, the trial court sentenced him to eight years in prison. Thereafter, OSAD was appointed to represent defendant.

¶ 3 On appeal, OSAD moves to withdraw its representation of defendant pursuant to *Anders v. California*, 386 U.S. 738 (1967), contending any appeal in this cause would be frivolous. We grant OSAD's motion and affirm the trial court's judgment.

¶ 4

I. BACKGROUND

¶ 5 In November 2008, the State charged defendant, an inmate at Pontiac Correctional Center, by information with one count of aggravated battery (720 ILCS 5/12-4(b)(18) (West 2008)), alleging he knowingly made physical contact of an insulting or provoking nature with Daniel Small, in that he threw an unknown liquid substance, striking Small on the face and body, and knowing Small to be a correctional institution employee who was engaged in the execution of his official duties. The State alleged defendant was subject to mandatory Class X sentencing because of his prior convictions.

¶ 6 In March 2009, defense counsel filed a motion for psychiatric examination to determine defendant's sanity in regard to this case. In April 2009, the trial court granted the motion. In June 2009, defense counsel filed a notice of the affirmative defense of insanity. In July 2009, the State filed a motion for the appointment of a second psychiatric expert. In January 2010, the State decided to proceed without the benefit of a second exam.

¶ 7 In April 2010, defendant's jury trial commenced. Daniel Small testified he was working as a correctional officer on June 19, 2008. He stated he was tending to another inmate when his head, chest, arms, and legs were splattered with an unknown liquid substance. Because he had lost his sense of smell after a motorcycle accident, he could not identify the substance. Small saw defendant standing with a Styrofoam cup in "a recovery position from just releasing the liquid." Small went to the healthcare unit to be evaluated and to start the paperwork.

¶ 8 Joyce Friel, a registered nurse at Pontiac Correctional Center, testified she evaluated Small and noticed he was wet and "smelled of urine." Friel had him wash off and put on a clean uniform.

¶ 9 William Troyer, an administrative assistant at Pontiac Correctional Center, testified he worked as an investigator in June 2008. During his investigation of the incident between defendant and Small, Troyer spoke with defendant. In a written statement identified as exhibit No. 1, defendant stated he was upset after Small ignored him so he threw a cup of water at him. The trial court admitted the exhibit.

¶ 10 For the defense, Dr. Robert Chapman testified as an expert witness in psychiatry. After examining defendant and reviewing his background information, Dr. Chapman found defendant suffered from a schizoaffective disorder, which caused him to lack substantial capacity to appreciate the criminality of his behavior. Dr. Chapman stated defendant had psychiatric problems since the age of four and heard voices since childhood. He opined defendant "knew he was throwing a liquid as the voices had told him to do."

¶ 11 On cross-examination, Dr. Chapman stated he was not surprised that defendant gave a different reason for the offense other than hearing voices. Dr. Chapman was aware defendant said he did it because he was angry at Small. Defendant had stated he previously assaulted Small but did not hear any voices on that occasion. Dr. Chapman stated it was possible defendant did not hear a voice during the instant case but threw the liquid because he was angry.

¶ 12 Following closing arguments, the jury found defendant guilty of aggravated battery. Defendant filed a motion for a new trial, which the trial court denied. In June 2010, the court sentenced him to eight years in prison. The court ordered the sentence be served consecutive to the sentences defendant was serving at the time of the offense. Thereafter, defendant filed a motion to reconsider sentence, which the court denied. This appeal followed.

¶ 13

II. ANALYSIS

¶ 14 On appeal, OSAD has filed a motion to withdraw as counsel and has attached to the motion a supporting memorandum pursuant to *Anders*. The proof of service shows service of the motion upon defendant. This court granted defendant leave to file additional points and authorities on or before August 29, 2011. Defendant has done so, and the State has also filed a brief. Based on an examination of the record, we conclude, as has OSAD, that no meritorious issues are presented for review and any appeal would be frivolous.

¶ 15 A. Sufficiency of the Evidence

¶ 16 OSAD argues no colorable argument can be made that the State's evidence was insufficient to convict defendant beyond a reasonable doubt. We agree.

¶ 17 "When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Ngo*, 388 Ill. App. 3d 1048, 1052, 904 N.E.2d 98, 102 (2008) (quoting *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006)). The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. *People v. Jackson*, 232 Ill. 2d 246, 281, 903 N.E.2d 388, 406 (2009). "[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable[,] or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008).

¶ 18 A person commits a battery when he knowingly causes bodily harm to an individual or knowingly makes physical contact of an insulting or provoking nature with another

person. 720 ILCS 5/12-3 (West 2008). A person commits aggravated battery if he commits battery while knowing the individual being harmed is an officer of the State of Illinois engaged in the execution of his official duties. 720 ILCS 5/12-4(b)(18) (West 2008).

¶ 19 In this case, Officer Small testified he was tending to another inmate when his head, chest, arms, and legs were splattered with a liquid substance. Small then saw defendant standing with a cup in "a recovery position from just releasing the liquid." Small stated when bodily fluids are involved, he is concerned because it could be a health hazard "somewhere down the road." Nurse Friel stated she evaluated Small and noticed he was wet and "smelled of urine." A rational trier of fact could find defendant made contact of an insulting or provoking nature with Small and thereby find him guilty of aggravated battery. See *People v. Walker*, 291 Ill. App. 3d 597, 603-04, 683 N.E.2d 1296, 1301 (1997) (finding a defendant who threw urine or water onto a correctional officer made physical contact of an insulting or provoking nature).

¶ 20 B. Insanity Defense

¶ 21 OSAD argues no colorable argument can be made that clear and convincing evidence existed on the defense of insanity. We agree.

¶ 22 "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). When an insanity defense is presented at trial, "the burden of proof is on the defendant to prove by clear and convincing evidence that the defendant is not guilty by reason of insanity." 720 ILCS 5/6-2(e) (West 2008). The State, however, retains the burden of proving defendant guilty of the charged offense beyond a reasonable doubt. 720 ILCS 5/6-2(e) (West 2008).

¶ 23 "The question of defendant's sanity and mental illness are questions of fact, and the fact finder's determination on these issues will not be disturbed unless contrary to the manifest weight of the evidence." *People v. Kando*, 397 Ill. App. 3d 165, 194, 921 N.E.2d 1166, 1189 (2009). In deciding the sanity of a defendant, the trier of fact may reject an expert's testimony, accept part or reject part of the expert's testimony, or rely on lay testimony. *People v. McCleary*, 208 Ill. App. 3d 466, 478-79, 567 N.E.2d 434, 442 (1990).

¶ 24 In this case, Dr. Chapman opined that, due to defendant's schizoaffective disorder, defendant lacked substantial capacity to appreciate the criminality of his conduct. Dr. Chapman stated defendant had a long history of mental illness and had been on psychotropic medication since the age of four. Defendant has also heard voices since childhood. On cross-examination, Dr. Chapman admitted he knew defendant stated his reason for committing the offense was he was angry at Officer Small. Moreover, defendant had indicated to him that he had previously assaulted Small and he had not heard voices on that occasion. Dr. Chapman conceded it was possible he assaulted Small because he was angry at him on this occasion as well.

¶ 25 Here, defendant admitted he threw the liquid substance at Small because he was mad at him for ignoring defendant. Dr. Chapman acknowledged the possibility that defendant's conduct resulted from anger rather than insanity. We find the jury's determination of defendant's guilt was not against the manifest weight of the evidence.

¶ 26 C. Assistance of Counsel

¶ 27 In his response to OSAD's motion to withdraw, defendant argues defense counsel failed to suppress his written statement that was admitted at trial. Defendant contends his statement was not voluntarily made.

¶ 28 "To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004) (citing *Strickland v. Washington*, 466 U.S.668, 687 (1984)). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 29 Our supreme court has noted the test to determine if a confession is voluntary looks at whether the defendant " 'made the statement freely, voluntarily, and without compulsion or inducement of any sort, or whether the [defendant's] will was overcome at the time he or she confessed.' " *In re G.O.*, 191 Ill. 2d 37, 54, 727 N.E.2d 1003, 1012 (2000) (quoting *People v. Gilliam*, 172 Ill. 2d 484, 500, 670 N.E.2d 606, 613 (1996)).

"In determining whether a statement is voluntary, a court must consider the totality of the circumstances of the particular case; no single factor is dispositive. Factors to consider include the defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the detention; the presence of

Miranda warnings; the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises." *People v. Richardson*, 234 Ill. 2d 233, 253-54, 917 N.E.2d 501, 514 (2009).

¶ 30 Here, Troyer testified he spoke with defendant in his office on July 14, 2008. Defendant told him what occurred, and Troyer typed up a report. Troyer allowed defendant to read the statement and he did not make any changes. Defendant initialed that he read the statement and then signed it at the bottom.

¶ 31 The evidence indicates defendant's statement was voluntary. Defendant does not offer any evidence to support his claim that the written statement was involuntary. The evidence shows defendant made his statement freely, voluntarily, and without compulsion. Moreover, nothing indicates defendant's will was overcome at the time he confessed. As his confession was voluntary, defendant was not denied the effective assistance of counsel.

¶ 32 Defendant also argues trial counsel was ineffective for not moving for a competency hearing and by not entering a plea of not guilty by reason of insanity.

"A defendant is presumed to be fit to stand trial or to plea, 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).

"Fitness speaks only to a person's ability to function within the context of a trial; a defendant may be fit to stand trial even though the defendant's mind is otherwise unsound." *People v.*

Griffin, 178 Ill. 2d 65, 79, 687 N.E.2d 820, 830 (1997). If a *bona fide* doubt of a defendant's fitness is raised, the trial court must hold a fitness hearing before proceeding. *People v. Burton*, 184 Ill. 2d 1, 13, 703 N.E.2d 49, 55 (1998). "Once the fitness question is raised, the burden falls on the State to establish a defendant's fitness by a preponderance of the evidence." *Griffin*, 178 Ill. 2d at 79, 687 N.E.2d at 830.

¶ 33 In this case, no evidence was presented to suggest defendant did not understand the nature and purpose of the proceedings or was unable to assist in his defense. After reading defendant's medical records and filing a motion for a psychiatric examination, defense counsel believed defendant was fit but may not have been sane at the time of the offense. We find defendant has failed to show counsel's performance was deficient or that prejudice resulted. Thus, his claim of ineffective assistance of counsel fails.

¶ 34 D. Sentence

¶ 35 OSAD argues no colorable argument can be made that the trial court abused its discretion in sentencing defendant to eight years in prison. We agree.

¶ 36 The Illinois Constitution mandates "[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." Ill. Const. 1970, art. I, § 11. "In determining an appropriate sentence, a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment, must be equally weighed." *People v. Hestand*, 362 Ill. App. 3d 272, 281, 838 N.E.2d 318, 326 (2005) (quoting *People v. Hernandez*, 319 Ill. App. 3d 520, 529, 745 N.E.2d 673, 681 (2001)).

¶ 37 A trial court has broad discretion in imposing a sentence. *People v. Chester*, 409

Ill. App. 3d 442, 450, 949 N.E.2d 1111, 1118 (2011). "A reviewing court gives great deference to the trial court's sentencing decision because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the cold record." *People v. Evangelista*, 393 Ill. App. 3d 395, 398, 912 N.E.2d 1242, 1245 (2009). Thus, the court's decision as to the appropriate sentence will not be overturned on appeal "unless the trial court abused its discretion and the sentence was manifestly disproportionate to the nature of the case." *People v. Thrasher*, 383 Ill. App. 3d 363, 371, 890 N.E.2d 715, 722 (2008).

¶ 38 In the case *sub judice*, the jury found defendant guilty of aggravated battery of a correctional officer, a Class 2 felony. 720 ILCS 5/12-4(e)(2) (West 2008). Due to his prior convictions, defendant was subject to mandatory Class X sentencing. 730 ILCS 5/5-5-3(c)(8) (West 2008). A Class X offender is subject to a sentencing range of 6 to 30 years in prison. 730 ILCS 5/5-8-1(a)(3) (West 2008). As the trial court's eight-year sentence was within the relevant sentencing range, we will not disturb the sentence absent an abuse of discretion.

¶ 39 In the case *sub judice*, the presentence report indicated defendant had an extensive criminal history. Starting with an adult conviction for arson in 1995, defendant's criminal record included criminal damage to property, aggravated criminal sexual abuse, and 11 convictions for aggravated battery. Given that the eight-year sentence was on the low end of the sentencing range, and considering defendant's criminal record, we find no abuse of discretion in the trial court's sentence. Moreover, defendant's sentence was required to be served consecutive to his other sentences because he committed the offense while in the Department of Corrections. 730 ILCS 5/5-8-4(f) (West 2008). Accordingly, as any appeal in this cause would be frivolous,

OSAD is granted leave to withdraw as counsel.

¶ 40

III. CONCLUSION

¶ 41 For the reasons stated, we grant OSAD's motion and affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed.