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2012 IL App (3d) 120076-U

Order filed September 20, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Peoria County, Illinois,
)	
v.)	Appeal No. 3-12-0076
)	Circuit No. 10-CF-210
MARIO FUNCHES,)	
)	Honorable
Defendant-Appellant.)	Katherine S. Gorman,
)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* Defendant was denied effective assistance of counsel when the jury was informed of defendant's prior conviction for domestic battery, and defendant suffered prejudice.
- ¶ 2 Following a jury trial, defendant, Mario Funches, was found guilty of domestic battery, a Class 4 felony, and was sentenced to four years' imprisonment. 720 ILCS 5/12-3.2(a)(1), (b) (West 2010). On appeal, defendant argues that: (1) trial counsel was ineffective for failing to object when the trial court informed prospective jurors that defendant had a prior conviction for domestic battery

and elicited testimony from defendant regarding that conviction; and (2) the sentencing order requiring him to pay several fines and fees should be adjusted or vacated. We reverse and remand.

¶ 3

FACTS

¶ 4 On March 16, 2010, defendant was charged by indictment with domestic battery. The offense was a Class 4 felony due to defendant's prior conviction for domestic battery. The indictment charged that on March 2 through March 4, 2010, defendant caused bodily harm to Raeann Bowen by striking her with his hands, and that defendant had been previously convicted of domestic battery. Defendant pled not guilty and claimed self-defense at trial. Defendant's first trial resulted in a hung jury.

¶ 5 During jury selection at defendant's second trial, the trial court read the indictment to the potential jurors, including the portion about defendant's prior conviction for domestic battery.

¶ 6 At trial, Bowen testified that on March 2 through March 4, 2010, she lived with defendant and her three children. On March 2, 2010, Bowen woke defendant up from a bad dream. Defendant had a recurrent dream that Bowen was having an affair with his brother, whom Bowen previously slept with before dating defendant. Bowen attempted to talk with defendant about the dream throughout the day, but he told her to leave him alone.

¶ 7 At approximately 5:30 p.m., Bowen and defendant got into an argument. Bowen testified that defendant invaded her personal space by getting "in [her] face," and she pushed him. Defendant pushed Bowen back, and they got into a pushing match. The two then began punching each other. Defendant punched Bowen in the arms and legs. The fighting went on for about 30 minutes. It ended when Jacob Smith, defendant's brother, who had been living in the house, told Bowen and defendant to stop.

¶ 8 Bowen then went back to cooking dinner. When she went into the bathroom, she saw bruising. Defendant asked if she was all right, and she told him to leave her alone. They got into another pushing match because she wanted to keep defendant from intruding on her "personal space." The pushing led to wrestling, and when defendant pushed her, Bowen fell into the bathtub. Defendant punched Bowen twice in the arms and legs and threw a speaker at her. Bowen kicked defendant, but could not recall how many times.

¶ 9 The remainder of the night was calm. Defendant apologized to Bowen, and they watched a movie and slept in the same bed. Bowen testified that there were no confrontations on March 3, 2010.

¶ 10 On March 4, 2010, Bowen's grandfather picked her up in the morning to go to two scheduled doctor's appointments. When Bowen returned that afternoon, she discovered defendant on the telephone with his former girlfriend. Bowen got angry at defendant, told him to get out of the house, and pushed items across the kitchen table at him. Defendant hung up the telephone and "got in [Bowen's] face[.]" Bowen pushed defendant, and he pushed her back. Defendant then punched Bowen, and she punched him back. Defendant hit Bowen at least 10 times.

¶ 11 Bowen started to gather her things so she and the children could leave the house. When Bowen grabbed for defendant's phone to call for a ride, he pushed her and punched her. Defendant pulled Bowen's hair, and Bowen bit him. The argument ended, and Bowen called her grandfather, who picked her up at approximately 2 p.m. Defendant later called Bowen's grandfather, because Bowen had defendant's social security card. Bowen's grandfather eventually called the police, and Bowen was taken to the hospital sometime after 10 p.m. The pictures of Bowen's injuries, which included bruises on her legs, arms, and back, and scratches on her face, were entered into evidence.

¶ 12 Bowen testified that on March 26, 2010, she wrote a letter to the State's Attorney stating that she was the one that started the altercation with defendant. Bowen stated that she slapped defendant while he was on the telephone with his former girlfriend. Bowen asked for the charges against defendant to be dropped.

¶ 13 Peoria police officer John McCavitt testified that he spoke with Bowen and defendant regarding the incident. Defendant told McCavitt that he and Bowen got into a verbal argument, but it did not get physical. Defendant later admitted that Bowen had bitten him twice. McCavitt observed bite marks on defendant's arm and leg. One looked fresh and the other looked a couple of days old.

¶ 14 Defendant testified that on March 2, 2010, he had a nightmare about Bowen cheating on him with his brother. Bowen wanted to talk about the nightmare all day, but defendant did not want to discuss it. Defendant attempted to leave the house several times throughout the day to get away from Bowen, but she prevented him from leaving. Bowen slapped defendant when he told her to get out of his face. Bowen also bit him in the arm.

¶ 15 At one point when defendant tried to walk out the front door, Bowen charged at him and acted like she was going to hit him. Defendant grabbed her by the throat, pushed her backwards into a wall, and told her to stop charging at him. This occurred a few times before defendant was able to actually leave the house at approximately noon.

¶ 16 Defendant testified that Bowen came looking for him and begged him to come back home. When defendant returned home, he and Bowen talked, and there was no fighting. Defendant did not see any bruises or marks on Bowen on March 2, 2010.

¶ 17 On March 4, 2010, Bowen got angry when he was on the telephone with his former

girlfriend. Bowen slapped defendant in the face with a plastic ashtray, pushed a tray of cookies across the kitchen table at him, and threw Gatorade bottles at him. Defendant got angry and told Bowen not to put her hands on him, because if he put his hands on her, he would go to jail. In response, Bowen slapped defendant, and then Smith stepped in and stopped further fighting. Defendant went to reach for his phone so he could leave, but Bowen also reached for the phone. Bowen bit defendant in the leg, and he pulled her hair. Defendant also testified that every time Bowen tried to attack him, he defended himself by grabbing her throat and pushing her backwards.

¶ 18 After Bowen's grandfather picked her up, defendant left the house. Defendant did not see any bruises on Bowen when she left. Defendant called the grandfather to get his social security card back from Bowen. Defendant also called the police in order to get his possessions out of the house. Thirty minutes later, police returned and arrested defendant. Defendant told the officer that his argument with Bowen was not physical because he did not want to get her into trouble.

¶ 19 In response to defense counsel's questions, defendant admitted that he had prior convictions. Then counsel asked if defendant had a prior domestic battery conviction, and defendant responded that he did.

¶ 20 In rebuttal, the State introduced certified copies of defendant's prior convictions for possession of a controlled substance and unlawful use of a weapon as impeachment evidence, just as the State did after defendant's testimony during his first trial.

¶ 21 During closing arguments, defense counsel stated that due to defendant's involvement with the law, he knew he would get into trouble if he hit Bowen. Counsel further stated that defendant told Bowen he would not fight her. Defendant only touched Bowen in self-defense.

¶ 22 The jury found defendant guilty. The trial court sentenced defendant to four years'

imprisonment. Defendant was also ordered to pay a \$100 public defender fee, \$200 deoxyribonucleic acid (DNA) analysis fee, \$100 sexual assault fine, \$100 domestic battery fine, \$100 domestic violence fine, \$100 drug court operation fee, and \$4.75 drug court fund fee. Defendant appeals.

¶ 23

ANALYSIS

¶ 24

I

¶ 25 On appeal, defendant first argues that trial counsel was ineffective for (1) failing to object when the trial court informed prospective jurors that defendant had a prior conviction for domestic battery; and (2) eliciting testimony from defendant during trial regarding that conviction.

¶ 26 To prevail on a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Manning*, 241 Ill. 2d 319 (2011); *Strickland v. Washington*, 466 U.S. 668 (1984). In establishing deficient performance, defendant must overcome a strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence. *Manning*, 241 Ill. 2d 319. This presumption may be overcome where no reasonably effective criminal defense attorney would engage in similar conduct. *People v. Fletcher*, 335 Ill. App. 3d 447 (2002).

¶ 27 In this case, we conclude that counsel's performance fell below an objective standard of reasonableness. Under section 111-3(c) of the Code of Criminal Procedure of 1963 (Code), defendant's prior domestic battery conviction was not an element of the offense, and therefore should not have been disclosed to the jury. 725 ILCS 5/111-3(c) (West 2010). Nevertheless, defense

counsel did not object when the judge informed prospective jurors of the prior conviction; counsel also elicited testimony from defendant confirming this conviction.

¶ 28 The State argues that it was defense counsel's trial strategy to allow the jury to learn of defendant's prior domestic battery conviction. The State claims the prior conviction showed that defendant did not domestically batter Bowen, because he knew the cost of doing so. The decision to introduce a defendant's prior convictions is generally a matter of trial strategy. See *People v. Williams*, 317 Ill. App. 3d 945 (2000). Here, however, we cannot say that admitting defendant's domestic battery conviction was a sound strategic decision. See *Fletcher*, 335 Ill. App. 3d 447. Defendant testified that he told Bowen not to put her hands on him, because if he put his hands on her, he would go to jail. If it were counsel's strategy to show that defendant knew better than to batter Bowen, we see no reason why counsel would need to introduce the prior conviction instead of relying on what defendant said to Bowen.

¶ 29 Additionally, counsel seems to have introduced the conviction in anticipation of it being used as impeachment evidence. This was not a sound strategy. First, if the State were to use the domestic battery conviction as impeachment, the trial court would have had to weigh its probative value against its prejudicial effect. See *Williams*, 317 Ill. App. 3d 945. As the prior conviction was identical to the crime charged, its admission would likely have resulted in unfair prejudice to defendant, and the conviction might have been precluded on this basis. See *People v. Atkinson*, 186 Ill. 2d 450 (1999). The State further argues that it could have offered the evidence under section 115-7.4 of the Code. 725 ILCS 5/115-7.4 (West 2010). This section required that the State disclose evidence of a prior offense in advance of trial, and that the trial court would have determined that the offense's probative value outweighed its prejudicial impact before allowing it to be admitted.

See *Id.* However, there is no indication in the record that the State disclosed the offense in this case.

¶ 30 Second, the State impeached defendant with only his possession of a controlled substance and unlawful use of a weapon convictions, just as the State did in defendant's first trial. Given that history, defense counsel, who represented defendant at both trials, had little reason to believe that the domestic battery conviction would be offered as impeachment evidence. Under the circumstances, we find that counsel's decision to present defendant's prior domestic battery conviction to the jury fell below an objective standard of reasonableness.

¶ 31 Additionally, defendant has shown prejudice. Other-crimes evidence is highly prejudicial, as it is harmful to defendant's credibility and known to overpersuade the jury. See *People v. Robinson*, 368 Ill. App. 3d 963 (2006). Any prejudice is enhanced when the prior crime is similar to the charged offense. *Id.* This prejudice is apparent here, particularly considering that defendant's first trial on similar evidence resulted in a hung jury. The question of guilt rested on defendant's credibility, which was inevitably affected by the admission of defendant's prior conviction for the same offense. See *People v. Sanchez*, 404 Ill. App. 3d 15 (2010). Therefore, we believe there was a reasonable probability that if the jury was not informed of defendant's prior domestic battery conviction, the result of the trial would have been different. Finding that defendant has established ineffective assistance of trial counsel, we reverse defendant's conviction and remand the cause for a new trial.

¶ 32

II

¶ 33 Defendant next argues, and the State concedes, that the sentencing order requiring him to pay several fines and fees should be adjusted or vacated. Although we need not reach this issue because we are remanding for a new trial, we will address the fines and fees in the event they arise on

remand.

¶ 34 The \$100 public defender fee should be vacated, because a hearing on defendant's ability to pay should have been conducted before the court imposed the fee. See 725 ILCS 5/113-3.1(a) (West 2010); *People v. Carter*, 2011 IL App (3d) 090238.

¶ 35 The \$200 DNA analysis fee should be vacated because the record reveals that defendant was ordered to submit a DNA sample for a previous conviction. See 730 ILCS 5/5-4-3(a), (j) (West 2010); *People v. Marshall*, 242 Ill. 2d 285 (2011).

¶ 36 Defendant should not have been ordered to pay a sexual assault fine because domestic battery does not qualify as a sexual assault. See 730 ILCS 5/5-9-1.7(a)(1) (West 2010).

¶ 37 The \$100 domestic battery fine was miscalculated and should be reduced to \$10. See 730 ILCS 5/5-9-1.6 (West 2010).

¶ 38 Defendant is also entitled to a \$5-per-day credit against several fines for the time he spent in custody before sentencing. See 725 ILCS 5/110-14(a) (West 2010). After his arrest, defendant was incarcerated for 224 days, from March 5 until October 14, 2010. Accordingly, defendant is entitled to credit against his fines, with sufficient credit to cover the cost for his domestic violence fine, drug court operation fee, and drug court fund fee.

¶ 39 CONCLUSION

¶ 40 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed, and the cause is remanded for further proceedings.

¶ 41 Reversed and remanded.