

NOTICE
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2012 IL App (4th) 100188-U

Filed 1/5/12

NO. 4-10-0188

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
JEFFERY DAVIS,)	No. 08CF1267
Defendant-Appellant.)	
)	Honorable
)	Charles G. Reynard,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The State presented sufficient evidence to prove defendant guilty of aggravated battery. The trial court made an adequate inquiry into defendant's claim he received ineffective assistance of counsel, and defendant forfeited any claim of error regarding a substitution of judge.

¶ 2 Defendant, Jeffery Davis, was convicted after a bench trial of aggravated battery (720 ILCS 5/12-4(b)(10) (West 2008)) and sentenced to five years' imprisonment in the Illinois Department of Corrections. Defendant appeals, contending he was not proved guilty beyond a reasonable doubt and the cause should be remanded for an inquiry into his claim trial counsel was ineffective for failing to request a substitution of judge. We disagree with defendant's contentions and affirm.

¶ 3 **I. BACKGROUND**

¶ 4 Defendant was indicted for the October 28, 2008, aggravated battery of David

McAtee, a 64-year-old resident of Woodhill Towers, a high-rise for the elderly.

¶ 5 Defendant was arraigned in February 2009 and later alleged he asked the public defender who was at the arraignment to file a motion for substitution of the judge. Counsel made a note in the file and indicated she would let his permanently assigned attorney know of his request. Apparently, this information was never received by assigned counsel and no motion was filed. Defendant filed a *pro se* motion in late March 2009 for substitution of the judge, alleging "extreme deficiencies and neglect" on the part of the public defender's office. At a status hearing, the court made a preliminary inquiry about the motion. Defendant explained the scenario regarding his earlier request for change of judge at arraignment, voiced other concerns with assigned counsel, complained the case had originally been a misdemeanor and had been upgraded to a felony, and noted he was forced to file his own motions.

¶ 6 After inquiring of defendant, defense counsel, and the State, the trial court concluded the motion for substitution of judge was untimely, there was no ineffective representation, and various other *pro se* motions should be dismissed because they were filed *pro se* and not adopted by defense counsel.

¶ 7 In October 2010, defendant and counsel appeared before both Judges Charles Reynard and Robert Freitag for status reports on the availability of either judge to conduct a jury trial. Several jury trials were ongoing and other cases set for trial required attention. According to defense counsel, as later reported at a posttrial hearing, counsel

"then discussed with Mr. Davis, at length, the likely scheduling, the availability of trial dates, his opportunity to, essentially[,] choose the judge he wanted, to proceed with a jury trial and elect

to take a bench trial; and I explained the merits of either, that he could, in fact, insist on a jury, have a bench trial with either judge, and he chose what actually happened."

¶ 8 Defendant waived his right to a jury trial, after full admonishment by Judge Reynard, and a bench trial commenced later that same day.

¶ 9 At trial, David McAtee testified he was a 64-year-old resident of Woodhill Towers, a public housing high rise for the elderly. He was in the lobby of the apartment complex at approximately 9 p.m. on October 26, 2008, talking with another resident, Arthur Kiper. McAtee required the assistance of a cane to walk and was using one at that time. McAtee observed defendant pushing buttons on security call boxes to gain entry to the locked building. Defendant was unsuccessful but then gained access when someone left the building and he entered before the door closed.

¶ 10 McAtee described himself as doing volunteer security duty as part of a tenant program. McAtee put up his hand telling defendant he could not enter. He put his hand up again, touching defendant on the chest. Defendant then put a hand on McAtee's chest, did a foot sweep, and kicked his feet out from under him. McAtee fell to the floor. McAtee said defendant told him if he called the police, he would come back and "get me." Defendant then left the building in a hurry.

¶ 11 Arthur Kiper, a wheelchair-bound resident, testified he was in the lobby with McAtee, saw defendant enter the building, and saw McAtee tell defendant to leave and place his hand on defendant's shoulder. At some point defendant said, "I'm a Marine, *** and if you put your hands on me again, I'll put you to the floor." Defendant then kicked McAtee's foot and

McAtee fell to the floor. Defendant leaned over McAtee, looked up and saw Kiper, and got up and left. Kiper did not know defendant.

¶ 12 Defendant testified and revealed he had prior felony convictions for theft and aggravated battery and was on mandatory supervised release when he was arrested for the instant charge. Defendant entered Woodhill Towers to speak to Charles Nelson Riley, who was involved in a civil suit with defendant pending in Federal District Court in Peoria. He pressed the button of another person he was familiar with to help him gain access. Then a woman who he was also familiar with exited the building, asked him who he was looking for, and let defendant into the building suggesting he could go straight through the building lobby to the other tower of the complex where she believed Riley lived.

¶ 13 Defendant said he recognized Kiper, had talked to him before, and wanted "to check up on him" because Kiper had a leg amputation. McAtee started asking questions, said he was a security officer for the Bloomington Housing Authority, and grabbed his arm. Defendant pulled his arm away and McAtee started cursing, "went kind of ballistic," and told him to leave.

¶ 14 Defendant started to leave, and McAtee used both hands to grab him by his collar. Despite telling McAtee to get his hands off him, McAtee started pushing him backward and defendant, realizing he was about to fall into a window or glass door, ducked his head under McAtee's arm and turned to the side. McAtee fell. Defendant grabbed him before he fell completely but McAtee fell into a push-up position as defendant grasped McAtee's feet and then laid his feet down. Defendant told him not to grab him like that and left the building.

¶ 15 In the State's rebuttal, McAtee confirmed he was using a cane that day and the person who left the building, and permitted defendant to enter, spoke to the defendant. McAtee

denied ever grabbing defendant with both hands.

¶ 16 The trial court found McAtee touched defendant, but it would be a "stretch" to characterize his conduct as force. The court found defendant reacted beyond the use of force necessary, or he could even reasonably believe was necessary, to defend himself. It was not necessary to take McAtee down to the floor. The court found defendant's testimony was not credible. With these findings, the court rejected defendant's assertion of self-defense and found defendant guilty of aggravated battery--*i.e.* physical contact of an insulting or provoking nature-- by pushing, tripping, or otherwise causing David McAtee, a person over 60, to be knocked to the ground.

¶ 17 Despite being represented by counsel, defendant filed his own "motion for admission of errors" and a later supplement to that motion, contending, in part, he received ineffective assistance of counsel because of the substitution-of-judge issue, a delay in representation, failure to call witnesses to testify to the Housing Authority's security patrol and video surveillance, and a failure to call as a witness the woman who let him in the door and Charles Nelson Riley to show his purpose for being in the building.

¶ 18 At a hearing on the posttrial motion, the trial court conducted a *Krankel* inquiry to determine whether new counsel should be appointed to represent defendant. *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). After hearing from both defendant and his counsel, the court found defendant's claims were not factually accurate, lacked merit, pertained to trial strategy, and defendant received the able assistance of counsel. The court denied defendant's motions, conducted a sentencing hearing, considered defendant's lengthy criminal history and all factors in aggravation and mitigation, and sentenced defendant to five years' imprisonment.

¶ 19 Defendant was fully admonished as to his appeal rights. Defendant later filed assorted *pro se* motions as well as a premature notice of appeal, and a postconviction petition. Those were all stricken because defendant was represented by counsel. The trial court heard and denied the motion to reconsider sentence filed by defendant's counsel. The court directed the clerk to file a notice of appeal and appointed the Office of the State Appellate Defender.

¶ 20 II. ANALYSIS

¶ 21 Defendant first contends he was not proved guilty of aggravated battery beyond a reasonable doubt because the degree of force he used was reasonable in light of McAtee's initial use of force in placing his hands on defendant to prevent him from entering the building. In short, defendant claims McAtee was the aggressor and defendant was just doing what he needed to do to protect himself or extricate himself from McAtee's grasp.

¶ 22 Our standard of review may be phrased as a question. After viewing the evidence in the light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime beyond a reasonable doubt? *People v. Bishop*, 218 Ill. 2d 232, 249, 843 N.E.2d 365, 375 (2006). Measured against that standard, defendant's argument has no merit.

¶ 23 Defendant conceded the physical confrontation occurred. He labeled McAtee as the aggressor and the evidence shows McAtee did, at a minimum, place or put his hand on defendant's shoulder. The trial court found it was a "stretch" to call that force, but more important, the court found defendant was not credible, the amount of force he used was not necessary, and he could not have reasonably believed it was necessary.

¶ 24 To establish self-defense, defendant must show (1) unlawful force was threatened

against him; (2) he was not the aggressor; (3) he believed the danger of harm was imminent; (4) force was necessary to avert that danger; (5) the amount of force was necessary; and (6) these beliefs were reasonable. *People v. Cochran*, 178 Ill. App. 3d 728, 737, 533 N.E.2d 558, 564 (1989).

¶ 25 Based on this record, one could conclude defendant did not show any of these factors and the State disproved all of them beyond a reasonable doubt. We conclude it would be a "stretch" to say McAtee used force, but even if he did, defendant's response was disproportionate and excessive. Defendant's threat to McAtee, his quick departure from the scene, the trial court's assessment of his credibility and the testimony of McAtee and Kiper support his guilt. The evidence was more than sufficient to prove the defense of self-defense did not exist and defendant was guilty beyond a reasonable doubt.

¶ 26 Defendant also contends we must remand for an adequate inquiry into defendant's claim his trial counsel was ineffective for not requesting a substitution of judge. We review *de novo* whether the trial court has conducted an adequate inquiry into the claim of ineffective assistance of counsel. *People v. Moore*, 207 Ill. 2d 68, 78, 277 N.E.2d 631, 638 (2003).

¶ 27 The trial court gave defendant numerous opportunities to make statements and arguments despite the fact he was represented by counsel. The court asked defendant questions and made every effort to discern his various complaints and rectify some of his misunderstandings.

¶ 28 It appears defendant made some request of an assistant public defender regarding a motion for change of judge. The attorney assigned to represent defendant did not learn of defendant's request or inquiry until defendant filed a *pro se* motion for change of judge on March

25, 2009. Defendant's *pro se* motion was untimely, and gave no reason for a substitution of judge. Defendant did not assert Judge Reynard was prejudiced against him either in the motion or verbally when he appeared at a status hearing on March 30, 2009. The trial court indicated a willingness to address the issue again if the record showed defendant had actually requested the filing of such a motion.

¶ 29 While defendant continued to file *pro se* motions, the issue of substitution of judge was not mentioned again until after the bench trial. Defendant filed his own "motion for admission of errors" and at a later hearing made reference to having a bench trial before a judge from whom he wanted a substitution; had the case stayed before Judge Freitag, the substitution of judges issue would have been satisfied. While the issue arose, again as noted, defendant had a litany of complaints about witnesses, the lack of witnesses, the lack of representation, and his general dissatisfaction with being found guilty.

¶ 30 The trial court gave both defendant and counsel ample opportunity to explain and comment on the issues at the *Krankel* hearing and concluded there was no ineffective assistance of counsel and defendant's complaints related to trial strategy. Defendant, who was quite capable of speaking up, never stated Judge Reynard was prejudiced against him.

¶ 31 From March 30, 2009, and through October 13, 2009, defendant does not assert he asked counsel to file a motion for change of judge or that he asked his counsel to revisit the issue. He did not state Judge Reynard was prejudiced against him. He voluntarily waived his right to a jury trial and later did not rebut counsel's assertion at the *Krankel* hearing that defendant had a *choice* of the judge he wanted to try the case, and chose to waive jury and have a bench trial before Judge Reynard.

¶ 32 While defendant may not like the result, the trial court's inquiry into defendant's assertion he received ineffective assistance of counsel was more than adequate.

¶ 33 Defense counsel became fully aware defendant was complaining about a failure to file the motion, knew such a motion (725 ILCS 5/114-5(a) (West 2008)) would be untimely, and thereafter decided not to pursue the matter. Later, he explained to defendant about the timing of a jury trial, the possibility of Judge Freitag or Judge Reynard hearing the case with or without a jury, and advised defendant of his options before defendant waived a jury trial and chose a bench trial before Judge Reynard.

¶ 34 Defendant cannot now complain about that tactical choice when he agreed to waive a jury trial, impliedly declined a trial before another judge, and chose a bench trial before Judge Reynard. Defendant asked to proceed in this way and forfeited any claim of error. *People v. Heard*, 396 Ill. 215, 219-20, 71 N.E.2d 321, 323 (1947); *People v. Johnson*, 334 Ill. App. 3d 666, 679, 778 N.e.2d 772, 784 (2002).

¶ 35 The trial court correctly concluded defense counsel made tactical choices in the exercise of his professional judgment and that defendant did not receive ineffective assistance of counsel. We agree.

¶ 36 III. CONCLUSION

¶ 37 Defendant was proved guilty beyond a reasonable doubt, defense counsel did not render ineffective assistance of counsel on the substitution-of-judge issue, and the *Krankel* inquiry by the trial court was adequate. We affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of \$50 against defendant as costs of this appeal.

¶ 38 Affirmed.