2013 IL App (1st) 113136-U

SECOND DIVISION
April 23, 2013

No. 1-11-3136

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 MC1 439422
	)	
YOLANDA GARZA,	)	Honorable
	)	Ursula Walowski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Quinn and Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for domestic battery was affirmed over her claim of ineffective assistance of trial counsel.

¶ 2 Following a jury trial, defendant Yolanda Garza was convicted of domestic battery of her brother, Rey Garza (Rey), and sentenced to 18 months' conditional discharge. On appeal, defendant contends that her trial counsel was ineffective for failing to impeach Rey with his sworn complaint. We affirm.

¶ 3 The record shows that Rey's original complaint alleged that on May 22, 2010, at 3233 South Leavitt Street in Chicago, defendant committed the offense of domestic battery in that she intentionally and without legal justification caused bodily harm to him. Rey specifically alleged that defendant "threw rocks at the victim striking him several times about the body causing no visible marks."

¶ 4 Prior to trial, the State amended the complaint by changing "rocks" to "objects," "victim" to "complainant," and striking the language "causing no visible marks." Defense counsel did not object to these changes. The State also filed a pretrial motion *in limine*, where it sought, in part, "[t]o prohibit any mention of the amendment of the complaint, the particular charges pursued, or the dismissal of certain counts of the complaint prior to trial." At the hearing on the motion, defense counsel indicated that he had no intention of mentioning any of the information the State sought to preclude, and the trial court granted the State's motion.

¶ 5 During opening statements, defense counsel argued that the incident in question was a spat between a brother and sister, and did not rise to the level of a criminal offense. At trial, Rey Garza, who was 56 years old at the time of trial, testified that defendant, who was 55 years old at the time of trial, was his sister. On May 22, 2010, Rey was cutting the lawn of Tim Metz, who lived at 3233 South Leavitt Street in Chicago. Metz, Rey, and defendant all resided on the same block. While Rey was cutting the lawn, defendant was throwing rocks and swearing at him from about 15 feet away. The rocks struck his shoulders and legs six or seven times, and Rey stated that the rocks hurt and left red marks on his body. Rey went to his house and called the police, but did not seek medical attention or take pictures of his injuries. Timothy Metz testified similarly to Rey. He also testified that he witnessed defendant throw rocks and debris at Rey, striking him in the upper body. Metz assumed Rey was hurt when he was hit with the rocks.

¶ 6 Deputy Sheriff Christopher Staszak, who lived in the neighborhood, testified that on the date in question he heard defendant yelling and saw her throwing what appeared to be rocks at Rey, which struck Rey's upper body. Staszak went inside of his house to tell his wife what was occurring outside. When he returned, defendant was inside of her house and Rey was outside. Staszak never called 9-1-1 or arrested defendant. Staszak also testified that defendant told him that she was throwing coins, not rocks, at Rey.

¶ 7 The defense rested without presenting evidence. During closing argument, defense counsel argued that not every indignity is a crime, and that if his own sister was prosecuted for everything she did to him, she would be serving a life sentence.

¶ 8 Following closing argument and during jury deliberations, the trial court received a note from the jury. The note inquired, "[i]s there a legal definition of bodily harm?" The court responded with Illinois Pattern Jury Instruction 11.65(a), which stated that, "[t]he term bodily harm means physical harm and includes but is not limited to sexually transmitted diseases, pregnancy and impotence." The jury ultimately found defendant guilty of domestic battery and the court sentenced her to 18 months' conditional discharge.

¶ 9 On appeal, defendant contends that he was not provided effective assistant of trial counsel. He specifically maintains that trial counsel's failure to impeach Rey with his own sworn complaint established that counsel's performance was deficient, and that he was prejudiced by the deficiency.

¶ 10 The question of whether defense counsel provided ineffective assistance requires a bifurcated standard of review. *People v. Harris*, 389 Ill. App. 3d 107, 131 (2009). We defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, but make a *de novo* assessment of the ultimate legal issue regarding whether counsel's actions support an ineffective assistance claim. *Harris*, 389 Ill. App. 3d at 131.

¶ 11 Counsel is ineffective when: 1) counsel's performance falls below an objective standard of reasonableness; and 2) the deficient performance prejudiced the defendant to such an extent that he was denied a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant must overcome the presumption that the challenged action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. The benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 696.

¶ 12 "[T]he decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel." *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). The decisions that counsel makes regarding matters of trial strategy are "'virtually unchallengeable.'" *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007), quoting *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). In fact, even mistakes in trial strategy or tactics will not, of themselves, establish that counsel was ineffective. *Palmer*, 162 Ill. 2d at 476. The issue of counsel's competency is determined by examining the totality of counsel's conduct, and not isolated incidents. *People v. Ayala*, 142 Ill. App. 3d 93, 99-100 (1986).

¶ 13 In this case, defendant's ineffective assistance claim centers on trial counsel's decision not to impeach Rey with his original complaint, which indicated he did not receive any visible marks from the rocks defendant used to strike him. This statement was in contrast to Rey's testimony, which indicated that the rocks left red marks on his body. Defendant now contends that had trial counsel impeached Rey with his original complaint, the jury would have agreed on the existence of reasonable doubt as to bodily harm, and the verdict would have been different. We disagree.

¶ 14 Defense counsel's decision to forego presenting the original complaint to perfect the impeachment of Rey was not deficient performance. Prior to trial, the court granted the State's motion *in limine*, which precluded defendant from making any reference to the amendments to the complaint. It is not objectively unreasonable for defense counsel to follow the orders of the court. See *People v. Bailey*, 232 Ill. 2d 285, 289 (2009) (stating that counsel's performance is constitutionally deficient only if it is objectively unreasonable under prevailing professional norms). Moreover, we agree with the State that counsel's decision to refrain from impeaching Rey with the pre-amended complaint constituted sound trial strategy. During opening and closing statements, defense counsel repeatedly asserted that the prosecution of the instant case was unreasonable because the matter involved nothing more than a spat between siblings. Eliciting testimony from Rey regarding whether the rocks left red marks on his body would not have advanced counsel's theory that this was not a case that required prosecution.

¶ 15 Defendant likewise cannot show that he was prejudiced by counsel's performance. Defendant's argument that the jury would have been left with no evidence of bodily harm if Rey had been impeached with the original complaint is untrue. There is no requirement that the evidence demonstrate a visible injury such as bruising to establish bodily harm. *People v. McEvoy*, 33 Ill. App. 3d 409, 411 (1975); see also *People v. Haywood*, 118 Ill. 2d 263, 276 (1987) (stating that physical pain may constitute bodily harm). Here, Rey specifically stated that it hurt when defendant pelted him with rocks. Rey's testimony was corroborated by Metz who testified that he would assume Rey was hurt where he witnessed him being hit by rocks or debris. Because defendant cannot establish that impeachment of Rey on the issue of visible injury would have changed the outcome at trial, defendant's claim of ineffective assistance must fail.

¶ 16 In reaching this conclusion, we are not persuaded by defendant's argument that nothing in the motion *in limine* precluded the defense from challenging Rey's testimony with his prior sworn

statement. Defendant specifically argues that a review of the motion reveals that it was not prepared specifically for this case because boilerplate was used in order to preclude defense counsel from making arguments that are universally recognized as irrelevant. Regardless, the motion clearly stated that the State sought to prohibit "any mention of the amendment of the complaint, the particular charges pursued, or the dismissal of certain counts of the complaint prior to trial." Thus, the language of the motion plainly shows that the State's intention was to prevent defense counsel from referring to the amendments made to the complaint, and the motion was ultimately granted by the trial court without objection from defense counsel. Furthermore, as stated above, we are not persuaded that defendant was prejudiced by counsel's failure to impeach Rey with the statement in question.

¶ 17 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 18 Affirmed.