SECOND DIVISION
July 14, 2015

No. 1-13-0565

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. 11 CR 16148
	)	
CHRISTIAN GARDNER,	)	Honorable
	)	Michele M. Simmons,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant failed to establish either that his trial counsel's closing argument constituted an unequivocal concession of defendant's guilt on the charge of disarming a peace officer or that, but for counsel's allegedly deficient performance, the result of defendant's bench trial would have been different.

¶ 2 Following a bench trial, defendant Christian Gardner was convicted of disarming a peace officer, attempted disarming of a peace officer, and two counts of aggravated battery of a peace officer. The court sentenced him to concurrent prison terms of eight years for disarming a peace

officer and five years for one count of aggravated battery. Defendant was also convicted of misdemeanor driving while intoxicated (DUI) and was sentenced to 200 days in the Cook County Department of Corrections (CCDOC). On appeal, defendant contends his trial counsel was ineffective when in closing argument he conceded defendant's guilt to the charge of disarming a peace officer. We affirm.

¶ 3 The prosecution of defendant on multiple felony counts and the DUI arose from a late-night incident when defendant refused to pull over his vehicle after a police officer clocked him for speeding. He was ultimately forced to stop his vehicle, and an altercation followed between defendant and police officers from two municipalities. The State's evidence at defendant's bench trial consisted primarily of the testimony of three police officers, video recordings from two police car mounted cameras, testimony from two hospital emergency room workers, and a hospital urinalysis detecting the presence of marijuana in defendant's urine.

¶ 4 Officer Gregory Eggebrecht of the Thornton Police Department testified that on September 3, 2011, at about 12:30 a.m., he observed defendant driving a red Chevrolet Monte Carlo at a high rate of speed southbound on Halsted Street in Thornton. Eggebrecht activated his radar and locked in the vehicle's speed at 51 miles per hour in a 35 mile-per-hour speed limit zone. Eggebrecht was in uniform and driving a marked police vehicle. He positioned his police vehicle behind defendant, activated his red and blue emergency lights and siren, and also shined his spotlight back and forth across the rear-view mirror and side mirror of defendant's car. Defendant did not stop; he turned westbound on 183rd Street and sped up. Eggebrecht radioed his dispatch that he was chasing a vehicle that would not pull over. By then he had moved from

Thornton into Homewood. Eggebrecht's police car was in the left lane and caught up and pulled alongside of defendant, who was in the right lane. Eggebrecht made eye contact with defendant and pointed over to the side of the road, indicating defendant should pull over to the right. Defendant looked at Eggebrecht, put his hands up with his palms up, shook his head from side to side, and then accelerated.

¶ 5 Sergeant Richard Sewell of the Homewood Police Department was in uniform that night driving a marked police vehicle equipped with an in-car video camera system. The video portion was operational that day; the audio was not working. At about 12:30 a.m. he was driving eastbound on 183rd when he observed Eggebrecht's Thornton police car coming toward him, its lights and siren activated, following a red sedan heading westbound. The two vehicles were going over the speed limit and passed Sewell at 183rd and Regal Road. Sewell activated the lights of his own police car, made a U-turn to catch up to them, and pulled behind defendant's car in the right-hand lane. The video portion of Sewell's in-car camera was recording and was played at trial. It showed, and both Eggebrecht and Sewell testified, that defendant's vehicle finally came to a stop only when the right-hand lane was blocked ahead of him by another vehicle. Defendant then started to pull his car to the left where there was a bit of room between Eggebrecht's police car and the vehicle in the right lane, and defendant attempted to pull out onto the left lane. Eggebrecht pulled his police car forward to block defendant from pulling out, and Sewell moved his squad car to the left rear of defendant's car to prevent him from backing up.

¶ 6 Eggebrecht exited his vehicle and drew his service weapon. Sewell also exited his vehicle with his service weapon in his left hand and his ASP baton in his right hand. Defendant had a

passenger in the right front seat, later identified as his younger brother, Capriest Gardner. Eggebrecht moved from the driver's side of his police car to near the driver's side of defendant's car and covered both the driver and his passenger with his service weapon. Both officers ordered the car's occupants to raise their hands, and they complied. Sewell told defendant to put the car in park, take off his seat belt, and get out. Defendant did place the car in park but said, "No, I'm not getting out." There were at least three to four commands to defendant to get out of his car. Defendant could have gotten out of the car if he had undone his seat belt, but he did not; he remained seated in the car. Sewell holstered his service weapon, undid defendant's seat belt, and grabbed defendant's left arm, pulling him from his car. The two men began to struggle and fell near the left front side of Sewell's police car. The two men slipped out of view of Sewell's video camera, with the video recording showing that at that moment Sewell's left hand was grasping both his baton and a portion of defendant's shirt. Sewell testified that the two men fell to the ground, with defendant on his back and Sewell on top. They began fighting, with defendant kicking at Sewell's legs at least twice and punching Sewell in the chest more than three or four times. Sewell ordered defendant to stop fighting, stop resisting, and to turn over and place his hands behind his back. He did not comply. During the struggle, Sewell attempted to strike defendant with his baton, which was then fully extended to about 16 inches in length. Defendant grabbed the top portion, pulled it out of Sewell's hand, and discarded it on the ground.

¶ 7 At about that time, two more uniformed Homewood police officers arrived in separate police cars: Officer Patrick Siemsen, whose video camera system recorded the incident, and Sergeant Tobin (the only officer present who did not testify at trial). Siemsen came over to where

Sewell and defendant were struggling next to the front left tire of Sewell's police vehicle and attempted to help Sewell get defendant handcuffed. Defendant continued to punch and kick at them. Siemsen was on the left side of defendant's body, Sewell on his right side. Sewell told defendant to stop resisting, that he was under arrest, and to stop fighting, but defendant continued to struggle with Sewell. Siemsen saw defendant kicking Sewell's body and legs.

¶ 8 Siemsen tried to handcuff defendant, who began punching, kicking and striking Siemsen in the arms, legs, and chest. Defendant lowered his head and shoulders and drove Siemsen backwards, making contact with Siemsen around his waist and lower chest area. Siemsen was placed off-balance. He felt a tug on his weapon which he wore on his right side in a security retention holster. He saw both of defendant's hands on the handle portion of his handgun and on the holster. Siemsen felt the holster moving toward defendant as he pulled it. Siemsen thought he was going to be killed so he told defendant, "I'm going to f*****g kill you, mother f****r." Defendant was unable to remove the handgun because Siemsen beat defendant's hands off while moving away from him. Defendant grabbed Siemsen and flipped him upside down, head over heels, slamming him on the ground. The three men were below the range of either Sewell's or Siemsen's police car camera, but when Siemsen flew into the air, his feet cartwheeling through the air were visible on Sewell's video. Siemsen testified at trial that he did not sustain any injuries. Sewell stepped back and deployed his Taser, ejecting two darts or probes which delivered an electrical shock. Defendant rolled to his left and tried to get up. Sewell ordered defendant repeatedly, "Lie on your stomach." Sewell moved in to attempt to handcuff defendant, and defendant started to kick Sewell. Eggebrecht then deployed his own Taser.

¶ 9 At about that time, Capriest Gardner exited the passenger side of the red car and ran towards Sewell, Eggebrecht and Siemsen. He was tackled from behind by Sergeant Tobin on the front right-hand side of Sewell's police car. Siemsen ordered both defendant and his brother Capriest, "Put your hands behind your back." Eggebrecht and Sewell were able to handcuff defendant, and Siemsen helped Tobin place Capriest in custody. Eggebrecht and Sewell took defendant to Eggebrecht's squad car and put him in the rear seat. Defendant lay on his back and kicked the window and door frame of the left-rear door, damaging the door panel and popping the window frame. As a result of his struggle with defendant, Sewell sustained scrapes to his left leg and left elbow.

¶ 10 Defendant and Capriest were transported to the Homewood police station, where defendant refused to get out of Eggebrecht's police car. Sewell assisted Eggebrecht in pulling defendant out of the squad car. In the booking room, it took Eggebrecht, Sewell and Tobin to get defendant secured to a bench. Defendant's behavior became very strange. One minute he would be happy and the next minute he would curse them. He was biting at the air and making strange facial movements. He appeared to Siemsen to be catatonic. Capriest exhibited similar symptoms but not to the same extreme. Because of defendant's behavior, the officers contacted the Homewood paramedics to transport defendant to the hospital. It took four police officers and three paramedics to secure defendant to the hospital gurney because he was resisting, fighting, and biting at them. Eggebrecht was concerned defendant was under the influence of drugs of some type.

¶ 11 Sean Cain, a registered nurse, and Marco Martin, an emergency room technician, testified that they were on duty at South Suburban Hospital when defendant arrived at the emergency room by ambulance at about 1:30 a.m. on September 3. Defendant was very agitated and upset, thrashing about on the cart, yelling that he did not want to be there, and using derogatory terms toward the EMS staff and ER staff. He was uncooperative, screaming and yelling, "I'm not black. I'm Asiatic. This is racial profiling." A mesh spitting mask had been placed over his face. Hospital security was summoned. Defendant was placed in restraints on his wrists and ankles and was strapped to a gurney. Cain checked defendant's vitals and administered a drug, Geodon, to combat defendant's thrashing. Martin tested a sample of defendant's urine which tested positive for THC – marijuana. The urinalysis report was received in evidence at trial. DVDs of the camera videos from the police cars of Sewell and Siemsen, and photographs of Sewell's abrasions on his leg and elbow, were also received in evidence

¶ 12 After the State rested, defendant requested a "directed finding of not guilty" on all charges. The trial court granted the motion as to one of the counts, resisting or obstructing a peace officer (Siemsen), in that the State failed to prove that defendant's resisting was the proximate cause of injury to Siemsen because Siemsen testified he was not injured. The motion was denied as to all other counts.

¶ 13 In the defense case in chief, Capriest Gardner testified that he was 19 years old and defendant's brother. On the date and time in question, he was the passenger in defendant's vehicle. He noticed the police when he saw the police officer in the squad car next to them. The officer "had his gun pointed out to the driver's side window," approached their vehicle, and told

them to put their hands up in the air. Capriest and defendant complied. The armed officer said, get the F out of the car. Then he snatched defendant out of the car and slammed defendant on the ground. Capriest could not see defendant any more but he heard him scream. Capriest exited out his side of the vehicle to get a closer view of what was going on. Capriest asked the officers what they were doing to defendant. A police officer slammed him onto the hood of the car. He was thrown to the ground. He heard defendant say, we are human beings, this is not right. Defendant was screaming. Capriest repeated the same thing, we are human beings, this is not right. A police officer punched him in the face while Capriest was on his knees and started to choke him. He screamed and blacked out for about 10 seconds. Then an officer escorted him to a police car. Capriest saw defendant again at the police station. Defendant looked normal and did not want to go to the hospital.

¶ 14 On cross-examination, Capriest stated that as defendant was driving them in a red Monte Carlo through Thornton, the car was speeding. A police car made a U-turn, pulled behind the red Monte Carlo, and activated his lights and siren, but defendant kept driving. Then a Homewood officer also did a U-turn and started pursuing their vehicle, so there were two police cars with their lights activated and their sirens activated following their car. The police officer pointed to defendant to pull over; he was pointing to the right, but defendant kept going. Defendant had cannabis in his system that day. Capriest was smoking cannabis with him that day. He was taken to the hospital because he was in the lockup staring out into space. He did not see defendant fighting with the police at the police station. Defendant was acting normal. Capriest denied that

his brother was using profanity at everybody at the station. It was true that defendant was screaming, "I am not black, I am Asiatic." That was normal behavior for defendant.

¶ 15 Defendant testified on his own behalf. He admitted that on October 1, 2008, he pled guilty to the offense of vehicular hijacking. On September 3, 2011, at about 12:30 a.m., he was driving on 183rd Street. Initially he was in Thornton. The Thornton police officer's lights were flashing red and blue when he saw them. The officer's headlights were really bright. Defendant kept on driving even with the officer's lights being activated. He did not hear the siren. He did not know the officer was trying to pull him over. He was not speeding. He told his brother to look and see if there were any drugs in the car. He told his brother to throw the drugs out the window. Defendant did not have anything on him, so he pulled over. He did not refuse to stop; he simply did not pull over immediately. He saw the officer pointing to the right but he kept driving. He did not turn off the ignition; the officers did. The officer told defendant to put the car in park and he did so. Defendant did not turn off the engine. The officer told him to get out of the car. He leaned away from the officer. He did not follow the command because he had his seat belt on. When the officer pulled him out of the car and he fell to the ground, he denied he started fighting with the officer. The officer did yell at him to stop resisting, but he never resisted. Defendant did not see the officer holding a baton or billy club type of weapon. The officer slammed defendant down to the ground with his knee in defendant's back and had defendant's hands wrapped behind his back. Defendant could not do anything. He said, please don't hurt me. Defendant denied he grabbed on to Siemsen's gun. He denied that when he could not get Siemsen's gun, he flipped Siemsen to the ground.

¶ 16 They took defendant to the police station. He did not want to give the officers any more stress or attitude. They took him to the hospital. He did not want to go and did not feel he needed to go. When they took him there, they strapped him to a gurney and put a mask on him like a fish net with little holes. He did not know why they put the mask on. He did not attempt to spit on anybody. He told an officer he had to urinate. An EMT or EMS told him to urinate in a jar.

¶ 17 Defendant admitted marijuana was still in his system when he was driving his car. He had been on marijuana "way earlier that morning." He denied fighting the officers. He denied he picked Siemsen up and flipped him to the ground; he maintained Siemsen fell over his shoulder. He denied fighting with the officers at the police station or cursing at them. He flailed his arms only when they attempted to put him on a gurney. The officers were viciously attacking him with the EMTs and putting him on the gurney. They restrained him on the gurney. He was not spitting on anyone.

¶ 18 After both sides rested, the parties presented closing arguments. Defense counsel argued that defendant did nothing wrong after stopping the car, that he was not violent, and that the police were the aggressors. Defense counsel argued that when Sewell went up to defendant's car with his gun and his baton, he reached in and threw defendant to the ground. "We see very little of him after that, of my client. We can hear him squirming and screaming." "The officer overreacted in this situation." "And I want the Court to take a good look at the video and see who was the aggressor in this particular instance. It certainly wasn't my client. He wasn't the aggressor." Describing the actions of Tobin and Siemsen overpowering Capriest, defense counsel argued: "Now, that is not the actions of the officers under control. Somebody has to be under

control in the streets. These officers were not." "This was an over reaction by the police, Judge, and I am asking you to find my client not guilty."

¶ 19 After the parties delivered closing arguments, the trial court carefully made findings as to each remaining charge, beginning with this observation:

> "I will start off by saying this clearly comes down to an issue of credibility. Credibility and further evidence that this Court has heard by way of a drug screen that was done on the defendant, also by way of what the Court has viewed with its own eyes and ears with regards to the [video] exhibits ***."

¶ 20 The court stated that the evidence refuted defendant's claims that he did not initially see the officers' attempts to stop him on the road, he was not combative to anyone, and he simply did not move at the pace the police asked him to. The court rejected defendant's credibility on the point that, despite having claimed he was mistreated at the scene, he did not want to go to the hospital. The court noted the two hospital witnesses who testified to defendant's combative and bizarre behavior at the hospital, including thrashing about, swearing, and having to wear a mask because he was spitting. The court noted it took four police officers and three paramedics to restrain him and that Geodon was administered to calm him down. The described combative behavior was contrary to defendant's own testimony. The court also pointed to the admission of both brothers to having smoked marijuana and that the test showed the marijuana was still in defendant's system.

¶ 21 The court found defendant guilty of misdemeanor driving under the influence and sentenced him to 200 days in the CCDOC, time considered served and actually served. On count

1, disarming a peace officer (Sewell), the court found defendant guilty based on the court's credibility determination that defendant grabbed Sewell's baton as Sewell was attempting to subdue him. The court sentenced defendant to eight years in prison on that count. The court also found defendant guilty on count 2, attempting to disarm a peace officer (Siemsen) and held that the count merged with count 1. On count 6, aggravated battery, contact of an insulting or provoking nature (Siemsen), the court found defendant guilty and noted that the video from Sewell's camera showed Siemsen's feet sailing high through the air. The court sentenced defendant to five years in prison concurrent with the eight-year sentence on count 1. On Count 9, aggravated battery based on kicking and punching Sewell, the court found defendant not guilty as there was insufficient evidence of bodily harm to Sewell. The court found defendant guilty on count 12, aggravated battery based on contact of an insulting or provoking nature (Sewell) and ruled that the count merged with count 6. The court found defendant not guilty on count 16, resisting or obstructing a peace officer (Sewell), as resisting was not the approximate cause of injury to Sewell, who was not injured.

¶ 22 Defendant's sole contention on appeal is that his trial counsel was ineffective for conceding in closing argument that defendant was guilty of disarming a peace officer (Officer Sewell). The relevant portion of counsel's closing argument is as follows:

> "Officer Siemsen [sic] says his baton was snatched out of his hand and thrown to the ground. Now, we can look at the bare words of that law and you can say that, yes, he disarmed a police officer. What was his intent? Was his intent to use – if he did do that,

was his intent to use that baton? Did he try to strike Officer Sewell after he snatched that baton out of his hand? Did he hit Officer Sewell with that? No.

Judge, the only thing I can tell you is you can follow the absolute letter of the law and convict my client. But with the testimony of these officers, the video that was going on, and the attended stock in this matter, my client was not the aggressor in this situation."

¶ 23 Defendant asserts that his trial counsel failed to represent him effectively in delivering this argument because it contradicted defendant's own testimony denying he had disarmed Sewell and the record contains no indication defendant consented to his counsel's concession of guilt. Defendant also contends that his counsel misapprehended the law in arguing that defendant did not use the baton and that he was acting in self-defense, not as the aggressor, where neither argument was a defense to the charge. Further, defendant argues that Sewell's video camera showed Sewell did not have his baton in his hand as he threw defendant to the ground, but this argument is belied by the video showing the baton in Sewell's left hand as he and defendant move off-camera toward the ground. The State responds that the two-pronged test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), requires a showing of deficient performance of counsel and prejudice to the defendant from that deficient performance, and that defendant cannot establish either prong of the *Strickland* analysis where defense counsel's argument was a matter of trial strategy and that defendant suffered no prejudice. The State asserts counsel's statement, when read in context, was a challenge to Officer Sewell's credibility and not a concession of guilt.

¶ 24 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy both prongs of *Strickland*. *People v. Salas*, 2011 IL App (1st) 091880, ¶ 91. As to the first prong, a 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. *People v. Olinger*, 176 Ill. 2d 326, 356 (1997). As a general rule, matters of trial strategy are immune from claims of ineffective assistance of counsel. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). Here, the parties' arguments on appeal, offering conflicting interpretations of the portion of defense counsel's closing argument under scrutiny, lead us to the conclusion that the statement did not constitute an unequivocal concession of defendant's guilt on the charge of disarming a peace officer. Clearly, counsel qualified his statement when he asked, "Was [defendant's] intent to use – *if he did do that*, was his intent to use that baton?" The statement was equivocal, subject to more than one interpretation.

¶ 25 In *People v. Elam*, 294 Ill. App. 3d 313 (1998), we affirmed the trial court's judgment finding defendant guilty but mentally ill of home invasion, armed violence, attempted kidnapping and aggravated criminal sexual assault, rejecting his claim on appeal that his trial counsel was ineffective in acknowledging evidence of guilt on all charges. We held that trial counsel's representation subjected the State's case to meaningful adversarial testing. *Id.* at 320. "Likewise, counsel did not unequivocally abdicate defendant's innocence to the State's charges or concede all of the elements [of the charges]." *Id.* Similarly, in the instant case defendant's trial counsel subjected the State's case to meaningful adversarial testing. Counsel presented an opening statement, energetically cross-examined the State's witnesses, presented defense

witnesses, made objections, forcefully pursued a partly successful motion for a finding in defendant's favor on one count at the end of the State's case, vigorously presented closing argument, and filed and presented a motion for new trial and a motion to reconsider sentence.

¶ 26 Moreover, we cannot agree with defendant that the portion of defense counsel's closing argument referred to above was a complete abandonment of defense to the charges. Even if counsel did concede he knocked the baton out of Sewel's hand, he did not concede defendant's guilt as to every element of the offense. To prove defendant guilty of disarming a peace officer, the State was required to show defendant took a weapon (baton) from a person (Officer Sewell) whom he knew was a peace officer, without that officer's consent, *while the officer was performing his official duties*. 720 ILCS 5/31-1a (West 2010). Here, defense counsel did not concede that the incident occurred while Sewell was performing his official duties. At every opportunity, in cross-examining State witnesses, presenting the testimony of the defense witnesses, moving at the close of the State's case in chief for findings in defendant's favor, and presenting argument at the close of trial, defense counsel vigorously challenged the State's position that Sewell was acting in the performance of his official duties when he pointed his service weapon at defendant and, when defendant did not respond quickly enough, snatched the passive defendant out of his car, threw him to the ground, and tasered him.

¶ 27 We conclude that defendant has not met his burden on appeal in establishing the first prong of the *Strickland* analysis.

¶ 28 Moreover, defendant has failed to establish that, even if counsel's performance was deficient, there was a reasonable probability that the result of the proceeding would have been

different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). There is no indication in the record that the trial court gave any consideration to defense counsel's alleged concession in reaching its factual findings. One manner in which a bench trial differs from a jury trial is that the record will often reveal in a bench trial an expression of the court's specific findings. This was a bench trial, and in announcing her findings the trial judge methodically dealt with each count of the information and the reasons for her findings. The judge stated that her determinations were based upon the officers' testimony and the squad-car videos, as well as the evidence from the emergency room professionals and urinalysis report indicating that, despite defendant's claim to the contrary, he was combative, agitated and uncooperative, possibly as a result of his ingestion of marijuana. The judge made no reference to defense counsel's closing argument in announcing her findings.

¶ 29 As the trier of fact, it was the trial court's responsibility to determine the credibility of all witnesses, including Officer Sewell, and to resolve any conflicts in the evidence. The trial court was in a superior position to assess the credibility of the witnesses, observe their demeanor, weigh their testimony, and resolve any conflicts therein. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Defendant's testimony differed from that of Sewell and other officers on a number of points, some of which were plainly resolved in the State's favor where the police car videos clearly impeached defendant's credibility. Defendant has been unable to demonstrate there was a reasonable probability that the result of the proceeding below would have been different if defense counsel had not made the remarks at issue in his closing argument. Since defendant has

not adequately shown how he was prejudiced by his counsel's performance, he cannot prevail on his claim of ineffective assistance. *People v. Woods*, 2011 IL App (1st) 092908, ¶ 38.

¶ 30 For the reasons set forth above, we affirm the judgment of the trial court.

¶ 31 Affirmed.