2016 IL App (1st) 141502-U

FIRST DIVISION
MARCH 14, 2016

No. 1-14-1502

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. 13 CR 2763
	)	
CLARENCE MANNING,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNIGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction is affirmed over his contention that his trial counsel was constitutionally ineffective for failing to request a jury instruction on the lesser-included offense of theft from person where he could not establish prejudice resulted from counsel's allegedly deficient performance.

¶ 2 The State charged defendant Clarence Manning with two counts of armed robbery with a firearm, one count of aggravated discharge of a firearm and one count of robbery. The State proceeded to trial on only the charges of armed robbery with a firearm. 720 ILCS 5/18-2(a)(2),

(3) (West 2012). Following a jury trial, defendant was found guilty of the lesser-included offense of robbery and sentenced to 11 years in prison. On appeal, he contends that his trial counsel was constitutionally ineffective for failing to request a jury instruction on the lesser-included offense of theft from person. For the reasons that follow, we affirm the judgment of the trial court.

¶ 3 At trial, the evidence showed that around midnight on December 23, 2012, Jenaya Saurel and her friend Keivoria Harris were at a house party near the 5900 block of South Rockwell Street in Chicago. After three hours at the party, they decided to leave and walk to a nearby gas station to buy water. While they were walking to the gas station, defendant joined them. Saurel and Harris did not know him and had not asked for his company. Defendant talked to Harris about the party and told her not "to worry about nothing" because he had a gun.

¶ 4 At the gas station, both Saurel and Harris bought a bottle of water. They left the gas station together and began walking back to the party. Defendant stayed behind, talking to an individual in a white car.

¶ 5 Saurel testified that, as she and Harris were walking back to the party, defendant ran up from behind and "tried to grab" her. She pushed him away. Defendant then grabbed Harris and began talking to her. Suddenly, Saurel heard a gunshot nearby. Defendant "grabbed" Saurel, using her "as a shield." Harris also heard one gunshot and saw defendant "ducking behind" Saurel. Harris and Saurel continued walking when they heard a second gunshot. Saurel testified defendant pushed her against a fence and tried to take her purse but she "snatched" it back. A third gunshot rang out. Saurel testified defendant again pushed her against the fence, took her purse and ran down a gangway between two houses. Harris testified she was walking toward

defendant and Saurel, and saw him push Saurel against the "gate," snatch her purse and run off through the gangway. Saurel pursued defendant down the gangway and into an alley, where she eventually caught defendant. She grabbed her purse but defendant "snatched" it back, and he continued to run.

¶ 6 Saurel testified defendant then turned and fired a gun in her direction three times. She saw "fire" coming from the firearm, which she described as "semiautomatic." Meanwhile, Harris had followed Saurel toward the alley, but not into the alley. Harris testified she heard two or three gunshots near the alley, but never saw a gun being fired. Saurel eventually lost sight of defendant and ran back toward Harris, telling her that defendant had a gun. Neither called the police because their phones were in Saurel's purse.

¶ 7 While Saurel looked for someone on the street to help find defendant, Harris walked back to the party. There, she asked people if she could use a cell phone to call the police, but everyone refused, saying "they were too busy." Eventually, Harris and Saurel met up and began walking home. They saw a police car, flagged it down and told the officers what happened. Saurel acknowledged that she never went to the hospital or had any pain in her arms after the incident. Both Saurel and Harris identified defendant in court as the man who took Saurel's purse.

¶ 8 On January 4, 2013, Saurel and Harris were at another party at the same house. They saw defendant. He approached Saurel and asked if she wanted her purse back. She acknowledged telling him that she did not want the purse from him, but would eventually get it back. Because Saurel felt "scared" and Harris felt "paranoid" with defendant at the party, they left. Neither called the police.

¶ 9 On January 6 and 11, 2013, Chicago Police Detective Chopp spoke with Harris and Saurel on the phone, respectively. They provided him with a description and nickname of the individual who took Saurel's purse. Harris told Chopp that she heard five gunshots, not three sets of one gunshot. Harris also told him that she heard the gunshots, then at least five minutes later, defendant pushed Saurel and took her purse. Chopp testified Saurel did not tell him that she had grabbed her purse back from defendant after chasing him into the alley or that she had chased defendant down a gangway into an alley. On cross-examination, Chopp testified Saurel did not tell him defendant had pulled out a gun in the alley or that he had shot at her. However, on redirect examination, Chopp testified Saurel did tell him that defendant pulled out a firearm, pointed it at her and fired. As a result of his conversations with Saurel and Harris, Chopp searched a police database and found an individual who closely resembled the description provided by the women. That individual was defendant.

¶ 10 On January 12, 2013, Chopp conducted two separate photo arrays with Saurel and Harris. Each identified defendant as the individual who took Saurel's purse. Chopp then issued an "investigative alert" concerning defendant and his role in the crime. Three days later, the police arrested defendant. The following day, Saurel and Harris met Chopp at the police station and individually viewed a lineup. Both identified defendant as the individual who took Saurel's purse.

¶ 11 That same day, Chopp interviewed defendant after giving him *Miranda* warnings. Chopp asked defendant if he knew why he had been arrested, and defendant replied "the thing on the 23rd." Defendant admitted that he walked with Harris and Saurel to the gas station and told them

that he was "carrying a handgun because he thought that it would make them feel safe." Defendant also thought that, by saying he had a firearm, "he might be able to have sex with them." He told Chopp that he did not actually have a firearm. While defendant was walking back to the party with the women, he heard gunshots, and admitted to grabbing Saurel and using her as a shield. He told Chopp that another man came toward them with a gun, grabbed Saurel's purse and ran away. However, defendant subsequently admitted to Chopp that he took Saurel's purse. He denied shooting a firearm at her. Defendant eventually threw the purse into a large bush on South Maplewood Avenue between West 59th Street and West 60th Street.

¶ 12 After the interview, Chopp followed defendant's directions, which "were perfect," and recovered a purse from a bush. Chopp also found a set of keys, some female clothes and cosmetic items near the bush. Chopp returned to the police station, where Saurel identified the purse as hers. Both Harris and Saurel identified People's Exhibit No. 6 at trial as Saurel's purse and its contents. Saurel's phone, money and Harris' phone were not in the purse that was recovered.

¶ 13 In defendant's case in chief, the parties stipulated that Chicago Police Officer Dixon spoke with Harris and Saurel the morning in question. Dixon and his partner investigated the crime scene and did not find any evidence. Defendant did not testify or present any other evidence on his behalf.

¶ 14 During a discussion regarding jury instructions, the court asked defense counsel whether she anticipated requesting lesser-included offense instructions on robbery and theft from person. Counsel replied that she would request those instructions and expected the necessary testimony

to come from the State's witnesses. The State objected to the theft instruction, arguing there was testimony that defendant used force, "that he pushed [Saurel] against the gate." The court understood this but stated there might be testimony from "the second witness for a lesser included" instruction on theft. It advised defense counsel to have "a case" regarding theft ready for the court's review.

¶ 15 The next day, at the jury instructions conference, defense counsel only requested a lesser-included offense instruction on robbery. The court confirmed with defendant that he wanted this instruction. Defendant responded that he understood his counsel might argue to the jury that he "may not be guilty of armed robbery but [he is] guilty of robbery." Finding "some evidence" that defendant committed robbery rather than armed robbery, the court allowed the instruction.

¶ 16 In closing arguments, defense counsel conceded that defendant took Saurel's purse, but argued he never had a firearm. The jury convicted defendant of the lesser-included offense of robbery. The court denied defendant's motion for a new trial, based on the State's alleged failure to prove him guilty beyond a reasonable doubt. The trial court subsequently sentenced defendant to 11 years in prison as a Class X offender due to his prior convictions. The court denied defendant's motion to reconsider his sentence. This appeal followed.

¶ 17 Defendant contends his trial counsel was constitutionally ineffective for failing to request a jury instruction on the lesser-included offense of theft from person where counsel already requested a lesser-included offense instruction on robbery, the evidence at trial supported a theft instruction and the instruction was consistent with counsel's trial strategy.

¶ 18 We evaluate claims of ineffective assistance of counsel under the two-prong approach set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). *People v. Givens*, 237 Ill. 2d 311, 330-31 (2010). Under *Strickland*, the defendant must show that his counsel was deficient and that the deficiency prejudiced him. *Id.* at 331. Under the first prong of *Strickland*, there is a strong presumption that counsel's actions or inactions were sound trial strategy. *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 72. Indeed, "the decision whether to tender a lesser-included offense instruction partakes of, and is unavoidably intertwined with, strategic trial calculations, matters within the sphere of trial counsel." *People v. Medina*, 221 Ill. 2d 394, 406 (2006). Under the second prong of *Strickland,* for a defendant to establish prejudice, a reasonable probability must exist that the outcome of his trial would have been different had trial counsel submitted the lesser-included offense instruction of theft. See *People v. Evans*, 186 Ill. 2d 83, 93 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome," or rather, "the result of the trial [was] unreliable or the proceeding [was] fundamentally unfair." *Id.*

¶ 19 The failure to establish either prong precludes a finding of ineffective assistance of counsel (*People v. Henderson*, 2013 IL 114040, ¶ 11), and the defendant bears the burden of demonstrating both prongs. *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 52. A reviewing court may proceed directly to the prejudice component of *Strickland* without determining first whether trial counsel's performance was deficient if it determines that the defendant did not suffer prejudice (*id.* ¶ 70), which is how we proceed in the instant case.

¶ 20 The evidence that defendant committed a robbery was significant. Critically, both of the State's witnesses, Jenaya Saurel and Keivoria Harris, testified consistently that defendant pushed

Saurel into a fence twice when attempting to take her purse. First, defendant pushed Saurel into a fence and unsuccessfully tried to grab her purse. Then, he pushed Saurel again and successfully took her purse and ran away. Detective Chopp also testified Harris told him that defendant pushed Saurel in order to take her purse. Robbery occurs when an individual takes property from another person by either using force or threatening its imminent use. 720 ILCS 5/18-1(a) (West 2012). The degree of force required " 'to constitute robbery must be such that the power of the owner to retain [her] property is overcome, either by actual violence physically applied, or by putting [her] in such fear as to overpower [her] will.' " *People v. Bowel*, 111 Ill. 2d 58, 63 (1986) (quoting *People v. Williams*, 23 Ill. 2d 295, 301 (1961)). This was not a case where the evidence showed defendant merely snatched Saurel's purse. See *People v. Hicks*, 2015 IL App (1st) 120035, ¶ 30 (" '[A] simple snatching or sudden taking of property from the person of another does not of itself involve sufficient force to constitute robbery.' ") (quoting *People v. Patton*, 76 Ill. 2d 45, 49 (1979)). Rather, there was uncontradicted evidence at trial from Saurel and Harris that defendant used force, by twice pushing Saurel into a fence, to take her purse. He used sufficient force to succeed in his second attempt to take the purse. Unlike robbery, theft involves no use of force. *People v. Hay*, 362 Ill. App. 3d 459, 465 (2005). Accordingly, given the evidence of force, no reasonable probability exists that the jury would have found defendant guilty of theft instead of robbery had his trial counsel requested a lesser-included instruction on theft. Therefore, defendant suffered no prejudice, he cannot satisfy the second prong of *Strickland* and his claim of ineffective assistance of counsel fails. *Henderson*, 2013 IL 114040, ¶ 11.

¶ 21 Nevertheless, defendant argues that the jury acquitted him of armed robbery, demonstrating it "already disbelieved" Harris and Saurel's testimony that he was armed with a firearm. Defendant therefore infers the jury might also have disbelieved their testimony concerning defendant's use of force had a lesser-included instruction on theft been presented to the jury. However, unlike Saurel and Harris' testimony regarding the use of force, the evidence that defendant used a firearm was contested at trial. Saurel testified that defendant shot at her with a semiautomatic firearm. Similarly, Harris testified that defendant told her he had a gun, and she heard gunshots near the alley. But in defendant's statements to Chopp, he denied having a firearm. Further, when the police searched the area of the crime shortly after it happened, they did not recover evidence that a firearm had been fired in the alley. Therefore, there was conflicting evidence that defendant committed an armed robbery by using a firearm. In contrast, there was only consistent and uncontested evidence that he took the purse by the use of force, *i.e.*, committed a robbery. The jury's failure to credit Saurel and Harris' testimony regarding defendant's use of a firearm does not mean we can simply assume the jury would have wholly rejected their testimony regarding his use of force. See *Hicks*, 2015 IL App (1st) 120035, ¶ 34.

¶ 22 Defendant also argues that, because he did not admit to pushing Saurel but did admit to stealing her purse, this establishes he did not use force. The record shows that defendant may have admitted taking Saurel's purse but he never denied pushing her. Needless to say, defendant's failure to admit using force in no way establishes that he did not use force. Next, defendant asserts that his "forthrightness" with Chopp "demonstrates his credibility and truthfulness." However, defendant neglects to mention that he initially told Chopp that another man stole

Saurel's purse and only later admitted to stealing the purse himself. Defendant lastly argues his act of offering the purse back to Saurel at a party on January 4, 2013, demonstrates he did not use force in taking the purse. This is a meritless argument as an isolated comment made by defendant at a party approximately two weeks after the crime, simply has no bearing on what occurred on the morning in question.

¶ 23 Finally, there being no reasonable probability that the outcome of defendant's trial would have been different had the theft instruction been given, we need not address defendant's argument that, had his counsel requested the instruction, he would have been sentenced as a Class 3 felon rather than as a Class X offender. Similarly, we need not address defendant's baseless contention that the court would have accepted the instruction had counsel requested it.

¶ 24 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.