2016 IL App (3d) 140644-U

Order filed November 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0644 Circuit No. 14-CF-266
KIM D. KAMMANN,	)	Honorable Sarah F. Jones, Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE CARTER delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant did not receive ineffective assistance of counsel.

¶ 2 Defendant, Kim D. Kammann, appeals his conviction for aggravated battery. He argues that defense counsel provided ineffective assistance at trial. We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant by superseding indictment with three offenses: (1) aggravated battery (count 1) (720 ILCS 5/12-3.05(a)(4) (West 2014)), (2) aggravated battery

(count 2) (720 ILCS 5/12-3.05(d)(1) (West 2014)), and (3) domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2014)).

¶ 5 The State brought the two charges of aggravated battery under two different statutory subsections. Count 1 alleged that on February 7, 2014, defendant: "knowing Rose Kammann to be an individual of 60 years of age or older, pushed Rose Kammann about the body, and as a result of said battery, *caused great bodily harm* *** to Rose Kammann." (Emphasis added.) That variant of aggravated battery is a Class 2 felony. 720 ILCS 5/12-3.05(a)(4), (h) (West 2014). Count 2 alleged only that defendant pushed Rose Kammann knowing her to be an individual of 60 years of age or older, and did not allege great bodily harm. That variant of aggravated battery is a Class 3 felony. 720 ILCS 5/12-3.05(d)(1), (h) (West 2014). The domestic battery count alleged that defendant bit Mary Kammann.

¶ 6 A. Trial

¶ 7 At trial, Mary testified that she was married to defendant from 1994 to 2007. She and defendant had two children, Kaelan (11 years old at the time of trial) and Kylee (7 years old at the time of trial). Mary testified that Kaelan was to participate in a spelling bee in Shorewood on February 7, 2014. To save time in the morning, the family stayed at a motel in Joliet the night before. Mary, Kaelan, Kylee, defendant, and Rose stayed at the motel. Mary explained that Rose is defendant's mother.

¶ 8 On the morning of February 7, 2014, defendant became angry, and began to yell at Mary and call her names. Mary testified that she slapped defendant on the leg. Defendant got up from his chair and went to the telephone, in an attempt to call the police. Mary hung up the telephone. She testified that defendant continued to attempt to call the police, but she hung up the telephone three times. After the third time, defendant bit Mary on the elbow.

¶ 9 Mary testified that defendant then tried to leave the room, in what she thought was an attempt to reach the lobby and call the police. Mary blocked the door so defendant could not exit. Mary testified that while she and defendant were by the door, Rose was standing by a cot positioned between the room's two beds, approximately five feet from Mary and defendant.

¶ 10 Mary testified that during the altercation between she and defendant, Rose had been imploring them to stop arguing. After Mary blocked defendant's initial attempt to leave the room, defendant turned around, told Rose to "shut up," and shoved her. Rose fell straight back. Mary testified that Rose never touched or attempted to touch defendant, and that her fall was the result of defendant's push, rather than a trip. Afterward, Mary noticed that Rose had a large bump on the upper-back portion of her head.

¶ 11 Rose testified that she is defendant's mother. On the day of the incident in question, Rose was 82 years old. That morning, defendant had become upset regarding Kaelan's behavior, and began criticizing Mary's parenting and calling her names. Defendant was loud. Though Rose did not see it, she understood that after defendant had been yelling for awhile, Mary slapped him. Next, defendant attempted to use the telephone, but Mary prevented him from doing so. Defendant then went to leave, but Mary prevented him from getting through the door. At this point, Rose was standing in the middle of the room, approximately 12 feet from the door. After being unsuccessful in his attempt to leave, defendant turned around, "came right back at" Rose, and pushed her down. Rose testified that defendant pushed her down with both of his hands, and that she had not laid her hands on defendant.

¶ 12 The push sent Rose to the floor, and she landed on her buttocks. Rose described her impact with the floor as "[v]ery hard." After her buttocks hit the floor, the back of Rose's head

hit the floor. Though her granddaughter thought Rose was dead, Rose assured her that she would be okay. Police eventually arrived and questioned Rose, but she declined to go to the hospital.

¶ 13 Rose testified that she felt pain in her buttocks in the days following the incident. She went to the doctor less than a week later, for a previously scheduled appointment. The doctor ordered x-rays, which showed that Rose had fractured her tailbone. She received a cortisone shot to alleviate the pain, but it was ineffective. Rose eventually had surgery to repair her tailbone.

¶ 14 Kaelan testified that on the morning in question, defendant brought him some pancakes for breakfast, but he complained because defendant had forgotten a fork. Defendant then began yelling at Mary, for failing to discipline Kaelan. Mary then "starting hitting" defendant on the leg. Defendant attempted to use the telephone, but Mary stopped him. Defendant then bit Mary on the elbow.

¶ 15 Kaelan testified that defendant then moved to the door, but Mary stopped him. Defendant and Mary continued yelling at each other by the door. Rose told them to stop fighting. Kaelan testified: "Then my dad thrust at [Rose] and pushed her down."

¶ 16 Joliet Police Officer Michael Botzum testified that he responded to the scene of the incident. Upon encountering defendant in the motel lobby, defendant explained that he had called the police, and that Mary had struck him in the face six or seven times. Botzum did not observe any marks on defendant's face that day, nor did he see any marks develop over the next week. Botzum later spoke with Mary, and observed that she had a bite mark on her right elbow. He also spoke to Rose, who complained of pain to her head. Botzum observed a large lump on the top of Rose's head, toward the back.

¶ 17 Defendant testified that he and Mary were yelling at each other on the morning in question. Mary then approached him and struck him six to eight times in the chest, face, and arm.

Defendant ran for the telephone, hoping to call the police. He testified that Mary then jumped on top of him and put her arm across his neck and face. He reached for the telephone, but Mary repeatedly took it out of his hand. Defendant testified that he could not breathe, so he bit Mary's elbow. The bite caused Mary to get off of defendant, at which point he moved for the door. Defendant testified that as he tried to leave, Mary shoved him. He tried to grab her by the arm to move her from the door, but was unable to do so.

¶ 18 Defendant then decided to go to the other side of the room, to get away from Mary. Rose was standing in the middle of the room with an angry look on her face. As defendant approached her, Rose struck him in the chest with both of her fists. Defendant testified that he grabbed Rose by the arm in an effort to move her out of the way. As he did so, Rose slipped on the carpeting and fell. Defendant testified that he did not shove Rose. After Rose fell, Mary approached, and defendant was able to leave the room. He went to the motel lobby and told the clerk to call the police.

¶ 19 B. Jury Instruction Conference

¶ 20 Prior to closing arguments, the court and the parties held a jury instruction conference. At that conference, defense counsel requested that the court instruct the jury as to the definition of "knowingly." Reading from Illinois Pattern Jury Instructions, Criminal, No. 5.01B (4th Ed. 2000) (hereinafter, IPI Criminal 4th No. 5.01B), defense counsel asked that the jury be instructed that "a person acts knowingly with *** regard to the result of his conduct when he is [consciously] aware that such result is practically certain to be caused by this conduct." Defense counsel pointed out that both aggravated battery charges require a defendant to act knowingly. Defense counsel acknowledged that the instruction was not mandatory, and that the committee

comments to the pattern instruction suggested that "knowingly" has a plain meaning within common understanding, but argued that providing the definition would nevertheless be useful.

¶ 21 The State objected, arguing that the instruction was unnecessary unless the jury requested it. The State also contended that defendant's mental state had not been made an issue by the evidence presented at trial, arguing: "I don't think there was any evidence that would contradict that this was a knowing act that was presented at trial based on the State's case or the defendant's testimony." Defense counsel disagreed with this characterization, pointing out: "[T]he definition here is acts knowingly with regard to the result of his conduct when he is consciously aware that such result is practically certain to be caused by his conduct. The result is great bodily harm." The State insisted that defense counsel was "reading the element wrong," and that only defendant's *actions* had to be done knowingly.

¶ 22 The trial court denied the defense's request for the "knowingly" instruction on the grounds that the term had a plain meaning and that it was not required by the committee comments to IPI Criminal 4th No. 5.01B.

¶ 23 Defense counsel then requested that he be allowed to argue that the State must prove defendant knew what the result of his conduct would be. The court referred to the indictment, pointing out that it did not explicitly include that element. Defense counsel insisted the indictment was incorrect in laying out the elements of the offense, though he allowed that the indictment was nevertheless sufficient in providing notice of the charges. The State, in turn, continued to argue that "[y]ou have to knowingly cause, not know that the result of what you are causing is going to be what it was." The trial court told defense counsel that it had already ruled on the issue, then reiterated that his request for jury instruction 5.01B was denied.

¶ 24 Following a brief recess, the jury instruction conference continued. Defense counsel then provided the State and the court with case law, and argued that he should be allowed "to argue the elements of this offense to the jury." Defense counsel argued that the court in *People v. Lovelace*, 251 Ill. App. 3d 607 (1993) had held that the required "knowing" mental state applied to the great bodily harm. That is, a defendant must know that his conduct would result in such harm. Defense counsel stated:

> "In *Lovelace*, *** the Court clearly discussed that element and the fact that the knowingly applies to the result of the conduct, not the conduct itself. And, Judge, I believe that this applies to Count 2 as well, the great bodily harm. Actually, it does not as far as Count 2 might. So my argument only applies to Count 1 ***."

The State responded:

> "It doesn't say that you have to know that your act has to cause great bodily harm that it entails. I don't know how the State could ever prove that a defendant knew that the result of his conduct would be broken bones or something like that. There would be no way for the State to prove that a specific defendant had the knowledge to cause great bodily harm. The intended act has to be an act that would cause great bodily harm."

Defense counsel then explained that whether a person acted knowingly with respect to the result of his conduct is often proven through circumstantial evidence.

¶ 25 The court then asked defense counsel to provide an example of the argument he wished to make to the jury. Defense counsel responded that, based on defendant's testimony, he would argue "that there was not an intent to cause great bodily harm in his conduct." The State objected to this potential argument, claiming that it did not "adequately state[] the law." Defense counsel

added: "[M]y argument would be that this was more of an accident and he was certainly not intending to do it."

¶ 26 The trial court denied defense counsel's request to make that argument. Defense counsel requested a standing objection to the State's closing argument, expressing that he did not wish to interrupt closing arguments. The court found the objection premature.

¶ 27 C. Closing Arguments

¶ 28 In its closing argument, after summarizing the evidence, the State asserted that the first proposition it needed to prove with regard to count 2 was "that the defendant knowingly caused bodily harm to Rose Kammann." The State then discussed the severity of Rose's injuries and the force with which she hit the ground, pointing out that Rose's granddaughter thought she was dead. As to the first proposition, the State concluded: "[w]e have proven that element."

¶ 29 In his closing argument, defense counsel emphasized the credibility of the witnesses. He asserted that Mary had concocted her version of events, then persuaded Rose and Kaelan to go along. Defense counsel conceded that Rose had suffered bodily harm, but argued that it fell short of *great* bodily harm.

¶ 30 As to count 2, defense counsel explained that the only two elements of that offense were "simply knowingly caused bodily harm and then that she is a senior citizen." Counsel continued: "So our defense to this case is essentially, you know, that [defendant] was believable in how he described [Rose] falling down and that was an accident and this was chaotic. *** It was not a push ***."

¶ 31 In rebuttal, the State argued that injuries as severe as those incurred by Rose could not result from being accidentally knocked over. The State argued that defendant did not accidentally knock Rose over, but that he forcefully shoved her. The State concluded: "When you do that,

you know that you are causing great bodily harm to somebody. You know that you are hurting them. You cannot forcibly shove an [82-year-old] woman to the ground and not know that you are going to hurt her."

¶ 32 Following arguments, the court provided the jury with its instructions. The instructions as to count 2 read as follows: "A person commits the offense of aggravated battery when he knowingly and by any means causes bodily harm to another person, and the other person is an individual of 60 years of age or older." The instructions further stated that to sustain the charge of aggravated battery on count 2, the State must prove "[t]hat the defendant knowingly caused bodily harm to Rose Kammann ***."

¶ 33 The jury found defendant not guilty on count 1 aggravated battery (the Class 2 felony requiring great bodily harm) and domestic battery. The jury found defendant guilty on count 2 aggravated battery (the Class 3 felony). Defense counsel filed a motion for new trial, alleging only that the State had failed to prove defendant guilty beyond a reasonable doubt. The trial court denied that motion and sentenced defendant to a term of three years' imprisonment.

¶ 34 ANALYSIS

¶ 35 On appeal, defendant argues that trial counsel was constitutionally ineffective. Specifically, defendant claims that counsel's performance was deficient in that he failed to: (1) "argue that the State had to prove the defendant knowingly caused bodily harm"; (2) object when the State argued the incorrect definition of "knowingly" to the jury; and (3) preserve the issue of the State's erroneous argument for appeal.

¶ 36 Claims of ineffective assistance of counsel are analyzed under the two-part framework set forth in the seminal case of *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Manning*, 241 Ill. 2d 319, 326 (2011). In order to prevail on such a claim, "[a] defendant must

show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. Under the first prong of this test, known as the deficient performance prong, the performance of counsel is measured by an objective standard of competence under prevailing professional norms. *Id*. Moreover, a "defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *People v. Smith*, 195 Ill. 2d 179, 188 (2000).

¶ 37 Before turning to the question of whether defense counsel's performance was deficient in the present case, we must first consider the offense of aggravated battery and the elements thereof. Count 2 of the indictment in the present case—the only count on which defendant was found guilty—alleged an aggravated battery in violation of section 12-3.05(d)(1) of the Criminal Code of 2012 (Code). 720 ILCS 5/12-3.05(d)(1) (West 2014). That section holds: "A person commits aggravated battery when, in committing a battery **** he or she knows the individual battered to be" a person 60 years of age or older. *Id*. Thus, the first element of the charged offense is the commission of a battery. Under section 12-3 of the Code, "A person commits battery if he or she knowingly without legal justification by any means *** causes bodily harm to an individual *** ." 720 ILCS 5/12-3 (West 2014). Accordingly, in order to sustain a conviction on count 2 aggravated battery, the State was obligated to prove that defendant knowingly caused bodily harm to Rose, knowing that she was 60 years of age or older.

¶ 38 It is well-settled that to knowingly cause bodily harm, a defendant "must be consciously aware that his conduct is practically certain to cause" such harm. *Lovelace*, 251 Ill. App. 3d at 619. In other words, the result of a defendant's conduct is at issue. *Id*.; see also, *e.g.*, *People v. Hall*, 273 Ill. App. 3d 838, 842 (1995) ("When an offense is defined in terms of a particular

result, *** a person is said to act knowingly when he is consciously aware that his conduct is practically certain to cause the result."); see also 720 ILCS 5/4-5(b) (West 2014) (defining "[k]nowledge" with respect to conduct). Such is the case whether the State must prove bodily harm or great bodily harm. *E.g.*, *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 53 (bodily harm); *People v. Steele*, 2014 IL App (1st) 121452, ¶ 23 (great bodily harm); *Lovelace*, 251 Ill. App. 3d at 619 (both).

¶ 39 In his closing argument, defense counsel accurately relayed that the first required element of count 2 was that defendant "knowingly caused bodily harm." Of course, this directly refutes defendant's claim on appeal that counsel "failed to argue that the State had to prove the defendant knowingly caused bodily harm." Counsel further argued that defendant's testimony—that Rose's fall was caused by an accidental slip—was credible. Counsel asserted simply: "It was not a push." Thus counsel plainly made the argument that defendant did not knowingly cause Rose bodily harm. That counsel chose to make this argument through layman's terms—referring to the fall as an accident and not a push—rather than by reciting the statutory definition of knowingness is a clear matter of trial strategy. Accordingly, we find that counsel's performance in his closing argument did not fall below an objective standard of reasonableness.

¶ 40 In its closing arguments, the State similarly asserted that the first proposition it needed to prove with respected to count 2 was "that the defendant knowingly caused bodily harm to Rose Kammann." The State reasoned that Rose must have hit the ground with great force, given the severity of her injuries. Based on that evidence, the State argued that it had proven the first proposition.

¶ 41 In its rebuttal, the State rejected defendant and defense counsel's contention that Rose had been knocked over accidentally. Again focusing on the severity of Rose's injuries, the State

argued that such injuries could not possibly result from an accident, and must have been the result of a forceful shove. The State contended that in forcefully shoving Rose, defendant would necessarily have known that he would at least cause bodily harm.

¶ 42 Defendant contends that defense counsel's performance was deficient in that he did not "object when the prosecutor argued the incorrect definition of 'knowingly' to the jury." The record belies this claim. At no point did the State argue an incorrect definition of "knowingly." In fact, when the State argued on rebuttal that defendant's knowledge that bodily harm would result from his conduct could be inferred from the nature of the conduct itself, it was arguing precisely the correct definition of the knowledge requirement. The State simply made no argument that defense counsel could object to. Accordingly, we find that defense counsel's decision not to object to the State's argument was not objectively unreasonable.

¶ 43 Next, defendant contends that defense counsel was ineffective for failing to preserve the issue of the State's erroneous closing arguments. Given our conclusion above, that the State did not present an erroneous closing argument, it follows that this portion of defendant's argument must also fail. See, *e.g.*, *People v. Land*, 2011 IL App (1st) 101048, ¶ 146 ("Since we find no error, we need not consider defendant's claims of plain error and ineffective assistance of counsel.").

¶ 44 Finally, though not directly relevant to the disposition of this case, we are compelled to address the jury instruction conference, given the emphasis that defendant has placed on those proceedings in his appellate briefs. Defendant has placed particular importance on defense counsel's comments at that conference in which he stated: "I believe that [the knowledge requirement] applies to Count 2 as well, the great bodily harm. Actually, it does not as far as Count 2 might. So my argument applies only to Count 1." Of course, this assertion was incorrect.

The requirement that the State prove defendant knew what the result of his conduct would be applied to both counts of aggravated battery. See *supra* ¶ 38. However, despite this isolated misstatement, the full record of the jury instruction conference shows that defense counsel did not misapprehend the law. On the contrary, he argued vehemently and repeatedly that the State would have the burden of proving defendant's knowledge of the result of his conduct.

¶ 45 To be sure, the jury instruction conference was rife with confusion on all parts. As the State concedes on appeal, the prosecutor took a clearly erroneous position in arguing that the State did not need to prove defendant knew what the result of his conduct would be. Moreover, the court likely misapprehended defense counsel's position, culminating in its inexplicable ruling barring counsel from arguing that the fall was an accident and that defendant did not intend such a result. These errors were all apparently cleared up prior to closing arguments, however, as defense counsel advanced his accident argument, and the State refuted that argument by contending that it had shown defendant had knowledge of the result. See *supra* ¶ 41. Accordingly, any errors or misstatements made in the jury instruction conference were of no effect, as they were resolved before the parties went before the jury.

¶ 46 CONCLUSION

¶ 47 The judgment of the circuit court of Will County is affirmed.

¶ 48 Affirmed.