2017 IL App (1st) 150412-U

Sixth Division
March 10, 2017

No. 1-15-0412

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. TB-584-487
	)	
	)	Honorable
GERARDO OREGEL,	)	Freddrenna M. Lyle and
	)	Maryam Ahmad,
Defendant-Appellant.	)	Judges Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held*:** Because defendant did not demonstrate that his trial counsel's decision to not call a medical expert witness at trial prejudiced his defense, defendant did not establish a claim for ineffective assistance of counsel.

¶ 2 Following a bench trial, defendant Gerardo Oregel was found guilty of driving under the influence, driving left of center, operating an uninsured vehicle, and failure to signal a lane change. Defendant was sentenced to 24 months of conditional discharge.[1] On appeal, defendant argues that his trial counsel was ineffective. He claims that his trial counsel did not call an

[1] Judge Lyle conducted the trial but Judge Ahmad imposed the sentence.

available medical expert witness to testify at trial, that the trial court primarily and expressly relied on the lack of medical expert testimony when it found him guilty, and that his trial counsel did not have a legitimate trial strategy for not calling the expert. Defendant requests that we remand this case for a new trial. We affirm.

¶ 3 Defendant's conviction arose from an incident that took place during the early morning hours of January 24, 2012. At a status call prior to trial, defense counsel advised the trial court that she tendered to the State a packet, which included a "report by a medical expert per Mr. Oregel's medical records and a CV of the expert's experience and expertise informing the State that we will be intending to call that person as an expert witness as trial." The record contains Dr. Karla G. Hudson's curriculum vitae as well as a document on the letterhead of "Karla Hudson, M.D" containing the header "Hypoglycemia Recovery" and stating, in pertinent part, as follows:

> "It is possible that patients with Type 2 diabetes that are not endogenously insulin deficient can recover from hypoglycemic events without administration of food or drink. The amount of time it takes for the body to effectuate recovery varies from patient to patient and can occur in minutes or over the course of hours."

The report also describes glucose counterregulation: "Glucose counterregulation is the sum of processes that protect against development of hypoglycemia or **restore euglycemia** if hypoglycemia should occur. When glucose cannot be obtained from the intestinal absorption of food, glucose counterregulatory mechanisms prevent or rapidly correct falling glucose plasma concentrations." (Emphasis in original.) The report concludes: "A patient with Type 2 diabetes

who is not endogenously insulin deficient can recover from hypoglycemic events without administration of food or drink."

¶ 4 On the day of the trial, the prosecutor informed the trial court that there had been a possibility that defendant was going to call an expert witness and that he was going to call a rebuttal witness, but that it was his current understanding that those witnesses would not be called. Defense counsel advised the trial court that she had tendered discovery of an expert witness but had not determined whether she was going to call the expert. Defense counsel further stated, "And, Judge, just depending on how the testimony comes in, we still may call - - I don't know that at this point I'm obligated to make that decision." The trial court informed defense counsel, "Well, you are and you are not. You are not obligated accept [*sic*] to the extent that we do not commence and continue cases." Thereafter, defense counsel informed the trial court that she did not "anticipate on any reason that we should have to call the expert, but I just don't want to put myself out of the box in case." The trial court informed defense counsel that, because it does not continue cases, if there was any possibility that she was going to call the expert, she needed to get a new date. In response, defense counsel stated, "I think we can go ahead. I feel comfortable going ahead right now," but she "wanted to make it clear for the record that we hadn't made any decision one way or another at this point."

¶ 5 After this exchange, the prosecutor informed the trial court that, if defendant's expert witness was called, he would request to call a rebuttal witness and indicated that he did not have an objection to getting a new date. The trial court explained again that it did not "commence and continue cases on a normal basis," and that "We can get started, we can go, we can finish this today. If not, then we need to get a date. And if you want to talk to your client about it, make that decision." Defense counsel responded: "I just want to make clear for the record that we had

made a decision on an expert witness with no knowledge about who the State was going to call or not call." Thereafter, the trial court accepted defendant's jury waiver, and the State presented its first witness.

¶ 6 Chicago police officer Duffy testified that he had been employed with the Chicago Police Department for 18 years and had made about five DUI arrests during this time. On the subject day at around 1 a.m., when patrolling south on Archer Avenue in his police car, he saw a black Ford Mustang drive over the double yellow lines and almost strike his car. Officer Duffy took "evasive action," turned to the right, activated his lights, and performed a U-turn to pull the vehicle over. When Officer Duffy activated his emergency equipment, the vehicle stopped in the lane of traffic, went on the median area, and sped across two lanes to the curb lane. Officer Duffy exited his squad car, approached the vehicle, and tried to talk to the driver, whom he identified in court as defendant. When Officer Duffy approached defendant and attempted to talk to him, Officer Duffy observed defendant "trying to talk" and testified that "I could not understand any words that were coming out of his mouth, it was just noise." Officer Duffy observed drool "all over the bottom" of defendant's mouth and on his shirt, which was something he had not seen before in his other DUI arrests.

¶ 7 Officer Duffy asked defendant to step out of his vehicle. When defendant tried to step out, he stumbled. Officer Duffy grabbed him so he would not fall down, and took him to the sidewalk for field sobriety tests. Because Officer Duffy did not have a camera to record the field sobriety tests, he called other police officers to come to the scene. After the other police officers arrived, Officer Duffy administered field sobriety tests, including the Horizontal Gaze Nystagmus (HGN) test and "walk-and-turn" test. Officer Duffy testified that defendant did not refuse to take the tests and that before administering them, defendant did not tell him that he was

having problems understanding things or that there was something wrong with him. The video of the field sobriety tests was played at trial, but it lacked an audio track.

¶ 8 Officer Duffy administered the HGN test first. Officer Duffy testified that prior to the HGN test, there were a couple of times that he was not able to communicate with defendant but that when he spoke with defendant later, defendant spoke in English, he "could understand the language," and he did not "really notice[]" a heavy accent. For the HGN test, Officer Duffy instructed defendant to keep his head straight and to follow the stimulus with his eye. Defendant continued to move his head as Officer Duffy moved the stimulus. Officer Duffy told defendant to keep his head still, and, in response, Officer Duffy testified that defendant was "mumbling, kind of incoherently, actually." Officer Duffy determined that defendant could not complete the test.

¶ 9 Officer Duffy administered a "walk-and-turn" field sobriety test next. Before administering the test, Officer Duffy demonstrated it. Defendant attempted the test, but, after he took three steps, he stumbled and refused to do it. Officer Duffy terminated the test and determined that defendant was not able to complete it. Defense counsel asked Officer Duffy if he knew what defendant was saying during the "walk-and-turn" test portion of the video. Officer Duffy testified that defendant's speech "became a little better as we went through this process," and that he could understand what defendant was saying when defendant was in the back of his squad car.

¶ 10 Officer Duffy testified that the total time from when he approached defendant's vehicle to when defendant was in custody in the back of the squad car was about 15 minutes. Based on Officer Duffy's experience, when someone is under the influence of alcohol, "[t]he speech usually does get better as time goes by." During the incident, Officer Duffy observed a "strong

odor of an alcoholic beverage" coming from defendant's mouth, and when he asked defendant whether he had been drinking, he could not get a response from defendant.

¶ 11 Officer Duffy described defendant's demeanor on the way to the police station as "[b]elligerent." At the police station, at around 2 a.m., after defendant was read his *Miranda* rights and the "Warning to Motorist," he refused to take a breath test. At about 4:24 a.m., after Officer Duffy finished his paperwork, he took defendant to be fingerprinted and photographed. Officer Duffy testified that he was with defendant on the subject night from about 1 a.m. to about 4:24 a.m. During this same time period, Officer Duffy never gave defendant anything to eat or drink or saw defendant eat, drink, or take medication, and defendant never asked to do so. Officer Duffy did not find any bottles of prescription medication, medical medallions, or medical cards on defendant. When the State asked Officer Duffy about his opinion regarding whether defendant was under the influence of alcohol, he testified as follows: "The drooling and the strong odor of alcoholic beverage, coming left of center into my lane, not being able to pullover [*sic*] correctly, and the strong alcoholic beverage on his breath and his belligerence on his way to the station and his refusal to take a Breathalyzer test, slurred speech."

¶ 12 Defendant testified on his own behalf. Defendant was born in Mexico and speaks more Spanish than English. At the beginning of his testimony, he agreed that he could understand what was happening in the trial proceedings. Defendant has Type 2 diabetes and takes prescription medication, including Januvia, for this disease. When he does not take his medication, he feels like he could faint or vomit and experiences hypoglycemia, which means his blood sugar is too low. With respect to hypoglycemia symptoms, he testified that he feels "like I'm going to faint if I don't take right away like Coke or Orange Juice some thing [*sic*] to pick me up." Defense counsel asked him "How long do those symptoms last until you take Orange

Juice; what will happen to you?" and defendant responded, "If I don't take my medicine, I feel like I'm going to faint, lose control of me, go to sleep."

¶ 13 The State also asked defendant questions about his symptoms when he experiences hypoglycemia. Defendant answered "Yes" to the following: "And when your blood sugar is too low, you need that [*sic*] eat or take medication or something to eat or drink, right?"; "And if you don't, you can faint"; "And in fact, you will continue to be sick until you take medication, food or drink, correct?"; and "You aren't going to be better without taking something?" The State also asked defendant questions about the condition known as hyperglycemia. Defendant agreed that hyperglycemia, which occurs when the blood sugar is too high, is another symptom of diabetes and that hyperglycemia can cause odor on the breath, which does not occur with hypoglycemia.

¶ 14 Defendant testified that he did not have an alcoholic drink on the subject day. He acknowledged that, due to his diabetes, he should not drink alcohol. During the day before the incident, defendant cleaned his house, cut the grass, and completed yard work. At 6 p.m., he had a glass of water and went to sleep. He forgot to take his medication, which he would usually take at 10 a.m. and 5 p.m. After he went to sleep, he received a call from his daughter asking him to pick her up. At around 12 a.m. or 12:45 a.m., he went to pick up his daughter, and after driving six blocks, the police pulled him over.

¶ 15 When the police pulled him over, defendant did not remember drooling but remembered feeling dizzy or faint. Defendant testified that he tried to explain to the police that he did not take his pills, that he needed to take them so he "can react fine," and that the police officer did not listen to him when he tried to explain his medical condition. Defendant testified that, in the video, which was previously viewed in court, he was trying to tell the officers that he did not take his medication, which is why he "was almost feeling - - fell down, faint" and that he was

scared for his health because he was "really feeling bad." Defendant further testified that, during the course of the incident when he was interacting with the police officers, he did not become more upset and the police officers were not listening to what he was saying.

¶ 16 After defendant was placed in the jail cell, he went straight to sleep and testified that he "was feeling bad, I was faint." At the police station, defendant testified that he did not have Coke, orange juice, or anything to eat and that the officers never asked him to take a breathalyzer test.

¶ 17 After closing argument, the trial court found defendant guilty of driving under the influence, driving left of center, operating an uninsured vehicle, and failure to signal the lane change. In doing so, the trial court indicated that there "might have been language difficulties" at the incident, as "those same language difficulties evidence themselves at this hearing." The trial court stated that, at one point, it thought an interpreter might be needed but that "the defendant answered the questions after attorney rephrased them appropriately."

¶ 18 The trial court noted that, based on Officer Duffy's testimony and the video, defendant did not perform the field sobriety tests and "was reluctant to even attempt to perform the walk-and-turn." The trial court then indicated that because the video did not have audio, it was not able to determine "whether that is a result of him saying 'I can't do it because I'm sick' " or whether it was because defendant was under the influence of alcohol. The trial court explained that it had difficulty attributing defendant's action "solely to type-two diabetes," noting that, "there is no medical testimony introduced, no expert testimony that would talk about what the symptoms would be. I have two lawyers who have, to my knowledge, no medical training telling me what the symptom[s] should be and a defendant telling me what his symptoms would be." The trial court also indicated that defendant did not have his medicine with him and did not

have any juice, and that if all of his actions at the scene were attributed to diabetes, it would think, as a layperson, that defendant's condition would not improve or stabilize. Finally, the trial court concluded that Officer Duffy's testimony has "not been rebutted and the officer testified to a strong odor of alcohol, the failure of the field sobriety tests."

¶ 19 The trial court denied defendant's motion to reconsider. The trial court sentenced defendant as stated above. This appeal followed.

¶ 20 On appeal, defendant contends that his trial counsel was ineffective because the trial court expressly relied on the absence of expert testimony in finding him guilty and there was no legitimate strategic reason not to call the available expert, Dr. Hudson. Defendant further argues as follows: (1) his trial counsel's performance was objectively unreasonable because she failed to call Dr. Hudson to testify that a person with Type 2 diabetes and hypoglycemia can recover from a hypoglycemic episode without consuming food, drink, or medication, which would have supported his theory of defense that his symptoms at the time of the incident were consistent with someone who was experiencing a hypoglycemic episode; (2) Dr. Hudson's testimony "would have countered the State's theory that [he] was drunk and 'sobered up' "; (3) while defendant testified about his own medical condition, he was neither a doctor nor fluent in English, and could not provide expert medical testimony about hypoglycemia or answer complex medical questions; (4) if his trial counsel had called Dr. Hudson as a medical expert witness at trial, there is a reasonable probability that the result of the trial would have been different; and (5) his trial counsel's failure to call Dr. Hudson was prejudicial because the trial court cited the absence of expert testimony as the primary reason for rejecting defendant's theory of defense, and it indicated that it had to rely on defendant's testimony, the attorneys, and a video with no sound to explain complex medical issues.

¶ 21 We review ineffective assistance of counsel claims under the standard provided in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under *Strickland*, to establish a claim for ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. We do not need to determine whether defense counsel's performance was deficient under the first prong before we review whether defendant suffered prejudice under the second prong. *Id.* at 697.

¶ 22 With respect to the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In particular, "a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004). A defendant must demonstrate that counsel's errors were "so serious" that defendant was deprived of a fair trial. *Strickland*, 466 U.S. at 687.

¶ 23 We conclude that defendant has not demonstrated that his trial counsel's failure to call Dr. Hudson as a medical expert witness at trial prejudiced his defense or "rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220. Dr. Hudson's report did not refer to, or identify, defendant, and nothing in the record indicates that Dr. Hudson had knowledge of defendant's Type 2 diabetes and medical history. Rather, the report generically stated, among other things: "It is *possible* that patients with Type 2 diabetes that are not endogenously insulin deficient can recover from hypoglycemic events without administration of food or drink" and "*A patient* with Type 2 diabetes who is not endogenously insulin deficient can

recover from hypoglycemic events without administration of food or drink." (Emphasis added.) Based on her report, if Dr. Hudson had been called at trial, she could have provided general information about hypoglycemia but could not have provided specific information about defendant and his symptoms. These would include whether defendant is "non endogenously insulin deficient" or whether it was possible for defendant to recover from a hypoglycemic episode without the administration of food, drink, or medication. In contrast, while Dr. Hudson's report was not specific to defendant, defendant himself gave a first-hand account of his symptoms when he experiences hypoglycemia. Specifically, he testified that "If I don't take my medicine, I feel like I'm going to faint, lose control of me, go to sleep," and he answered "yes" when asked "And when your blood sugar is too low, you need that [*sic*] eat or take medication or something to eat or drink, right?"; "And if you don't, you can faint?"; and "And, in fact, you will continue to be sick until you take medication, food or drink, correct?" Accordingly, we cannot agree with defendant that Dr. Hudson's testimony would have been "decisive" or that there was a reasonable probability that the result of the trial would have been different if she had testified.

¶ 24 We are not persuaded by defendant's contention that the lack of expert medical testimony was prejudicial because his trial counsel presented his "complex technical defense solely through defendant's testimony," where defendant was not fluent in English, was not a doctor, and had difficulty understanding English. Defendant agreed that he could understand what was happening in the trial proceeding. The trial court initially considered the need for an interpreter, but after observing defendant, stated, "But the defendant answered the questions after attorney rephrased them appropriately." Further, defense counsel and the State did not ask defendant complex medical questions, but rather asked him questions about how he feels when he does not take his medication and when his blood sugar is too low.

¶ 25 Moreover, we disagree with defendant's contention that the trial court expressly relied on the absence of medical expert testimony when it found him guilty. When issuing its ruling, the trial court noted the absence of medical testimony, but also indicated that defendant testified about his symptoms. The trial court noted that Officer Duffy's testimony was not rebutted. Officer Duffy testified in detail about the incident and why he believed defendant was under the influence of alcohol, including "the drooling," "strong alcoholic beverage on his breath," "not being able to pullover [*sic*] correctly," and "his belligerence on his way to the station and his refusal to take a Breathalyzer test, slurred speech." In its ruling, the trial court expressly noted Officer Duffy's testimony regarding the "strong odor of alcohol."

¶ 26 To support his contention that his trial counsel was ineffective, defendant relies on *People v. York*, 312 Ill. App. 3d 434, 437 (2000), where the reviewing court held that trial counsel's unprofessional conduct deprived the defendant of a fair trial. We do not find *York* persuasive. In *York*, the defendant was charged with criminal sexual assault, and DNA testing showed that the defendant did not deposit semen on the victim. *Id.* at 436. At trial, defense counsel asked the defendant whether he had received the DNA testing results, but did not actually present the available DNA test results, which would have supported the defendant's theory that he did not participate in the assault and corroborated the defendant's testimony. *Id.* at 436-37. Unlike *York*, in this case, Dr. Hudson's testimony would not have corroborated defendant's testimony. While Dr. Hudson could have testified generically that it is possible for a patient to recover from hypoglycemia without food, drink, or medication, defendant agreed at trial that, when he does not take medication and his blood sugar is too low, he will continue to be sick until he has food, drink, or medication. Here, the potential medical evidence would have contradicted defendant. As such, this case is distinguishable from *York*.

¶ 27 Defendant has not demonstrated that he was prejudiced by his trial counsel's alleged error of not calling Dr. Hudson as an expert witness, and therefore, he has not met the second prong of the *Strickland* test. Given this finding, we need not address whether trial counsel was deficient under the first prong. *Strickland,* 466 U.S. at 697. For the reasons explained above, we affirm defendant's conviction.

¶ 28 Affirmed.