2018 IL App (3d) 160056-U

Order filed June 13, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

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. 3-16-0056 Circuit No. 15-CF-1254
JASON C. BINGHAM,	)	Honorable Carmen Julia Goodman,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not prejudiced when his trial counsel agreed to the admission of his prior conviction based on the erroneous belief that it was an element of the charged offense. The trial court did not err in denying defendant's motion for a mistrial based on a police officer's testimony that he had prior dealings with defendant.

¶ 2 Defendant, Jason C. Bingham, appeals his convictions for domestic battery and criminal damage to property. Defendant argues that his trial counsel was ineffective for allowing the introduction of defendant's prior domestic battery conviction under the erroneous belief that it

was an element of the charged offense. Defendant also argues that the trial court erred in denying his motion for a mistrial based on an officer's testimony that he had prior dealings with defendant. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged with two counts of domestic battery (720 ILCS 5/12-3.2(a)(1), (a)(2) (West 2014)). The indictment alleged "the defendant is hereby placed on notice that it is the intent of the People of the State of Illinois to seek an enhanced Class 4 sentence based upon the defendant's prior conviction for Domestic Battery." Defendant was also charged with two counts of criminal damage to property (*id.* § 21-1(a)(1)).

¶ 5 The State filed a motion *in limine* to admit prior acts of domestic violence pursuant to sections 115-7.4 and 115-20 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.4, 115-20 (West 2014)). The motion stated that the State sought to admit one prior conviction, specifically "[t]hat the defendant had previously entered a plea of guilty to a Class 4 Domestic Battery in Will County case number 02 CF 471 and the prior conviction involved the same physical actions, specifically pushing the victim about the mouth, as in the pending matter before the Court."

¶ 6 At the hearing on the motion *in limine*, defense counsel stated that he believed the prior conviction was admissible because the State was using it to enhance the charged offense from a Class A misdemeanor to a Class 4 felony. Defense counsel indicated that, if asked, he would stipulate to the conviction itself because he believed it was an element of the offense. The State then indicated that it wanted to introduce defendant's prior domestic battery conviction as a prior conviction rather than as a prior act of domestic violence. The parties agreed to stipulate as to defendant's prior domestic battery conviction.

¶ 7 The matter proceeded to a jury trial. The court read the following stipulation to the jury: "[D]efendant has previously been convicted of domestic battery in Will County case number 02 CF 471."

¶ 8 Tracey Bingham, defendant's mother, testified that defendant lived with her at the time of the incident. Tracey had gone to church on the morning of June 21, 2015, from 11 a.m. until 12:30 p.m.[1] Defendant arrived home at some point after Tracey had returned home from church. Tracey stated that she was not sure exactly when defendant came home, but it was maybe 3 or 4 p.m. Tracey "knew that [defendant] was drunk by the way he was acting." Defendant made a lot of noise, including growling sounds. Tracey asked defendant to stop making noise, and defendant went to the back bedroom. Defendant remained there for approximately half an hour.

¶ 9 Tracey heard a crash and went to the back bedroom to see what had happened. The door was closed, and the doorknob had become detached from the door. Tracey explained that the doorknob would occasionally slide off. Defendant could not exit the room. Tracey retrieved a butter knife and tried to open the door. Defendant then "kicked the middle part of the door out and came out the door." Tracey testified: "He came out of the room and just grabbed me in the face. I don't know if he was trying to dig my eye out or what. Then he hit me on the side and then he kept continue [*sic*] trying to push me down." Tracey stated that defendant pushed her approximately five times and hit her on the side of the torso twice. Defendant also grabbed her as though "he was trying to dig [her] eye out and cut [her] under [her] eye." Her face was bleeding. Tracey went into the bathroom. Defendant returned to the back bedroom for about an hour. Defendant then entered the living room and lay on the couch.

[1]Tracey testified that these events occurred on June 22, 2015. However, based on other evidence presented in the case, it is clear that Tracey meant that the events she described began on Sunday, June 21, 2015, and ended in the early morning hours of Monday, June 22, 2015.

¶ 10 Tracey testified that Aaron Bingham, defendant's brother, arrived at the residence a couple hours later. Tracey did not call Aaron and ask him to come over; he just showed up. Aaron saw Tracey's face and fought with defendant because defendant had hurt Tracey. Tracey believed defendant had a knife and Aaron had "the thing that you sharpen the knife against" during the fight. At some point, defendant called the police. The police arrived approximately five minutes later. They asked Tracey what had happened, and she told them.

¶ 11 Tracey identified several photographs taken by the police officers who responded after the incident. Tracey identified two photographs of herself in which she had a cut under one of her eyes. Tracey also identified a photograph of the "[b]ack bedroom window that [she] heard crash." The window was broken in the photograph. Tracey identified a photograph of the door to the back bedroom, which was damaged. Tracey stated that the photographs accurately reflected how the window and door looked on the date of the incident.

¶ 12 Tracey testified that she moved after the incident because she did not feel safe in her former residence. Tracey explained that if defendant "had got released and got to drinking again, he would have broke in the door if I wouldn't have opened it."

¶ 13 Tracey acknowledged that in a written statement she gave to the police upon their arrival at the residence, she had stated only that defendant pushed her and hit her in the eye. She did not mention that she believed defendant was trying to gouge her eye out and that defendant pushed her multiple times. Tracey stated: "I might not have wrote everything down the way it should have been documented, but I know what [defendant] did." The written statement said that the incident occurred at 1:20 p.m. on June 21, 2015.

¶ 14 An audio recording of defendant's 911 call was played for the jury. In the recording, defendant talked continuously and was difficult to understand. He was unresponsive to many of

the 911 operator's questions. He repeatedly told the 911 operator that he had been asleep, and his brother attacked him with a knife.

¶ 15 Officer Bill Otis testified that he was called to Tracey's residence in the early morning hours of July 22, 2015. The prosecutor asked Otis why he was dispatched to Tracey's residence. Otis replied, "Come to think of it, I don't think we were dispatched to it. I think me and my partner just went to the address due to hearing the defendant's name over the radio and having dealings with him before." Defense counsel did not object. Otis testified that when he arrived at the residence, he found "defendant standing on the sidewalk no shirt on just sweating like you wouldn't believe, just agitated." Otis testified that the officers had defendant smoke a cigarette in order to calm him down. Otis stated: "This is a big muscular guy and I have dealt with him before. I actually had my tazer [*sic*] unholstered—." Defense counsel objected, and the court sustained the objection.

¶ 16 The State asked: "So you said that in your dealings with the defendant—Strike that. Once you made contact with the defendant what did you do next?" Otis testified that the officers put defendant in handcuffs. Otis then spoke to Tracey. Tracey had a black eye that was starting to swell and a cut under her eye. She was calm. Otis overheard Tracey tell another officer that the incident with defendant had occurred around midnight. Otis also spoke to Aaron. Aaron was calm, but he was angry that defendant had attacked Tracey. Aaron's arm was scratched and bloody. Aaron said that he had come over to the residence after Tracey called him and told him defendant had attacked her. Inside the residence, a window was broken and "a door [was] cracked from the frame."

¶ 17 Defendant moved for a mistrial "based upon Officer Otis bringing the defendant's criminal contacts into play." Defendant argued that Otis mentioned his prior dealings with

defendant at least three times, and it prejudiced defendant's right to a fair trial. The State argued that the "whole notion of contacts" was vague and not unduly prejudicial. The court denied the motion for a mistrial.

¶ 18 Officer Von Stein testified that he and Otis went to Tracey's residence at approximately 1:25 a.m. on June 22, 2015. Stein testified that Tracey appeared calm, but she was "a little disgusted at the situation." Stein observed a scratch with a small amount of blood below Tracey's eye. Stein obtained a written statement from Tracey. Tracey told Stein that at approximately midnight, her son was being loud. Tracey did not say that the entire incident occurred at midnight. Stein had not previously noticed that Tracey indicated on her written statement that the incident occurred at 1:20 p.m. on July 21, 2015.

¶ 19 Officer David Szymanski testified that he was dispatched to Tracey's residence on the night of the incident. When Szymanski arrived, defendant walked out of the house wearing only his underwear. Defendant yelled at his brother, and he appeared to be very agitated. Szymanski did not observe any injuries on defendant. Defendant repeatedly stated that he did not remember what had happened. Defendant said he had been inside sleeping, and he did not hit Tracey.

¶ 20 During closing argument, the State discussed Tracey's testimony, the officers' testimony that they saw Tracey bleeding, the officers' descriptions of the demeanor of all the people at the residence, and the photographs of Tracey's face and residence. The State did not discuss Otis's statements about his prior dealings with defendant.

¶ 21 The jury found defendant guilty of all counts. The court sentenced defendant to four years' imprisonment on each count of domestic battery, to be served concurrently. The court sentenced defendant to 214 days' imprisonment on each count of criminal damage of property, to be served concurrently.

¶ 22 ANALYSIS

¶ 23 I. Ineffective Assistance of Counsel

¶ 24 Defendant argues that his trial counsel provided ineffective assistance in that counsel agreed to the admission of defendant's prior domestic battery conviction based on the erroneous belief that it was an element of the offense. The State concedes that defendant's prior conviction was not an element of the offense and that defense counsel provided deficient performance "by not objecting to—and even advocating for—defendant's prior conviction to be read to the jury." The State also concedes that it abandoned its motion *in limine* arguing that defendant's prior conviction should have been admitted as substantive evidence. However, the State contends that defendant cannot establish a claim of ineffective assistance of counsel because defendant was not prejudiced by counsel's deficient performance. We agree.

¶ 25 We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this standard, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant. *Id*. at 687. In order to show prejudice, "[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." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

¶ 26 In the instant case, there is not a reasonable probability that the result of the proceeding would have been different if defendant's prior domestic battery conviction had not been introduced into evidence. The State's case against defendant was strong. Tracey gave credible and consistent testimony regarding the incident. Tracey testified that at some point after returning home from church, defendant came home intoxicated and went to the back bedroom.

Tracey heard a crash and saw that the doorknob had become detached from the door to the back bedroom. As Tracey attempted to open the door with a butter knife, defendant kicked a panel out of the door. Defendant pushed Tracey, hit her on her side, and grabbed her face as though he were trying to gouge out her eye. Photographs taken by the police officers showed that Tracey had a cut under her eye and that there was damage to the door and window in the back bedroom. Tracey gave a written statement to the officers saying defendant pushed her and hit her in the eye. Although Tracey's written statement was not as detailed as her trial testimony, it was consistent with her trial testimony.

¶ 27 Defendant contends that Tracey's testimony was not credible based on the inconsistencies between her trial testimony, written statement, and oral statement to the police regarding what time the incident happened. Defendant also argues that Tracey's testimony was not credible because she testified that she did not call Aaron before he came over to her residence, but Otis testified that Aaron said Tracey did call him. However, these were relatively minor inconsistencies which did not render Tracey's testimony unworthy of belief. See *People v. Green*, 298 Ill. App. 3d 1054, 1064 (1998) ("Minor inconsistencies and discrepancies in the testimony of a witness do not render the testimony unworthy of belief and affect only the weight to be given the testimony."). We also note that Tracey testified at trial that she was not sure the exact time that the incident occurred.

¶ 28 We reject defendant's reliance on *People v. Robinson*, 368 Ill. App. 3d 963 (2006), in support of his argument that he was prejudiced by the introduction of his prior conviction for domestic battery. In *Robinson*, the court held that the erroneous admission of the defendant's past DUI convictions in his aggravated DUI trial was not harmless error. *Id.* at 977. The court reasoned that the erroneous admission of other-crimes evidence carried a high degree of

prejudice, especially since the past offenses were similar to the offense for which the defendant stood trial. *Id.* at 976. The court also reasoned that the properly admitted evidence was not overwhelming, as the only evidence of the defendant's intoxication was the testimony of one police officer. *Id.* at 977. Here, the properly admitted evidence against defendant was significantly stronger than in *Robinson*. Tracey's trial testimony about how she was injured by defendant was consistent with the previous account she gave to the police and was corroborated by the photographs of her injuries and the damage to the back bedroom.

¶ 29 II. Mistrial

¶ 30 Defendant argues that the trial court erred in denying his motion for a mistrial where Officer Otis testified numerous times that he had prior encounters with defendant and implied that these encounters were of a violent nature.

¶ 31 "A mistrial should be granted where an error of such gravity has occurred that the defendant has been denied fundamental fairness such that continuation of the proceedings would defeat the ends of justice." *People v. Nelson*, 235 Ill. 2d 386, 435 (2009). "The trial court's denial of a mistrial will not be disturbed on review absent a clear abuse of discretion." *Id.*

> "Although the erroneous admission of other-crimes evidence ordinarily calls for reversal, the evidence must have been a material factor in the defendant's conviction such that, without the evidence, the verdict likely would have been different. If it is unlikely that the error influenced the jury, reversal is not warranted." *People v. Hall*, 194 Ill. 2d 305, 339 (2000).

¶ 32 Here, the trial court did not abuse its discretion in denying defendant's motion for a mistrial because it is unlikely that Otis's comments influenced the jury. Otis's comments about having prior "dealings" with defendant and having "dealt" with defendant in the past were vague

and did not explicitly implicate defendant in prior criminal activity. Otis's remark about having his taser unholstered is also relatively vague. Defendant contends that this remark implied that Otis had a past violent encounter with defendant. However, Otis's comment could also be interpreted more neutrally to mean that he had his taser unholstered because defendant seemed agitated and Otis knew from past encounters that defendant was a "big muscular guy." We also note that the State did not mention Otis's testimony about his prior encounters with defendant during closing argument. Moreover, the State's case against defendant was strong. See *supra* ¶ 26. Thus, any error resulting from Otis's statements was not of "such gravity *** that the defendant has been denied fundamental fairness." *Nelson*, 235 Ill. 2d at 435.

¶ 33 CONCLUSION

¶ 34 The judgment of the trial court is affirmed.

¶ 35 Affirmed.