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2014 IL App (3d) 120864-U

Order filed September 30, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of the 9th Judicial Circuit, |
| |) | McDonough County, Illinois, |
| Plaintiff-Appellee, |) | |
| |) | Appeal No. 3-12-0864 |
| v. |) | Circuit No. 12-CF-19 |
| |) | |
| TANNER ICENOGLA, |) | Honorable |
| |) | Raymond A. Cavanaugh, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice O'Brien and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant did not receive ineffective assistance of trial counsel.

¶ 2 After a jury trial, the defendant, Tanner Icenogle, was convicted of aggravated battery (720 ILCS 5/12-3.05(d)(3) (West 2012)) and sentenced to 18 months' probation. On appeal, the defendant argues that he received ineffective assistance of trial counsel when counsel did not seek to admit potentially exculpatory evidence at trial. We affirm.

¶ 3 **FACTS**

¶ 4 The defendant was charged by information with one count of aggravated battery. The trial court appointed public defender Douglas Miller, and the matter proceeded to a jury trial.

¶ 5 At trial, Edward Fulkerson testified that he was the assistant principal at Macomb Junior Senior High School (Macomb). On January 31, 2012, at approximately 8 a.m., Fulkerson asked the defendant to take his hat off. The school had a rule requiring students to remove their hats, and Fulkerson noted that school officials had "always treated [the defendant] with white gloves because of temper issues." Initially, the defendant ignored Fulkerson, and Tasha Kastner, a nearby teacher, asked the defendant to remove his hat. The defendant responded "I'll take my hat off when I good well feel like taking my hat off." Fulkerson walked up to the defendant and told him to take off the hat a third time. When the defendant failed to do so, Fulkerson lifted the hat off the defendant's head and instructed him to go to the office. The defendant became agitated and screamed "[g]ive me back my goddamn hat, you fucking son of a bitch." Fulkerson continued to direct the defendant to the office, but the defendant continued yelling. At some point, the defendant threw down his coffee cup and shoved Fulkerson against a locker. The defendant pinned Fulkerson to the locker and held his hand in the air as if he were going to punch Fulkerson. Fulkerson told the defendant to let go and walk to the office, and eventually Fulkerson radioed the office to call 911. At that point, the defendant released Fulkerson and made a cellular telephone call. Fulkerson heard the defendant say into the telephone that "Fulkerson assaulted me and now I'm going to jail." While speaking on the telephone, the defendant became angry and punched a locker.

¶ 6 During Fulkerson's testimony, the State moved to admit a video-recording of the incident. The court admitted the evidence and allowed it to be published to the jury without objection. The video depicted the events as described in Fulkerson's testimony.

¶ 7 Kastner testified that she was a physical education teacher at Macomb. On the date of the incident, Kastner saw Fulkerson ask the defendant to remove his hat. The defendant did not comply, and Kastner asked the defendant to remove his hat. The defendant responded that he would remove it when he felt like it. Thereafter, Fulkerson approached the defendant from behind and took the hat off the defendant's head by its bill. The defendant became angry and started swearing at Fulkerson. Fulkerson attempted to guide the defendant to the office, and Kastner heard a bang against the lockers. Kastner saw the defendant pin Fulkerson against a locker.

¶ 8 Ginger Shryack testified that she was a special education teacher at Macomb. On the date of the incident, she heard yelling and profanity coming from down the hallway. Shryack recognized the voice as that of the defendant. Shryack had the defendant in class and was the case manager for his Individual Education Plan (IEP). Shryack noted that the defendant had temper issues at school. During the incident, Shryack tried to calm the defendant as she had done on prior occasions. However, once the defendant stepped away from Fulkerson, another teacher asked Shryack to step back, fearing that she was getting close.

¶ 9 The defendant testified that on January 31, 2012, he was 18 years old, and he was a student at Macomb. At approximately 8 a.m., the defendant was wearing a hat in a school hallway. A physical education teacher asked the defendant to remove his hat, and he told her to wait a minute. The defendant then felt someone come from behind and "rip [his] hat off." The defendant realized that Fulkerson had removed his hat without permission, became angry, and attempted to retrieve his property. The defendant had Fulkerson against a locker in an attempt to retrieve his hat and tried unsuccessfully to pull Fulkerson's arms down to grab his hat. About the time that Fulkerson radioed the office to call 911, the defendant backed off and started walking

towards the office. Before reaching the office, the defendant "punched [a] locker instead of punching" Fulkerson.

¶ 10 The school year before the incident, Fulkerson had taken the defendant's confederate flag belt buckle and belt. The defendant attempted to get the items back but was unsuccessful until his father spoke with Fulkerson and the police were called. At the time of the present offense, the defendant thought that Fulkerson would eventually return his hat.

¶ 11 On cross-examination, the defendant admitted that there was a school rule against wearing hats, and at the time of the incident, he knew that Fulkerson was a school employee. The defendant admitted that he shoved Fulkerson against the lockers with his hands, but he did not remember the entire incident because his anger had clouded his recollection. Nonetheless, the defendant thought he was acting reasonable at the time.

¶ 12 At the conclusion of the trial, the jury found the defendant guilty of aggravated battery. At the sentencing hearing, Melonie Icenogle, the defendant's mother, testified that on Friday, January 27, 2012, the defendant learned that one of his friends had been killed in a car accident. The following Monday, the school made counselors available to the students, but did not allow the students to hold an assembly in memory of the deceased student or decorate her locker. Around 1 p.m., the defendant left school.

¶ 13 Melonie stated that the defendant had been previously diagnosed with a learning disability in reading and reading comprehension, and an auditory processing deficiency. The defendant took medication for attention deficit hyperactivity disorder (ADHD) with impulsivity and anxiety. In December 2011, the defendant stopped taking Prozac.

¶ 14 The defendant's presentence investigation (PSI) report stated that the defendant was eligible for IEP services due to behaviors related to ADHD. The report indicated that the defendant denied having any difficulty controlling his anger and stated that the present case was

an isolated incident. At the end of the hearing, the trial court sentenced the defendant to 18 months' probation.

¶ 15 After sentencing, the defendant made a *pro se* motion alleging ineffective assistance of counsel. The trial court allowed Miller to withdraw and appointed Nigel Graham to represent the defendant on postsentencing matters.

¶ 16 Graham filed a "Motion to Vacate Conviction and Re-Sentence." The motion argued that the defendant had received ineffective assistance of trial counsel because Miller never notified the defendant of an offer by the State to reduce the charge to a misdemeanor with a sentence of community service. The trial court denied the motion, and the defendant appeals.

¶ 17 ANALYSIS

¶ 18 The defendant argues that he was denied effective assistance of counsel when relevant, potentially exculpatory evidence, was only brought out at sentencing. The defendant contends that the evidence that the aggravated battery occurred on the heels of the unexpected death of his friend, at a time when he was diagnosed with ADHD with impulsivity and anxiety and had discontinued taking Prozac, would have helped the jury understand that his behavior was reasonable under the circumstances.

¶ 19 The State argues that the defendant has forfeited review of this claim because the argument was not raised in the postsentence motion. In reply, the defendant concedes that the argument could have been raised in the postsentence motion but contends that both trial and posttrial counsel were ineffective for not introducing the evidence at trial and for not raising this issue in a postsentence motion. Consequently, we review the merits of the defendant's ineffective assistance of trial counsel argument to determine if posttrial counsel was ineffective for failing to raise an issue concerning trial counsel's decision not to admit the evidence at issue.

¶ 20 To establish ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Henderson*, 2013 IL 114040; *Strickland v. Washington*, 466 U.S. 668 (1984). The failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 217 Ill. 2d 407 (2005). We review the defendant's ineffective assistance claim *de novo*. *People v. Morris*, 2013 IL App (1st) 111251.

¶ 21 In the instant case, the defendant was charged with aggravated battery. To secure a conviction, the State had to prove beyond a reasonable doubt that the defendant, in committing a battery, knew that the battered individual was a teacher or school employee upon school grounds. 720 ILCS 5/12-3.05(d)(3) (West 2012). A person commits battery when he "knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3(a) (West 2012).

¶ 22 At trial, defense counsel raised an affirmative defense of defense of property. Defense counsel argued that the defendant was justified in using force to secure the return of his property. This affirmative defense required the jury to decide if the defendant was justified in using force against Fulkerson because he reasonably believed that such conduct was necessary to prevent or terminate Fulkerson's tortious interference with personal property that the defendant lawfully possessed. 720 ILCS 5/7-3 (West 2012).

¶ 23 The defendant has not established that trial counsel's performance was deficient for failing to present evidence of the defendant's emotional state, learning disabilities, ADHD, and discontinuation of Prozac use at trial. This evidence did not make the defendant's decision to shove and pin Fulkerson against a locker in an effort to retrieve his hat more reasonable.

Adoption of the defendant's argument would require this court to apply a subjective reasonable belief standard. However, we find that an objective reasonable belief standard is more appropriate because of the similarity between the defense of property claim and self-defense. See *People v. Dickey*, 2011 IL App (3d) 100397 (defendant must prove in arguing self-defense that he actually and subjectively believed a danger existed which required the use of force and his beliefs were *objectively* reasonable). Applying this objective standard, the admission of evidence of the defendant's emotional state and mental impairments would not have proved that his decision to resort to force was reasonable. The defendant testified that he knew there was a school rule against wearing hats and he had successfully retrieved property that Fulkerson had taken from him in the past. In light of evidence that the defendant was not subject to tortious interference with his property, evidence of the defendant's psychological and emotional state would not have shown that his decision to resort to force to retrieve his hat was objectively reasonable. Defense counsel was not deficient for failing to present this evidence at trial.

¶ 24 The defendant also fails to demonstrate that the admission of the evidence would have altered the outcome of the proceeding. During the trial, the jury heard evidence that the defendant had temper issues and was treated with "white gloves" by the school administration. Admission of Melonie's testimony and information from the PSI report might help explain the cause of the defendant's outbursts, but would not make them appear reasonable. As a result, the outcome of the proceeding would not have changed. The defendant has not demonstrated that he received ineffective assistance of trial counsel.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of McDonough County is affirmed.

¶ 27 Affirmed.