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FACTS

¶ 4 In May 2011, the defendant came to the attention of a law-enforcement detail called WAVE or Working Against Violent Elements. The WAVE detail is comprised of members of the Illinois State Police, the Federal Bureau of Investigation, and other agencies. At trial, in addition to the defendant, many WAVE members testified.

¶ 5 Sergeant Beliveau. On May 3, 2011, Illinois State Police Master Sergeant Joseph R. Beliveau was working with three other WAVE officers in a covert sport utility vehicle in the neighborhood of 25th and State Streets in East St. Louis. The area is reportedly known for major criminal activity. Sergeant Beliveau testified that he and his WAVE unit were looking for crimes involving violence, firearms, or narcotics. As the officers drove west on State Street, near 25th Street, they noticed a Pontiac Grand Am with tinted windows driving on the parking lot of Crown Food Mart, a store on the corner of those two streets. As the Pontiac began accelerating, Sergeant Beliveau saw the passenger-side door close, giving him the impression that a passenger had just entered the vehicle. The driver of the Grand Am drove onto 24th Street. After traveling one block, the Grand Am stopped, and the passenger side door reopened. A man, later determined to be the defendant, came out of the door and began walking towards the Crown Food Mart, with one hand clenched, and called out: "Come on. I got it."

¶ 6 Sergeant Beliveau decided that he needed to speak with the defendant, and so he activated the vehicle's emergency lights. He and Special Agent Tony Luther (of the Troy police department) exited the vehicle. The defendant began walking backwards away from the officers and then began to run towards 25th Street. Special Agent Luther identified himself as a law-enforcement officer and ordered the defendant to stop running. Officer Beliveau saw the defendant make a throwing motion towards the street, and then the officer heard something hit the ground and break. Upon investigation of the area where he believed

the item would have landed, he discovered two small pieces of what appeared to be crack cocaine and a small glass "one-hitter" pipe.

¶ 7 Agent Luther and Illinois State Police Officer Homan caught the defendant as he was running away and put him on the ground. Sergeant Beliveau saw the defendant comply with the officers' order to walk towards the WAVE sport utility vehicle, but while the defendant walked towards the vehicle, he spoke loudly and insultingly to the officers. Beliveau asked the defendant to remain calm, but he refused to do so. The defendant was placed in handcuffs. The officers walked the defendant to the driver's-side rear door, and Agent Luther pulled on the defendant's shirt to get him into the vehicle. The defendant was sitting on the edge of the vehicle seat while Agent Luther continued to try to get the defendant turned and fully inside the vehicle. The defendant began kicking towards Sergeant Beliveau's groin area with his right foot. Sergeant Beliveau testified that he saw the defendant's foot as it was coming towards his body, and that in an effort to avoid being kicked, he leaned in, which resulted in the kick landing on his hand and in the upper left thigh area as opposed to the intended groin area target. Though Sergeant Beliveau considered the kick to be offensive, he was not injured. The defendant's behavior deteriorated in the sport utility vehicle, and so the officers called for transport backup from the East St. Louis police department.

¶ 8 Agent Luther. Agent Luther testified to the same set of facts. He explained in detail what transpired when Sergeant Beliveau was kicked by the defendant. The officers were attempting to get the defendant into the sport utility vehicle, but were having difficulty in doing so. Agent Luther went around to the opposite door of the vehicle and began pulling on the back of the defendant's shirt—pulling the defendant into the vehicle, while the officers on the other side of the vehicle were attempting to push the defendant into the vehicle.

¶ 9 Later, after the defendant was transported by the East St. Louis police department,

Agent Luther was questioned about whether he witnessed the defendant kick Sergeant Beliveau or heard anything to make him believe that the defendant kicked Sergeant Beliveau. Agent Luther stated that because he was intensely focused on pulling the defendant into the back of the vehicle, he did not see or hear any evidence that the defendant kicked Beliveau.

¶ 10 Kevin Crolly. Kevin Crolly, a member of the National Guard who serves with the WAVE unit, was present at the time of the defendant's arrest. His role with WAVE was to support the law-enforcement officers by obtaining criminal histories and driver's license statuses. He was standing by the vehicle as Beliveau and Luther were attempting to get the defendant inside. Crolly could not see inside, but heard Beliveau exclaim that the defendant was trying to kick him.

¶ 11 Agent Melvin. Agent Tyson Melvin of the Illinois State Police was a member of the WAVE detail and was working in a different area of East St. Louis on the date of the defendant's arrest. Upon hearing over the police radio that his colleagues were involved in an incident with a suspect, his WAVE team traveled to that location to provide support. He observed both doors of the Sergeant Beliveau WAVE sport utility vehicle open, and Beliveau and a subject were visible in the interior of the vehicle. Agent Melvin approached the vehicle and was told by Sergeant Beliveau that the subject had kicked him. Melvin did not see the defendant kick Sergeant Beliveau.

¶ 12 The Defendant. The defendant testified at trial to his felony record which included convictions for retail theft, receiving the credit card of another, and aggravated battery. He acknowledged having a crack cocaine problem which had lasted for decades. He acknowledges that he purchased crack cocaine on May 3, 2011, in the area of the Crown Food Mart in East St. Louis. He admitted that he threw the crack and crack pipe down. He testified that he was handcuffed and escorted to the police vehicle. He admitted that he used

abusive language to the officers. The defendant did not admit purposefully kicking Sergeant Beliveau. He testified that Agent Luther was grabbing him by his arms and dragging him, which caused his feet to go up and apparently hit Beliveau. He did not know that he struck Beliveau. He explained that he was sitting in the backseat of the vehicle facing out and talking to the officer when suddenly he was grabbed from behind and dragged into the vehicle which caused his feet to come up. In stating his point, the defendant testified, "If I want to kick him, I could have kicked him." He testified to his belief that he never struck Sergeant Beliveau, even on an accidental basis.

¶ 13 In closing argument, defense counsel argued that the State failed to prove that the defendant committed aggravated battery beyond a reasonable doubt. The jury convicted the defendant of all three counts.

¶ 14 The defendant filed a posttrial motion, which was denied after a hearing on December 28, 2011. The court proceeded to the sentencing hearing. The defendant was sentenced to a six-year term for aggravated battery and a five-year term for unlawful possession of a controlled substance. The sentences were to be served concurrently. The defendant appeals from his conviction and sentence for aggravated battery.

¶ 15 **LAW AND ANALYSIS**

¶ 16 On appeal the defendant alleges that his trial attorney was ineffective with respect to allowing testimony of Beliveau's prior consistent statements that the defendant had kicked him. As a result, he asks this court to overturn his conviction for aggravated battery and remand this cause for a new trial.

¶ 17 The United State Constitution guarantees every criminal defendant the right to the assistance of legal counsel. U.S. Const., amend. VI. The Supreme Court has interpreted the sixth amendment right to counsel to mean that the defendant has the right to "effective assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

Strickland v. Washington set forth the method for evaluating defense counsel's performance in a criminal case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Illinois Supreme Court adopted the *Strickland* standard in *People v. Albanese*, 104 Ill. 2d 504, 525-26, 473 N.E.2d 1246, 1255-56 (1984), *cert. denied*, 471 U.S. 1044 (1985). Constitutionally competent assistance is measured by a test of whether the defendant received "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Strickland* standard has two components. First, the defendant must establish that defense counsel's performance was deficient. *Id.* Second, the defendant must show his legal defense was prejudiced by counsel's deficient performance. *Id.* at 693.

¶ 18 To prove that counsel's challenged actions or inactions were deficient, the defendant must prove that counsel's performance was not the product of sound trial strategy. *People v. Simms*, 192 Ill. 2d 348, 361, 736 N.E.2d 1092, 1106 (2000). We presume that defense attorneys pursue sound trial strategies. See *Strickland*, 466 U.S. at 689. Trial strategies are unsound only when no reasonably effective criminal defense attorney, facing similar circumstances, would pursue such strategies. *People v. Faulkner*, 292 Ill. App 3d 391, 394, 686 N.E.2d 379, 382 (1997); *People v. Fletcher*, 335 Ill. App. 3d 447, 453, 780 N.E.2d 365, 370 (2002). Specifically, the failure to object, or the affirmative solicitation of damaging testimony, can serve as the basis for an ineffective-assistance-of-counsel claim. See *People v. Royse*, 99 Ill. 2d 163, 171-72, 457 N.E.2d 1217, 1221-22 (1983) (counsel ineffective given a pattern of incompetence including the failure to object to hearsay evidence); *People v. Phillips*, 227 Ill. App. 3d 581, 590, 592 N.E.2d 233, 239 (1992) (defense counsel found to be ineffective for soliciting testimony of other-crimes evidence from a police officer); *People v. Moore*, 356 Ill. App. 3d 117, 127, 824 N.E.2d 1162, 1170-71 (2005) (defense counsel strategy was unsound when eliciting incriminating hearsay from State witnesses instead of impeaching these same witnesses with missing evidence); *People v. Orta*, 361 Ill.

App. 3d 342, 343, 836 N.E.2d 811, 813 (2005) (stating that "[a] person charged with a crime has the right to expect his lawyer's questions to prosecution witnesses will not help the State prove its accusation").

¶ 19 To prevail on an ineffective-assistance-of-counsel claim, "[the] 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." *People v. Lefler*, 294 Ill. App. 3d 305, 311, 689 N.E.2d 1209, 1214 (1998) (citing *Strickland*, 466 U.S. at 695). The term "reasonable probability" has been defined to mean "a probability sufficient to undermine confidence in trial's outcome." *Id.* at 311-12, 689 N.E.2d at 1214 (citing *Strickland*, 466 U.S. at 687). The fact that professional errors have been committed, without more, is not enough to undermine confidence. We always examine the issue from the perspective of whether the defendant received a fair trial, despite an attorney's flawed performance. *Id.* at 312, 689 N.E.2d at 1214. In that context, a fair trial means "a trial resulting in a verdict worthy of confidence." *Id.* (citing *People v. Moore*, 279 Ill. App. 3d 152, 161-62, 663 N.E.2d 490, 498 (1996)).

¶ 20 At issue are two prior consistent statements of Master Sergeant Joseph R. Beliveau about the incident in which the defendant allegedly kicked him. While no one witnessed the defendant kicking Beliveau, two witnesses testified that at about the time of the kicking incident, Sergeant Beliveau explained that the defendant was trying to kick him (Kevin Croll) and that he had been kicked (Agent Melvin). Defense counsel did not object to the hearsay nature of these prior consistent statements. The State argues that both statements of Sergeant Beliveau amounted to exceptions to the hearsay rule in that each statement was an excited utterance.

¶ 21 Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. *People v. Caffey*, 205 Ill. 2d 52, 88, 792 N.E.2d 1163, 1187 (2001). Although exceptions to this rule exist, hearsay evidence is ordinarily inadmissible because

the evidence is considered unreliable. *Id.* In order to be admissible as an excited utterance,"there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, there must be an absence of time for the declarant to fabricate the statement, and the statement must relate to the circumstances of the occurrence." *People v. Sutton*, 233 Ill. 2d 89, 107, 908 N.E.2d 50, 62 (2009). In determining whether the hearsay is admissible, the court looks at the totality of the circumstances. *Id.* This "analysis involves consideration of several factors, including time, the mental and physical condition of the declarant, the nature of the event, and the presence or absence of self-interest." *Id.*

¶ 22 The timing of the utterance can be critical to the analysis of whether the statement was spontaneous. The primary concern with timing is whether the declarant made the statement at a time when he was still impacted by the excitement of the event. *People v. Connolly*, 406 Ill. App. 3d 1022, 1025, 942 N.E.2d 71, 76 (2011). "An excited utterance can still be made even after having spoken previously to another after the event." *Id.* at 1026, 942 N.E.2d at 76.

¶ 23 In this case, had defense counsel objected to the testimony of Crolly and Melvin reiterating Sergeant Beliveau's statement that the defendant kicked him, we conclude that given the totality of the circumstances, Beliveau's statements to Crolly and Melvin met the standard necessary for excited utterances and would therefore have been admissible. Both statements (which in actuality may have been one statement rather than two statements) were made in the heat of the moment in which Sergeant Beliveau was allegedly kicked by the defendant. We find that the act of being kicked was sufficiently startling. Finally, the statement(s) involved the circumstances of the occurrence. Because the statements would have been admissible, we do not find that defense counsel's performance was deficient.

¶ 24 Furthermore, there could be no prejudice suffered by the defendant even if the statements were construed as hearsay because of his own admission on cross-examination.

At first in the defendant's testimony he denied kicking Sergeant Beliveau. Alternately, he claimed that if he did kick Sergeant Beliveau, that the kick was accidental. However, on cross-examination, he acknowledged that during the heat of his arrest, he threatened the officers, and he confirmed that he kicked Sergeant Beliveau although the defendant claimed again that the kick was accidental.

¶ 25 We conclude that the defendant's claim for ineffective assistance of counsel fails, and we affirm his conviction for aggravated battery.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 28 Affirmed.