

2013 IL App (1st) 111568-U

FOURTH DIVISION  
June 6, 2013

No. 1-11-1568

**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 JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 2004
	)	
SHANNON FRYE,	)	Honorable
	)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's jury conviction of domestic battery affirmed; conviction for violation of an order of protection reversed due to ineffective assistance of counsel; cause remanded for new trial on that charge.

1-11-1568

¶ 2 Following a jury trial, defendant Shannon Frye was found guilty of domestic battery and violation of an order of protection, then sentenced to concurrent, four year terms in prison. On appeal, defendant does not contest the sufficiency of the evidence to sustain his convictions; he solely claims that his trial counsel was ineffective for acts and omissions related to the charge of violating an order of protection. He thus requests this court to reverse his conviction on that charge and remand his case for a new trial on it.

¶ 3 The record shows that, in addition to the offenses of which he was convicted, defendant was charged with home invasion stemming from an incident that occurred on December 12, 2009, at an apartment located in the building at 319 East 130th Street (the apartment) in Chicago, Illinois. During this incident, defendant and Alicia Myles, the mother of two of his children, were involved in a physical altercation.

¶ 4 Defendant was convicted on evidence showing that on the morning of the incident, Myles and her children were outside the apartment when defendant approached from behind and forced Myles to open the door and allow him inside. There, defendant stomped, punched and kicked Myles, while cursing about child support paperwork which she had filed in relation to their daughter. Defendant fled after a neighbor entered the apartment and called police. When Chicago police officer Regin Perpignan arrived at the apartment shortly thereafter, she saw that Myles was crying and that her face was swollen and bloody.

¶ 5 Myles testified that defendant previously accosted her in a similar manner on January 23, 2009, which caused her to obtain an order of protection against him. Under that order, defendant

was prohibited from entering the apartment and from having any contact with Myles or their daughter from February 10, 2009, through August 9, 2010, which included the day of the incident at issue here. Myles further testified that defendant never lived with her at the apartment, but acknowledged that she had consensual sex with him there on one occasion after the order of protection was in effect, which resulted in the conception of their second child, who was born in July 2010.

¶ 6 During direct examination by his trial counsel, defendant acknowledged that he received a copy of the order of protection in court and that it prohibited him from entering the apartment and from contacting Myles. Defendant testified that he was living at the apartment when the order was issued, then moved into his mother's home. He further testified that he had no contact with Myles for several months after that, but that Myles began to visit him on occasion at the grocery store where he worked, and at his mother's house. He and Myles resumed a sexual relationship at that time, and their encounters always occurred at his mother's house. Defendant denied going to the apartment on the day of the incident, or at any time after the order of protection was issued, and also denied ever receiving child support paperwork.

¶ 7 The jury found defendant not guilty of home invasion, but guilty of domestic battery and violation of an order of protection. In this appeal, defendant contends that trial counsel was ineffective for (1) failing to move for a directed verdict on the charge of violation of an order of protection, (2) eliciting testimony during his direct examination that supplied evidence of an essential element of that offense and which the State had not presented during its case-in-chief,

and (3) failing to object to an inadequate issues instruction on that offense. Defendant raises no issue with respect to counsel's representation on the domestic battery charge.

¶ 8 To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that he suffered prejudice as a result of that deficiency. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). To satisfy the deficient performance prong, defendant must overcome the strong presumption that the challenged action or inaction was the product of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). To establish prejudice, defendant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 9 To prove defendant guilty of violating an order of protection in this case, the State was required to prove that he committed an act prohibited by a valid order of protection, and also that he did so after having been served notice of the contents of the order or having otherwise acquired actual knowledge thereof. 720 ILCS 5/12-30 (West 2008). Defendant first claims that counsel was ineffective for failing to move for a directed verdict after the State failed to introduce evidence that he knew, or had notice of, the order of protection.

¶ 10 The State concedes that at the time it rested its case-in-chief, it had not presented any evidence establishing the actual knowledge element of the offense. However, the State maintains that trial counsel was not ineffective for failing to move for a directed verdict on the order of protection charge, and for eliciting defendant's testimony to establish his knowledge of the order

and its contents. The State asserts that these decisions were part of a sound trial strategy to convince the jury that defendant was the more credible party, that he did not commit the underlying acts which formed the basis for the three charges, and thus was not guilty of any of them.

¶ 11 In general, counsel's decision whether to move for a directed verdict is a matter of trial strategy (*People v. Jennings*, 142 Ill. App. 3d 1014, 1028 (1986)), as is counsel's choice regarding which theory of defense to pursue and the manner in which to question witnesses (*People v. Campbell*, 264 Ill. App. 3d 712, 732-33 (1992)). The fact that counsel's chosen strategy ultimately proves unsuccessful does not, in and of itself, establish deficient performance (*People v. Fuller*, 205 Ill. 2d 308, 331 (2002)), and the ultimate determination of counsel's ineffectiveness is made from the entire record, not isolated instances (*People v. Kluppelberg*, 257 Ill. App. 3d 516, 526 (1993)).

¶ 12 The State proceeded on the theory that defendant came to Myles' apartment angry over a child support order, forced his way inside and beat her. The overall defense strategy was to highlight weaknesses in Myles' testimony, thereby undermining her credibility while bolstering that of defendant, and raising reasonable doubt of defendant's guilt. Through his cross-examination of Myles, counsel attempted to portray her as a jealous ex-girlfriend who used the order of protection against defendant at her whim, and during closing argument, counsel pointed out her continuing sexual relationship with defendant and highlighted the lack of physical evidence to corroborate Myles' version of events.

¶ 13 Contrary to the State's contention, we fail to see how defense counsel would have jeopardized this strategy by moving for a directed verdict on the count of violation of an order of protection. This is particularly so where the State had clearly failed to present evidence on an essential element of that charge, and, as the record shows, the jury was not present when counsel moved for and argued his motion for a directed verdict on the count of home invasion. Had counsel presented the proper motion, the charge of violation of the order of protection would have been directed out before defendant testified as part of the defense case.

¶ 14 In addition, defendant's knowledge of the order of protection and its contents had no relation to any of the above mentioned weaknesses and inconsistencies in Myles' testimony, such as the lack of corroborating physical evidence, and counsel could have attacked her credibility without eliciting this damaging testimony from defendant. Accordingly, there was no need for counsel to elicit this testimony from defendant in an attempt to further his overall strategy, and by doing so, counsel established an essential element that the State had failed to provide.

¶ 15 The record further shows that counsel failed to object to an issues instruction on the subject charge that the State concedes was incomplete in that it failed to include two of the four propositions of which it is comprised, *i.e.*, the State had to prove that at the time he acted, defendant had been served notice of the contents of the order or had otherwise acquired actual knowledge thereof. Illinois Pattern Jury Instructions, Criminal, No. 11.78 (4th ed. Supp. 2009) (hereinafter, IPI 11.78). This was the element that the State had failed to establish during its

case-in-chief, and which was provided by defense counsel during his direct examination of defendant.

¶ 16 Finally, the record reveals that during closing argument, defense counsel stated that the order of protection itself states "respondent served in open court," and explained that defendant, the respondent, never denied receiving it. However, the order does not contain any indication as to whether defendant was present in court or served with the order, and thus there was no reason for counsel to concede this element of the offense based on the contents of the order.

¶ 17 Given these numerous and dubious decisions relating to the charge of violation of an order of protection, we find on the facts presented, that they fall outside the parameters of sound trial strategy or objectively reasonable representation. *Smith*, 195 Ill. 2d at 188. We further find that defendant was prejudiced, in that there is a reasonable probability that the result of his trial on the charge of violation of an order of protection would have been different but for these compounded errors. *Graham*, 206 Ill. 2d at 476.

¶ 18 We therefore affirm defendant's conviction for domestic battery, reverse his conviction for violation of an order of protection, and remand for a new trial as to that charge.

¶ 19 Affirmed in part, reversed and remanded in part.