2011 IL App (2d) 100596-U
No. 2-10-0596
Order filed October 3, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHAD W. CONWAY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 09-CF-3345 Honorable Thomas E. Mueller, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

Held: (1) Defense counsel was not ineffective for failing to request a jury instruction on defense of another, as counsel's reasonable trial strategy, supported by several witnesses, was to show that defendant did not commit the acts constituting the offense; (2) we vacated defendant's trauma center fee and spinal cord injury fee, as the offense of which defendant was convicted did not subject him to those fees.

¶ 1 Following a jury trial, defendant, Chad W. Conway, was convicted of mob action (720 ILCS 5/25-1(a)(1) (West 2008)) and sentenced to three years' imprisonment. He was also ordered to pay a $100 trauma center fee and a $5 spinal cord injury fee. Defendant appeals, arguing (1) that he received ineffective assistance of counsel when his trial counsel failed to request that an instruction

on defense of another (720 ILCS 5/7-1(a) (West 2008)) be given to the jury, and (2) that the trauma center and spinal cord injury fees were improperly imposed. For the following reasons, we vacate the fees but otherwise affirm.

¶ 2 I. BACKGROUND

¶ 3 On January 20, 2010, defendant was indicted on one count of aggravated battery (720 ILCS 5/12-4(b)(8) (West 2008)) and one count of mob action (720 ILCS 5/25-1(a)(1) (West 2008)) as a result of an incident that took place on November 27, 2009, at the Milk Pail, in East Dundee. Testimony at trial established the following facts.

¶ 4 On the evening of November 27, 2009, Robert Maida, Steven Fanuke, Jaime Calderon, and Angela Collingbourne were providing security for a rap concert being held at the Milk Pail. None of the individuals providing security were licensed security guards. During the concert, Maida saw Jacob Rosenbach, who was defendant's brother, appear to throw gang signs. Rosenbach was given two warnings by the guards to stop. When Rosenbach was observed throwing gang signs a third time, Maida physically escorted Rosenbach out of the facility.

¶ 5 When they got outside, Rosenbach, who was heavily intoxicated, began to swing at Maida. Maida called for assistance and, along with the other guards, he brought Rosenbach to the ground and tried to zip-tie his hands. At that point, defendant exited the facility and told the guards that he was Rosenbach's brother. Defendant told the guards to let Rosenbach go and attempted to release him. Defendant yelled and screamed, "that's my brother," "let him go," and "what are you doing." Fanuke told defendant to back off and that they were handling the situation. Collingbourne tried to explain to defendant that they would let Rosenbach back into the building after he calmed down. Defendant tried to move around Fanuke and struggled with him. As the guards worked to subdue Rosenbach, defendant attempted to pull the guards off of Rosenbach. Defendant grabbed Fanuke's

shoulders and tried to maneuver him out of the way. Defendant became agitated and punched Fanuke. Defendant ran off, chased by Fanuke. Defendant returned in a car, and while the guards were focused on defendant, Rosenbach jumped into the car, which sped away. Ultimately, defendant and Rosenbach were taken into custody and identified by the guards.

¶ 6 Three witnesses testified on behalf of defendant. They testified that they saw the guards wrestle Rosenbach to the ground, and one stated that she saw a guard punch Rosenbach. According to each witness, defendant did not strike anyone during the incident. Although one of the witnesses could not recall if defendant was ever outside of her line of sight, two of the witnesses expressly stated that defendant was in their view at all times after he left the building.

¶ 7 The jury found defendant not guilty of aggravated battery but guilty of mob action. The trial court sentenced defendant to three years' imprisonment. Defendant timely appealed.

¶ 8 II. ANALYSIS

¶ 9 A. Ineffective Assistance of Counsel

¶ 10 Defendant contends that trial counsel was ineffective for failing to request that an instruction on defense of another be given to the jury. A claim of ineffective assistance of counsel requires a defendant to establish that (1) his attorney's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). The failure to satisfy either prong is fatal to a defendant's claim. *People v. Colon,* 225 Ill.2d 125, 135 (2007). Under the first prong, there is a strong presumption that trial counsel's action or inaction was the result of sound trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). "To overcome this presumption, a defendant must show that trial counsel's action was so irrational and unreasonable that no reasonably effective attorney would pursue that strategy under

similar circumstances." *People v. Salcedo*, 2011 IL App (1st) 083148, ¶50. "In deciding whether defense counsel's performance was deficient, the court must consider counsel's conduct from his perspective at trial and must avoid using hindsight." *Id.* "Failure to request a self-defense instruction constitutes ineffective assistance of counsel when such failure was not the result of trial strategy." *People v. Haynes*, 408 Ill. App. 3d 684, 689 (2011).

¶ 11 "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force." 720 ILCS 5/7-1(a) (West 2008). Defense of person is an affirmative defense. 720 ILCS 5/7-14 (West 2008). "The legal effect of an affirmative defense is to admit that the acts occurred, but to deny responsibility." *People v. Podhrasky,* 197 Ill. App. 3d 349, 352 (1990); see also *People v. Rodriguez*, 336 Ill. App. 3d 1, 15 (2002) (by raising the affirmative defense of self-defense, the defendant admitted the homicide, but denied criminal responsibility).

¶ 12 We find that defense counsel's decision not to ask for a jury instruction on defense of another was reasonable trial strategy. Counsel argued in opening arguments that he was going to present witnesses who would testify that, although Rosenbach fought with the guards, defendant was not involved in that altercation. During trial, counsel presented three witnesses who testified that they never saw defendant hit anyone. In closing arguments, counsel argued: "What it comes down to is they have witnesses that say it happened, we have witnesses that say it didn't happen." He asked the jurors to determine which of the witnesses were more credible, and he emphasized that the three witnesses testified "[v]ery, very clearly" that defendant did not touch anyone. He added, "if he didn't touch anyone, there couldn't be an aggravated battery or there couldn't be a mob action on his part." He further stated, "we're quite comfortable that it didn't happen." As noted above, if

defendant wished to raise the affirmative defense of defense of another, he necessarily had to admit that he committed the act. Here, given the fact that three defense witnesses supported defendant's claim that he did not commit the act, we cannot say that counsel's chosen strategy was unreasonable. Accordingly, because defendant cannot meet the first prong of the *Strickland* analysis, his ineffective-assistance-of-counsel claim fails and it is not necessary for us to consider the second prong. See *Colon*, 225 Ill. 2d at 135.

¶ 13 B. Trauma Center Fee and Spinal Cord Injury Fee

¶ 14 Defendant asserts that the trial court erred by ordering him to pay a $100 trauma center fee and a $5 spinal cord injury fee. The State agrees.

¶ 15 The trauma center fee may be imposed only upon those convicted of driving under the influence of alcohol or drugs (730 ILCS 5/5-9-1(c-5) (West 2008)), certain drug-related offenses (730 ILCS 5/5-9-1.1(b) (West 2008)), or certain weapons offenses (730 ILCS 5/5-9-1.10 (West 2008)). See *People v. Valle*, 405 Ill. App. 3d 46, 61 (2010). Similarly, the spinal cord injury fee may be imposed only upon those convicted of driving under the influence of alcohol or drugs (730 ILCS 5/5-9-1(c-7) (West 2008)) or certain drug-related offenses (730 ILCS 5/5-9-1.1(c) (West 2008)). Defendant was not convicted of any of these offenses. Accordingly, the $100 trauma center fee and $5 spinal cord injury fee must be vacated.

¶ 16 III. CONCLUSION

¶ 17 For the reasons stated, we vacate the $100 trauma center fee and $5 spinal cord injury fee but otherwise affirm defendant's conviction and sentence.

¶ 18 Affirmed in part and vacated in part.