2012 IL App (2d) 100870-U
No. 2-10-0870
Order filed March 7, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CLARENCE J. WEBER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 08-CF-2769 Honorable Theodore S. Potkonjak, Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: Defense counsel was not ineffective under *Cronic*: although counsel's opening statement presented a self-defense theory that ultimately did not go to the jury, this did not equate to a concession of guilt or a failure to meaningfully test the State's case.

¶ 1 Following a jury trial in the circuit court of Lake County, defendant, Clarence J. Weber, was found guilty of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) in connection with the stabbing death of his estranged wife, Adelina Weber. During defendant's opening statement, one of his attorneys conceded that defendant had stabbed Adelina. The attorney argued that defendant

was not guilty because he had acted in self-defense, but the trial court ultimately concluded that there was no evidence to the support the theory. Accordingly, the trial court refused to instruct the jury on self-defense and barred defendant's attorneys from raising the theory during closing arguments. Defendant argues that, under these circumstances, his attorneys essentially conceded his guilt, thereby violating his right to the effective assistance of counsel. We disagree, and we therefore affirm.

¶ 2 Prior to trial, defendant moved to suppress statements made to police following his arrest. The trial court granted the motion on the basis that the police had not honored defendant's request to have counsel present during questioning. Among other things, defendant had told police that Adelina attacked him because he threatened to report to authorities that she was in the United States illegally. While in custody, defendant engaged in a telephone conversation with his daughter, Cheryl Thomas. During the conversation—which was tape-recorded—defendant claimed that he had acted in self-defense. The trial court ruled that defendant was barred by the hearsay rule from introducing those statements. The court further ruled, however, that if the State chose to offer portions of the conversation into evidence, the jury would be permitted to hear defendant's exculpatory statements.

¶ 3 At trial, the State introduced evidence that on July 5, 2008, at about 2 p.m., Adelina walked into the lobby of the Marriott Spring Hill Suites hotel in Lincolnshire, pleading for help. She was bleeding from a neck wound and she collapsed in the lobby. The hotel's assistant general manager performed cardiopulmonary resuscitation until paramedics arrived and transported Adelina to a nearby hospital. Adelina worked at the Walker Brothers Pancake House, which was located about 200 yards in front of the hotel. Adelina was working that day and, according to the testimony of her coworkers, she left work between 1:30 and 2 p.m. Her vehicle, a red Chevrolet Trailblazer, had been

parked in the employee parking area of the restaurant's parking lot. The vehicle was later discovered in the hotel's parking lot near a dumpster enclosure. The driver's door was open, a set of keys was found on the driver's seat, and there was a knife on the floorboard. No blood was present on the knife. Adelina was wearing an apron when she entered the hotel. Just under $100 was found in the pocket of the apron.

¶ 4 Several handwritten notes were discovered in Adelina's vehicle. One stated, in pertinent part, "Lina, I hope you will come and talk. I will be at Gurnee Mills." Another note stated, "Lina can we talk I'm behind the Marriott hotel." Yet another note addressed to "Lina" requested a meeting "[b]ehind the hotel like the last time." According to one of her coworkers, Adelina was known as "Lina." That coworker testified that, on July 2, 2008, she told Adelina that there was a piece of paper on the windshield of Adelina's vehicle. After retrieving it, Adelina appeared to be nervous. Adelina had previously filed a petition for the dissolution of her marriage to defendant. The petition was served on defendant on July 1, 2008.

¶ 5 Police collected cigarette butts from the Walker Brothers Pancake House parking lot and an adjacent parking lot. Laboratory analysis of some of the cigarette butts revealed the presence of DNA that matched a DNA sample collected from defendant.

¶ 6 Dr. Manuel Montez, a forensic pathologist, performed an autopsy. He concluded that Adelina died as a result of a single stab wound to the neck and chest. Dr. Montez testified that, while performing an external examination of Adelina's body, he observed a sharp force injury consistent with a stab wound on the right side of her neck. He also examined Adelina's clothing and observed that the strap of her apron had been cut or pierced by a sharp object, as had the collar of her blouse and the fabric lying underneath the collar. Dr. Montez found no evidence of defensive wounds to

the upper extremities that would suggest that Adelina had attempted to shield herself from an attacker. Dr. Montez testified that the characteristics of the neck wound indicated a clean entry and exit by the weapon that produced the wound. He indicated that, if the wound had been inflicted in the midst of a struggle, he would have expected to see tearing at the edge. Dr. Montez's internal examination of Adelina's body revealed that the path of the neck wound led to the upper lobe of the right lung, which had been pierced. The weapon cut the right main bronchus, allowing air into the chest cavity and causing the upper lobe of the right lung to collapse. Dr. Montez also noted an injury to the pulmonary artery. The wound was 4 to 4½ inches deep, and Dr. Montez described the path of the wound through Adelina's body as "linear," suggesting that she was not moving when the wound was inflicted. The path of the wound was downward, right to left, and slightly front to back.

¶ 7 On cross-examination, Dr. Montez acknowledged that he did not know whose hands were on the weapon that inflicted the wound to Adelina's neck. He also acknowledged that he did not know how many hands were on the weapon. He indicated that he did not find a "hilt mark," which occurs with bladed weapons when the entire length of the blade enters the body and the handle is forced into the skin. On redirect examination, Dr. Montez explained that the clean wound and linear wound pathway that he observed were inconsistent with a scenario in which Adelina was holding the weapon while someone else plunged it into her neck. He also testified that it would have taken tremendous force to penetrate Adelina's apron strap, the collar of her blouse, and the fabric under the collar. Dr. Montez further explained that, because the weapon had penetrated several layers of clothing, the handle would not have had contact with Adelina's skin and therefore would have left no hilt mark.

¶ 8 Yoko Walrath testified that, on the morning of June 29, 2008, after exiting the Walker Brothers Pancake House, she observed a middle-aged white man looking into a red SUV. He was wearing white gloves. She observed the man look in her direction and then step into a silver SUV. He did not drive off. Walrath was shown photographs of Adelina's vehicle and a vehicle owned by defendant. She testified that those vehicles resembled, respectively, the red SUV that the gloved man was looking into and the silver SUV that he then entered. Craig Cooper testified that he served Adelina's petition for dissolution of marriage on defendant. Cooper observed that defendant was wearing a glove-like bandage.

¶ 9 Yuji Tamura testified that between 11 a.m. and noon on July 5, 2008, while driving through the parking lot behind the Spring Hill Suites Hotel, he observed defendant arguing with a woman who was standing by the open driver's door of a red SUV. Tamura was shown a photograph of Adelina's vehicle. He identified the vehicle in the photograph as the one he had seen the woman standing by.

¶ 10 On July 7, 2008, a motor vehicle registered to defendant—a silver Chevrolet Equinox SUV—was discovered parked at a truck stop in Indiana. The front license plate was missing. Parked next to defendant's SUV was a vehicle with a missing rear license plate. An Indiana license plate was found on the ground near the vehicle. The following day, defendant was arrested as he walked along a Lake County, Indiana, road. Defendant initially refused to identify himself to the arresting officer. The interior of defendant's SUV was subsequently searched and its license plate and two pairs of gloves were found inside. At least one of the pairs of gloves was white.

¶ 11 Adelina's sister-in-law, Cynthia Trujillo, testified that Adelina had two children with defendant. Early in 2008, Adelina and the children came to live with Trujillo, her husband, and

another sister-in-law. Defendant did not come with them, but on occasions in June 2008, Trujillo would see defendant sitting in his car in a parking lot across the street from her home. Trujillo was shown an item of jewelry—a chain—found in defendant's possession when he was arrested. Trujillo testified that the chain belonged to Adelina.

¶ 12 It was stipulated that, not long before Adelina was killed, defendant had purchased a pair of binoculars.

¶ 13 The defense rested without presenting any evidence. The trial court refused defendant's request to instruct the jury on self-defense and second-degree murder. The court concluded that there was no evidence to support those theories. The defense's theory during closing argument was that the circumstantial evidence presented by the State did not prove beyond a reasonable doubt that it was defendant who had stabbed Adelina. The trial court ruled that, in rebuttal, the State could argue that there was no evidence that defendant acted in self-defense.

¶ 14 As noted, defendant's claim that he did not receive the effective assistance of counsel is based on remarks of one of his attorneys during opening statement. That attorney, Katharine Hatch, stated as follows:

> "Self-defense is the tragic incident that occurred on July 5, 2008. We are conceding that [defendant] was there, cigarette butts. We are conceding that [defendant] was in the car with Adelina when this occurred, and we are conceding that [defendant] stabbed Adelina, but it was in self-defense. This is not first-degree murder.
>
> You will hear, of course, there are no defensive wounds when you come at someone with a knife and the knife comes backwards. You are the one holding the knife.

*** Now this transpired in the parking lot of the Walker Bros. Restaurant. It's an extremely busy restaurant in a very busy intersection of Lake County. You will hear that notes were left. Murderers don't leave notes. Murderers don't leave notes, meet me in the back. He wanted to speak with his wife, as he had previously, and on each previous occasion, she returned okay. And these are after the divorce had been filed.

[Defendant] did not flee Illinois to avoid prosecution responsibility. He was scared. He was frightened. *** He fled because he was scared. There is one stab wound. There is no rage. There are no multiple wounds. This is self-defense. This is a clear-cut case of self-defense. [Defendant] was defending himself, which he has a legal right to do. And I'm asking you to hold the State to their burden, which is an extremely high burden, and I am confident at the end and at the close of all the evidence that you will return a verdict of not guilty."

¶ 15 Defendant argues that Hatch's concession during opening statement that he stabbed Adelina was tantamount to a concession of guilt because, although Hatch stated that defendant acted in self-defense, there was no evidence to support that theory. Defendant contends that, by conceding his guilt, Hatch deprived him of his right to the effective assistance of counsel. Ordinarily, claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694.

¶ 16 Although, under *Strickland*, a specific showing of how counsel's errors were prejudicial is ordinarily necessary to establish a constitutional violation, in exceptional circumstances prejudice may be presumed. *United States v. Cronic*, 466 U.S. 648 (1984). In *Cronic*, the Court observed:

> "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' [Citation.] The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656-57.

Thus, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659.

¶ 17 Defendant relies primarily on our supreme court's decision in *People v. Hattery*, 109 Ill. 2d 449 (1985). In that case, the defendant was in the company of Rufus Mister when they encountered Albert Anderson. Mister insisted that Anderson supply him with drugs. They all proceeded to Anderson's apartment. The defendant stayed in the apartment with Anderson's wife and two children, while Mister and Anderson left to obtain drugs. When Mister and Anderson returned to the apartment, Anderson's wife and children were dead. In a statement to police, the defendant indicated that Mister had instructed him to kill Anderson's wife and children if Mister did not return in five minutes. Mister had threatened to harm the defendant and his family if he did not comply, so he strangled Anderson's family when the five-minute period elapsed. The State sought the death

penalty. Although the defendant pleaded not guilty, his attorney's opening statement during the guilt-innocence stage included the following remarks:

> " '*We are not asking you to find [defendant] not guilty. At the end of your deliberations, you will find him guilty of murder. We are asking you to consider the evidence that you hear today and in the next few days to explain why he did the horrible thing that he did. Once you have found him guilty, we will proceed and you will find him eligible for the death penalty. The question, and the only question facing you, will be whether to impose the death penalty on Charles Hattery for trying to save the life of his family. Thank you.*' (Emphasis added.)" *Id.* at 458-59.

¶ 18 During the guilt-innocence stage, defense counsel did not develop any defense to the murder charges, call any witnesses, or present a closing statement. Rather, in anticipation of the penalty phase, counsel cross-examined the State's witnesses in an effort to show that the defendant was compelled by threat of violence to commit the crimes. The *Hattery* court concluded that "[d]efense counsel's trial strategy—which attempted to show that defendant was guilty of murder but undeserving of the death penalty—was totally at odds with defendant's earlier plea of not guilty." *Id.* at 464. Relying on *Cronic*, the *Hattery* court reversed the defendant's conviction, reasoning that the prosecution's case had not been subjected to meaningful adversarial testing. *Id.* The court declined to consider whether it might have been sound strategy to concede guilt and focus on sparing the defendant's life; a strategy antithetical to the defendant's not-guilty plea was impermissible unless the record showed that the defendant had consented to the strategy. *Id.* at 464-65.

¶ 19 Defendant argues that here, as in *Hattery*, the prosecution's case was not subjected to meaningful adversarial testing. However, in *Hattery*, unlike in this case, defense counsel

unequivocally conceded the defendant's guilt. *Id.* at 464; see also *Wiley v. Sowders*, 647 F.2d 642, 650 (6th Cir. 1981) ("Counsel's *complete* concession of petitioner's guilt nullified the adversarial quality of this fundamental issue" (emphasis added)). Here, in contrast, defense counsel did not concede defendant's guilt at all. Section 9-1 of the Criminal Code of 1961 (Code) (720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)) provides, in pertinent part:

> "(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another[.]"

¶ 20 Defense counsel conceded that it was defendant who stabbed Adelina. There was no concession, however, that he acted with the culpable mental state set forth in either subsection (a)(1) or subsection (a)(2) of section 9-1 of the Code. More importantly, defense counsel did not concede the lack of a lawful justification, but rather argued that defendant acted in self-defense and thus with a legal justification (see 720 ILCS 5/7-1 (West 2008)). In essence, defendant's argument on appeal is that the theory of self-defense was futile and so by conceding that defendant stabbed Adelina, counsel sacrificed defendant's right to hold the State to its burden of proof. But defendant has not cited a single decision in which the rule of *Hattery* was extended to anything but an unequivocal concession of guilt.

¶ 21 *Hattery* has been described as a case "where counsel abandon[ed] even the pretense of defending his client." *People v. Caballero*, 126 Ill. 2d 248, 267 (1989). That description simply

does not apply to what occurred here. Hatch's opening statement indicates that she hoped that the jury would consider the fact that Adelina did not suffer any defensive wounds as circumstantial evidence that defendant was not the initial aggressor. To that end, Hatch argued that "there are no defensive wounds when you come at someone with a knife and the knife comes backwards." Perhaps Hatch should have foreseen that this theory would not ultimately go to the jury. Although "[a]n instruction for self-defense is given in a homicide case where there is some evidence in the record which, if believed by a jury, would support a claim of self-defense" (*People v. Everette*, 141 Ill. 2d 147, 157 (1990)), courts "must be wary so as not to permit a defendant to demand unlimited instructions based upon the merest factual reference or witness' comment" (*id.*). But it was not inconceivable that the trial court might have permitted the jury to consider counsel's self-defense theory, and there is no reason to believe that Hatch offered it in anything but an earnest attempt to secure defendant's acquittal. The defense arguably may have been inept, but not to the extent that it amounted to no defense at all. Counsel's decision to engage in a risky and ultimately unsuccessful gambit by arguing self-defense against long odds does not, in our view, represent performance that was " 'so inadequate that, in effect, no assistance of counsel [was] provided' " (*Cronic*, 466 U.S. at 654 n.11 (quoting *United States v. Decoster*, 624 F.2d 196, 219 (D.C. Cir. 1976) (MacKinnon, J., concurring, joined by Tamm and Robb, JJ.))).

¶ 22 *People v. Fair*, 159 Ill. 2d 51 (1994), supports our conclusion that counsel's opening statement did not trigger a presumption of prejudice under *Cronic* and *Hattery*. In *Fair*, the defendant was found guilty of two counts of first-degree murder in connection with the deaths of his girlfriend and her 11-year-old son, both of whom were beaten to death with a baseball bat. The defendant told police that he had been arguing with his girlfriend. She picked up a knife, but he was

able to disarm her and the argument continued. According to the defendant, " 'things just got crazy' " (*id.* at 64), and he picked up a baseball bat and struck his girlfriend's son three times in the head. The defendant reported that he then began crying. His girlfriend cursed him, and he struck her in the head four or five times with the bat. During opening statement, the defendant's attorney made the following remarks:

> " 'Any time there is a loss of life, whatever reason, it's tragic and it would be simpler if I could tell you that [defendant] was not there, but he was there.
>
> It would be simpler if I could tell you that he didn't do this.
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> * * *
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> But the truth, the truth is that the evidence will show that [defendant] admitted that he was there and that he admitted that he killed [the victims].
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> * * *
>
> The evidence will show that he was there and this happened, but as I said before, that is the simple part, because that part is brought to you in a statement that [defendant] signed. Those will be [defendant's] own words that he will tell you that.' " *Id.* at 76-77.

¶ 23 Relying principally on *Hattery*, the defendant insisted that these remarks amounted to a guilty plea entered without his consent. The *Fair* court disagreed:

> "We find *Hattery* inapplicable to the case at bar because defense counsel *did* subject the State's case to meaningful adversarial testing. Defense counsel made numerous pretrial motions, including two motions to quash arrest and a motion to suppress statements. Counsel made an opening statement, arguing that while defendant may have been guilty of murder, he did not possess the requisite intent to support a conviction for first degree murder.

> Defense counsel cross-examined certain witnesses who were crucial to the State's case ***. During the defense case in chief, counsel called [one of the officers who interviewed the defendant] as a witness and questioned him about defendant's statement. In closing argument, defense counsel advocated that the evidence was insufficient to prove defendant guilty of first degree murder.
>
> In short, this was not an instance where defense counsel conceded defendant's guilt and failed to provide an effective defense. Rather, defense counsel was placed in the precarious position of representing a defendant who had made statements implicating his culpability for the two murders, and where the evidence was overwhelming. 'In situations where there is overwhelming evidence of guilt and no defense, if counsel contests all charges he is liable to lose credibility with the trier of fact when it comes to charges where a legitimate defense exists.' [Citations.] *** Counsel vigorously represented defendant, made no concessions of defendant's guilt on the charges of first degree murder, and subjected the State's case to meaningful adversarial testing." (Emphasis in original.) *Id.* at 78-79

¶ 24 Clearly, the defendant's statement in *Fair* that " 'things just got crazy' " (*id.* at 74) could not reasonably have been expected to overcome the inference that the defendant intended the natural and probable consequences of his acts (see *People v. Foster*, 168 Ill. 2d 465, 484 (1995)), so the theory that the defendant in *Fair* lacked the requisite criminal intent was no more likely to succeed than the self-defense theory argued in this case. If anything, the self-defense theory in this case was stronger. Moreover, it bears emphasis that, as in *Fair*, there simply was no truly viable defense available to defendant's attorneys. Although the evidence that it was defendant who stabbed the victim was circumstantial, we think it is accurate to describe the State's case against defendant as overwhelming.

The State presented evidence that defendant was essentially stalking Adelina after she left him to live with Trujillo. Defendant parked across the street from Trujillo's home, had purchased binoculars, and had been seen peering into Adelina's SUV while she was at work. He had left notes for Adelina, asking her to meet with him behind the hotel where her vehicle was parked when she was stabbed, and he had been seen arguing with a woman at that location a few hours before the stabbing. Significantly, there is no apparent reason why Adelina would have parked her vehicle behind the hotel after leaving work on the date she was killed, except to meet with defendant. Given these circumstances it would be a remarkable coincidence if Adelina was simply the victim of a random—and apparently motiveless—act of violence in broad daylight. Moreover, defendant's apparent attempt to elude the authorities by leaving the state tends to confirm his involvement in her death.

¶ 25 Counsel's strategic options were also complicated by the uncertainty about whether the State would introduce incriminating statements that defendant made in a conversation with his daughter. Claiming self-defense undermined counsel's ability to persuade the jury that the circumstantial evidence against defendant left a reasonable doubt about the identity of Adelina's assailant. On the other hand, an argument focused on the circumstantial character of the evidence would have simply invited the State to play its trump card and use defendant's own words as direct evidence of his involvement in Adelina's death. Although the trial court might then have permitted defendant to argue that he acted in self-defense, the jury might have dismissed the argument as an afterthought.

¶ 26 Accordingly, this is not a case where prejudice can be presumed from counsel's allegedly deficient performance. Because defendant has not argued that application of the two-prong

Strickland test establishes a violation of his right to the effective assistance of counsel, we need not consider whether his conviction should be reversed on that basis.

¶ 27 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 28 Affirmed.