2011 IL App (3d) 090421–U

Order filed August 15, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellee,	)	Rock Island County, Illinois.
	)	
	)	Appeal No. 3--09--0421
v.	)	Circuit No. 08–CF–682
	)	
KENNY E. JACKSON,	)	Honorable
	)	F. Michael Meersman,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: (1) The defendant was not entitled to a jury instruction on the affirmative defense of involuntary intoxication where the defendant's counsel expressly disavowed any reliance on that defense before trial and during the jury instruction conference and the evidence presented at trial did not support such an instruction; (2) the defendant's attorney did not provide ineffective assistance of counsel by relying upon a legally-unavailable defense or by failing to tender a jury instruction on involuntary intoxication.

¶ 2 Following a jury trial, the defendant, Kenny Jackson, was found guilty of burglary and sentenced to a term of six years' imprisonment. In this appeal, the defendant argues that his

conviction should be overturned because the trial court should have instructed the jury on the affirmative defense of involuntary intoxication. In the alternative, the defendant argues that he was denied the effective assistance of counsel because his attorney based his defense entirely upon a theory of voluntary intoxication, which is no longer a legally-available defense in Illinois.

¶ 3 BACKGROUND

¶ 4 On the morning of July 12, 2008, Moline police officers John McAtee and John Sawyer were dispatched to the Moline Forge plant in response to a report of a break-in. While en route to the plant, the officers saw the defendant lying on his back in front of a gas station which was located approximately seven blocks from the plant. The defendant was barely conscious and appeared to be intoxicated. His hand was bleeding profusely. When asked why he was covered in blood, the defendant initially mumbled "I really fucked up." In response to further questioning, the defendant claimed that he had been stabbed on a nearby bike path. The officers confiscated the defendant's shoes and then proceeded to the Moline Forge plant. The defendant was transported by ambulance to the hospital.

¶ 5 When the officers arrived at the Moline Forge complex, they saw a broken window on the side of the office building. A trail of blood led from the window to the business office where a filing cabinet had been overturned and damaged. The filing cabinet was covered with blood and there were pry marks on a locked drawer. In the Moline Forge parking lot, the police recovered a screwdriver with what appeared to be blood on it. A blood-stained "Roca" shirt and a bloody undershirt that appeared to have been used as a bandage were found on a nearby bicycle path.

¶ 6 Officer William Mason, an investigator with the Moline police department, interviewed the defendant at the hospital. The defendant told Officer Mason that he had been drinking earlier

and could not remember what had happened. However, the defendant did recall that he had been wearing a "Roca" shirt. Officer Mason obtained a buccal swab of the defendant's DNA, which matched DNA found at the scene of the break-in.

¶ 7 After he was discharged from the hospital, the defendant was arrested and charged with burglary and criminal trespass to property. During a pretrial hearing one week before the defendant's jury trial was scheduled to begin, defendant's counsel indicated that she wished to call a physician at trial to testify about the potential side effects of certain prescription drugs the defendant was taking on the evening the break-in occurred. The court suggested that the trial be continued for approximately one month to ensure that there was sufficient time for expert witness disclosures. The defendant objected. The court told the defendant that he could either proceed to trial in one week without the physician expert witness or wait approximately one month and go to trial with the expert witness. The court granted a short recess so the defendant could discuss the matter with his counsel. After the recess concluded, the defendant's counsel stated on the record, "I've discussed this with my client. He's–we are basically going to be foregoing any involuntary intoxication defense. We will not call any physicians."

¶ 8 During the defendant's jury trial, the parties stipulated that blood found below the broken window at the Moline Forge plant matched the defendant's DNA profile and that footwear impressions from the floor of the business office were consistent with the soles of the defendant's shoes. Officers McAtee and Sawyer testified regarding the circumstances of the defendant's arrest. Keith Decker, the Vice President of Engineering and Maintenance at Moline Forge, testified that the defendant had worked at Moline Forge from May through December of

2007 and that petty cash was kept in a locked drawer in a filing cabinet in the office where the break-in occurred.

¶ 9 The defendant testified that, on the evening of July 11, 2008, he attended a barbeque at the Rock Island apartment complex where he used to live. He had just moved out of his apartment at the time and was planning to spend the night at his friend Del's apartment. The defendant testified that he remembered drinking at least two beers at the barbeque and that he later blacked out.[1] He remembered knocking on Del's door at some point after midnight, and the next thing he remembered was waking up in the hospital. The defendant claimed that he did not remember traveling to Moline, entering Moline Forge, or speaking to Officers McAtee and Sawyer at the gas station.

¶ 10 The defendant testified that he took Accupril, a daytime medication, and Chlonidine, a nighttime medication, for high blood pressure. He claimed that the Chlonidine made him tired and sometimes caused him to pass out. He also claimed that he had quit drinking several years ago and that the night of July 11, 2008, was the first time he had combined alcohol with Chlonidine. The defendant testified that he did not expect to have a reaction from the alcohol, and he claimed that no one had ever explained the side effects of his medications. The defense did not present any expert medical testimony regarding the potential side effects of Accupril or Chlonidine.

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[1] Although the defendant only remembered drinking two beers, he admitted on cross-examination that it was possible that he drank more than that. During closing argument, defense counsel stated that the defendant had "probably had a lot more than" one or two drinks.

¶ 11 During the jury instruction conference, the prosecutor expressed concern that the defendant had effectively raised the affirmative defense of involuntary intoxication by claiming that he wasn't warned about the side effects of his prescription medication. The prosecutor suggested that the jury should be instructed on this affirmative defense "to protect the State's case." The court responded that instructing the jury on the affirmative defense of involuntary intoxication would "cloud the issue" because the defendant had not raised that defense. The court noted that, to convict the defendant of burglary, the State had to prove that the defendant entered the building without permission with the intent to commit a theft. The court stated that the defense had admitted that the defendant entered the building but sought to argue that he may have done so for some other purpose (*i.e.*, without intending to commit a theft). Thus, the court concluded that the defense was attempting to present the defendant's intoxication not as an affirmative defense but, rather, as an "explanation of [the defendant's] actions." However, the prosecutor insisted that the defendant had "definitely" "raised the defense" of involuntary intoxication, and again objected that the court was not "doing anything about it." This prompted the following exchange between defense counsel and the court:

> "[DEFENSE COUNSEL]: Our defense is that he was intoxicated.
>
> THE COURT: But it's a voluntary intoxication.
>
> [DEFENSE COUNSEL]: Correct.
>
> THE COURT: I mean it's not an involuntary. And it's not raised as an affirmative defense because again if that was allowed, then you would never convict anybody of anything because they would just say I was so drunk I don't remember what I did, And that's not a valid defense in this state. *** I mean, if he says, I was given a date rape drug

or something, well, then there is a difference. But *** in this state you can't get yourself intoxicated and then absolve yourself from liability for what you have done."

The court decided not to instruct the jury on the defense of involuntary intoxication and ruled that it would address the issue later if the jury raised any questions about it.

¶ 12 During her closing argument, defense counsel conceded that the defendant had committed criminal trespass to property by admitting that the defendant had forcibly entered the Moline Forge office building without permission. However, she argued that the State had not proven that the defendant committed burglary because the evidence did not suggest that the defendant entered the building with the intent to commit a theft. She noted that the defendant took nothing of value from the plant and that the police did not find anything taken from the plant on the defendant's person or in any of the clothes they found on the bike path. She suggested that the defendant might have broken into the building to get shelter[2] and that he might have tried to open the drawers of the filing cabinet because he was looking for a bandage for his injured hand. She also suggested that the defendant might have inadvertently knocked over the filing cabinet in his drunkenness and that some of the cabinets might have been damaged by other workers before the incident in question. In addition, she argued that it was not clear that the defendant knew that the petty cash was kept in a filing cabinet, and she questioned why the defendant would break into his former employer's office to steal petty cash when he was gainfully employed and, in fact, had recently been given a pay raise which was scheduled to take effect the following Monday. She

[2] Defense counsel noted that the defendant had no place to stay that night because he had moved out of his old apartment, had not yet moved into his new apartment, and his friend Del did not let him in when he knocked on his door after the party.

also attacked the credibility of Officer McAtee and Officer Sawyer, noting inconsistencies between Officer McAtee's initial police report and the testimony that each of the officers presented at trial. However, defense counsel never argued that the defendant's intoxication deprived him of the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

¶ 13 The jury found the defendant guilty of burglary and criminal trespass to land. The court subsequently vacated the conviction on the lesser offense and sentenced the defendant to a term of six years' imprisonment on the burglary conviction. This appeal followed.

¶ 14 ANALYSIS

¶ 15 The defendant argues that circuit court committed reversible error by failing to instruct the jury on the affirmative defense of involuntary intoxication.

¶ 16 We review a circuit court's decision whether to give a particular jury instruction for abuse of discretion. *People v. Jones*, 175 Ill. 2d 126, 132 (1997). A defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence, and if there is such evidence, it is an abuse of discretion for the trial court to refuse to so instruct the jury. *Id.* at 131-32. Very slight evidence upon a given theory of a case will justify the giving of an instruction. *Id.* at 132.

¶ 17 Under section 6-3 of the Criminal Code of 1961 (the Code), "[a] person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law." 720 ILCS 5/6-3 (West 2008). An intoxicated or drugged condition that is an unexpected side effect of a

prescription drug is "involuntarily produced" within the meaning of section 6-3 of the Code if the defendant was not warned of the possibility of such a side effect. *People v. Hari*, 218 Ill. 2d 275, 292 (2006). Thus, a defendant is entitled to a jury instruction on involuntary intoxication if he presents some evidence, however slight, suggesting that: (1) his prescription medication produced an intoxicated or drugged condition which "deprive[d] him of substantial capacity either to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law" at the time of the alleged offense; and (2) he was never warned that his prescription medication could cause such a condition. *Id.*, 218 Ill. 2d at 292, 295-96.

¶ 18 Here, the defense counsel did not request a jury instruction on involuntary intoxication. Normally this would forfeit the issue on appeal. *People v. Delgado*, 376 Ill. App. 3d 307, 314 (2007). However, Supreme Court Rule 451(c) permits review of "substantial defects" in jury instructions "if the interests of justice require." Ill. S. Ct. R. 451(c) (eff. July 1, 1997). Rule 451(c) is "construe[d] *** identically" with the plain error rule (*People v. Herron*, 215 Ill. 2d 167, 175 (2005)) which allows us to consider forfeited errors if either the evidence was closely balanced or the error substantially denied the defendant's right to a fair trial. *Id.*; *see also People v. Adams*, 394 Ill. App. 3d 217, 231 (2009). Our supreme court has explained that " '[f]undamental fairness includes, among other things, seeing to it that certain basic instructions, essential to a fair determination of the case by the jury, are given.' " *People v. Pegram*, 124 Ill. 2d 166, 173 (1988), quoting *People v. Ogunsola*, 87 Ill. 2d 216, 222 (1981). Accordingly, a trial court's failure to instruct the jury on an affirmative defense that is supported by the evidence constitutes reversible error, even if the defendant failed to tender a jury instruction on the

defense. *Pegram*, 124 Ill. 2d at 174; *see also People v. Gonzalez*, 385 Ill. App. 3d 15, 21 (2008).[3] Relying on these principles, the defendant argues that the circuit court committed reversible error by failing to instruct the jury on the affirmative defense of involuntary intoxication, even though his lawyer never tendered such an instruction.

¶ 19 In this case, the defense counsel did not merely fail to tender a jury instruction on involuntary intoxication; she expressly disavowed any reliance on the defense of involuntary intoxication and rejected the prosecutor's suggestion that the jury should be instructed on that defense. During the jury instruction conference, the defense counsel agreed with the circuit court that she was arguing "voluntary intoxication," not involuntary intoxication, and she did not object or disagree when the court stated that she had not raised an affirmative defense. Moreover, prior to trial, defense counsel informed the court that she had discussed the matter with her client and that the defendant was "foregoing any involuntary intoxication defense." Thus, defense counsel did not merely forfeit a jury instruction on involuntary intoxication; rather, she affirmatively waived any reliance on that defense. *See generally People v. Blair*, 215 Ill. 2d

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[3] Moreover, if an affirmative defense is raised, "the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense." 720 ILCS 5/3-2(b) (West 2008); *Hari*, 218 Ill. 2d at 292. Thus, when the evidence presented at trial is sufficient to raise an affirmative defense, the circuit court must instruct the jury on that affirmative defense and on the State's burden of proof for that defense. *Pegram*, 124 Ill. 2d at 174; *Gonzalez*, 385 Ill. App. 3d at 21.

427, 444 n.2 (1995), quoting *United States v. Olano*, 507 U.S. 725, 733 (1993) (distinguishing forfeiture from waiver and noting that "forfeiture is the failure to make the timely assertion of the right," whereas " waiver is the 'intentional relinquishment or abandonment of a known right' "); *People v. Phipps*, 238 Ill. 2d 54, 62 (2010). Because defense counsel affirmatively waived any reliance on a theory of involuntary intoxication, the circuit court committed no error in declining to instruct the jury on that theory. *See, e.g., United States v. Collins*, 223 F.3d 502, 509 (7th Cir. 2000) (where defendant's claim on appeal regarding the timing of a supplemental jury instruction was "not merely forfeited, but affirmatively waived" by defense counsel at trial, the issue was "not subject to appellate review at all" because there was "no error to correct").

¶ 20 Even if the defense counsel had attempted to raise the defense of involuntary intoxication, no jury instruction on that defense would have been warranted because there was no evidence that the defendant's intoxication "deprive[d] him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law"—an essential element of the defense. 720 ILCS 5/6-3 (West 2008). No expert testified that the prescription drugs that the defendant allegedly took on the night of the break-in could produce such debilitating effects, either alone or in combination with alcohol. Moreover, although several witnesses testified that the defendant was intoxicated shortly after the break-in, no witness testified that the defendant was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law at the time he broke into the building. Nor did the defendant present any such testimony. (He claimed that he could not remember anything about the break-in.) Accordingly, the evidence presented at trial was insufficient to support a jury instruction on involuntary intoxication. See, *e.g.*, *People v. Smith*, 231 Ill. App. 3d 584, 593

(1992) (holding that defendant was not entitled to jury instruction on involuntary intoxication, even though he presented expert medical testimony regarding the intoxicating effects of drugs administered to him at the hospital, where he "failed to present *any* evidence that [those drugs] deprived him of substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law").[4]

¶ 21 Thus, even if defense counsel had merely forfeited—rather than affirmatively waived—the right to a jury instruction on involuntary intoxication, his claim on appeal would be unreviewable. Rule 451(c) authorizes appellate review of a forfeited claim regarding jury instructions only if the circuit court committed error. *Adams*, 394 Ill. App. 3d at 231. The circuit court's failure to instruct the jury on the affirmative defense of involuntary intoxication in this case would have been erroneous only if there was "some foundation for the instruction in the evidence." *Jones*, 175 Ill. 2d at 131. As shown above, there was no evidence to support an essential element of the defense of involuntary intoxication. Thus, the circuit court did not err in declining to instruct the jury on that defense.

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[4] This distinguishes the defendant's case from *Hari*. In *Hari*, the supreme court held that the defendant was entitled to a jury instruction on involuntary intoxication where the defendant presented expert testimony by a doctor who opined to a reasonable degree of medical and psychiatric certainty that: (1) the defendant suffered from involuntary intoxication at the time he committed the charged offense; and (2) as a result of this involuntary intoxication, the defendant "lacked the substantial capacity to appreciate the criminality of his acts or conform his conduct to the requirements of the law." 218 Ill. 2d at 295-96.

¶ 22 In the alternative, the defendant argues that he was denied effective assistance of counsel because his attorney relied upon a defense of voluntary intoxication, which is no longer a legally-available defense in Illinois. Ordinarily, a claim of ineffective assistance of counsel is reviewed pursuant to the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the defendant must show (1) that counsel's performance was constitutionally deficient, *i.e.*, fell below an objective standard of reasonableness, and (2) that the deficient performance was prejudicial, meaning that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 687-88, 694. However, in *United States v. Cronic*, 466 U.S. 648 (1984), the Supreme Court held that where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, there is a denial of Sixth Amendment rights that makes the adversarial process itself presumptively unreliable. *Cronic*, 466 U.S. at 659. Such radically deficient representation constitutes ineffective assistance of counsel *per se*, even absent a showing of prejudice. *Cronic*, 466 U.S. at 659; *People v. Kozlowski*, 266 Ill. App. 3d 595, 600(1994).

¶ 23 Here, the defendant argues that his trial counsel failed to subject the State's case to meaningful adversarial testing because her theory of defense was premised entirely upon "voluntary intoxication," which is no longer a legally-recognized defense in Illinois. *See*, *e.g.*, *People v. Jackson*, 362 Ill. App. 3d 1196, 1201 (2006).

¶ 24 Contrary to the defendant's argument, his trial counsel did not rely upon a defense of voluntary intoxication. She did not suggest that the defendant's intoxication was so extreme that it rendered him unable to form the specific intent to commit a theft, to appreciate the criminality of his conduct, or to confirm his actions to the requirements of the law. Rather, she argued that

the evidence presented at trial did not establish that the defendant entered the Moline Forge office building with the *intent to commit a theft*, an essential element of the burglary charge. See 720 ILCS 5/19-1(a) (West 2008). For example, during her closing argument, defense counsel noted that the defendant took nothing of value from the Moline Forge plant and suggested that the defendant might have broken into the building merely to obtain shelter. She argued that, once he was inside the office building, the defendant might have tried to open the drawers of the filing cabinet because he was looking for a bandage for his injured hand, not because he was trying to steal petty cash kept in the cabinet. She also argued that it was not clear that the defendant knew that the petty cash was kept in the filing cabinet and suggested that it was unreasonable to infer that the defendant would break into his former employer's office to steal an extremely small amount of money when he was gainfully employed and had recently received a pay raise. Although she repeatedly referenced the defendant's intoxication during her closing argument, she did so only to suggest alternative explanations for the defendant's actions and to negate the inference that the defendant entered the building with the intent to commit a theft. She did not argue that the defendant's voluntary intoxication somehow excused his actions or rendered him incapable of forming the intent to commit a theft. Thus, the defendant's counsel did not rely upon the legally-unavailable defense of voluntary intoxication.

¶ 25 Moreover, contrary to the defendant's argument, defense counsel did not fail to subject the State's case to meaningful adversarial testing. Although she conceded the defendant's guilt on the criminal trespass charge, she vigorously challenged the State's proof as to the more serious charge of burglary. She called the defendant and one other witness, cross-examined the State's witnesses at some length, challenged the credibility of Officer McAtee's and Officer

Sawyer's testimony, raised objections to certain evidence and arguments presented by the State, and moved for a directed verdict at the close of the State's evidence. In so doing, she held the State to its burden of proof on the burglary charge and argued that the State had failed to prove an essential element of that charge. Thus, counsel's performance did not constitute ineffective assistance under *Cronic*. *See, e.g.*, *People v. Page*, 155 Ill. 2d 232, 264-65 (1993) (holding that counsel was not ineffective under *Cronic* where counsel did not concede the defendant's guilt on the principal offense charged but rather "thoroughly tested the State's proof of guilt, cross-examining the prosecution witnesses" and "objecting to allegedly improper evidence and argument").[5]

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[5] Under the circumstances presented here, counsel's decision to concede the defendant's guilt on the charge of criminal trespass to property did not constitute *per se* ineffective assistance of counsel. It is not *per se* ineffective assistance for a defense attorney to concede the defendant's guilt on a charge where there is "overwhelming evidence" of the defendant's guilt as to that charge, particularly where the attorney asserts a defense to other, more serious charges and pursues that theory during closing arguments and during cross-examination. *People v. Johnson*, 128 Ill. 2d 253, 269-270 (1989) (counsel did not provide ineffective assistance by conceding the defendant's guilt for murder where counsel contested the charge of felony murder which would make the defendant eligible for the death penalty); see also *People v. Horton*, 143 Ill. 2d 11, 25-26 1991) (counsel's trial strategy was not ineffective where counsel only contested those charges that were not supported by overwhelming evidence). In fact, conceding the defendant's guilt on a lesser charge in the face of overwhelming inculpatory evidence can be a prudent strategy because, if counsel contests such a charges when there is no valid defense, "he is likely to lose

¶ 26 The defendant also argues that his counsel's failure to tender a jury instruction on involuntary intoxication amounted to *per se* ineffective assistance of counsel under *Cronic* because it "deprived [the] defendant of the right of having the issue of his guilt or innocence presented to the jury as an adversarial issue." In addition, he also appears to argue that his counsel's failure to tender such a jury instruction prejudiced his defense, arguably suggesting that his counsel was ineffective under *Strickland*. As noted above, although the defendant's counsel did not raise the defense of involuntary intoxication, she nevertheless held the State to its burden on the burglary charge and subjected the State's case to meaningful adversarial testing. Thus, her performance was not ineffective under *Cronic*.

¶ 27 Nor can the defendant prove that his counsel was ineffective under the standards set forth in *Strickland*. The defendant cannot show that he was prejudiced by his counsel's failure to tender an involuntary intoxication instruction because, as shown above, there was insufficient evidence presented at trial to support such an instruction. It might reasonably be argued that, even though counsel did not intend to raise the defense of involuntary intoxication at trial, she should nevertheless have tendered an instruction on involuntary intoxication after the State conceded (erroneously) that the evidence supported such an instruction. However, we cannot say that defense counsel's failure to do so prejudiced the defense. As noted above, we agree with the

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credibility with the trier of fact when arguing issues for which a legitimate defense exists." *Horton*, 143 Ill. 2d at 26. Here, because of the DNA evidence, footprint evidence, and other evidence, the defendant had no viable defense to the charge of criminal trespass. Thus, counsel's decision to concede that charge and vigorously contest the more serious charge of burglary was sound.

circuit court that the evidence presented at trial did not support an involuntary intoxication instruction. Thus, if defense counsel had asked for such an instruction, the circuit court would have correctly refused it.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Rock Island County.

¶ 30 Affirmed.