2017 IL App (3d) 140878-U

Order filed March 14, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal Nos. 3-14-0878 and 3-15-0278
v.	)	Circuit No. 05-CF-391
	)	
ROBERT CHAPMAN,	)	Honorable Edward Burmila, Jr.,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by denying defendant's motion for leave to file a successive postconviction petition because defendant failed to establish prejudice.

¶ 2 Defendant, Robert Chapman, appeals the trial court's denial of his motion for leave to file a successive postconviction petition. Defendant argues he established cause and prejudice with regard to two claims: (1) ineffective assistance of trial counsel based on counsel's failure to investigate the victim's arrest record for domestic violence against defendant, and (2) ineffective

assistance of appellate counsel based on counsel's failure to argue on direct appeal that the trial court erred by finding his pastor's testimony was not barred by clergy privilege. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2004)) for causing the death of Cassandra Frazier, defendant's girlfriend. The State filed a "Motion to Admit Other Crimes Testimony and Motion in Limine on Other Evidence." This motion sought, *inter alia*, that the State be allowed to introduce the testimony of Pastor Herman Ware regarding an incident that occurred prior to the murder where defendant allegedly set fire to Frazier's apartment and defendant's 2003 conviction for domestic battery against Frazier.

¶ 5 A hearing was held on the State's motion. Ware testified he was a pastor with the Southern Baptist Convention of Churches. Ware testified he had previously spoken with Detective Rick Raasch about a prior conversation Ware and defendant had about the fire in Frazier's apartment. Ware knew his conversation with Raasch was being recorded. Regarding his recorded conversation with Raasch, Ware stated: "[E]verything that I said at that time, I stand on it." The prosecutor asked Ware if defendant had made admissions to Ware regarding the fire. Ware replied, "He shared some things with me as a pastor." At that point, defense counsel objected and stated defendant was asserting the "pastor-client privilege." On cross-examination, Ware testified defendant began the conversation about the fire by saying it was a conversation between him and Ware as his pastor.

¶ 6 At a later hearing, the State submitted a copy of the audio-recorded interview between Raasch and Ware to the trial court. This audio recording is not included in the record on appeal. The prosecutor stated:

"Your Honor, I have prepared an audio CD for your Honor of the interview with [Ware] who previously testified in front of the Court.

I believe we will be waiving any further testimony as far as the foundation at this point for the purpose of this hearing for your Honor to review that tape."

Defense counsel then stated, "That is correct, judge." The matter was continued.

¶ 7 After listening to the audio recording, the trial court granted the State's motion to admit Ware's testimony at trial. The trial court reasoned:

"There is no indication that the defendant was ever seeking spiritual guidance or counseling. Neither the defendant nor the pastor ever indicated that there was—that what was said should be kept only between the two of them. In fact, the pastor characterized the conversation as more of a friend-on-friend situation.

The pastor is the one who initiated all the questions, which had absolutely nothing to do with any guidance or counseling that I could see. There were questions regarding facts, and nothing more than that.

***

Now, I did note from the pastor's testimony, he indicated, and I think I have it pretty much word-for-word, he would like to think that he was talking to me as a pastor, referring to the defendant. But he didn't say—he didn't come right out and say that's, in fact, what it was in the tape—or the CD. It contradicts that any way.

> The pastor went on to say in his testimony that he needed someone to talk to as his pastor. That might be true, but that there is no indication that that's, in fact, what was happening at the time.
>
> And the pastor also testified that everything he said to the detective, he stands on it. So, he confirmed that what was on the CD was correct.
>
> The pastor also said, I think on cross, that he started the conversation by saying it was between the pastor and the parishioner, but there is no indication on the CD that that was ever the case. And his testimony was some time after what he indicated on the CD.
>
> So, all things considered, I don't think the exception or the privilege applies, and I am going to allow that testimony."

¶ 8 At a subsequent pretrial hearing, the trial court ruled defendant's 2003 conviction for domestic battery against Frazier would be admissible at trial.

¶ 9 A jury trial was held. The trial evidence was previously summarized in appellate decisions issued in defendant's direct appeal proceedings. See *People v. Chapman*, No. 3-07-0799 (2011) (unpublished order under Supreme Court Rule 23); *People v. Chapman*, 2012 IL 111896. Much of the evidence against defendant was comprised of confessions defendant made to Detective Scott Cammack. Our supreme court summarized this evidence in defendant's direct appeal proceedings as follows:

> "At defendant's trial, Joliet police detective Scott Cammack testified about conversations he had with defendant shortly after the murder, and the State played two audio-taped interviews between defendant and Cammack. According to this evidence, defendant told Cammack that he considered Frazier to be his wife and

that they argued often. On the day of Frazier's death, defendant consumed alcohol and used crack cocaine after work before coming home around 9:45 p.m. to their apartment. Upon arriving at the apartment, Frazier yelled at him. Defendant then took a shower and went to bed with Frazier. At that point, she yelled at him again. Defendant got out of bed, packed his clothes into a box he placed by the door, but then returned to bed naked.

According to defendant, Frazier stabbed him in the leg after he got back into bed. Defendant then grabbed the knife from Frazier, cutting his hand in the process. He told Frazier, 'you want to stab a nigger, I will let you see how it feels.' Defendant then began stabbing Frazier while they were still in bed. The two eventually fell onto the floor. Defendant straddled over Frazier while she was on the floor and continued to stab her in her upper body and neck. At some point during the attack, Frazier told defendant that she loved him. At this, defendant stopped stabbing Frazier, but left the knife sticking into her neck.

Defendant stated that after the attack, he left the bedroom and put on his clothes and boots. He returned to the bedroom briefly, leaving a boot track in the blood. While in the bedroom, defendant noticed Frazier remove the knife from her neck. Defendant then went to the kitchen table where he searched through Frazier's purse for money so he could pay for a taxi to get out of the area.

In the meantime, Frazier was badly bleeding after having removed the knife from her neck. She managed to crawl out of the bedroom and into the living room, where she was able to get on her feet. When Frazier got to the front door with her hand on the doorknob, defendant threw her back to the floor. Defendant

> explained to detective Cammack that he wanted to prevent Frazier from leaving the apartment because he feared she would go for help and a neighbor would become involved. Defendant estimated that he was in the apartment for about three or four minutes from the time the stabbing ended to the time he left. Defendant described the injury to his leg as having 'just been grazed.' "
>
> *Chapman*, 2012 IL 111896, ¶¶ 4-7.

¶ 10 The doctor who performed an autopsy on Frazier testified she had 18 stab wounds. The testimony established Frazier died as the result of a stab wound to her neck which struck her carotid artery and jugular vein.

¶ 11 At trial, Ware testified that in November 2004, approximately four months prior to Frazier's death, Ware had several conversations with defendant. Ware became concerned for Frazier's safety because she and defendant "had some pretty heated disagreements and arguments." Defendant indicated to Ware he was concerned that Frazier might break up with him. Defendant told Ware he cared about Frazier and "he couldn't see her with anybody else." At one point, defendant told Ware he would rather see Frazier dead than with someone else.

¶ 12 On November 2, 2004, Ware learned that Frazier's apartment had burned down. Ware went to the apartment and saw a pile of charred clothes on Frazier's bed. It appeared the fire started in the bedroom. Later, Ware saw defendant walking down the street while Ware was driving his car. Ware pulled up next to defendant and "asked him why did he do that, why did he set that girl's house on fire like that." Defendant was upset and told Ware "that's what he did." Then defendant ran down the street. Later that day, defendant called Ware and asked Ware to take him to the hospital for a stomach problem. Ware took defendant to the emergency room.

While they were waiting in the emergency room, defendant and Ware discussed Frazier. Ware described defendant's statements as follows:

> "He said he was just angry that [Frazier] would want to do anything and wanted—make anything—anything that was more important to her than him. That he wanted to show her how he felt about it. He was really upset about that. He felt that she would pay more attention to other things maybe, or children, or the church or anything else, anything that was more important than him, and he didn't like that. He didn't like that at all."

¶ 13 Ware testified defendant told him he set fire to Frazier's apartment:

> "He told me how he did it. He told me—I asked him how did he get in the house, how did he do it. He said he broke in the house. I think he think said he went up in the back window of the house, and he took the clothes, all her clothes, threw them on the bed and lit the bed up—lit the fire on the bed."

¶ 14 Defendant told Ware he was angry at Frazier and believed "she put too much value in stuff and not enough on their relationship, and he wanted her to see how it felt to not have anything." Ware explained that when defendant and Frazier got into arguments, "she would tell him that that was her house, and if he didn't like it, he had to go. And he didn't like that."

¶ 15 At the close of its case, the State introduced a certified statement of conviction into evidence, which showed defendant had previously been convicted of domestic battery against Frazier on October 31, 2003.

¶ 16 During closing argument, defense counsel argued that defendant acted under a sudden and intense passion as a result of serious provocation—namely, being stabbed by Frazier—such

that he was guilty of second degree murder rather than first degree murder. Defense counsel stated defendant was not claiming that he acted in self-defense:

> "[M]y client is not saying that this is a situation of self-defense. He acknowledges his blame. He is not saying, you know, this was all her fault. I didn't over react. I didn't mistakenly believe I was entitled to self-defense. He is acknowledging, I made a mistake. I reacted in the heat of passion. For this, I am sorry."

¶ 17 The jury found defendant guilty of first degree murder. The trial court sentenced defendant to 60 years' imprisonment.

¶ 18 On direct appeal, defendant argued: (1) the trial court's failure to strictly comply with Illinois Supreme Court Rule 431(eff. May 1, 2007) constituted plain error; (2) the trial court abused its discretion by admitting defendant's prior domestic battery conviction; and (3) the trial court erred by admitting other-crimes evidence regarding defendant's prior act of arson to Frazier's apartment. We affirmed defendant's conviction. *Chapman*, No. 3-07-0799. Defendant appealed the matter to the supreme court, arguing only that the trial court erred by admitting his prior domestic battery conviction. The supreme court affirmed the decision of the appellate court. *Chapman*, 2012 IL 111896, ¶ 37.

¶ 19 Defendant filed a *pro se* postconviction petition. In his petition, defendant argued, *inter alia*, the trial court erred by failing to apply the clergy privilege to Ware's testimony. Defendant also argued trial counsel was ineffective for failing "to investigate and introduce the background of the victim, Cassandra Frazier in this case, even though such background was obviously relevant to the question as to whether or not [defendant] acted in self-defense."

¶ 20 The trial court summarily dismissed defendant's petition. On appeal, the Office of the State Appellate Defender filed a motion to withdraw as counsel pursuant to *Pennsylvania v.*

Finley, 481 U.S. 551 (1987). We granted the motion and dismissed the appeal. *People v. Chapman*, No. 3-13-0134 (2014) (unpublished order under Supreme Court Rule 23).

¶ 21 Defendant filed a motion for leave to file a successive postconviction petition. Attached to the motion for leave was defendant's proposed successive postconviction petition. The petition argued, *inter alia*, that trial counsel failed to investigate Frazier's background, which would have shown that Frazier was arrested for domestic violence toward defendant. Defendant argued the evidence of this arrest would have supported the affirmative defense of self-defense or the reduced charges of involuntary manslaughter or second degree murder. The petition also argued appellate counsel was ineffective for failing to argue that the trial court erred in admitting Ware's statements regarding the prior arson incident because the statements were protected by clergy privilege.

¶ 22 Also attached to the motion for leave was a letter from the Will County sheriff's office defendant received in response to a request under the Freedom of Information Act (5 ILCS 140/1 *et seq.* (West 2014)). Along with the letter, defendant filed a document entitled "Will County Sheriff's Office Domestic Violence Victim Notification Form." The form indicated Frazier had been arrested for domestic violence on May 4, 2003, and defendant was the victim.

¶ 23 The trial court denied defendant's motion for leave to file a successive petition. Defendant appeals.

¶ 24 ANALYSIS

¶ 25 Defendant argues the trial court erred by denying his motion for leave to file a successive postconviction petition because he established cause and prejudice with regard to two claims: (1) ineffective assistance of trial counsel based on counsel's failure to investigate Frazier's arrest record for domestic violence against defendant, and (2) ineffective assistance of appellate

counsel based on counsel's failure to argue on direct appeal that the trial court erred by finding Ware's testimony was not barred by clergy privilege. For the reasons that follow, we find defendant has failed to establish prejudice with regard to either of his claims.

¶ 26 The filing of successive postconviction petitions is governed by section 122-1(f) of the Post-Conviction Hearing Act (725 ILCS 5/122-1(f) (West 2014)), which provides:

> "Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process."

¶ 27 We need not determine whether defendant has shown cause before considering whether defendant has shown prejudice. If we determine that "defendant cannot show prejudice, we need not address defendant's claim of cause." *People v. Smith*, 2014 IL 115946, ¶ 37.

¶ 28 I. Ineffective Assistance of Trial Counsel—Failure to Investigate

¶ 29 First, defendant argues he established cause and prejudice with regard to his claim that his trial counsel was ineffective for failing to investigate Frazier's arrest record, which would have shown an arrest for domestic violence against defendant. With regard to the prejudice prong, defendant contends that: (1) trial counsel's failure to investigate Frazier's arrest record was objectively unreasonable because it would have supported a defense of imperfect self-

defense, and (2) but for this failure, there is a reasonable probability the jury would have found defendant guilty of second degree murder on the theory of imperfect self-defense. See *People v. Jeffries*, 164 Ill. 2d 104, 113 (1995) ("The imperfect self-defense form of second degree murder occurs when there is sufficient evidence that the defendant believed he was acting in self-defense, but that belief is objectively unreasonable.").

¶ 30 However, Frazier's arrest for domestic violence, without more, would not have been admissible at trial. "[W]hen the theory of self-defense is raised, the victim's aggressive and violent character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence ***." *People v. Lynch*, 104 Ill. 2d 194, 200 (1984). "[E]vidence of a victim's mere arrest is inadmissible since it does not indicate whether the victim actually performed any of the acts charged." *People v. Ellis*, 187 Ill. App. 3d 295, 301 (1989). On the other hand, "a prior altercation or an arrest, without a conviction, can be adequate proof of violent character when supported by firsthand testimony as to the victim's behavior." *People v. Cook*, 352 Ill. App. 3d 108, 128 (2004).

¶ 31 In his motion for leave to file a successive petition and his successive petition, defendant submitted the document from the sheriff's office showing Frazier was arrested for domestic violence in 2003, but defendant provided no evidence that she was ever convicted. Furthermore, defendant gave no firsthand account of the behavior that led to Frazier's arrest despite the fact that he was the alleged victim. Without more, evidence of Frazier's mere arrest would have been inadmissible to support a theory of imperfect self-defense.

¶ 32 Even if the arrest were admissible, the facts of this case did not support a theory of imperfect self-defense. Defense counsel's statements during closing argument showed that counsel made a deliberate decision not to pursue a theory of imperfect self-defense. Instead,

defense counsel chose only to argue that defendant acted in the heat of passion. This decision was reasonable based on the trial evidence. Defendant confessed that Frazier stabbed him in the leg with a knife, causing minor injuries. Defendant then grabbed the knife and told Frazier, "you want to stab a nigger, I will let you see how it feels." This statement indicated defendant was retaliating against Frazier for stabbing him rather than attempting to defend himself. Defendant proceeded to stab Frazier 18 times in the upper body. When defendant stopped, he left the knife in her neck and looked through her purse for money. Frazier was bleeding heavily, but removed the knife from her neck and stood up. Defendant pushed her back down so she would not be able to get help from a neighbor. Defendant then left the apartment. Additionally, evidence was presented at trial that defendant had previously been convicted of domestic violence against Frazier. Based on this evidence, there is no reasonable probability that a jury would have found that defendant believed he was acting in self-defense even if defendant offered evidence that Frazier had previously been arrested for domestic violence against him. Thus, we find defendant cannot show prejudice with regard to this claim, and we need not address his claims of cause. See *Smith*, 2014 IL 115946, ¶ 37.

¶ 33 II. Clergy Privilege

¶ 34 Additionally, defendant argues he established cause and prejudice with regard to his claim that appellate counsel provided ineffective assistance in failing to argue that Pastor Ware's testimony regarding defendant's statements about the fire was barred by clergy privilege. Even if we were to accept defendant's argument that he established cause, which we do not, we find defendant is unable to demonstrate prejudice with regard to this claim. "To establish 'prejudice,' the defendant must show the claimed constitutional error so infected his trial that the resulting conviction violated due process." *People v. Coleman*, 2013 IL 113307, ¶ 82.

¶ 35 We reject defendant's claim that there is a reasonable probability his appeal would have been successful if appellate counsel had argued that the trial court erred by finding Ware's statements were not barred by clergy privilege. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010) ("[A] defendant raising *** a claim [of ineffective assistance of appellate counsel] must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful."). Section 8-803 of the Code of Civil Procedure (735 ILCS 5/8-803 (West 2004)) provides:

> "A clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs, shall not be compelled to disclose in any court *** a confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of such religious body or of the religion which he or she professes, nor be compelled to divulge any information which has been obtained by him or her in such professional character or as such spiritual advisor."

¶ 36 The trial court found the above statute did not bar Ware's statements because there was no evidence that defendant was seeking spiritual guidance at the time the statements were made or that the conversation "should be kept only between the two of them." The trial court acknowledged that Ware testified during the hearing that defendant "started the conversation by saying it was between the pastor and the parishioner," but found Ware's prior recorded statements to Raasch contradicted that testimony. "It falls within the province of the trier of fact to judge the credibility of witnesses, resolve conflicts in the evidence, and draw conclusions based on all the evidence." *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 21.

¶ 37 Defendant correctly notes the audio recording of the conversation between Raasch and Ware is not included in the record and does not appear to have been formally introduced into evidence. However, defendant agreed to the trial court hearing the audio recording without further foundation, and defendant does not argue here that the trial court improperly considered the audio-recorded conversation. "To meet the cause-and-prejudice test for a successive petition requires the defendant to 'submit enough in the way of documentation to allow a circuit court to make that determination.' " *Smith*, 2014 IL 115946, ¶ 35 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010)). Without the audio recording, it is impossible for us to determine whether the trial court's ruling was against the manifest weight of the evidence.

¶ 38 Moreover, we find that any error in the trial court's admission of Ware's testimony was harmless. Because the issue of clergy privilege was preserved for appeal, it would have been reviewed for harmless error if appellate counsel had raised the issue on direct appeal. Given the overwhelming evidence of defendant's guilt for the first degree murder of Frazier—including his detailed confession to the police—any error in the admission of Ware's testimony regarding defendant's prior commission of arson was harmless beyond a reasonable doubt. *People v. Nieves*, 193 Ill. 2d 513, 530 (2000) ("[T]his court repeatedly has held that the improper introduction of other-crimes evidence is harmless error when a defendant is neither prejudiced nor denied a fair trial based upon its admission.").

¶ 39 CONCLUSION

¶ 40 The judgment of the trial court is affirmed.

¶ 41 Affirmed.