2011 IL App (4th) 100437-U

Filed 12/20/11

NO. 4-10-0437

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
CHARLES LANCER BELL,	)	No. 09CM1510
Defendant-Appellant.	)	
	)	Honorable
	)	John C. Costigan,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Steigmann and McCullough concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's trial counsel's failure to request a jury instruction on the affirmative defense of self-defense did not amount to ineffective assistance of counsel since no such instruction was warranted. We remand, however, for the trial court to impose fines and costs as appropriate and grant defendant credit toward his fines for time served in presentence custody.

¶ 2 In February 2010, a jury convicted defendant, Charles Lancer Bell, of domestic battery. 720 ILCS 5/12-3.2(a)(2) (West 2008). In March 2010, the trial court sentenced defendant to 18 months' conditional discharge and 60 days in jail. Defendant appeals, arguing (1) he was denied the effective assistance of counsel as his trial attorney failed to seek a jury instruction on self-defense and (2) the court erroneously failed to grant him monetary credit toward fines for time he served in presentence custody. We disagree with defendant that he received ineffective assistance of counsel and agree with the parties that the cause should be remanded for the court to impose fines and costs and award defendant credit toward his fines.

¶ 3 I. BACKGROUND

¶ 4 On August 6, 2009, defendant was involved in a physical altercation with Michelle Tuggle, his girlfriend, at defendant's mother's house where the three of them lived. At the time, Tuggle habitually used alcohol. She typically consumed a 12-pack of beer in a day. When she drank, Tuggle became physically violent. On more than one occasion before August 6, 2009, Tuggle abused defendant when she was drunk and angry.

¶ 5 That day, Tuggle drank to the point of intoxication. At some time early in the day, Tuggle accompanied defendant and his nine-year-old daughter to have their portrait taken. Tuggle became upset when defendant's daughter complained that Tuggle was going to be included in the picture. Later that afternoon at defendant's mother's house, with defendant's daughter still present, Tuggle and defendant began arguing about a woman she thought defendant was seeing. Tuggle shouted curses at defendant.

¶ 6 Defendant's is the only account of what ensued inside defendant's mother's house. According to defendant, Tuggle began hitting him. Defendant tried to restrain her by holding her hands. He instructed his daughter to go upstairs, where his mother was. Tuggle continued hitting defendant, calling him names, and demeaning him. When defendant tried to go upstairs, Tuggle tried to pull him back downstairs. In defendant's words, she continued "fussing and cursing." Defendant's daughter was watching from the top of the stairs. His mother was yelling at him and Tuggle to stop fighting.

¶ 7 Defendant and Tuggle eventually made it to the top of the stairs. Tuggle derided defendant's daughter. Defendant gave Tuggle a stern look, and Tuggle spit in defendant's face. Tuggle grabbed defendant and pushed him outside onto the back porch, where she continued to

slap defendant. She continued to yell at defendant, calling him names and accusing him of cheating on her. Defendant grabbed Tuggle, and according to him, Tuggle stumbled and fell onto her side. According to defendant, Tuggle kicked defendant from the ground several times until defendant struck the back of her head with an open hand two or three times, then picked her up and took her back inside.

¶ 8 George Ridgeway saw the couple fighting on the lawn from his residence four houses away. According to Ridgeway, he witnessed defendant shove Tuggle to the ground onto her face and subsequently punch the back of her head with closed fists 8 to 10 times before picking her up and taking her inside. Ridgeway had had no previous contact with defendant or Tuggle. He instructed his wife to call the police. When an officer arrived, Ridgeway described defendant and Tuggle and indicated which house they had returned to.

¶ 9 The responding Bloomington police officer, David Ziemer, proceeded to defendant's mother's house. Defendant met him at the door. Defendant confirmed he had been in a fight. When a second officer arrived to watch defendant, Officer Ziemer proceeded downstairs to find Tuggle. According to Officer Ziemer, Tuggle was observably intoxicated. When Officer Ziemer again spoke with defendant, defendant denied there had been an altercation and asked if he was free to leave. Officer Ziemer responded that he was.

¶ 10 The officers left to speak with Ridgeway, who at that time was standing across the street from defendant's mother's house. Ridgeway again described the incident as he had witnessed it. The officers then observed Tuggle emerge from the house, followed by defendant. She stumbled and fell in the middle of the road. Officer Ziemer called an ambulance per Tuggle's request.

¶ 11 After the ambulance arrived, Officer Ziemer confronted defendant with Ridgeway's description of the earlier events. Defendant denied punching Tuggle. He stated Tuggle had beaten him and caused trouble for him and the neighbors. He stated he would not allow himself to be disrespected publicly and maintained the only time he touched Tuggle during the incident was to take her inside the house. Defendant was then arrested.

¶ 12 On August 7, 2009, the State charged defendant with domestic battery. On February 23, 2010, defendant was tried before a jury. Witnesses testified to the events as described above.

¶ 13 At the jury-instruction conference, defendant requested an amendment to the State's proposed instructions defining domestic battery. Without objection from the State the trial court amended Illinois Pattern Jury Instructions, Criminal, Nos. 11.11, 11.12 (4th ed. 2000) (hereinafter, IPI Criminal 4th Nos. 11.11, 11.12), to include the phrase "without legal justification" as an element of the offense that the State was required to prove beyond a reasonable doubt. For example, the so-called issues instruction–the modified version of IPI Criminal 4th No. 11.12–stated the prosecution was required to prove, among other things, "[t]hat the defendant knowingly without legal justification made physical contact of an insulting or provoking nature with Michelle Tuggle." IPI Criminal 4th No. 24-25.06, on the affirmative defense of self-defense, was not tendered by either party and was not given.

¶ 14 During deliberation, the jury submitted a question asking the trial court to clarify the phrase "knowingly without legal justification." The State indicated it regretted not objecting to defendant's argument that the "without legal justification" language should be included. It stated there was insufficient evidence of justification to require the instruction to be modified.

However, after discussion between the court and the parties, the court amended the relevant phrase in the instructions to read, "knowingly *and* without legal justification" (emphasis added). The jury subsequently returned a guilty verdict.

¶ 15 On March 10, 2010, the trial court held a sentencing hearing. No transcript of the sentencing hearing appears in the record, and defendant has supplemented the record with a statement by the trial judge that he has no specific recollection of what occurred at the hearing. In a written order, the court sentenced defendant to 18 months' conditional discharge and, concurrent with a sentence for violation of his bail bond, 60 days in county jail ("4 upfront, 56 stayed"). The sentencing order indicates a condition of defendant's discharge was that he "[p]ay all fines, restitution, costs, fees and mandatory assessments, including VCVA, as set forth in the fine/cost sheet provided by the McLean County Circuit Clerk by _____." The space left for the due date of the payment was left blank. No assessment of particular fines or costs appears in the written order. The handwritten docket entry for the sentencing hearing states, "[Defendant] fined 250 + CC; 200 DV; 10 DB; 50 CPN; 28 VCVA 18 mths CD; [illegible]; DV Assess & Proto by Rem 6/10/10 @ 1:30 p.m." A March 10, 2010, "Notice to Party" and a "Receipt Voucher," dated effective March 11, 2010, reflect imposition of additional fines and costs, including a $15 "CHILDREN'S ADVOCACY CENTER FEE" and a $10 "DRUG COURT FEE."

¶ 16 On May 12, 2010, the trial court denied defendant's motion for a new trial. This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 A. Ineffective Assistance of Counsel

¶ 19 Defendant first argues he received ineffective assistance of counsel because his trial lawyer failed to request an instruction on self-defense. We disagree.

¶ 20 To establish the defendant received ineffective assistance of trial counsel, a defendant must show (1) his counsel's performance was inadequate "in that it fell below an objective standard of reasonableness" and (2) there is a reasonable probability that the outcome of the trial would have been different absent his counsel's deficient performance. *People v. Moore*, 189 Ill. 2d 521, 535, 727 N.E.2d 348, 355-56 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Here, a "reasonable probability" means one "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 21 In this case, defendant's claim of ineffective assistance of counsel is based on his trial counsel's failure to request an instruction on self-defense. Defendant claims he was prejudiced by his lawyer's omission because a self-defense instruction should have been given and the jury, if instructed on self-defense, would have been more likely to rule in defendant's favor. In general, a defendant is entitled to a jury instruction on self-defense whenever such a theory is supported by some evidence, however slight. *People v. Everette*, 141 Ill. 2d 147, 157, 565 N.E.2d 1295, 1299 (1990). A defendant claiming self-defense must show "(1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable." *People v. Lee*,

213 Ill. 2d 218, 225, 821 N.E.2d 307, 311 (2004); see also 720 ILCS 5/7-1(a) (West 2010) ("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."). If any of these elements cannot be sustained by the evidence, no jury instruction on self-defense is warranted. *Cf. Lee*, 213 Ill. 2d at 225, 821 N.E.2d at 311 ("If the State negates any one of these elements, the defendant's claim of self-defense must fail.").

¶ 22 Defendant cites two cases in which the defense attorneys were held to have provided ineffective assistance by failing to request applicable jury instructions. In *People v. Pegram*, 124 Ill. 2d 166, 174, 529 N.E.2d 506, 509 (1988), the supreme court held the defendant's lawyer's failure to request an instruction on the affirmative defense of compulsion amounted to ineffective assistance. The defendant in that case testified that he was held at gunpoint and forced to participate in a robbery. *Id.* at 169, 529 N.E.2d at 507. In the court's estimation, compulsion was "[t]he principal contested issue" in that case. *Id.* at 173, 529 N.E.2d at 509. Accordingly, the court stated, "it cannot be said that the jury, not having been instructed on the defense of compulsion, knew that the defendant's testimony concerning his fears of immediate harm and being forced by the two masked men to do the described acts could provide a defense to the charge of robbery." *Id.* As the evidence in that case demanded an instruction on the defense of compulsion, yet defense counsel failed to request such an instruction, the court concluded, the defendant was prejudiced by his counsel's deficient performance. *Id.* at 174, 529 N.E.2d at 509.

¶ 23 In *People v. Gonzalez*, 385 Ill. App. 3d 15, 21, 895 N.E.2d 982, 988 (2008), the

appellate court held the defendant's attorney provided ineffective assistance by failing to request instructions related to an affirmative defense. There, the trial court instructed the jury that it was "a defense to the charge of aggravated criminal sexual abuse that the defendant reasonably believed [the victim] to be 17 years of age or older." *Id.* at 20, 895 N.E.2d at 987. However, it did not instruct the jury on the definition of reasonable belief or the State's onus of disproving the affirmative defense beyond a reasonable doubt. *Id.* at 20-21, 895 N.E.2d at 987. The appellate court concluded these further instructions were warranted by the evidence and, if given, could have affected the verdict. *Id.* at 21, 895 N.E.2d at 988. The victim of the alleged aggravated criminal sexual assault denied ever telling the defendant her age and denied the truthfulness of a statement she had signed, which indicated otherwise. *Id*. at 15, 895 N.E.2d at 988. The appellate court further allowed that the victim's appearance and demeanor, observed by the jurors, could have supported the defense. *Id.* Thus, even though the victim's testimony was refuted by a detective who testified the defendant told him he knew the victim was 14 years old, the court stated, "[W]e cannot say that the State's evidence here was so substantial that the result would not have been different had the jury been properly instructed." *Id.* It concluded, "We therefore find that defendant suffered prejudice as a result of counsel's failure to ensure that the jury was properly instructed." *Id.*

¶ 24 In this case, in contrast to *Pegram* and *Gonzalez,* defendant would not have been entitled to an instruction on his affirmative defense had his attorney tendered one. Here, defendant's self-defense claim relies on inferences–specifically, regarding whether defendant actually and subjectively believed his use of force was necessary to defend himself–that the trial court may not have found sufficiently compelling to satisfy the standard for issuing a jury

instruction had counsel requested one. Often, fifth-amendment protections place a defendant's unexpressed motives and beliefs beyond proof by direct evidence and necessitate such inferences. Here, however, the parties presented direct evidence of two motivations for defendant's actions: (1) defendant testified he smacked the back of Tuggle's head two or three times "in response to" Tuggle's persistent abuse and derision over the course of the day of the altercation, and (2) Officer Ziemer testified defendant told him, when asked about the altercation, "he wasn't going to be disrespected" publicly and in front of his family. Unlike *Pegram*, where the defendant testified that he was directed at gunpoint to commit a robbery and that he feared for his life, here, defendant's testimony failed to satisfy his burden of presenting some evidence establishing his subjective belief that his use of force was necessary to defend himself.

¶ 25 With no direct evidence that defendant believed hitting Tuggle was necessary to prevent her from inflicting imminent harm on him, defendant's self-defense argument relies on conjecture into defendant's thoughts. Defendant's desires to retaliate and to protect his reputation among his neighbors are not *necessarily* inconsistent with a belief that he would suffer imminent harm unless he struck Tuggle. Nevertheless, no evidence positively indicates defendant actually possessed such a belief. Accordingly, the trial court would not have erred by denying a requested self-defense instruction.

¶ 26 Defendant further argues his trial counsel should have argued for an instruction on self-defense based on the Committee Note to IPI Criminal 4th No. 11.12. This usage note states, "Whenever the jury is to be instructed on an affirmative defense, it is necessary to use the phrase 'without legal justification' in Instruction 11.11 ***, and this instruction must be

combined with the appropriate instructions from Chapter 24-25.00 [(on affirmative defenses)]." Defendant asserts that he was entitled to IPI Criminal 4th No. 24-25.06 on the use of force in defense of a person since the phrase "without legal justification" was inserted into IPI Criminal 4th Nos. 11.11 and 11.12 in this case. Defendant's argument reroutes the cause-effect relationship described in the Committee Note to IPI Criminal 4th No. 11.12. A finding that the defendant is entitled to an instruction on an affirmative defense triggers the incorporation of the phrase "without legal justification" into IPI Criminal 4th No. 11.11, not the other way around.

¶ 27 Here, the evidence did not warrant an instruction on self-defense. Had an instruction been requested and given, moreover, there is so little evidence that defendant subjectively believed his use of force was necessary that the probability the verdict would have been different is insufficient to undermine confidence in the outcome. Thus, the failure of defendant's attorney to request an instruction on self-defense did not prejudice defendant and did not constitute ineffective assistance of counsel.

¶ 28 B. Credit Toward Fines

¶ 29 Defendant next argues the trial court erred by not according him monetary credit toward his child advocacy center and drug court fines. The State concedes that defendant is entitled to credit, but notes the court appears not to have imposed fines and costs required by statute. The State asks that we remand for the court to assess fines and costs as appropriate and to award defendant credit toward his fines. We agree with the State.

¶ 30 In *People v. Rohlfs*, 322 Ill. App. 3d 965, 972, 752 N.E.2d 499, 504 (2001), the defendant received a "Notice to Defendant" detailing fines and costs he allegedly owed. While the trial court's docket entry appeared to impose costs, the fines and costs portion of the

sentencing order was left blank. *Id.* at 971, 752 N.E.2d at 504. This court held neither the fines nor the costs imposed could be affirmed even though the assessment of costs was mandatory. *Id.* The cause was accordingly remanded for the trial court to assess fines and costs. *Id.*

¶ 31 As in *Rohlfs*, the docket entry for the sentencing hearing in this case indicates that fines and costs were imposed. However, the written sentencing order is blank with respect to fines and costs. Accordingly, we remand with directions for the trial court to enter an amended sentencing judgment showing the imposition of appropriate fines and costs and awarding defendant credit toward fines.

¶ 32 For purposes of remand, we note defendant is entitled to $10 in potential credit toward fines for the parts of August 6 and August 7, 2009, that he spent in custody before posting bond. 725 ILCS 5/110-14 (West 2008). Further, we note the children's advocacy center fee and drug court fee apparently assessed against defendant are fines, not fees, for purposes of credit. *People v. Brown*, 406 Ill. App. 3d 1068, 1084, 952 N.E.2d 32, 45 (2011).

¶ 33 Finally, the State expresses concern that a $250 assessment against defendant as indicated in the "Notice to Party" defendant received was excessive. The assessment is labeled "MCLEAN COUNTY" and cites section 5-9-1 of the Uniform Code of Corrections (730 ILCS 5/5-9-1 (West 2008)) as its statutory authorization. The State correctly indicates that section 5-9-1(c) provides for a mandatory "additional penalty of $10 for every $40, or fraction thereof, of fine imposed[,]" sometimes referred to as a lump-sum surcharge. See 730 ILCS 5/5-9-1(c) (West 2008). As the State notes, a fine of $250 under section 5-9-1(c) would be appropriate only if defendant was assessed nearly $1,000 in other fines, which is not the case here.

¶ 34 Several indicators suggest the State's worries are unfounded. First, the docket

entry for the sentencing hearing indicates, in part, "[defendant] fined $250 + CC." Apparently, the trial court intended to impose a $250 *fine* as a part of defendant's sentence in addition to other assessments. This is consistent with the citation to section 5-9-1 in the "Notice to Party." While this citation does not refer to any specific statutory subsection, section 5-9-1(a) provides, "An offender may be sentenced to pay a fine as provided in Article 4.5 of Chapter V." 730 ILCS 5/5-9-1(a) (West 2008). In turn, under section 5-4.5-55(e), a Class A misdemeanor offender such as defendant may be sentenced to pay "[a] fine not to exceed $2,500 for each offense or the amount specified in the offense, whichever is greater," in addition to other penalties. 730 ILCS 5/5-4.5-55(e) (West 2008). Further, the "Notice to Party" elsewhere includes a $120 "LUMP SUM SURCHARGE," citing section 5-9-1(c). For these reasons, it appears no error with respect to calculation of the fine under section 5-9-1(c) occurred and the $250 fine was authorized under sections 5-9-1(a) and 5-4.5-55(e). However, it should go without saying that, on remand, the amounts assessed for fines and costs and awarded to defendant as credit should be those authorized by statute and according to the court's discretion, where granted.

¶ 35 III. CONCLUSION

¶ 36 For the foregoing reasons, we affirm the trial court's judgment. We remand and direct the court to issue an amended written sentencing judgment imposing fines and costs and awarding defendant credit as appropriate. As part of our judgment, we award the State its $50 assessment against defendant as costs of this appeal.

¶ 37 Affirmed; cause remanded with directions.