2012 IL App (4th) 110499-U

Filed 10/3/12

NO. 4-11-0499

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
KENNETH R. DYE,	)	No.10CM805
Defendant-Appellant.	)	
	)	Honorable
	)	Derek J. Girton,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Turner and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant was unable to demonstrate prejudice from trial counsel's errors of (1) failing to object to the introduction of other-crimes evidence, and (2) failing to ensure the jury was given a limiting instruction, he could not successfully present a claim of ineffective assistance of counsel.

¶ 2 In February 2011, a jury convicted defendant, Kenneth R. Dye, of violating an order of protection (720 ILCS 5/12-30(a)(1) (West 2008)). Defendant appeals, arguing his trial counsel rendered ineffective assistance by allowing the admission of other-crimes evidence, and by failing to ensure the jury was instructed regarding the proper and limited use of such evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 28, 2010, the State charged defendant with one count of violation of an order of protection, a Class A misdemeanor (720 ILCS 5/12-30(a)(1), (d) (West 2008)). At defendant's jury trial, the State presented the following evidence. The victim, Sherry Dye, testified

she had been married to defendant for two years, and had dated for 18 years. On February 23, 2010, she obtained an order of protection against him, which prohibited him from coming within 250 feet of Dye, her residence, her place of employment, and "any other specified place."

¶ 5 During the pendency of the order of protection, on October 22, 2010, at approximately 7 p.m., she arrived home to find defendant in the bedroom of her house. Apparently, he had entered by breaking the door. He was standing with a shotgun, covered with a sheet, in his hands. Defendant asked Dye if she had heard of the "Burning Bed." She said she tried to change the subject, and told him she did not want a gun in the house. He left after she gave him $95. After he left, Dye went to her daughter's house to spend the night. She returned home around 6 a.m. the next day and found her air conditioner torn out of the wall, her window broken, her door kicked in, and a crowbar lying on the couch. She found a gun standing in the corner of her bedroom with a sheet wrapped around it. She called the police and they removed the gun.

¶ 6 For the final question, the prosecutor asked Dye the following:

"Q. Okay. And what about after the 22nd, did you, did he try to contact you after that?

A. After the 22nd, nope, I ain't had no kinda contact with him at all period. Not until after he stabbed me.

Q. Okay."

¶ 7 On cross-examination, Dye testified she and defendant were married on December 15, 2009, and she obtained the order of protection against him on February 23, 2010. She explained to defense counsel how defendant had broken the door when entering on October 22, 2010. She also testified she saw defendant on November 1, 2010, at his brother's yard sale, and the following

conversation occurred (as testified to by Dye): "[H]e came to the car and said 'you gonna be mad at me[.]' I said '[W]hy is that[?]' [H]e said 'cause I been smokin some weed.' " Defendant's counsel objected, but the trial court did not rule on the objection. The following exchange occurred:

> "Q. [By defense counsel:] All right. And you said that [defendant], when he came to your house on the 22nd, had picked up some money of his?
>
> A. [By Dye:] Yep.
>
> Q. And if you, if you'd had no contact with him before then why would his money be at your house?
>
> A. Because for, uh, he had sold some pills and the people came over there to pay him for it.
>
> Q. So, he was over at your house before—
>
> A. And he came back to pick up his money and that's what he came to get.
>
> Q. So, okay, so he was at your house prior to this then?
>
> A. He sold some pills and the people paid him for it and he came back and got it.

¶ 8 On redirect examination, the prosecutor asked Dye if she knew for certain defendant had sold pills. She said she was not part of the transaction, but her nephew was. She said "[T]he men came outside and [] paid my nephew the money." She explained that when defendant entered her house the second time on October 22 or 23, 2010, her door had already been broken, but she had put knives in the hinges to try to keep it closed. When she came home the next day, she saw the

knives were broken, so she knew someone had gotten into the house. She said she did not call the police the day before because defendant had only wanted his money. She said: "[H]e left respectively [*sic*], he did not, he didn't throw no fit with me, he didn't argue, he just 'give me my money and I'm gonna go,' you know, just like that. 'You ain't gotta worry bout me' and took off walkin down the alley." She explained that this exchange took place before she found him in her bedroom with a shotgun.

¶ 9 The State introduced a certified copy of the order of protection at issue. The State then called Danielle Lewallen, a Danville police officer, who testified she responded to Dye's residence on October 23, 2010, upon a violation-of-order-of-protection call. Dye also requested she remove a shotgun from the residence. The officer identified a shotgun (marked as People's exhibit No. 2) as the one removed from the residence. The officer could not recall whether there was evidence of a forced entry. The State rested.

¶ 10 Defendant presented the testimony of Joan Duckworth, a female who claimed she was dating defendant and was with him the entire evening of October 22, 2010, from approximately 5 p.m. to 11 p.m. She said he left to check on his brother sometime between 10 p.m. and midnight. Defendant rested.

¶ 11 The jury found defendant guilty. Defendant filed a posttrial motion, but did not include the issue he raises in this appeal. The trial court denied his motion and sentenced him to 360 days' incarceration to run concurrently with the one-year prison sentence ordered in a separate case (Vermilion County case No. 10-CF-638). This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Defendant contends his trial counsel rendered ineffective assistance by (1) allowing

the jury to hear other-crimes evidence, and (2) failing to ensure the jury was properly instructed on the limited use of this other-crimes evidence. He contends his counsel erred by failing to object to the testimony referring to him (1) kicking in the door, (2) stabbing Dye sometime after October 22, 2010, (3) smoking cannabis, and (4) selling pills. He claims these evidentiary errors were exacerbated by counsel's failure to ensure the jury was admonished about the proper use of this evidence.

¶ 14 A claim of ineffective assistance of counsel is analyzed under the two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), where the defendant must demonstrate that his counsel's actions (1) were unreasonably deficient under an objective standard, and (2) so prejudiced the defendant that he was denied a fair trial.

¶ 15 Both defendant and the State suggest the application of the plain-error doctrine in this appeal since the trial court did not have the opportunity to consider these issues as counsel did not object during the trial-court proceedings. We agree the issue was forfeited, and we will review the issue on its merits, but not under a plain-error analysis. Instead, we review the issue under a *Strickland* analysis because defendant contends the failure to object was due to the alleged incompetence of his trial counsel. See *People v. Eddmonds*, 101 Ill. 2d 44, 63 (1984).

¶ 16 Generally, evidence of other crimes or bad acts is not admissible due to the danger the jury could use such evidence to determine only that the defendant has the propensity to commit crime. See *People v. Chapman*, 2012 IL 111896, ¶ 19. However, when the alleged other-crimes evidence is inextricably intertwined to the charged offense, the admission of the evidence is analyzed pursuant to ordinary relevancy principles. *People v. Manuel*, 294 Ill. App. 3d 113, 124 (1997). In other words, if the other bad acts are part of a course of conduct leading up to the charged crime,

then evidence of those acts may be considered admissible intrinsic evidence of the charged offense. *People v. Morales*, 2012 IL App (1st) 101911, ¶ 25.

¶ 17 The State tends to argue along this line of reasoning—that evidence of defendant doing these four bad acts (breaking down a door, stabbing Dye, smoking marijuana, and selling pills) was admissible to demonstrate an "ongoing emotional struggle between a husband and wife in a love triangle." According to the State, because these bad acts were arguably "inextricably intertwined" with the charged offense, it was not error for the jury to hear of such evidence. We disagree.

¶ 18 We fail to see how any of the four other separate crimes affected or was connected to the charged crime of defendant's violation of an order of protection. The complained-of bad acts do not (1) demonstrate an ongoing dispute between the parties, (2) show defendant engaged in a course of conduct, or (3) provide a context for the charged offense. In fact, the charged offense is not a crime for which any of that is important, as the State was not required to prove a motive or criminal intent. *C.f.*, *People v. Forcum*, 344 Ill. App. 3d 427, 444 (2003) (evidence of prior threats by a defendant to do violence to the eventual victim are admissible to show malice and criminal intent); *Manuel*, 294 Ill. App. 3d at 124 (the previous incidents provided an explanation for aspects of the charged crime that were not otherwise understandable). Simply put, a defendant violates an order of protection when he commits an act prohibited by an order of protection and after having notice of the order. 720 ILCS 5/12-30(a)(1) (West 2008). None of the four bad acts were related to this offense or necessary to prove the commission of the offense.

¶ 19 As such, the evidence regarding those four other bad acts should not have been admitted. See *People v. Lindgren*, 79 Ill. 2d 129, 140 (1980) ("The erroneous admission of evidence of other crimes carries a high risk of prejudice and ordinarily calls for reversal."). At the very least,

the jury should have been instructed regarding the limited purpose of this evidence. See Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000) (a limiting instruction to explain why the evidence is being admitted). This instruction would have lessened the impact of the improperly admitted evidence. *People v. Denny*, 241 Ill. App. 3d 345, 360 (1993).

¶ 20 Though we determine that the admission of the other-crimes evidence was error, we find defendant cannot demonstrate ineffective assistance of counsel because the error was not so substantial as to deprive him of a fair trial. That is, defendant cannot demonstrate the second prong of the *Strickland* standard. On this record, defendant cannot establish that a reasonable probability exists that the outcome of the trial would have been different absent the errors.

¶ 21 In order for the jury to find defendant guilty beyond a reasonable doubt, the State was required to prove (1) defendant knowingly came within 250 feet of Dye's residence, (2) there existed a pending order of protection prohibiting such conduct, and (3) defendant knew of the order. The evidence at trial established, by Dye's testimony, that defendant had entered the residence, on at least one occasion, between October 22, 2010, and October 23, 2010. Given the factual scenario as testified to by Dye and Officer Lewallen, defendant cannot reasonably assert that the result of the trial would have been different without the testimony regarding (1) whether he kicked in the door to the residence, (2) whether he subsequently stabbed Dye, (3) whether he smoked marijuana, or (4) whether he sold pills. There is no reasonable connection between the commission of these other bad acts and the question of whether defendant violated the order of protection.

¶ 22 Where direct evidence of the alleged criminal offense was admitted and not rebutted, we cannot find that the jury found defendant guilty due to the introduction of evidence of these other bad acts, or even that the introduction of such evidence persuaded the jury toward a guilty finding.

Therefore, based on the record before us, we conclude defendant is unable to demonstrate he suffered prejudice as a result of the trial errors. The failure to satisfy the prejudice prong of the *Strickland* standard precludes a finding of ineffective assistance of counsel. *People v. Enis*, 194 Ill. 2d 361, 377 (2000).

¶ 23 III. CONCLUSION

¶ 24 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 25 Affirmed.