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2015 IL App (4th) 150005-U

NO. 4-15-0005

FILED
May 15, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: MATTHEW M., a Minor,	)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
Petitioner-Appellee,	)	McLean County
v.	)	No. 14JD20
MATTHEW M.,	)	
Respondent-Appellant.	)	Honorable
	)	Elizabeth A. Robb,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Pope and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the affirmative defense of self-defense may not be raised for the first time on appeal. The appellate court further found trial counsel's decision not to raise the defense at respondent's adjudicatory hearing constituted a matter of sound trial strategy supported by the record.

¶ 2 In January 2014, the State filed a petition for adjudication of wardship, alleging Matthew M., a minor (respondent), was delinquent in that he committed multiple offenses of resisting a peace officer (720 ILCS 5/31-1(a), (a-7) (West 2012)). In September 2014, following an adjudicatory hearing, the trial court found respondent guilty on one count of resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2012)). In December 2014, following a dispositional hearing, the court entered an order of (1) 18 months' probation, subject to certain terms and conditions; (2) 10 hours of community service; and (3) $2,996.16 restitution.

¶ 3 Respondent appeals, arguing (1) the evidence presented at the adjudicatory hearing was insufficient to prove him guilty beyond a reasonable doubt where his struggles were in response to the officer's use of excessive force; and (2) to the extent this issue was not specifically raised, he received ineffective assistance of trial counsel. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 In January 2014, the State filed a petition for adjudication of wardship, alleging respondent was delinquent in that on September 15, 2013, he committed multiple offenses of resisting a peace officer (720 ILCS 5/31-1(a), (a-7) (West 2012)). The State alleged respondent violated section 31-1(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/31-1(a) (West 2012)), a Class A misdemeanor, in that he (1) ran from Officer Todd Walcott after the officer ordered him to stop, and (2) physically struggled with Officer Timothy Marvel while being placed under arrest by kicking his legs and swinging his arms to free himself. The State further alleged respondent violated section 31-1(a-7) of the Code (720 ILCS 5/31-1(a-7) (West 2012)), a Class 4 felony, in that his struggle with Officer Marvel was the proximate cause of an injury to Officer Marvel's hand.

¶ 6 A. Adjudicatory Hearing—Day One

¶ 7 In August 2014, the trial court conducted an adjudicatory hearing on the State's petition. The following is a summary of the evidence presented at the hearing.

¶ 8 1. *State's Case in Chief*

¶ 9 a. Officer Walcott

¶ 10 The State called Officer Walcott as a witness. Officer Walcott testified he was dispatched to the 900 block of West Market Street in Bloomington, Illinois, in a marked vehicle,

where it was believed four African-American males were attempting to gain access to a vehicle. As he approached the area, Officer Walcott observed four subjects take off running from a parking lot. Officer Walcott, wearing a police uniform, exited his vehicle and ran after the suspects. He caught up with the suspects outside a home and, in a raised voice, identified himself as "police" and told them to "stop." Two suspects ran westbound and two ran eastbound. Officer Walcott called over his police radio, advising the direction the suspects ran, and then followed the eastbound suspects. He eventually detained one eastbound suspect and another officer detained the second eastbound suspect.

¶ 11 Officer Walcott later saw the two westbound suspects after they were detained and transported back to the 900 block of West Market Street. During the hearing, Officer Walcott identified one of the westbound suspects by giving respondent's name. He did not make an in-court identification of respondent as a westbound suspect.

¶ 12 b. Officer Marvel

¶ 13 The State next called Officer Marvel. Officer Marvel testified he was dispatched to the 900 block of West Market Street in a marked vehicle, where it was believed four young African-American males were burglarizing a vehicle. One of the suspects was described as wearing "a dark blue or black sweater or shirt or long-sleeved shirt with white writing on it."

¶ 14 Officer Marvel testified, as he approached the 900 block of West Market Street, Officer Walcott advised him two suspects ran westbound. Officer Marvel proceeded after the westbound suspects. While driving westbound, Officer Marvel observed two male subjects running northbound up an alleyway. One of the males was wearing a dark blue, long-sleeved sweatshirt with white writing or white stripes. Officer Marvel turned his vehicle northbound into

the narrow alleyway and activated his overhead lights and siren. The two suspects turned around and looked in Officer Marvel's direction. One suspect ran westbound and the other, the one with the dark blue shirt, continued to run northbound.

¶ 15 After testifying to the actions of the two suspects, the State questioned Officer Marvel as to what he did next. Officer Marvel testified:

> "I continued northbound up the alleyway following the male wearing a dark blue shirt. I later identified him as [respondent]. As I went up the alley, it was a very narrow alleyway, I got up beside and opened my car door to pull around in front and hit him—hit him with the car door as was pulling my car, I went—I tried to put him under arrest."

The State then proceeded to clarify Officer Marvel's statement as follows:

> "[THE STATE]: Now, as you stated, you were—are you driving towards [respondent]?
>
> [OFFICER MARVEL]: Yes, sir.
>
> [THE STATE]: What is [respondent] doing?
>
> [OFFICER MARVEL]: He's continuing to run.
>
> [THE STATE]: So he's running away from the vehicle?
>
> [OFFICER MARVEL]: Yes, sir.
>
> [THE STATE]: Now the individual, [respondent], is running on the driver's side of the vehicle?
>
> [OFFICER MARVEL]: Yes, sir.

[THE STATE]: You said that you opened your door and it accidently hit [respondent]. Was he still running at the time?

[OFFICER MARVEL]: Yes, he was.

[THE STATE]: So had you stopped your vehicle before opening the door?

[OFFICER MARVEL]: No, I had not. I was slowing my car down, opening the door in preparation to get out of the car to chase him further.

[THE STATE]: What happened when the door hit [respondent]?

[OFFICER MARVEL]: He fell to the ground.

[THE STATE]: And where did you go? Where did you proceed to go?

[OFFICER MARVEL]: I continued driving my car a little farther forward, turned it to where it would block off his running as I got out of my car and at that point I went to him."

¶ 16 Officer Marvel, wearing a police uniform, exited his vehicle and approached respondent lying on the ground. He placed himself on top of respondent to place him in custody. Respondent began to fight with Officer Marvel by "pushing away from [him], [and] flailing his arms and legs about in an effort to get away from [him]."

¶ 17 In an effort to gain control over respondent and prevent him from fleeing, Officer Marvel attempted to strike respondent in the upper back. He missed and struck respondent on

the back of the head. Despite the strike, respondent continued to resist. Officer Marvel reached a point where he could strike respondent in the common peroneal nerve, located in the side to front upper leg. After doing so, respondent submitted and Officer Marvel placed him in handcuffs. Officer Marvel testified throughout the struggle he told respondent to stop fighting and resisting the police. Officer Marvel made an in-court identification of respondent as the individual he detained.

¶ 18 After detaining respondent, Officer Marvel assisted another officer in detaining the other individual he initially observed running in the alleyway. He also noticed his hand was sore and swelling and sought medical care. Officer Marvel was treated for a broken hand.

¶ 19 On cross-examination, respondent questioned Officer Marvel:

> "[TRIAL COUNSEL]: So you say you're opening the door to your car and that's when you accidentally knock [respondent] down with it, correct?
>
> [OFFICER MARVEL]: Yes, sir."

Officer Marvel acknowledged, in order for the door to hit respondent, respondent would have needed to be next to the vehicle. Officer Marvel further acknowledged an in-car video would have been activated when he triggered the sirens on his vehicle. He did not review the in-car video and was uncertain of whether it existed the day of the hearing.

¶ 20 On this evidence, the State rested its case.

¶ 21 2. *Continuance*

¶ 22 After the State rested, respondent's trial counsel requested to continue the hearing to allow him, at the request of respondent and his mother, to make another inquiry into whether

the in-car video existed. In response, the State requested to keep hearing the testimony as all of the witnesses were present. Respondent's counsel concurred in the State's request.

¶ 23 3. *Directed Finding*

¶ 24 Prior to presenting testimony, respondent moved for a directed finding as to the allegation relating to Officer Walcott. Specifically, respondent alleged Officer Walcott (1) did not identify respondent in court as being one of the suspects who ran from him, and (2) gave a sole description of the individuals that ran from him as four African-American males. The court granted respondent's motion.

¶ 25 4. *Respondent's Case in Chief*

¶ 26 Respondent testified on his own behalf. Respondent claimed he was walking through the alleyway by himself when he noticed a police vehicle drive past the alleyway, stop, back up, and place its lights on. Respondent started to run because "[he] didn't know what was going on. [He] was the only one in the alley, [and Officer Marvel] had his lights on coming at [him] 30 miles an hour."

¶ 27 Respondent testified Officer Marvel's vehicle's door struck him, causing him to fall "face first" to the ground. Officer Marvel then placed himself on top of respondent and "punched" him twice in the back of his head and once around his jaw. Respondent testified Officer Marvel called him a "nigger," a "bitch" twice, and told him, "you'd better not f—ing move nigger." Respondent did not recall Officer Marvel stating, "stop resisting" or "get down on the ground."

¶ 28 Respondent testified after Officer Marvel placed him in handcuffs, Officer Marvel struck him another time in the back of his head. Respondent testified he was never struck in the

leg area.

¶ 29 As to his own actions during the incident, respondent testified he never attempted to "flail away or kick or punch at" Officer Marvel and continued to yell, "stop." After respondent was released from the police department, he went to a hospital. He did not have any broken bones or injuries but rather "just a couple of scrapes and stuff."

¶ 30 On cross-examination, after seeing Officer Marvel pull down the alleyway with his lights activated, respondent acknowledged this indicated Officer Marvel wanted him to stop.

¶ 31 5. *State's Rebuttal*

¶ 32 The State recalled Officer Marvel to the stand. Officer Marvel testified he struck respondent once on the back of the head and did not strike him in the jaw or face area. He further testified he never called respondent a "bitch" or "nigger." As to the speed he was driving down the alleyway, Officer Marvel testified he was going very slowly, probably less than five miles per hour.

¶ 33 On re-cross-examination, respondent questioned Officer Marvel as to the speed he was going in his vehicle and the likelihood of respondent outdistancing him. Officer Marvel testified he was unsure of the exact speed respondent was running.

¶ 34 At the conclusion of the testimony, the trial court continued the hearing to allow respondent the opportunity to make another inquiry into whether the in-car video existed.

¶ 35 B. Subpoena *Duces Tecum*

¶ 36 After the hearing, respondent filed a subpoena *duces tecum*, mandating the records keeper at the Bloomington police department produce any in-car video relating to this incident. In September 2014, respondent received a letter indicating the Bloomington police

department maintained in-car video on their server for a period of six months, after which it is automatically deleted. Therefore, the footage from September 15, 2013, was deleted prior to respondent's first pretrial conference in April 2014.

¶ 37 C. Adjudicatory Hearing—Day Two

¶ 38 In September 2014, the trial court conducted the second day of the adjudicatory hearing on the State's petition. Respondent advised the court the in-car video no longer existed. The parties proceeded to closing argument.

¶ 39 During closing argument, respondent's trial counsel argued this was a "credibility issue." He raised the question of whether Officers Marvel's use of his vehicle's door was intentional or accidental, submitting it was in fact intentional. He further highlighted the strike by Officer Marvel to respondent's head. Respondent's trial counsel concluded, arguing as follows:

> "The [respondent] indicated he didn't resist, the officer indicated he did. This is a minor who's already knocked flat on the ground by the officer's car door. So his statement makes more sense that he was punched again and he didn't get up. Certainly his statement about how things happened is more credible than the officer's. The State has the burden of proof, and the State has not met its burden."

¶ 40 The trial court found the State's allegation respondent violated section 31-1(a-7) of the Code (720 ILCS 5/31-1(a-7) (West 2012), in that his struggle with Officer Marvel was the proximate cause of an injury to Officer Marvel's hand, proved beyond a reasonable doubt.

¶ 41 D. Dispositional Hearing

¶ 42 In December 2014, the trial court conducted a dispositional hearing. The court made a finding of delinquency and placed the minor under an order of 18 months' probation, subject to certain terms and conditions. The court further ordered respondent to 10 hours of community service and the payment of $2,996.16 in restitution. The court placed respondent's mother under an order of protective supervision.

¶ 43 This appeal followed.

¶ 44 II. ANALYSIS

¶ 45 On appeal, respondent argues (1) the evidence presented at the adjudicatory hearing was insufficient to prove him guilty beyond a reasonable doubt where his struggles were in response to Officer Marvel's use of excessive force; and (2) to the extent this issue was not specifically raised, he received ineffective assistance of trial counsel. We address these arguments in turn.

¶ 46 A. Sufficiency of the Evidence

¶ 47 The trial court found respondent guilty of resisting arrest by a peace officer in violation section 31-1(a-7) of the Code (720 ILCS 5/31-1(a-7) (West 2012)). Section 31-1(a) mandates: "A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer *** of any authorized act within his official capacity commits a Class A misdemeanor." 720 ILCS 5/31-1(a) (West 2012). Section 31-1(a-7) further provides: "A person convicted for a violation of this Section whose violation was the proximate cause of an injury to a peace officer *** is guilty of a Class 4 felony." 720 ILCS 5/31-1(a-7) (West 2012).

¶ 48 Respondent argues the evidence presented at the adjudicatory hearing was

insufficient to prove him guilty beyond a reasonable doubt where his struggles were in response to Officer Marvel's use of excessive force. Respondent does not assert the evidence was insufficient to prove he resisted arrest in violation of section 31-1(a-7) of the Code (720 ILCS 5/31-1(a-7) (West 2012)), but rather contends the evidence presented sufficiently triggered the affirmative defense of self-defense and the State failed to prove beyond a reasonable doubt his resistance was not justified.

¶ 49 A person may not use force to resist arrest by a known peace officer, even if the arrest is unlawful. 720 ILCS 5/7-7 (West 2012); *People v. Wicks*, 355 Ill. App. 3d 760, 763, 823 N.E.2d 1153, 1156 (2005). An exception to this rule applies where an officer uses excessive force. *Wicks*, 355 Ill. App. 3d at 763, 823 N.E.2d at 1156; *People v. Bailey*, 108 Ill. App. 3d 392, 398, 439 N.E.2d 4, 9 (1982). The use of excessive force by an officer invokes an individual's right of self-defense. *Bailey*, 108 Ill. App. 3d at 398, 439 N.E.2d at 9.

¶ 50 "Self-defense *** is an affirmative defense ***, meaning that unless the State's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, must present some evidence thereon." *Bailey*, 108 Ill. App. at 398, 439 N.E.2d at 9. When the affirmative defense of self-defense is properly raised by the evidence, the burden of proving guilt beyond a reasonable doubt as to this issue is upon the State. *Bailey*, 108 Ill. App. at 399, 439 N.E.2d at 9.

¶ 51 A theory of self-defense may properly be raised even if a defendant's own testimony is inconsistent with that theory. *Bailey*, 108 Ill. App. at 399, 439 N.E.2d at 9. However, a defendant "cannot construct a theory of self-defense *** by combining State's evidence and defense evidence." *Bailey*, 108 Ill. App. at 399, 439 N.E.2d at 9.

¶ 52 Respondent asserts the State's evidence alone properly raised the affirmative defense of self-defense and the State failed to prove beyond a reasonable doubt respondent's resistance was not justified. At his adjudicatory hearing, respondent asserted his testimony he did not resist was more credible when considering he was intentionally knocked to the ground by Officer Marvel's vehicle's door and struck in the head. Respondent did not specifically assert the force used by Officer Marvel was excessive; nor did he raise the issue of self-defense. "Thus, since the issue concerning the affirmative defense cannot be raised for the first time on appeal, we need not consider it." *People v. Abrams*, 48 Ill. 2d 446, 458, 271 N.E.2d 37, 44 (1971).

¶ 53 Even if, *arguendo*, we reached the merits of respondent's argument, the evidence presented at the adjudicatory hearing was insufficient to shift the burden to the State to disprove the affirmative defense. Respondent's evidence, consisting solely of his testimony, failed to raise the affirmative defense of self-defense. To raise self-defense, there must be evidence of resistance. See *People v. Robinson*, 92 Ill. App. 3d 972, 975, 416 N.E.2d 793, 797 (1981) (finding an instruction on self-defense unwarranted where the defendant's evidence failed to indicate the defendant resisted). Respondent maintained throughout he did not resist arrest. Moreover, there must be some evidence respondent acted out of fear for his safety. See *Wicks*, 355 Ill. App. 3d at 764, 823 N.E.2d at 1157. No such evidence was presented. Respondent's evidence failed to raise the affirmative defense of self-defense.

¶ 54 Contrary to respondent's assertion, the State's evidence did not raise the affirmative defense of self-defense, thereby placing the burden on the State to prove otherwise. Although the State presented evidence respondent resisted, it did not present evidence this resistance was out of fear for his safety. See *Wicks*, 355 Ill. App. 3d at 764, 823 N.E.2d at 1157;

Robinson, 92 Ill. App. 3d at 975, 416 N.E.2d at 797 (finding a jury instruction on self-defense unwarranted where the State's evidence did not indicate the defendant struck the officer out of fear). The State's evidence failed to raise the affirmative defense of self-defense.

¶ 55 Even if respondent had preserved the issue for appeal, neither respondent's nor the State's evidence adequately raised such defense so as to shift the burden to the State to disprove respondent's assertion he acted in self-defense. See *Bailey*, 108 Ill. App. 3d at 400, 439 N.E.2d at 10.

¶ 56 Finally, we note, as to respondent's brief assertion the State's failure to preserve Officer Marvel's in-car video, which was statutorily mandated evidence (720 ILCS 5/14-3(h-15) (West 2012)), "must be held against them," this claim is forfeited as respondent failed to object below. *In re M.W.*, 232 Ill. 2d 408, 430, 905 N.E.2d 757, 772 (2009). Respondent declines to put forth an argument articulating how either of the two prongs of plain-error review is satisfied, thereby forfeiting plain-error review on appeal. *People v. Nieves*, 192 Ill. 2d 487, 503, 737 N.E.2d 150, 158 (2000).

¶ 57 B. Ineffective Assistance of Counsel

¶ 58 Respondent next contends, to the extent his argument of self-defense was not specifically raised, trial counsel was ineffective.

¶ 59 Minors have a statutory right to be represented by counsel in juvenile proceedings. 705 ILCS 405/1-5(1) (West 2012). Although a statutory right, Illinois courts have reviewed ineffective-assistance-of-counsel claims in juvenile proceedings under the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *In re Ch. W.*, 408 Ill. App. 3d 541, 546, 948 N.E.2d 641, 647 (2011). Under *Strickland*, one must show (1) counsel's representation fell

below an objective standard of reasonableness, and (2) the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687; *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163-64 (1999). To satisfy the deficiency prong of *Strickland*, counsel's performance must be so deficient that counsel was "not functioning as the 'counsel' guaranteed by the sixth amendment [(U.S. Const., amend. VI)]." *People v. Easley*, 192 Ill. 2d 307, 317, 736 N.E.2d 975, 985 (2000). A party raising this claim must overcome "the strong presumption the challenged action or inaction could have been the product of sound trial strategy." *Ch. W.*, 408 Ill. App. 3d at 547, 948 N.E.2d at 648.

¶ 60 We are mindful of the problems associated with addressing an ineffective-assistance-of-counsel claim raised for the first time on appeal. *In re Ch. W.*, 399 Ill. App. 3d 825, 829-30, 927 N.E.2d 872, 876 (2010). Nevertheless, if the record on appeal is sufficient to address the merits of such a claim, we may elect to do so. See *In re Danielle J.*, 2013 IL 110810, ¶ 35, 1 N.E.3d 510

¶ 61 The record demonstrates trial counsel's decision not to raise the affirmative defense of self-defense constitutes a matter of sound trial strategy. See *People v. Sanchez*, 2014 IL App (1st) 120514, ¶¶ 29-31, 7 N.E.3d 69. Respondent asserted throughout he did not resist arrest. In closing argument, trial counsel argued respondent's assertion was more credible when considering he was knocked to the ground by Officer Marvel's vehicle's door and struck in the head. Trial counsel's decision to advocate in conformity with the testimony of his client, rather than argue an alternative argument discrediting his client's testimony, was a decision of sound trial strategy. As discussed above, neither the State's nor respondent's evidence adequately raised the affirmative defense of self-defense, rendering any such argument by trial counsel meritless.

Any claim of ineffective assistance of counsel for counsel's decision to refrain from arguing the affirmative defense of self-defense must fail.

¶ 62 III. CONCLUSION

¶ 63 We affirm the trial court's judgment, concluding the affirmative defense of self-defense may not be raised for the first time on appeal. We further reject respondent's claim of ineffective assistance of counsel where trial counsel's decision to refrain from arguing this defense constituted a matter of sound trial strategy supported by the record.

¶ 64 Affirmed.