2018 IL App (4th) 150056-U

NO. 4-15-0056

FILED
January 11, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
LATRICE BOLDEN,	)	No. 14CF191
Defendant-Appellant.	)	
	)	Honorable
	)	Patrick W. Kelley,
	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Holder White and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in its response to the jury's request for the "legal definition of knowingly." Defense counsel's representation of defendant was not ineffective. The evidence was sufficient to prove defendant knowingly violated a stalking no contact order. Defendant's convictions based upon counts II and III violate the one-act, one-crime rule, and remand is warranted for purposes of determining the less serious offense.

¶ 2 A jury found defendant, Latrice Bolden, guilty of three counts of aggravated battery (counts I to III) and one count of violation of a stalking no contact order (count IV). The trial court sentenced her to 2 years' probation, with 14 days in jail. Defendant appeals, arguing (1) the trial court erred in its response to the jury's request for the "legal definition of knowingly"; (2) defendant's trial counsel provided ineffective assistance of counsel; (3) her conviction for violating a stalking no contact order should be reversed because the jury was

improperly instructed on the definition of knowledge; and (4) her convictions on counts II and III violate the one-act, one-crime rule. We affirm in part, vacate in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In February 2014, the State charged defendant with three counts of aggravated battery (counts I to III) and one count of violation of a stalking no contact order (count IV). The charges stem from a physical altercation in which defendant struck Cereshia Gates and her then one-year-old son, J.G.

¶ 5 In count I, the State alleged defendant knowingly made contact of an insulting or provoking nature to Gates in a public place of accommodation (720 ILCS 5/12-3.05(c) (West 2014)). In count II, the State charged defendant with knowingly making contact of an insulting or provoking nature to J.G. in a public place of accommodation (720 ILCS 5/12-3.05(c) (West 2014)). In count III, the State alleged defendant knowingly caused bodily harm to a child, J.G. (720 ILCS 5/12-3.05(b)(2) (West 2014)). In count IV, the State charged defendant with a violation of a stalking no contact order (740 ILCS 21/125 (West 2014)). The charges were later superseded by indictment for counts I through III. The State refiled count IV without objection.

¶ 6 A. Jury Selection

¶ 7 Defendant's trial began in November 2014. During jury selection, prospective jurors were asked whether they, or a family member, had any prior experience with orders of protection or stalking no contact orders. Prospective jurors McGraw and Martin both responded in the affirmative. Prospective juror Huffman stated that her daughter had an order of protection against her ex-boyfriend. Prospective juror Rotondo stated that she had requested an order of protection but her request had been denied. McGraw, Martin, Huffman, and Rotondo confirmed

that there was nothing about their experiences that would make them unable to serve on the jury and they were subsequently seated as jurors.

¶ 8 B. Testimony

¶ 9 During the trial, the State presented the testimony of Cereshia Gates. Gates testified that defendant approached her in the parking lot of the Chuck E. Cheese restaurant on the evening of February 8, 2014.

¶ 10 Gates testified she was leaving the restaurant with her friend Rebekah Tavender and Tavender's son. Gates was carrying J.G. in her arms. She stated that defendant approached and demanded that she "put [her] baby down." Gates testified that defendant knocked a food container out of her hand as she was walking toward the car. She further explained that defendant "came up on [her]" and punched her in the face while she was holding J.G. When Gates continued walking toward the car, defendant "swung again."

¶ 11 Gates stated that Tavender yelled at her to get in the car. Gates opened the passenger side door to put J.G. in the car when defendant "swung" at her again. Gates testified that she put J.G. in the car seat and Gates was "like over the top of [J.G.] so he couldn't get hit[.]" As Gates turned around, defendant started "fighting." Gates explained that she fell into the passenger seat and "one of [defendant's] hits hit [J.G.]." She observed a "big cut" on J.G.'s head. Gates further explained that Tavender attempted to call the police but defendant knocked the phone out of her hand. Gates testified the altercation ended when defendant "grabbed" Tavender's phone and "took off running."

¶ 12 On cross-examination, defense counsel questioned Gates about defendant's motive for the attack. The following exchange took place:

"Q. You and [defendant] have children with the same individual, correct?

A. Yes, sir. ***

Q. Now, if I understand correctly, just all of a sudden out of the blue on *** February 8th of this year, you are saying that [defendant] just came up in the parking lot on you?

A. Yes, sir. ***

Q. [A]nd no reference to anything else, just, 'Bitch, put down your kid?'

A. Yes.

Q. Okay, so I mean out of the blue?

A. Out of the blue.

Q. Nothing leading up to this, right?

A. No.

Q. Just [you are] going along and you're going through the cosmos and all of a sudden, boom, she just pops up right then and there at 9:28 and it's on?

A. No, there was threats before saying she is going to get me and she will have no mercy.

Q. Now those were reported, obviously, to the police, right?

A. Yeah."

¶ 13 After defense counsel questioned Gates about defendant's prior threats, the following exchange between Gates and the prosecutor ensued:

"Q. Defense counsel asked you whether this came out of the blue, and you said that there were threats leading up to it?

A. Yes, sir. ***

Q. How were [the threats] communicated?

A. *** [O]n Facebook at the time.

Q. What type of threats? *** [Defense counsel's objection overruled.]

A. She was going to beat my ass, talking about my son like bad, horrible."

¶ 14 Gates testified that defendant had made threats against her for two years. She further testified that defendant threatened her by saying, "every mutha f*** is going down." Over defense counsel's objection, Gates also testified she made a report to the police when defendant contacted Gates's employer. The prosecutor inquired, "So this bad blood has been going on for over two years?" Gates responded, "Yes."

¶ 15 Rebekah Tavender corroborated Gates's testimony regarding defendant's prior conduct. On cross-examination, Tavender testified defendant stole Gates's cell phone before the altercation in February 2014. When defense counsel asked whether defendant "committed the offense of robbery" by "knowingly [taking] that phone," Tavender responded, "Yes." The trial court sustained the State's objection to defense counsel's question.

¶ 16 Tavender confirmed that she witnessed the altercation between defendant and Gates in February 2014. She explained that Gates was "trying to walk away from the situation" but defendant began to hit Gates after telling her to "put down her baby." Tavender further testified that defendant "did end up hitting [J.G.]."

¶ 17 The responding officer, Rhett Spengel, testified that he was dispatched to the Chuck E. Cheese restaurant in Springfield, Illinois. When he arrived at the scene, he observed a "one or two inch scratch mark" on J.G.'s face. He subsequently took statements from Gates,

Tavender, and an independent witness, Maria Goth.

¶ 18 Maria Goth testified that she observed a "fight between two females" who she did not know at the time. Goth stated that at about 9 p.m. she was sitting in her vehicle in the parking lot of Chuck E. Cheese. She testified that she saw Gates "carrying her son *** [as] she was leaving." Goth further explained that "the other girl"—whom Goth later identified in court as the defendant—struck Gates "with her son in her arms." Goth testified she was approximately two parking spots away from the altercation.

¶ 19 Defendant's sister, cousin, and a friend testified for defendant. Porsche Bolden, defendant's sister, explained that defendant was at Bolden's daughter's birthday party at a hotel located in Springfield on the day of the altercation in February 2014. She stated defendant never left the birthday party. Donna Ousley, defendant's cousin, testified that she took photographs, which were admitted at trial, of defendant with her daughter at the hotel pool. Defendant's friend, Kimberly Rios, confirmed that she never saw defendant leave the hotel. The parties also stipulated to a hotel bill showing that defendant checked into the hotel at 3:22 p.m. on February 8, 2014, and checked out at 11:13 a.m. the following day.

¶ 20 C. Instructions Conference

¶ 21 At the instructions conference, the prosecutor tendered a jury instruction, which stated, in pertinent part, "to sustain the charge of violation of a stalking no contact order, the State must prove *** [defendant] had been served notice of the contents of a stalking no contact order or otherwise had acquired actual knowledge of the contents of the order." The prosecutor explained that he modified the jury instruction: "I took this off of the [pattern] instruction [for violations of] Orders of Protection and I changed the language to Stalking/No Contact." Defense

counsel stated he had no objection to the proposed jury instruction.

¶ 22 D. Closing Argument

¶ 23 During closing argument, the State argued that defendant committed aggravated battery with respect to both J.G. and Gates:

> "Cereshia [Gates] *** said from the stand *** 'I put my son in the seat and I went back to protect myself,' and what happened? She fell into the car seat because of [defendant] *** as she was trying to protect her child. *** It is not the child's fault that she missed."

¶ 24 By contrast, defense counsel argued the altercation in the parking lot could not have occurred because "defendant was at the hotel during the time frame when [it] occurred." He further argued defendant's "alibi alone" created reasonable doubt.

¶ 25 When asked whether any exhibits should be excluded from the jury room, defense counsel identified the stalking no contact order and stated "my suggestion would be that the stipulation *** which said [the stalking no contact order] was in full force and effect goes back instead." The trial court indicated the jury should have an opportunity to review the stalking no contact order because it explained defendant could not come within 500 feet of Gates. The trial court asked, "Is that all right[?]" Defense counsel responded, "Yeah, there is no other allegations [*sic*]" in the stalking no contact order.

¶ 26 E. The Jury Note

¶ 27 During jury deliberations, the jury sent a note requesting the "legal definition of knowingly." The following colloquy occurred between the court and the attorneys:

"THE COURT: They want a definition for knowingly. *** The question just reads: Legal definition of knowingly. There is a 5.01B [IPI] instruction.

* * *

THE COURT: 5.01B(3) [provides that] 'conduct performed knowingly or with knowledge is performed willfully'; does that sound right? *** What do you think, Mr. Hanken? *** [Paragraph] 3 is the more simple one[.] I think that would be sufficient to define it for these instructions.

MR. HANKEN [(Defense attorney)]: Well, you know, I'm not disagreeing with Your Honor, but I think [paragraph] 2—you know, again, I know it is hard to try to read into, you know, what their question is, but the way the jury instructions are formed, knowingly, I think, kind of goes hand-in-hand with [paragraph] 2 in that [*sic*]. ***

THE COURT: Yeah, I think the third paragraph is what we are going to use here[.] ***

MR. SHAW [(Prosecutor)]: 'In cases where the instruction is given, use Paragraph 1 if the offense is defined in terms of the prohibited contact [*sic*]. Use Paragraph 2 if the offense is defined in [terms of] the prohibitive [*sic*] result.'

MR. HANKEN [(Defense attorney)]: The prohibitive [*sic*] result.

MR. SHAW [(Prosecutor)]: In the prohibitive [*sic*] result.

MR. HANKEN [(Defense attorney)]: When both conduct and result [are] at issue, use both paragraphs 1 and 2.

MR. SHAW [(Prosecutor)]: It is not normally given. I know I did it in trial ten years ago, this came up and it was just not given, however if the Court wants to give it, I think Paragraph 1 is actually—

THE COURT: That's a mouthful. ***

MR. HANKEN [(Defense attorney)]: And so—and then the other note says that they take no position about whether it should be given in the absence of a specific request. I think the reasoning being that they are saying that knowingly has a plain meaning within the jury's common understanding. ***

THE COURT: There is a specific jury request here, so—

MR. HANKEN [(Defense attorney)]: Right, if given—

THE COURT: I guess we will give Paragraph 1."

¶ 28 In response to the jury note, the court provided an instruction defining "knowingly" as follows: "A person acts with knowledge of the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists."

¶ 29 The jury found defendant guilty on all counts. At the sentencing hearing, the trial court sentenced defendant to 2 years' probation, with 14 days in jail.

¶ 30 This appeal followed.

¶ 31 II. ANALYSIS

¶ 32 Defendant argues on appeal that (1) the trial court erred in its response to the jury's request for the "legal definition of knowingly"; (2) her trial counsel provided ineffective

assistance of counsel; (3) her conviction for violating a stalking no contact order should be reversed because the jury was improperly instructed on the definition of knowledge; and (4) her convictions on counts II and III violate the one-act, one-crime rule.

¶ 33 A. Trial Court's Response to Jury's Request

¶ 34 Defendant maintains she was denied a fair trial because the trial court failed to properly define "knowingly" in response to the jury's request. She contends the court's error "effectively denied her the due process right to have a jury determine her guilt beyond a reasonable doubt on every element of the charged offenses." We disagree.

¶ 35 Initially, we note that while defendant requested an alternative definition at trial, she failed to raise the issue in a posttrial motion. Thus, defendant has forfeited the issue. *People v. Rathbone*, 345 Ill. App. 3d 305, 308-09, 802 N.E.2d 333, 336 (2003). However, defendant maintains her forfeiture may be excused under the plain error doctrine. A reviewing court may consider an unpreserved error if it was clear or obvious and (1) the evidence was closely balanced or (2) the error was so serious defendant was denied a fair hearing. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010). Plain-error analysis "applies where the defendant has failed to make a timely objection. There, '[i]t is the defendant rather than the [State] who bears the burden of persuasion with respect to prejudice.' " *People v. Thurow*, 203 Ill. 2d 352, 363, 786 N.E.2d 1019, 1025 (2003) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)). "[A]n instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (Emphasis omitted.) *Thurow*, 203 Ill. 2d at 365, 786 N.E.2d at 1026 (citing *Neder v. United States*, 527 U.S. 1, 9 (1999)). The trial court's decision to refuse a requested jury instruction is

reviewed for an abuse of discretion. *People v. Peterson*, 372 Ill. App. 3d 1010, 1015, 868 N.E.2d 329, 333 (2007).

¶ 36 Here, as stated, defendant argues the trial court erred in its response to the jury's request for the "legal definition of knowingly." To sustain the charge of aggravated battery in a public place of accommodation (count II), the State was required to prove defendant "knowingly made contact of an insulting or provoking nature to J.G." in a "public place of accommodation." See 720 ILCS 5/12-3.05(c) (West 2014). To sustain the charge of aggravated battery to a child (count III), the State was required to prove defendant "knowingly caused bodily harm to J.G." and at the time J.G. was under the age of 13. See 720 ILCS 5/12-3.05(b)(2) (West 2014).

¶ 37 In response to the jury's request, the trial court provided an instruction derived from the first paragraph of the Illinois Pattern Jury Instructions, Criminal, No. 5.01B (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 5.01B). The first paragraph of 5.01B provides as follows:

> "[1] A person [(knows) (acts knowingly with regard to) (acts with knowledge of)] the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists." IPI Criminal 4th No. 5.01B.

¶ 38 Defendant contends, however, that the trial court should have provided the jury with the second paragraph of 5.01B, which provides as follows:

> "[2] A person [(knows) (acts knowingly with regard to) (acts with knowledge of)] the result of his conduct when he is consciously aware that such result is

practically certain to be caused by his conduct." IPI Criminal 4th No. 5.01B.

¶ 39 The committee comments to IPI Criminal 4th No. 5.01B state, in pertinent part, as follows:

> "The Committee takes no position as to whether this definition should be routinely given in the absence of a specific jury request. *** If given, it should only be given when the result or conduct at issue is the result or conduct described by the statute defining the offense. *** In cases where the instruction is given, use paragraph [1] if the offense is defined in terms of prohibited conduct. Use paragraph [2] if the offense is defined in terms of a prohibited result. If both conduct and result are at issue, use *both* paragraphs [1] and [2]. *See People v. Lovelace*, 251 Ill. App. 3d 607, 622 N.E.2d 859 (2d Dist. 1993), where the trial court committed reversible error by giving the jury only paragraph [1], and not both paragraphs [1] and [2], when both conduct and result were at issue." (Emphasis in original.) IPI Criminal 4th No. 5.01B.

¶ 40 Defendant maintains the trial court should have provided the second paragraph of IPI Criminal 4th No. 5.01B because the State was required to prove defendant knew the *result* of her conduct—*i.e.*, that she would cause insulting or provoking contact with, and bodily harm to, J.G. Conversely, the State argues the trial court did not abuse its discretion by denying defendant's requested response. The State argues that, under the doctrine of transferred intent, defendant's "knowledge and intent as to [Gates] would simply transfer to J.G. making the instruction as to knowledge of the results unnecessary and improper." See *Smith v. Moran*, 43 Ill. App. 2d 373, 376, 193 N.E.2d 466, 468 (1963).

¶ 41 We need not address the State's theory of transferred intent because we find defendant has failed to establish that she was prejudiced by the trial court's failure to provide the jury with the second paragraph of 5.01B. Even if the trial court had provided the jury with the second paragraph, the jury likely still would have found defendant guilty given there was a substantial probability that she would cause insulting or provoking contact—and bodily harm—to J.G. when she began swinging at Gates before Gates put J.G. down. The State presented evidence that defendant told Gates to "put [J.G.] down" before the altercation occurred, thus providing circumstantial evidence defendant was aware of J.G.'s vulnerabilities while in Gates's arms. Further, Gates testified defendant "swung" at her while she was still holding J.G. Thus, even if the jury had received defendant's requested instruction, the jury could still have concluded defendant was aware of the likely practical consequence of her actions when she swung at Gates *before* she put J.G. down. See 5.01B. Assuming *arguendo* the failure to use defendant's alternative definition of "knowingly" was error, the evidence was not closely balanced nor was the error so serious that defendant was denied a fair hearing. *Hillier,* 237 Ill. 2d at 539. We find no plain error occurred with regard to the trial court's response to the jury's request.

¶ 42 B. Ineffective Assistance of Counsel

¶ 43 Defendant next argues that she was denied effective assistance of counsel for the following reasons: defense counsel (1) elicited testimony regarding defendant's other crimes and failed to seek a limiting instruction as to such evidence; (2) failed to request a separate trial for the violation of the no stalking order charge or, alternatively, failed to redact portions of the stalking no contact order; (3) elected not to strike jurors who had prior experience with orders of

protection or stalking no contact orders; and (4) failed to preserve objections or raise issues regarding the jury instructions in a posttrial motion.

¶ 44 Our supreme court recently held that "reviewing courts in Illinois should carefully consider each ineffective assistance of counsel claim on a case-by-case basis." *People v. Veach*, 2017 IL 120649, ¶ 48. To establish ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, a defendant must show that "counsel's performance 'fell below an objective standard of reasonableness' and that the deficient performance prejudiced the defense." *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009) (quoting *Strickland*, 466 U.S. at 687-88). To satisfy the prejudice prong of *Strickland,* defendant "must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceedings' result would have been different." *In re. Ch. W.*, 399 Ill. App. 3d 825, 829, 927 N.E.2d 872, 875 (2010). "A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness." *People v. Simpson*, 2015 IL 116512, ¶ 35, 25 N.E.3d 601. Here, we find defendant is unable to satisfy the prejudice prong of *Strickland*.

¶ 45 i. *Other Crimes Evidence*

¶ 46 Defendant contends counsel was ineffective for opening the door to evidence of defendant's prior bad acts, *i.e.*, other crimes evidence, when the State had agreed to avoid this line of questioning unless it was raised by defense counsel. Alternatively, she contends defense counsel was ineffective for failing to request a limiting instruction regarding the other crimes evidence.

¶ 47 Generally, "[e]vidence of other crimes is admissible if it is relevant for any

purpose other than to show the defendant's propensity to commit crime." *People v. Pikes*, 2013 IL 115171, ¶ 11, 998 N.E.2d 1247. It is "admissible to show *modus operandi*, intent, motive, identity, or absence of mistake with respect to the crime with which the defendant is charged." *Id.*

¶ 48 Here, defense counsel asked Gates whether the incident in the parking lot occurred "out of the blue." Gates stated, "No, there was [*sic*] threats before saying [defendant] is going to get me and she will have no mercy." Defense counsel asked whether Gates reported defendant's threats to the police, and Gates responded, "Yes."

¶ 49 Following defense counsel's cross-examination of Gates, the State elicited the following testimony that defendant challenges on appeal: (a) Gates made "a number" of police reports regarding defendant; (b) defendant contacted Gates on social media and threatened to "beat [her] ass"; (c) Gates testified that she had an "OP" against defendant; (d) defendant allegedly said to Gates, "every mutha [f] *** [i]s going down"; (e) defendant committed "robbery" when defendant allegedly "grabbed" Gates' phone; (f) on a prior occasion, defendant "climb[ed] through a window" and "stole" Gates' phone; and (g) Gates was forced to leave her job after defendant contacted her employer. Defendant contends her counsel was ineffective by opening the door to this evidence.

¶ 50 While we agree with defendant that defense counsel's decision to open the door to this evidence is difficult to comprehend, we cannot conclude that the result would have been different had the testimony not been elicited. *Ch. W.*, 399 Ill. App. 3d at 829. Here, an independent witness, Goth, described the attack and positively identified defendant as the attacker. Goth directly contradicted defendant's alibi testimony that she was somewhere else at

the time of the attack. Goth went on to testify that she witnessed defendant strike Gates while Gates was still holding J.G. Goth testified that she was only two parking spaces away from the altercation when it occurred. Even if the "other crimes" evidence was not admitted, or had a limiting instruction been requested, the jury's verdict likely would not have been different. The jury still would have been left with the testimony of Goth—an independent witness—who corroborated Gates's testimony that defendant struck her while J.G. was in her arms.

¶ 51 ii. *Violation of the Stalking No Contact Order*

¶ 52 Defendant also argues her counsel was ineffective by failing to request separate trials for violation of the stalking no contact order (count IV) and the aggravated battery charges (counts I to III). Specifically, defendant contends the stalking no contact order did not bear on the three aggravated battery charges and it had the effect of allowing the jury to consider prejudicial other crimes evidence when it deliberated on the aggravated battery charges. Alternatively, defendant argues the stalking no contact order should have been redacted before it was given to the jury because it contained "prejudicial material." Defendant points to the portion of the order that states she committed "two or more acts of the following, monitoring, observing, surveilling, threatening, communicating or interfering [with] or damaging property or pets [of Gates]." It also prohibited defendant from coming within 500 feet of Gates. According to defendant, the contents of the stalking no contact order "predicted that [defendant] was likely to cause future harm" to Gates.

¶ 53 The trial court has "substantial discretion" to grant or deny separate trials for the charged offenses. *People v. Trail*, 197 Ill. App. 3d 742, 746, 555 N.E.2d 68, 71 (1990). Defense counsel's decision "not to seek a severance, although it may prove unwise in hindsight, is

regarded as a matter of trial strategy." *People v. Poole*, 2012 IL App (4th) 101017, ¶ 10, 972 N.E.2d 340. A defendant may be placed on trial in one proceeding for separate offenses when they are based on two or more acts that are part of the same comprehensive scheme. *Trail*, 197 Ill. App. 3d at 746, 555 N.E.2d at 71.

¶ 54 Here, we find defendant is unable to establish the prejudice prong of *Strickland.* As stated before, the independent witness, Goth, positively identified defendant as the assailant and directly contradicted defendant's alibi defense. The contents of the stalking no contact order neither enhanced nor diminished Goth's testimony. Assuming the charges in this case had been severed for trial, or the stalking no contact order had been redacted, we cannot say "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Accordingly, we find defense counsel's representation in not requesting a severance of the charges was not ineffective.

¶ 55 iii. *The Jurors*

¶ 56 Defendant also argues defense counsel was ineffective for failing to strike the four jurors who indicated they had prior experience with orders of protection or stalking no contact orders. We disagree.

¶ 57 In *People v. Manning*, 241 Ill. 2d 319, 333, 948 N.E.2d 542, 550 (2011), our supreme court explained that defense counsel's "strategic choices" during jury selection involve matters of trial strategy and therefore are "virtually unchallengeable." See also *People v. Perry*, 224 Ill. 2d 312, 341–42, 864 N.E.2d 196, 214 (2007) ("To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy."). We cannot say defense counsel was ineffective by failing to exercise peremptory strikes on the four jurors who indicated they had prior experience with orders of

protection and stalking no contact orders, especially when all four jurors indicated that nothing about their prior experiences would make them unable to serve on the jury.

¶ 58 iv. *Defense Counsel's Failure To Object*

¶ 59 Defendant contends defense counsel was ineffective by failing to object to the court's response to the jury's request for the "legal definition of knowingly" or raise the claim of error in a posttrial motion. As discussed *supra*, the outcome at trial likely would not have been different even if the trial court had tendered defendant's requested response. Accordingly, we cannot say defense counsel's performance prejudiced defendant under the second prong of the *Strickland* standard. *Strickland*, 466 U.S. at 687–89.

¶ 60 C. Violation of the Stalking No Contact Order

¶ 61 Next, defendant argues, in essence, the evidence was insufficient to prove her guilty of a "knowing violation of a stalking no contact order" pursuant to section 125 of the Stalking No Contact Order Act. 740 ILCS 21/125 (West 2014). On this issue, defendant argues that "to sustain [her] conviction for knowingly violating a stalking no contact order, the State was required to prove beyond a reasonable doubt that [she] was consciously aware that the order was in effect and specifically prohibited her from coming within 500' of Gates." We disagree.

¶ 62 For purposes of proving a knowing violation of a stalking no contact order under the Act, the State was required to establish that defendant: (1) was served with a stalking no contact order, and (2) committed an act prohibited by the order. See *People v. Stiles*, 334 Ill. App. 3d 953, 957, 779 N.E.2d 397, 401 (2002). As an initial matter, we find that the parties' stipulation, which established the existence of a stalking no contact order in effect at the time and its service on defendant, was by itself sufficient to prove the first element of the offense. As to

whether there was proof of a "knowing" violation, this aspect of the offense described in section 125 of the Act relates not to a defendant's familiarity with the substance of the order, but instead relates to a defendant's awareness of her own conduct—conduct that is prohibited by the order. See 740 ILCS 21/125 (West 2014). In other words, the State in this case was not required to further prove defendant's familiarity with, or actual knowledge of, the order's contents. It only had to prove that the act committed by defendant—an act that was prohibited by the order—was done so knowingly. Viewing the evidence in the light most favorable to the State, we find it was sufficient to establish defendant guilty of a knowing violation of a stalking no contact order. Defendant's corresponding argument that her counsel was ineffective for failing to object to the jury instruction on this charge is, thus, also without merit.

¶ 63 D. One-Act, One-Crime Rule

¶ 64 Defendant argues—and the State concedes—her convictions for aggravated battery of J.G. violate the one-act, one-crime rule (counts II and III). While the parties agree a violation of the one-act, one-crime rule occurred, they disagree as to the remedy. The State argues that we should vacate count II as it is the less serious offense. Defendant requests that we remand this matter to the trial court to determine the less serious offense. We agree with defendant that remand is appropriate here.

¶ 65 "The one-act, one-crime rule prohibits multiple convictions when the convictions are based on precisely the same physical act." *People v. Millsap,* 2012 IL App (4th) 110668, ¶ 18, 979 N.E.2d 1030. "Multiple convictions are improper if they are based on precisely the same physical act." *People v. Miller,* 238 Ill. 2d 161, 165, 938 N.E.2d 498, 501 (2010). "[U]nder the one-act, one-crime doctrine, [a] sentence should be imposed on the more serious offense and the

less serious offense should be vacated." *People v. Artis*, 232 Ill. 2d 156, 170, 902 N.E.2d 677, 686 (2009). "In determining which offense is the more serious, a reviewing court compares the relative punishments prescribed by the legislature for each offense." *Id.* "If the punishments are identical, we are instructed to consider which offense has the more culpable mental state." *In re Samantha V.*, 234 Ill. 2d 359, 379, 917 N.E.2d 487, 500 (2009).

¶ 66 Here, counts II and III are premised on the same physical act—defendant's striking J.G. Specifically, count II alleged defendant knowingly made contact of an insulting or provoking nature to J.G. in a place of public accommodation. 720 ILCS 5/12-3.05(c) (West 2014). Count III alleged defendant knowingly caused bodily harm to a child by striking J.G. 720 ILCS 5/12-3.05(b)(2) (West 2014). Both offenses are classified as Class 3 felonies (720 ILCS 5/12-3.05(h) (West 2014)) and both require a knowing mental state. See *People v. Robinson*, 379 Ill. App. 3d 679, 684-85, 883 N.E.2d 529 (2008) (Explaining that, for battery offenses, the criminality of a defendant's conduct depends on whether she acted knowingly or intentionally). Accordingly, we cannot determine the less serious offense because both involve the same punishment and the same mental state. Under these circumstances, we must remand the matter to the trial court to make that determination. See *In re Samantha V.*, 234 Ill. 2d 359, 917 N.E.2d 487 (2009).

¶ 67 In *In re Samantha V.*, 234 Ill. 2d at 379–80, a juvenile was adjudicated delinquent on two counts of aggravated battery. The supreme court explained, "Aggravated battery that causes great bodily harm and aggravated battery on a public way are both Class 3 felonies and both require that the accused acted intentionally and knowingly when committing the offense." *Id.* at 379. The court further explained that "[u]nder these circumstances, we cannot determine

which is the more serious offense." *Id.* The court concluded that the proper remedy was to "remand the matter to the trial court for that determination." *Id.* at 379–80.

¶ 68 The State argues in its brief that count II should be vacated because "that conduct is less serious than the infliction of bodily harm alleged in Count III." To support this argument, the State relies on two cases—*People v. Young*, 362 Ill. App. 3d 843, 853, 840 N.E.2d 825, 833 (2005), and *People v. Curtis*, 367 Ill. App. 3d 143, 148, 854 N.E.2d 269, 274 (2006)—that were decided before our supreme court's ruling in *In re Samantha V.* Accordingly, we remand to the trial court for it to determine the less serious offense as between counts II and III and order that conviction be vacated.

¶ 69 III. CONCLUSION

¶ 70 For the reasons stated, we affirm defendant's convictions on counts II and III and remand with directions that the trial court vacate the less serious offense. We otherwise 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. 55 ILCS 5/4-2002 (West 2014).

¶ 71 Affirm in part, vacate in part, and remand with directions.