

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

| | | |
|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| |) | Cook County. |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 17 CR 1401 |
| |) | |
| HABIB ALSHIMARY, |) | Honorable |
| |) | Mark W. Martin |
| Defendant-Appellant, |) | Judge, presiding. |

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for domestic battery is affirmed where he did not receive ineffective assistance of trial counsel.

¶ 2 Following a jury trial, defendant Habib Alshimary was convicted of domestic battery and sentenced to two years in prison. He now appeals, arguing that his trial counsel provided ineffective assistance by failing to re-open proofs to present testimony from the complaining

witness's parents that she was "bipolar" and a "habitual liar." Defendant also contends trial counsel was ineffective for failing to secure the complaining witness's availability at a hearing on his motion for a new trial so that the witness could have been questioned about a jailhouse letter and phone call in which the witness allegedly recanted her trial testimony. For the reasons that follow, we find no ineffective assistance of counsel and therefore affirm defendant's conviction.

¶ 3

I. BACKGROUND

¶ 4 On January 24, 2017, defendant was indicted on one count of home invasion (720 ILCS 5/19-6(a)(2) (West 2016)) and one count of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2016)). The case proceeded to a jury trial.

¶ 5 At trial, Angelica Martinez testified that she was currently in the custody of the Cook County Department of Corrections and on probation for possession of a controlled substance. She also had two misdemeanor convictions for retail theft and a felony conviction for obstructing a peace officer.

¶ 6 Angelica further testified that, on the morning of December 29, 2016, she was at her parents' house in Hoffman Estates when defendant called her and asked for help getting to court in Rolling Meadows. Angelica and defendant dated for "a few years," but had broken up about a month prior to that date. At around 10 a.m., Angelica was in a back room talking to a friend on the phone when defendant walked in through the back door. He "started getting loud," asking why she was not answering her phone and whether she was talking to her "other boyfriend." Angelica told defendant that she was talking to her boyfriend, even though she did not actually have one. Defendant then struck Angelica in the face with the back of his hand, causing her to fall and land on the coffee table with her arm. Her nose "started to bleed a little bit." Defendant proceeded to "throw[] things off the coffee table just making a mess."

¶ 7 Angelica asked defendant to leave, but defendant refused and continued arguing with her. At this point, Angelica's father, Orlando Martinez, emerged from his bedroom and threatened to call the police. Defendant told Orlando that there was no need to call the police because he would leave willingly. However, Angelica did not know whether defendant actually left voluntarily, as she changed her clothes and then fled out of the house through a window before the police arrived because she was "on probation and [she] had a warrant."

¶ 8 Angelica returned to her parents' house about an hour later. Defendant called her again, stating that he was "sorry for everything" and "just really need[ed] directions to get to court." Angelica agreed to help defendant. Shortly thereafter, defendant entered the house and found Angelica in the "kitchen area." He yelled at Angelica about not answering her phone and making him late to court. He then put one of his hands on her neck and applied pressure.

¶ 9 Orlando emerged from his bedroom once again, and Angelica told him to call the police. She then ran into her bedroom and "barricaded" herself in by placing a long candlestick across the doorframe. Defendant pounded on the door and said he was "sorry" and that "[t]his won't happen again, just open the door." She did not open the door but exited the house through her bedroom window because she heard Orlando calling the police. Officers found her in a nearby neighborhood and brought her to the police station.

¶ 10 Angelica testified that her injuries from the day in question included (1) a mark on her arm where she landed on the coffee table, (2) a red nose, and (3) a scratch on her neck. She identified photographs of each injury that were taken at the police station later that day.

¶ 11 Angelica further testified that defendant had also hit her "[q]uite a few" times prior to the day in question. She suffered "numerous" injuries during these occasions, including a bloody lip and a black eye. There was also an incident in which defendant took her phone and broke it "into

a million pieces” by throwing it against a wall. Angelica never contacted the police about the abuse because she always “had a warrant and [she] didn’t want to go to jail.”

¶ 12 On cross-examination, Angelica testified that before leaving her parents’ house for the first time on the day in question, she changed her clothes and left the old ones in her bedroom. She did not recall telling the police that she left them in her friend’s car. Angelica also denied holding a Bible at any point during her arguments with defendant. Although she testified on direct examination that the second argument began in the “kitchen area,” she clarified that she and defendant were in the living room when Orlando came out of his bedroom. Angelica did not mention any damage to her bedroom door and stated that it was a “regular door.” She also acknowledged that she was undergoing methadone treatment for her heroin addiction. At time of trial, she had not used heroin for seven months.

¶ 13 Orlando testified that he was awoken around 10 a.m. on the day in question by the sound of “loud voices,” one of which he recognized as Angelica’s, coming from the “rec room” at the back of the house. He walked into the kitchen, where he could see Angelica and defendant arguing in the rec room. Defendant was yelling about going to court and Angelica having a new boyfriend. Angelica was holding a Bible and defendant was hitting underneath it with a set of keys.

¶ 14 Orlando retrieved a gun from his bedroom and then returned to the kitchen and asked defendant to leave. Defendant exited through the back door and drove away in an SUV that was parked in the driveway. Orlando called the police, but Angelica had left the house by the time an officer arrived.

¶ 15 After the officer left, Orlando went back to bed. He was awoken again “a short time later” by the sound of Angelica and defendant arguing in the living room in the front of the house. Orlando exited his bedroom with his gun and saw defendant pleading with Angelica to come to

court with him. Angelica then ran into her bedroom and shut the door. Defendant “started knocking and then pounding on the door,” asking her to show him the way to court. At Angelica’s request, Orlando dialed 9-1-1 and asked them to send a squad car. Defendant was eventually able to push down the bedroom door because it “wasn’t on its hinges.” Defendant then entered the bedroom, but Angelica had already fled out of the window.

¶ 16 On cross-examination, Orlando testified that he did not see defendant hit Angelica during the first argument. He also did not observe any broken glass or furniture in the rec room as a result of that altercation. Orlando explained that Angelica’s bedroom door was already damaged and “off the hinges” before defendant ever came into the house.

¶ 17 Hoffman Estates police officer Adam Marak testified that he was dispatched to Orlando’s house at around 10:20 a.m. on the day in question. Upon arrival, he spoke to Orlando, who was the only person there. Marak told him to call the police again if defendant returned.

¶ 18 Marak was later dispatched to the home a second time around 12:22 p.m. As he arrived, he observed Angelica run across the driveway towards the back of the house. He also saw defendant exit the back of the house, followed by Orlando.

¶ 19 Defendant was taken to the police station. Other officers brought Angelica to the station at around 12:45 p.m. and Marak interviewed her. At this time, Marak noticed an abrasion on Angelica’s right elbow and a two-to-three inch “red swollen scratch on the left side of her neck.” An evidence technician arrived to photograph Angelica’s injuries at approximately 2:40 p.m. When shown the photographs of the injuries in court, Marak testified that the elbow injury was “a little less obvious in the photo than it was in person,” and that the photograph of Angelica’s neck did not clearly show the injury because it was “shadowed.”

¶ 20 On cross-examination, Marak testified that Angelica told him during their interview that she changed her clothes in her friend's car and did not know where they were.

¶ 21 The State rested, and the defense rested without presenting evidence.

¶ 22 On November 9, 2017, the day after the conclusion of evidence, the court held an *in camera* hearing at defense counsel's request. Counsel alleged that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose Angelica's bipolar diagnosis. Specifically, counsel informed the court that Orlando had told her after his trial testimony that he "wanted to clear his conscious [*sic*]" and that he "couldn't see [defendant] going to jail" because Angelica is "bipolar" and "a habitual liar." Counsel also stated that Angelica's mother, Henrietta Martinez, told her that she spoke with the State and told them that Angelica is bipolar and a habitual liar.

¶ 23 The court rejected the *Brady* claim, noting that the State denied having any knowledge that Angelica was bipolar and that there had been no medical information of a diagnosis presented to the court. The court also stated, however, that it would allow the defense to "reopen [its] case to call a witness and produce admissible evidence" if it so desired. Defense counsel never requested to re-open proofs.

¶ 24 The jury found defendant guilty of domestic battery but not guilty of home invasion. Defendant filed a motion for a new trial, which was denied.

¶ 25 Defendant subsequently filed a "MOTION FOR A NEW TRIAL BASED ON NEW EVIDENCE" in the form of (1) a letter defendant received from Angelica while in jail and (2) a posttrial jailhouse phone call between Angelica and defendant.

¶ 26 In the letter, a portion of which appears in the record on appeal, Angelica discusses her plans to have a baby with defendant and her preparations for his upcoming sentencing hearing. She states that "you know [I']m bipolar and the state used me so that's why [I] lied and [I]'m so

sorry.” Lastly, she states, “Your [sic] my life [H]abib and [I] know alcohol had alot [sic] to play for your acting out and [I] forgive you.”

¶ 27 The record on appeal does not contain a recording of the phone call. However, at the hearing on the motion for a new trial, defense counsel stated that “there is one part in the phone call between [Angelica] and [defendant] where she does say she lied. She does later on retract that.” The case was continued for the State to have an opportunity to listen to the phone call.

¶ 28 At the next court date, the State acknowledged that Angelica “d[id] at one point say she was lying because she was mad” at defendant but later stated that she was “going to sleep good because [she] didn’t lie.” Defense counsel rested on her motion, indicating that she would not call Angelica as a witness at the hearing because she had been unable to locate her. Defense counsel declined to request a continuance, explaining that she had already attempted to subpoena Angelica on “numerous occasions” and left messages with her family to no avail.

¶ 29 The court denied defendant’s motion, finding that neither the letter nor the phone call were reliable because they were not made under oath or subject to cross-examination. The court also opined that the phone call was “inconsistent” and “not even a recantation.” Thus, the court concluded that defendant’s new evidence “f[ell] woefully short” of justifying a new trial.

¶ 30

II. ANALYSIS

¶ 31 On appeal, defendant argues that trial counsel was ineffective for failing to re-open proofs in order for Angelica’s parents to testify about her lack of credibility. Defendant also argues that counsel was ineffective for failing to request a continuance at the hearing on the motion for a new trial so that Angelica could be questioned about the letter and phone call.

¶ 32 A defendant asserting ineffective assistance of counsel must show that (1) his counsel’s performance fell below an objective standard of reasonableness and (2) he was prejudiced by that

deficient performance in that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v. Jackson*, 2020 IL 124112, ¶ 90 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *People v. Hale*, 2013 IL 113140, ¶ 18. A claim of ineffective assistance will not succeed if the defendant fails to satisfy either prong. *Jackson*, 2020 IL 124112, ¶ 90.

¶ 33 A. Failure to Re-Open Proofs

¶ 34 We first address defendant's argument that counsel provided ineffective assistance by not re-opening proofs for the testimony of Angela's parents.

¶ 35 "[D]ecisions concerning whether to call certain witnesses on a defendant's behalf are matters of trial strategy, reserved to the discretion of trial counsel." *People v. Enis*, 194 Ill. 2d 361 378 (2000). There is a strong presumption that such decisions reflect a sound trial strategy, and they are therefore "generally immune from claims of ineffective assistance of counsel." *Id.* However, the presumption of reasonableness is overcome where counsel's strategy was "so unsound that no meaningful adversarial testing was conducted." *Id.*

¶ 36 Here, we cannot say that trial counsel's decision not to call Angelica's parents rose to the level of ineffective assistance. Even assuming that they would have testified in accordance with counsel's representations, we find no reasonable probability that the outcome of defendant's trial would have been different but for their testimony. According to counsel's offer of proof, Angelica's parents only expressed concern for Angelica's general penchant for dishonesty. Neither of Angelica's parents had any knowledge that she was not truthful in this specific case. Although Angelica's credibility was undoubtedly an important issue in this matter, her trial testimony was

largely corroborated by that of Orlando and Marak, notwithstanding defendant's exaggeration of a few minor discrepancies.

¶ 37 Moreover, the record reveals that Angelica's credibility was thoroughly explored at trial in defense counsel's cross-examinations and closing arguments. Indeed, the jury was presented with several reasons to question Angelica's credibility, including her criminal history and heroin addiction. The jury also heard that the argument with defendant started after Angelica lied about having another boyfriend, that Angelica had never reported past abuse to the authorities because she had warrants, and that she twice fled from police in this case because she was "on probation and [she] had a warrant." Despite this evidence, the jury credited Angelica's testimony and found defendant guilty. Under these circumstances, we find no reasonable probability that the jury would have changed its credibility determination had it been presented with additional general testimony that she was, in her parents' opinion, bipolar and a habitual liar. Counsel was therefore not ineffective on this basis.

¶ 38 B. Request for a Continuance

¶ 39 Defendant next argues that counsel was ineffective for failing to request a continuance to secure Angelica's testimony in support of his motion for a new trial. However, the record reveals that counsel made "numerous" unsuccessful attempts to serve Angelica with a subpoena. Counsel also stated that she reached out to Angelica's family to locate her, but was unable to do so. Thus, there is no indication that Angelica would have been available to testify had counsel requested a continuance. We cannot say that counsel was ineffective in failing to secure Angelica's testimony where she made reasonable attempts to subpoena her. See *People v. McLaurin*, 2015 IL App (1st) 131362, ¶ 35 (no ineffective assistance for failing to secure a witness's availability where the witness could not be located and was unwilling to disclose his location).

¶ 40 Additionally, defendant has not shown that he was prejudiced by the lack of testimony from Angelica. Requests for a new trial based on newly discovered evidence are closely scrutinized and generally disfavored by the courts. *People v. Williams*, 2020 IL App (1st) 172118, ¶ 33. To warrant a new trial, the defendant must demonstrate that the newly discovered evidence is material, noncumulative, and “of such a conclusive character that it will likely change the result on retrial.” *People v. Anderson*, 2017 IL App (1st) 122640, ¶ 94.

¶ 41 Here, as the defense made no offer of proof, the contents of Angelica’s testimony are purely speculative. It is simply unknown whether and to what extent Angelica would have recanted her trial testimony. Even assuming, as defendant suggests on appeal, Angelica could have authenticated the phone call and letter, it is evident that the trial court did not deny defendant’s motion for a new trial merely because the evidence was unauthenticated. Rather, the court denied the motion because the new evidence was unreliable, as it was equivocal and not made under oath. Additionally, even if the letter and phone call could be considered a recantation of Angelica’s trial testimony, our supreme court has stated that recantation evidence is “inherently unreliable” and warrants a new trial only in “extraordinary circumstances.” *People v. Sanders*, 2016 IL 118123, ¶ 33. The trial court clearly did not consider this case to present such extraordinary circumstances. Accordingly, there is no reasonable probability that defendant would have been granted a new trial had counsel requested a continuance to locate Angelica. Defendant’s claim of ineffective assistance therefore fails.

¶ 42

III. CONCLUSION

¶ 43 For the reasons stated, we affirm the judgment of the circuit court.

¶ 44 Affirmed.