Illinois Official Reports

Appellate Court

People v. Broches, 2022 IL App (2d) 200001

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GEORGE D. BROCHES, Defendant-Appellant.
District & No.	Second District No. 2-20-0001
Filed	March 31, 2022
Decision Under Review	Appeal from the Circuit Court of Kane County, No. 18-CF-1019; the Hon. Kathryn D. Karayannis, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	James E. Chadd, Thomas A. Lilien, and James K. Leven, of State Appellate Defender's Office, of Elgin, for appellant. Jamie L. Mosser, State's Attorney, of St. Charles (Patrick Delfino, Edward R. Psenicka, and Steven A. Rodgers, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE McLAREN delivered the judgment of the court, with opinion. Presiding Justice Bridges and Justice Hutchinson concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, George D. Broches, appeals his conviction of financial institution fraud, arguing that he received ineffective assistance of counsel at his jury trial. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On May 18, 2018, the State charged defendant in a two-count indictment with financial institution fraud (720 ILCS 5/17-10.6(c)(1), (c)(2) (West 2018)). The State alleged that defendant "knowingly executed or attempted to execute a scheme or artifice" to defraud First State Bank, in that defendant presented a check to First State Bank in the amount of $4100 from JP Morgan Chase Bank (Chase Bank), knowing that the check would not be paid by Chase Bank and, later, defendant withdrew $4000 in cash from First State Bank, without providing sufficient funds or credit to either bank.

¶ 4 Prior to trial, the State filed a motion *in limine* to admit evidence of defendant's prior financial crime: in 2000, defendant wrote checks to third parties and withdrew cash from Associated Bank accounts, knowing there were insufficient funds to cover the checks and withdrawals, totaling over $97,000 in fraudulently obtained funds from Associated Bank. At the hearing on the State's motion, Judge John A. Barsanti, presiding, the State indicated that it was having difficulty obtaining a witness from Associated Bank to testify. The court stated that it would allow evidence of the prior financial crime to show *modus operandi* or absence of mistake but that the evidence must be competent. The court then continued the matter.

¶ 5 The jury trial, Judge Kathryn D. Karayannis, presiding, was held on September 16, 2019. At trial, Jill Summerhill, vice president of operations at First State Bank in Sycamore, testified as follows. First State Bank maintains its records through a computer system. Summerhill was familiar with the computer system and accessed it every day. The computer system maintained all customer information, images of every check, copies of all account agreements and disclosures, and all customer records. The computer system required a password for access, which Summerhill had. When asked about certain records regarding defendant's account between June 9 and August 4, 2017, Summerhill testified that the records were made and kept in the regular course of business. These records were admitted into evidence.

¶ 6 Summerhill testified that the computer records showed the following. On June 9, 2017, defendant opened a checking account at the First State Bank Ottawa branch. The account agreement indicated that defendant initially deposited $25 in cash. On July 27, 2017, defendant deposited a $4100 check and $150 in cash into his First State Bank account at the North Aurora branch. The check was drawn from defendant's Chase Bank account and indicated defendant as both the payor and the payee. Before the July 27 deposits, defendant's balance was $339.47. On July 28, 2017, defendant withdrew $4000 from his First State Bank account at the Sycamore branch. On August 1, 2017, defendant's $4100 check was returned for insufficient funds. First State Bank charged a $4.50 bounced check fee to defendant's account. Defendant's account had a negative balance of $3540.03.

¶ 7 Summerhill telephoned defendant, and defendant told Summerhill that he would make the account "positive." On August 2, 2017, defendant deposited $300 in cash into his First State Bank account. Summerhill waited to call police, to give defendant time to pay back the bank,

but defendant did not return her phone calls. On August 25, 2017, Summerhill contacted the Sycamore Police Department and filed a police report. Summerhill was not aware of any other deposits made by defendant until December 3, 2018, when defendant deposited the full amount he owed First State Bank, $3240.03.

¶ 8 Summerhill testified that the bank had a video surveillance system and that it was constantly recording. She estimated that she used the system a dozen times. On August 25, 2017, Summerhill downloaded video showing defendant's transactions at the Sycamore and North Aurora branches and "burned" them onto a disk for the Sycamore Police Department. The video footage of the two transactions was admitted into evidence and published to the jury. Summerhill gave two still-frame photos of defendant that she "captured" from the two videos: one from defendant's transaction at the North Aurora branch on July 27, 2017, and the second from the Sycamore branch on July 28, 2017. These still-frame photos were admitted into evidence and published to the jury.

¶ 9 After Summerhill's testimony, the trial court excused the jury. The prosecutor then explained to the court that she intended to establish defendant's other crime through a certified transcript of the proceedings in federal court in which defendant pled guilty to the prior offense. The prosecutor stated that she would read to the jury portions of the transcript establishing the factual basis of defendant's guilty plea. She also stated that it was the State's understanding that such would be admissible, as "a certified transcript, a public record would be an exception to the hearsay rule and also would be self-authenticating." The prosecutor explained that there were no witnesses available from the bank to testify regarding defendant's other crime, because they no longer worked there and the State was unable to locate them. Further, the prosecutor stated that the State had subpoenaed the records from Associated Bank but the records had been destroyed.

¶ 10 Defense counsel stated that he had no objection to the admission and reading into the record of the specific pages of the transcript identified by the prosecutor. Defense counsel also asked that additional parts of the transcript be read to the jury.

¶ 11 Rooail Jacob, a branch manager at Chase Bank, testified as follows. Chase Bank offers banking services, including checking and savings accounts. The bank maintains its records with a computer system. Before coming to court, Jacob looked up defendant's bank records. He also testified that People's exhibits 11-C through 11-OO were defendant's Chase Bank statements and deposit and withdrawal slips, from July through September 2017. These records were made and kept in the ordinary course of business. The records showed that, at the time defendant deposited the $4100 check, his Chase Bank account held $240.

¶ 12 Sycamore police officer Michael Eide testified as follows. On August 25, 2017, Eide responded to a report of fraud at First State Bank and met with Summerhill. Summerhill provided Eide with computer printouts of account transactions, records, DVDs, and still photographs. Eide transferred these items to Sergeant Joseph Meeks. Eide did not meet with defendant.

¶ 13 Sergeant Meeks testified as follows. On October 20, 2017, Meeks spoke with Eide about this case and received financial documents and photographs. Meeks spoke with Summerhill. Meeks determined that defendant committed the fraudulent check deposit incident in North Aurora and the cash withdrawal in Sycamore. He turned the case over to the North Aurora Police Department. Meeks did not meet with defendant.

¶ 14 Outside the presence of the jury, the State told the court that it intended to introduce evidence of defendant's prior crime. The court stated that it would read a limiting instruction to the jury twice, once before it heard the evidence and once at the end of the case. Defense counsel agreed to the two readings of the limiting instruction.

¶ 15 The court then instructed the jury that the evidence the State was about to present was for a "limited purpose." The court then instructed the jury:

> "The evidence that will be received, that the Defendant has been involved in an offense other than that charged in the indictment. This evidence has been received on the issue of the Defendant's intent, plan, identity, knowledge, and absence of mistake or accident, and may be considered by you only for that limited purpose.
>
> It is for you to determine whether the Defendant was involved in that offense, and if so, what weight should be given to this evidence on the issue of the Defendant's intent, plan, identity, knowledge, and absence of mistake or accident."

¶ 16 The prosecutor then told the jury that the State was seeking to admit into evidence "a certified copy of a transcript of proceedings" before a federal judge on June 2, 2006, in the United States District Court for the Northern District of Illinois, Western Division, in United States v. Broches. The trial court admitted the transcript into evidence without objection.

¶ 17 The portion of the transcript read to the jury stated:

> "Associated Bank is a financial institution with offices in De Kalb, Illinois. *** Old Second National Bank is a financial institution with offices in Maple Park, Illinois.
>
> [Codefendant] maintained and had signatory authority for the [codefendant] Partnership, Old Second account. Defendant and [codefendant] maintained and had signatory authority for the Spring Garden Bank account. Defendant and [codefendant] maintained and had signatory authority for a commercial checking account at Associated Bank in the name of Arcade Dreams bearing the account number 2263006492.
>
> Defendant and [codefendant] devised and engaged in a scheme to defraud Associated Bank, in which they fraudulently obtained over $97,000 from Associated Bank, by depositing worthless checks from the [codefendant] Partnership, Old Second Bank account, into the Spring Garden and Arcade Dreams Associated Bank account, in order to inflate the apparent balances of the accounts, and thereby, deceive Associated Bank in honoring checks issued against those accounts without sufficient funds.
>
> It was part of a scheme that codefendant, *** wrote and caused to be written numerous checks on the [codefendant] Partnership Old Second account, knowing that there were not sufficient funds in that account to cover the checks and then deposit it and caused the deposit of these checks into the Spring Garden and Arcade Dreams Associated Bank accounts.
>
> Defendant and [codefendant] deposited and caused to be deposited into the Spring Garden Associated Bank account the following checks under the [codefendant] Partnership Old Second account.
>
> Check number 1017 payable to Spring Garden in the amount of $15,450 on January 5th, of 2000. Check number 1019 payable to Spring Garden in the amount of $19,550

on January 7th, of 2000. Check number 1022 payable to Spring Garden in the amount of $38,950 on January 10th, of 2000.

In addition, Defendant and [codefendant] deposited and caused to be deposited into the Arcade Dreams Associated Bank account the following checks drawn on the [codefendant] Partnership Old Second account. Check number 1018 payable to Arcade Dreams in the amount of $14,750 on January 7th, of 2000. Check number 1120 payable to Arcade Dreams in the amount of $18,750 on January 7th, of 2000. Check number 1024 payable to Spring Garden in the amount of $41,350 on January 10th, of 2000.

It was further part of the scheme that after [codefendant] inflated the balances of the Spring Garden and Arcade Dreams bank accounts in this manner, the Defendant and [codefendant] wrote checks to third parties, and withdrew cash from the Spring Garden and Arcade Dreams Associated Bank accounts, knowing that there were not sufficient funds in these accounts to cover those checks and withdrawals.

It was further part of the scheme that by hiding checks in this manner, Defendant and [codefendant] fraudulently obtained over $97,000 from Associated Bank."

¶ 18 The State rested, and defendant moved for a directed verdict, which the trial court denied. Defendant presented no witnesses.

¶ 19 After hearing all the evidence, the court instructed the jury. In addition to the Illinois Pattern Jury Instructions (IPIs), a non-IPI instruction (No. 19) was given without defense counsel's objection. IPI No. 19 provided that an "offer of restitution in a crime of theft is not a defense to the crime."

¶ 20 After deliberating, the jury found defendant guilty of both counts of financial institution fraud. Defendant's posttrial motion was denied. The trial court merged count II into count I and, on December 23, 2019, sentenced defendant to 4½ years' imprisonment. On December 31, 2019, defendant filed a timely notice of appeal.

¶ 21 II. ANALYSIS

¶ 22 A. Standard of Review

¶ 23 Defendant argues that defense counsel was ineffective for failing to object to the admission of the transcript from his guilty plea in federal court to bank fraud.

¶ 24 All defendants have a constitutional right to receive the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *People v. Peterson*, 2017 IL 120331, ¶ 79. Effective assistance of counsel means "reasonable, not perfect, representation." *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. To establish ineffective assistance of counsel, a defendant must show both that (1) counsel's performance was deficient and (2) prejudice resulted from that deficiency. *Strickland v. Washington*, 466 U.S. 668, 681, 691-92 (1984); *People v. Eubanks*, 2021 IL 126271, ¶ 30. The failure to establish either prong is fatal to a claim of ineffective assistance of counsel. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000).

¶ 25 Defendant acknowledges that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith" but may be admissible if relevant for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); see also *People v. Pikes*, 2013 IL 115171, ¶ 11. Thus, defendant does not

challenge the relevancy of the evidence; rather, he contends that the transcript was inadmissible because it was hearsay.

¶ 26 Hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted. *People v. Caffey*, 205 Ill. 2d 52, 88-89 (2001); Ill. R. Evid. 801(c) (eff. Oct. 15, 2015). A statement is an oral or written assertion, or nonverbal conduct of a person if it is intended by the person as an assertion. Ill. R. Evid. 801(a) (eff. Oct. 15, 2015). Due to its lack of reliability, hearsay evidence is generally inadmissible unless it falls within an exception to the hearsay rule. *Caffey*, 205 Ill. 2d at 88-89. The party-admission doctrine is an exception to the hearsay rule. *People v. Ramsey*, 205 Ill. 2d 287, 294 (2002). A statement by a party-opponent is not hearsay if it is offered against a party and is "the party's own statement" or "a statement of which the party has manifested an adoption or belief in its truth." Ill. R. Evid. 801(d)(2) (eff. Oct. 15, 2015).

¶ 27 Here, the statements in the transcript were admissions of defendant, a party-opponent, or the statements were made by the federal prosecutor and were adopted by defendant. Therefore, they were not hearsay. See *id.*

¶ 28 Defendant argues that the prosecutor improperly read portions of the transcript to the jury, which rendered it inadmissible "hearsay upon hearsay." The prosecutor read a recitation of the factual basis for defendant's guilty plea. Thereafter, defendant affirmed that he committed the offense as stated. Thus, the statements read into the record were not hearsay because defendant, a party-opponent, adopted the statements. See *id.*

¶ 29 Defendant also argues that the transcript (1) was inadmissible hearsay because it did not meet the business record hearsay exception under Illinois Rule of Evidence 803(6) (eff. Sept. 28, 2018) and (2) the transcript was not properly self-authenticated under Illinois Rule of Evidence 902(11) (eff. Sept. 28, 2018). We reject both contentions and hold that the trial court properly admitted the transcript as a public record.

¶ 30 The transcript was admissible as a public record or report under Illinois Rule of Evidence 803(8) (eff. Sept. 28, 2018). Rule 803(8) excludes the following from the hearsay rule: "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth *** (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report ***." *Id.* Here, Mary Lindbloom, the official court reporter in federal court, had a duty to report what she observed during that proceeding. See 28 U.S.C. § 753(b) (2018) ("The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases ***.").

¶ 31 We are not aware of any Illinois case holding that Rule 803(8) includes transcripts. However, the Illinois Rules of Evidence largely mirror the Federal Rules of Evidence regarding the admissibility of a public record of a matter observed by one with a duty to report. Compare Ill. R. Evid. 803(8) (eff. Sept. 28, 2018), with Fed. R. Evid. 803(8). Accordingly, we determine that an interpretation of the Federal Rules of Evidence is persuasive. See *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 129 n.2. Federal courts have held that a trial transcript is admissible to prove that testimony of a party was given in a prior proceeding. See, *e.g.*, *United States v. Arias*, 575 F.2d 253, 254 (9th Cir. 1978) (holding that, in a perjury trial, a trial transcript of a prior proceeding was admissible as a public record of a matter observed by one with a duty to report under Federal Rule of Evidence 803(8)); *Garcia v. Gloor*, 618 F.2d 264,

271-72 (5th Cir. 1980) (holding that a transcript of testimony from an unemployment compensation hearing was admissible under the public records hearsay exception when properly authenticated).

¶ 32 Here, court reporter Lindbloom had a duty to report what she observed in federal court during defendant's guilty plea proceeding. The federal court reporter statute provides in part: "The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases ***." 28 U.S.C. § 753(b). Lindbloom then certified that the transcript was a "correct transcript" of defendant's guilty plea proceeding. The transcript was, as such, "*prima facie* a correct statement" of the proceedings. *Id.* Notably, defendant offers nothing to rebut this presumption.

¶ 33 In *United States v. Lumumba*, 794 F.2d 806, 815 (2d Cir. 1986), the defendant argued that the trial court erred by admitting a trial transcript in his contempt hearing. The court of appeals held that the certified transcript was properly admitted under 28 U.S.C. § 753(b) and Federal Rule of Evidence 902(4) as a certified copy of a public record. *Id.*

¶ 34 Similarly, here, because the transcript was certified, it was also admissible pursuant to Illinois Rule of Evidence 902(4) (eff. Sept. 28, 2018). Rule 902 provides:

> "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> (1) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
>
> * * *
>
> (4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any statute or rule prescribed by the Supreme Court." Ill. R. Evid. 902(1), (4) (eff. Sept. 28, 2018).

¶ 35 The transcript of defendant's federal guilty plea proceeding bears the dated file stamp of "Michael W. Dobbins, Clerk United States District Court." Further, Lindbloom certified that the transcript was correct. Thus, the transcript was self-authenticated under Rule 902(4). Therefore, the trial court properly admitted the transcript.

¶ 36 Having determined that the trial court properly admitted the complained-of evidence, we find that any objection by defense counsel would have been futile. See *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 33 ("Necessarily, counsel cannot be deemed ineffective for failing to raise an objection to admissible evidence—such an objection would be futile."). Therefore, defendant's claim of ineffective assistance of counsel fails. See *People v. Lawton*, 212 Ill. 2d 285, 304 (2004) (it is axiomatic that an attorney will not be deemed ineffective for failing to make a futile objection).

¶ 37 Defendant also contends that the transcript was inadmissible as a business record pursuant to Illinois Rule of Evidence 803(6) (eff. Sept. 28, 2018), because the certification is not dated and did not meet the requirements of Illinois Rule of Evidence 902(11) (eff. Sept. 28, 2018). However, because we have determined that the transcript was otherwise admissible, we need not address these arguments.

¶ 38 In addition, defendant contends that the transcript of his guilty plea proceeding in federal court was not a public record. However, as previously mentioned, a transcript of a federal court proceeding is a public record. See *Lumumba*, 794 F.2d at 815. Therefore, defendant's argument fails.

¶ 39 Finally, defendant argues that defense counsel was ineffective for failing to object to the State's tendered non-IPI jury instruction that an "offer of restitution in a crime of theft is not a defense to the crime." Defendant contends that this instruction was incomplete and misleading and that counsel should have tendered an alternative instruction that "restitution (or attempts [there at]) may be relevant to show the absence of an intent to deprive the owner permanently of his property." See *People v. Haissig*, 2012 IL App (2d) 110726, ¶ 53. Defendant asserts that he was entitled to this alternative instruction.

¶ 40 Defendant's argument fails because, even if the alternative instruction had been given, defendant cannot establish that the outcome of the trial would have been different. The evidence that defendant was guilty of financial institution fraud was overwhelming. The evidence showed that defendant wrote a $4100 check from his Chase Bank account when his balance in that account was $240. Despite this deficient Chase Bank account balance, defendant deposited the $4100 check, not at Chase Bank but at First State Bank. Then defendant withdrew $4000 from his First State Bank account. At that time the balance in his First State Bank account was $339.47. The evidence established that defendant knew or should have known that his $4100 check would not be honored by Chase Bank because his account was underfunded.

¶ 41 Further, evidence of defendant's alleged restitution was weak, at best. After Summerhill told defendant that his checking account was overdrawn, defendant deposited only $300. Defendant waited 14 months to make First State Bank whole, which was 7 months after he was indicted. We note that defense counsel conceded during closing argument that defendant's restitution was not "quick enough." Thus, we conclude that defendant has not shown that, even absent defense counsel's alleged errors regarding the jury instructions, defendant has failed to establish that a reasonable probability exists that the outcome of the trial would have been different. Therefore, defendant's claims of ineffective assistance of counsel fail.

¶ 42 III. CONCLUSION

¶ 43 The judgment of the circuit court of Kane County is affirmed.

¶ 44 Affirmed.