2024 IL App (2d) 230478-U
No. 2-23-0478
Order filed November 21, 2024

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TAMARA C. SCHMIDT, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 22-CF-514 Honorable Elizabeth K. Flood, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Mullen concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was ineffective for failing to investigate and present an insanity defense at defendant's discharge hearing, because defendant's conduct during and shortly after the offenses, combined with her schizophrenia diagnosis by the fitness evaluator, suggested that she was incapable of appreciating the criminality of her conduct when she committed the offenses.

¶ 2 Defendant, Tamara C. Schmidt, appeals from a judgment, following a discharge hearing, finding her "not not guilty" of several offenses. She contends that (1) her counsel was ineffective for failing to investigate and present an insanity defense at the discharge hearing and (2) the State failed to prove that the value of stolen property exceeded $500 as charged. Because we conclude

that defense counsel was ineffective for not investigating and raising an insanity defense at the discharge hearing, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 The State indicted defendant on one count of burglary based on her knowingly and without authority entering a house that was for sale with the intent to commit a theft therein (720 ILCS 5/19-1(a) (West 2020)), one count of felony theft based on her knowingly obtaining control over personal property (value exceeding $500 but not $10,000) from inside the house with the intent to permanently deprive the owner of the use or benefit of the property (720 ILCS 5/16-1(a)(1)(A), (b)(4) (West 2020)), and one count of criminal trespass to real property based on her knowingly and without lawful authority entering the house (720 ILCS 5/21-3(a)(1) (West 2020)).

¶ 5 On April 14, 2022, defense counsel entered his appearance. On April 20, 2022, defense counsel requested, and the trial court ordered, defendant's fitness evaluation. On June 29, 2022, the fitness evaluator released her fitness evaluation report. The evaluator stated that she initially met with defendant over Zoom on June 14, 2022. When the evaluator informed defendant that the trial court had ordered her to complete a psychological evaluation regarding her fitness to stand trial, defendant stated that she " '[did not] have a court case' " and that " '[t]his [was] double jeopardy.' " Defendant said that she had been " 'put in here by XO cops. They are not cops. They have strips. I'm being held against my will.' " Defendant denied that she was currently receiving mental health treatment or had any prescriptions for psychotropic medication. She was argumentative with the evaluator, saying she would be released that day and reiterating that she " '[did not] have a court case.' " She insisted that she did not need mental health treatment and that she was " 'not crazy.' " After defendant became agitated, began repeating herself, and threw the laptop through the chuckhole of her cell, the evaluation was terminated.

¶ 6 On June 22, 2022, the evaluator met with defendant in person at the Kane County Adult Justice Center. The evaluator spoke with defendant from the front of the cell because she refused to come out. According to the evaluator, defendant had disheveled hair and wore a blanket around her shoulders. After the evaluator explained the purpose for the meeting, defendant stated, " 'I don't have a case. Please leave me alone. Just go away.' " Defendant became agitated and uncooperative and refused to engage in the evaluation. She began to yell that she had no court papers or a court case. Given defendant's behavior, the evaluator terminated the interview and left.

¶ 7 The report further stated that records from the jail indicated that defendant presented as paranoid and uncooperative and that she ate very little food because she believed that someone was poisoning her and that there were bugs in the food.

¶ 8 The evaluator diagnosed defendant with "Unspecified Schizophrenia Spectrum and Other Psychotic Disorder." The evaluator opined to a reasonable degree of psychological certainty that defendant did not currently meet the legal criteria for fitness to stand trial. The evaluator elaborated that defendant displayed "delusional thought processes, [was] not grounded in reality, and [was] disorganized in her thinking." Defendant was "not aware of her role as the defendant" in the process and was "not taking care of her basic needs." "Furthermore, her thoughts [were] illogical, she [was] guarded, and [she] [was] unable to actively engage in treatment or make sound decisions." These symptoms, the evaluator opined, interfered with defendant's functioning and required her to have psychiatric treatment for stabilization. The evaluator recommended that defendant receive inpatient treatment if she were found unfit to stand trial. The evaluator based the treatment recommendation on defendant's "symptom presentation, her limited insight into her current mental health needs, and her need for psychiatric interventions." The evaluator also opined

to a reasonable degree of psychological certainty that defendant could be restored to fitness within one year.

¶ 9 At a fitness hearing on July 6, 2022, the trial court found defendant unfit to stand trial and committed her to the custody of the Department of Human Services (DHS) for inpatient treatment. At that point, defendant, who was present via Zoom, stated, "I have no case. I have no case. Okay? I have no case. So that's it. The case has been dropped." The court commented that defendant's statements were "not appropriate to what [was] occurring." The court continued the matter "for status of fitness and receipt of a treatment plan."

¶ 10 DHS placed defendant at Ingalls Hospital for inpatient restoration treatment. As part of the restoration process, defendant was evaluated approximately every 90 days for one year.

¶ 11 The first progress report, dated November 1, 2022, stated as follows in the section titled "Condition on Admission." Defendant was guarded and difficult to engage in conversation. She said that she had no psychiatric illnesses and would be leaving that day. She refused to answer any questions about her psychiatric symptoms. She said that she was there on " 'bogus charges,' " the charges had been dropped, and she could not discuss the reason for her admission because there was no pending criminal case. Defendant further stated that her fiancé, Thomas Bitner, owned the house in question and was currently in Ingalls Hospital " 'on the men's side.' " Defendant made incoherent statements about the Kane County Jail. The evaluator could not obtain further history from defendant because of the "extremely disorganized nature of her thought pattern and behavior." After the evaluator mentioned the subject of medication, defendant abruptly walked out of the interview and refused to engage further.

¶ 12 The evaluator noted that defendant was unable to reconstruct the events preceding her arrest and responded nonsensically to questions regarding her legal situation or the reason for her

admission to the hospital. Defendant could not engage in meaningful conversation, did not understand the nature of the charges, and could not answer questions about the legal proceedings. The evaluator opined that defendant's thinking was so impaired that she was incapable of assuming a meaningful presence in a courtroom or working intelligently and collaboratively with her attorney.

¶ 13 The evaluator's diagnosis was "psychotic disorder unspecified." The evaluator opined that defendant remained unfit to stand trial but could be restored to fitness within one year with appropriate treatment, including psychotropic medication to alleviate her mood instability, psychotic symptoms, and disorganization. The evaluator noted that a petition for involuntary medication had been filed.

¶ 14 The next progress report was dated January 23, 2023. The evaluator noted that, since the last report, the involuntary-medication petition had been granted and defendant was taking a daily dose of Zyprexa. She showed some improvement, started to attend "select groups," occasionally spoke to her team, and had less frequent and intense auditory hallucinations. However, she could still not engage in meaningful restoration treatment or discussions of her legal situation or the proceedings. Although "[h]er psychosis [was] showing some improvement," she was not yet able to attend restoration groups or rationally discuss her charges with her team. The evaluator diagnosed defendant with schizophrenia. In the evaluator's opinion, defendant remained unfit to stand trial but, with continued treatment, could be restored to fitness within one year.

¶ 15 The April 4, 2023, progress report stated that, after taking Zyprexa for some time, defendant's "progress plateaued." Defendant was subsequently prescribed Haloperidol and her Zyprexa was tapered to a lower dose. After the switch to Haloperidol, defendant showed "slow further improvement." She was becoming more social and conversational. She also began

attending restoration groups and individual meetings with her therapist. She "[was] no longer noted to respond to internal stimuli," but she continued to struggle with delusional content and had little insight into her situation or charges. She appeared capable of learning legal terms, roles, and topics, but she continued to deny that she had been criminally charged. Thus, she "[could not] apply learned knowledge to her situation." Defendant would cooperate with restoration treatment until it became apparent that her own charges were being discussed, and then she would become paranoid and guarded. The evaluator opined that defendant remained unfit to stand trial but, with continued treatment, could be restored to fitness within one year.

¶ 16 The final progress report, dated June 21, 2023, noted again that, since taking Haloperidol, defendant demonstrated improvement, as she was more social and more able to converse. She was also engaging in groups. She "[did not] appear to respond to internal stimuli as frequently." However, she continued to have difficulty with delusional content and had little insight into her situation or charges. After a brief period of being able to discuss her charges with rational understanding, she backslid into her previous state. She began to deny again that she " '[had] court.' " She still could not discuss her situation or "apply any learned knowledge to her situation." The evaluator continued to diagnose defendant with schizophrenia. The evaluator opined that defendant remained unfit to stand trial and was unlikely to be restored to fitness within one year, given that she "failed two adequate trials of two different classes of antipsychotics," was unwilling to try different medication and, despite some improvement, remained unable to meaningfully or rationally participate in her defense.

¶ 17 On June 27, 2023, the trial court again found that defendant was unfit to stand trial. The court further found that defendant could not be restored to fitness within one year. Accordingly, the court set the matter for a discharge hearing.

¶ 18 The following facts were established at the discharge hearing. Philip Livingston owned a house at 333 McKee Street in St. Charles. In late February 2022, Livingston listed the house for sale with Kent Hernandez, a real estate agent. Because Livingston had moved to Wisconsin, Hernandez placed a lockbox on the front door, which was located inside the unlocked front porch. According to Hernandez, the lockbox allowed entry by only those with the authorized code. He did not give permission to defendant to enter the house, nor was she a potential buyer. Livingston testified that the house had not been sold as of March 23, 2022, but there was an interested party.

¶ 19 At about 8:45 a.m. on March 23, 2022, Tarra Fiedler, who lived next door to 333 McKee Street, was taking her daughter to school when she noticed a woman moving items from the house. Specifically, the woman used a dolly to remove a "wooden chest or big piece of wooden furniture." Fiedler recognized the woman as a neighborhood resident. Fiedler was shown a photo of defendant and identified her as the woman who removed the piece of furniture. "[H]alf way through the day," it was raining, and Fiedler noticed "a little bit more stuff outside" 333 McKee Street. At around 3 p.m., as she was leaving to pick her daughter up from school, Fiedler saw cars stop and pick up items from the curb. Fiedler testified that there were "tubs" of "[p]ersonal belongings" on the curb. Fiedler took two photos of the items on the curb. She identified People's exhibit 3 as a photo depicting someone stopping their car to pick up some items. Later that evening, she took another photo of the items. She identified People's exhibit 4 as the second photo she took. Asked what it depicted, she said, "All the furniture and everything I believe out of his house at that point." When asked if the items on the curb were "more or less personal belongings," Fiedler responded, "A lot more." Fiedler texted both photos to Livingston and asked him "if he had planned for this to be happening." On cross-examination, Fiedler identified one of the items as a "round wooden table that [she] [knew] was in [Livingston's] living room."

¶ 20 Taylor Phillips, who lived across the street and two houses down from 333 McKee Street, testified that, on March 23, 2022, she noticed that "a lot of th[e] items in the house were brought outside and put on the curb." She identified People's exhibit 3 as a photo of the belongings from 333 McKee Street that had been placed on the curb. On that same date, she saw defendant removing items from 333 McKee Street and placing them on the curb. Phillips recognized defendant as a woman who lived in the neighborhood. At one point, Phillips and her children went to the curb to look for "fun items" and saw defendant carrying out a box that contained "some frames and photos" and "Christmas ornaments and trinkets."

¶ 21 Hernandez testified that, late on March 23, 2022, Livingston called and asked him to go to the house because he believed someone had been inside. When Hernandez shined his flashlight onto the front porch, he saw the lockbox and a "broken" doorknob on the floor. He also noticed a new doorknob on the door. Hernandez then called the police.

¶ 22 On the evening of March 23, 2022, Officer Jacob Wollenweber of the St. Charles police department was dispatched to investigate a suspicious person at 333 McKee Street. When he arrived, he saw "a pile of household goods and items along the parkway about 30 feet long and 5 feet wide." Because several neighbors identified defendant as a suspect, Wollenweber went to her nearby apartment. He knocked on the door, and defendant answered. Defendant stepped outside the door and spoke to Wollenweber and another officer.

¶ 23 Wollenweber testified that defendant said that she had been removing items from 333 McKee Street because her fiancé had just purchased the house. Defendant said that the house was unlocked and that she had not damaged the lockbox. Asked about the for-sale sign on the property, defendant said that "she removed it because she bought the property." When Wollenweber asked

defendant how the items had gotten on the curb, she answered that she moved what she could out of the house and to the street.

¶ 24 Wollenweber identified People's exhibit 1 as his body camera's video-recorded conversation with defendant outside her apartment. The video, just over four minutes long, was played in court. The video showed the police knocking on defendant's door. Defendant answered and, when asked, stepped outside the door. She was clothed and appeared to be holding a blanket or shirt. Her hair was slightly disheveled. Although she initially appeared somewhat disoriented, she was attentive and engaged with the officers. When they asked about the incident, she appeared to understand and answered appropriately. She spoke clearly and did not ask for questions to be repeated. The officers asked where she had been that day, and she replied that she was "moving up the street" to the house at 333 McKee Street. She explained that her fiancé had purchased the house and had the paperwork for the purchase. She planned to move in on Friday and was moving items out of the house. When asked how she got into the house, she initially claimed that the door was unlocked, but then she added that the prior owner left a key. She explained that she replaced the front doorknob with a gold doorknob she bought from Menards. She said that she had not yet moved any items into the house. When asked if the door was unlocked when she entered the house, she replied, "[W]e're still working on [the house]." She reaffirmed that she and her fiancé purchased the house. When asked where her fiancé was, she said he was in California. She said his name was Thomas Bitner and clarified that he lived in California. When asked how often he came to the area, she said he was "usually here by now[,] but he has work to do." She did not know his occupation. When asked how long they had been engaged, she hesitated before replying, "October." When the officers asked defendant when she and Bitner planned to get married, she again hesitated before replying, "Tomorrow." She said that no one was in the house when she

went in. She placed items from the house on the curb, removed the for-sale sign, and placed it with the items. The officers then informed defendant that she was under arrest for burglary. She cooperated when they asked her to turn around to be handcuffed.

¶ 25 Livingston testified that he had lived at 333 McKee Street from 2015 to February 2022. He listed the house for sale in late February 2022, but it had not been sold as of March 23, 2022. He had moved to Wisconsin in February 2022.

¶ 26 On March 23, 2022, Livingston received a text message from his former next-door neighbor. The text included two photos depicting some of his personal belongings sitting on the curb in front of 333 McKee Street. Livingston identified People's exhibits 3 and 4 as the photos he received. He had given only his real estate agent permission to be in the house. Because he was worried about his personal belongings being taken or damaged by the rain, he immediately called his father, his real estate agent, and the police.

¶ 27 When asked about the value of the missing or damaged items, Livingston estimated the value at approximately $10,000. However, defendant objected for lack of foundation, and the trial court sustained the objection. Instead of laying a proper foundation, the prosecutor asked Livingston to describe "what kind of items—or what was missing to the best of [his] recollection." Livingston answered, "There were personal belongings such as, you know, holiday decorations, electronics, clothes were damaged, furniture was damaged, items of furniture were missing." When asked to describe the missing furniture, Livingston responded that "[i]t would be, you know, dressers, chairs," and "[m]aybe an end table."

¶ 28 Defendant offered no evidence besides the initial fitness evaluation report and the four progress reports.

¶ 29 In closing argument, the State asserted that, because defendant had not raised it as an affirmative defense, the trial court was precluded from finding defendant not guilty by reason of insanity. The State also noted that diminished capacity is not a valid defense under Illinois law.

¶ 30 We quote defense counsel's closing argument in its entirety:

> "Judge, the State failed to prove [defendant] guilty beyond a reasonable doubt of burglary. My client suffers from schizophrenia. She did not knowingly enter a home with intent to permanently deprive anything or to commit any felony. The evidence is that she went into a house.
>
> She thought she had permission to be there. She brought items out to a curb. She didn't take anything. There's no evidence that anything was taken by her.
>
> There was evidence that somebody else drove up and took the items. There's no evidence that she damaged any items either. And based on that we're asking that you find her not guilty because she couldn't have committed the knowing or the intentional elements of that crime. Also, she's suffering from a series DSM-5 mental illness, that being schizophrenia.
>
> This is similar to [*People v. Jackson*, 2017 IL. App. 142879]. In that case[,] the defendant suffered from psychological issues that altered his mental state. He had a fitness evaluation, a DHS evaluation. In that case[,] the court determined the lack of knowing mental state, just like lack of *mens rea* to knowingly enter the dwelling and permanently deprive the homeowner or to commit a felony inside that home.
>
> The police officer did not see my client enter the house. They only spoke to her after the fact. No one was able to locate my client. She told the police officer about her

fiance, Mr. Binyard [*sic*], Thomas Binyard [*sic*]. And based on that I ask that you find that my client did not commit this offense beyond a reasonable doubt, Judge. Thank you."

¶ 31 The trial court found defendant "not not guilty" of all three offenses. The court determined that defendant could form the *mens rea* of the offenses. The bodycam video showed that defendant was lucid when answering the officers' questions. Although her answers were not all "completely rational," they "matched the questions." The court found it "impossible to tell" whether defendant was being evasive with her answers or that she actually believed what she was saying. However, it did not appear to the court that she was "overtly hallucinating or schizophrenic" when she spoke with the officers.

¶ 32 The trial court agreed with the State that diminished capacity is not a valid defense under Illinois law. The court distinguished *Jackson*, where the defendant struck a police officer while "having spasms" and "out of control and clearly irrational." By contrast, the court explained, "the question [in this case] is not whether the defendant knew that she was committing a specific physical act, which could have been involuntary. The question is her state of mind when she entered the house." The court found that defendant "clearly understood that she was entering the house without permission or without lawful authority when she took it upon herself to remove the doorknob and replace it when it had a lock on it." The court further found that defendant "knew at that time that placing items on the curb *** would permanently deprive the owner of the use or benefit of the property, especially as it was raining the day that the items were placed outside, uncovered, into the curb."

¶ 33 The trial court noted that it had also reviewed the initial fitness evaluation report and the four progress reports. The court concluded that the initial report was too remote in time to establish that defendant suffered from any mental illness when committing the offenses three months

beforehand. The court also noted that, even if defendant was suffering from a mental illness on March 23, 2022, the court could not know if defendant was "on medication or *** in what way that mental illness may have been presenting or not presenting on that day." Accordingly, the reports did not dissuade the court from concluding that defendant knowingly entered the house without lawful authority and had intended to permanently deprive the owner of the property.

¶ 34 Finally, the trial court found that the neighbors' testimony and the photo exhibits showed that "[there] were many items of furniture and clothing and other personal items on the parkway in front of [the house]." Based on People's exhibit 4, "pertaining to the number of items left on the curb," the court found that the property's value exceeded $500.

¶ 35 In conjunction with finding defendant "not not guilty" of all three offenses, the trial court extended defendant's fitness restoration treatment for an additional 15 months. The court ordered a report on whether defendant's treatment should be inpatient or outpatient.

¶ 36 Defendant, in turn, filed a motion for a new discharge hearing or, alternatively, a finding of not guilty of burglary. Defendant asserted that she had not presented a diminished capacity defense but, rather, had argued that the State failed to prove that, despite her schizophrenia, she possessed the requisite mental state at the time of the burglary. Defendant further asserted that the State did not prove that the value of the property taken or damaged exceeded $500.

¶ 37 The trial court denied the motion for a new discharge hearing. Defendant then filed this timely appeal.

¶ 38 II. ANALYSIS

¶ 39 On appeal, defendant contends that (1) defense counsel was ineffective for failing to investigate and present an insanity defense at the discharge hearing and (2) the State failed to prove beyond a reasonable doubt that the value of the property removed from the house exceeded $500.

¶ 40 We address first the ineffectiveness claim. We apply the *Strickland* standard to ineffectiveness claims. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). See *People v. Manns*, 373 Ill. App. 3d 232, 239 (2007) (applying *Strickland* to counsel's performance at a discharge hearing). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that (1) counsel's performance was deficient and (2) the deficiency was prejudicial. *Strickland*, 466 U.S. at 687. The failure to establish either prong of *Strickland* precludes a finding of ineffectiveness. *People v. Easley*, 192 Ill. 2d 307, 318 (2000).

¶ 41 Generally, counsel's performance is strongly presumed to be reasonable. *People v. Jones*, 2012 IL App (2d) 110346, ¶ 82. "Matters of trial strategy are generally immune from ineffective assistance of counsel claims." *People v. Jones*, 2023 IL 127810, ¶ 51. We presume that counsel's actions or inactions were the product of sound trial strategy (*People v. Bates*, 2018 IL App (4th) 160255, ¶ 47), that counsel knew the law and how to apply it (*People v. Boyd*, 2021 IL App (1st) 182584, ¶ 64), that counsel fully investigated potential defenses and knew the facts of the defendant's case (*People v. Ressa*, 2019 IL App (2d) 170439, ¶ 25), and that counsel's actions and representations were ethically sound (*People v. Wood*, 2014 IL App (1st) 121408, ¶ 77). "A defendant can overcome the strong presumption that defense counsel's choice of strategy was sound if his or her decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." *Jones*, 2012 IL App (2d) 110346, ¶ 82. Strategic errors can arise from misapprehensions of law. *People v. Garmon*, 394 Ill. App. 3d 977, 987 (2009). Ultimately, a strategic choice is deemed unreasonable when it fails to subject the State's case to any meaningful adversarial testing. *People v. Custer*, 2019 IL 123339, ¶ 39.

¶ 42 A defendant is prejudiced by counsel's deficient performance if there is a reasonable probability that the result would have been different but for counsel's deficient performance. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). A reasonable probability is one sufficient to undermine confidence in the outcome. *People v. Petrie*, 2021 IL App (2d) 190213, ¶ 80.

¶ 43 Here, defendant's claim of ineffective assistance of counsel arises in the context of a discharge hearing. A discharge hearing is not a criminal proceeding. *People v. Mayo*, 2017 IL App (2d) 150390, ¶ 3. A discharge hearing occurs only after the defendant has been found unfit to stand trial, and it is a proceeding to determine only whether to enter a judgment of acquittal, not to determine guilt. *Mayo*, 2017 IL App (2d) 150390, ¶ 3. The question of guilt is deferred until the defendant is found fit to stand trial. *Mayo*, 2017 IL App (2d) 150390, ¶ 3. A trial court can make one of three findings at a discharge hearing: an acquittal, not guilty by reason of insanity, or "not not guilty." *Manns*, 373 Ill. App. 3d at 238. A defendant is found "not not guilty" if the evidence at a discharge hearing is sufficient to establish guilt; no conviction results, and the defendant is subject to further treatment ranging from one to five years depending on the offense. *Mayo*, 2017 IL App (2d) 150390, ¶ 3 (citing 725 ILCS 5/104-25(d) (West 2012)). Although a judicial finding of "not not guilty" does not establish a conviction, the standard of proof is the same as required for a conviction. *Mayo*, 2017 IL App (2d) 150390, ¶ 3. Accordingly, the *standard of review* is the same as that applicable to a criminal conviction. *People v. Peterson*, 404 Ill. App. 3d 145, 150 (2010). When presented with a challenge to the sufficiency of the evidence, the reviewing court's function is not to retry the defendant. *Peterson*, 404 Ill. App. 3d at 150 (citing *People v. Collins*, 106 Ill. 2d 237, 261 (1985)). Rather, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt. *Peterson*, 404 Ill. App. 3d at 150.

¶ 44 Here, defendant asserts that defense counsel was ineffective for not investigating and presenting an insanity defense but instead raising the invalid defense of diminished capacity.

¶ 45 Defendant is correct that diminished capacity is no longer a recognized defense in Illinois. *People v. Nepras*, 2020 IL App (2d) 180081, ¶ 24 (the now-defunct affirmative defense of diminished capacity permitted "a legally sane defendant to present evidence of [her] mental illness to negate the specific-intent element of a particular crime"). But defendant also claims that an insanity defense was the "only viable avenue to obtain an acquittal on all the charges" and thus suggests no other arguable defense theory. Defendant's position implies that *if* an insanity defense was not actually viable, then defense counsel left defendant no worse off for raising a diminished capacity defense, for (by defendant's concession) there was no other avenue available to the defense (notably, defendant does not claim that counsel failed to subject the State's case to meaningful adversarial testing—as by, for example, failing to cross-examine the State's witnesses). Since we hold—for the reasons below—that defense counsel provided ineffective assistance for failing investigate and raise an insanity defense, we need not determine whether defense counsel's arguments at the discharge hearing can be construed as raising a diminished capacity defense.

¶ 46 In Illinois, all criminal defendants are presumed to be sane. *People v. Welling*, 2021 IL App (2d) 170944, ¶ 48. Insanity is an affirmative defense that must be raised by the defendant, who bears the burden of proving the defense by clear and convincing evidence. *Welling*, 2021 IL App (2d) 170944, ¶ 48. "A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate

the criminality of his conduct." 720 ILCS 5/6-2(a) (West 2000). An insanity defense can be raised at a discharge hearing and, if proven, operates to acquit the defendant of the charges. 725 ILCS 5/104-25(c) (West 2000).

¶ 47 As noted, " '[t]rial strategy includes an attorney's choice of one theory of defense over another.' " *People v. Cundiff*, 322 Ill. App. 3d 426, 435 (2001) (quoting *People v. Campbell*, 264 Ill. App. 3d 712, 732 (1992)). Thus, whether to present an insanity defense carries a strong presumption of reasonableness. See *Cundiff*, 322 Ill. App. 3d at 435.

¶ 48 Defendant has overcome the strong presumption that defense counsel acted reasonably in not investigating and presenting an insanity defense. Obviously, early in the proceedings, counsel had begun to suspect that defendant might lack the ability to understand the proceedings or assist in her defense, as counsel had interactions with defendant and thereafter requested a fitness evaluation. It is undisputed that, at the time of the discharge hearing, defendant suffered from some form of mental illness and was not fit to stand trial. See 725 ILCS 5/104-10 (West 2022) ("A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense."). However, the record lacks any indication that counsel, understanding that defendant was suffering from significant mental health issues, sought an insanity evaluation or otherwise pursued an insanity defense.

¶ 49 Admittedly, an insanity defense is viable only if the mental disease or defect existed when the defendant committed the offenses. See 720 ILCS 5/6-2(a) (West 2022). Thus, the finding that defendant was unfit to stand trial did not alone establish that she was insane at the time of the offenses. See *Manns*, 373 Ill. App. 3d at 240; *People v. Burnett*, 2016 IL App (1st) 141033, ¶ 48 (fitness to stand trial and sanity at the time of the offense "concern different time frames and

different standards"). However, the nature and circumstances of the offenses, defendant's interactions with the police shortly after the offenses, and defendant's fitness evaluation and subsequent progress reports were sufficient to create a duty to investigate and present an insanity defense. See *People v. Penn*, 2022 IL App (4th) 210084-U, ¶ 48.

¶ 50 We first consider the nature and circumstances of the offenses. Defendant did not break into another's home to surreptitiously steal items. Rather, she apparently intended to supplant the owner and occupy the house for herself. Her attempt was remarkably brazen. After breaking the doorknob and removing the lockbox, she replaced the doorknob with a new one. She then proceeded to remove various items from the house and place them on the curb in the rain. She also removed the for-sale sign from the front yard and placed it with the other items at the curb. She did this in full view of the neighbors, as if her acts were perfectly ordinary and innocent. Significantly, the irrationality of defendant's conduct was not lost on the State, which remarked at the discharge hearing that "[r]easonable people don't move into a house, act irrationally, and just start to live there." Defendant's actions, which were unabashedly public and displayed no concern for being caught, suggested that she lacked the substantial capacity to appreciate the criminality of her conduct.

¶ 51 We next consider the video recording of defendant's interaction with the police shortly after the incident. See *People v. Dwight*, 368 Ill. App. 3d 873, 880 (2006) (the defendant's conduct shortly before or after the incident bears on the issue of insanity). When defendant answered the door, she had disheveled hair and appeared disoriented, although she seemed to understand the questions asked. Her explanation for her conduct that day did not dispel its bizarreness but only showed her as likely delusional. Essentially, she claimed that her California-based fiancé, whose employment she did not even know, had purchased a home from an owner who left it fully

furnished at closing. Defendant's fanciful explanation for her strange conduct suggested that she was suffering from a mental illness that prevented her from realizing the criminal nature of her actions.

¶ 52 Further reason for pursuing an insanity defense was provided by the initial fitness evaluation and subsequent progress reports. In all of these reports, the evaluator noted defendant's struggles with delusions and diagnosed her with schizophrenia. We recognize that defendant first met with the evaluator nearly three months after the incident and that "[t]he insanity of a person either before or after the commission of a crime cannot excuse the crime," but "only insanity existing at the very time of the crime can excuse the same." *People v. Dunigan*, 96 Ill. App. 3d 799, 820 (1981). However, we cannot say that the time interval rendered the evaluations irrelevant to whether defendant suffered from a mental illness at the time of the offenses. This is especially so given that the diagnosis and findings of the evaluator were consistent with defendant's behavior during and shortly after the offenses. Moreover, although the reports did not indicate that defendant had a history of mental illness preceding the initial evaluation or that she manifested symptoms of mental illness at the time of the offenses, the evaluator focused on defendant's current fitness to stand trial and apparently was not asked to opine on whether she suffered from a mental illness at the time of the offenses. In our view, the reports were relevant to show that, at the time of the offenses, defendant suffered from a mental defect that rendered her substantially incapable of appreciating the criminality of her conduct.

¶ 53 Defendant relies on *Penn*, *Manns*, and *People v. Young*, 220 Ill. App. 3d 98 (1991), each of which addressed claims that defense counsel was ineffective for failing to raise an insanity defense at the discharge hearing. Those cases support our conclusion that counsel was deficient for failing to pursue an insanity defense.

¶ 54 In *Young*, the defendant's ex-wife and son testified that the defendant held them at gunpoint and demanded that the ex-wife confess to killing the defendant's mother, who was, in fact, alive. *Young*, 220 Ill. App. 3d at 102-03. The appellate court agreed with the defendant that defense counsel failed to subject the State's case to meaningful adversarial testing. *Young*, 220 Ill. App. 3d at 107-08. Counsel pursued a legally unsound double-enhancement theory and, while doing so, failed to cross-examine the State's witnesses and effectively conceded the defendant's guilt. *Young*, 220 Ill. App. 3d at 107-08. The court agreed with the defendant that a reasonable attorney would have presented an insanity defense, which the court noted was strongly supported by the defendant's (1) medical history, (2) fitness evaluations following the crime, and (3) conduct in committing the offense. *Young*, 220 Ill. App. 3d at 108. In particular, the experts who evaluated the defendant concluded that he suffered from paranoia and delusional thinking when he committed the crime. *Young*, 220 Ill. App. 3d at 108.

¶ 55 In *Manns*, the defendant was charged with aggravated robbery for taking $100 by gunpoint from a bank teller. *Manns*, 373 Ill. App. 3d at 233. During postarrest detention and several subsequent psychological evaluations, the defendant insisted that he was entitled to withdraw the money because he owned the bank, or the bank (or the idea for it) had been "stolen" from him. *Manns*, 373 Ill. App. 3d at 235, 237, 241. Despite such evidence, defense counsel did not pursue an insanity defense and instead opted to merely cross-examine the teller to verify that the defendant said that he wanted $100 and that the bank had been "taken from him." *Manns*, 373 Ill. App. 3d at 241. On appeal, the court held that counsel was ineffective for failing to obtain an insanity evaluation and raise an insanity defense, where the defendant's behavior at the time of the offense, his statements in court, and his fitness evaluations beginning 20 days after the offense showed that

he was unable to appreciate the criminality of his conduct during the offense. *Manns*, 373 Ill. App. 3d at 240.

¶ 56 In *Penn*, the defendant was charged with various offenses against two police officers arising out of his encounter with them. *Penn*, 2022 IL App (4th) 210084-U, ¶ 4. The appellate court held that defense counsel was ineffective for failing to investigate an insanity defense where there was "ample" evidence to support a request for a sanity evaluation and an investigation into an insanity defense. *Penn*, 2022 IL App (4th) 210084-U, ¶ 48. The court noted the defendant's history of psychiatric admissions, his delusional accusations during the police encounter that the officers had spit on him, his erratic behavior during pretrial hearings, a fitness evaluation (three weeks after the offense) describing him as hypomanic, easily confused, and showing evidence of bipolar disorder. *Penn*, 2022 IL App (4th) 210084-U, ¶¶ 5, 7, 10, 14, 19, 48. The court noted that counsel could have called the evaluator, cross-examined the officers further on their prior contacts with the defendant and their observations of him during the offense, and obtained a sanity evaluation to present at the discharge hearing. *Penn*, 2022 IL App (4th) 210084-U, ¶¶ 49-50.

¶ 57 Here, as in *Penn*, *Manns*, and *Young*, defendant displayed irrational thinking while committing the offenses. Also, only hours after the offenses, defendant gave the police a delusional explanation for her conduct. We recognize that, in *Young*, unlike here, the fitness evaluator opined as to the defendant's mental condition at the time of the offense. See *Young*, 220 Ill. App. 3d at 108. However, the fitness evaluator in *Manns* and *Penn* did *not* opine as to the defendant's mental condition as the time of the offense, yet the court in each case found that the evaluator's findings three weeks after the offense were relevant and, along with other indicia, suggested that the defendant lacked the substantial capacity to appreciate the criminality of his conduct when he committed the offense. See *Penn*, 2022 IL App (4th) 210084-U, ¶¶ 10, 48;

Manns, 373 Ill. App. 3d at 234, 240. Likewise here, the diagnosis of schizophrenia three months after the offenses was consistent with defendant's behavior during and shortly after the offenses. Thus, *Young*, *Manns*, and *Penn* support defendant's claim that defense counsel was unreasonable for failing to obtain an insanity evaluation and present an insanity defense.

¶ 58 Having concluded that defense counsel performed deficiently for failing to pursue an insanity defense, we next address whether that deficiency prejudiced defendant. We note that prejudice may be presumed where there is a complete breakdown of meaningful adversarial testing. See *Manns*, 373 Ill. App. 3d at 239; *Young*, 220 Ill. App. 3d at 107. Counsel's performance here was far better than that. At the discharge hearing, counsel (1) argued that, under *Jackson*, the State failed to prove that defendant had the required mental state for the offenses, (2) cross-examined the State's witnesses, and (3) contended that the State did not prove that the value of the items exceeded $500. Therefore, we do not presume that defendant was prejudiced by counsel's failure to investigate and present an insanity defense.

¶ 59 Instead, we determine whether there was actual prejudice, *i.e.*, whether a reasonable probability exists that the result of the discharge hearing would have been different if counsel had not performed deficiently. See *Houston*, 226 Ill. 2d at 144 (setting forth reasonable-probability standard for actual prejudice); *Penn*, 2022 IL App (4th) 210084-U, ¶ 58 (declining to presume prejudice and applying the actual-prejudice standard). As noted, a reasonable probability is one sufficient to undermine confidence in the outcome. *Petrie*, 2021 IL App (2d) 190213, ¶ 80.

¶ 60 There was actual prejudice here. We disagree with the State that defendant was not actually prejudiced by the absence of an insanity defense because the evidence at the hearing did not conclusively show that she was insane. Defendant is not required to conclusively show that the insanity defense would have succeeded. Rather, she is required to show only a reasonable

probability that the defense would have succeeded. She met that standard given (1) the bizarre nature of her offenses, (2) her delusional statements to the police shortly afterward, and (3) her fitness evaluation and subsequent progress reports indicating a diagnosis of schizophrenia. Not only was insanity a viable defense, but it was the only viable defense defendant had. See *Manns*, 373 Ill. App. 3d at 241. Nonetheless, aside from finding the actual-prejudice standard met, we offer no opinion on whether an insanity defense would have succeeded.

¶ 61 Because defense counsel was ineffective for failing to investigate and present an insanity defense at the discharge hearing, we reverse the trial court's "not not guilty" finding and remand for a new discharge hearing. Having reversed on that basis, we need not reach the issue of whether the evidence was sufficient to establish that the value of the items removed from the house exceeded $500.

¶ 62 III. CONCLUSION

¶ 63 For the reasons stated, we reverse the judgment of the circuit court of Kane County and remand for further proceedings.

¶ 64 Reversed and remanded.