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2014 IL App (3d) 120812-U

Order filed August 28, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois, |
| Plaintiff-Appellee, |) | |
| v. |) | Appeal No. 3-12-0812 |
| |) | Circuit No. 06-CF-241 |
| ANTONY BELL, |) | Honorable |
| Defendant-Appellant. |) | Scott Shipplett, Judge, Presiding. |

JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's amended postconviction petition at the second stage of proceedings.

¶ 2 Following a jury trial, defendant, Antony Bell, was found guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 2006)), and was sentenced to 32 years' imprisonment. In 2012, defendant filed an amended postconviction petition, which the trial court dismissed at the second stage of proceedings. Defendant appeals, arguing he made a substantial showing that trial counsel was ineffective for failing to lay a proper foundation to admit the victim's toxicology

report. We affirm.

¶ 3

FACTS

¶ 4

In 2006, defendant was charged by information with first degree murder for the shooting death of Patrick Thomas-Lynch. 720 ILCS 5/9-1(a)(2) (West 2006). At defendant's jury trial, the evidence indicated that on April 24, 2006, Thomas-Lynch went to Christopher Mixon's apartment on two separate occasions to confront Mixon. Thomas-Lynch and Mixon did not get along because Thomas-Lynch was dating Mixon's former girlfriend, Amanda Yoho, and Mixon had accused Thomas-Lynch of burglarizing his apartment. The first time Thomas-Lynch went to Mixon's apartment, Thomas-Lynch argued with Mixon for accusing him of burglarizing Mixon's apartment. Thomas-Lynch eventually left, but returned to the apartment about an hour later with his friend Derek. Defendant, Justin Warren, Michael Martinez, and Bryson Davis were on the second-story balcony attached to Mixon's apartment, while Mixon stood in the doorway. As Thomas-Lynch stood on the staircase leading to the balcony, defendant fired a revolver toward Thomas-Lynch. Thomas-Lynch was shot in the chest and died as a result.

¶ 5

Yoho testified that on the day of the shooting, she was sitting in her car near Mixon's apartment. Yoho received a telephone call from Mixon, but ended the phone call when Thomas-Lynch approached her vehicle. Thomas-Lynch told Yoho he wanted to fight Mixon and then went to Mixon's apartment with Derek. Yoho testified that Thomas-Lynch walked up the staircase toward Mixon's apartment and argued with Mixon for a few minutes. Yoho heard the door to Mixon's apartment slam shut, followed by three gunshots. Yoho saw Thomas-Lynch fall backward off the staircase, and she ran toward him. Yoho lifted his shirt and noticed a hole in his chest. Yoho testified that she did not see a weapon on Thomas-Lynch and he did not normally carry a weapon.

¶ 6 Warren testified that he was on the balcony with Mixon, defendant, Martinez, and Davis when Thomas-Lynch arrived at Mixon's apartment the second time. Thomas-Lynch stood near the bottom of the staircase, and another man stood in the yard. Mixon and Thomas-Lynch began arguing and shouting back and forth, and then Warren noticed that Mixon pulled out a handgun. Warren decided to leave and walked down the staircase past Thomas-Lynch. Warren did not see anything in Thomas-Lynch's hand. A few minutes later Warren heard gunshots.

¶ 7 Martinez testified he was at Mixon's apartment both times Thomas-Lynch came to the apartment. The first time, Martinez heard Thomas-Lynch yell from outside that he wanted to fight Mixon. Mixon did not go outside, and Thomas-Lynch eventually left. About an hour later, Thomas-Lynch returned. Martinez, Mixon, defendant, Davis, and Warren were on the balcony, and Mixon was by the screen door inside his apartment. Thomas-Lynch stood at the bottom of the stairs leading to the balcony, and Derek stood in the yard. Thomas-Lynch and Mixon yelled at each other. Thomas-Lynch demanded an explanation as to why Mixon told people he burglarized Mixon's apartment. Thomas-Lynch also challenged Mixon to come outside and fight him.

¶ 8 Martinez testified that Thomas-Lynch had an aggressive look on his face as he walked about halfway up the staircase to the balcony. At that point, Davis asked Thomas-Lynch for a cigarette, and Thomas-Lynch came up a few more stairs to hand it to Davis. Thomas-Lynch then asked the men on the balcony why Mixon would not fight him. As Thomas-Lynch approached the balcony, defendant stepped toward Thomas-Lynch and pulled out a handgun that Martinez had seen Mixon holding earlier inside the apartment. Defendant's hand was shaking, and he told Thomas-Lynch to come no closer. Thomas-Lynch told defendant he was not going to shoot him and placed his hand under his shirt like he was reaching for something. Defendant fired the

handgun. Martinez heard three gunshots and saw Thomas-Lynch fall down the stairs. Martinez testified he did not see Thomas-Lynch with a gun.

¶ 9 Davis testified that the first time Thomas-Lynch came to the apartment, he was with Mixon on the balcony. Thomas-Lynch stood on the staircase and told Mixon he did not break into his apartment. Davis testified that Thomas-Lynch was not talking loudly and he did not feel threatened by Thomas-Lynch. Thomas-Lynch left and returned an hour later with Derek. Davis was on the balcony with Martinez and Mixon. Thomas-Lynch was near the top of the staircase leading to the balcony, and according to Davis, looked normal but concerned. Thomas-Lynch told Mixon he did not break into his apartment, but he did not yell and was not threatening. Davis asked Thomas-Lynch for a cigarette, and Thomas-Lynch gave him one. Davis then saw Derek run and when Davis turned around, he saw defendant on the balcony holding a handgun. Defendant's hand was shaking. Thomas-Lynch told defendant he would not shoot him, while he stepped back down the stairs. Defendant fired three gunshots, and Thomas-Lynch fell down the stairs.

¶ 10 The State made an oral motion *in limine* to exclude testimony regarding cocaine found on Thomas-Lynch's body and the toxicology results indicating the presence of cocaine and cannabis in his system. Defendant argued for admission of the evidence, claiming it was relevant to corroborate testimony that Thomas-Lynch was aggressive. The State argued there was no foundation to admit this evidence because there was no expert testimony to establish that cocaine or cannabis would make a person more aggressive. The State also noted that no witness testified Thomas-Lynch was under the influence of any drug. The trial court granted the State's motion *in limine* based on the lack of foundation to establish the effect of these drugs on Thomas-Lynch or a correlation between these drugs and aggressive behavior.

¶ 11 Police Officer Paul Vannaken testified that he and Officer Brad Cirimotich interviewed defendant the day after the incident. The interview was videotaped and played for the jury. In the interview, defendant initially denied knowing anything about the shooting at Mixon's apartment. Defendant later admitted he was on Mixon's balcony, but denied shooting a gun. Defendant claimed Thomas-Lynch came to the apartment and threatened to kill Mixon and everyone on the balcony. After further questioning, defendant said that he shot Thomas-Lynch accidentally. Defendant explained that the shooting happened quickly, and that he tried to scare Thomas-Lynch and shot the gun at least twice toward the ground without looking.

¶ 12 Defendant told the police he did not have any problems with Thomas-Lynch, except that Thomas-Lynch would threaten him when he was threatening Mixon. Defendant stated that Mixon received a phone call from Yoho before Thomas-Lynch arrived at Mixon's apartment. Yoho told Mixon that Thomas-Lynch was coming down the street with someone else and that she thought he had a gun. When Thomas-Lynch arrived and walked up the steps to the balcony, defendant told him to go because they did not want any problems. A few minutes later, Mixon handed defendant a gun and told him to scare Thomas-Lynch by shooting toward the ground. Defendant said his hands were shaking as he held the gun, and Thomas-Lynch told defendant to shoot him when he saw defendant with the gun. Defendant did not think he shot Thomas-Lynch. He claimed he shot Thomas-Lynch in self-defense because he saw Thomas-Lynch reach into and lift up his shirt and thought he was going to shoot him.

¶ 13 At the State's request, the trial court took judicial notice of Thomas-Lynch's 2005 conviction for unlawful restraint. Defendant did not present any additional evidence. The trial court instructed the jury on first degree murder, self-defense based on the reasonable belief that deadly force was necessary to prevent great bodily harm to oneself or another, and second degree

murder based on the unreasonable belief that deadly force was necessary. The jury found defendant guilty of first degree murder.

¶ 14 The trial court denied defendant's motion for new trial and sentenced him to 32 years' imprisonment. On direct appeal, this court affirmed defendant's conviction. *People v. Bell*, No. 3-07-0262 (2009) (unpublished order under Supreme Court Rule 23).

¶ 15 In 2010, defendant filed a *pro se* postconviction petition. Defendant was appointed postconviction counsel, who filed an amended postconviction petition on April 18, 2012. Relevant to this appeal, defendant alleged that his constitutional rights were violated when the trial court refused to allow evidence relating to the presence of cocaine in the victim's body and his possession of cocaine at the time of the shooting because this evidence was relevant to his claim of self-defense. Specifically, defendant alleged trial counsel was ineffective for failing to: (1) interview several witnesses to support defendant's claim of self-defense, asserting these witnesses would have established that Thomas-Lynch was under the influence of cocaine or alcohol on the date of the incident and was aggressive when under the influence; and (2) present expert testimony to support the admissibility of Thomas-Lynch's toxicology report. Defendant also argued that trial counsel's ineffectiveness was based on matters outside the record, and thus could not have been raised by appellate counsel on direct appeal.

¶ 16 Defendant attached several exhibits to his petition, including: (1) research studies linking cocaine and alcohol use with increased aggression; (2) an autopsy and toxicology report, which indicated Thomas-Lynch had cocaine and cannabis in his system at the time of death and 10 grams of cocaine found hidden in his buttocks region; and (3) a letter from Mixon stating Thomas-Lynch had a reputation for alcohol and cocaine use and that Thomas-Lynch had an aggressive attitude on the date of the incident. Defendant also attached his own affidavit,

averring that Thomas-Lynch had a history of marijuana, cocaine, and alcohol use and was violent and unpredictable when under the influence of these drugs. Defendant further averred that he believed Thomas-Lynch was under the influence of these drugs at the time of the incident.

¶ 17 On September 19, 2012, the State filed a motion to dismiss defendant's petition, alleging defendant's petition failed to establish the proper foundation and the relevance for the toxicology report. On September 21, 2012, the trial court entered a written order granting the State's motion to dismiss. Defendant appeals.

¶ 18 ANALYSIS

¶ 19 Defendant argues his petition should proceed to an evidentiary hearing because he made a substantial showing that trial counsel was ineffective. Defendant contends counsel should have laid a proper foundation in order to admit evidence that Thomas-Lynch had cocaine in his system because this evidence was relevant to support his claim of self-defense. Additionally, defendant claims appellate counsel was ineffective for failing to address this on direct appeal.

¶ 20 The Post-Conviction Hearing Act provides for a three-stage review process for criminal defendants who challenge their convictions based on constitutional violations. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Domagala*, 2013 IL 113688. In order to proceed to a third-stage evidentiary hearing, the allegations set forth in the petition, as supported by the record or accompanying affidavits, must make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403 (2003). In making this determination, all well-pleaded facts in the petition and affidavits are to be taken as true. *Id.* We review *de novo* the dismissal of a petition without an evidentiary hearing. *People v. Pendleton*, 223 Ill. 2d 458 (2006).

¶ 21 To prevail on a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness;

and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Manning*, 241 Ill. 2d 319 (2011); *Strickland v. Washington*, 466 U.S. 668 (1984). Defendant's failure to satisfy either prong defeats a claim of ineffective assistance. *People v. Graham*, 206 Ill. 2d 465 (2003). Thus, if the claim can be disposed of on the ground that defendant suffered no prejudice, the reviewing court need not determine whether counsel's performance was deficient. *Id.*

¶ 22 Here, even assuming trial counsel's failure to lay a foundation for the toxicology report was objectively unreasonable, we find that defendant's claim must fail because he cannot show a reasonable probability that the outcome of the trial would have been different had the toxicology report been admitted into evidence. Defendant argues that if the jury was informed that Thomas-Lynch had cocaine in his system, they may have credited his account that Thomas-Lynch was the aggressor. As such, defendant attempts to introduce Thomas-Lynch's cocaine use to show his character for violence.

¶ 23 When the theory of self-defense is raised in a homicide or battery case, evidence of the victim's aggressive and violent character is relevant to show who the aggressor was, and defendant may show it by appropriate evidence. See Ill. R. Evid. 404(a)(2) (eff. Jan. 1, 2011) (allowing evidence of pertinent character trait of victim); Ill. R. Evid. 405(a) (eff. Jan. 1, 2011) (allowing proof by reputation or opinion testimony); Ill. R. Evid. 405(b)(2) (eff. Jan. 1, 2011) (allowing proof through specific instances of the alleged victim's prior violent conduct); *People v. Lynch*, 104 Ill. 2d 194 (1984). Evidence of a victim's violent character may be offered either: (1) to show that defendant's knowledge of the victim's violent tendencies affected his perceptions of and reactions to the victim's behavior; or (2) to support defendant's version of the facts when there are conflicting accounts of what happened. *Lynch*, 104 Ill. 2d 194.

¶ 24 Here, defendant attempts to introduce the toxicology report to show Thomas-Lynch was more likely to be the aggressor in order to justify his use of deadly force. However, this report falls short of the methods to prove character evidence under Rule 405 through reputation or opinion testimony or specific instances of Thomas-Lynch's prior violent conduct. Instead, defendant would like the jury to infer that because Thomas-Lynch used cocaine, he was more likely to be the aggressor, relying on his affidavit that Thomas-Lynch tended to be more violent when using cocaine and research studies showing a correlation between cocaine use and aggression. This supporting evidence does not tend to show that Thomas-Lynch was more likely to be the aggressor on the day of the shooting because there is no indication what quantity of cocaine would increase Thomas-Lynch's aggression or the type of violence he exhibited when using cocaine in combination with marijuana.

¶ 25 At trial, however, the jury was presented with evidence specifically relating to Thomas-Lynch's conduct on the day of the incident. In defendant's statements to police, he claimed Thomas-Lynch threatened to kill Mixon and everyone on the balcony. Defendant also stated that he believed Thomas-Lynch had a gun, and he thought Thomas-Lynch would shoot him when he reached for his shirt. Martinez supported defendant's claim when he testified that Thomas-Lynch was yelling at Mixon, had an aggressive look on his face, and challenged Mixon to a fight. Martinez also testified that when Thomas-Lynch placed his hand under his shirt like he was reaching for something, defendant fired the gun. The jury was also presented with Davis' testimony that prior to the shooting, Thomas-Lynch did not yell and was not threatening. Davis also stated that when defendant pulled out a gun, Thomas-Lynch began retreating down the stairs. Additionally, none of the witnesses, including defendant, saw Thomas-Lynch with a gun.

¶ 26 The jury considered this evidence and determined that defendant did not reasonably

believe he was in imminent danger of death or great bodily harm. Even if the toxicology report had been admitted, we find no basis for defendant's belief, reasonable or unreasonable, that deadly force was necessary under the circumstances. Other than defendant's affidavit, there was no evidence indicating that Thomas-Lynch was under the influence or that he exhibited conduct that would cause defendant to believe he needed to use deadly force. Instead, the evidence indicated that only defendant had a gun and he repeatedly fired at Thomas-Lynch as he retreated down the stairs. Based on Thomas-Lynch's actual conduct during the incident, we find that admission of the toxicology report would not create a reasonable probability that the result of trial would have been different. As such, defendant cannot show that trial counsel was ineffective. See *People v. Love*, 285 Ill. App. 3d 784 (1996) (stating that a defendant cannot show prejudice merely by speculating that the results would have been different if counsel had performed differently). Therefore, we hold the trial court properly dismissed defendant's postconviction petition.

¶ 27

CONCLUSION

¶ 28

The judgment of the circuit court of Knox County is affirmed.

¶ 29

Affirmed.