2014 IL App (4th) 130705-U

NO. 4-13-0705

FILED
September 9, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
JAMES R. ARMSTRONG,	)	No. 11CF17
Defendant-Appellant.	)	
	)	Honorable
	)	John B. Huschen,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Appleton and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant (1) did not establish his trial counsel's performance was ineffective for not offering a modified Illinois Pattern Jury Instruction, Criminal, No. 3.14 (4th ed. 2000), to the jury, and (2) forfeited his argument the trial court erred in ordering him to pay restitution.

¶ 2 In February 2011, the State charged defendant, James R. Armstrong, with arson (720 ILCS 5/20-1(a) (West 2010)). In October 2011, a Woodford County jury found defendant guilty. In December 2011, the trial court sentenced defendant to four years' imprisonment and ordered him to pay $8,149.74 in restitution.

¶ 3 On appeal, defendant argues (1) he received ineffective assistance of trial counsel because counsel elicited testimony from several witnesses regarding prior bad acts but failed to offer a modified Illinois Pattern Jury Instruction, Criminal, No. 3.14 (4th ed. 2000) (hereinafter,

IPI Criminal 4th No. 3.14), to limit the jury's consideration of that evidence to the witness's motivation to lie; and (2) the trial court erred when it ordered him to pay restitution without considering his ability to pay. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In February 2011, a grand jury indicted defendant for arson (720 ILCS 5/20-1(a) (West 2010)) for the burning of a 2005 Chrysler Town and Country minivan owned by Jeannie Armstrong.

¶ 6 In October 2011, the trial court held a jury trial at which the following evidence was presented. Soon after midnight on June 28, 2010, an El Paso police officer responded to a report of a vehicle fire at Jeannie's home. When Jeannie answered the door and the officer told her the vehicle was on fire, she made a comment to the effect of, "I can't believe he would set my van on fire." Investigators determined the fire was started on the outside of the vehicle. There was evidence of a "pour pattern" along the side of the vehicle and gasoline on the driver's-side door. During a July 1, 2010, interview, defendant told a police investigator "he wanted to hurt [Jeannie] financially, [and] wanted her to lose the van."

¶ 7 Jeannie testified she married defendant in March 2006 but they had separated before the fire. Approximately a week before the vehicle fire, defendant "threatened to hunt [her] down and kill [her]." When the police officer informed her about the vehicle fire, she told the officer she thought defendant "probably did it." At 4:44 a.m. on the day of the fire, she received a text message from defendant asking, "You up yet[?]" Defendant sent her other text messages on June 28, 2010, including one telling Jeannie to call him or he would come and find her. On cross-examination, defense counsel asked Jeannie if defendant had threatened her on

June 27, 2010, and Jeannie testified defendant told her he would "get" her and "get back" at her.

¶ 8 Samantha Armstrong, defendant's daughter, testified she and defendant had a conversation about the vehicle fire in October 2010, in which defendant admitted setting the vehicle fire. On cross-examination, defense counsel inquired whether Samantha told anyone about this conversation. She testified she did not tell anyone "at first, because I was trying to protect my father because I was a big daddy's girl." However, she and defendant had an argument in December 2010 and things changed.

¶ 9 Robert Klein testified he is married to Anna Klein, who was previously married to defendant. On July 12, 2010, he and defendant were talking about the vehicle fire. Robert testified he mentioned the vehicle fire and defendant said, "Jeannie had got what was coming to her." Defendant explained how he would have done it and then "stated that he had gotten a can of gasoline and dumped [it] on the van, and then he put the glass upside down on the van as he was walking away, and he lit the gasoline on fire as it was dripping down the side or running down the side." Robert testified the conversation ended with defendant saying he did not have anything to worry about because he was not in El Paso at the time of the fire and had an alibi witness. On cross-examination, Robert testified he did not tell authorities about this conversation until December 2010 because he "didn't think that my repeating a conversation that was told to me would be cause for anything." Robert testified he told his wife about the conversation, but she would not have told anyone because "[s]he's terrified of him."

¶ 10 Holly Wheeler testified she dated defendant from August 2010 until late November 2010. In October 2010, she and defendant had a conversation about the vehicle fire in which defendant admitted setting Jeannie's van on fire. Defendant boasted he would not get

caught because Trent Gilbert would be his alibi. Wheeler told police about this conversation in December 2010.

¶ 11 On cross-examination, defense counsel asked Wheeler why she waited until December 2010 to talk to police about her conversation with defendant. Wheeler responded, "[b]ecause James had did some property damage after we broke up, and he had threatened my life," and she was concerned about Samantha's safety, so she contacted Samantha and then Jeannie, who forwarded Wheeler's contact information to police. Counsel asked what happened on December 3, 2010, to cause her concern for Samantha's safety. Wheeler testified defendant "threatened" her and her vehicle had been tampered with.

¶ 12 Trent Gilbert testified defendant contacted him and said he was going through a divorce and needed an alibi. When someone contacted Gilbert and asked if defendant was with him on June 27, 2010, he told the person defendant had been with him. Gilbert testified this was a lie and defendant had not been with him on June 27, 2010. He lied because he thought he was helping a friend out with a divorce and would not have lied if he had known defendant was being investigated for arson.

¶ 13 Defendant testified he was with Gilbert on June 27, 2010, watching a softball game and drinking. Late in the evening, Gilbert drove him to the hotel where he was staying. Defendant did not go into the hotel because his "head was spinning," so he stayed outside. He denied asking Gilbert for an alibi, telling Klein about how he would have set the fire, and admitting to Samantha he set the fire. He testified he told Wheeler he had been accused of setting the fire.

¶ 14 The jury found defendant guilty of arson.

¶ 15 In December 2011, the trial court held a sentencing hearing. The parties stipulated restitution would be paid to Government Employee Insurance Company (GEICO) in the amount of $8,149.74. The court sentenced defendant to four years' imprisonment and ordered him to pay $8,149.74 in restitution to GEICO within six months of discharge

¶ 16 In December 2011, defendant filed a motion for a new trial, arguing the State's witnesses had a "grudge" against him and the evidence was inconclusive of his guilt. The same month, before the trial court heard the motion, defendant appealed. In May 2013, this court found the appeal premature because of the pending posttrial motion and remanded the case to the trial court. *People v. Armstrong*, 2013 IL App (4th) 120008-U, ¶¶ 11-13. In August 2013, the trial court denied defendant's motion for a new trial.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant argues (1) he received ineffective assistance of trial counsel because counsel elicited testimony from several witnesses regarding prior bad acts but failed to offer a modified IPI Criminal 4th No. 3.14 to limit the jury's consideration of that evidence to the witness's motivation to lie; and (2) the trial court erred when it ordered him to pay restitution without considering his ability to pay. We affirm.

¶ 20 A. Defendant's Ineffective-Assistance-of-Counsel Claim

¶ 21 1. *The Strickland Standard*

¶ 22 Ineffective-assistance-of-counsel claims are reviewed under the two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a defendant must demonstrate (1) "his defense counsel's performance was

deficient in that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment' "; and (2) "but for defense counsel's deficient performance, the result of the proceeding would have been different." *People v. Coleman*, 183 Ill. 2d 366, 397, 701 N.E.2d 1063, 1079 (1998) (quoting *Strickland*, 466 U.S. at 687, 694.). To satisfy the first prong, "a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *Id.* A court "may resolve ineffectiveness claims under the two-part *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance." *Id.* at 397-98, 701 N.E.2d at 1079.

¶ 23 2. *Merits of Defendant's Claim*

¶ 24 Defendant asserts defense counsel was deficient for failing to offer a modified IPI Criminal 4th No. 3.14 where counsel, on cross-examination, elicited (1) Wheeler's testimony defendant threatened her and her car was tampered with, and (2) Robert Klein's testimony Anna Klein was terrified of him. Defendant asserts there is no strategic reason for not submitting a modified IPI Criminal 4th No. 3.14 to limit Wheeler's testimony "to her motive to fabricate evidence" against him. He suggests the jury should have been provided with a modified IPI Criminal 4th No. 3.14 stating:

> "[1] Evidence has been received that the defendant has been involved in conduct other than that charged in the information.
>
> [2] This evidence has been received on the issue of an individual's motive to testify falsely against the defendant, and

may be considered by you only for that limited purpose.

[3] It is for you to determine what weight should be given to this evidence on the issue of whether this provided motive for the individual to testify falsely against the defendant."

Defendant's argument is unpersuasive.

¶ 25 "[IPI Criminal 4th No. 3.14] is the appropriate jury instruction to be given to explain to the jury the limited purpose of other-crimes evidence." *People v. Stevenson*, 2014 IL App (4th) 130313, ¶ 55, 12 N.E.3d 179. "The term 'other-crimes evidence' encompasses misconduct or criminal acts that occurred either before or after the allegedly criminal conduct for which the defendant is standing trial" (*People v. Spyres*, 359 Ill. App. 3d 1108, 1112, 835 N.E.2d 974, 977 (2005)) and is limited to acts committed by the *defendant* (*People v. Pikes*, 2013 IL 115171, ¶ 16, 998 N.E.2d 1247). See also *People v. Chapman*, 2012 IL 111896, ¶ 19, 965 N.E.2d 1119 ("evidence of other crimes is admissible if relevant for any purpose other than to show a defendant's propensity to commit crimes"); Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); *Stevenson*, 2014 IL App (4th) 130313, ¶ 44, 12 N.E.3d 179 ("Permissible purposes for other-crimes evidence include motive, intent, identity, lack of mistake, and *modus operandi*.").

¶ 26 The unmodified IPI Criminal 4th No. 3.14 reads as follows:

"[1] Evidence has been received that the defendant[s] [(has) (have)] been involved in [(an offense) (offenses) (conduct)] other than [(that) (those)] charged in the [(indictment) (information) (complaint)].

[2] This evidence has been received on the issue[s] of the

[(defendant's) (defendants')] [(identification) (presence) (intent) (motive) (design) (knowledge) (_____)] and may be considered by you only for that limited purpose.

[3] It is for you to determine [whether the defendant[s] [(was) (were)] involved in [(that) (those)]](offense) (offenses) (conduct)] and, if so,] what weight should be given to this evidence on the issue[s] of ____."

¶ 27 Defendant cannot establish trial counsel was deficient for failing to offer a modified IPI Criminal 4th No. 3.14. It is well established " '[m]atters of trial strategy are generally immune from claims of ineffective assistance of counsel.' " *People v. Manning*, 241 Ill. 2d 319, 327, 948 N.E.2d 542, 547 (2011) (quoting *People v. Smith*, 195 Ill. 2d 179, 188, 745 N.E.2d 1194, 1200 (2000)). See also *People v. Pecoraro*, 175 Ill. 2d 294, 326-27, 677 N.E.2d 875, 891 (1997) ("The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court. Defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable."). Defendant does not argue counsel's cross-examination was deficient and acknowledges counsel sought to discredit several witnesses by highlighting reasons they might have had to blame defendant and the amount of time they waited before telling police about defendant's admission. Nor does he argue IPI Criminal 4th No. 3.14 was necessary because counsel introduced alleged other-crimes evidence. (We note evidence *someone* tampered with Wheeler's vehicle and another person is terrified of defendant is not misconduct qualifying as other-crimes evidence.) Rather, defendant argues trial

counsel was deficient for not *offering* a *modified* IPI Criminal 4th No. 3.14 for the purpose of limiting the jury's consideration of Wheeler's testimony to her "motive to fabricate evidence." Defendant has not provided any precedent where other-crimes evidence was introduced and a jury instruction given to limit the jury's consideration of the evidence to discrediting a witness or that IPI Criminal 4th No. 3.14 was modified in the manner suggested. Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 1.02), is the appropriate instruction to explain to the jurors they are the sole judges of the believability of the witnesses, and the jury received IPI Criminal 4th No. 1.02. As defendant has provided no legal basis for his proposed jury instruction, we conclude trial counsel's failure to offer such an instruction was not so objectively unreasonable "no reasonably effective defense attorney faced with similar circumstances would pursue that strategy." *People v. Shelton*, 401 Ill. App. 3d 564, 584, 929 N.E.2d 144, 163 (2010).

¶ 28 Defendant cannot show he was prejudiced by defense counsel's performance in failing to *offer* a modified IPI Criminal 4th No. 3.14. As above, defendant has provided no authority to support modifying IPI Criminal 4th No. 3.14 in the manner suggested. Nor has he shown such an instruction or "modified" IPI Criminal 4th No. 3.14 would have been accepted by the trial court. See *People v. Banks*, 237 Ill. 2d 154, 210, 934 N.E.2d 435, 466 (2010) ("The decision to give a non-IPI rests within the sound discretion of the trial court."). Moreover, IPI Criminal 4th No. 1.02, which was given to the jury, adequately addresses witness credibility and was sufficient to address the issue. See *People v. Maldonado*, 193 Ill. App. 3d 1062, 1072, 550 N.E.2d 1011, 1018 (1989). As it is the jury's function to assess the credibility of the witnesses (*People v. Washington*, 2012 IL 110283, ¶ 60, 962 N.E.2d 902), a reasonable jury could have

found the witnesses' testimony defendant admitted he set the fire credible despite the fact they did not immediately tell others or may have had "an ax to grind." Indeed, the jury could have concluded defendant, who testified everyone but him was lying, was the one lacking credibility.

¶ 29 Assuming *arguendo* counsel was deficient for failing to offer this instruction, defendant cannot show the result would have been different. The evidence showed defendant had a motive for setting the fire, asked Gilbert to provide him with an alibi, told Klein he set the fire in a manner consistent with how investigators testified the fire was set, told police investigators he wanted to financially hurt Jeannie, and admitted to his daughter he set the fire.

¶ 30 B. Defendant's Restitution Claim

¶ 31 Defendant argues the trial court improperly ordered him to pay restitution because it did not consider his ability to pay. He adds the order to pay $8,149.74 six months after release from prison is "onerous."

¶ 32 At the sentencing hearing, the State and defense counsel stipulated to restitution in the amount of $8,149.74 to GEICO. The parties' stipulation did not include the payment term "six months after discharge." This term was announced by the trial court. With respect to defendant's argument the court did not consider his ability to pay, there was no need for the court to do so where defendant stipulated to the restitution. With respect to the due date for the restitution to be paid, defendant forfeited this issue as he did not object to the restitution order at sentencing or raise the issue in his motion to reconsider sentence. *People v. Culbreath*, 343 Ill. App. 3d 998, 1008, 798 N.E.2d 1268, 1276 (2003).

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the trial court's judgment. As part of our

judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 35 Affirmed.