2016 IL App (3d) 140334-U

Order filed November 9, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0334
v.	)	Circuit No. 13-CF-426
	)	
ANTHONY D. BARLOW,	)	Honorable
	)	Stephen Kouri,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Schmidt concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held*: Defendant's trial counsel did not provide ineffective assistance for failing to call defendant's close friend as a witness at defendant's murder trial, as a matter of trial strategy, where the potential witness was not credible and defense counsel could not be sure of his testimony. Defendant's trial counsel did not provide ineffective assistance by failing to request a jury instruction regarding accomplice-witness testimony where the defense's theory was that defendant was not a participant in the crime.

¶ 2 Following a jury trial, defendant, Anthony D. Barlow, was found guilty of armed robbery and first degree murder. Defendant was sentenced to 35 years of imprisonment for first degree murder. Defendant appealed, arguing his trial counsel was ineffective. We affirm.

¶ 3 FACTS

¶ 4 On May 21, 2013, defendant was charged with armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)). The State alleged that defendant, on November 4, 2011, "while armed with a firearm, took property being United States currency from the person or presence of Yahya D. Mahmoud, a/k/a John Mahmoud, by the use of force or by threatening the imminent use of force." Mahmoud died from complications from the gunshot wound he received during the armed robbery and the State subsequently also charged defendant with the first degree murder of Mahmoud (720 ILCS 5/9-1(a)(3) (West 2010)).

¶ 5 On November 12, 2013, defendant's jury trial took place. In her opening statement, the prosecutor argued that the evidence would show that in November of 2011, John Mahmoud received a text message from a stripper he knew as "Jazmine." Jazmine wanted to know if Mahmoud wanted to party, and they agreed to meet at a gas station. Jazmine, who was later identified as Lakisha Foster, got a ride to the gas station from a second girl, who was later identified as Helen Starks. Defendant, who was Lakisha's boyfriend, rode in the car with Lakisha and Helen to the gas station. At the gas station, Lakisha got out of Helen's car and got into Mahmoud's black BMW. Helen parked a few car lengths behind the BMW and also got into Mahmoud's BMW. Defendant appeared at the passenger door of Mahmoud's BMW, armed with a gun, and demanded money from Mahmoud. Mahmoud gave his wallet. A second man appeared at the driver's side of Mahmoud's BMW, broke the glass of the driver's side window,

and shot Mahmoud in the chest. Fingerprints discovered on the driver's side door belonged to the second man, Robert Buford.

¶ 6 In her opening statement, defense counsel indicated that the evidence would show that defendant was not at Mahmoud's BMW at the time Buford shot Mahmoud and defendant was not accountable for the shooting. Defense counsel indicated the evidence would show that Mahmoud knew Lakisha as "Jazmine" for about a year from frequenting strip clubs where Lakisha danced and defendant was Lakisha's boyfriend at the time of Mahmoud's murder. Defense counsel also indicated that the evidence would show that Helen drove Lakisha to the gas station to meet Mahmoud. Helen would testify that defendant was in the car with them, but Lakisha would testify that defendant was not in the car when they drove to the gas station. Defense counsel told the jury that fingerprints found on the BMW showed that the man on the driver's side of the vehicle was Robert Buford and other fingerprints found on the BMW confirmed that "Jazmine" was Lakisha Foster. Defense counsel told the jury that that Helen, Lakisha, Buford and defendant ended up at the home of defendant's sister, Keyiana Jackson, after the shooting, but whether defendant was present at the BMW when the robbery took place was for the jury to decide. Defense counsel further indicated there would be evidence that defendant had been shot in the knee about a month prior to Mahmoud's murder and defendant was on crutches and had a knee brace on the day of the incident.

¶ 7 The evidence at defendant's jury trial showed that on November 4, 2011, at 1:45 a.m., Mahmoud's vehicle pulled up next to a taxi cab and Mahmoud yelled that he needed an ambulance because he had been shot. The cab driver immediately got out of her car and opened Mahmoud's driver's side door. The cab driver saw shattered glass. Mahmoud indicated he had been shot in his chest. The cab driver called 9-1-1. On the 9-1-1 recording the cab driver could

be heard asking Mahmoud, "Do you know who shot you?" Mahmoud responded that two black males shot him when he was parked in his car, but Mahmoud did not know their identities.

¶ 8 A police officer testified that he discovered Mahmoud with a single gunshot wound to his chest. Mahmoud told the officer that he and a female named "Jazmine" were talking in his parked car when two black males approached on either side of his vehicle. The male on the driver's side of his car produced a handgun and shot Mahmoud in the chest and then asked Mahmoud for his wallet, which Mahmoud provided. "Jazmine" got out of his car and was grabbed by the male on the passenger side. Mahmoud was transported to the hospital. The officer searched Mahmoud's vehicle for Mahmoud's cellular phone but did not find it. Lakisha's purse was found in the BMW. Mahmoud's wallet was later found in the area of where the incident took place. There was no cash in the wallet.

¶ 9 Helen testified that her family was close family friends with defendant's family. Helen testified that on the evening of November 3, 2011, she worked at Buffalo Wild Wings until 11:30 p.m. and then went home. Helen received a phone call from Lakisha and then went to defendant and Lakisha's home. Buford was also at their home. Helen drove defendant, Buford, and Lakisha to a gas station where Lakisha got into the BMW of Lakisha's "trick" (Mahmoud's vehicle). Lakisha called Helen and asked her to get into Mahmoud's vehicle because Lakisha was "fixin to turn the trick" but did not feel safe. Helen parked her vehicle a few parking spots from Mahmoud's vehicle and got into Mahmoud's vehicle. Defendant and Buford remained in Helen's vehicle.

¶ 10 Mahmoud began to repeatedly ask if Lakisha was trying to set him up, which made Helen feel uncomfortable so she asked to be let out of the car. Lakisha move the front passenger seat forward, and Helen exited out of the passenger side of the car. Helen heard defendant, who was

standing on the passenger side of Mahmoud's vehicle say, "Bitch, get down on the ground." Defendant appeared as though he could have had a gun, but Helen did not know if he had a gun. Helen also testified that Buford was on the driver's side of the car and Buford had gun. Buford told Mahmoud, "Bitch, give me what you got." Helen ducked and heard glass shattering on the driver's side of the car, and then she heard two or three gunshots. Helen ran back to her car. As she was running, Buford and defendant told her to meet them at Keyiana's home, which was one or two blocks away. Helen, defendant, and Buford arrived at Keyiana's home at the same time. Buford had a gun, and defendant had a cell phone. Defendant gave the cell phone to Buford. Helen did not know to whom the phone belonged. Lakisha subsequently arrived and was angry that defendant left her behind. Helen did not see any money, jewelry, or wallet while she was at Keyiana's home, and she never asked for any money from Lakisha, Buford or defendant. Keyiana was "snapping" and cussing everybody out because she was angry that they had come to her house. Keyiana made everyone leave. Helen gave defendant a ride home, and then she went home. Helen did not go to police after the incident because Buford and defendant told her not to say anything. Helen confirmed that at the time of the incident, defendant had a limp due to a gunshot wound that he incurred the month prior.

¶ 11 A few weeks after the incident, on December 8, 2011, Helen had been interviewed by police. At trial, Helen testified that she did not tell police that Buford was present during the armed robbery because she was drunk and high on marijuana during the interview. Helen had told police that defendant told her to get down and hit her in the head with a gun during the incident, but at the time of trial she testified that she could not recall whether defendant had a gun. Helen also told police during her interview that defendant was not the shooter.

¶ 12 Keyiana Jackson testified that she was defendant's sister. Keyiana knew Lakisha, who was defendant's girlfriend, through defendant. Keyiana also knew Helen and Buford because they had been family friends since childhood. In the early morning hours of November 4, 2011, Keyiana and her cousin Michelle Talley were asleep in Keyiana's home. They were awoken by a knock on the front door. Helen, Buford, and defendant were at the front door. Keyiana argued with defendant about coming to her home so late. About 15 or 20 minutes later Lakisha arrived. Lakisha was acting weird and crying. Both Buford and defendant used the bathroom. Keyiana did not recall seeing anything in her bathroom that was not there prior to the arrival of defendant, Buford, Helen and Lakisha. Keyiana testified that she did not recall giving a statement to police indicating that Buford and defendant were in the bathroom together with a broken touch screen cell phone that did not belong to her brother. Keyiana also testified that she did not recall what she had told police when she was interviewed because she was just saying anything to be able to go home after police told her that they would take her kids from her. She testified police had told her that she could be facing 10 to 22 years of imprisonment for obstruction of justice. On cross-examination, Keyiana confirmed that Helen, Buford, and defendant arrived at her home together and prior to the arrival of Lakisha. Keyianna testified that she did not recall telling police that Lakisha had arrived first. Keyiana went on to testify that she did not remember who arrived at her home first. Keyiana also testified that on November 4, 2011, defendant was walking with a limp and had crutches with him. Keyiana testified that she heard Helen ask Lakisha, "Where is my fucking money?" Defendant, Buford, Helen and Lakisha were still in Keyiana's home when she went to bed.

¶ 13 Portions of the video of Keyiana's police interview were entered into evidence. In her police interview, which took place on April 16, 2013, Keyiana had been told that she was in

police custody in connection with the investigation of a murder. The detective told Keyiana that she was going to be asked some "very pointed questions" and whether or not she answered them "could determine what happens from this point on." The detective noted that Keyiana had three kids and that he wanted Keyiana to go home that day, but he was "looking for cooperation." Keyiana was asked about the night of the incident and she indicated, "They kept saying it was a robbery gone wrong." Keyiana had asked her brother if he did anything that night, and he said, "Sis, this ain't got nothing to do with you." Keyianna said that defendant and Buford were talking in the bathroom and when she attempted to get into the bathroom, she saw a black, expensive, "high-tech," touch phone, with a broken screen.

¶ 14 Michelle Talley, who is Keyiana and defendant's cousin, testified that she was awoken in the early morning of November 4, 2011, from the arrival of defendant, Buford, Helen and Lakisha at Keyiana's home. Michelle could not recall who arrived first, but she did recall that defendant and Buford arrived together. When Lakisha arrived she looked upset, and she sat on the couch. Michelle saw Helen counting $120 or $140 in currency. Michelle denied telling police that it did not take long for defendant, Buford, Helen, and Lakisha to divvy up the money. A video of Michelle's police interview was entered into evidence. On the video Michelle told police that some money came out and it did not take long for the foursome (Helen, Lakisha, Buford and defendant) to divvy up the money.

¶ 15 Officer Scott Bowers testified that Buford's thumbprint was found on the driver's side door of Mahmoud's BMW and Lakisha's fingerprint was found on the exterior side of the passenger door. The driver's side window of the BMW was broken. Inside the BMW Bowers found an iphone case but no phone. Mahmoud's shirt had three holes, which were possible bullet holes, on the left arm and left chest area.

¶ 16 Lakisha testified that in November of 2011 she was working at a strip club in Peoria. She had been working there, on and off, for six to seven years. For the past year, she had been in a "dating relationship" with Mahmoud. She considered herself to be "somebody to please him" and had sex with him for money. At the time of the Mahmoud's murder, Lakisha was also defendant's girlfriend. Defendant and Lakisha lived together. On the evening of November 3, 2011, Lakisha had begun texting Mahmoud from her home while defendant and Buford were present. Lakisha and Mahmoud agreed to meet at a gas station. Helen arrived at defendant and Lakisha's home that evening and drove Lakisha to the gas station to meet Mahmoud. Defendant and Buford were still at the apartment when they left and were not in the car with Helen and Lakisha when they drove to the gas station. At the gas station, Lakisha got into Mahmoud's car and asked him if he wanted to go to a bar for drinks. Helen followed Mahmoud and Lakisha to the bar, but the bar was closed. Mahmoud indicated they could just do their "thing" and found a dark place to park. Helen joined Mahmoud and Lakisha in Mahmoud's car and was in the back seat. Lakisha, Helen, and Mahmoud were going to do "this little kind of a threesome thing" but Mahmoud did not want to do anything with Helen, so Helen started getting out of the car on the passenger side of the vehicle. Lakisha heard defendant say, "Bitch, get down." Defendant was speaking to Lakisha in a very aggressive tone from the passenger side of the car. Lakisha was surprised by defendant and got down. She heard something slide across the roof of the car, like metal on metal. Buford tapped on the driver's side window and told Mahmoud to open the window. Lakisha heard a gunshot and ran to Keyiana's home, leaving her purse and beer in Mahmoud's vehicle. (Police found soda in the BMW but not a beer).

¶ 17 Lakisha testified that Keyiana opened the door when Lakisha arrived. Lakisha believed she was the first one to arrive at Keyiana's home, but she was not sure of the order in which she,

Helen, Buford and defendant had arrived at Keyiana's home. Lakisha saw Buford give defendant what Lakisha recognized as Mahmoud's cell phone. Defendant had a cell phone but it was different than Mahmoud's cell phone. Lakisha asked defendant and Buford why they would do that to her and indicated that she had left her purse with all her information in Mahmoud's vehicle. Keyiana drove the foursome (defendant, Lakisha, Helen, and Buford) to defendant and Lakisha's home. Lakisha went home with defendant, despite the shooting, because they lived together. Lakisha did not call police.

¶ 18 On November 26, 2011, about three weeks after the incident, Lakisha had been questioned by police about the robbery and shooting of Mahmoud. At that time, Lakisha told police that she did not know the two black males who had approached on either side of the BMW and robbed and shot Mahmoud. Lakisha testified that she lied to police because defendant had threatened her.

¶ 19 Defendant's medical records were introduced into evidence and showed that he had suffered a leg wound in the month prior to the incident. Defendant's medical records indicated that at the time of the incident defendant was able to move about "very comfortably" using one crutch.

¶ 20 In closing arguments, defense counsel argued that Lakisha and Helen testified falsely, and defendant could not have participated in the crime because he had a leg injury. The jury found defendant guilty of both armed robbery and first degree murder.

¶ 21 Defendant filed a *pro se* motion alleging ineffective assistance of counsel, arguing that his counsel should have contacted Buford to prove defendant's innocence. Defendant's trial counsel testified that she did not call Buford as a defense witness because she could not be sure

of what his testimony would be at trial. The trial court appointed a new public defender to represent defendant on his ineffective assistance of counsel claim.

¶ 22 At the hearing on defendant's motion, defendant testified that the day before his trial he requested that his attorney subpoena Buford to testify at his trial that Buford did not know the other person involved and that Buford had not planned the robbery with anyone but the two females. Defendant's attorney indicated that the State had already subpoenaed Buford and she would speak with him when he got to the courthouse the following day. The State never called Buford as a witness, and it was defendant's understanding that his attorney never spoke with Buford. It was also defendant's understanding that Buford was in the court house on the day of defendant's trial but since his defense counsel never subpoenaed Buford they could not call him as a witness. Defendant asked his counsel to find Buford in the courthouse and ask him what his testimony would be if he were called as a defense witness. Defendant was "kind of sure" that his counsel never spoke with Buford because she never indicated that she did so, but defendant was not 100% sure. Defendant did not speak with Buford prior to trial and did not know what Buford would have said at his trial. Defendant believed, based on police reports and Buford's videoed police statements, that Buford would have testified that Buford and a female planned the robbery and that Buford had not planned the robbery with defendant or any other male because Buford had never implicated defendant. Defendant acknowledged that Buford could have also testified that defendant was the shooter and had planned the robbery. Defendant also acknowledged that he did not know what Buford's testimony would have been.

¶ 23 Defendant's post-trial counsel indicated he had a "proffer" for the trial court in that earlier in the week he had spoken with Buford, who had been sentenced to 20 years of

imprisonment, in regard to what Buford's statement would have been had he been called to testified as a witness at defendant's trial. Defendant's counsel stated:

> "His testimony would essentially be as follows: That he did participate in what's called a lick, a robbery. He participated in it. He says that Lakisha orchestrated it, called him and he appeared at the location of the incident in question where the black BMW was located. He drove up by himself. He approached that black BMW initially from the driver's side, and then he said that he walked around to the passenger's side. He states that he never had a gun. He states that he never saw a gun. He additionally stated that [defendant], who he knew as a—you know, throughout his life and knew who he was and what he looked like, was not present there that day. I would also proffer that he—in regards to the unknown black male that was there, that that person was unknown to him. He didn't know who it was. He didn't get a good look at him. He never saw that other black male with the gun. He said that when he was on the passenger's side of the vehicle that's when he heard a shot, but didn't see a shot, and then he fled."

¶ 24 The prosecutor made an offer of proof, stating that it was probably not clear on the record that defendant's trial counsel had passed away and could not be called as a witness. The prosecutor indicated that she had previously spoken with defendant's trial counsel and her testimony would have been the same as defendant's in regard to discussing whether to call Buford as a witness both before and during trial. The prosecutor indicated that defendant's trial counsel knew Buford would be in the courthouse on the day of trial because the State had issued a writ for his appearance, but she decided not to call Buford as a witness because they did not

know what Buford would say during his testimony and he could have said defendant was the shooter, making it too much of a risk to have him testify.

¶ 25 With no objection from either party, the trial court took judicial notice of Buford's police interviews regarding the crime, wherein Buford eventually confessed to his involvement but did not identify defendant as a participant.

¶ 26 During his initial five-hour police interview on December 28, 2011, Buford confirmed that he had been in jail since December 7, 2011, after being arrested on an unrelated incident. Detectives asked Buford where he was on November 4, 2011, or the first week of November. Buford said he was likely staying at a friend or family member's home in Peoria with his "baby momma." Buford lived with his mom but stayed over at other people's homes when he was spending time with his "baby momma." Buford did not have a job. On the weekends, Buford mostly got drunk or smoked weed. Buford made most of his money by doing $5 haircuts at his mother's house and selling a little bit of crack. Buford had three kids with different women and had one child on the way. Buford was shown a picture of Lakisha, and Buford said that he knew her through defendant as "Jaz." Buford and defendant knew each other their whole lives because their mothers had grown up together, and Buford considered defendant to be his cousin. Buford and defendant would hang out at Lakisha and defendant's home or at the home of defendant's sister, Keyiana. They all hung out about two or three times per week. Lakisha was a stripper and was "defendant's girl." Both defendant and Lakisha drank "like a mother-fucker." Defendant had been shot a couple months ago and was on crutches. Defendant could not really move around, so he and Buford would hang out and play video games. The detectives showed Buford a photo of Mahmoud, and Buford indicated that he had never seen Mahmoud before. Detectives asked Buford what he would say if they could put Buford with Mahmoud on the

morning of November 4, 2011. Buford indicated that he had never seen Mahmoud before in his life and was never with him. Detectives told Buford that Mahmoud was dead and they were giving Buford an opportunity to explain his actions on November 4, 2011. Buford said: "I don't know what happened with that man," "I promise you I have never seen him," "I don't even play with guns," "If I knew what happened to that man, I would have told you," "I would have told you all if anything happened," "It couldn't have been too much evidence because I wasn't there," and "I don't know this man." Detectives showed Buford a photo of Mahmoud's black BMW. Buford indicated that he did not know Mahmoud and had never been in or around Mahmoud's black BMW. Detectives told Buford that Lakisha told them that she was with Mahmoud in his black BMW when two guys came up on either side of the vehicle and the man on the driver's side demanded money from Mahmoud. Lakisha would not identify the man on the passenger side but indicated Buford was the man on the driver's side. Detectives indicated they knew Lakisha set up the robbery of Mahmoud and Buford needed to tell police if he had shot Mahmoud intentionally or accidentally. Buford indicated he was telling police everything he knew. "To be honest with ya'll if she telling you I was there, I just met her." Police indicated that Lakisha had Buford's number in her phone. Buford said that Lakisha must have gotten his number from defendant because he never spoke with Lakisha on the phone. Buford said that he would not do an armed robbery and, if he did, it would not have been a robbery set up by Lakisha. When detectives asked if defendant was at the robbery, Buford indicated that he really did not know if defendant was there because Buford was not there. Detectives repeatedly told Buford they had evidence, other than Lakisha's statement, that placed Buford at the robbery. Detectives continued to ask Buford if the shooting was an accident or intentional. Buford did not

respond. After five hours of being in the interview room, Buford indicated, "I need some time, man."[1] The detectives agreed to let Buford think about things overnight.

¶ 27 In Buford's second interview the following day on December 29, 2011, detectives told Buford they knew Lakisha set up the robbery and they believed the shooting was an accident but they needed to hear Buford's side of the story. Buford asked why Lakisha was not locked up if they knew that she was the mastermind. Detectives told him they had plans for everyone involved. The detectives asked, "Was it an accident or was it intentional?" Detectives said, "We can explain an accident but we cannot explain an execution." Buford indicated that a couple of nights before the robbery Lakisha told Buford about one of her "regular" clients who had money. Lakisha told Buford that her "regular" would be an easy robbery. Lakisha gave Buford a gun prior to the robbery. On the evening of the robbery Lakisha called Buford when Buford was at Keyiana's house smoking weed, drinking, and trying to hit on one of Keyiana's friends. Lakisha asked Buford if he still needed money, and Buford thought, "yeah, why you got some money for me?" Buford indicated that it was strange that Lakisha called him out of the blue because he and Lakisha did not really have a relationship where they would speak with each other on the phone. Lakisha told Buford that she was down the road in a black car with the headlights on with her "regular." Buford decided to participate in the robbery because he needed the money to help his pregnant girlfriend and his mother. Buford walked out of Keyiana's home to do the robbery and there was already a man standing at the corner. Buford told the detectives, "then what fucked me up was that she never said there was gonna be another motherfucker." The detective asked, "Who do you think it was?" Buford said that he did not know the other man. They asked if the second man was defendant, and Buford said that he did not know

[1] During the interview, the detectives left the room to give Buford breaks, and they gave Buford cigarettes, food, and water.

because the second man was wearing a hoodie. Buford indicated that he went up to driver's side window from the rear of the car and tapped on the driver's side window. Lakisha was in the front seat and a second woman was in the back seat. Buford pointed the gun at Mahmoud and said, "Give me everything." Mahmoud asked Lakisha, "What the fuck?" Mahmoud rolled down the window, and Buford stuck his arm with the gun into the car. Mahmoud grabbed Buford's wrist and pulled. The window started rolling up. Buford tried to drop the gun and pull his arm away from Mahmoud, but his middle finger caught the trigger and the gun went off. Buford did not take a cell phone or wallet from Mahmoud. Buford said that he did not get anything for the attempted robbery. After the gun went off, Buford ran to Keyiana's house alone. Lakisha was not at Keyiana's house after the robbery. Buford told detectives that he gave the gun back to Lakisha later the day of the incident or the following day.

¶ 28 After reviewing Buford's police interviews, the trial court denied defendant's motion for new trial and claim of ineffective assistance of counsel. The trial court found that a reasonable defense attorney would have found Buford's testimony damaging due to his lack of credibility. At sentencing, the trial court sentenced defendant to 35 years of imprisonment. Defendant appealed.

¶ 29 ANALYSIS

¶ 30 I. Failure to call Buford as a Witness

¶ 31 On appeal, defendant asserts his trial counsel was ineffective for failing to call Buford as a defense witness to testify at his trial. At the time of defendant's trial, charges were pending against Buford related to the robbery and murder of Mahmoud. Evidence at defendant's trial indicated that Buford had shot Mahmoud during the course of a robbery. Buford did not testify for the State or for the defendant. Prior to defendant's trial, Buford had confessed to shooting

Mahmoud. Defendant claims that Buford was the only person who could have corroborated his defense theory that he was not present at the crime and, thus, his counsel was ineffective for failing to call Buford as a witness at trial. The State argues that defendant's trial counsel was not ineffective because her decision not to call Buford as a witness was a matter of trial strategy.

¶ 32 To prove ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and counsel's deficiency prejudiced defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). To the extent the trial court's findings of fact bear upon its ineffective assistance of counsel determination, those findings shall be given deference and will not be reversed unless they are against the manifest weight of the evidence. *People v. Max*, 2012 IL App (3d) 110385, ¶ 64. The ultimate question of whether trial counsel provided ineffective assistance is a question of law that is subject to a *de novo* review. *Id.*

¶ 33 Counsel's conduct is afforded a strong presumption that it falls within a range of reasonable professional assistance and that challenged actions constituted sound trial strategy. *Albanese*, 104 Ill. 2d at 526. Decisions regarding evidence to present, which witnesses to call, and the theory of the defense are all matters of trial strategy, which are generally immune from claims of ineffective assistance of counsel. *People v. Morris*, 2013 IL App (1st) 110413, ¶ 74. A defendant may overcome the strong presumption that a challenged action is a matter of sound trail strategy by showing that counsel's decision not to present a witness was so irrational and unreasonable that no reasonably effective defense attorney would pursue the same strategy. *Id.* Counsel may be deemed ineffective for failing to present exculpatory evidence, including failing to call witnesses whose testimony would support an otherwise uncorroborated defense. *People v. Bryant*, 391 Ill. App. 228, 238 (2009).

¶ 34 In this case, defendant's post-trial counsel indicated Buford's potential testimony would have been that Buford did not know the other man at the crime scene and did not get a good look at the other male but that the other male did not have a gun. Buford also told defendant's posttrial counsel that he was not the shooter and did not have a gun. Buford claims he was on the driver's side briefly but walked around to the passenger side. Mahmoud, Lakisha, and Helen all had indicated the person on the driver's side shot Mahmoud. Buford's indication that he was not the shooter and was not the person on the driver's side when Mahmoud was shot creates a possible inference that defendant was not only present, as Helen and Lakisha had testified, but that defendant was the shooter. Additionally, the version of events that Buford relayed to defendant's post-trial counsel varied substantially from his police statement, in which he had admitted to standing on the driver's side of the vehicle and accidently shooting Mahmoud during the robbery while the other male, who he could not identify because the second male was wearing a hoodie, stood on the passenger side of the vehicle. At no point did Buford definitely indicate that defendant was not a participant in the robbery.

¶ 35 Furthermore, the version of events that Buford relayed to defendant's post-trial counsel did not seem plausible or credible in light of other evidence presented at trial. Both Lakisha and Helen testified that defendant was standing on the passenger side of the vehicle. Defendant was with Lakisha, Helen, and Buford, who had all admitted to being at the robbery, immediately prior to and immediately after the incident. Defendant's sister and cousin indicated that defendant appeared at his sister's house, just blocks from the incident, at the same time the others had come to her house, in the early morning of November 4, 2011. Thus, in determining that counsel was not ineffective for failing to call Buford as a witness, it was not against the manifest weight of the evidence for the trial court to find Buford would not have been a credible witness.

Max, 2012 IL App (3d) 110385, ¶ 64 (the trial court's findings of facts that bear upon its ineffective assistance of counsel determination shall be given deference unless against the manifest weight of the evidence); *cf. People v. Belknap*, 2014 IL 117094, ¶ 50 (a reviewing court must undertake a commonsense analysis of all the evidence in context when reviewing a claim under the first prong of the plain error doctrine); *cf. People v. Adams*, 2012 IL 111168, ¶ 22 (in determining whether the evidence was closely balanced under a plain error review, the reviewing court noted it must make a commonsense assessment of the evidence and determined that defendant's explanation of events, while not logically impossible, was highly improbable).

¶ 36 We also note that defendant does not present an affidavit from Buford of his potential testimony. From Buford's indication to post-trial counsel, it seems that Buford would have denied being the shooter, which could imply that defendant was the shooter. On this record, defendant's assertion that Buford's testimony would have corroborated his defense is nothing more than speculation. Therefore, defendant has not overcome the strong presumption that his trial counsel's decision to refrain from calling Buford as a witness was a matter of sound trial strategy.

¶ 37 II. Accomplice-Witness Jury Instruction

¶ 38 Defendant argues that his counsel was ineffective for failing to request a jury instruction regarding accomplice-witness testimony in regard to Lakisha and Helen's testimony. As stated above, to prove ineffective assistance of counsel a defendant must show that his or her counsel's performance was deficient and counsel's deficiency prejudiced defendant. *Strickland*, 466 U.S. at 687; *Albanese*, 104 Ill. 2d at 525.

¶ 39 Counsel may render ineffective assistance for failing to tender the accomplice-witness jury instruction regarding accomplice testimony. *People v. Campbell*, 275 Ill. App. 3d 993, 999 (1995). Illinois Criminal Pattern Jury Instruction 3.17 (IPI No. 3.17) provides:

> "When a witness says he was involved in the commission of a crime with defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000).

¶ 40 A witness is an accomplice for the purpose of providing the accomplice-witness instruction where there is probable cause to believe the witness was guilty of the offense at issue as a principle or under a theory of accountability. *People v. Caffey*, 205 Ill. 2d 52, 116 (2001). Thus, the accomplice-witness instruction should be given where all the evidence and reasonable inferences flowing from the evidence establish probable cause to believe the witness participated in the planning or commission of the crime. *Id.*

¶ 41 In this case, although there may be probable cause to believe that the foursome planned the robbery of Mahmoud together, defendant's counsel may have chosen, as a matter of trial strategy, to forgo the instruction. The defense's theory was that defendant was not at the scene of the crime and was not involved in the robbery. Requesting a jury instruction that suggests the foursome were accomplices would have undermined defendant's theory of the case.

¶ 42 Additionally, defendant was not prejudiced by his trial counsel's failure to request the accomplice-witness jury instruction. Failure to give the accomplice-witness instruction did not deprive the jury of essential guidance in its evaluation of the evidence. See *People v. Hoard*, 249 Ill. App. 3d 21, 32 (1993); *People v. Garner*, 248 Ill. App. 3d 985 (1993) (finding that any error

from a failure to specifically tender the jury regarding accomplice-witness testimony was harmless). The jury was instructed as to its duty to evaluate the believability of witnesses under Illinois Pattern Jury Instructions 1.02, 3.11, and 3.12, which were sufficient to generally instruct the jury as to an accomplice's credibility. See *Garner*, 248 Ill. App. 3d at 991. Taken the jury instructions as a whole in the context of this case, defendant was not prejudiced by his counsel's failure to tender the accomplice-witness instruction.

¶ 43 CONCLUSION

¶ 44 The judgment of the circuit court of Peoria County is affirmed.

¶ 45 Affirmed.

¶ 46 JUSTICE McDADE, dissenting:

¶ 47 I respectfully dissent from the majority's decision to affirm the circuit court's ruling on the defendant's motion alleging ineffective assistance of trial counsel.

¶ 48 I am perplexed by the majority's analysis of the first issue in paragraphs 35 and 36. First, the majority states that "the version of events that Buford relayed to defendant's post-trial counsel did not seem plausible or credible in light of other evidence presented at trial." *Supra* ¶ 35. The case law cited by the majority to support its analysis of the issue as one that requires, or even allows, a reviewing court to assess the credibility of witnesses is totally inapposite. We are not faced with first-prong plain error review, testing whether the evidence at trial was closely balanced in light of the defendant's failure to preserve a legal issue. Rather, this case involves assessments made by the circuit court post-trial, and the majority on direct appeal, and performed to excuse the arrogation of the jury's function in refusing to hold or order a new trial. Generally, it is not the function of this court to assess the credibility of witnesses or the weight to be assigned to evidence. See, *e.g.*, *People v. Evans*, 209 Ill. 2d 194, 211 (2004) (noting that "[i]t is

the function of the trier of fact to assess the credibility of the witnesses, to determine the appropriate weight of the testimony, and to resolve conflicts or inconsistencies in the evidence"). Here the jury was denied that opportunity.

¶ 49 Additionally, I do not believe it is appropriate to assume that the jury would have found Buford not credible simply because Foster and Starks' testimony placed the defendant at the scene. The credibility of Foster and Starks was eminently assailable based on their criminal histories, the fact that Buford would have testified that Foster planned the robbery, testimony by the police that in his police interview Buford apparently stated that he planned the robbery with Foster and Starks, the caution urged upon the jury by the accomplice witness instruction, and Buford's probable, and apparently disinterested, testimony that the defendant was not at the scene. Thus, I question both the legitimacy and the accuracy of the majority's conclusion that "it was not against the manifest weight of the evidence for the trial court to find Buford would not have been a credible witness" (*supra* ¶ 35). This was a jury trial; it would have been for the jury to decide whether Buford was credible in light of the other testimony presented. Instead, the opportunity for the jury to make such a finding has been usurped by trial counsel, the trial court, and the majority.

¶ 50 Second, the majority's conclusion in paragraph 36 that Buford's testimony would have implied the defendant was the shooter is simply incorrect. No inference that the defendant was the shooter could possibly be raised from Buford's testimony. According to posttrial counsel's account of what he had been told by deceased trial counsel, Buford would have testified that the defendant *was not present* at the scene of the robbery and shooting. See *supra* ¶ 23 (" 'He additionally stated that [defendant], who he knew as a—you know, throughout his life and knew

who he was and what he looked like, was not present there that day.' "). This is totally inconsistent with any conclusion that the defendant was the shooter.

¶ 51 Beyond the manner in which the majority analyzes this issue, I disagree with the outcome. I believe there was nothing for the defendant to lose and everything to gain by calling Buford. Foster and Starks had already placed the defendant at the scene and implicated him in the robbery. The only evidence trial counsel had offered in support of the theory that the defendant had not been present was medical evidence regarding a recent surgery on his leg and his need for two crutches, which had been partially refuted to the extent that he could apparently walk with one crutch.[2] Further, under accomplice accountability, if the defendant had been present and participating in the robbery, he would have been accountable for the shooting no matter whether he or Buford was the shooter. See 720 ILCS 5/5-2(c) (West 2010) (stating that "[a] person is legally accountable for the conduct of another when: * * * either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense"). But apparently Buford would have testified that the defendant was not even present at the scene. In light of the fact that trial counsel proceeded on a theory that the defendant was not present, it seems clear to me that it was not only deficient performance by trial counsel, but also reversibly prejudicial to the defendant, to fail to call the only witness who could affirmatively support that theory. See *People v. King*, 316 Ill. App. 3d 901, 913 (2000) (stating "our case law holds that counsel's tactical decisions may be deemed ineffective when they result in counsel's failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense").

[2] There was no testimony that the second male used any crutch or that he limped.

¶ 52 For these reasons, I would find that the defendant's conviction should be reversed and the matter remanded for a new trial.

¶ 53 My position on the defendant's first issue on appeal would obviate the need to address the merits of his second argument that trial counsel was also ineffective for failing to request an accomplice witness jury instruction. However, I write further because I believe that the majority's analysis of that issue is ill-conceived. In paragraph 41, the majority claims that a decision by trial counsel to request the accomplice witness jury instruction would have suggested that Foster, Starks, Buford, and the defendant were accomplices. This is inconsistent with the language and focus of the instruction and its judicial interpretation. The purpose of the accomplice witness instruction would have been to inform the jury that it should view the testimony of Foster and Starks with suspicion due to *their* potential involvement in the commission of the crime. As the supreme court has stated:

> "The test for determining whether a witness is an accomplice for purposes of the accomplice-witness instruction is whether there is probable cause to believe that the witness was guilty of the offense at issue as a principal, or as an accessory under an accountability theory. Thus, an accomplice-witness instruction should be given to a jury if all the evidence and the reasonable inferences therefrom establish probable cause to believe not merely that the witness was present and failed to disapprove of the crime, but that the witness participated in the planning or commission of the crime. If probable cause is established, the instruction should be given

> despite the witness' protestations that he or she did not so participate." *People v. Caffey*, 205 Ill. 2d 52, 116 (2001).

If the instruction is given properly, it is unreasonable to suggest that its inclusion with respect to the testimony of Foster and Starks would somehow automatically implicate the defendant more than their testimony has already done.

¶ 54 In sum, I would reverse the circuit court's decision on the defendant's first argument, vacate his conviction and remand for a new trial. I would not reach the merits of the defendant's second argument.