2017 IL App (1st) 150511-U

No. 1-15-0511

Order filed August 16, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 7441
	)	
JERMAINE COOPER,	)	Honorable
	)	Bridget Jane Hughes,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant did not demonstrate trial counsel was ineffective for failing to request an instruction pursuant to *People v. Prim*, 53 Ill. 2d 62 (1972), where the instruction was unwarranted because the jury did not indicate it was deadlocked.

¶ 2 Following a jury trial, defendant Jermaine Cooper was convicted of possession with intent to deliver 15 grams or more but less than 100 grams of cocaine (720 ILCS 570/401(a)(2)(A) (West 2014)), possession with intent to deliver 15 grams or more but less than 100 grams of heroin (720 ILCS 570/401(a)(1)(A) (West 2014)), and possession with intent to

deliver more than 30 grams but not more than 500 grams of cannabis (720 ILCS 550/5(d) (West 2014)), and sentenced to concurrent terms of 24 years' imprisonment each for the cocaine and heroin convictions and 5 years' imprisonment for the cannabis conviction. On appeal, defendant contends counsel was ineffective for failing to request an instruction pursuant to *People v. Prim*, 53 Ill. 2d 62 (1972), after the jury sent the court a note during deliberations. For the following reasons, we affirm.

¶ 3 Because defendant does not challenge the sufficiency of the evidence, we recite only the facts necessary for our disposition. The evidence at trial established that on March 30, 2014, two Hoffman Estates police officers, responding to a dispatch regarding a suspicious vehicle in a residential neighborhood, found defendant in the driver's seat of the vehicle. The officers smelled cannabis, and when they asked defendant to step out of the vehicle, he fled. The officers chased defendant, detained him, and recovered $941 in cash, a cell phone, keys, and a wallet from his person. One of the officers searched the vehicle. In the course of the search, the officer recovered a black plastic bag containing suspect cannabis, suspect heroin, and suspect cocaine, all packaged in small plastic bags. The officer also recovered a coffee grinder, three scales, 50 to 100 small plastic bags, three toothbrushes, and a spoon with powder residue on it, all of which were indicative of drug sales. The vehicle also contained various papers addressed to defendant, although the recovered rental agreement for the vehicle was in someone else's name. The recovered substances were sent to the state crime lab and tested positive for 27.9 grams of heroin, 15.4 grams of cocaine, and 32.4 grams of cannabis.

¶ 4 Following closing arguments, the court instructed the jury, and among other things, explained the various verdict forms. The jury was given three verdict forms for each substance

(cocaine, heroin, and cannabis). The jury was instructed, "Under the law, a person may be found (1) not guilty of possession with intent to deliver a controlled substance and not guilty of possession of a controlled substance; or (2) guilty of possession with intent to deliver a controlled substance; or (3) guilty of possession of a controlled substance." The jury left the courtroom for deliberations at 3:40 p.m.

¶ 5 At 5:35 p.m., the court reconvened outside the jury's presence after receiving a note from the jury. The note read, "[W]hat does it mean if we are all in agreement about possession but cannot agree on intent to deliver?" The court asked how the parties wanted to respond to the note. The following colloquy ensued.

"[DEFENSE COUNSEL]: Please continue to deliberate until you have unanimous decisions or unanimity on the charges before you.

[THE COURT]: [State]?

[STATE]: I believe I would accept that.

[THE COURT]: But the reason I think that's confusing, and I'm raising it to the parties is they don't have to be unanimous. If they all agree with possession and they don't all agree with intent, you would think that they would reasonably understand that is the verdict they should sign, on the possession and not the intent.

[DEFENSE COUNSEL]: It is my belief that they should continue -- apparently there is a disagreement as to the issue of intent.

[STATE]: Correct. And they need to continue to deliberate to settle that issue. In the end if they can't settle that issue they can fall back on their compromised verdict which is what that question is telling us, or if we read between the lines is telling us. So I think the wording utilized by Defense Counsel is the middle of the roadway explaining that.

[THE COURT]: You should continue to deliberate until --

[STATE]: You have unanimity on what is the appropriate verdict.

[DEFENSE COUNSEL]: Yes, on what would be the appropriate verdict.

[THE COURT]: Say that again. I'm not going to say unanimity. Please continue to deliberate until you have a unanimous verdict --

[DEFENSE COUNSEL]: As to all issues.

[STATE]: As to all issues.

[DEFENSE COUNSEL]: You have instructions as to what would be appropriate verdicts. You have instructions -- you have verdict forms which reflect all possibilities, when you have reached --

[THE COURT]: You have been instructed as to all possible verdicts.

[DEFENSE COUNSEL]: Yes. When you come to a unanimous conclusion --

[STATE]: As to all issues.

[DEFENSE COUNSEL]: As to all issues, sign the verdict that is appropriate .

[STATE]: That is appropriate.

[THE COURT]: Okay, I'm going to tell you what I changed. I believe that they do not have to be unanimous as to intent because I think you were right, they fall back to possession. Okay, I could change it. You have been instructed as to all possible verdicts. When you reach a unanimous decision as to the issues sign the verdict form that is appropriate. Am I correct?

[DEFENSE COUNSEL]: Yes, perfect.

[STATE]: They will be back in 10 minutes with another question."

¶ 6 The note sent to the jury read, "You have been instructed as to all possible verdicts. When you reach a unanimous decision as to the issues, sign the verdict form that is appropriate and correct." The jury returned after a "short recess" and found defendant guilty of possession with intent to deliver heroin, possession with intent to deliver cocaine, and possession with intent to deliver cannabis. Defendant filed a motion for a new trial, which the court denied. The court

sentenced defendant to concurrent terms of 24 years' imprisonment each for the cocaine and heroin convictions and 5 years' imprisonment for the cannabis conviction. This appeal followed.

¶ 7 On appeal, defendant contends that defense counsel was ineffective for failing to request a *Prim* instruction, as set forth in Illinois Pattern Jury Instructions (IPI), Criminal, No. 26.07 (4th ed. 2000), after the court received the note from the jury indicating it agreed on possession, but disagreed about intent.

¶ 8 In order to prove ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficiency substantially prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 162 (2001). To show sufficient prejudice, a defendant must show that, but for the deficiency, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

¶ 9 Defendant asserts that the instruction given to the jury hastened or coerced the verdict because the jury's note revealed they were deadlocked and, after receiving the instruction, the verdict was returned after a "short recess." Thus, according to defendant, defense counsel was deficient for failing to request an instruction which informed jury that they could return no verdict if a consensus could not be reached. Defendant argues that he was prejudiced by defense counsel's deficiency because the trial court likely would have given the *Prim* instruction had it been requested, and there was a reasonable probability that the jury would have remained hung on the intent to deliver charges.

¶ 10 The Illinois Supreme Court addressed the issue of what a trial judge should do when a jury indicates that it may be deadlocked and unable to reach a verdict in *People v. Prim*, 53 Ill. 2d 62. The supreme court noted that providing additional instruction to a jury has possible coercive effects. *Id.* at 74. However, the court stated that, "[j]urors, and especially those voting in the minority, conceivably could feel a coercive influence if when seeking guidance from the court they are met with stony silence and sent back to the jury room for further deliberation." *Id.* The *Prim* court then developed a model instruction with the purpose of addressing the coercive effect concerns. *Id.* at 75-76. IPI 26.07 sets forth its own *Prim*-based instruction:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case." Illinois Pattern Jury Instructions, Criminal, No. 26.07 (4th ed. 2000).

¶ 11 Here, we find that defense counsel's performance was not deficient because a *Prim* instruction was not warranted. *Prim* instructions are necessary when a jury indicates it is deadlocked. *Prim*, 53 Ill. 2d at 74. In this case, however, the jury's note did not indicate it was deadlocked. See e.g., *People v. Boyd*, 366 Ill. App. 3d 84, 99 (2006) (jury note reading the jury could not "agree" did not indicate a deadlocked jury). It instead indicated that the jury agreed regarding the possession element and did not agree regarding the intent element, apparently unclear on what to do next.

¶ 12 The court, after conferring with the parties, noted, "If they [the jurors] all agree with possession and they don't all agree with intent, you would think that they would reasonably understand that is the verdict they should sign, on the possession and not the intent." Thus, the record reveals that the court's instruction was responsive to the jury's apparent confusion regarding the verdict forms. Defendant nevertheless maintains that the instruction was improper because it did not inform the jury that they could return no verdict if they were unable to reach a consensus. Because we do not find that the jury was deadlocked, we see no reason for defense counsel to request such an instruction or for the trial court to instruct the jury in this manner. See *Boyd*, 366 Ill. App. 3d at 99 (finding no error or violation of *Prim* where court did not provide *Prim* instruction to jury that was not deadlocked).

¶ 13 Moreover, we find that the court's response to the jury's note was neutral and the language was not coercive or intended to hasten the verdict. See *People v. Wilcox*, 407 Ill. App. 3d 151, 163 (2010) (noting that a trial judge's comments to a jury are improper if, under the totality of the circumstances, the language chosen by the judge "actually interfered with the jury's deliberations and coerced a guilty verdict") (citing *People v. Fields*, 285 Ill. App. 3d 1020,

1029 (1996)). The aim of the suggested instruction in *Prim* was to avoid instructing jurors to "heed the majority" as a means of securing a verdict. *People v. Gregory*, 184 Ill. App. 3d 676, 681 (1989). Here, the jury's note did not indicate that there was a majority view; instead, it noted only there was a disagreement as to defendant's intent to deliver. The trial judge's instruction that the jury had been instructed on all possible verdicts and to sign the appropriate form was straightforward, neutral, and noncoercive. *Id.* ("A court's instruction to a jury to continue deliberating should be simple, neutral, and not coercive.") It did not imply that a majority view was the correct view, but merely responded to what the court and the parties perceived as confusion regarding the verdict forms, while encouraging the jury to continue deliberating on the issue of intent to deliver.

¶ 14 Further, we are unpersuaded by defendant's contention that, based on the "short recess" between the court's response to the jury's note and the jury's verdict, the instruction coerced the verdicts. Brief deliberations provide an inference of juror coercion. *Wilcox*, 407 Ill. App. 3d at 163 (citing *People v. Ferro*, 195 Ill. App. 3d 282, 292 (1990)). However, the length of jury deliberations following the judge's comments is insufficient alone to serve as proof that the verdict was the product of coercion. *Gregory*, 184 Ill. App. 3d at 682; *Wilcox*, 407 Ill. App. 3d at 163. The record in this case is unclear regarding the length of time the jury deliberated after receiving the court's response. Further, the jury's note indicates that it had come to unanimous agreement on at least one of the issues prior to sending the note, and therefore may not have had much more to deliberate on after receiving the court's response. We therefore find that the "short recess" in this case does not provide an inference of juror coercion.

¶ 15 Based on a review of the record, we cannot say that the instruction "imposed such confusion or pressure on the jury to reach a verdict that the accuracy and integrity of the verdict returned becomes uncertain." *Gregory,* 184 Ill. App. 3d at 681-82 (citing *People v. Branch,* 123 Ill. App. 3d 245, 251 (1984)). Because we find that the court's response was proper and a *Prim* instruction was not warranted, we conclude that defendant cannot demonstrate counsel's failure to request a *Prim* instruction constituted ineffective assistance of counsel. *People v. Patterson,* 192 Ill. 2d 93, 107 (2000) (noting the failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel).

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 17 Affirmed.