2018 IL App (1st) 152239-U

SIXTH DIVISION
November 30, 2018

No. 1-15-2239

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 608
	)	
MARCOS MACIAS,	)	Honorable
	)	Thomas V. Gainer Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's decision following an evidentiary hearing that defendant received effective assistance of counsel was manifestly erroneous. Because we cannot conceive of any sound trial strategy that would justify counsel's failure to call an available witness who would have bolstered an otherwise uncorroborated defense, we reverse and remand this case for a new trial.

¶ 2 Following a jury trial, defendant Marcos Macias was found guilty of two counts of attempted first degree murder of a peace officer and aggravated discharge of a firearm. Defendant filed a motion for judgment of acquittal notwithstanding the verdict, or alternatively, for a new trial. An evidentiary hearing was held on defendant's allegations of ineffective assistance of counsel. The court the denied defendant's motion for a new trial, finding that

defense counsel exercised sound trial strategy. The trial court then merged the aggravated discharge of a firearm counts into the attempted first degree murder of a peace officer counts, and sentenced defendant to 55 years in the Illinois Department of Corrections. Defendant's motion to reconsider his sentence was denied. On appeal, defendant contends that he was denied effective assistance of counsel by both trial counsel and posttrial counsel for several reasons. Defendant alternatively claims that this court should reduce his sentence or remand the case for resentencing because the trial court relied on an improper factor when it sentenced him and the punishment was excessive. For the following reasons, we reverse and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 In January 2010, defendant was charged with eight counts of attempted first degree murder and two counts of aggravated discharge of a firearm for shooting at two Chicago police officers in the early morning hours of December 3, 2009. Defendant retained private counsel, David Wiener, and defendant's jury trial began in March 2013.

¶ 5 Jury Trial

¶ 6 At trial, Chicago police officers James Shackleton and Jason Volger testified that on the night in question they received a call about a drug deal out of a residential building at 642 North Armour in Chicago. The officers were in plain clothes and Officer Volger was wearing a "hoodie." They were also wearing their Chicago police badges and "stars" around their necks, and had guns, radios, and handcuffs. The officers testified that on the night in question, they saw four Hispanic men walking down Huron Street from Armour Street, and followed them to determine whether further investigation was needed. The men split up at the corner of Huron and Noble, and the officers followed the two men who walked eastbound on Huron. The two men

yelled something to three Hispanic men who were standing behind a black Honda Accord that was double parked at approximately 1350 to 1360 West Huron.

¶ 7 The officers testified that defendant was one of the three men behind the Honda Accord. The officers testified that they knew defendant from the neighborhood. Defendant was wearing a black knit hat, black hoodie, and a black jacket over the hoodie. The officers approached the three men to conduct a field interview. As the officers approached, defendant said, "What's up, n****r, what's up, n****r?" to Officer Volger. Officer Shackleton, who was about 15 to 20 feet away from defendant, saw defendant reach into his waistband and point a pistol at Officer Volger. Officer Shackleton drew his own weapon and yelled, "Chicago Police, Chicago Police." Defendant held his gun with both hands, and fired his gun at both the officers. Officer Shackleton radioed for help while Officer Volger and defendant continued shooting. Officer Volger was struck by glass from the car he was hiding behind when defendant shot the window of the car. Defendant eventually stopped shooting and ran eastbound down Huron and then turned northbound on Ada.

¶ 8 Officer Volger radioed that shots had been fired at and by the police, and provided their location and a description of the offender. He described the offender as a male Hispanic wearing a black jacket, black hoodie, and a black knit cap. He stated that the offender had a slight mustache.

¶ 9 Officers Kolodziejski and Calicdan arrived about a minute later. Officers Volger and Shackleton described the shooter to them. The officers drove eastbound on Huron. Officers Shakleton and Volger returned to the vehicle where the other two witnesses, Noel DeLeon and Eddie Ayala, were located, and detained them. Approximately 10 minutes later, the first

responding officers returned to the scene with defendant seated in the back of the car. Defendant was wearing the same clothes he was wearing when he shot at the police officers.

¶ 10 Officer Kolodziejski testified that he and Officer Calicdan arrived at Noble and Huron about a minute after receiving the call about shots fired. Officers Volger and Shackleton described the offender as a Hispanic male with slight facial hair wearing a black knit hat and a black jacket. About a block away, near Huron and Throop, Officer Kolodziejski saw defendant on the south side of Huron between two parked cars. When defendant saw the officers, he turned and walked back to the sidewalk. The officers testified that he was not walking completely upright when he was walking between the parked cars. Officer Kolodziejski testified that defendant was sweating and out of breath when he was stopped. Defendant was wearing a black jacket, black knit hat, and had partial facial hair. Officer Kolodziejski found a black glove in defendant's hoodie pocket.

¶ 11 Officer Kolodziejski handcuffed defendant and put him in the backseat of his patrol car. Officers Volger and Shackleton separately identified defendant as the shooter. The identification occurred 8 to 10 minutes after defendant was detained. Both officers testified at trial that there was no doubt in either of their minds that defendant was the person who fired at them.

¶ 12 Mark Miller testified that on the date of the incident, he lived at 720 North Elizabeth Street. At approximately 1:50 a.m. on December 3, 2009, Miller was awakened by multiple gunshots. He testified that the bullets were coming from more than one gun. After the shots stopped, Miller looked out his window that overlooked the alley and saw police walking through the backyard with flashlights. Later, Miller took his dog out and noticed something under the first step of his house. He recovered a Beretta M9 9-millimeter handgun with a magazine. Miller testified that there was no ammunition in the gun or magazine, and that he took the weapon to

the police station. Miller testified on cross-examination that he did not see anyone in the back of his building after he heard the gunshots.

¶ 13 Claudia Bidirel testified that Daniel DeLeon is the father of her two children. On the date in question, Daniel's mother, Daisy Acevedo, lived at 1361 West Huron Street with Eddie Ayala and Noel DeLeon. On December 2, 2009, Bidirel, Daniel, and their children were at Acevedo's home. Sometime that evening, Acevedo, Ayala, and Noel left the house. There was a knock on the door, and when Bidirel opened the door, an unknown person was standing there. She saw defendant standing on the sidewalk by the gate in front of the house. Bidirel spoke to the unknown person, but not to defendant. After the conversation, she spoke to Daniel and they tried to contact Daniel's mother because Daniel owed defendant money for drugs. The unknown person later returned to the house but Bidirel did not open the door.

¶ 14 At approximately 1:45 a.m. on December 3, 2009, Bidirel heard Acevedo's car outside. Bidirel looked out the window and saw Acevedo's black Honda Accord double parked across the street. Bidirel saw Noel standing by the car talking to defendant. Acevedo came into the house and spoke with Daniel. Bidirel then heard gunshots outside. Bidirel identified defendant at the police station the next afternoon and at trial. She testified that he was not wearing a hat when she saw him at the gate or when he was standing behind the Honda Accord.

¶ 15 Noel DeLeon testified that he was Daniel's brother. He acknowledged that he had a pending burglary charge and that he was previously convicted of burglary and retail theft. On December 3, 2009, at approximately 1:45 a.m., Noel returned home with his mother and Ayala. There were no available parking spots so they double parked his mother's black Honda Accord. Noel testified that when he got out of the car, defendant approached him and said Daniel owed him $70 for "crack." Noel asked what defendant would do if Daniel could not pay, and defendant

showed him a gun and indicated, "like, 'we are going to do something to him.' " Defendant then told Noel to "hold on," and looked across the street. Noel saw two plainclothes police officers across the street, coming from behind a van. Noel knew they were officers because of their badges around their necks. Noel testified that defendant looked towards the officers and said, "What's up?" Defendant pulled out a semi-automatic pistol from his waist and began shooting at the officers. Noel and Ayala "hit the floor" and defendant ran east on Huron, but Noel did not see where he went. Noel identified defendant at the police station at around 10:30 that morning and again at trial. Noel stated that the gun defendant showed him and was metallic gray. The gun recovered from Miller's yard, a 9-millimeter pistol, was black.

¶ 16 Forensic Investigator David Ryan responded to a call of shots fired in the early morning hours of December 3, 2009, and went to the area of 1369 West Huron. He met with detectives and was asked to administer a gunshot residue test on defendant. Defendant was seated in the back of a squad car at the time. Investigator Ryan had defendant step out of the car, took pictures of him, and then administered a gunshot residue test to defendant's right and left hands. Defendant was wearing a black knit cap, black nylon jacket, and a black hooded sweatshirt. Investigator Ryan found a glove inside the right front pocked of the hooded sweatshirt. He took the glove so that a gunshot residue test could be performed on it.

¶ 17 Investigator Ryan testified on cross-examination that the residue test was taken at 3:27 a.m. and that he did not know how long defendant had been in the police car before he administered the test. Investigator Ryan testified that he did not perform any tests to determine whether or not there was gunshot residue in the backseat of the car. Investigator Ryan testified that the "most likely" place to find gunshot residue on a jacket is on the cuff, but he did not test defendant's jacket or other clothing for residue.

¶ 18 On redirect examination, Investigator Ryan testified that he did not examine defendant's clothing for gunshot residue because his main concern was the glove and defendant's hands.

¶ 19 Robert Berk testified as an expert in trace evidence analysis and gunshot residue analysis. He explained that he looked for the presence of primer gunshot residue, which contains compounds that have elements of lead, barium, and antimony present. On December 4, 2009, Berk received defendant's jacket, sweatshirt, black cap, and glove. He also received the gunshot residue kit that had been administered by Investigator Ryan. Berk examined the samples from the kit that were taken from defendant's hands and stated that his finding was inconclusive. Specifically, Berk testified that the glove testified positive for the presence of prime gunshot residue, and the jacket tested negative for gunshot residue. On cross-examination, Berk testified that the cuff of the jacket testified negative for gunshot residue, and that the only positive test for gunshot residue came from the glove.

¶ 20 The parties stipulated that Peggy Konrath would be qualified to testify as an expert in the field of forensic science, namely latent fingerprint analysis and comparison. After examining the recovered 9-millimeter Beretta handgun, Konrath found no latent fingerprint impressions suitable for comparison. The parties further stipulated that Brian Maryland would be qualified to testify as an expert in the field of firearm examination, and that after examining the officers' weapons, he determined that Officer Shackleton fired 8 rounds and Officer Volger fired 20 rounds. Maryland determined the Beretta fired 11 rounds.

¶ 21 Following the State's presentation of evidence, defendant was admonished regarding his right to testify. The trial court told defendant that the decision "on whether or not you *** want to testify is a decision that only you can make." The trial court also stated that it was "a decision that you can certainly talk to your lawyer about but ultimately the decision has to be yours. Do

you understand that?" Defendant replied, "yes." The following colloquy took place between the court and defendant:

"Q: Have you reached a decision on whether or not you are going to testify?

A: Yes, I have.

Q: What is the decision?

A: I'd like to testify, sir.

Q: Has anyone promised you anything in order for you to testify?

A: No.

Q: Has anyone threatened you to get you to make that decision to testify?

A: No.

Q: Are you making that decision of your own free will?

A: Yes, sir."

¶ 22 The court determined that defendant knowingly and voluntarily made the decision to testify. Defendant then testified. He acknowledged that he had a felony conviction for retail theft, a felony conviction for possession of a controlled substance, and a felony conviction for robbery.

¶ 23 Defendant testified that he grew up by Huron and Willard, and still frequented the area because he had family and friends there. He owned a Chevy Astro that had been parked at 1352 Huron Street for three weeks before the incident because it was not drivable. Defendant testified that sometime in the afternoon or evening of December 2, 2009, he gave Daniel "a couple $20 bags of cocaine." Defendant expected to be paid later but was never paid. Defendant stated that he went to Daniel's family home later that evening to collect the money owed to him but was not paid at that time. Defendant testified that he knew Officer Shackleton and Officer Volger before the incident from talking to them over the years.

¶ 24 Defendant was shown a picture of himself on the morning he was arrested, and testified that on that date he had a full mustache and a beard. Defendant testified that on the night in question, he was wearing a black hooded sweatshirt, a black jacket, and a black ski hat. He was not carrying a gun. At about 1:30 a.m., while he was standing on the corner of Huron and Ada Street, he heard 20 to 30 gunshots. Defendant testified that he was scared, so he ducked down between cars. After the gunfire stopped, he attempted to cross the street, and encountered police officers. Defendant testified that the officers "hopped out of the car with their gun[s] drawn and apprehended me, they put cuffs on me." Defendant testified that he is right-handed, and that he had a glove on him that day. He had worn the glove earlier in the day, but then took it off. Defendant testified that at no point in time did the glove come in contact with a gun. Defendant denied ever coming in contact with a gun on the date in question and denied shooting at Officer Shackleton and Officer Volger. Defense counsel asked why defendant was alone at 1:40 a.m. on the date in question, and defendant responded that he "had just got done selling my last bag of cocaine." Defendant testified that Elizabeth Street is about two blocks from where he was arrested.

¶ 25 On cross-examination, defendant testified he had been selling drugs to Daniel for a few years and that he only went to Daniel's house once to collect money from him. Defendant stated that he did not hear anyone yell, "Police, freeze." He denied seeing Acevedo, Noel, or Ayala on the night in question. Defendant stated that he only saw Biderel when he went to Acevedo's house looking for Daniel to collect his money. Defendant further testified on cross-examination that he was taken into custody and Detective DeCicco read him his *Miranda* rights. Defendant testified that he did not talk to Detective DeCicco because he "refused to talk to the police." Defendant denied that he told Detective Decicco that he was running because he heard gunshots

and thought that rival gang members may have been shooting at him. Defendant stated that he never saw Officer Shackleton or Officer Volger on the date in question and did not see a car that was double parked on the 1300 block of Huron that night.

¶ 26 In rebuttal, the State called Detective DeCicco, who testified that he had a conversation with defendant on the date in question. Detective DeCicco testified that defendant initially denied participation in the incident but then admitted that he was on Ohio Street when rival gang members were shooting. Defendant told him that he had been running and hiding between cars when he saw the police. Defendant denied that he was on Huron Street the night of the incident.

¶ 27 At the conclusion of trial, defendant was found guilty of two counts of attempted first degree murder of a peace officer and aggravated discharge of a firearm.

¶ 28 Posttrial Motion and Sentencing

¶ 29 Defendant then released his trial counsel, Weiner, and hired new counsel. Defendant's posttrial counsel filed a motion for judgment of acquittal notwithstanding the verdict, or alternatively, for a new trial. In support of the motion, defendant argued that he received ineffective assistance of counsel by Weiner, who only visited him one time in the three and a half years he was in jail. Defendant's motion further argued that Weiner failed to investigate an occurrence witness who would have testified that he had been with defendant at the time of the shooting and that defendant was not the shooter. An affidavit was attached to the motion. The affidavit was from Sandra Macias, defendant's mother, who stated that she attempted to bring a potential witness to the attention of Weiner, but that Weiner did not call the witness. An evidentiary hearing was held on defendant's allegations of ineffective assistance of counsel.

¶ 30 Sandra Macias testified at the hearing on defendant's posttrial motion that she hired Weiner to represent defendant. Defendant had told Sandra that on the night in question, he was

with someone named "RC," who was also known as Rene Cardona. Sandra testified that she and her husband had been looking for RC, but did not find him until three and half to four years after the incident because he had been in jail. When Sandra saw RC, he told her that defendant "didn't do it." Sandra called Weiner and told him about RC. Sandra testified that she brought RC to court once, and that she believed it was on the date that the case had first been set for trial, but she could not be sure. Sandra testified that on that date Weiner's associate was present instead of Weiner, so she introduced RC to the associate. RC gave his phone number to the associate and was told he would receive a phone call, but never did. Sandra further testified that to her knowledge, Weiner never talked to defendant while he was in jail.

¶ 31 On cross-examination, Sandra testified that when she brought RC to court, RC's girlfriend Lisa was also present. Sandra testified that when she "mentioned [RC] Mr. Weiner told me he would get laughed right out of court if he brought [RC] because it wasn't something – he didn't like bring it up in the very beginning. He was like if I bring it up now we will be laughed right out of court."

¶ 32 Rene "RC" Cardona testified next. He testified that he knew defendant from growing up in the neighborhood and that he was with defendant at the time of the shooting. RC testified that he and defendant were at Huron and Ada, next to a vacant lot, when they saw two people approaching eastbound on Huron Street. The approaching individuals were wearing hoodies. There were another two or three people in the middle of the street standing behind a car. Then he heard gunshots. RC testified that he could not see the faces of the two people wearing hoodies because he was about a half-block away from them. RC testified that the three people in the street were standing on Huron behind a car that was double-parked facing westbound. RC

testified that he heard a lot of gunshots, probably "30 shots because it just kept going on for a little bit," but that defendant was right next to him when that occurred.

¶ 33 RC further testified that he did not want to get shot and told defendant they should leave. RC then fled through the empty lot, turned left on the corner of Acona, and ran to Carpenter School. He then continued on to his house. He did not see where defendant went. RC testified that on the night in question, he did not see defendant with a weapon and did not see him discharge a weapon. RC testified that sometime after that incident he came to learn that defendant was arrested for the shooting.

¶ 34 RC testified that he had a conversation with defendant's mom "maybe two" years after the shooting. RC stated that he went to the courthouse with defendant's mom and spoke to defendant's lawyer. He gave defendant's lawyer a statement and his information, but was never contacted. RC testified that he told defendant's lawyer that defendant "was right next to me when the shooting occurred and that I know for a fact it wasn't him because he was standing right next to me and I told him that I was willing to testify to that."

¶ 35 On cross-examination RC testified that when the shooting happened, he was on parole for a burglary conviction. He stated that on the night in question he was purchasing drugs from defendant. Before the shots were fired he did not hear anyone yell "police" and did not see any police officers in the area.

¶ 36 Defendant next testified that he was with RC when the shooting took place. When the shots were fired, defendant ducked down behind a nearby car and RC ran in the opposite direction. Defendant testified that he did not have a gun in his possession on the night in question. Defendant testified that he had been incarcerated since December 3, 2009, and that Weiner never came to see him while he was in jail. An associate who worked for Weiner visited

him once and defendant told him what happened on the date of the shooting. Defendant stated that he told the associate about RC and that the associate took notes. Defendant stated that the only conversations he had with Weiner took place in the "bullpen" behind the courtroom, and that the conversations only lasted "seconds." Defendant stated that he never had a discussion with Weiner about whether defendant would testify in his case.

¶ 37 On cross-examination, defendant stated that he did not choose to testify but that his attorney told him that he had to testify. Defendant stated that Weiner "told me to come out here and say I was alone" right before he took the stand. Defendant testified that he disagreed with Weiner's direction but did it anyway.

¶ 38 Weiner also testified at the hearing on defendant's posttrial motion. Weiner testified that the first time he learned of an alibi witness was through an ARDC complaint that was made by defendant after he was found guilty. Weiner stated that he had nothing in writing to show that defendant's parents did or did not mention RC or an alibi witness to his associates. Weiner testified that throughout the course of his representation of defendant he never met with defendant in the Cook County Department of Corrections, but met with him in lockup behind the courtroom. He testified that he met defendant in a courthouse conference room one time immediately before trial. Weiner testified that defendant "indicated to me that he was alone and when he heard shots he ducked between two cars and was not involved in the shooting, and quite frankly, I believe him." Weiner testified that he did not remember what defendant told him about testifying, "but I encouraged the defendant to take the witness stand. I don't remember what he in fact told me about whether or not he wanted to testify. I thought it would be the correct trial strategy that he take the stand and tell his version of what occurred on the date that the two police officers had been shot at."

¶ 39 On cross-examination, Weiner testified that three other attorneys worked for him during his representation of defendant and that he sent them to speak with defendant, but that he never personally went to the jail to see defendant. Weiner testified that he does not remember ever meeting RC and does not remember ever hearing anything about RC from his associates.

¶ 40 After hearing arguments, the trial court noted that the date on which RC was brought into court was December 10, 2012. The trial court stated the witness was brought in three years after defendant had been arrested and that "[Sandra] found him and brought him to court, so that he could talk to the lawyers." The trial court then quoted Sandra's testimony where she stated that Weiner told her "he would get laughed right out of court if he brought [RC] in because it wasn't something – he didn't bring it up in the very beginning." After noting that testimony, the trial court stated, "That may have been an artful way to suggest that Mr. Weiner's trial strategy was to not call a twice-convicted felon who only surfaces three years after the arrest of the [d]efendant and about three months before the beginning of the trial, to be this so-called alibi witness." The trial court also stated that the knowledge that was gained from defendant by the attorney working for Weiner "I believe, can be [imputed] to Mr. Weiner, and it would make a sound strategic decision not to call [RC] when he otherwise corroborates all four eyewitnesses and doesn't come forward [for] three years, only right before trial, *** and this isn't all cut out of whole cloth, and is a twice-convicted felon who as, by his own admission, buying drugs from the [d]efendant the night of the shooting." The trial court further stated, "I don't believe that the outcome of this litigation would have been different had [RC] been called as a witness." The trial court stated that RC corroborated "everything but the fact that defendant was the shooter." The trial court then denied the motion for a new trial. This appeal follows.

¶ 41 ANALYSIS

¶ 42 Defendant claimed in his posttrial motion for a new trial that he was denied effective assistance of counsel where trial counsel failed to investigate an available witness that would have testified that defendant was not involved in the shooting. "If, after a hearing, the judge finds that the defendant did not in fact receive effective assistance of counsel, then he shall order a new trial." *People v. Bell*, 197 Ill. App. 3d 613, (1990). "If, however, he determines that the defendant received effective assistance of counsel, he shall deny a new trial and leave standing defendant's conviction and sentence. If the court denies defendant a new trial, defendant can still appeal to the appellate court based on his assertion of ineffective assistance of counsel." *Id*. (citing *People v. Krankel*, 102 Ill. 2d 181, 189 (1984)); see also *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 42 (quoting *People v. Moore*, 207 Ill. 2d 68,81-82 (2003) ("After *** the required inquiry is conducted, '[i]f the court determines that the claim of ineffectiveness is spurious or pertains only to trial strategy, the court may then deny motion and leave standing the defendant's convictions ***. If the trial court denies the motion, defendant may still appeal his assertion of ineffective assistance of counsel along with his other assignments of error.' "). Here, the trial court determined that defendant received effective assistance of counsel.

¶ 43 On appeal, the standard of review depends on whether the trial court did or did not determine the merits of defendant's posttrial claims of ineffective assistance of counsel. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. "Our supreme court has held that if the trial court made no determination on the merits, then our standard of review is *de novo*." *Id*. However, "[i]f a trial court has reached a determination on the merits of a defendant's ineffective assistance of counsel claim, we will reverse only if the trial court's action was manifestly erroneous." *Id*. (citing *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008)). " 'Manifest error' is error that is clearly plain, evident, and indisputable." *People v. Morgan*, 212 Ill. 2d 148, 155 (2004). In this

case, the trial court reached a determination on the merits of defendant's ineffective assistance of counsel claim. Therefore, we review the trial court's determination for manifest error.

¶ 44 Defendant claims on appeal (and claimed in his posttrial motion) that Weiner was made aware of RC, a potential witness, during the pendency of defendant's case and before it went to trial, but that defense counsel failed to contact RC. The State responds that Weiner's "decision" not to call RC was a matter of sound trial strategy.

¶ 45 "Claims alleging ineffective assistance of counsel are judged under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984)." *People v. Haynes*, 192 Ill. 2d 437, 472-73 (2000). To establish a claim for ineffective assistance of counsel, defendant must show that counsel's representation fell below an objective standard of reasonableness so as to deny him the right to "counsel" guaranteed under the sixth amendment. *Strickland*, 466 U.S. at 687-88; *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). In assessing such claim, this court must defer to counsel's conduct within the context of trial and without the benefit of hindsight. *Strickland*, 466 U.S. at 689. As such, "a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not incompetence." *People v. Coleman*, 183 Ill. 2d 366, 397 (1998).

¶ 46 In addition to showing that counsel's performance fell below an objective standard of reasonableness, a defendant must establish that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687. Proof of prejudice requires an affirmative showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome." *Id*. at 694.

¶ 47 It is well-settled that strategic choices made by defense counsel after a thorough investigation of the law and facts relevant to the plausible options are "virtually unchallengeable." *Id*. at 687-89. It is equally settled that trial counsel's decision whether to present a particular witness is within the realm of strategic choices that are generally not subject to attack on the grounds of ineffective assistance of counsel. *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999) (citing *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989)). However, along with these general rules, 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. *Tate*, 305 Ill. App. 3d at 612.

¶ 48 Trial counsel has a professional duty to conduct "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. This duty derives from counsel's basic function to "make the adversarial testing process work in the particular case." *Id*. at 690. The duty includes the obligation to independently investigate any possible defenses. *People v. Kokoraleis*, 159 Ill. 2d 325, 329 (1994). The failure to interview witnesses may indicate ineffective assistance of counsel "particularly where the witness was known to trial counsel and his testimony may have been exonerating." *Coleman*, 183 Ill. 2d at 398. "Case law rejects the notion that a strategic decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." (Internal quotation marks omitted.) *People v. Madej*, 177 Ill. 2d 116, 136 (1997). Traditionally, courts have not reviewed an attorney's choices when made on the basis of strategic considerations. However, these strategic decisions may be made only after there has been a "thorough investigation of all matters relevant to plausible options." *Strickland*, 466 U.S. at 690.

¶ 49 Here, at the hearing on defendant's posttrial motion, defendant's mother testified that defendant had told her that on the night in question he was with someone named "RC," but that she had been unable to locate him until three and a half to four years later because RC was incarcerated. When she saw him, RC told Sandra that defendant "didn't do it." Sandra testified that she called Weiner and told him about RC, but that Weiner told her if he brought RC to the court's attention, he would get laughed right out of court. She also testified that she brought RC to a court date, but that Weiner's associate was there instead. She introduced RC to the associate and he stated that he would contact RC.

¶ 50 RC testified at the hearing that he was with defendant on the night in question and defendant did not have a weapon on him. RC was with defendant when the shooting occurred, and they both ran away when they heard gunshots so that they would not get shot. RC did not see where defendant went after they separated. RC testified that he went to a court date with Sandra and that he gave defendant's attorney a statement and his information, but was never contacted.

¶ 51 Weiner testified that he had never heard of RC, and his associates never mentioned RC. Weiner testified that Sandra did not call him and tell him about RC, and that the first time he learned about a potential alibi witness was when defendant filed posttrial motions and filed an ARDC complaint against him. Weiner testified that he encouraged defendant to testify at trial because he believed defendant's story that he was alone on the night in question and was not involved in the shooting.

¶ 52 At the conclusion of the evidentiary hearing on defendant's posttrial motion, the trial court found that Weiner's alleged statement to Sandra regarding the possibility of being laughed out of court indicated that Weiner had made a strategic decision not to call RC. The trial court stated that it was Weiner's trial strategy "not to call a twice-convicted felon who only surfaces

three years after the arrest of the [d]efendant and about three months before the beginning of trial." The trial court further stated that it believed the knowledge that was gained by Weiner's associate from defendant regarding RC was imputed to Weiner, and that it was a sound strategic decision not to call RC "when he otherwise corroborates all four eyewitnesses and doesn't come forward for three years, only right before trial, *** and is a twice-convicted felon who is, by his own admission, buying drugs from the [d]efendant the night of the shooting."

¶ 53 We note that just as a court "should not second-guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." *People v. Popoca*, 245 Ill. App. 3d 948, 959 (1993). Weiner specifically testified that he did not remember defendant's parents ever mentioning RC, and that he did not remember any of his associates mentioning RC. Accordingly, it was manifest error for the trial court to conclude that Weiner made the strategic decision not to call RC despite his testimony to the contrary.

¶ 54 A defendant can overcome the strong presumption that defense counsel's choice of strategy was sound if counsel's decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy. *Id*. Here, we can think of no sound trial strategy to explain why counsel failed to investigate an available witness who would have bolstered an otherwise uncorroborated defense. Accordingly, we find that defense counsel's failure to investigate RC constituted deficient performance.

¶ 55 Defendant also argues that defense counsel's decision to not ask for a limiting instruction on other-crimes evidence was in error. We agree. The facts indicated that defendant was in the area of the shooting on the night in question because he was selling drugs. Evidence of other

crimes a defendant has committed "overpersuades a jury, which might convict the defendant only because it feels that a defendant is a bad person who deserves punishment. [Citation.]" *People v. Manning*, 182 Ill. 2d 193, 213-14 (1998). While other-crimes evidence is admissible when it is relevant for a permissible purpose, like establishing any material question other than a defendant's propensity to commit a crime, the jury should be instructed that the evidence can only be considered for the limited purpose for which it was offered, and not the defendant's propensity to commit crimes. See *People v. Harris*, 288 Ill. App. 3d 597, 606 (1997). "The best way to address the problem is to use the limiting instruction contained in Illinois Pattern Jury Instructions, Criminal, No. 3.14 (3 ed. 1992), taking care that the proper limited purpose of the evidence is used." *Id*. "The failure of an attorney to seek a limiting instruction when he is entitled to one is not a matter of discretion or trial strategy." *People v. Hooker*, 253 Ill. App. 3d 1075, 1085 (1993). "[S]uch a failure demonstrates than an attorney's performance was deficient ***" Accordingly, we find that defense counsel was deficient for failing to request a limiting instruction in this case.

¶ 56 We also agree with defendant's contention that defense counsel erred in failing to adequately cross-examine the State's gunshot residue expert, Robert Berk. Defense counsel did not ask Berk about the length of time that the residue had been on the glove, or about potential contamination of the glove. The gunshot residue particles found on the glove were the only extrinsic evidence connecting defendant to the shooting.

¶ 57 We now consider whether these errors prejudiced defendant. Consideration under the second prong of the *Strickland* test, *i.e.*, whether counsel's failure to investigate prejudiced defendant, requires us to look at the evidence presented at trial. "Prejudice is demonstrated if there is a reasonable probability that, but for counsel's deficient performance, the result of the

proceeding would have been different." *People v. Makiel*, 358 Ill. App. 3d 102, 105-06 (2005). "A reasonable probability is a probability sufficient to undermine the outcome." *Strickland*, 466 U.S. at 694. "Whether defense counsel was ineffective for failure to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented." *Makiel*, 358 Ill. App. 3d at 107. When there are opposing versions of events, and no extrinsic evidence is presented to corroborate or contradict either version, the trial court's finding of guilty necessarily involves the court's assessment of the credibility of State's witnesses against that of defendant. *People v. Sebby*, 2017 IL 119445, ¶ 63. When both versions are credible, the evidence is considered closely balanced. *Id*.

¶ 58 While the evidence presented at trial against defendant seems abundant – four witnesses and the positive test for gun residue on defendant's glove – we note that defendant was outnumbered in witnesses because he was prevented from presenting any on his own behalf. See *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) (few rights are more fundamental that an accused's sixth amendment right to present witnesses in his own defense). See also *People v. Solomon*, 158 Ill. App. 3d 432 (1987) (failure to present available witnesses to corroborate a defense has been found to be ineffective assistance). We find that the evidence was closely balanced where both versions of events were credible. In light of the closely balanced evidence, we find that the cumulative effect of defense counsel's errors amounted to prejudice under *Strickland*, and thus the trial court's finding of effective assistance of counsel was manifest error.

¶ 59 Accordingly, the trial court should have granted defendant's motion for a new trial based on his ineffective assistance of counsel claim. Because we are sending this case back for a new trial, defendant's sentencing arguments are moot. We reverse and remand for a new trial.

¶ 60 CONCLUSION

¶ 61 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County, and remand for a new trial.

¶ 62 Reversed and remanded.