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2018 IL App (3d) 150752-U

Order filed May 31, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
Plaintiff-Appellee,)	of the 10th Judicial Circuit,
v.)	Peoria County, Illinois.
ALLEN STEVE FITZPATRICK, JR.,)	Appeal No. 3-15-0752
Defendant-Appellant.)	Circuit No. 14-CF-471
	The Honorable
	David A. Brown
	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Trial counsel's failure to seek dismissal of time-barred charges before defendant's trial was harmless where charges were dismissed after trial and evidence that defendant committed first degree murder was overwhelming.

¶ 2 Defendant Allen Steve Fitzpatrick, Jr. was tried for first degree murder (720 ILCS 5/9-1(a)(1)-(3) (West 2006)), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2006)), and attempted mob action (720 ILCS 5/8-4(a), 5/25-1(a) (West 2006)). The jury found defendant guilty of all

charges. Before sentencing, defendant filed a motion to arrest judgment on the charges of aggravated battery, aggravated discharge, and attempted mob action, alleging that the statute of limitations had expired. The trial court granted defendant's motion and sentenced defendant to 60 years in prison for first degree murder. On appeal, defendant argues that his trial counsel was ineffective for failing to seek dismissal of the time-barred charges against him prior to trial. We affirm.

¶ 3

FACTS

¶ 4

On July 29, 2014, defendant was charged by an eight-count indictment with multiple offenses. Counts 1 through 3 alleged that defendant committed the first-degree murder of Robin Underwood. Count 4 alleged that defendant committed aggravated battery with a firearm against Jennifer Lindler. Count 5 alleged that defendant committed aggravated discharge of a firearm by shooting in the direction of Micah Forman. Count 8 alleged that defendant engaged in attempted mob action. According to the indictment, all of the above offenses occurred on March 15, 2006. Counts 6 and 7 are not relevant to this appeal.

¶ 5

A jury trial was held in July 2015 on counts 1-5 and 8 of the indictment. At trial, Jennifer Lindler testified that on March 15, 2006, she called someone named "Mike" to buy crack cocaine. Lindler's aunt, Robin Underwood, drove Lindler in her truck to the 1300 block of Ellis Street in Peoria to buy the drugs. Lindler testified that "Mike" exited an alley, walked toward her and yelled "gun." Lindler heard gunshots and hid behind Underwood's truck. Lindler then jumped into the truck and told Underwood to drive. She testified that she saw white muzzle flashes coming from the front of the vehicle and heard many shots in rapid succession. She jumped into the backseat of the truck and passed out. When she regained consciousness, Underwood was slumped over the steering wheel.

¶ 6 Lindler testified that she was shot in her back, thighs and calves. She pulled up her pant legs and showed the jury scars on her calves. She testified that she still had a bullet in her hip. Lindler’s surgeon testified that he performed an abdominal laparotomy on Lindler to repair holes in her small bowel and colon caused by gunshot wounds.

¶ 7 Ronald Lee, also known as “Scoop,” testified that he was a member of the “Black Peastones” gang in March 2006. Defendant, Anthony King and Johnny Marizetts were also members of the gang. Micah Forman was a member of a rival gang.

¶ 8 Lee testified that on March 15, 2016, defendant, King and Marizetts came to his house. Lee was home with his nephew, Taurus McKinney, at the time. Marizetts told Lee that they were going to “take care of business on Micah” and asked for a gun. McKinney gave Marizetts a “Mack 11” gun. Lee saw that defendant had a .380 caliber gun in his waistband. Sometime after 10:00 p.m. that night, defendant called Lee and told him to “lay back because the business was handled.”

¶ 9 The next day, defendant met with Lee and told him what happened the night before. Defendant said that he was waiting in the bushes for Micah and “jumped out on him.” Defendant said he started shooting at Micah, and Micah “hit the ground.” Defendant told Lee he was going to lay low and “see if everything was going to be cool.”

¶ 10 Forman testified that he was a member of the “Black Disciples” gang. At about 8:00 pm on March 15, 2006, he received a phone call from two women wanting to buy drugs. He met them on the 1300 block of Ellis Street. The women came in a truck. The passenger of the truck was standing by the back of the truck when he approached. As he walked toward her, someone started shooting. He ducked down and ran. While running, he turned back and saw two people shooting but did not remember who they were. He admitted telling the police shortly after the

incident that defendant shot at him but said he did so because he was not getting along with defendant at the time and the shooter had the same build as defendant. He admitted that he picked out defendant's photo from a lineup in 2006 and said, "That guy shot at me 10 times."

¶ 11 Starceya Johnson, who has a child with defendant, testified that a few days to a week after March 15, 2006, she and defendant discussed the shooting on Ellis Street, and defendant said he had been shooting at Forman.

¶ 12 Vicki Davis, who lived at 1313 Ellis Street, testified that she heard a bang and a flash of light from a gun during the evening of March 15, 2006. She went outside and saw one of the shooters get into a silver van. She could not see the shooter's face but described him as a slender black man.

¶ 13 Anthony King testified that he drove a gray minivan in March 2006. On the night of March 15, 2006, King, Johnson, Marizetts and defendant got into the van while another man, Johnny Sims, drove. When they arrived on Ellis Street, someone said they saw Forman. Sims stopped the van, and defendant, Johnson and Marizetts got out and started shooting. Defendant and Marizetts ran toward a truck, while Johnson ran after Forman in the opposite direction. Defendant opened the door to the truck, and he and Marizetts fired 12 to 13 shots inside. Marizetts, Johnson and defendant got back into the minivan with King and Sims. King asked defendant why he shot into the truck, and defendant replied, "[I]t is what it is." King testified that defendant had a .380 or 9 millimeter gun, Johnson had a .357 revolver and Marizetts had a .25 caliber gun that night.

¶ 14 At the crime scene, police recovered several bullet casings from a .380 caliber weapon and a .25 caliber weapon in and around Underwood's truck. A bullet removed from Underwood's cranium came from the same .380 caliber gun that police found in a vehicle during

a traffic stop in 2007. The gun's owner, Andre McCormick, testified that he bought the gun in late 2006 from a "shorter" male who used to buy drugs from him.

¶ 15 Lacey Mayne, who was romantically involved with defendant in 2006, testified that on March 15, 2006, she and defendant were at the home of defendant's sister, Ayissha Fitzpatrick, from 7:30 pm to 10:00 pm. Defendant's sisters, Ayissha Fitzpatrick and Eulonda Fitzpatrick, testified that defendant was at Ayissha's house for a birthday party from around 7:00 pm on March 15, 2006, to 1:00 am on March 16, 2006.

¶ 16 The jury was given eight verdict forms, consisting of a "not guilty" and "guilty" form for each offense with which defendant was charged. During deliberations, the jury sent a note to the judge asking, "What is the dispensation? Is the verdict in 4-parts or are the [sic] independent of each other or are certain ones linked to each other? – i.e. mob action[,] reckless discharge[,] 1st degree murder[?]" The trial court referred the jury to the instructions.

¶ 17 The jury found defendant guilty of all offenses. Defendant filed a motion for a new trial, as well as a motion to arrest judgment, arguing that counts 4, 5 and 8 were barred by the applicable statute of limitations. The State agreed that defendant's motion to arrest judgment should be granted. The trial court granted the motion and sentenced defendant to 60 years in prison for first degree murder. Defendant filed a motion to reconsider sentence, which the trial court denied.

¶ 18

ANALYSIS

¶ 19 The statute of limitations requires that, unless specifically provided for elsewhere, a defendant must be prosecuted for any felony offense within three years. 720 ILCS 5/3-5(a) (West 2016). An exception is provided for murder. 720 ILCS 5/3-5(b) (West 2016). The other crimes with which defendant was charged fall within the three-year statute of limitations. See 720 ILCS

5/3-5(a) (West 2016). Defendant's trial took place in 2015, nine years after defendant was alleged to have committed murder, aggravated battery with a firearm, aggravated discharge of a firearm, and attempted mob action. Thus, at the time of defendant's trial, the statute of limitations had run on all of the crimes for which he was charged, except murder.

¶ 20 For a defendant to prevail on a claim of ineffective assistance of counsel, he must establish that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the results of the proceedings would have been different. *People v. Sifford*, 247 Ill. App. 3d 562, 566 (1993) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Trial counsel's failure to move to dismiss charges that are barred by a statute of limitations constitutes ineffective assistance of counsel if the defendant is convicted of those charges. See *id.*; *People v. Gwinn*, 255 Ill. App. 3d 628, 632 (1994); *People v. Meier*, 223 Ill. App. 3d 490, 492 (1992); *People v. Staton*, 154 Ill. App. 3d 230, 232 (1987). However, the issue in this case is whether counsel's failure to move to dismiss charges barred by a statute of limitations constitutes ineffective assistance of counsel where the defendant is not convicted and sentenced on the time-barred charges but is convicted of a separate charge and evidence related to the other crimes was presented at trial.

¶ 21 In a similar case, the First District ruled that a defendant was denied effective assistance of counsel where she was convicted of and sentenced for armed robbery, home invasion, and felony murder because the statute of limitations had run on armed robbery and home invasion and her counsel did not seek dismissal of those charges. See *Staton*, 154 Ill. App. 3d at 232. However, the court noted: "the defendant does not take issue with her conviction and the sentence imposed for felony murder and *** the record fails to disclose that defense counsel's oversight adversely affected the outcome of the trial court's finding or sentence with regard to

this offense.” *Id.* Thus, the trial court reversed the defendant’s convictions for armed robbery and home invasion but affirmed her murder conviction. *Id.*

¶ 22 When irrelevant evidence is admitted during a trial, it will be considered harmless if there is no reasonable probability that the defendant would have been acquitted by the jury if the error had not occurred. *People v. Bowens*, 407 Ill. App. 3d 1094, 1111 (2011). Where the evidence of guilt is overwhelming, a conviction need not be reversed on the basis of the improper admission of evidence. *People v. Jones*, 108 Ill. App. 3d 880, 884 (1982).

¶ 23 Here, defendant argues that he was prejudiced by the admission of evidence at trial related to the time-barred charges of aggravated battery, aggravated discharge and attempted mob action. However, the only evidence defendant claims would be irrelevant to the murder charge against him is Lindler’s testimony regarding her injuries and the testimony provided by her surgeon about the medical treatment she received as a result of her gunshot wounds. While Lindler’s surgeon’s testimony would be irrelevant in a trial for the murder, Lindler would still be able to testify about what she saw the night of the murder and the injuries she sustained. See *People v. Nieves*, 193 Ill. 2d 513, 531 (2000) (all facts and circumstances surrounding a murder are admissible evidence to shed light on the events and reveal the nature of the crime).

¶ 24 Any slight prejudicial effect that the surgeon’s testimony may have had on defendant is overshadowed by the substantial evidence of his guilt of murder. See *Nieves*, 193 Ill. 2d at 530. Based on the evidence presented connecting defendant to Underwood’s murder, defendant failed to establish that there is a reasonable probability that the result of defendant’s murder trial would have been different if his counsel had successfully moved to dismiss the time-barred charges against him prior to trial.

¶ 25 CONCLUSION

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

¶ 27 Affirmed.