2018 IL App (3d) 150785-U

Order filed April 26, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
	)	Whiteside County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0785
v.	)	Circuit No. 14-CF-357
	)	
GERALD L. WARREN,	)	Honorable
	)	Stanley B. Steines,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: Defendant received ineffective assistance of counsel where defense counsel failed to request an instruction that the testimony of the State's primary witness was subject to suspicion and should be considered with caution.

¶ 2 Defendant, Gerald L. Warren, was found guilty of burglary and theft. The circuit court sentenced him to a term of 15 years' imprisonment for burglary, to run concurrently with a 5-year term of imprisonment for theft. On appeal, defendant argues that he received ineffective assistance of counsel. We vacate defendant's convictions and remand for further proceedings.

¶ 3 FACTS

¶ 4 The State charged defendant with burglary (720 ILCS 5/19-1(a) (West 2014)) and theft (*id.* § 16-1(a)(1)). The information alleged that defendant "or one for whose conduct said defendant was legally accountable" entered The Beverage Store in Rock Falls, Illinois, with the intent to commit a theft, and then committed said theft.

¶ 5 Defendant's jury trial commenced on April 14, 2015. James Hollaway of the Rock Falls Police Department testified that he was staking out The Beverage Store at approximately 2 a.m. on November 16, 2014, when he noticed an individual walking around inside the store. The store was closed and padlocked at the time. Hollaway approached the store in his squad car. He observed two male subjects in the store. One of the men exited the store by crawling through the store's drive-up window then fled from Hollaway on foot. Hollaway pursued the man in his squad car.

¶ 6 The dashboard video recording from Hollaway's squad car was played in court. The video shows two men outside the store, one of whom flees from Hollaway. After driving past the store, then turning right down another street, Hollaway turns into the parking lot of an apartment complex. There, approximately 22 seconds after Hollaway passed The Beverage Store, the video recording briefly shows a parked silver van. Hollaway testified that he recognized the van as belonging to defendant, who he was familiar with from his 17 years with the police department. Hollaway had seen defendant driving that van more than 50 times. The individual that Hollaway is pursuing cannot be seen on the video after he is initially shown fleeing. Hollaway testified that the suspect ran past the van without stopping, coming within 15 to 20 feet of the van. Hollaway did not see anyone inside the van, nor did he see anyone exiting the van.

¶ 7 A few minutes into the chase, Hollaway learned that officer Jarrett Ludwig had detained a suspect. Hollaway went to Ludwig's location and saw that Robert Gage had been placed under arrest. Gage was wearing a pair of blue rubber gloves. Gage was found with a black backpack containing five cartons of cigarettes, as well as a number of electronic cigarettes. The backpack also contained a Jack Daniel's tin. Ludwig recovered $1800 in cash from Gage, bundled with a rubber band. Hollaway later found a crowbar just outside the drive-up window of The Beverage Store.

¶ 8 Hollaway testified that Gage told officers that "there were other people involved." When the defense objected on hearsay grounds, the court instructed the jury that it could not consider that comment for the truth of the matter asserted. When the prosecutor asked Hollaway who the other individuals were that Gage said were involved in the offense, the defense again objected. The court again instructed the jury that it could not consider the forthcoming testimony for the truth of the matter asserted. The court further clarified for the jury: "This goes to the effect on the listener to show why he did what he did next and for no other purpose than that."

¶ 9 Hollaway testified that Gage told him that he had been with Emanuel McGlown and defendant that evening. Gage told him that the Super 8 hotel "was a pick up spot *** for when the burglary was done." Gage later told Hollaway that the group had been traveling in a silver van. After Gage told Hollaway about the van, Hollaway knew exactly "who [he] was looking for."

¶ 10 After speaking to Gage at the police station, Hollaway drove to the Super 8 hotel. Dashboard camera footage from that portion of the morning in question was played in court. When Hollaway arrived at the hotel, other officers had stopped a silver van in the hotel's carport. Hollaway recognized the vehicle as defendant's van. Defendant was in the driver's seat and

McGlown was in the front passenger seat. McGlown and defendant were taken into custody. Hollaway testified that a search of the van revealed nothing of evidentiary value, nor did a search of McGlown reveal any evidence connecting him to the burglary of The Beverage Store.

¶ 11 Ludwig's testimony was substantially similar to that of Hollaway. Ludwig testified that after he apprehended Gage, Gage told him that defendant and McGlown were also involved in the burglary and that they had all planned to meet in a van at the Super 8 hotel if they became separated. The defense objected to that testimony on hearsay grounds, but the court again overruled the objection and instructed the jury that it was not to be considered for the truth of the matter, but only to show why Ludwig acted in the manner that he did.

¶ 12 Ludwig also testified that after defendant and McGlown were detained at the Super 8 hotel, defendant said that they were there to visit McGlown's mother, Bambie Wilson. Ludwig was familiar with Wilson, but after entering the hotel there was no indication that Wilson had been there that night.

¶ 13 Billy Murray, a deputy for the Whiteside County Sheriff's Department, executed the traffic stop on the silver van at the Super 8 hotel. He had been advised that the hotel was a possible meeting point for the suspects. Defendant told Murray that he and McGlown had been together the entire evening. He explained that they had gone to the Super 8 hotel so McGlown could visit his mother, who worked there as a housekeeper.

¶ 14 Sandra Skinner worked as a bookkeeper and cashier at The Beverage Store. She was summoned to the store by police in the early morning hours of November 16, 2014. Once there, Skinner identified the cash found on Gage as money that would have been under her desk in a Jack Daniel's tin. She kept the tin in a box behind a Mr. Coffee box under her desk. Skinner further testified that defendant was a regular customer at the store. She recalled that a week

before the burglary, defendant had come to her office at the store to ask if he could write a check. She could not recall with certainty whether defendant had seen her handling money at that time.

¶ 15 Kelly Sharkey testified that she lived in Rock Falls with her three children. Defendant had previously lived at the house as well, but moved out approximately a week before the events in question. Sharkey testified that defendant called her on November 15, 2014, complaining that his apartment was too cold and asking if he could sleep at Sharkey's house. Sharkey consented, testifying that defendant arrived at her house at approximately 11:15 or 11:30 that night. Sharkey went to bed at 11:30 p.m., and defendant was not at her house when she awoke.

¶ 16 Sharkey was familiar with Gage and McGlown. Gage was a friend of Sharkey's teenage son, Joseph Sauer. Sharkey knew McGlown through his mother. Both Gage and McGlown were also at the house on November 15, 2014. Sharkey did not know what time the men arrived at the house, but testified that they were still there when she went to bed. Sharkey testified that The Beverage Store was "a couple blocks" from her house.

¶ 17 Sauer testified that Gage and McGlown arrived at the house on the afternoon of November 15, and that defendant arrived later. At some point later in the evening, Sauer was in his basement bedroom while Gage, McGlown, and defendant were upstairs. Sauer went to bed at approximately 1 a.m. and did not know if the three men were still in the house at that time.

¶ 18 Gage, who was 19 years old at the time of trial, testified that he had been convicted of burglary stemming from the events in question. He had not received any consideration in exchange for his testimony at defendant's trial. Gage had known defendant through Sharkey for approximately eight months prior to the incident. Gage recalled that he was at Sharkey's house all day on November 15, 2014, as was his friend McGlown. Defendant was also at the house.

At approximately 12:30 a.m., on November 16, Gage, McGlown, and defendant were in Sharkey's kitchen.

¶ 19 According to Gage, defendant asked him if he wanted to make some money. The group then "talked about going to The Beverage Store and getting money from it." Defendant told Gage that there would be money located "in a Jack Daniel's tin box in the office under the desk." Defendant also explained where the office was. Gage testified that defendant provided him and McGlown with gloves, a crowbar, and a hammer. After 20 minutes of planning, the group went to The Beverage Store in defendant's van.

¶ 20 Defendant parked the van in the parking lot of an apartment complex a block away from the store. Gage testified that the group agreed to meet later at the Super 8 hotel. Defendant stayed in the van while Gage and McGlown went to The Beverage Store. They pried open the store's drive-up window with the crowbar, and Gage left the crowbar outside the window. Gage found the office, desk, and Jack Daniel's tin exactly where defendant told him they would be. Gage took the tin, as well as some cartons of cigarettes and electronic cigarettes. After seeing a police car pull up, Gage and McGlown climbed out through the drive-up window.

¶ 21 Gage ran away from the police car. He ran in the direction of the parking lot in which defendant had parked. Gage was eventually stopped and arrested. Gage told the arresting officers who he was with and where they intended to meet.

¶ 22 Following closing arguments, the circuit court instructed the jury. Neither party requested a jury instruction bearing on accomplice testimony, and, as such, none was given. The jury found defendant guilty of burglary and theft. The circuit court sentenced defendant to a term of 15 years' imprisonment for burglary and a concurrent term of 5 years' imprisonment for theft.

¶ 23 ANALYSIS

¶ 24 On appeal, defendant argues that his attorney was ineffective for, *inter alia*, failing to procure a jury instruction relating to the testimony of an accomplice. The State concedes that defendant was entitled to such an instruction, but argues that he was not prejudiced by the absence of the instruction. We agree with defendant.

¶ 25 A defendant charged with a felony has a constitutional right to the effective assistance of counsel. U.S. Const., amends. VI, XI, § 1; Ill. Const. 1970, art. I, § 8. Claims of ineffective assistance of counsel are analyzed under the two-part framework set forth in the seminal case of *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Manning*, 241 Ill. 2d 319, 326 (2011). To prevail on such a claim, "[a] defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. In order to satisfy the prejudice prong, a defendant must prove a reasonable probability exists that, but for counsel's deficient performance, the outcome of the trial would have been different. *People v. Smith*, 195 Ill. 2d 179, 188 (2000).

¶ 26 Illinois Pattern Jury Instructions, Criminal, No. 3.17 (approved July 18, 2014) (hereinafter IPI Criminal No. 3.17) states: "When a witness says he was involved in the commission of a crime with the 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." The State concedes that defendant was entitled to have that instruction read to the jury, and makes no argument that defense counsel did not render deficient performance by failing to request it. The State only argues that defendant cannot satisfy the prejudice prong of *Strickland*.

¶ 27 Whether a defendant is prejudiced by counsel's failure to request IPI Criminal No. 3.17 turns largely on the other evidence, apart from the accomplice testimony, the State presents. See *People v. McCallister*, 193 Ill. 2d 63, 91 (2000) (citing "the strength of the evidence offered against defendant apart from [the accomplice's] testimony"). In *People v. Wheeler*, 401 Ill. App. 3d 304, 313-14 (2010), this court found defense counsel had rendered ineffective assistance for failing to request an instruction bearing on accomplice testimony. In that case, Jacque Buckley testified as an accomplice at defendant's first-degree murder trial. *Id*. at 306-07, 313. In holding that counsel's failure to request the accomplice instruction was not harmless, *i.e.*, prejudicial, this court wrote:

> "[T]he evidence was closely balanced and the State's case rested upon Buckley's credibility as its key witness. Without Buckley's testimony, there were no witnesses who could identify defendant's car, no witnesses who could identify defendant as the shooter, and no physical evidence presented to link defendant to the crime. ***
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> *** Had the accomplice-witness instruction been given, the jury would have been compelled to examine Buckley's testimony with close scrutiny. Due to the fact that the State's case hinged on Buckley's testimony, we find that this deficient performance so prejudiced the defense as to deny the defendant a fair trial." *Id*. at 314.

¶ 28 The facts of the present case are similar to the facts in *Wheeler*. The State's case here turned almost entirely on Gage's testimony. The only evidence possibly linking defendant to the burglary, outside of Gage's testimony, was Hollaway's testimony that he saw defendant's van parked approximately a block from The Beverage Store and Sharkey's testimony that defendant

was with Gage and McGlown at her house. Even those pieces of evidence, without Gage's corroborative testimony are of little inherent probative value. That is, defendant parking somewhat near the scene of a crime and having been in the same house as the offenders earlier in the day is not alone evidence that defendant was himself involved in any criminal conduct. The value of that evidence, like the State's case, turned on the testimony of Gage.[1] See also *People v. Butler*, 23 Ill. App. 3d 108, 112 (1974) (finding counsel ineffective for failing to request accomplice instruction where it "was crucial to the State's case, which otherwise was supported only by highly questionable circumstantial evidence").

¶ 29 Moreover, it cannot be understated how significant the accomplice instruction is, and, in turn, how significant the lack of said instruction can be. Had IPI Criminal No. 3.17 been delivered, the court would have told the jury, just before it began deliberations, that the testimony of the State's primary witness was to be taken with suspicion and caution. It is not difficult to envision such an instruction impacting the jury's deliberative process. Where the State's case against defendant turned almost entirely upon the testimony of an alleged accomplice, a reasonable probability exists that the outcome of the trial would have been different had the accomplice instruction been delivered. *Wheeler*, 401 Ill. App. 3d at 314.

¶ 30 In reaching this conclusion, we necessarily reject the State's contention that defendant was not prejudiced by counsel's failure to request the accomplice instruction. The State argues: "The evidence in this case is not closely balanced. Gage's testimony was clear, direct, and corroborated by other independent evidence." Somewhat ironically, the State undermines its own argument when it asserts that the evidence was not close, then relies entirely on Gage's

[1]Similarly, the State also urges that Skinner's testimony that defendant was in the store's office a week earlier (though she could not recall whether he had seen her handling money) "supports the inference defendant 'cased' the store." This too, absent Gage's testimony, is "highly questionable circumstantial evidence." *People v. Butler*, 23 Ill. App. 3d 108, 112 (1974).

testimony to support that point. The State's argument, essentially, is that Gage's testimony was so reliable that his credibility could have survived the issuing of the accomplice instruction. However, as *McCallister*, *Wheeler*, and *Butler* make clear, determination of whether prejudice flowed from the failure to deliver IPI Criminal No. 3.17 turns on the evidence in the case *apart* from that provided by the accomplice. This is a more prudent and practical analysis. The State's implicit analysis would have this court step into the role of factfinder in assessing Gage's credibility, then attempting to divine his remaining credibility following the delivery of IPI Criminal No. 3.17. We would note further than many of the examples of corroboration of Gage's testimony offered by the State, such as Gage's testimony about using a crowbar to enter the store being corroborated by Hollaway's testimony that he found a crowbar in that area, have no bearing on whether defendant actually participated in the offense.

¶ 31 We would be remiss if we did not address in closing the testimony of Hollaway and Ludwig, each of whom testified that Gage identified defendant as a coconspirator immediately upon being apprehended. Taken at face value, this testimony would bolster Gage's credibility immensely. See *People v. Smith*, 139 Ill. App. 3d 21, 34 (1985) ("The admission of a [prior consistent] statement used to bolster the sagging credibility of a witness is reversible error when the witness' in-court testimony is crucial."). While the circuit court instructed the jury not to consider the testimony for the truth of the matter asserted, there would be obvious difficulties in the jury attempting to perform those " 'mental gymnastics' " (*In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 78 (quoting David H. Kaye *et al.*, The New Wigmore: A Treatise on Evidence: Expert Evidence § 4.7.2 (2d ed. 2010)) by ignoring such critical testimony when later assessing Gage's credibility. Ultimately, because we vacate defendant's convictions and remand

for further proceedings based on the ineffectiveness of counsel, we need not consider whether this testimony amounted to reversible error.

¶ 32 CONCLUSION

¶ 33 The judgment of the circuit court of Whiteside County is vacated and the cause is remanded for further proceedings.

¶ 34 Vacated.

¶ 35 Cause remanded.