2018 IL App (4th) 160624-U

NO. 4-16-0624

FILED
December 6, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	DeWitt County
TIMOTHY R. HANNAH,	)	No. 16CF16
Defendant-Appellant.	)	
	)	Honorable
	)	Karle Eric Koritz,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Harris and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* We reverse defendant's convictions and remand the case for separate trials because defendant's trial counsel provided ineffective assistance of counsel.

¶ 2 In March 2016, the State charged defendant with unlawfully disposing of methamphetamine manufacturing waste (720 ILCS 646/45 (West 2016)) and being a sexual predator or a child sex offender in a public park (720 ILCS 5/11-9.4-1(b) (West 2016)). After a jury trial in May 2016, defendant was found guilty of both charges. The trial court sentenced defendant to four years and six months in prison on the unlawful disposal of methamphetamine manufacturing waste conviction and 364 days in jail to be served concurrently on the sex predator or child sex offender in a public park conviction. Defendant appeals, raising the following issues: (1) the State failed to present sufficient evidence to prove he was guilty beyond a reasonable doubt of either charge; (2) his trial counsel was ineffective; (3) the trial court

improperly imposed a $2500 methamphetamine fine pursuant to section 90 of the Methamphetamine Control and Community Protection Act (720 ILCS 646/90 (West 2016)); and (4) the circuit clerk improperly imposed a number of fines. We find defense counsel provided ineffective assistance of counsel requiring the reversal of defendant's convictions and the remand of this case for separate trials.

¶ 3 I. BACKGROUND

¶ 4 Defendant's jury trial began on May 17, 2016. Detective Scott Pippen of the DeWitt County Sheriff's Office testified he is responsible for registering sex offenders in DeWitt County. He registered defendant on several occasions. On February 19, 2016, defendant completed a sex offender registration form. Detective Pippen went over the information on the registration form with defendant to verify its accuracy. Detective Pippen was asked at trial if defendant's Florida conviction for possession of child pornography, which required him to register as a sex offender in DeWitt County, classified him as a sexual predator and a child sex offender. He responded yes. Defendant did not object to this testimony.

¶ 5 Inspector Charles Luke Werts, a detective with the DeWitt County Sheriff's Office, testified he was currently assigned to an Illinois State Police Task Force specializing in drug investigations. On March 8, 2016, Officer Viverito of the Illinois Conservation Police contacted Werts about a drug offense at "Weldon Springs State Park." Viverito told Werts two park workers found the burnt remains of what they believed to be a methamphetamine lab after seeing and investigating a bright flame across the lake. At the fire's location, the two park workers saw a man and woman, between 30 and 40 years of age, with a small black and white dog leaving the area in a maroon, four-door car. Inspector Werts observed two separate burn locations at Weldon Springs State Park. He saw what looked like burnt plastic bottles. He could

also see two pennies. The plastic bottles were typical for manufacturing methamphetamine.

¶ 6 Inspector Werts testified Tracy Stogsdill and defendant matched the description of the two people seen by the park workers. Werts subsequently interviewed both defendant and Stogsdill. Defendant acknowledged he was at the state park on the morning of March 8. Defendant said he went to the restroom directly next to the burn site while Tracy had the dog. Defendant told Werts he threw away some trash from the car. Defendant denied burning anything at the park. Werts told defendant he was investigating the remains of a burned-up methamphetamine lab. Defendant never accused Stogsdill of being involved with the burnt methamphetamine waste.

¶ 7 According to Werts, defendant acknowledged he knew what a "one-pot meth lab" was after it was described to him by Inspector Freytag. Werts said a "one-pot meth lab" is a way of manufacturing methamphetamine inside a single plastic bottle. While called a "one-pot meth lab," a second plastic bottle is used in the process. Defendant admitted seeing two people in a white truck at the park. Werts testified the two people seen by defendant were park workers.

¶ 8 Tracy Stogsdill testified defendant lived with her at her residence for about one year. On March 8, 2016, she and defendant went to Weldon Springs State Park after defendant told her he needed to burn some trash. She drove a maroon car to the park. On the way, Stogsdill could smell fuel inside the car, which she believed was coming from defendant's plastic bag of trash. Stogsdill suggested they go to Weldon Springs State Park to burn the trash.

¶ 9 When they got to the park at 7:30 a.m., she took her dog for a walk and could not see defendant. She did not see anyone else. After returning to her car, she saw a fire on the sidewalk next to the bathrooms. She did not see anyone start the fire or anyone by the fire. The flames were approximately two-feet tall. She could not see what was being burned in the fire.

Defendant did not tell her what he was going to burn. According to her testimony, she told the police she asked defendant at the park what he was "doing burning on the sidewalk" when they got to the car. Defendant did not respond to her.

¶ 10 Stogsdill admitted having experience with methamphetamine. She used the drug herself and saw defendant with it. She testified defendant would ask her to buy him water bottles and pop bottles at the grocery store. She did not know what defendant did with the bottles. She also had familiarity with the manufacture of methamphetamine, telling the police various ways a person can cook the drug. She was unaware of how defendant specifically cooked methamphetamine because she never saw him do it. Stogsdill testified defendant never told her about using pennies when making methamphetamine. However, she had heard using pennies might make a better batch of methamphetamine. She acknowledged telling the police defendant had used pennies when making methamphetamine.

¶ 11 Stogsdill told the police that defendant had never carried a methamphetamine bottle around her house but she had seen him do this in other places. Defendant would not leave these bottles unattended during the manufacturing process because the bottles might blow up. She was familiar with ingredients used in making methamphetamine, including lye, salt, Coleman fuel, and ice packs, which either she or defendant would buy at Ace Hardware or Walmart. She told the police defendant extracted lithium strips from batteries. However, she never saw him do this. She said those strips were used in the manufacturing process. She denied ever manufacturing methamphetamine or disposing of a methamphetamine lab. Prior to defendant moving into her residence, she had never seen anyone produce methamphetamine.

¶ 12 Sergeant Michael Campbell of the Illinois State Police testified he was assigned to the State Police Methamphetamine Response Team and dispatched to Weldon Springs State Park

in DeWitt County on or about March 8, 2016. He was directed to an outdoor restroom at the state park. A "90-degree wooden partition" was in front of the restroom door. He saw a burnt pile of debris outside the door but inside the partition and a separate pile outside the partition across the sidewalk in a grassy area. Inside the partition, the remnants of the burnt debris included what appeared to be a "thicker-walled" plastic bottle, like a Gatorade or Powerade type bottle, some liquid, some pennies, and a "white solid material." Outside the partition, the burnt remains included a thinner-walled green bottle, like a Mountain Dew or 7UP bottle, clear crystals consistent with a rock salt material, and some liquid as well. Campbell testified the debris was similar and consistent with "burnt cooks" he had seen in the past. The burnt remnants inside the partition were consistent with a "one-pot cook." The green bottle outside the partition was consistent with an "ACL gas generator" used in the final step of a one-pot cook.

¶ 13 Campbell testified the bottle which contained the methamphetamine would test on the base side of the pH scale. In this case, the white chunky material and the liquid that was inside the partition by the restroom was tested using pH paper at an eight. Campbell stated this told him it was part of the cook. The green bottle outside the partition was also tested with pH paper. It tested at a one, which is on the acidic side of the pH scale. Campbell stated bottles used as generators will test on the acidic side of the pH scale. Based on his training and experience responding to over 250 methamphetamine labs, he believed the burned waste was from the manufacture of methamphetamine.

¶ 14 The State then rested its case. Defense counsel stated he was not making a motion for a directed verdict because such a motion would be meritless. The trial court then asked whether defendant had any motions on the admissibility of defendant's convictions and the form the evidence could be introduced in the case. Defense counsel responded:

"Your Honor, while we don't have—well, I have been shown a certified copy of a conviction. My client has acknowledged that he has a conviction for a felony in the state of Florida. That is reflected on People's Exhibit Number 1 as the basis for the reason for People's Exhibit Number 1 to begin with.

I don't know what else the People intend to offer as far as that goes, but that's the only evidence that's before the Court, I think."

The State noted it should be allowed to question defendant about his Florida child pornography conviction if he testified. The court and defense counsel then had the following exchange:

THE COURT: [Defense counsel], do you have any objection to the admissibility of the prior conviction, or at least the methodology of introducing the prior conviction by way of the previously admitted Exhibit 1 for the People, that being the sex offender registration form?

[DEFENSE COUNSEL]: The methodology used to impeach?

THE COURT: I'm not asking you whether or not you agree that it's admissible. But in terms of the actual methodology or proof of the—extrinsic proof of prior conviction, do you have a position with respect to the People's Exhibit 1 being that extrinsic proof?

[DEFENSE COUNSEL]: Your Honor, People's Exhibit 1 is evidence of the fact that my client registers as a sex offender in the state of Illinois. On that form it contains information that forms the basis for that requirement. That's—I thought that would be more evidence toward Count II as opposed to impeachment evidence than anything else so—well, I'll leave that to the Court's discretion."

The court then asked the State whether it had any authority showing extrinsic evidence other

than a certified conviction could be used for purposes of proving a prior conviction for impeachment purposes. The State noted it had no authority for that proposition. The court then stated:

> "It's a strange factual scenario here. The People's Exhibit 1 has already been admitted without objection ostensibly for the purpose of proving-up the prior conviction out of Florida for purposes of proving that the Defendant is a sex offender or a sexual predator by Illinois law, and that's a different purpose than introducing that for purposes of impeachment.
>
> The Court understands that that particular exhibit may already be before the jury on that other question, but for purposes of impeachment in the absence of authority stating that evidence of a prior conviction may be made by something other than a certified conviction for purposes of impeachment and in the absence of a stipulation otherwise, the Court will deny using the prior record for that reason.
>
> Now, if, for some reason, the Defendant wants to talk about that on direct examination then I believe he would open the door for the People. But at this point the motion to use that prior conviction is denied for purposes of impeachment."

¶ 15 Defendant testified on his own behalf. He had lived with Stogsdill for a little over one year prior to his arrest in this case. He and Stogsdill were together on the morning of March 8. She asked him if he wanted to go out for breakfast. While she drove to breakfast, she said she needed to make a stop. They went to the park. According to his testimony, he was not familiar with the area. Stogsdill parked the car and told him not to let the dog follow her. She retrieved a

white plastic bag from the trunk and then "disappeared" away from the driver's side of the vehicle. He believed she threw the bag in the trash because she was back within five or six minutes and came back empty handed. Defendant called for the dog to return, put the dog in the car, and then walked down to the tree line to urinate. He denied (1) going to the restroom facility where the burn piles were found, (2) taking a bag to the restroom facility, (3) burning anything at the park, and/or (4) seeing a fire. As he and Stogsdill were leaving, he saw a white pick-up truck with two men inside pass them.

¶ 16 Defendant stated Stogsdill had disposed of bags like these on two separate occasions and was knowledgeable about methamphetamine, its manufacture, and its waste. She injected herself with methamphetamine four to five times per day on an almost daily basis up until March 8. Defendant denied disposing of any methamphetamine manufacturing waste at any time while he was with Stogsdill.

¶ 17 According to defendant, Stogsdill would disappear for three and a half to four hours every five or six days and return with four and a half to five grams of methamphetamine that she would then use over the next days. Defendant used the methamphetamine with her but denied knowing where she acquired it. Defendant testified neither he nor Stogsdill cooked methamphetamine where they lived. He also denied cooking methamphetamine anywhere else. Defendant denied knowing what was in the bags Stogsdill threw away, but he assumed it was waste from her manufacture of methamphetamine.

¶ 18 The State called Detective Werts as a rebuttal witness. Werts testified he interviewed defendant about what happened at Weldon Springs State Park. Defendant told the detective he used the men's restroom at the park and did not say Stogsdill brought a bag of garbage to the park. On cross-examination, Detective Werts stated he did not ask defendant if

Stogsdill got anything out of the car, what she was doing, or where she went at the park.

¶ 19 Defense counsel conceded defendant's guilt to the charge of being a sexual predator or child sex offender at a public park charge during his closing argument, telling the jury:

> "This is not a, this is not a law that says that you have to knowingly or you have to have some sort of huge intent. No. He just strictly can't be there. They call it a strict liability-type case. You can't do it period. It's like speeding. Speed limit says this. If you go more than that you're speeding period. Ain't no ifs, ands[,] or buts about it. Don't care if you know your speedometer is workin'. Doesn't matter. You're not supposed to be there. He wasn't supposed to be there. He was. And that should take you about a minute to find him guilty of that or less, or as fast as you can sign the guilty form."

With regard to the charge of disposing of methamphetamine manufacturing waste, defense counsel argued Stogsdill, not defendant, burned the waste.

¶ 20 On May 18, 2016, the jury found defendant guilty on both charges. On July 25, 2016, the trial court sentenced defendant to four years and six months in prison for unlawfully disposing of methamphetamine manufacturing waste and a concurrent term of 364 days in jail for being a sex predator/child sex offender in a public park. The court ordered defendant's jail sentence to be merged into his prison sentence.

¶ 21 Defendant filed neither a posttrial motion nor a motion to reconsider sentence.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 A. Sufficiency of the Evidence

¶ 25 Defendant first argues the State failed to prove beyond a reasonable doubt he was guilty of either disposing of methamphetamine manufacturing waste or being a sexual predator or child sex offender in a public park. When reviewing a claim regarding the sufficiency of the evidence to convict, we look at whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in a light most favorable to the prosecution. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004). It is the function of the trier of fact to assess the credibility of witnesses, the weight to give witness testimony, and any inferences to be drawn from the evidence in the case. *People v. Lee*, 213 Ill. 2d 218, 225, 821 N.E.2d 307, 311 (2004). "The jury must also resolve conflicts or inconsistencies in the evidence." *Lee*, 213 Ill. 2d at 225, 821 N.E.2d at 311. It is not the function of the appellate court to retry a defendant. *Cunningham*, 212 Ill. 2d at 279, 307 N.E.2d at 308.

¶ 26 1. *Unlawful Disposal of Methamphetamine Manufacturing Waste*

¶ 27 Defendant argues the State failed to present sufficient evidence to prove beyond a reasonable doubt he (1) burned methamphetamine manufacturing waste and (2) knew the waste had been used to manufacture methamphetamine. We disagree.

¶ 28 Pursuant to section 45(a) of the Methamphetamine Control and Community Protection Act (Act) (720 ILCS 646/45(a) (West 2016)), "[i]t is unlawful to knowingly burn, place in a trash receptacle, or dispose of methamphetamine manufacturing waste, knowing that the waste was used in the manufacturing of methamphetamine." Section 10 of the Act (720 ILCS 646/10 (West 2016)) defines " '[m]ethamphetamine manufacturing waste' " as "any chemical, substance, ingredient, equipment, apparatus, or item that is left over from, results from, or is produced by the process of manufacturing methamphetamine, other than finished

methamphetamine." This same section defines " '[m]anufacture' " as "to produce, prepare, compound, convert, process, synthesize, concentrate, purify, separate, extract, or package any methamphetamine, methamphetamine precursor, methamphetamine manufacturing catalyst, methamphetamine manufacturing reagent, methamphetamine manufacturing solvent, or any substance containing any of the foregoing." 720 ILCS 646/10 (West 2016).

¶ 29 When the evidence in this case is viewed in a light most favorable to the State, a rationale trier of fact could easily find the bottles found at Weldon Springs State Park were used to manufacture methamphetamine based on the testimony of Sergeant Campbell. Based on his training and experience in responding to over 250 methamphetamine labs, Campbell testified it was his opinion the burned waste found at the park was used in the manufacture of methamphetamine. He testified the remnants found inside the partition by the bathroom were consistent with a "one-pot cook" and the bottle found outside the partition was consistent with an "ACL gas generator," which is used in the final step of "cooking" methamphetamine in a "one-pot cook" process. Campbell also testified he performed tests to determine the pH level of the materials on the scene. According to Campbell, the test results were consistent with what one would expect in materials used in the methamphetamine manufacturing process.

¶ 30 As for defendant's involvement in burning the methamphetamine manufacturing waste and his knowledge the waste had been used to manufacture methamphetamine, Stogsdill's testimony and circumstantial evidence supports the jury's finding. Stogsdill testified defendant had items he needed to burn. While she did not see him start the fire, she did see the fire. Defendant told the police he was familiar with a "one-pot meth lab." Defendant also admitted he was at the park with Stogsdill. Finally, defendant chose to dispose of the trash at an empty state park where he presumably believed the trash would not be traced back to him instead of simply

throwing the trash away in a more conventional method. This is strong circumstantial evidence defendant knew these materials had been used to manufacture methamphetamine. While defendant attempted to blame Stogsdill for burning the waste, the jury did not find him credible.

¶ 31 2. *Sexual Predator or Child Sex Offender in a Public Park*

¶ 32 Defendant next argues the State failed to present sufficient evidence to prove beyond a reasonable doubt he was a sexual predator or child sex offender in a public park. According to defendant, the State neither established he was a sexual predator or child sex offender or that he was in a public park. We disagree.

¶ 33 We note defendant's trial attorney did not argue the State failed to establish defendant was at a state park or qualified as a child sex offender under Illinois law. In fact, during his closing argument, defendant's attorney stated the jurors should find defendant guilty of this charge as fast as they could sign their names to the guilty verdict form. Because defendant's trial attorney conceded to the jury it could quickly find defendant guilty of being a child sex offender in a public park, defendant is estopped pursuant to the doctrine of invited error from arguing on appeal the evidence was not sufficient to convict him of this crime. *People v. Lucas*, 231 Ill. 2d 169, 174, 897 N.E.2d 778, 781 (2008).

¶ 34 Regardless, the State presented evidence defendant was a child sex offender and was at a public park. Detective Pippen who registered defendant as a sex offender in DeWitt County was asked if defendant's Florida conviction for possession of child pornography, which required him to register as a sex offender in DeWitt County, classified him as a sexual predator and a child sex offender. Detective Pippen, without objection, responded in the affirmative. Further, numerous witnesses testified the incident in question occurred at "Weldon Springs State Park."

¶ 35 B. Ineffective Assistance of Counsel

¶ 36 Defendant next argues he was "greatly prejudiced" by several errors his attorney committed at trial. Defendant points to counsel's failure to do the following: (1) file a motion to sever the two charges; (2) request an accomplice jury instruction when the evidence showed Stogsdill could have been charged as a principal or an accomplice on the methamphetamine charge; (3) object to hearsay testimony provided by a State witness; and (4) move for a directed verdict at the end of the State's case in chief.

¶ 37 A defendant has a constitutional right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." (Internal quotation marks omitted.) *People v. Veach*, 2017 IL 120649, ¶ 30, 89 N.E.3d 366.

¶ 38 For defendant to demonstrate his counsel's performance was deficient, he must show "counsel's performance was objectively unreasonable under prevailing professional norms." *People v. Cherry*, 2016 IL 118728, ¶ 24, 63 N.E.3d 871. As the United States Supreme Court has stated:

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689.

Defendant must overcome the strong presumption his counsel's conduct falls within the wide range of reasonable professional assistance and could be considered sound trial strategy.

¶ 39 Even if defendant can establish his counsel's performance was objectively unreasonable under prevailing professional norms, he must also show he was prejudiced by his attorney's performance. To do this, "defendant must show *** there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Veach*, 2017 IL 120649, ¶ 30. "A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) *Veach*, 2017 IL 120649, ¶ 30.

¶ 40 We can quickly dispense with defendant's arguments his trial counsel was ineffective for not making a motion for a directed verdict and for failing to object to hearsay testimony by a State witness. As noted earlier, the State presented sufficient evidence to convict defendant beyond a reasonable doubt of both charges. As a result, any motion for a directed verdict at the close of the State's case would have been unsuccessful.

¶ 41 With regard to defense counsel's failure to object to Detective Werts's testimony an Illinois Conservation Officer told him that two park workers told the conservation officer they saw a bright flame across the lake, went to investigate, saw a man and woman leaving the scene in a maroon Chevrolet, and found the burnt remains of what they believed was a methamphetamine lab, we need not determine whether defense counsel's failure to object was objectively unreasonable because defendant was not prejudiced by this testimony. Defendant admitted he was at the scene, Stogsdill testified she saw a fire, and Sergeant Campbell testified the burnt remains found at the State Park were consistent with a "one-pot cook" methamphetamine manufacturing operation. As a result, the jury did not learn anything from these hearsay statements it did not learn from the witnesses in this case.

¶ 42 We next turn to defendant's argument his trial counsel was ineffective for not

moving to sever the charges in this case. This argument has merit. Defendant argues the State had to present evidence defendant was a sexual predator or child sex offender to establish he was guilty of being a sexual predator and/or child sex offender in a public park. However, defendant argues this evidence would have been inadmissible with regard to the methamphetamine charge.

¶ 43 Pursuant to section 111-4(a) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/111-4(a) (West 2016), "Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are based on the same act or on 2 or more acts which are part of the same comprehensive transaction." Defendant concedes the two charged offenses in this action are part of the same comprehensive transaction. However, he argues he was prejudiced by having to defend himself against the unlawful disposal of methamphetamine waste charge when the jury was told he was a child sex offender.

¶ 44 Section 114-8 of the Procedure Code (725 ILCS 5/114-8(a) (West 2016)) states, "If it appears that a defendant or the State is prejudiced by a joinder of related prosecutions or defendants in a single charge or by joinder of separate charges or defendants for trial the court may order separate trials, grant a severance of defendants, or provide any other relief as justice may require." Defendant contends the trial court would have granted a motion for severance in this case to avoid the jury hearing evidence he was a child sex offender at defendant's trial on the methamphetamine charge.

¶ 45 "The trial court is entitled to substantial discretion when deciding whether to sever charges, and that discretion is to be exercised so as to prevent injustice." *People v. Patterson*, 245 Ill. App. 3d 586, 588, 615 N.E.2d 11, 13 (1993). The decision to sever or not turns on the particular facts of each case. *Patterson*, 245 Ill. App. 3d at 588, 615 N.E.2d at 13.

The facts in this case favored severance to prevent injustice.

¶ 46 In *People v. Edwards*, 63 Ill. 2d 134, 136, 345 N.E.2d 496, 497 (1976), a three-count indictment charged defendant with one count of armed robbery and two counts of unlawful use of weapons. The unlawful use of a weapon charge alleged in count II of the indictment was a Class A misdemeanor. The unlawful use of a weapon charge alleged in count III was a Class 3 felony because the defendant had a prior felony burglary conviction. *Edwards*, 63 Ill. 2d at 136, 345 N.E.2d at 497. Defendant moved to sever count III from the other charges because he would be prejudiced by the State's introduction of evidence regarding his prior burglary conviction. *Edwards*, 63 Ill. 2d at 137, 345 N.E.2d at 497. The appellate court found the trial court abused its discretion in not granting defendant's motion for severance. *Edwards*, 63 Ill. 2d at 138, 345 N.E.2d at 498. Our supreme court agreed, stating:

> "We share the appellate court's concern that the procedure used in this case involves a significant risk that the trier of fact will use evidence of a prior conviction in determining the defendant's guilt or innocence of an unrelated offense. The procedure could have easily been avoided in the instant case. The State does have an interest in its pursuit of judicial economy in prosecuting all charges against one defendant in one trial, but that interest is not so strong as to justify the denial of a severance in the instant case. We find that the joinder of the armed robbery and the felonious unlawful use of a weapon charges created such a strong possibility that the defendant would be prejudiced in his defense of the armed robbery charge that it was an abuse of the trial court's discretion to deny a severance." *Edwards*, 63 Ill. 2d at 139-40, 345 N.E.2d at 498-99.

¶ 47 The State argues defense counsel's decision not to move to sever the charges

should be seen as trial strategy. In *People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 24, 75 N.E.3d 503, the First District stated: "Generally, a defense decision not to seek a severance, although it may prove unwise in hindsight, is regarded as a matter of trial strategy." In *Fields*, the First District rejected the defendant's reliance on *Edwards* because *Edwards* did not involve an ineffective assistance of counsel claim. Instead, the issue in *Edwards* was whether the trial court erred in denying the defendant's motion to sever. The First District in *Fields* relied on the Second District's decision in *People v. Gapski*, 283 Ill. App. 3d 937, 942-43, 670 N.E.2d 1116, 1119-20 (1996). In *Gapski*, the Second District rejected the defendant's reliance on *Edwards*, concluding defense counsel's decision to not file a motion to sever was a matter of trial strategy.

¶ 48 This case is distinguishable from *Edwards* because defense counsel did not file a motion to sever. In that sense, this case is more like *Gapski* because defendant is arguing his trial counsel was ineffective for not moving to sever the charges. The State points to the possibility defense counsel in this case did not move to sever the charges because he was pursuing an "all-or-nothing" defense strategy. In other words, defendant would either be acquitted of both charges or convicted of both charges. However, the record belies the State's argument. If defense counsel was pursuing an "all-or-nothing" defense strategy, counsel was clearly ineffective considering he told the jury it should find defendant guilty of being a child sex offender in a public park as fast as each juror could sign his or her name to the verdict form.

¶ 49 The State also argues defense counsel would have known the prior conviction would be admissible to impeach defendant if he testified. However, as the record shows, the State was not allowed to impeach defendant with this prior conviction because it did not have a certified copy of the conviction. Further, even if the State did have a certified copy, defendant may have chosen not to testify or the court may have found the prejudicial effect of the

conviction outweighed its probative value.

¶ 50 Based on the record in this case, we believe defense counsel's failure to move for the trial court to sever the charges was objectively unreasonable under prevailing professional norms and cannot be excused as mere trial strategy. We find defense counsel's failure to move to sever these charges prejudiced defendant with regard to both counts. Because both charges were tried together, the State had the right and the burden to establish defendant's status as a sexual predator or child sex offender. Had defendant been able to defend the methamphetamine charge by itself, he likely could have kept the jury from learning of his conviction for possessing child pornography or his status as a sexual predator or child sex offender. Further, had defendant been able to defend the charge he was a sexual predator or a child sex offender in a public park by itself, his attorney would not have told the jury it should find him guilty of that charge as fast as the jurors could sign their names to the verdict form.

¶ 51 Because the jury had to determine whether to believe defendant's version of events, a reasonable probability exists the result of this trial would have been different if the jury did not learn defendant was a sexual predator or child sex offender. As in *Edwards*, trying the two charges together created a significant risk the jury would consider defendant's criminal history and his status as a sexual predator or a child sex offender in determining whether to convict him on the methamphetamine charge.

¶ 52 The methamphetamine charge came down to a credibility contest between Stogsdill and defendant. Stogsdill said defendant took the waste to the park and burned it. Defendant said Stogsdill took the waste to the park and got rid of it. Neither defendant nor Stogsdill were strangers to methamphetamine. They both used it, and they were both aware of how it was produced. Further, the evidence was undisputed Stogsdill decided to go to Weldon

Springs State Park and drove defendant to the state park.

¶ 53 What further diminishes our confidence in the outcome of this case is defense counsel's failure to request an accomplice witness instruction. Based on the evidence, this was also objectively unreasonable. Illinois Pattern Instruction, Criminal, No. 3.17 (4th ed. 2000) 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." Our supreme court has stated the following test to determine whether a witness is an accomplice: " 'The question is whether there is probable cause to believe that [the witness] was guilty either as a principal, or on the theory of accountability.' " *People v. Cobb*, 97 Ill. 2d 465, 476, 455 N.E.2d 31, 35 (1983), quoting *People v. Robinson*, 59 Ill. 2d 184, 191, 319 N.E.2d 772, 776 (1974). The supreme court also noted it had "stated that an accomplice is one who could himself have been indicted for the offense either as a principal or as an accessory." *Cobb*, 97 Ill. 2d at 476, 455 N.E.2d at 35, citing *People v. Nowak*, 45 Ill. 2d 158, 258 N.E.2d 313 (1970).

¶ 54 Based on the evidence in this case, probable cause exists Stogsdill was guilty as a principal or under a theory of accountability for unlawfully disposing the methamphetamine manufacturing waste in this case. Stogsdill admitted she drove defendant to the park so he could burn some trash; she chose the park as the burn location; she used methamphetamine herself and knew defendant used methamphetamine; and, she was familiar with at least parts of the methamphetamine manufacturing process and believed defendant manufactured methamphetamine.

¶ 55 Further, defendant testified it was Stogsdill who took the trash to the park to dispose of it. He just thought they were going out for breakfast. Defendant testified Stogsdill

took the plastic bag from the car at the park and returned to the car empty-handed.

¶ 56 Based on the record in this case, Stogsdill could have been charged with unlawfully disposing of methamphetamine manufacturing waste. Had defense counsel requested the accomplice jury instruction, the trial court would have erred in not giving it. As a result, the jury would have been instructed Stogsdill's testimony was subject to suspicion, the jurors should consider it with caution, and her testimony should be carefully examined in light of the other evidence in this case.

¶ 57 As previously stated, this was, in essence, a credibility contest to determine who unlawfully disposed of the methamphetamine manufacturing waste at the park, Stogsdill or defendant. Defense counsel should have asked for the accomplice witness jury instruction, and the jury should have been provided the same. This error along with defense counsel's failure to ask for a severance of the two charges and his concession of defendant's guilt to one of the two counts against him undermines our confidence in the result of this trial. As a result, we must reverse defendant's convictions and remand for separate trials. We need not address defendant's arguments with regard to his fines and fees.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, the State presented sufficient evidence to convict defendant of both (1) being a sexual predator and/or a child sex offender in a public park and (2) unlawfully disposing methamphetamine manufacturing waste. However, we reverse defendant's convictions and remand this case for new separate trials because defendant received constitutionally ineffective assistance from his trial counsel.

¶ 60 Reversed and remanded.