

NOTICE
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2018 IL App (5th) 150541-U

NO. 5-15-0541

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Marion County.
)	
v.)	No. 12-CF-283
)	
JERRY J.M. COURTNEY,)	Honorable
)	Michael D. McHaney,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justice Chapman concurred in the judgment.
Justice Welch specially concurred.

ORDER

¶ 1 *Held:* Defendant was denied a fair trial due to ineffective assistance of counsel.

¶ 2 Defendant, Jerry J.M. Courtney, appeals from the trial court’s judgment, entered upon a jury verdict, convicting him of residential burglary and two counts each of unlawful possession of a weapon by a felon and aggravated possession of stolen firearms. The trial court sentenced him to concurrent terms of 25 years’ imprisonment for aggravated possession of stolen firearms and two terms of 10 years’ imprisonment for residential burglary and unlawful possession of a weapon by a felon. Defendant appeals

his convictions and sentences, asserting that his trial counsel was ineffective. We reverse and remand.

¶ 3 For events occurring on September 21 and 22, 2012, the State charged defendant with residential burglary (count I); aggravated participation in methamphetamine manufacturing, between 100 and 400 grams (count II); possession of methamphetamine, between 100 and 400 grams (count III); unlawful possession of a weapon by a felon, ammunition (count IV); unlawful possession of a weapon by a felon, firearm (count V); aggravated possession of stolen firearms, between 2 and 5 firearms (count VI); and aggravated possession of stolen firearms, between 11 and 20 (count VII). Prior to trial, the State bifurcated the methamphetamine charges and proceeded to trial on the remaining charges.

¶ 4 In September 2012, after being released from jail, Nathaniel Benjamin lived with his grandfather, Gerald Benjamin, for several days. Gerald was a retired Marion County Sheriff. On September 19, 2012, Gerald took Nathaniel to Nathaniel's mother's home, where Nathaniel was to remain on home confinement. Shortly thereafter, Nathaniel removed his monitoring bracelet and went on the run.

¶ 5 On September 21, 2012, at 7 a.m., Gerald left for his regularly scheduled weekly breakfast engagement. When Gerald returned home between 10:30 a.m. or 11 a.m., he found some items out of place, and realized his home had been burglarized. Gerald noticed the curtain over the bathroom window was askew, the window was unlocked, and there was mud on the windowsill. Gerald checked the house and found that most of his guns and ammunition were missing, as well as a camera, a bayonet, and a sheath. The

guns were taken from his dresser, from behind a curtain in the living room, from his gun safe in the basement, and from a hidden compartment in a false step inside of a closet. Gerald testified that 16 firearms were stolen from him on September 21. Gerald suspected Nathaniel was responsible for the burglary because Nathaniel knew Gerald's routine, knew about the false step, and could have left the bathroom window unlocked while staying at the house.

¶ 6 Gerald reported the burglary to the Marion County Sheriff's department. Detective Anthony Decker responded to the residence. Decker did not find any evidence of forced entry. Police were unable to retrieve fingerprints from the bathroom window. Gerald reported that Nathaniel drove a green truck and believed he was living in Mt. Vernon.

¶ 7 After leaving Gerald's residence, Decker received a telephone call from the sheriff's office advising him that an informant working with the Mt. Vernon police department reported being approached by a man driving a green truck attempting to sell firearms. Officers arranged a buy bust, during which officers took Nathaniel into custody. During a search of Nathaniel's green truck, police recovered 11 firearms, ammunition, the bayonet, and the camera that had been stolen from Gerald's home.

¶ 8 At trial, Nathaniel testified he was currently in custody in Jefferson County, being held on a charge of possession of stolen firearms related to the 11 firearms found in his truck on September 21. Nathaniel also had a pending charge in Marion County for residential burglary of Gerald's home. Nathaniel testified no promises had been made to him and he had not been offered any plea deal in exchange for his testimony.

¶ 9 Nathaniel testified he was living at Pete Johnson's house in Mt. Vernon after cutting off his ankle monitor in September 2012. On September 20, Nathaniel, Johnson, and defendant, whom Nathaniel did not know, were all at Johnson's house. Johnson stated he wanted a gun, and Nathaniel told Johnson that he knew where there were a lot of guns and how to get them. The men discussed breaking into Gerald's home and stealing the firearms.

¶ 10 The next morning, Nathaniel drove himself and Johnson to the home of defendant's girlfriend, Bianca Meeks, in Central City. Nathaniel testified that Bianca drove defendant, Johnson, and Nathaniel to Gerald's home in her car. Bianca dropped the men off near the house and drove around while the men stole the firearms from inside of Gerald's house. Nathaniel testified he entered Gerald's home through a bathroom window he had previously left unlocked and then let Johnson and defendant in through the door. Under Nathaniel's direction, the men took the guns and ammunition, and then carried them to the pick-up point. They then loaded the items into Bianca's car, and Bianca drove them back to her house in Central City. Nathaniel testified that he gave defendant some of the guns as payment for his help, and they loaded the rest of the guns into Nathaniel's truck and he left. Nathaniel was arrested later that day while attempting to sell the firearms. Nathaniel testified that all of the firearms and ammunition found in his truck were stolen from Gerald's house with help from defendant and Johnson. After Nathaniel's arrest, police searched Johnson's home, which led to the recovery of one of the firearms and some ammunition stolen from Gerald's home.

¶ 11 The Marion County Sheriff's department notified the Central City police department that they were attempting to locate Bianca Meeks, and provided the department with a description of her car and license plate. Early in the morning on September 22, a Central City police officer located the car while on patrol and conducted a traffic stop on the vehicle. Bianca was driving the vehicle and John Harden was in the front passenger seat. A trained canine walked around the vehicle and alerted officers to the presence of narcotics. Officers found narcotics under the front passenger seat floorboard where Harden was seated. In the backseat, officers found distinctive, handmade ammunition that had been stolen from Gerald.

¶ 12 Officers then obtained a search warrant for Bianca Meeks' home, which they executed in the early morning hours of September 22. Defendant was alone in the house, and asleep when the officers executed the warrant. The officers found two loaded magazines inside of a cereal box in the kitchen, which had been taken from Gerald's home. During the search, police found methamphetamine and materials used in the manufacturing of methamphetamine.

¶ 13 Bianca Meeks testified she lived with her brother in Central City. Defendant had been staying at her house frequently for a couple of months. Bianca testified that on the morning of September 21, she drove Nathaniel, Nathaniel's girlfriend, Johnson, and defendant to a house in the country. On the way, the men discussed committing a burglary. Bianca dropped the men off and then drove around with Nathaniel's girlfriend before returning for the men 10 minutes later. The men were carrying things with them, taken from the house, including two long guns and backpacks. They loaded up her car,

and she drove everyone back to her house. Bianca testified they loaded the items into Nathaniel's car, and Nathaniel and his girlfriend left. Bianca stated she later saw defendant with one of the firearms identified as being stolen from Gerald's home.

¶ 14 On September 23, Detective Decker received information that a man named Earl Higgins was attempting to sell three firearms. Decker testified the description of the guns matched those still not recovered from the burglary of Gerald's home. On September 24, police obtained and executed a search warrant at Higgins' home. On the front porch of Higgins' residence, police found a black bag containing three firearms wrapped in t-shirts. Gerald identified these firearms as having been stolen from his home on September 21. Police also searched a Dodge truck parked in Higgins' driveway. Inside police found a pistol, two magazines, and additional ammunition, all stolen from Gerald's home.

¶ 15 Higgins testified he was dating defendant's mother. Higgins stated that a couple of days before the search warrant was executed, defendant brought the firearms found on the porch to Higgins' house. Higgins testified defendant indicated he needed to leave the guns there for a couple of days and would be back to get them. Once defendant was arrested, however, Higgins attempted to sell the guns for defendant. Higgins testified the Dodge truck parked at his house was defendant's vehicle. Defendant kept some of his belongings in the truck and Higgins did not have keys to it. On the date of trial, Higgins had been arrested for possession of the stolen firearms and was in custody.

¶ 16 Nicholas Meeks was the brother of Bianca Meeks. He testified he saw defendant with the firearm and two magazines recovered from the Dodge truck on September 21.

¶ 17 After his arrest, defendant made a call from the Marion County jail, wherein he requested the person he was speaking with, “to check the cereal box.” At trial, defendant testified in his own defense, denying he entered Gerald’s house or brought the firearms to Higgins’ home.

¶ 18 Trial counsel’s theory of defense, as articulated in her closing argument, was that the State’s witnesses were not credible and had something to gain by testifying against defendant. Near the end of trial, out of the presence of the jury, defense counsel advised the court that defendant was unhappy with counsel’s performance. Defendant expressed concern that counsel was not cross-examining the State’s witnesses or presenting any evidence, and requested a new attorney. The court denied defendant’s request for a new attorney.

¶ 19 The jury convicted defendant on each of the counts. The trial court sentenced defendant to a 10-year term on the residential burglary conviction in count I; a 10-year term for the unlawful possession of a weapon by a felon (firearm) in count V; and a 25-year term on the aggravated possession of between 11 and 20 stolen firearms in count VII. The court did not enter sentences for the unlawful possession of a weapon by a felon (ammunition) under count IV because it was similar to the charge in count V, or for aggravated possession of between two and five stolen firearms under count VI because it was a lesser-included offense of count VII. The State nol-prossed counts II and III, the methamphetamine charges.

¶ 20 On appeal, defendant contends he was denied his right to the effective assistance of counsel in that his trial counsel failed to meet the standard of a reasonably competent

attorney under similar circumstances when she failed to impeach the State's witnesses with their prior inconsistent statements and pending criminal charges. Defendant also argues his trial counsel was ineffective for failing to challenge the State's case on the charge of aggravated possession of between 11 and 20 stolen firearms by introducing evidence that Gerald did not have an accurate inventory of the firearms present in his home at the time of the burglary.

¶ 21 Claims of ineffective assistance of counsel are evaluated under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that he suffered prejudice as a result of counsel's deficient performance. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). To prove prejudice, a defendant must show a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different. *People v. Pulliam*, 206 Ill. 2d 218, 249 (2002). "A reasonable probability is a probability sufficient to undermine confidence in the outcome, namely, that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Enis*, 194 Ill. 2d 361, 376-77 (2000).

¶ 22 Defense counsel's conduct is presumed to fall within the wide range of professionally reasonable assistance. *People v. Rodriguez*, 364 Ill. App. 3d 304, 312 (2006). Generally, counsel's decision whether to cross-examine or impeach a witness is a matter of trial strategy that will not support a finding of ineffective assistance of counsel. *People v. Williams*, 329 Ill. App. 3d 846, 854 (2002). Counsel's failure to utilize useful

impeachment against key State witnesses can, however, amount to ineffective assistance of counsel. *People v. Vera*, 277 Ill. App. 3d 130, 140 (1995).

¶ 23 Evidence that a witness made a statement inconsistent with his trial testimony is admissible to impeach the witness's credibility. *People v. Evans*, 2016 IL App (3d) 140120, ¶ 30. Furthermore, evidence that a witness has been arrested or charged with a crime can be brought during cross-examination where it reasonably tends to show that the witness's testimony might be influenced by bias, interest, or motive to testify falsely. *People v. Makiel*, 358 Ill. App. 3d 102, 114 (2005). Impeachment evidence showing bias, interest, or motive " 'must give rise to the inference that the witness has something to gain or lose by his testimony.' " *Makiel*, 358 Ill. App. 3d at 114 (quoting *People v. Triplett*, 108 Ill. 2d 463, 476 (1985)).

¶ 24 During trial, counsel did not attempt any cross-examination of many of the State's key witnesses including Gerald Benjamin, Nathaniel Benjamin, Nicholas Meeks, and Earl Higgins. Counsel's cross-examination of Bianca Meeks consisted of the following:

"Q. Your testimony today is that you drove the defendant and others to a house in the country?

A. Yes.

Q. Did you recall giving a statement in this case, a statement on the 21st of September? I'm sorry, the 22nd of September.

A. Did I give a statement?

Q. And was that statement given in the police department or to the police?

A. I don't remember giving a statement.

Q. Thank you. No further questions.”

¶ 25 A review of the record reveals defense counsel asked a total of 14 questions on cross-examination of the State’s nine witnesses. These questions included Bianca’s testimony, as set forth above, counsel’s cross-examination that Nathaniel identified defendant after being shown a single photograph of defendant, that defendant was not present during the traffic stop of Bianca’s vehicle, and that defendant was asleep when police arrived to execute the search warrant at Bianca’s residence. Notably, most of this testimony was duplicative of that already brought out during direct examination.

¶ 26 The police reports indicate that after their arrest, both Nathaniel and Bianca provided statements to police that were inconsistent with their trial testimony. In his statement to police, Nathaniel initially denied any knowledge of the burglary even though 11 of the stolen firearms were recovered from his vehicle. Nathaniel told police he was fishing at the time of the burglary and refused to provide police with the names of those who could confirm his alibi “unless he knew that it was going to help him.” Later in the interview, Nathaniel told police “there were two guys that went into his grandfather’s house and he would tell [the police] their names as soon as he gets something set up.” Nathaniel then told police he told the men where to find the guns and drew them a map of the house but continued to deny personally entering the house. Nathaniel eventually identified Pete Johnson and defendant as the men, and acknowledged that he intended to sell the guns in order to purchase a hotel room for him and his girlfriend.

¶ 27 When police interviewed Bianca Meeks on September 22, she claimed not to have seen defendant in three days or more and denied knowing how the ammunition got into

her car. Bianca stated she did not know defendant was at her house and denied all knowledge of the methamphetamine found there. Bianca told police she lived in the house with her brother Nicholas and her infant daughter. During questioning, Nicholas Meeks admitted to purchasing pseudoephedrine pills for defendant to cook methamphetamine. Nicholas told police his niece, Bianca's infant daughter, stays at the house about half the time.

¶ 28 After police interviewed Nicholas and Bianca Meeks, the State charged Bianca Meeks with aggravated participation in methamphetamine manufacturing, and two counts of possession of methamphetamine based on the items found at her house. The State charged Nicholas Meeks with methamphetamine-related child endangerment and unlawful use of property.

¶ 29 Here, defense counsel did not use Nathaniel's prior inconsistent statements to police to impeach his trial testimony or elicit evidence that Nathaniel was seeking to benefit from providing information helpful to the investigation. Defense counsel failed to use Bianca's prior inconsistent statements to police to impeach her trial testimony that placed defendant at the scene and in possession of one of the stolen firearms. Counsel also failed to inform the jury of the pending methamphetamine charges against Bianca and Nicholas to suggest their potential bias or motive to testify falsely. Counsel's theory of defense was to attack the credibility of the State's witnesses; however, counsel inexplicably failed to use the impeachment evidence in her possession. Considering all of the circumstances, it was unreasonable for counsel to perform little or no cross-examination or impeachment of the State's key witnesses against defendant.

¶ 30 Counsel's failure to impeach the State's key witnesses is particularly problematic when combined with counsel's failure to inform the jury of the fact that Gerald did not have an accurate inventory of his firearms prior to the burglary. The police reports indicated that on September 21, Gerald originally reported 17 firearms missing and later reported another one missing, bringing the total to 18. However, the same police report indicates that on September 24, 2012, Detective Decker learned that two of the firearms reported missing by Gerald on September 21 had been pawned by Nathaniel on September 19. Detective Decker's report indicates he informed Gerald of the pawned firearms and Gerald stated it was possible that Nathaniel had taken the guns from his house on September 19, the day Nathaniel moved out of Gerald's home.

¶ 31 On appeal, defendant contends his trial counsel was ineffective for failing to introduce evidence that Gerald gave police an inaccurate inventory of the firearms stolen on September 21, where his testimony was critical to proving defendant possessed more than 11 firearms. The State contends defendant's argument on this point is "moot" because the two pawned firearms were not included on the list of 16 stolen firearms presented to the jury. The State misses the point of defendant's argument.

¶ 32 In order to convict defendant of the greater offense of possessing between 11 and 20 stolen firearms, the State needed to prove that defendant participated in the burglary on September 21 and that at least 11 firearms were stolen at that time. The State's evidence supporting a finding that at least 11 firearms were stolen on September 21 consisted of Gerald's testimony that 16 firearms were stolen that day, and Nathaniel's testimony that the 11 stolen firearms recovered from his vehicle were stolen on that day

with help from Johnson and defendant. The police reports indicate, however, that Nathaniel stole at least two firearms from Gerald prior to September 21, without Gerald's knowledge. The evidence was that many of the firearms in Gerald's sizeable gun collection were stored out of sight, in a gun safe in the basement or hidden in a compartment in a closet. The State was required to prove the number of guns stolen, and defense counsel failed to challenge the State's evidence on that element by raising the fact that Gerald did not have an accurate inventory of the firearms in his house at the time of the burglary.

¶ 33 Furthermore, it was unreasonable for counsel not to have informed the jury of Nathaniel's prior theft of guns from Gerald only days before the burglary, to raise the implication that Nathaniel may have stolen more than two guns before September 21, and that Nathaniel had a motivation to lie about the number of guns stolen on September 21 in order to mitigate the potential charges he faced for his solo crimes. Trial counsel's representation fell below an objective standard of reasonableness when she failed to use Nathaniel's prior inconsistent statements, his attempts to broker himself a favorable deal, and his previous theft from Gerald to impeach Nathaniel's trial testimony that the 11 firearms recovered from in his vehicle were stolen on September 21 with the help of Johnson and defendant.

¶ 34 Having found that counsel's representation fell below an objective standard of reasonableness, defendant must show he was prejudiced by counsel's deficient performance. On appeal, defendant acknowledges that an acquittal on all charges was unlikely even with adequate representation. Instead, defendant argues that absent

counsel's critical errors, he would have likely been acquitted of the most serious charge, possession of between 11 and 20 stolen firearms, and received a significantly lesser sentence because the 25-year sentence he received for this offense was not authorized under the other convictions.

¶ 35 Aggravated possession of between 11 and 20 stolen firearms is a Class X felony punishable between 6 and 40 years in prison. 720 ILCS 5/24-3.9(a)(3), 24-3.9(c)(3) (West 2012). Residential burglary and aggravated possession of between two and five stolen firearms were each Class 1 felonies. 720 ILCS 5/19-3(b), 24-3.9(c)(1) (West 2012). Under the general sentencing provisions, a Class 1 felony carries a prison term of between 4 and 15 years. 730 ILCS 5/5-4.5-30(a) (West 2012). Defendant's convictions for unlawful possession of a weapon by a felon were nonprobationable Class 2 felonies, with a sentencing range of 3 to 14 years based upon defendant's criminal history. 720 ILCS 5/24-1.1(a), (e) (West 2012). Defendant is correct that his 25-year sentence for aggravated possession of between 11 and 20 stolen firearms exceeds the maximum sentence permitted by his other convictions, clearly prejudicing him.

¶ 36 Here, counsel's representation fell below an objective standard of reasonableness and undermined confidence in the outcome of the trial. See *People v. Lee*, 185 Ill. App. 3d 420, 428 (1989). Absent counsel's deficient representation there is a reasonable probability that the outcome of the trial and sentencing would have been different. Accordingly, we reverse the judgment of the circuit court of Marion County and remand the cause for a new trial.

¶ 37 Reversed and remanded.

¶ 38 JUSTICE WELCH, specially concurring:

¶ 39 I concur with the majority reversing and remanding the judgment of the circuit court of Marion County. Here, the totality of counsel's representation fell below an objective standard of reasonableness, and the defendant was prejudiced by the errors of trial counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 40 In this case, there was overwhelming evidence that the defendant participated in the burglary on September 21; however, there was a question as to the number of guns stolen on that day, and defense counsel was unreasonable in not cross-examining witnesses on this fact. The defendant makes much to do about the number of questions asked by trial counsel during trial; however, the test is not the number of questions asked, but rather the quality of the questions. Here, the defendant's trial counsel failed to provide even the most basic defense strategy. We are therefore required to overturn the conviction based on the inactions of defense counsel at trial.