2019 IL App (1st) 160891-U

No. 1-16-0891

Order filed February 5, 2019

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 17684
	)	
MICHAEL WELLS,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Mason and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's convictions for unlawful vehicular invasion and aggravated battery over his contentions that: (1) he was denied the effective assistance of trial counsel; and (2) the State failed to prove him guilty beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant Michael Wells was convicted of unlawful vehicular invasion (720 ILCS 5/18-6(a) (West 2014)) and aggravated battery on a public way (720 ILCS 5/12-3.05(c) (West 2014)). He was sentenced to two concurrent terms of four years'

imprisonment. On appeal, he argues that (1) he was denied the effective assistance of trial counsel; and (2) the State failed to prove him guilty beyond a reasonable doubt. We affirm.

¶ 3 Defendant was arrested, along with co-defendant Eddie Craig, following an incident on September 8, 2014.[1] Defendant was charged by indictment with armed robbery, vehicular invasion, unlawful possession of a firearm by a felon, aggravated unlawful restraint, and three counts of aggravated battery. Defendant filed a motion to sever, which the court granted. Defendant waived his right to a jury trial and the case proceeded to simultaneous but severed bench trials.

¶ 4 Otis Bankhead testified that, about 9:00 p.m., on September 8, 2014, he sat in his car, which was parked in front of his home, speaking on the phone and drinking a combination of tequila and pineapple juice. The street was well lit and, as he sat, he saw a man, whom he identified as defendant, walk past his car. After Bankhead finished his phone call, defendant approached him and displayed a gun. Defendant cocked the pistol and said "You know what this is." Bankhead told defendant that he could have whatever he wanted and gave his chain necklace, cellular phone, and keys to defendant. As Bankhead was removing more jewelry, defendant instructed him to open the door for his "homey." Bankhead then realized that another man, whom he identified as Craig, was standing at his passenger side door. Bankhead opened the door for Craig, who then leaned into the car. When Craig demanded property, Bankhead gave him a bracelet, a watch, and about $160.

¶ 5 After Bankhead gave his property to Craig, defendant walked around the car and entered on the passenger side. Defendant gave Bankhead's keys to Craig. Defendant asked Bankhead

[1] Co-defendant Craig is not a party to this appeal.

where he lived and Bankhead pointed to his house across the street. Bankhead explained that he tried to "stall" by first claiming that the "sheriff" was pulling up nearby and then by hesitating to provide the alarm code for his residence. Defendant struck the side of Bankhead's face with the gun and demanded the code. Bankhead provided the code and Craig walked toward the residence.

¶ 6 Defendant exited the car and walked to the driver's side. Bankhead also exited the car and stood face-to-face with defendant. Bankhead realized that defendant's gun was in his pocket and so he grabbed defendant's wrist to prevent him from retrieving it. He also yelled for help. As Bankhead and defendant were "tussling," they fell to the ground. Craig returned and struck Bankhead in the head with his gun multiple times, causing Bankhead to bleed heavily. Bankhead saw defendant pull out his gun and cock it. Bankhead put his hands up and said, "Please don't kill me." Police began to arrive on the scene and Bankhead saw defendant run through an alley. Subsequently, while Bankhead was at the scene, police officers asked him to view two individuals. The first individual, defendant, was seated in the back of a squad car. An officer shined a light on defendant's face and Bankhead identified him as one of the offenders. Bankhead was transported to the hospital for treatment. He received seven stitches above his right eye and 30 staples in the top of his head. While at the hospital, an officer returned Bankhead's car and apartment keys.

¶ 7 On cross-examination, Bankhead testified that about 15 minutes elapsed between when the police arrived to when he identified defendant as one of the offenders. Bankhead described defendant as wearing "all black" with a black hat. Bankhead estimated that defendant was sitting in the passenger seat of his car for about 10 minutes.

¶ 8 On redirect-examination, Bankhead testified that he was focused on defendant's face, which is why he could not recall what style of hat defendant was wearing. Bankhead also testified that, when defendant entered his car and the dome light came on, defendant was about a foot-and-a-half away from him and nothing obstructed his view. Bankhead explained that, on September 9, 2014, he met with an Assistant State's Attorney (ASA) at the police station and provided a statement. On that morning, Bankhead was also shown a photograph of an individual, whom he identified as defendant, and then signed the photograph.

¶ 9 On recross-examination, Bankhead testified that when he saw defendant in the show-up, defendant was not wearing a hat. Bankhead acknowledged that, in the photograph of defendant that he was shown the following day, defendant was wearing a white t-shirt.

¶ 10 William Pierce, a neighbor of Bankhead's, testified that, on the night in question, he was sitting alone on his porch facing the street. About 10:30 p.m., he saw a red or maroon Oldsmobile Alero drive past heading northbound on Long Avenue. The car then parked on the southeast corner of the Long Avenue and Walton Street intersection, which is a half-block from Pierce's residence. Pierce saw a man, whom Pierce described as "tall," exit the car and walk southbound on the east side of Long. Pierce also saw another man, who was shorter than the first, walking in the same direction but on the west side of Long. When the men reached the intersection of Long and Iowa, Pierce saw them both turn and walk northbound. As they did so, Pierce noticed that Bankhead was in his car, which was parked on Long. The shorter man walked to the driver's side of Bankhead's car and the taller man walked to the passenger's side. Pierce saw that both men were carrying handguns. Pierce heard the shorter man say "let me get that sh*t" and saw that the taller man was leaning into Bankhead's car through the passenger door.

The taller man then started walking toward Bankhead's residence. Pierce observed Bankhead and the shorter man begin to "tussle" by the driver's side of the car. When the taller man realized this, he ran back toward the car. The taller man then struck Bankhead on the top of head with the butt of his gun.

¶ 11 When Pierce heard sirens, he saw the two men flee. Pierce saw that the shorter man ran through the "south alley of Walton." The taller man ran down Long toward Walton. Pierce next saw the Oldsmobile Alero drive away with the police in pursuit. Pierce described Bankhead as being "very bloody" due to the "two big gashes" in the top of his head. Pierce explained that he did not call the police himself, but instructed his sister-in-law to do so when the incident began. He estimated that the police arrived four minutes later.

¶ 12 On cross-examination, Pierce testified that the shorter man was wearing a black jacket, dark pants, and a black cap. Pierce stated that, when the two man fled, he saw the taller man enter the Oldsmobile Alero but had "no idea" if the shorter man entered the car.

¶ 13 Chicago police sergeant Kristen Hanson testified that, on the night in question, she was on patrol in the area. She responded to a call that there was a robbery in progress on Long Avenue. As Hanson drove northbound on Long, she encountered Bankhead, covered in blood, repeatedly yelling "it's him." Hanson saw Craig standing next to Bankhead. Craig began to run toward a maroon Alero parked on the corner of Walton and Long. He entered on the passenger side and the car drove westbound on Walton. Hanson observed two people inside the car. When the car reached the intersection of Walton and Pine, it came to a stop. Hanson exited her vehicle and, as she did so, Craig exited the Alero and fled southbound. Hanson saw that the driver of the Alero, whom she identified as defendant, was struggling to open his door. She drew her weapon

and ordered him to the ground. Defendant complied and yelled, "He made me do it." At that time, other officers arrived and placed defendant into custody. On cross-examination, Hanson testified that defendant was not in her "line of vision" when she arrived on the scene. She acknowledged that she did not see anything discarded from the Alero as she pursued it, nor did she notice any jewelry or weapons in the car.

¶ 14 Chicago police officer Melvin Mendez testified that he responded to the call of a robbery in progress in the 900 block of Long Avenue. Mendez arrived in the area and saw a red Oldsmobile Alero fleeing the scene. He pursued on a parallel road. When the Alero stopped, Mendez saw the passenger, whom he identified as Craig, exit the vehicle and flee. He pursued and eventually placed Craig into custody. Mendez then returned to the Alero. He entered the car and, in the backseat, recovered a set of keys. Mendez later presented the keys to Bankhead while he was in the hospital. Bankhead identified the keys as belonging to him.

¶ 15 During closing argument, defense counsel argued that the State's evidence did not prove beyond a reasonable doubt that defendant committed armed robbery. Counsel noted that defendant, who was arrested minutes after the radio call went out about a possible robbery in progress, was not found with any of Bankhead's property. Counsel further noted that no firearms were recovered. Counsel stated: "This is not an armed robbery. This is something else. Not saying it's not a bad crime, but it's certainly not armed robbery." Counsel further stated that defendant "might not be in front of you the most wonderful guy in the world, but he is not an armed robber."

¶ 16 Prior to the court announcing its verdict, the State nol-prossed the unlawful possession of a weapon by a felon count.

¶ 17 The court found defendant guilty of unlawful vehicular invasion and aggravated battery on a public way. The court also found defendant not guilty of armed robbery. In doing so, the court stated that it found Bankhead's testimony to have been credible. He also stated that the inference that Bankhead was impaired due to drinking was refuted by his attempts to distract and delay Craig from entering his residence. The court further noted that "there was no problem whatsoever" with the identification because Bankhead saw the perpetrators "close up" and the dome light inside his car was on.

¶ 18 The court denied defendant's motion for a new trial and the matter proceeded to sentencing. After hearing arguments in aggravation and mitigation, the court sentenced defendant to two concurrent four-year terms.

¶ 19 On appeal, defendant first contends that he was denied the effective assistance of trial counsel because his counsel: (1) failed to file a motion to suppress the show-up identification; and (2) only addressed the armed robbery count during closing argument.

¶ 20 We evaluate claims of ineffective assistance of counsel under the two-prong approach set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Givens*, 237 Ill. 2d 311, 330-31 (2010). To prevail, a defendant must first demonstrate that his counsel's performance, objectively measured against prevailing professional norms, was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment. *Strickland*, 466 U.S. at 687; see also *People v. Jackson*, 205 Ill. 2d 247, 259 (2001). In so doing, the defendant "must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). Second, the defendant must show he was prejudiced by counsel's deficient

performance, which means that that there must be a reasonable probability that, but for defense counsel's deficient performance, the result of the proceeding would have been different. *People v. Brown*, 2015 IL App (1st) 122940, ¶ 47. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Failure to establish either prong precludes a finding of ineffective assistance of counsel. *People v. Henderson*, 2013 IL 114040, ¶ 11. A reviewing court need not examine counsel's performance where it may dispose of defendant's claim based on lack of prejudice. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 55.

¶ 21 Defendant argues that his trial counsel was ineffective for failing to file a motion to suppress the show-up identification made by Bankhead. Specifically, defendant asserts that the show-up was unduly suggestive because defendant was handcuffed and seated alone in the back of a squad car with a police officer shining a flashlight on his face.

¶ 22 "[W]here an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *People v. Henderson*, 2013 IL 114040, ¶ 15.

¶ 23 When ruling on a motion to suppress a show-up, a trial court conducts a two-part inquiry. *People v. Rodriguez*, 387 Ill. App. 3d 812, 829 (2008) (citing *People v. Ramos*, 339 Ill. App. 3d 891, 897 (2003)). "First, 'the defendant must prove that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law.' " *People v. Jones*, 2017 IL App (1st) 143766, ¶ 28 (quoting *People v. Moore*, 266 Ill. App. 3d 791, 797 (1994)). "Second, if the defendant establishes that the confrontation was unduly

suggestive, the burden shifts to the State to demonstrate that, 'under the totality of the circumstances, the identification * * * is nonetheless reliable.' " *Id.* (quoting *Moore*, 266 Ill. App. 3d at 970).

¶ 24 Here, defendant cannot show that he was prejudiced by counsel's failure to file a motion to suppress. Put another way, even if counsel had filed a motion to suppress the show-up identification, it is not reasonably probable that the motion would have been granted where the show-up confrontation was not unnecessarily suggestive and conducive to irreparable misidentification.

¶ 25 Our supreme court has approved of "showups near the scene of the crime as acceptable police procedure designed to aid police in determining whether to continue or to end the search for the culprits." *People v. Lippert*, 89 Ill. 2d 171, 188 (1982). Such was the case here where, after apprehending two fleeing individuals, responding officers needed to ascertain whether to continue the search. Moreover, the fact that defendant was handcuffed in the backseat of a police vehicle was not unduly suggestive. See *Jones*, 2017 IL (App) 143766, ¶ 30 (show-up not unduly suggestive where the defendant was "obviously in custody, as he was handcuffed and hauled from the back of a squad car"). Further, the show-up occurred late at night, which necessitated the use of a flashlight so that Bankhead could clearly see the face of the individual. *People v. Rodriguez*, 387 Ill. App. 3d 812, 832 (2008) (finding that the use of flashlights did not render the show-up improper because "the lighting was a necessary part of the procedure to ensure that the eyewitnesses had adequate lighting to make a reliable identification at night"). As such, defendant cannot meet his burden to prove that the show-up was "unduly suggestive." Because defendant cannot show that there is a reasonable probability that a motion to suppress would

have been granted, he cannot show that he was prejudiced by counsel's failure to file the motion. *People v. Wilson*, 164 Ill. 2d 436, 454 (1994) ("As a general rule, trial counsel's failure to file a motion does not establish incompetent representation, especially when that motion would be futile."). Accordingly, defendant's trial counsel was not ineffective for failing to file the motion.

¶ 26 Defendant next contends that he was denied the effective assistance of counsel where his counsel addressed only the armed robbery charge during closing argument, rather than all of the counts he was charged with. Specifically, defendant argues that defense counsel "basically conceded" that he was guilty.

¶ 27 The content of closing argument is generally considered a matter of trial strategy. See *People v. Franklin*, 135 Ill. 2d 78, 119 (1990); *People v. Shamlodhiya*, 2013 IL App (2d) 120065, ¶ 15. "Generally, matters of trial strategy will not support a claim of ineffective assistance of counsel unless counsel failed to conduct any meaningful adversarial testing." *People v. Patterson*, 217 Ill. 2d 407, 441 (2005). Our supreme court has explained that whether counsel conducted any meaningful adversarial testing must be construed narrowly. *People v. Johnson*, 128 Ill. 2d 253, 269-70 (1989) (even counsel's concession of guilt does not constitute "*per se* ineffectiveness" whenever the defense attorney concedes his client's guilt to offenses in which there is overwhelming evidence of that guilt.").

¶ 28 After examining the record, we cannot say that counsel "failed to conduct any meaningful adversarial testing." The evidence showed the following: Bankhead identified defendant as the perpetrator shortly after the attack; an eyewitness corroborated the sequence of events as related by Bankhead, even though the witness could not positively identify the perpetrators; defendant

was arrested fleeing the scene by the responding officer; and, upon being apprehended, he immediately told the officer that "he made me do it."

¶ 29 Given this overwhelming evidence, counsel was faced with a difficult task. *People v. Guest*, 166 Ill. 2d 381, 396 (1995). Rather than risk losing credibility by arguing against all the charges, counsel decided to focus on the most severe crime, armed robbery. See *Guest*, 166 Ill. 2d at 395; *People v. Fair*, 159 Ill. 2d 51 (1994) (counsel argued that, although the defendant may be guilty of murder, the defendant did not have the intent required to support conviction for first degree murder); *People v. Horton*, 143 Ill. 2d 11 (1991) (counsel's trial strategy was not ineffective in stipulated bench trial where counsel only contested those charges that were not supported by overwhelming evidence). Counsel's decision to focus on the most severe charge during closing argument did not rise to the level of failing to conduct any meaningful adversarial testing. Indeed, counsel's decision resulted in a not guilty verdict on that count. Because defendant's complained of error amounts to a matter of trial strategy, and counsel did not fail to conduct meaningful adversarial testing, his ineffective assistance of counsel claim must fail.

¶ 30 Defendant also contends that the State failed to prove him guilty beyond a reasonable doubt of unlawful vehicular invasion and aggravated battery on a public way.

¶ 31 When a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier-of-fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences from the record must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. It is the responsibility of

the trier-of-fact to resolve conflicts in the testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Brown*, 2013 IL 114196, ¶ 48. We will not substitute our judgment for that of the trier-of-fact on issues involving the weight of the evidence or the credibility of the witnesses. *Brown*, 2013 IL 114196, ¶ 48. A defendant's conviction will not be overturned unless the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *Id.*

¶ 32 Defendant does not dispute that the State proved the elements of the offenses of vehicular invasion and aggravated battery on a public way. Rather, he challenges the reliability of Bankhead's identification of him as the perpetrator.

¶ 33 A single witness's identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). In assessing identification testimony, we consider the following five factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972): (1) the witness's opportunity to view the defendant during the offense; (2) the witness's degree of attention at the time of the offense; (3) the accuracy of the witness's prior description of the defendant; (4) the witness's level of certainty at the subsequent identification; and (5) the length of time between the crime and the identification. *Slim*, 127 Ill. 2d at 307–08. None of these factors, standing alone, conclusively establishes the reliability of identification testimony; rather, the trier of fact is to take all of the factors into consideration. *Biggers*, 409 U.S. at 199–200.

¶ 34 After reviewing the five *Biggers* factors, we conclude that Bankhead's identification was reliable. First, the record shows that Bankhead had a sufficient opportunity to observe defendant. Bankhead testified that he first saw defendant's face when defendant walked past his car on a

well-lit section of Long Avenue. Defendant then approached Bankhead's car, affording him another opportunity to view his face, and said "You know what this is" as he held a gun. Defendant then entered Bankhead's car and sat next to him for ten minutes. Bankhead testified that the dome light inside his car was on and that he was focused on defendant's face. Second, Bankhead exhibited a high degree of attention during the robbery. He testified to specific details, such as what defendant said and what direction he fled, that were corroborated by Pierce's testimony. Bankhead also positively identified defendant as one of the perpetrators 15 minutes after the incident took place. See *People v. Donahue,* 2014 IL App (1st) 120163, ¶ 95 (finding that an identification that took place three days after the offense was a short amount of time). Bankhead again identified defendant as the perpetrator in open court and the record does not indicate that he ever wavered in his confidence regarding the identification. As such, Bankhead's identification was reliable and sufficient to sustain defendant's convictions.

¶ 35 Defendant nevertheless argues that Bankhead's identification is unreliable because (1) he had been drinking alcohol prior to the incident; (2) he was in a "state of shock" following his injuries when he identified defendant in the show-up; (3) his description of defendant's clothing did not match what defendant was wearing when he was apprehended minutes later; and (4) none of Bankhead's property was recovered from defendant's person.

¶ 36 We initially note that all of defendant's contentions were fully explored at trial during cross-examination. It was the responsibility of the trier-of-fact to determine Bankhead's credibility, the weight to be given to his testimony, and to resolve any inconsistencies and conflicts in the evidence. *People v. Starks*, 2014 IL App (1st) 121169, ¶ 51; *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Given its decision, the court resolved these alleged

inconsistencies in favor of the State. In doing so, the court was not required to disregard the inferences that flow from the evidence or search out all possible explanations consistent with a defendant's innocence and raise them to a level of reasonable doubt. *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 51. We will not substitute our judgment for that of the trier of fact on these matters. *Sutherland*, 223 Ill. 2d at 242.

¶ 37 That said, here, Officer Hanson testified that when she arrived at the scene she encountered Craig standing next to Bankhead, who repeatedly yelled "it's him." Craig then fled and entered on the passenger side of a maroon Oldsmobile Alero. When the Alero came to a stop, Hanson saw the driver, whom she identified as defendant. After defendant and Craig were apprehended, Officer Mendez entered the Alero and recovered Bankhead's keys from the backseat.

¶ 38 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 39 Affirmed.