2019 IL App (3d) 160681-U

Order filed January 29, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0681
v.	)	Circuit No. 13-CF-128
	)	
JONATHAN D. WADE,	)	Honorable
	)	Clark E. Erickson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Carter concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err when it summarily dismissed defendant's *pro se* postconviction petition.

¶ 2 Defendant, Jonathan D. Wade, appeals the summary dismissal of his *pro se* postconviction petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant and his codefendant, Jerrell W. Wade, with attempted first degree murder (720 ILCS 5/8-4(a), 9-1 (West 2012)) and aggravated battery with a firearm (*id.* § 12-3.05(e)(1)). Both defendant and Jerrell were tried jointly by one jury in which the following evidence was adduced.[1]

¶ 5 The victim, Greg Dismuke, went to a barbershop on Fifth Avenue in Kankakee at approximately 3:30 p.m. The barbershop was located at the end of a strip mall. Defendant and Jerrell shot at Dismuke in the strip mall's parking lot. Five eyewitnesses testified that both Jerrell and defendant shot at Dismuke. Two eyewitnesses with partial views saw Jerrell shoot at Dismuke. One eyewitness testified that only Jerrell shot Dismuke. Another witness with a partial view testified that defendant shot at Dismuke. The police recovered 16 nine-millimeter shell casings from the parking lot. Analysis of the shell casings established that they were discharged from two guns—5 shells from one gun and 11 shells from a different gun.

¶ 6 Dismuke testified that he was not carrying a firearm at the time of the incident. No eyewitnesses saw Dismuke with a firearm. Eyewitnesses testified that Dismuke moved quickly, weaving in between cars in order to avoid the shooters. A surveillance video from across the street corroborated this testimony.

¶ 7 Makeisha Bell testified that she waited for defendant and Jerrell in a car in the strip mall parking lot. After the shooting, defendant and Jerrell entered the car and Bell drove out of the parking lot. The police picked up defendant and Jerrell shortly thereafter. Eyewitnesses identified defendant and Jerrell as the shooters in a show-up and from photograph arrays.

[1]In defendant's direct appeal, this court exhaustively recited the facts adduced at his trial. *People v. Wade*, 2015 IL App (3d) 130780. For the purposes of consistency between cases, we adopt that recitation in large part here, supplementing where relevant to the particular issues of this appeal.

¶ 8 Defendant and Jerrell then presented the following evidence. Jerrell testified that he made an appointment for a haircut about an hour before the shooting. Bell gave defendant and Jerrell a ride to the barbershop. The barbershop was crowded so Jerrell told his barber that they would wait outside. Shortly thereafter, Dismuke exited the barbershop, approached defendant and Jerrell and said, "What's up?" Jerrell asked Dismuke what he meant and Dismuke responded, "[Y]ou already know what it is." Dismuke then pulled out a gun and fired shots at Jerrell.

¶ 9 Jerrell testified that he pulled out his gun and fired at Dismuke in self-defense. Dismuke hid behind a truck. Jerrell headed toward Dismuke so that Dismuke could not continue shooting at them from behind the truck. Dismuke ran in between cars, but continued to shoot at defendant and Jerrell. Jerrell stopped shooting once Dismuke dropped his gun. Jerrell assumed Dismuke dropped the gun after Jerrell shot him. Jerrell and defendant entered Bell's car and left; Jerrell did not think that the police would believe he shot Dismuke in self-defense. Jerrell explained that he had recently been shot at and two of his brothers were killed by gunfire. Jerrell had heard that Dismuke was the individual that shot at him and killed his brothers. Jerrell stated that he kept a gun with him for protection because of the previous shootings. He denied shooting at Dismuke in retaliation for the deaths of his brothers. Jerrell testified that defendant did not have a gun on the day of the shooting.

¶ 10 Defendant testified that he did not have a gun during the incident outside the barbershop. He ducked behind Jerrell to avoid the cross fire. Defendant did not know that Dismuke was in the barbershop when Jerrell and defendant arrived. He did not see Dismuke get shot.

¶ 11 In its closing argument, the State made the following comments that are relevant to this appeal. The State noted, "[a]t some point prior to the shooting, both defendant [and Jerrell]

rounded up their bullets, put them in their guns, and went out looking for trouble." The State added, "You know the motive. It's very clear. Payback equalizing. Jerrell never cooperated with the police in the prior shootings. Why? He was going to take care of it himself." The State argued that defendant and Jerrell did not act in self-defense, but were "hunting" the victim. According to the State, unlike defendant and Jerrell, Dismuke "wasn't constantly armed and seeking out his prey." The State also commented, "Violence certainly seems to follow [the defendant's] around." Finally, the State argued,

> "[Jerrell] arms himself a year before the crime and calmly waits for his opportunity. He and [defendant] went to avenge their family. Why cooperate with the police when you could exact violence street justice on your own. He was not carrying a gun for protection. It had been six months since he had any trouble. He was carrying that gun for opportunity and to be ready when opportunity arose. And he enlisted [defendant's] help."

¶ 12 Before the jury deliberated, the circuit court instructed the jurors that closing arguments are not evidence and that any statement during arguments that is not based on the evidence should be disregarded.

¶ 13 The jury found defendant guilty of all charges. The court sentenced defendant to 32 years' imprisonment for attempted first degree murder with a 25-year sentencing enhancement. The court merged the aggravated battery with a firearm charge with the attempted murder charge. Defendant appealed contending that the circuit court erred in instructing the jury. This court affirmed. *People v. Wade*, 2015 IL App (3d) 130780.

¶ 14 Subsequently, defendant filed a *pro se* postconviction petition raising several claims. The claim relevant to this appeal is that appellate counsel provided ineffective assistance for failing to

challenge the prosecutor's improper comments during closing arguments. The circuit court dismissed defendant's *pro se* postconviction petition at the first stage.

¶ 15 II. ANALYSIS

¶ 16 Defendant contends that the court erred when it summarily dismissed his *pro se* postconviction petition at the first stage. Defendant argues that his *pro se* postconviction petition presented the gist of a claim that he received ineffective assistance of appellate counsel. He contends that it is arguable that appellate counsel was ineffective where he did not raise the issue of the State's comments during closing arguments. The comments were not supported by the evidence at trial, e.g., that the shooting was premeditated and that defendant and Jerrell were seeking revenge and "hunting" the victim.

¶ 17 To warrant second-stage proceedings on defendant's claim of ineffective assistance of trial and appellate counsel, defendant's petition must establish both that "(1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *People v. Brown*, 236 Ill. 2d 175, 185 (2010). We examine only the prejudice prong because a lack of prejudice renders irrelevant the issue of counsel's performance. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998). To satisfy the prejudice prong, defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *People v. Barrow*, 195 Ill. 2d 506, 520 (2001). Unless the underlying issue is meritorious, a defendant cannot be said to have incurred any prejudice from counsel's failure to raise the issue on appeal. *Id.* at 523.

¶ 18 We find that, even assuming that appellate counsel's performance was deficient for failing to raise the issue of improper closing arguments, defendant cannot satisfy the prejudice prong. Improper remarks made by the prosecution during closing arguments generally do not

mandate reversal unless the comments are so prejudicial to constitute a material factor in defendant's conviction. *People v. Townsend*, 136 Ill. App. 3d 385, 394 (1985). In other words, the jury would likely have reached a contrary verdict had the comments not been made. *Id*. For example, a prosecutor's improper comments do not rise to the level of reversible error when the comment was isolated and the jury was specifically instructed that closing arguments are not evidence and the evidence was not closely balanced. *People v. Johnson*, 119 Ill. 2d 119, 140 (1987).

¶ 19 Here, while we do not condone the comments made by the State during closing arguments, the jury was specifically instructed that closing arguments are not evidence and that any statement made during arguments that is not based on the evidence should be disregarded. The jury is presumed to have followed the court's instructions. *People v. Taylor*, 166 Ill. 2d 414, 438 (1995). Moreover, the evidence of defendant's guilt is overwhelming. The evidence at trial established that both defendant and Jerrell shot at the victim. Five eyewitnesses testified that both defendant and Jerrell shot at the victim. Analysis of the shells recovered from the scene established that two firearms were used. Beyond the self-serving testimony of Jerrell and defendant, no eyewitness testified that the victim possessed and used a firearm during the incident. In other words, the evidence that both Jerrell and defendant each discharged a firearm is overwhelming.

¶ 20 While defendant claims that the evidence does not overwhelmingly disprove his theory of self-defense, we note that eyewitnesses observed the victim cowering, ducking, weaving, and running in between the vehicles in the parking lot to escape the shooters. "A surveillance video from across the street corroborated this testimony." *Wade*, 2015 IL App (3d) 130780, ¶ 7. In other words, the victim was not observed acting as the aggressor. Further, there is no evidence

that the victim was armed so as to justify Jerrell and defendant's actions. Consequently, we find that defendant cannot show substantial prejudice such that the verdict would have been different had the prosecutor not made the remarks. See *People v. Cisewski*, 118 Ill. 2d 163, 178 (1987) ("Although we believe this comment would have been best left unsaid by the prosecutor, in light of the overwhelming evidence of defendant's guilt, we cannot say that the verdict would have been different absent this single isolated remark."). Therefore, it is not arguable that appellate counsel provided ineffective assistance for failing to raise this issue on appeal.

¶ 21 III. CONCLUSION

¶ 22 The judgment of the circuit court of Kankakee County is affirmed.

¶ 23 Affirmed.