

No. 120649

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Appellate Court of Illinois, No. 4-13-0888.
)	
Plaintiff-Appellee,)	There on appeal from the Circuit Court of the Fifth Judicial District, Coles County, Illinois, No. 12 CF 479.
-vs-)	
)	
BLACKIE VEACH)	Honorable Mitchell K. Schick,
Defendant-Appellant)	Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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The appellate court declined to address defendant's claim of ineffective assistance of counsel because it erroneously believed the issue required consideration of matters outside the record on appeal. The record fully supports the claim as it shows that trial counsel allowed the admission of recorded interviews of key State witnesses which contained objectionable prior consistent statements and bad character evidence of defendant. Because trial counsel failed to use the rules of evidence to shield defendant from the admission of this inadmissible prejudicial evidence, this Court should find that trial counsel was ineffective, and grant defendant a new trial.

The State agrees with defendant that the direct appeal record is sufficient to resolve his claim of ineffective assistance of counsel. State's brief at 11, 27-28. But, contrary to the State's arguments and as recognized by the dissenting Appellate Court Justice, the State's ultimate conclusion – that counsel provided effective assistance – is wrong.

The State argues that because the recordings of Matthew Price, Johnny Price, and Renee Strohl contained prior inconsistent statements,

defendant did not suffer prejudice from the admission of the recordings.

State's brief at 12, 15, 18. On page 18 of its brief, the State concludes:

"Because the recorded statements were inconsistent with the trial testimony in many respects, they were not prejudicial to the defense even to the extent that they also contained consistent statements." Defendant disagrees.

Because the recordings contained both impeachment evidence and prior consistent statements, trial counsel had the duty to delete the prior consistent statements from the recordings before presenting them to the jury. *People v. Moore*, 2012 IL App (1st) 100857, ¶ 48; *People v. Wiggins*, 2015 IL App (1st) 133033, ¶¶ 36, 65; *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

The State discusses how the defense benefitted from various inconsistent statements in the recordings to show that the admission of the recordings did not prejudice defendant. State's brief at 15-18. However, while prior inconsistent statements in the recordings were admissible to impeach Matthew, Johnny and Renee, the complained-of prior consistent statements and bad character evidence should have been redacted by trial counsel. *People v. Morales*, 281 Ill.App.3d 695, 701 (1st Dist. 1996) ("Only the inconsistent portions of a prior inconsistent statement are admissible into evidence."). Therefore, if it was defense counsel's trial strategy to allow in the entire recorded statements of Matthew, Johnny and Renee, so he could bring out inconsistencies in their trial testimony, that strategy was contrary to established legal precedent and amounted to the ineffective assistance of

counsel. *People v. Dupree*, 2014 IL App (1st) 111872, ¶¶ 49, 51 (defense counsel ineffective for not objecting to introduction of prior consistent statement, for opening door for State to introduce prior consistent statement, and for not requesting limiting instruction).

The State argues that the admission of bad character evidence in the recordings did not prejudice defendant. Concerning Renee's recorded remark about defendant's mother saying defendant had hurt people after consuming alcohol, the State notes: "Although an objection to Renee's remark that defendant became violent when he drank hard alcohol may have been sustained, there is no reasonable probability that but for the error the outcome would have been different." State's brief at 19. Defendant disagrees. This recorded double-hearsay statement made by Renee after being coached by Matthew (R.XVI 530, 551-52), could have been the single most influential factor resulting in defendant's convictions. Absent this inadmissible inflammatory statement, there was no evidence expressly showing a history of violent conduct by defendant. And, the State's conclusion that Renee's comment was not referenced again by the prosecution, is wrong. State's brief at 19-20. In summation, the prosecution argued to the jury that defendant was guilty because he had a history of violence. (R.XX 1248)

It should be noted that Renee testified that defendant was a peaceful person who had never attempted to hurt her. (R.XVI 587, 591) And, when Matthew forced Renee at gunpoint to fight Debbie Davis, defendant

attempted to intervene as a peace maker. (R.XVI 585) Trial counsel's failure to object to the inadmissible portions of Renee's recorded statement noted above exposed the jury to this highly unreliable and prejudicial evidence and opened the door for the State to argue in closing that defendant had a history of violence. (R.XX 1248)

The State makes the fantastic argument that defendant benefitted from Johnny's recorded "statements about defendant's 'gang affiliations.'" State's brief at 20. The State asserts that trial counsel wanted to "emphasize" the gang evidence to show that Johnny was "misattributing Matthew's actions to defendant." State's brief at 20, 26. The State refers to this as the "false attribution" defense. State's brief at 20, 26. The State's position makes little sense as such a defense finds no support in the record. Moreover, trial counsel did not present such a defense. And, if it was trial counsel's defense that Johnny was attributing acts of Matthew to defendant due to some unknown psychological affliction, and if this elusive and insupportable defense could only be brought out through unfairly prejudicial gang evidence, then counsel provided ineffective assistance of counsel. *People v. Baines*, 399 Ill.App.3d 881, 896 (1st Dist. 2010) (trial counsel ineffective for presenting confusing defense that in many ways buttressed the State's case).

The State asserts that its position that the recorded statements did not prejudice defendant is supported by the fact that trial counsel mentioned the substance of the recordings during the trial and the State did not. However, the opposite is true. Once the inadmissible and highly prejudicial statements

were admitted, trial counsel's attempt to mitigate the prejudicial impact of the evidence shows that he knew the statements prejudiced defendant. And, the State's decision not to mention the recorded statements in closing shows that the prosecution knew the prejudicial evidence was inadmissible so that any mention of the inadmissible evidence in closing would have compounded the error which could have assisted defendant in obtaining a new trial on appeal. See *People v. Lawler*, 142 Ill.2d 548, 561 (1991) (new trial granted where error of improperly admitted evidence "was compounded by the prosecutor's remarks in closing argument"). Moreover, as noted above, the prosecution did comment on the inadmissible recorded statements when it argued that defendant had a history of violence. (R.XX 1248)

The State argues that Johnny's recorded statements about having a problem with defendant and about Matthew challenging defendant when defendant expressed his desire to assault Johnny were used to show defendant's "motive, not propensity." State's brief at 21; People's Exhibit 24, 16:22 - 17:20, 20:18-40, 20:35-40. However, why would trial counsel introduce motive evidence against his own client? If the State had wanted to present such motive evidence, it could have done so through Johnny's in-court testimony, but it chose not to. It is untenable for the State to argue that trial counsel acted reasonably in presenting prejudicial motive evidence against his own client when such evidence would not have been otherwise presented.

The State argues that Renee's recorded statement that defendant had told her he would kill Derrick Enlow was not other-acts evidence. The State

asserts that the statement was admissible to explain why defendant had picked up a knife before answering the door. State's brief at 22. However, defendant testified that he had picked up a souvenir baseball bat before answering the door, not a knife. (R.XX 1167-69) Therefore, there was no need for trial counsel to present evidence showing why defendant may have picked up a knife before answering the door. And, in light of the unfairly prejudicial nature of the comment and its almost non-existent probative value, the State's claim that it was trial strategy to admit the comment is untenable.

The State, relying on *People v. Graham*, 206 Ill.2d 465, 479 (2003), argues that defense counsel's decision not to object to the recordings was trial strategy. State's brief at 25. In *Graham*, this Court found that the admission of prior consistent statements did not cause prejudice to the defendant because the statements "comported with the defense theory" of the case. However, in this case, the recorded prior consistent statements of Johnny and Matthew that defendant had cut Matthew's and Renee's necks did not comport with defendant's claim that he did not cut their necks. Therefore, the State's reliance on *Graham* is misplaced.

The State argues that because defense counsel wanted to use portions of the recordings for impeachment, counsel was correct in concluding that the completeness doctrine rendered the remainder of the recordings admissible. State's brief at 27. However, under the completeness doctrine, the remainder of a writing, recording, or oral statement is admissible only if required to

prevent the jury from being misled. *People v. Craigen*, 2013 IL App (2d) 111300, ¶ 46; Ill. R. Evid. 106. Here, the State has offered no explanation of how the admission of the complained-of statements was required to prevent the jury from being misled. Because the jury would not have been misled by admission of only the admissible portions of the recordings, trial counsel rendered ineffective representation if he concluded that the completeness doctrine required him to stipulate to the admission of the entire recordings. Where inadmissible evidence “is contained in an otherwise competent statement or confession, it must be deleted before the statement or confession is read to the jury”; the completeness doctrine “does not give the party an automatic right to introduce material which is otherwise inadmissible.” *People v. Moore*, 2012 IL App (1st) 100857, ¶ 48.

The State argues that defense counsel’s decision not to make a meritorious objection can be a matter of sound trial strategy. State’s brief at 29. However, when counsel fails to use evidentiary and procedural rules to protect his client, reviewing courts have granted relief when the record shows no viable strategy for counsel’s conduct. *People v. Zambrano*, 2016 IL App (3d) 140178, ¶ 32 (ineffective assistance of counsel found where appellate court could not ascertain any viable strategy for counsel’s decision not to submit accomplice-witness instruction); *People v. Fletcher*, 335 Ill.App.3d 447, 453-54 (5th Dist. 2002) (reviewing court will not presume sound trial strategy where counsel allowed the admission of prejudicial evidence without objection where such evidence could have been excluded by the rules of

evidence); *People v. Moore*, 279 Ill.App.3d 152, 157 (5th Dist. 1996) (absence of challenge to objectionable prejudicial evidence “speaks of particularly egregious lawyering” and will support a claim of ineffective assistance of counsel as reviewing courts will not “construe the unobjected-to admission of this testimony as strategy rather than mistake”); *People v. Simpson*, 2015 IL 116512, ¶ 34 (first prong of *Strickland* met where defense counsel failed to make meritorious objection to videotape evidence); *People v. Fillyaw*, 409 Ill.App.3d 302, 314 (2d Dist. 2011) (counsel’s failure to make meritorious objection revealed that counsel did not understand the law).

The prejudice prong of *Strickland* “may be satisfied if defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair.” *People v. Jackson*, 205 Ill.2d 247, 259 (2001). The defendant needs only to show “that it is plausible that the result of the trial would have been different absent counsel's errors.” *Fillyaw*, 409 Ill.App.3d at 312. In this case, the evidence was closely balanced. And, evidence was presented by several neutral witnesses that Matthew had made statements that Johnny Price had cut his and Renee’s necks. The credibility of Matthew’s claim that defendant cut his and Renee’s necks was impeached by the testimony of Tina Broom, Alvina Wright, and Adrianna Pedigo. Broom testified that Matthew had told her that both defendant and Johnny had been standing behind him at the time of the assault. (R.XX 1105-06) Wright and Pedigo both testified that Matthew had told them it was Johnny Price who had cut his throat. (R.XX 1098-99, 1111)

Based on the record in this case, it is evident the jury had to weigh the credibility of the witnesses, and that it had considerable concerns whether the evidence proved defendant's guilt beyond a reasonable doubt. After four hours of deliberation, the jury notified the court that it was: "Very hung with no end in sight...." (Jury instructions envelope; (R.XX 1308)) A case is closely balanced where there are a number of factual issues to be resolved and where testimony was presented in support of both the State's and defendant's version of events. *People v. Virgin*, 302 Ill.App.3d 438, 445 (1st Dist. 1998); see also *People v. Lindgren*, 79 Ill.2d 129, 142 (1980) (State's case not overwhelming where there is "evidence to be weighed and witness credibility to be judged").

Because of the nature of the prior consistent statements and bad character evidence, and because the jury was at one time "[v]ery hung," it is evident that the admission of this highly inflammatory and inadmissible evidence was a significant factor in the rendering of the guilty verdicts. If defense counsel had properly kept this evidence from the jury, there is a reasonable probability the trial would have resulted in acquittals or a hung jury. Therefore, defendant was denied the effective assistance of counsel and must be granted a new trial.

CONCLUSION

For the foregoing reasons and the reasons in defendant's opening brief, Blackie Veach, defendant-appellant, respectfully requests that this Court reverse the judgments of the appellate and circuit courts, and remand this cause to the circuit court for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Jack Hildebrand, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 10 pages.

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