FIFTH DIVISION
March 21, 2014

No. 1-11-3003

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 22936
	)	
KIEARRE REESE,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was not denied effective assistance of counsel because trial counsel's decision to argue mistaken identification rather than an unreasonable belief in the need for self defense was a strategic decision and immune from a claim of ineffective assistance of counsel.

¶ 2 Following a jury trial, defendant Kiearre Reese, was found guilty of first degree murder of Marshawn Melcher pursuant to section 9-1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1) (West 2008)) with a finding that he personally discharged a firearm during the murder pursuant to section 5–8–1(a)(1)(d)(iiii) of the Unified Code of Corrections (730 ILCS 5/5–8–1(a)(1)(d) (West 2008)). Defendant was also found guilty of attempted first degree murder of Terelle Griffin pursuant to section 8-4(a) of the Code (720 ILCS 5/8-4(a), 9-1(a)

(West 2008)), with a finding that he personally discharged a firearm during the attempt pursuant to section 5–8–1(a)(1)(d)(iii) of the Unified Code. The trial court sentenced defendant to 20 years in prison for first degree murder with a 25-year firearm enhancement and six years for attempted murder with a 25-year firearm enhancement to be served consecutively, for an aggregate sentence of 76 years. On appeal, defendant contends that he was denied effective assistance of counsel because trial counsel pursued a second degree murder theory in both cross-examination and in the instructions tendered to the jury, but abandoned that theory in closing argument in favor of a theory of misidentification. We affirm.

¶ 3 According to the State's theory of the case, on August 8, 2008 around 10:30 p.m. defendant shot and killed Marshawn Melcher and shot and injured Terrelle Griffin in Meyering Park in Chicago after an argument erupted during a dice game. At trial, the State presented evidence from seven witnesses, including two eyewitnesses to the shooting, Marvel Williams and Griffin.

¶ 4 Williams was 11 years old at the time of the shooting. He testified that he observed a number of individuals, including defendant, playing dice. He saw Melcher and Griffin join the game. At some point during the dice game, Melcher asked defendant to return two dollars so that Melcher could get on the bus to go home. Defendant and Melcher began to argue and defendant shot him in the chest. Defendant then shot Griffin. Williams heard a total of four gunshots. He did not see Melcher or Griffin with a gun. At some point after the shooting, Williams saw an individual named Darius grab a gun from beneath a bush and run off with it before the police arrived.

¶ 5 Griffin testified that on the night of the shooting he went to play a dice game with Melcher, Martino Mosby, and Darius Ballark. At some point, he left the park because someone told him that the dice game was going to be robbed. He returned 20 to 30 minutes later and soon after observed defendant shoot Melcher. As he began to walk away, defendant shot him in the chest. Griffin testified that neither he nor Melcher had any weapons at the park, and never threatened defendant. On cross-examination, Griffin acknowledged that he had five prior felony convictions for drug offenses and an escape from electronic monitoring, and he also admitted to lying to the police about his name and birth date. He admitted stashing guns in the bushes of the park in the past because it was part of their drug territory, but testified he did not do so the night of the shooting.

¶ 6 Detective Clifford Martin testified that he arrived at the park after the shooting and observed Melcher's deceased body; he spoke to a number of witnesses but did not interview Williams because he had already been taken home. He later interviewed Williams and Griffin, who both identified a photo of defendant as the shooter. On cross-examination, defendant inquired about the contents of Williams's two interviews following the shooting. Martin testified that during the first interview on August 15, 2008 Williams told him that he saw the dice game get robbed by a "China-man asking [defendant] for two dollars back" and then the man pulled out a gun and shot Melcher and Griffin. About two weeks later, Williams was interviewed again, he told Martin that defendant had won all the money during the dice game and Melcher and Griffin were upset with defendant. At some point during the game, the men looked at each other and appeared to be giving one another a "signal." An individual with defendant then pulled a gun out of his pocket and passed it to defendant, and defendant started

shooting. Williams told Martin that he saw Griffin try to retrieve a gun from the bushes during the shooting, but couldn't. Williams then identified defendant as the shooter after Martin showed him a photo array. Martin also testified that during grand jury proceedings in November 2008, Williams stated that he had seen a girl pass a gun to defendant.

¶ 7 The State rested and defendant did not present any evidence. Following a preliminary jury instruction conference, the court admonished defendant and asked if it was his decision to submit jury instructions on the lesser included offenses of second degree murder and aggravated battery with a firearm. Defendant indicated that he discussed the jury instructions with his counsel, and that it was his decision to submit instructions on the lesser included offenses. During the final jury instruction conference, defense counsel argued for the lesser included instructions, explaining that the shooting occurred in an area where Griffin sold drugs and Williams testified that Darius retrieved a gun from the bushes immediately following the shooting. Counsel argued that "it is a reasonable inference that the jury can make that my client was acting in self-defense." However, I also believe it's a reasonable inference that the jury could find my client was, was [sic] being unreasonable when he used the amount of force he used in self-defense." The trial court granted the motion over the State's objections, stating that:

> "Nobody has testified at all that they ever saw a weapon in the hand of Terrell Griffin or Marshaw Melcher. *** However, in light of the fact that there were four shots heard and there was a gun, according to Marvell that he saw Darius get a gun from the bushes, and all of this happened in close proximity to each other, I

> feel that there is some evidence, however slight, and therefore I will allow a second degree instruction."

¶ 8 During its closing arguments, the State argued that it proved its case beyond a reasonable doubt because witness testimony established that defendant intentionally shot and killed Melcher and shot and injured Griffin with no justification. In defendant's closing, defense counsel highlighted Griffin's role as a well-known drug dealer in the community who "stashed weapons to protect [his] drugs." He also focused on Williams's inability to identify the shooter, and his inconsistent interviews. Defense counsel did not discuss a theory of self-defense.

¶ 9 Following closing arguments, defendant was found guilty of first degree murder and attempted first degree murder. The jury also found that defendant personally discharged a firearm that proximately caused death or great bodily harm to another person. The trial court sentenced defendant to 20 years in prison for first degree murder with a 25-year firearm enhancement and six years for attempted murder with a 25-year firearm enhancement to be served consecutively, for an aggregate sentence of 76 years.

¶ 10 On appeal, defendant contends that he was denied effective assistance of counsel because his trial attorney failed to argue in closing that he should be found guilty of second degree murder.

¶ 11 The Illinois Supreme Court has held that, to determine whether a defendant was denied his right to effective assistance of counsel, an appellate court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007) citing *People v. Albanese*, 104 Ill. 2d 504 (1984). Under the first prong of the *Strickland* test, the defendant must prove that his counsel's performance fell below an objective standard of

reasonableness "under prevailing professional norms." *Colon*, 225 Ill. 2d at 135. "It is well settled in Illinois that counsel's choice of jury instructions, and the decision to rely on one theory of defense to the exclusion of others, is a matter of trial strategy." *People v. Sims,* 374 Ill. App. 3d 231, 267 (2007). "Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence," and therefore, are "generally immune from claims of ineffective assistance of counsel." *People v. Enis*, 194 Ill. 2d 361, 378 (2000). Consequently, an unsuccessful defense will not support an ineffective assistance claim unless that defense was so unsound that counsel entirely fails to conduct meaningful adversarial testing of the State's case. *People v. Perry*, 224 Ill. 2d 312, 355 (2007). Under the second prong, the defendant must show that, "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135. To prevail, the defendant must satisfy both prongs of the *Strickland* test. *People v. Brown*, 236 Ill. 2d 175, 185 (2010). Where the facts relevant to an ineffective assistance of counsel claim are not disputed, our review is *de novo. People v. Bew,* 228 Ill.2d 122, 127 (2008); *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 12 A defendant is entitled to a jury instruction on an affirmative defense if there is some evidence, however slight, in the record to support that defense. *People v. Washington*, 2012 IL 110283, ¶ 43. A person commits the offense of second degree murder when he commits the offense of first degree murder and was acting under a sudden and intense passion resulting from serious provocation or unreasonably believed that circumstances existed that would excuse his actions as a justifiable use of force. 720 ILCS 5/9-2 (West 2008). Once the affirmative defense of self-defense is raised, the State has the burden of proving beyond a reasonable doubt not only

the elements of the charged offense, but also that the defendant did not act in self-defense. *People v. Lee,* 213 Ill.2d 218, 224-25 (2004).

¶ 13 Here, trial counsel was faced with a decision regarding which theory of defense he should argue to the jury, misidentification or unreasonable belief in the need for self-defense. Although there was no legal impediment to arguing both theories in the alternative, defense counsel was faced with the practical difficulty of presenting inconsistent theories to the jury. Defense counsel

may well have believed that he would appear, at the very least, disingenuous if he argued: "My client did not shoot these men, and if he did, he did so in self-defense." It was up to defense counsel to decide whether the jurors, in whose selection he participated, and whose demeanor he was able to observe during the presentation of the evidence, would be receptive to such a legally permissible but logically inconsistent presentation of alternative theories. This is a matter of strategy, and, to the extent it is based on factors not appearing in the record, such as juror demeanor, it is one that we are incapable of rationally second guessing. For reasons such as this, reviewing courts have routinely recognized that such matters of trial strategy are generally immune from claims of ineffective assistance. See e.g. *People v. Milton*, 354 Ill. App. 3d 283, 289-90 (2004); *People v. Shamlodhiya*, 2013 IL App (2d) 120065 ¶ 23.

¶ 14 Furthermore, we reject defendant's contention that trial counsel's failure to argue a theory of second degree murder during the closing argument left the jury "little choice but to disregard the theory." Although trial counsel did not argue a theory of second degree murder during the closing argument, a review of the record shows that the jury was well aware of the favorable and

unfavorable evidence against defendant, the blatant inconsistencies in Williams's testimony, and the jury instruction on both first and second degree murder.

¶ 15 Finally, contrary to defendant's contention, we agree with the State that the tendering of second degree murder instruction to a jury does not concede a defendant's guilt on the elements of first degree murder. In this case, the State was still required to prove all elements of first degree murder beyond a reasonable doubt and also that defendant did not act in self-defense. See *Lee,* 213 Ill. 2d at 224–25. The jury found that the State met its burden and convicted defendant of first degree murder, and we as a reviewing court, finding that the verdict was not against the manifest weight of the evidence, defer to this finding. See *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992) holding that a verdict is against the manifest weight of the evidence only "where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence."

¶ 16 For the foregoing reasons, we find that defendant was not denied the effective assistance of counsel and affirm the judgment of the Circuit court of Cook County.

¶ 17 Affirmed.