SECOND DIVISION
March13, 2012

No. 1-10-1350

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County.
	)	
v.	)	No. 05 CR 22405
	)	
ROBERT MONSON,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

O R D E R

¶ 1 ***Held:*** In proceedings on defendant's postconviction petition, it was not error for the trial court to grant defendant's request to proceed *pro se.* At the hearing, defendant failed to establish incompetent representation of his trial counsel and substantial prejudice to the defendant as a direct result thereof. The jury instruction complained of concerned an element of the offense that was not contested at trial and that defendant conceded to in his testimony when he took the stand in his defense and, therefore, cannot form the basis of any relief.

¶ 2 Following a jury trial, defendant Robert Monson was found guilty of attempted murder (720

ILCS 5/8-4,9-1) (West 2006)) and aggravated battery (720 ILCS 5/12-4(b)(1) (West 2006)). Defendant was sentenced to an extended term of 50 years in prison for the attempted murder and to a consecutive sentence of three years in prison for the aggravated battery. The circuit court denied defendant's *pro se* posttrial motion in which he alleged, among other things, ineffective assistance of counsel. Defendant appealed this denial. This court remanded this case to the circuit court for the purpose of conducting an inquiry into defendant's *pro se* claims of ineffective assistance of trial counsel. (No. 1-06-1682, March 12, 2008 unpublished order). Pursuant to this court's order, the trial judge conducted a hearing on remand on defendant's 17 claims of ineffective assistance of counsel. Defendant indicated his desire to proceed *pro se* at this hearing and the trial court allowed defendant's request. Also present at the hearing was defendant's trial counsel, Raymond Prusak and defendant's wife, Star Monson who was a codefendant and her trial counsel, John Miraglia.

¶ 3 BACKGROUND

¶ 4 Defendant admitted that he shot Tory Jenkins in the mouth. He also admitted that he caused Tory great bodily harm and tried to kill him. As a direct result of the shot defendant fired, Tory Jenkins is a quadriplegic who can only breathe with the assistance of a ventilator. No one contested these facts at trial.

¶ 5 At trial, the primary factual dispute was whether Tory Jenkins was unarmed or armed when defendant shot him. Defendant and his codefendant wife both testified that Tory Jenkins had a gun and was aiming it at the defendant when he shot Tory.

¶ 6 However, the facts illicted from numerous eye witnesses at trial tell a much different story.

¶ 7 Iris Whitfield, the victim of defendant's aggravated battery, is the sister-in-law of defendant

and the sister of codefendant Star Monson. Iris Whitfield lived a couple of blocks from the Versailles Apartment Complex, where the shooting took place and was employed as manager of the Complex for approximately five years. While manager, Iris rented an apartment to the defendant and co-defendant without disclosing to her boss or anyone else that they were related.

¶ 8 Earlier on the day of the shooting, Iris ran into both defendant and her sister. A verbal altercation ensued involving allegations that Iris had disclosed to one or more of Star's old boyfriend's where Star lived, causing the boyfriends to visit Star at her apartment. Defendant, Star's husband, made his displeasure known to Iris and although Iris denied disclosing this information to anyone, Starr kept repeating the allegation. Defendant and Starr kept repeating that defendant should kick Iris's ass for these disclosures. Iris left and drove home.

¶ 9 Iris has twin teenage daughters, Amber and Amanda. When Iris arrived home Amber was with her 17 year old boyfriend, a high school student named Tory Jenkins. Iris's nephew, Maurice arrived and Tory Jenkins left with Maurice by car. As Iris and her daughter Amber were leaving to do some shopping, Iris's brother Clint, Iris's son Edward, and their friend Derrick pulled into the driveway. Iris's other daughter, Amanda called needing a ride home from an after-school sports practice. Clint, Edward and Derrick went to pick up Amanda. Iris and Amber then continued in their car to go shopping. While driving along, Iris and Amber saw Star driving in her vehicle. Both Iris and Star stopped their respective cars. Iris exited her car and approached Star in her car. Star yelled profanities at Iris and told Iris she had something for her but was not going to give it to her in front of Iris's daughter.

¶ 10 Later, while Iris and Amber were driving near the apartment complex, a tenant flagged down

Iris, indicating she wished to speak with her. Iris pulled over. While Iris's daughter Amber waited in the car, she saw Star in the Versailles apartment parking lot sitting on her car. At Amber's insistence, Iris went over to Star to try to talk to her to clear up any misunderstandings.

¶ 11 Iris, her daughters, her son, her brother and Derrick had planned to go out to eat. As Clint, Edward, Derrick and Amanda were driving by the apartment complex they saw Iris's car parked there and pulled in. Maurice and Tory were also there. Iris testified that it is not unusual for her daughter and other relatives and friends to come over to the complex where she works on a regular basis. The conversation Iris started with Star became heated and defendant, who was standing next to Star, pulled out a gun and said, "Which one of you motherfuckers want to die first?" He pointed it at Iris and repeated the phrase as he pointed it at others who were present. When he got to Tory Jenkins, defendant pointed the gun at him and yelled the same phrase only this time defendant actually shot Tory. After shooting Tory, he used his gun to beat Iris around the head and threatened to shoot her in the head as she begged for her life and pleaded for him not to shoot her in front of her daughters. Iris's sister was screaming "Shoot the bitch" while all of this was going on. A witness from one of the apartments yelled to the defendant that she had called 911 and the police were on their way. Star approached the defendant, hugged him and they turned and walked away.

¶ 12 There was no weapon found at the scene other than the gun that was still in the defendant's possession. No eye witnesses reported seeing anyone with a weapon other than the defendant. All eye witnesses except for the defendant and his wife stated that Tory Jenkins was unarmed when defendant shot him. The factual dispute regarding whether the defendant shot Tory Jenkins in cold blood or in self defense was resolved by the jury when it returned a guilty verdict.

¶ 13 ANALYSIS

¶ 14 Defendant identifies a single issue in the "Issue Presented For Review" section of his appellate brief: "Whether the trial court should have appointed counsel to represent the defendant at the hearing on his posttrial motion?" However, the body of defendant's brief raises the additional issues of whether the trial court was correct in denying defendant's posttrial motion alleging numerous instances of ineffective assistance of counsel and in determining that the jury was properly instructed on sentencing enhancement. We will address all issues raised by defendant both by caption and content in the defendant's brief.

¶ 15 Defendant's appellate counsel argues that the trial court erred when the court failed to appoint without counsel at the hearing on defendant's *pro se* posttrial motion alleging ineffective assistance of counsel. However, defendant informed the trial court that he wished to proceed *pro se* at the hearing on his posttrial motion. The following colloquy occurred at the start of the hearing

¶ 16 "THE COURT: Mr. Monson, it was my understanding you wanted to proceed without counsel, is that correct?

THE DEFENDANT: That's correct, your Honor."

¶ 17 Unlike the *Krankel* case or much of its progeny, defendant made a specific request to proceed pro se rather than asking the trial court to appoint an attorney to represent the defendant on his posttrial motion. See, *e.g. People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant was granted his request to proceed *pro se*. Additionally, no argument is presented that defendant is incompetent. See *Indiana v. Edwards*, 554 U.S. 164 (2008). Therefore, defendant's argument that the trial court should have intervened and *sua sponte* appointed counsel to represent the defendant is misplaced.

¶ 18 Defendant concedes on appeal that even if defendant had asked that new counsel be appointed, new counsel is not automatically required every time a defendant presents a *pro se* motion for a new trial alleging ineffective assistance of counsel, citing *People v. Moore*, 207 Ill. 2d 68 (2003). In *Moore*, our supreme court held that "when a defendant presents a *pro se* posttrial motion claim of ineffective assistance of counsel, the trial court should first examine the factual basis of defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion ***. The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 77.

¶ 19 "At a minimum, the trial court must afford the defendant an opportunity to specify and support his complaints." *People v. Ward*, 371 Ill. App. 3d 382, 433 (2007), quoting *People v. Cummings*, 351 Ill. App. 3d 343, 351 (2004). This court declined to address defendant's ineffective assistance claims in defendant's initial appeal and remanded the case to the trial court in order to give the defendant this opportunity.

¶ 20 On appeal defendant argues that the trial court's denial of his posttrial motion following a hearing on remand was erroneous where the record of the proceedings on remand demonstrated that his trial counsel provided ineffective assistance of counsel during his criminal trial. In 1984, the U.S. Supreme Court laid out the seminal test for evaluating allegations of ineffective assistance of counsel in criminal trials. *Strickland v. Washington*, 465 U.S. 668, 687 (1984). There are two distinct parts to the test: (1) deficient attorney performance, and (2) resulting prejudice to the defense

that is so serious that it brings the verdict into question. The Court provided guidance to the lower courts for evaluating part one of the test when it stated that while effective attorney representation is an objective standard of reasonableness, "scrutiny of counsel's representation must be highly deferential." *Strickland*, 465 U.S. at 667. Strategic decisions made by counsel are "virtually unchallengeable", as are "reasonable" decisions making investigation unnecessary. *Strickland*, 465 U.S. at 667; *People v. Banks*, 237 Ill. 2d 154, 215-16 (2010). With that backdrop, we will analyze the defendant's claims.

¶ 21 At the hearing on defendant's *pro se* posttrial motion alleging ineffective assistance of counsel, defendant raised seventeen areas which he alleged were deficient. All seventeen allegations were rejected by the trial court. Six of those seventeen issues are appealed to this court.

¶ 22 Defendant first argues that he suspects that his trial counsel may have been using drugs and that the suspected "addiction could have compromised [his] professional abilities." Defendant, at the hearing on his posttrial motion for ineffective assistance of counsel, submitted certain Attorney Registration and Disciplinary Commission (ARDC) correspondence that indicated his trial counsel was subsequently suspended from the practice of law for three years, effective November 18, 2008, for legal work unrelated to defendant's trial. Defendant argued that it was relevant because counsel's three year suspension is based on matters that occurred not long after defendant's trial. While we agree that these are admittedly upsetting developments, they are nonetheless developments that are unrelated to trial counsel's actions at defendant's trial which is what we are concerned with here. Defendant cannot impute any wrongdoing his trial counsel committed in another case to prove that his trial counsel was deficient at defendant's trial. Defendant must show actual deficient

performance during his trial and, more importantly, that the deficient performance prejudiced the defendant at trial to such a degree that a miscarriage of justice occurred. Defendant's argument on its face fails. Illinois courts have long held that ineffective assistance of counsel in a specific case cannot be proven merely by demonstrating that counsel was the subject of ARDC complaints and was even subsequently disbarred. *People v. Szabo*, 144 Ill. 2d 525, 531 (1991). Defendant has not argued any correlation between trial counsel's 2008 suspension and trial counsel's representation of defendant at trial in the instant case. *People v. Elvart*, 189 Ill. App. 3d 5524, 530 (1989) (defense counsel was not ineffective because he was suspended from the practice of law for drug addiction where the record did not reflect any connection between the suspension and defendant's representation). Additionally, we have reviewed the entire trial record and agree that the trial court properly rejected this claim, relying in part on its own observation of counsel during trial. We reviewed no actions or comments by trial counsel that would indicate his ability to execute his professional legal duties was compromised and the defendant points to none. The trial record indicates that his representation was vigorous and clear during all segments of the trial including objections and cross examinations, as well as opening statements and closing arguments made to the jury.

¶ 23 Defendant's next issue is that trial counsel failed to include defendant's stepson/co-defendant's biological son, Merritt Poindexter Monson as a witness in defendant's answers to discovery which resulted in the trial court's refusal to allow the witness to testify at trial. At the hearing on remand, defendant's trial counsel indicated that he interviewed Merritt as part of his pre-trial investigation. Merritt revealed that he did not witness anything and did not know anything

concerning the day his stepfather shot Tory Jenkins. Defense counsel's interview of defendant's daughter who defendant testified was home babysitting his five year old son also confirmed that neither she nor Merritt witnessed the shooting. None of the many eye witnesses who testified in court ever mentioned that Merritt was present at the scene. Merritt never came forward to give a statement to police about the shooting. Therefore, the initial interview statement by Merritt to trial counsel is consistent with other witnesses' accounts of the shooting and were reasonably reliable. Much later, at defendant's insistence and just before trial, defendant's trial counsel re-interviewed Merritt who now stated that he not only witnessed his stepfather shoot Tory, but also saw other things at the scene that might be helpful to the defense of his stepfather's case.

¶ 24 Upon remand, trial counsel told the court he seriously questioned the veracity of Merritt's new statements which were diametrically opposed to the previous interviews he conducted. Trial counsel, at defendant's insistence, sought to call Merritt as a witness. The trial court denied his request to call an undisclosed witness who would provide such testimony without providing the State with proper notice so they could conduct any necessary investigation. From the comments made by defendant's trial counsel about his evaluation of Merritt's new statements *vs*. his prior statements, it was reasonable for trial counsel to have a "good faith" belief that the witness, if called to the stand, would testify falsely. See *People v. Bartee*, 208 Ill. App. 3d 105, 108, cert. denied, 502 U.S. 1014 (1991) (applying the "good faith" standard of belief by attorney to witness's intent to commit perjury). At the hearing on remand, trial counsel indicated he was relieved by the court's ruling barring Merritt from testifying, as he was not faced with the ethical dilemma of determining what steps he would need to take surrounding testimony he elicited which he believed to be false. In this

case, defendant's trial attorney had a good faith basis in fact to believe that Merritt knew nothing about the shooting in question. There was no reasonable basis to include Merritt on any witness list.

¶ 25 It appears that trial counsel exercised his independent obligation to investigate the facts of this case when he interviewed Merritt initially and it was appropriate for him to rely on Merritt's first interview statements when compiling answers to discovery which omitted Merritt's name from any list of witnesses who might have knowledge of the shooting. Merritt's statement that he knew nothing was consistent with the testimony of the other witnesses. Trial counsel did not learn of Merritt's second contradictory statement until well after discovery was exchanged and trial was about to begin. Clearly, such omission of Merritt's name from any discovery disclosures to the State was reasonable under the circumstances and did not rise to the level of ineffective assistance of counsel.

¶ 26 Next, the defendant claims ineffective assistance of his counsel at his criminal trial because counsel called two witnesses to the stand, Clint Poindexter and Maurice McKinley who testified consistently with the State's witnesses and offered no support for the defendant's theory of self-defense.

¶ 27 First, six State witnesses testified at trial that defendant shot an unarmed man in the mouth and then proceeded to hit an unarmed woman in the head with the same gun. Clint and Maurice were called by defendant's counsel. Decisions concerning who to call to the witness stand are matters of trial strategy that are given deference and usually cannot support an ineffective assistance of counsel claim. By defendant's own arguments, his trial attorney was aware of the possible evidence since he called them as witnesses. The decisions of which witnesses to call and what evidence to present are generally unassailable matters of trial strategy that cannot form the basis of

a claim of ineffective assistance of counsel, *People v. Banks*, 237 Ill. 2d 154, 215 (2010) see also, *People v. Enis*, 194 Ill. 2d 361, 378 (2000) ("decisions concerning whether to call certain witnesses on a defendant's behalf are matters of trial strategy, reserved to the discretion of trial counsel.") In fact, trial counsel's strategic choices are "virtually unchallengeable." *People v. Palmer*, 162 Ill. 2d 463, 476 (1994). These trial decisions are "generally immune from claims of ineffective assistance of counsel." *Enis*, 194 Ill. 2d at 378.

¶ 28 Defense counsel's questions addressed to both Clint and Maurice appeared to be intended to try to further the defendant's defense that the parking lot confrontation that resulted in defendant shooting Tory Jenkins was one that was a hostile, threatening meeting organized by defendant's sister-in-law. The fact that this strategy failed does not mean counsel was ineffective. Sometimes, there is not much any defense attorney can do, especially when guilt is established through so many eye witnesses, including Ms. Javiera Thomas, an independent witness who observed the shooting of an unarmed man from an apartment window. Additionally, defendant alleges that trial counsel was ineffective in failing to perfect what he believes was critical impeachment of both witnesses. Defendant quibbles with nonessential facts regarding the prior statements made by either Clint or Maurice to investigators that may have omitted certain details. Even if trial counsel had perfected impeachment of his witnesses he called to the stand on some minor details regarding omissions in their prior statements surrounding how they came to the parking lot that day, it is an impossible leap of logic that the jury would have disregarded the other witnesses who told the jury they saw defendant shoot an unarmed man.

¶ 29 The next issue raised by defendant is that trial counsel failed to insure that the court's order

excluding witnesses from the courtroom while the trial was conducted was adhered to and that this rose to the level of ineffective assistance of counsel. Taking the allegation as being true, any error was harmless. Defendant argues that a defense witness, Kenneth Stokes, sat through a portion of the trial and then testified. The State moved to strike his testimony. That motion was denied by the trial court. Defendant now argues that because of the risk that the ruling "could have just as easily " gone the other way, it is evidence of ineffective assistance of counsel. Defendant admits he suffered no prejudice whatsoever. This claim is frivolous. It does not even remotely meet the *Strickland* test outlined above.

¶ 30 The final allegation of ineffective assistance of counsel is that during routine status dates on the case long before trial, defendant's counsel did not appear but instead sent either an associate or a law clerk to stand in for him. Defendant admits in his brief that defendant "suffered no real harm" in this alleged deficiency. Again, this court applies the *Strickland* test and without a clear showing of prejudice that calls his guilty verdict rendered at the subsequent trial into question, this allegation fails.

¶ 31 Finally, defendant submits that he was improperly sentenced to an additional 25 years in prison because of a defective jury instruction. Defendant argues that a version of Illinois Pattern Criminal Jury Instruction No. 26.01 erroneously inserted the article "the" in front of the phrase "great bodily harm" which had the effect of removing from the jury's determination whether the victim, Tory Jenkins actually suffered great bodily harm.

¶ 32 The jury instruction read as follows: "We, the jury, find the fact does exist that, during the commission of the offense of attempt first degree murder, the defendant personally discharged a

firearm which proximately caused ***the*** great bodily harm to Tory Jenkins." (Emphasis supplied to word in dispute).

¶ 33 This argument by defendant is ludicrous given that Tory Jenkins was wheeled into the courtroom on a gurney and testified to his life as a high school student on the basketball team prior to being shot by the defendant *vs*. his current physical condition where he cannot move from the neck down and is dependent on a ventilator to breathe. The State also called his treating doctor who testified to Tory's horrific injuries and his resulting reduced life expectancy. Defendant took the stand and admitted that he caused great bodily harm to Tory and intended to do just that, characterizing his shot as a lucky one.

¶ 34 The United States Supreme Court has instructed us on this very issue when it stated that "[o]ur precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by defendant*." (emphasis in original) *Blakely v. Washington*, 542 U.S. 296, 303 (2004). Even without defendant's admission at trial that he caused great bodily harm to Tory, our supreme court has held that an *Apprendi* error can be harmless error when the evidence in support of the element at issue indicates it to be "clear beyond a reasonable doubt that a properly instructed, rational jury would have found defendant guilty," absent the specific error complained of. *People v. Thurow*, 203 Ill 2d 352, 368-69 (2003). Even absent defendant's own testimony, the evidence was overwhelming that defendant's gunshot to Tory's mouth rendered Tory a ventilator-dependent quadriplegic. The fact that Tory suffered great bodily harm was not contested at defendant's trial. Defendant cannot show ineffective assistance by his trial counsel when he failed to object to this

alleged error in the jury instruction. The concessions at trial, the independent proof by the State and defendant's trial testimony were more than sufficient to establish Tory's great bodily harm at the hands of the defendant beyond any reasonable doubt.

¶ 35 CONCLUSION

¶ 36 For all the forgoing reasons, the judgment of the trial court on defendant's posttrial motion is affirmed.

¶ 37 Affirmed.