2014 IL App (1st) 111375-U

FIRST DIVISION
AUGUST 25, 2014

No. 1-11-1375



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 08 CR 19408 |
| | ) | |
| MIGUELANGEL GARCIA, | ) | Honorable |
| | ) | Brian Flaherty, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

**ORDER**

¶ 1 *Held*: Defense counsel did not provide ineffective assistance of counsel when he elected not to exercise a for-cause challenge or peremptory challenge against a potential juror who had expressed a bias against gang members during *voir dire*.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Miguelangel Garcia was convicted of first-degree murder, attempted first-degree murder, and aggravated battery with a firearm. Subsequently, he was sentenced to a total of 95 years of imprisonment. On appeal, the defendant argues that a new trial was warranted because he received ineffective assistance of counsel. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On November 24, 2007, 16-year-old Melody Elias (Elias) was shot to death in front of her home in Calumet City, Illinois. Daniel Witting (Witting) was also injured during the shooting. In October 2008, the defendant, along with other codefendants, was charged with first-degree murder of Elias, the attempted first-degree murder of Witting, and aggravated battery with a firearm.

¶ 5 On January 15, 2010, the trial court denied the defendant's pretrial motion to suppress his incriminating statement to the police, finding that the statement was given freely and voluntarily.

¶ 6 On January 24, 2011, the jury selection process began. One day after the jury was selected, three jurors sought to be excused from serving on the jury for separate reasons: illness, depression, and employer issues. The parties both agreed to dismiss all three jurors. In replacing the three lost jurors, the trial court called prospective jurors[1] S.W., W.G., H.M.H., B.M., K.L.,[2] and W.M. The trial court asked these six prospective jurors certain general questions, by requesting that they raise their hand if they disagreed with any of the following: (1) the defendant was presumed innocent until proven guilty; (2) the State had the burden to prove him guilty beyond a reasonable doubt; (3) the defendant did not have to present any evidence at all; (4) an officer's testimony should be given no more or less weight than any other witness; (5) any personal disagreement about the law must be set aside and the law must be applied and followed. No one raised his or her hand in response to any of these questions. During individual questioning by the trial court, prospective juror B.M. (Juror M) stated that he and his brother were both victims of burglaries, but that nothing about those experiences would prevent him

[1] We elect to abbreviate the prospective jurors' and jurors' names in order to protect their identities.

[2] K.L.'s name was erroneously entered on the record as "June Elias," the victim's mother.

from being a fair and impartial juror. Juror M stated that he would wait to hear the evidence and jury instructions before rendering a decision, that he understood and accepted the defendant's presumption of innocence, and that the defendant was not required to present any evidence. Juror M understood and accepted that, if the defendant elected not to testify, he must not consider this as proof of guilt. When asked whether the defendant's alleged street gang membership would prevent him from giving the defendant a fair and impartial trial, Juror M responded, "it would." No further questions were asked by the trial court or the attorneys regarding this response. Juror M then stated that he would return a verdict of guilty if the State proved the defendant guilty beyond a reasonable doubt, and likewise would return a not guilty verdict if the State failed to prove the defendant guilty.

¶ 7 The State then used a peremptory challenge on S.W., while defense counsel used two peremptory challenges on W.G. and H.M.H. Both the State and defense counsel then accepted Juror M as a juror. Both parties then accepted K.L. and W.M. as alternate jurors.

¶ 8 On January 25, 2011, the jury trial commenced. Witting testified that at about 1:10 a.m. on November 24, 2007, he and Elias were sitting in his blue car which was parked in front of Elias' home. Witting then noticed a gold car pull up in front of his car at an angle, while a second gold car pulled up alongside the passenger side of his car. A third black car drove up behind Witting's car. All three cars surrounded and blocked in Witting's car. The driver's side of Witting's car was next to a street curb. Witting testified that Kevin Kerby (Kerby), whom he had known for four years prior to that night, exited the driver's seat of the first gold car. Witting testified that Kerby, nicknamed "Oreo," was a member of the Latin Kings street gang. After exiting the first gold car, Kerby cursed and yelled "Dragon Killer," which Witting interpreted to mean Kerby would kill anybody who associated with the Latin Kings' rival gang, the Latin

Dragons. Kerby then kicked Witting's driver's side door and tried to open it. Witting also noticed two people standing on the passenger side of Witting's car. Witting then reversed his car and hit the black car behind him. At that time, Witting heard gunshots coming from the passenger side of his car, which shattered the front windshield and passenger side window. As a result, Witting was shot in both hands and Elias was shot in the chest. Witting then drove his car onto the curb and the grassy area, and maneuvered around the first gold car that was blocking him from the front. Witting then heard a second wave of gunshots coming from behind him, which shattered his back windshield. As Witting sped away, he noticed a car chasing him and heard more gunshots. Witting then sped to the hospital for medical help. At the hospital, Witting spoke briefly with the police and told them that Kerby was involved in the shooting. Witting suffered permanent injuries to his hands. On cross-examination, Witting denied that he was affiliated with any street gangs, but that he "hung out" with both Latin Kings and Latin Dragons members. Witting did not recognize the two people who stood on the passenger side of his car. He testified that he had told Officer Maletich at the hospital after the shooting that he did not know whether Kerby was the shooter. On redirect examination, Witting testified that he did not see who was firing the gun because his attention was on the driver's side of his car at that time.

¶ 9 Sara Brogdon (Brogdon) testified that she socialized with Krista Cane (Cane), Kerby, and Llewellyn Peed (Peed) in November 2007. Brogdon knew Kerby was a member of the Latin Kings gang. On November 21, 2007, Brogdon, Kerby, Peed, and Cane were in Brogdon's car when Kerby told them that he had learned that his car "had been blown up" by "the Dragons." The group then drove to a home in Harvey, Illinois, where Kerby exited the car and returned shortly with the defendant, who had a black gun with a long clip. Two days later, on November

23, 2007, Brogdon was at a party at Peanut's[3] house in Calumet City with Kerby, Cane, Peed, the defendant, and other Latin Kings members. Brogdon drank alcohol and smoked marijuana at the party. Kerby was angrily talking about how "the Dragons had blown up his car" and how he wanted to "F them up." Brogdon saw that the defendant had the same black gun that he had possessed two days prior to the party. After midnight on November 24, 2007, everyone at the party left and got into four separate cars to look for members of the Latin Dragons. The defendant had the black gun in his possession when the group left Peanut's home, and Kerby directed who would ride in which car. Kerby was the driver of Brogdon's tan-colored car, while Brogdon rode in the passenger seat and both Cane and Peed sat in the backseat. The defendant entered a second car—a gold car—alone. Two individuals nicknamed DK and Drama got into a stolen black car. Peanut, Dollar Bill and Andy rode in a fourth, orange car. Brogdon testified that the party group drove around until they saw a dark blue car parked with two passengers inside. Kerby, who was driving Brogdon's car, parked it at an angle in front of the dark blue car, which blocked the dark blue car from going forward. The defendant then stopped parallel to the passenger side of the dark blue car, while the black car parked behind the dark blue car and prevented it from going backwards. Brogdon did not see the fourth orange car at this point. Brogdon's trial testimony regarding the shooting was consistent with Witting's testimony about the incident. Brogdon added that DK tried to open the passenger door of the dark blue car. After the dark blue car drove in reverse and hit the stolen black car that was parked behind it, she heard gunshots and saw the defendant standing with a gun in his hand and gunsmoke around him. At that time, the defendant was standing on the passenger side of the dark blue car. Brogdon then observed the dark blue car drive over a curb, go around Brogdon's car, and flee down the street.

[3] Peanut was Lewis Crenshaw's nickname.

As the dark blue car drove over the curb, Brogdon heard more gunshots and saw the defendant chase the dark blue car in his car. Brogdon then heard faint gunshots as they drove away. After the shooting, Kerby instructed Brogdon and others not to tell the police about the shooting. A few days later, on November 27, 2007, the police visited Brogdon's home and she subsequently went to the police station, provided a statement to the police, and testified before the grand jury. On cross-examination, Brogdon admitted that she was in a sexual relationship with Kerby in November 2007, and that she could not remember whether she actually saw the defendant fire the gun.

¶ 10 Peed, who was 22-years-old at the time of trial, testified pursuant to a plea agreement with the Cook County State's Attorney Office. In exchange for testifying truthfully, Peed would serve 85% of a 7-year sentence for attempted murder, and 50% of a consecutive 7-year term for conspiracy to commit murder. Peed testified that he was a member of the "future Latin Kings," which meant that he was on probation and had yet to become an official Latin Kings member. Neither Brogdon nor Cane was a gang member. On November 21, 2007, after Kerby received a telephone call that his car had blown up, he, Kerby, Cane and Brogdon drove to Kerby's house where the fire department was extinguishing the flames in Kerby's car. The group then drove to Harvey, Illinois, where Kerby exited the car, entered a house, and reemerged with the defendant. The defendant had in his possession a 9-millimeter gun with a long clip. On November 24, 2007, Peed was drinking and smoking at a party at Peanut's house. Kerby, Brogdon, Cane, and other Latin Kings members such as the defendant were also present. During the party, the defendant said that he was going to get the gun, after which the defendant and DK left and returned within 10 minutes with the firearm. Peed observed that the gun appeared to be the same one that the defendant possessed on November 21, 2007. Peed testified that Kerby was upset

that the Latin Dragons blew up his car, that he wanted to look for "Dragons" and "[expletive] them up," and that the entire party group left Peanut's house in four separate cars and drove around Calumet City. Peed's testimony regarding the events prior to and during the shooting was consistent with Brogdon's trial testimony. Peed testified that, during the shooting, he saw the defendant holding a gun and firing at the passenger side of the blue car. The defendant's car then chased the blue car as the blue car fled. After the shooting, everyone except the defendant returned to Peanut's home. On November 26, 2007, Peed turned himself in to the police and gave a videotaped statement about the incident. On cross-examination, Peed stated that, when he gave his statement to the police, the police already knew that the defendant was the shooter and that they told Peed everything that had occurred before they asked him for his version of the events. Peed testified that, during the shooting, he saw the defendant standing and shooting the gun "countless" times.

¶ 11 The State also presented evidence at trial that, after the shooting, the police secured Witting's blue vehicle, which had several bullet holes on the passenger side, several broken windows, and blood in the interior of the car. The police also recovered 11 discharged cartridge casings, vehicle parts, and paint chips from the crime scene. Six spent projectiles and bullets were also recovered from inside the blue vehicle.

¶ 12 Firearms expert Patricia Wallace testified that she determined that all 11 cartridge cases were fired from a single 9-millimeter firearm. She also examined three bullets recovered in this case, which she determined were discharged from a single 9-millimeter firearm. However, she was unable to determine whether the cartridge cases and the bullets were fired from the same handgun.

¶ 13 Detective Chris Lareau (Detective Lareau) testified that he was assigned to investigate the shooting death of Elias. On November 25, 2007, Louis Crenshaw, whose nickname was "Peanut," and Albert Redmond, whose nickname was "Drama," were already in police custody. Detective Lareau later located and arrested the defendant. At the police station, Detective Lareau and Detective Rob Williams (Detective Williams) conducted several videotaped interviews with the defendant. The defendant initially denied knowledge of the shooting, and told the police that he did not know the identity of the shooter. The police then informed the defendant that others involved in the incident had identified the defendant as the shooter. Eventually, the defendant admitted that he was the shooter and that he fired "a lot" of shots. In his videotaped statement, the defendant stated that he shot at the car with a semi-automatic weapon, that he was the only shooter, that he did not know there was a little girl inside the car, and that he disposed of the gun near his home after the shooting. The defendant described the weapon as a black gun with a long clip. Detective Lareau further testified that he, Detective Williams and the defendant then went to a location in Harvey, Illinois, where the defendant had indicated that he had disposed of the murder weapon. However, the detectives were unable to locate the firearm.

¶ 14 Defense witness Officer Tony Curtis (Officer Curtis) testified that he interviewed Witting at the hospital after the shooting. Witting identified Kerby, Crenshaw ("Peanut") and Redmond ("Drama") as the individuals who were at the crime scene, but did not identify them as the shooters. Two days later, on November 26, 2007, Witting identified a photograph of the defendant as the shooter. Later on that day, November 26, 2007, Officer Curtis and an assistant State's Attorney interviewed Witting at the hospital. At that time, Witting only identified Kerby and indicated that he could not identify anyone else involved at that time.

¶ 15 Following closing arguments and deliberations, the jury found the defendant guilty of the first-degree murder of Elias, the attempted first-degree murder of Witting, and aggravated battery with a firearm. Specifically, the jury found that the defendant personally discharged the firearm.

¶ 16 On March 2, 2011, the defendant filed a motion for a new trial, which the trial court denied. On April 12, 2011, the trial court sentenced the defendant to consecutive terms of 60 years for first-degree murder and 35 years for attempted first-degree murder.[4]

¶ 17 On May 10, 2011, the defendant filed a timely notice of appeal.

¶ 18 ANALYSIS

¶ 19 The sole issue on appeal is whether the defendant received ineffective assistance of counsel so as to warrant a new trial, which we review *de novo*. See *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008) (*de novo* review proper where facts surrounding defendant's ineffective assistance of counsel claim are undisputed).

¶ 20 The defendant argues that defense counsel[5] was ineffective when, during *voir dire*, he failed to make either a for-cause challenge to strike Juror M or a peremptory challenge against him. He contends that because Juror M stated that the defendant's alleged gang membership would prevent him from giving the defendant a fair and impartial trial, defense counsel's acceptance of Juror M as a jury member constituted deficient performance. The defendant further argues that defense counsel's deficient performance prejudiced him because there was a reasonable probability that a jury free from bias would have acquitted him.

[4] The aggravated battery with a firearm conviction merged with the attempted first-degree murder conviction.

[5] Defendant was represented by two defense attorneys during *voir dire* and trial. For clarity, we refer to the defendant's legal representatives in the collective as "defense counsel."

¶ 21 The State counters that defense counsel provided effective assistance during jury selection and at trial. The State argues that the defendant has failed to show that counsel's decisions were not tactical and a matter of jury selection strategy. Specifically, the State argues that defense counsel could have determined that Juror M, who admittedly had gang bias, would benefit the defense because the State's main witness, Peed, was a gang member. The State further argues that the defendant has not shown prejudice, where the evidence adduced at trial against the defendant was overwhelming and there was no reasonable probability that the outcome would have been different but for defense counsel's alleged deficiency. In the alternative, the State maintains that this court should remand this case to the trial court for a hearing pursuant to Supreme Court Rule 329 (eff. Jan. 1, 2006), to determine whether Juror M's response regarding his gang bias was accurate in the trial record.

¶ 22 To prevail on a claim of ineffective assistance of counsel, the defendant: (1) must prove that counsel's performance fell below an objective standard of reasonableness so as to deprive him of the right to counsel under the sixth amendment (performance prong); and (2) that this substandard performance resulted in prejudice (prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). To establish the performance prong, the defendant must overcome a strong presumption that, under the circumstances, the challenged action or inaction was sound trial strategy. *People v. Lopez*, 371 Ill. App. 3d 920, 929 (2007). Because effective assistance of counsel refers to competent, not perfect, representation, "matters relating to trial strategy are generally immune from claims of ineffective assistance of counsel." *Id.* at 929. Further, in determining the adequacy of counsel's representation, "a reviewing court will not consider isolated instances of misconduct, but rather the totality of the circumstances." *Id.* To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceedings would have been different." *People v. King*, 316 Ill. App. 3d 901, 913 (2000). A reasonable probability is one that sufficiently undermines confidence in the outcome. *Id.* The defendant must satisfy both prongs to prevail on his claim of ineffective assistance of counsel. However, a reviewing court may analyze the facts of the case under either prong first, and if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008).

¶ 23 We find that the defendant has failed to show he was prejudiced by defense counsel's decision not to challenge Juror M during *voir dire*. The surviving victim, Witting, testified in detail at trial regarding the shooting. Witting testified that, prior to the shooting, three cars surrounded his car and prevented him from leaving. Kerby then kicked Witting's driver's side door, and cursed and yelled at him. Witting noticed two people standing on the passenger side of his vehicle. As Witting attempted to flee, he heard gunshots coming from the passenger side of his car, which shattered the front windshield and passenger side window. As Witting drove over a curb and around the first gold car that was blocking him from the front, a second wave of gunshots shattered his back windshield. As Witting sped away, one of the three cars chased him and continued to shoot at him. Witting's trial testimony regarding the details of the shooting was consistent with Brogdon's and Peed's testimony. Brogdon testified that, during the shooting, she observed both the defendant and DK standing on the passenger side of Witting's car. Brogdon heard gunshots and saw the defendant with a gun in his hand and gunsmoke around him. Brogdon testified that the defendant's car then chased the dark blue car and she heard faint gunshots as they drove away. Brogdon had also seen the defendant with a black gun two days prior the shooting. Peed also testified that, two days prior to the shooting, the defendant had in his possession, a 9-millimeter firearm with a long clip. Peed testified that, on the day of the

shooting, he was a party at Peanut's house when he noticed that the defendant was in possession of what appeared to be the same firearm as the one he possessed two days earlier. During the shooting, Peed saw the defendant holding a gun and firing at the passenger side of Witting's blue vehicle. Peed observed the defendant's car chasing the blue car as the blue car fled. At trial, evidence was also presented that the police recovered 11 discharged cartridge casings from the crime scene, as well as bullets from inside the blue car. Firearms expert, Wallace, testified that the 11 cartridge cases were fired from a single 9-millimter firearm, while three bullets that she examined were also discharged from a single 9-millimeter firearm. The defendant's videotaped interviews with the police were also played for the jury, in which the defendant admitted that he was the shooter and that he fired "a lot" of shots at Witting's car with a semi-automatic weapon. Detective Lareau also testified that he and Detective Williams attempted to locate the murder weapon after the defendant told them where he had disposed of it. Based on the overwhelming evidence against the defendant at trial, we find that, even assuming that defense counsel was deficient in not challenging Juror M, there was no reasonable probability that, but for defense counsel's alleged error, the result of the trial would have been different.

¶ 24 Notwithstanding the overwhelming evidence against him, the defendant argues that he has satisfied the prejudice prong under *Strickland*. Although the defendant acknowledges that the evidence was sufficient to convict him, he argues that there was a reasonable probability that Juror M's bias affected the outcome of the trial because the jury had "reasons to doubt this evidence." The defendant specifically argues that Brogdon's version of the events, which suggested the defendant as the shooter, was "highly suspect" because Brogdon's testimony revealed that she drank heavily and smoked marijuana on the night of the shooting. We find this argument to be unpersuasive, where, as discussed, Brogdon's testimony regarding the shooting

significantly paralleled Witting's and Peed's testimony. The defendant also argues that the jury had reason to doubt Peed's testimony because he received "considerable benefits" pursuant to a plea agreement with the State and some aspects of his trial testimony conflicted with Peed's own prior statements to the police. Even if these concerns were valid reasons for the jury to doubt Peed's testimony and even if Juror M was excluded from serving on the jury, there was no reasonable probability that the outcome would have been different in light of the defendant's own incriminating statement admitting to being the lone shooter. The defendant's incriminating statement to the police detailed how he fired "a lot" of shots, as well as provided a physical description of the gun and how he had disposed of it after the shooting. The defendant further argues that the jury had reason to doubt his incriminating statement to the police because it was not given freely so as to remove any doubt of guilt. However, prior to trial, the trial court had denied the defendant's motion to suppress his incriminating statement to the police, finding that the statement was given freely and voluntarily. The defendant does not challenge the court's ruling on his motion to suppress in this appeal, nor does he deny that his incriminating statement provided details of the shooting that were consistent with Brogdon's and Peed's testimony of the shooting.

¶ 25 The defendant further points to the lack of physical evidence connecting him to the shooting, as support for the defense theory that other Latin Kings members framed him for the crime. He also argues that Juror M's bias against gangs would have "loomed large" because this case was "steeped in gang references and gang evidence." From there, the defendant speculates that Juror M's bias "likely poisoned the deliberative process," particularly in light of certain "unusual events at trial [that] suggested the other jurors would be uniquely susceptible to gang bias." He described these "unusual events" as the fact that three jurors had sought to be excused

from serving on the jury one day after the jury was selected; and the fact that, during trial, a juror had complained about receiving an anonymous telephone call from Calumet City which the juror had reported to the police. The defendant surmises that these events revealed a charged atmosphere in which "gang implications" were foremost in the jurors' minds and that Juror M's bias against gangs likely played a substantial role during deliberations. We reject these arguments and decline to engage in such speculation. The record clearly reveals that the three jurors sought to be excused from serving on the jury for reasons such as illness, depression, and employment issues. With regard to the juror who received a telephone call from an unknown number in Calumet City, the trial court properly questioned the juror, who expressed that he did not have any concerns about it and that he could remain fair and impartial to the parties. Thus, in light of the overwhelming evidence against the defendant, we cannot conclude that there was a reasonable probability that the result of the trial would have been different but for defense counsel's alleged error in not challenging Juror M. Therefore, we find that the prejudice prong under *Strickland* cannot be established. Accordingly, we hold that the defendant's ineffective assistance of counsel claim must fail.

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.