

2011 IL App (1st) 091942-U
No. 1-09-1942

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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. 04 CR 30616
ROBERT CLARK,)	
)	
Defendant-Appellant.)	Honorable
)	Lawrence P. Fox,
)	Judge Presiding.
)	
)	
)	

JUSTICE MURPHY delivered the judgment of the court.
Quinn, P.J., and Steele, J., concurred in the judgment.

ORDER

HELD: The trial court did not err by allegedly failing to adequately address defendant's pretrial motion for appointment of counsel other than the public defender where it was not required to address the claims of ineffective assistance of counsel asserted therein prior to trial. Trial counsel was not constitutionally ineffective for promising to present certain evidence during the opening statement and then failing to do so at trial where defendant was not prejudiced by the challenged conduct. Defendant's sentence was not excessive where the trial court properly considered factors in aggravation and mitigation

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in determining his sentence.

¶ 1 Following a jury trial, defendant Robert Clark was found guilty of first degree murder and sentenced to 100 years' imprisonment. On appeal, defendant contends that the trial court failed to adequately address his pretrial motion for appointment of counsel other than the public defender and his arguments in support thereof, that defense counsel was ineffective for promising to present certain evidence during the opening statement and then failing to do so during trial, and that his sentence is excessive. For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 Defendant was charged with multiple counts of first degree murder, including felony murder, aggravated vehicular hijacking, armed robbery, and attempted armed robbery in connection with the June 11, 2004, death of Leodis Norwood. Prior to trial, defendant filed a *pro se* motion for appointment of counsel other than the public defender, in which he asserted that he had not had meaningful communication with defense counsel and that counsel had failed to file meritorious pretrial motions and was not willing to conduct an adequate investigation or contact witnesses. The trial court conducted a brief hearing on defendant's motion and denied it.

¶ 4 At trial, Kermit Ozier testified that about 7:45 p.m. on June 11, 2004, he was sitting on the front porch of his house at 9128 South Lafayette Avenue in Chicago with his girlfriend, his daughter, and his niece, when a white Chevrolet Lumina came to an abrupt stop about four or five houses away from him. A younger man exited from the passenger side of the vehicle and an older man exited from the driver's side. The two men were arguing, and the older man reached into the passenger side of the car and pulled out a steering wheel locking device known as the

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Club. The older man turned to the younger man, and the younger man grabbed him by the shirt, took the Club, and struck him in the head with it a few times. The older man fell to the ground, and the younger man stood over him and punched him between two and four times. The younger man then went through the older man's pockets while he was on the ground, and Ozier saw paper coming out of the pockets.

¶ 5 Ozier then saw the younger man sit in the driver's seat of the vehicle, and the older man staggered to his feet and put half his body in the driver's seat. Ozier explained that it looked like the older man was trying to stop the younger man from pulling away in the vehicle. The younger man nonetheless pulled away and drove down Lafayette Avenue, and the older man hung on to the side of the car until he was flung from the vehicle and onto the pavement in front of Ozier's yard. The younger man sped up and continued down Lafayette, and the older man, who was bleeding from the upper part of his body, did not move again. Shantea McCullough, Ozier's girlfriend, testified as to the events she witnessed from his front porch about 7:45 p.m. on the evening of June 11, 2004, and her testimony was largely identical with his.

¶ 6 Anya Robinson testified that about 7:45 p.m. on June 11, 2004, she was driving on the 9100 block of South Lafayette when she saw a white car. One man was inside the car while another was outside, and they were fighting. The man on the outside had his hands inside the car, and the man on the inside was hitting him in the head. The car sped away, and the man who was holding on from the outside let go and was left lying in the street.

¶ 7 Erma Williams, defendant's aunt, testified that on the evening of June 11, 2004, defendant arrived at her house at 207 West 111th Street in Chicago and was wearing jeans, but

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no shirt, and was agitated. Defendant stayed at Williams' house for about 20 minutes and used the telephone. After defendant had gone, Williams noticed there was a white car in the driveway to her house. The trial court later admitted verified vehicle records from the Secretary of State of Illinois into evidence, which showed that the car found in Williams' driveway was owned by Norwood.

¶ 8 Leonard Allison, defendant's cousin, testified that he picked up defendant in Chicago on June 12, 2004, and brought him back to his house in Hammond, Indiana, after defendant had called him and told him that he had gotten into a fight and wanted to stay with him until things blew over. While at Allison's house, defendant told him that he had gotten into an argument with Norwood and hit him in the face with a Club. Allison acknowledged that he testified before a grand jury that defendant told him that Norwood might have died. A day after taking him in, Allison drove defendant to Minnesota, where he talked with a family member, and then back to Chicago, where he dropped him off. Allison further testified that he did not see any injuries on defendant's face or head when he first picked him up and took him to Indiana. Chicago police detective Danny Stover testified that around November 18, 2004, he went to Birmingham, Alabama, where he located defendant and extradited him to Chicago.

¶ 9 Dr. Joseph Cogan testified that he performed an autopsy on Norwood on June 12, 2004, and discovered that he was 71 years-old when he died and suffered numerous injuries to his head, neck, and brain that were consistent with being struck by a Club and fists. Dr. Cogan opined within a reasonable degree of medical and scientific certainty that Norwood's death was caused by multiple injuries from the assault and from being dragged and thrown from a moving vehicle,

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and he classified Norwood's death as a homicide. On cross-examination, Dr. Cogan stated that he performed a toxicology screening of Norwood during the autopsy, which revealed that his blood-alcohol content was about .12.

¶ 10 Forensic investigator William Sullivan testified that on June 11, 2004, he went to the 9100 block of South Lafayette and collected evidence, including a ball cap, a metal curtain rod, papers, and a portion of a Club. In addition, Investigator Sullivan found blood on the street and curb by 9104 and 9122 South Lafayette and took blood swabs. Investigator Sullivan then went to Williams' house, where he found a white 1993 Chevrolet Lumina that had blood on the hood, the inside and outside of the driver's side door, and the driver's side window. Investigator Sullivan also discovered blood on a part of a Club and a long-sleeve t-shirt that were found inside the vehicle.

¶ 11 Forensic scientist Brian Schoon testified that he obtained the DNA profiles of defendant and Norwood from a buccal swab taken from defendant and a blood standard taken from Norwood. Schoon compared their profiles to those found in the blood taken from the scene of the crime and from the car found at Williams' house. Schoon determined that the DNA profile found in the blood swabs taken from the interior floor and front hood of the car, the street at 9104 South Lafayette, both recovered portions of the Club, and the left sleeve of the t-shirt found in the car matched that of Norwood. Schoon also determined that the blood taken from the collar and cuffs of the shirt found in the car contained a mixture of the DNA profiles of Norwood and defendant, and that the mixture was mainly comprised of defendant's profile.

¶ 12 After the State rested its case-in-chief, the defense called Dr. Jonathan Arden, a board

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certified forensic pathologist, who testified that he reviewed the autopsy report, autopsy photos, and other materials related to the death of Norwood and prepared a report of his findings as a consultant for defense counsel. Dr. Arden opined that the injuries Norwood suffered from being struck by a blunt object were not fatal and that he died of injuries that were sustained when his head, which was in motion, struck a stationary surface, such as the ground.

¶ 13 Sarah Clark, defendant's sister, testified that she had been dating Norwood for about eight years prior to his death. About 3:30 p.m. on June 11, 2004, he picked up Clark and her daughter from preschool, and Clark could tell that he had been drinking because he was louder when he was drunk.

¶ 14 Based on this evidence, the jury found defendant guilty of aggravated vehicular hijacking and first degree murder and not guilty of armed robbery. At the sentencing hearing, the trial court found that defendant was eligible for the death penalty based on his conviction for felony murder, but ultimately determined that the death penalty was an inappropriate sentence in this case and merged his conviction for aggravated vehicular hijacking into that for murder and sentenced him to 100 years' imprisonment.

¶ 15 ANALYSIS

¶ 16 I. Pretrial Motion

¶ 17 Defendant first contends in his appellant's brief that the trial court failed to conduct an adequate inquiry into his claims of ineffective assistance of counsel set forth in his pretrial motion for appointment of counsel other than the public defender. Defendant acknowledges in his reply, however, that since the filing of his appellant's brief, our supreme court has decided the

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case of *People v. Jocko*, 239 Ill. 2d 87, 92-93 (2010), in which it held that a trial court is not obligated to address a defendant's *pro se* claims of ineffective assistance of counsel prior to trial. As such, we conclude that the trial court did not err by allegedly failing to conduct an adequate inquiry into defendant's claims of ineffective assistance of counsel prior to trial where it was not required to address such claims in the first place.

¶ 18 II. Ineffective Assistance of Counsel

¶ 19 Defendant next contends that defense counsel was ineffective for promising the jury it would hear certain evidence during the opening statement, and then failing to present such evidence at trial. To prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance.

Strickland v. Washington, 466 U.S. 668, 687-88 (1984). A failure to make the requisite showing of either deficient performance or sufficient prejudice defeats a defendant's claim of ineffective assistance of counsel. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994).

¶ 20 Defendant maintains that defense counsel told the jury during the opening statement that the incident that resulted in Norwood's death was a drunken fight among friends. Counsel also told the jury that both defendant and Norwood were drinking at the time, that defendant had a drinking problem, that Norwood became combative and argumentative when he drank, that Norwood hit defendant on the head with the Club, that it would see defendant's scar, and that Norwood choked defendant. Defendant asserts that counsel did not present any evidence showing that defendant was drinking at the time of the incident, that Norwood became

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combative, or that Norwood choked defendant or hit him with the Club and gave him a scar.

¶ 21 Defendant, citing *People v. Patterson*, 192 Ill. 2d 93 (2000), and *People v. Chandler*, 129 Ill. 2d 233 (1989), maintains that counsel's failure to produce evidence after promising to do so during the opening statement constitutes ineffective assistance. We initially note that while counsel in both *Patterson* and *Chandler* failed to present evidence that was promised during the opening statement, our supreme court ultimately held in both cases that counsel was ineffective for making a mistake regarding the applicable law in the case and failing to present a defense. *Patterson*, 192 Ill. 2d 121-23; *Chandler*, 129 Ill. 2d at 248-49. Thus, unlike in those cases, where counsel was held to have been ineffective for making a mistake of law and failing to present a defense, in this case defendant is only contending that counsel failed to present evidence promised during the opening statement.

¶ 22 Moreover, regardless of whether defendant has established that counsel's performance was constitutionally deficient, he cannot prevail on his claim of ineffective assistance because he has not established that he was prejudiced by counsel's allegedly deficient performance. To establish prejudice under *Strickland*, the defendant must prove there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Simms*, 192 Ill. 2d 349, 362 (2000). A defendant's failure to establish sufficient prejudice defeats his claim of ineffective assistance (*Palmer*, 162 Ill. 2d at 475), and if this court determines that a defendant has failed to establish prejudice, it need not also address the adequacy of counsel's performance (*People v. Ashford*, 168 Ill. 2d 494, 502 (1995)).

¶ 23 Defendant, citing *People v. Fluker*, 318 Ill. App. 3d 193 (2000), *People v. Yonker*, 256 Ill.

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App. 3d 795 (1993), and *People v. Cosme*, 247 Ill. App. 3d 420 (1993), asserts that the prosecution is ordinarily barred from making a reference to a defendant's failure to testify or present evidence and that as a result of counsel's unfulfilled promise to present evidence, the prosecutor in this case was able to direct the jury's attention during closing and rebuttal arguments to the defense's failure to present evidence. Defendant maintains that counsel's deficient performance thus interfered with the presumption of his innocence and that the outcome of the trial therefore rested on the weakness of the defense, rather than on the strength of the State's case. While we agree with defendant that a prosecutor may not shift the burden of proof to a defendant during closing or rebuttal argument (*People v. Adams*, 281 Ill. App. 3d 339, 345 (1996)), we disagree with defendant that the prosecutor did so in this case as a result of counsel's failure to present promised evidence.

¶ 24 In *Fluker*, 318 Ill. App. 3d at 203, the prosecutor's argument shifted the burden of proof where it gave the impression that the defendant should have presented a witness to testify that he was not the shooter. In *Yonker*, 256 Ill. App. 3d at 800, the prosecutor shifted the burden of proof by arguing that the jury should find the defendant guilty if it did not believe his testimony. In *Cosme*, 247 Ill. App. 3d at 434, the prosecutor shifted the burden of proof by suggesting that the defendant was required to put forth evidence that no murder had occurred.

¶ 25 The record in this case shows that during closing, the prosecutor argued that there was no evidence that Norwood was an aggressive drunk or had choked defendant and that although Sarah Clark testified that Norwood had been drinking prior to the incident, she did not say that he was aggressive. The record also shows that during rebuttal, the prosecutor argued that there was

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no evidence that defendant had a drinking problem or had been drinking on the day of the incident, or that Norwood was aggressive.

¶ 26 Thus, unlike in *Fluker* and *Cosme*, where the prosecutor shifted the burden of proof by suggesting that the defendant was required to or should have presented evidence of his innocence, and *Yonker*, where the prosecutor argued that the jury could convict the defendant if it did not believe his testimony, the prosecutor in this case merely commented on what the evidence did and did not show. The prosecutor did not suggest that defendant was required to have presented additional evidence of his innocence or that the jury could find him guilty based on the weakness of his defense, rather than on the strength of the State's case. As such, we determine that counsel's allegedly deficient conduct did not allow the prosecutor to shift the burden of proof or pollute the presumption of innocence.

¶ 27 Defendant, citing *English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010), also asserts that the unfulfilled promise to present evidence prejudiced him by creating a negative inference against him and his defense. In that case, counsel failed to call a witness after promising to do so in the opening statement, and the court held that counsel's failure to adequately investigate the decision to promise a witness' testimony during the opening statement and then not to call her at trial constituted deficient performance and that the defendant was prejudiced by the negative inference against him and his testimony created by counsel's error and the inflammatory testimony relating to that witness that was presented during trial. *Id.* at 729.

¶ 28 We initially note that *English*, a lower federal court decision, is not binding on this court and can be held to be no more than persuasive. *People v. Miller*, 107 Ill. App. 3d 1078, 1086

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(1982). Furthermore, the evidence presented at trial in this case was largely consistent with the sequence of events as set forth by counsel in the opening statement, in which the incident was described as “a stupid, senseless fight.” Just as counsel stated during the opening, the evidence showed that Norwood had been drinking prior to the incident, that he and defendant had gotten into an argument in his car, that he grabbed the Club after they had exited his car, that defendant took the Club from him and hit him in the head with it, that defendant panicked and drove away in his vehicle, and that he died from the injuries he sustained from being thrown from his vehicle as defendant drove away.

¶ 29 Although defendant is correct in asserting that there was no evidence presented at trial to support counsel’s opening statements that defendant had been drinking prior to the incident, that Norwood was argumentative when he drank, or that defendant had a scar on his head, the remainder of the narrative of the “stupid, senseless fight” that resulted in Norwood’s death was borne out during trial. Thus, unlike in *English*, 602 F.3d at 729-30, where counsel entirely betrayed the promise to call a witness that would corroborate the defendant’s version of events and the jury was allowed to hear damaging testimony about the uncalled witness that reflected negatively on the defendant due to counsel’s erroneous promise, in this case the evidence presented at trial did not entirely betray counsel’s characterization of the case and the State was not allowed to present additional damaging evidence as a result of counsel’s error.

¶ 30 Moreover, defendant was not prejudiced by counsel’s alleged deficient performance where the evidence of his guilt was overwhelming. The record shows that the jury found defendant guilty of aggravated vehicular hijacking and first degree murder, in that he killed

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Norwood during the commission of the crime of aggravated vehicular hijacking. A person commits aggravated vehicular hijacking when he commits vehicular hijacking and the person from whose immediate presence the vehicle is taken is 60 years of age or older. 720 ILCS 5/18-4(a)(1) (West 2002). A person commits vehicular hijacking where he takes a motor vehicle from the immediate presence of another by the use of force. 720 ILCS 5/18-3(a) (West 2002). A person commits first degree murder where he kills an individual without lawful justification and, in performing the acts which cause the death, he was committing a forcible felony. 720 ILCS 5/9-1(a)(3) (West 2002).

¶ 31 The evidence presented at trial shows that defendant took Norwood's vehicle by the use of force where he hit him in the head with the Club and drove away in his car, and that Norwood was 71 years-old at the time. The evidence also shows that defendant caused the death of Norwood while he took his car by the use of force where Norwood died of some combination of the injuries he suffered from being beaten by defendant and from being thrown from his vehicle as defendant drove away. Thus, regardless of any alleged deficiency in counsel's performance, the evidence clearly showed that defendant was guilty of aggravated vehicular hijacking and felony murder.

¶ 32 For the reasons stated above, we determine that defendant has not made a sufficient showing that he was prejudiced by counsel's allegedly deficient performance to satisfy the second prong of the *Strickland* test, and we therefore conclude that counsel was not constitutionally ineffective in this case.

¶ 33 III. Excessive Sentence

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¶ 34 Defendant further contends that his sentence of 100 years' imprisonment for first degree murder is excessive and that this court should either reduce his sentence to a more appropriate term or remand the matter for a new sentencing hearing. Defendant does not dispute that the term falls within the permissible statutory range, but asserts that the sentence is excessive where he had a limited history of violent crimes, and where the 100-year sentence was in effect a life sentence and was a great increase from his prior sentences.

¶ 35 Where the sentence imposed by the trial court falls within the statutory range permissible for the offense of which the defendant is convicted, a reviewing court may disturb that sentence only if the trial court has abused its discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). Such a sentence will be deemed excessive and the result of an abuse of discretion where it is greatly at variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 36 The record shows that during the sentencing hearing, the trial court made an initial finding that defendant was eligible for the death penalty based on his conviction for felony murder. Following testimony and argument in aggravation and mitigation, the court noted that although defendant's long criminal history, which consisted of 13 prior felony convictions, was an aggravating factor, "his proclivity to commit violent crimes was more present in his younger years" and his most serious convictions were for class 2 felonies. The court also cited defendant's relationship with his family as a mitigating factor. In aggravation, the court noted "the horrible nature of the crime that [defendant] committed and the incredibly poor – not just poor judgment[,] but the incredible lack of an appreciation for the seriousness of the

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circumstances,” where he struck Norwood, who was 71 years-old, over the head with the Club multiple times.

¶ 37 The trial court stated that it had considered the factors in aggravation and mitigation and that in its opinion, any sentence other than a death sentence was well-deserved. The court then stated that the death penalty was not appropriate in this case and that it did not think that “the Defendant necessarily should be sentenced to a term of life imprisonment.” The court, however, also noted that any sentence imposed on defendant would likely cause him to spend the rest of his life in prison, as he was 46 years-old at the time of sentencing. The court concluded that “[b]ased on all of the evidence, the nature and circumstances surrounding his criminal history, and the offense that he has been convicted of here, the appropriate sentence in this case is a sentence of 100 years.”

¶ 38 It is the province of the trial court to balance factors in aggravation and mitigation and make a reasoned decision as to the appropriate punishment (*People v. Streit*, 142 Ill. 2d 13, 21 (1991)), and it is not our prerogative to reweigh these factors and independently decide that the sentence is excessive (*People v. Alexander*, 239 Ill. 2d 205, 214 (2010)). The record in this case shows that the trial court considered proper aggravating and mitigating factors in making its sentencing determination where it considered defendant’s extensive criminal history, the nature of the crime, and his relationship with his family, and that it then imposed a term within the permissible statutory range. Under these circumstances, we conclude that the trial court did not abuse its discretion by sentencing defendant to 100 years’ imprisonment.

¶ 39

CONCLUSION

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¶ 40 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 41 Affirmed.