

2011 IL App (1st) 093277-U

SIXTH DIVISION
September 9, 2011

No. 1-09-3277

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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. 07 CR 23362
)	
JOVON SCOTT,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant failed to establish his counsel was ineffective for allegedly failing to perfect impeachment and the trial court's judgment was affirmed.

¶ 2 Following a bench trial, defendant Jovon Scott was found guilty of two counts of aggravated battery with a firearm and was sentenced to consecutive terms of 24 and 6 years' imprisonment. He was also found guilty of two counts of aggravated discharge of a firearm and sentenced to two concurrent terms of 10 years' imprisonment, to be served concurrently with the 30-year combined sentence for the aggravated battery with a firearm convictions. On appeal,

defendant contends he was denied effective assistance of counsel where his trial attorney failed to introduce impeachment evidence. We affirm.

¶ 3 The evidence presented in this case showed that on October 25, 2007, defendant went to Joseph Rice's residence at 11933 South Prairie Avenue in Chicago and told Rice that his brother was involved in an altercation nearby. Rice went to check on his brother, and got into a fight with several people. Rice reported the incident to police. On October 26, defendant approached Rice, who was on his porch, and the two men argued over whether Rice put defendant's name in a police report. Gunshots were subsequently fired at Rice and his residence, striking both Rice and Lloyd Johnson.

¶ 4 During opening statements, defense counsel argued that the witnesses who would testify that defendant was involved in this incident had a motive to falsely implicate him, and there was no physical evidence connecting him to the crime. Counsel further alleged that Rice assumed that defendant was involved in the shooting because of the incident that took place the day before.

¶ 5 At trial, Joseph Rice, who had three prior felony convictions, testified that he lived with his girlfriend LaShanda Davis, and her daughter Darneisha Moore. On October 25, defendant, who Rice knew from the neighborhood, went to Rice's residence to tell him that a fight was occurring and that Rice's brother was involved. Rice went to check on his brother, and then 20 people, including a person carrying a gun, came out of a nearby house and accosted Rice. Rice believed that defendant had staged a "set up" where Rice and his brother would get "jumped." Rice reported the incident to police, but did not mention defendant.

¶ 6 At about 3:20 p.m. on October 26, Rice and Davis left to go to the store and saw a couple of people outside, including defendant. When they returned from the store, Rice went inside his residence where Davis, Moore, and Rice's friend, Lloyd Johnson, were located. A short time

later, Rice went outside, stood on his porch, and saw defendant and two other people talking outside. Defendant walked over to Rice's porch, stood in front of his house at the bottom of the stairs, and accused Rice of "put[ting] his name in something." Rice told defendant that he did not know what he was talking about, and when Rice saw that defendant was not listening to him, he asked, "now what?" It appeared to Rice that defendant was taking off his coat to fight, but then he took it partially off, pulled out a gun, and shot at Rice. Rice testified that he never asked defendant "why you got that strap?" The first bullet went past Rice's head and hit the door. Rice ran inside his residence, closed the door behind him, and defendant shot at least three more times through the door. One of the bullets hit Rice in the leg, and Rice observed that Johnson had been shot near his spine. Rice never told police that the first shot struck him. Police subsequently arrived on the scene and an ambulance took Rice and Johnson to the hospital.

¶ 7 Darneisha Moore testified that about 40 minutes before the shooting in question occurred, she was standing on the front porch while her mother and Rice were getting into a car to go to the store. Moore saw defendant and a couple of other neighbors outside, and heard defendant state that "since Joe put his name in something, that he gone [*sic*] get it." Moore never told police about this statement. Rice and Davis left to go to the store and returned a short time later. At about 4 p.m., Moore was inside of the house with Rice, Davis, and Johnson. Rice went outside and Moore overheard an argument. Moore looked out of the window and saw defendant and Rice arguing. It appeared to Moore that defendant was taking off his jacket, but then she saw him take out a gun. Rice turned around and went inside the house closing the door behind him. Moore did not see defendant fire the gun, but she heard about five shots come through the door, and observed that Rice was shot in the leg and Lloyd was not moving. Moore further testified that Rice was shot before he entered the residence, she never told police that Rice asked defendant "why you got strap," and she never told police that after she observed defendant

pointing a gun in Rice's face he fired a shot.

¶ 8 After the State rested, defense counsel stated that she needed to bring the detectives into court to perfect the impeachment, and that she would be questioning them regarding their reports. The State indicated that it would need a continuance to confirm that the reports were accurate. When the trial court asked defense counsel what her offer of proof was with regard to the officer's testimony, she stated that there was information regarding where the victim was, how many shots were fired initially, and how many shots were fired through the door. When the State indicated that it wanted to confirm what was in the police reports before agreeing to a stipulation, the court commented that it did not want to delay the trial for "this kind of nitpicking." Nevertheless, the court granted additional time to complete the trial.

¶ 9 Upon reconvening two weeks later, the parties stipulated that Detective Colbin would testify that Moore did not tell him that she heard defendant say that Rice was "going to get it." He further would have testified that Moore did tell him that she heard Rice say the words, "Why you got a strap," and that she saw defendant pointing a gun in Rice's face. Colbin lastly would have testified that Rice indicated to him that the first shot struck him in the thigh.

¶ 10 Defendant testified that in October 2007 he was residing with his sister on 119th Street and Prairie Avenue in Chicago where there was a large gang presence. While living at that address, he became friends with Rice. On October 25, defendant observed Rice's brother involved in a fight, went to Rice's residence, and told him about the fight. Rice got involved in the altercation which resulted in a shooting. The next morning, defendant saw Rice standing on his porch. They had an argument where defendant accused Rice of putting his name in a report regarding the prior incident, but defendant left to play basketball before the argument escalated. Defendant did not shoot a gun in the direction of Rice or the house Rice occupied. He subsequently learned that police were looking for him in connection with a shooting, and turned

himself in.

¶ 11 During closing argument, defense counsel stated that Rice's testimony was inconsistent, and that, due to their relationship, Moore did whatever she could to corroborate his testimony. Defense counsel specifically argued that Rice's testimony regarding the events of the shooting differed from what he told detectives. For instance, counsel argued that, unlike his testimony at trial, Rice told detectives that he was sitting, not standing on the porch, he asked defendant why he had a "strap," and was hit by the first gunshot. Counsel further argued that the location of the bullet holes in the door contradict Rice's testimony that defendant was standing at the bottom of the stairs because the trajectory of the bullets would have entered the door at a higher level.

¶ 12 Following argument, the trial court ultimately found defendant guilty of two counts of aggravated battery with a firearm and two counts of aggravated discharge of a firearm. In doing so, the trial court stated that the primary issue in the case was the credibility of the witnesses, *i.e.*, whether defendant was properly identified as the shooter, or if it was mistaken identity. The court found the State's witnesses "far more credible than [defendant]."

¶ 13 On appeal, defendant contends that he was denied effective assistance of counsel because trial counsel forgot to introduce the impeachment evidence underlying her attacks on the eyewitnesses' credibility. He specifically maintains that counsel failed to prove-up the impeachment of certain aspects of Rice's testimony with a detective's testimony and/or a police report in which Rice allegedly told a detective inconsistent facts regarding the shooting.

¶ 14 Claims of ineffective assistance of counsel are assessed under the bifurcated standard of review as articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 209 Ill. 2d 194, 219 (2004); *People v. Sprind*, 403 Ill. App. 3d 772, 777-78 (2010). Counsel is ineffective when: 1) counsel's performance falls below an objective standard of reasonableness; and 2) the deficient performance prejudiced the defendant to such an extent that he was denied a

fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Enis*, 194 Ill. 2d 361, 376 (2000). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant must overcome the presumption that the challenged action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. The benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 696.

¶ 15 "[T]he decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel." *Pecoraro*, 175 Ill. 2d at 326. The decisions that counsel makes regarding matters of trial strategy are "virtually unchallengeable." *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007), quoting *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). In fact, even mistakes in trial strategy or tactics will not, of themselves, establish that counsel was ineffective. *Palmer*, 162 Ill. 2d at 476. The issue of counsel's competency is determined by examining the totality of counsel's conduct, and not isolated incidents. *People v. Ayala*, 142 Ill. App. 3d 93, 99-100 (1986).

¶ 16 In this case, defendant's claim of ineffective assistance centers on two statements made by Rice during trial that, according to defendant, would have been contradicted by police testimony had trial counsel perfected the impeachment. Defendant notes that Rice testified at trial that he was standing on the porch before the shooting, and that he never asked defendant if he had a "strap" on him. In contrast to these statements, trial counsel, in making her closing argument, stated that Rice told detectives that he was sitting on the porch, and that he did ask defendant if he had a "strap." Defendant now contends that had trial counsel not forgotten to perfect the impeachment of Rice by eliciting testimony from the detectives that Rice did in fact make those inconsistent statements, it would have been reasonable for the trial court to conclude that the

State failed to meet its burden. We disagree.

¶ 17 Defense counsel's decision not to present the testimony of the detective to perfect the impeachment of Rice was a strategic decision. Counsel clearly presented an alibi defense at trial. During opening statements, counsel indicated that the only individuals that would testify that defendant was involved in the incident were people who had a motive to lie against him. She further stated that no physical evidence connected defendant to the crime, and that Rice simply assumed that defendant was involved in the shooting because of the incident that took place the day before. More importantly, at trial, counsel elicited testimony from defendant that he was playing basketball at the time of the shooting, and thus was not at the scene of the crime. Therefore, there would have been no reason for defense counsel to prove what position Rice may have been in when he was on the porch, or if Rice asked defendant if he had a "strap." Moreover, defendant fails to argue in his brief how any such alleged statements made by Rice, true or false, would have been relevant to defendant's defense that he was not the shooter.

¶ 18 We further note that following the continuance granted by the trial court, defense counsel did make an offer of proof as to the impeachment evidence regarding Moore. This further shows that counsel did not simply forget to impeach Rice's testimony. Additionally, perfecting the impeachment of Rice would not have affected Moore's credibility as argued by defendant. As it stands, Moore's credibility was already impeached by Detective Colbin, and the trial court still found her a credible witness. Nevertheless, even if we assume that trial counsel did forget to impeach Rice's testimony, such an omission was harmless as the contested statements do not advance trial counsel's alibi defense. See *People v. McNutt*, 146 Ill. App. 3d 357, 368 (1986) (where the defendant claimed he was asleep at home during the commission of the crime, there was no reason for counsel to object to any of the evidence concerning how and where the stabbing occurred).

¶ 19 Notably, when the trial court granted defense counsel additional time after the State rested for the purpose of questioning detectives about certain possible inconsistencies in police reports, the trial court commented that it did not want to delay the trial for "this kind of nitpicking." This comment clearly demonstrates the court's belief that the "nitpicking" would not have affected its decision as the trier of fact. Counsel did impeach Moore as to the statements in her police report. However, defendant has not, and cannot, show that there was any probability that the outcome of his trial would have been different if Rice made minor inconsistent statements to police where defendant presented an unsupported alibi and was positively identified as the shooter by two witnesses.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 21 Affirmed.