

No. 1-10-0316

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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. 06 CR 19380
)	
MACEO DICKEY,)	Honorable
)	Angela Munari Petrone,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Sterba concurred in the judgment.

ORDER

¶ 1 *HELD:* Defendant's claim of ineffective assistance of counsel must fail because he could not establish how he was prejudiced by counsel's alleged error. Two of defendant's convictions must be vacated pursuant to the one-act, one-crime rule.

¶ 2 After a bench trial, defendant Maceo Dickey was convicted of two counts of attempted first degree murder and three counts of aggravated battery, and sentenced to 50 years in prison. On appeal, defendant contends that he was denied effective assistance of counsel because counsel failed to impeach the victim with certain prior inconsistent statements. He also contends that certain convictions must be vacated pursuant to the one-act, one-crime doctrine. We affirm in

part and vacate in part.

¶ 3 After an August 2006 incident in the Cook County jail during which correctional officer William Baker was beaten, defendant was charged by indictment with attempted first degree murder, attempted first degree murder of a peace officer, aggravated battery causing great bodily harm to a peace officer, and two counts of aggravated battery to a peace officer.

¶ 4 Before trial, the State indicated that it would be proceeding on counts one through four of the indictment, *i.e.*, two counts of attempted first degree murder, one count of aggravated battery causing great bodily harm, and one count of aggravated battery. The State *nol prossed* the fifth count of the indictment.

¶ 5 The victim, William Baker, testified that while he was inside the officers' area or "bubble" writing a report defendant stood in front of the glass. The victim asked defendant to move away. As defendant had his hands on his stomach, the victim then asked whether defendant was hurt. The victim thought that defendant could not hear him, so he exited the office, went into the interlock, *i.e.*, the hallway, and unlocked and opened the door leading to the "tier," the area where the inmates were housed. The victim again asked if defendant was hurt and requested he move away from the glass. Defendant responded "fu** you, or something on that order." Defendant then moved toward the victim and struck him with a closed fist on the head. Approximately five or six other inmates moved closer, and someone yelled that they should "kill the motherfu**." The victim was pushed backward. He lost consciousness at some point, and woke up in a sitting position on the floor of the hallway.

¶ 6 The victim called for help on the radio as he was bleeding and could barely see. He watched as defendant opened the door with a key, entered the hallway, and kicked him in the face. Defendant then threw the keys to the floor and exited the hallway.

¶ 7 The victim's injuries included wounds to the face and head, a broken hand, crushed

vertebrae in his neck, and crushed cartilage in his foot. He did not return to work for 16 months.

¶ 8 During cross-examination, the victim indicated that although defendant was on the tier, he did not know defendant personally and had never written him up. He did not recall telling hospital personnel that he was struck from behind or that a prison riot had occurred. He indicated that he did not remember saying, in a deposition in a civil proceeding, that a person whom he "now" knew was defendant was standing in front of the glass.

¶ 9 The State also presented the testimony of Eddie Adams, Majeed Hamida, and Archie Mitchell. All three had previous felony convictions and were present in the tier on the day of the incident.

¶ 10 Eddie Adams, who was in prison at the time of trial, testified that he saw defendant and other inmates standing near the window. At some point, the victim exited and approached defendant. Adams could not hear the contents of the subsequent conversation. When the victim turned and walked away, defendant followed him into the interlock. As the victim turned around, defendant hit him in the face with a closed hand. After hitting the victim a few more times, defendant picked him up and dropped him on his head. Although other inmates approached the interlock to watch the incident, they did not go inside.

¶ 11 Majeed Hamida testified that he was in the day room when he heard the victim tell defendant to step away from the glass. Defendant responded that this was "the F'ing day room" and he could do as he pleased. The victim then said that he was asking nicely and to please step away. Defendant said no and threw a punch at the victim. Although the victim fell to the floor, defendant continued to hit him. Hamida also saw defendant make a jabbing motion toward the victim, but could not see what was in defendant's hand. Defendant then picked up the victim, raised the victim over his head, and flipped the victim to the ground.

¶ 12 Archie Mitchell testified that after the victim asked defendant and another person

standing near the window to move away, the victim came to the door and repeated his request. As the victim turned around to go back to the office, defendant ran through the door. Mitchell saw defendant punch the victim, pick him up "like they was wrestling," and ultimately drop the victim on his head. When defendant left the area, his shirt was bloody, however, when Mitchell later saw defendant he was wearing a clean shirt.

¶ 13 During closing argument, the defense argued that defendant was being made a "fall guy" for a prison riot and that the victim did not know who defendant was before the incident, other than that he was a resident of the tier. In rebuttal, the State acknowledged that three of its witnesses were convicted felons, but argued that as the incident took place in a jail, it would be hard to find witnesses who were not.

¶ 14 In finding defendant guilty, the court stated that there were "slight inconsistencies" in the testimony of witnesses, but that these inconsistencies were collateral and were to be expected because each witness had a "different vantage point" during the incident. Although Adams, Hamida, and Mitchell were all convicted felons, the court found them credible because the "major points" of their testimony were corroborated by each other and the victim. The three witnesses all described defendant's actions as unprovoked and agreed that defendant picked the victim up and then slammed the victim to the floor. The court entered a finding of guilty as to the attempted first degree murder of a peace officer, as well as "the other counts."

¶ 15 Ultimately, the court sentenced defendant to 50 years in prison for the attempted murder of a peace officer conviction, 30 years for attempted first degree murder, 15 years for the aggravated battery causing great bodily harm, and 5 years for each aggravated battery. The sentences were to run concurrent to each other.

¶ 16 On appeal, defendant contends he was denied effective assistance of counsel when counsel questioned the victim regarding prior inconsistent statements, but then failed to perfect

the impeachment by introducing those prior inconsistent statements into evidence. See 725 ILCS 5/115-10.1 (West 2006) (a witness's prior inconsistent statement is admissible as substantive evidence if the statement is inconsistent with his trial testimony, the witness is subject to cross-examination regarding the statement and acknowledges under oath that he made it, and the statement describes or explains an event of which the witness had personal knowledge). Specifically, defendant highlights the victim's testimony denying he told anyone at the hospital that he was injured in a prison riot, and stating that he did not remember testifying in a deposition that he was attacked by the "person who I now know" was defendant. Defendant contends that he was prejudiced by this failure because the victim was the only witness for the State whose credibility was not attacked.

¶ 17 To show an attorney's representation was ineffective, a defendant must establish (1) the attorney's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When determining whether an attorney's performance was unreasonable, a reviewing court must indulge in a strong presumption that trial counsel's actions fell within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the complained of action could be considered sound trial strategy. *Strickland*, 466 U.S. at 689. A defendant shows prejudice by showing a reasonable probability, *i.e.*, a probability sufficient to undermine confidence in the outcome of the proceeding, that but for counsel's errors, the proceeding would have resulted in a different outcome. *Strickland*, 466 U.S. at 694. Our supreme court has held that *Strickland* requires a defendant to show actual prejudice in order to succeed on his claim, rather than mere speculation as to prejudice. *People v. Bew*, 228 Ill. 2d 122, 135 (2008).

¶ 18 As failure to satisfy either prong of the *Strickland* test defeats a claim of ineffective

assistance, a court does not have to determine whether counsel's performance was deficient before examining the prejudice a defendant suffered because of counsel's alleged errors. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). Absent prejudice, there is no basis to find ineffective assistance. *Edwards*, 195 Ill. 2d at 163.

¶ 19 Defendant's claim of ineffective assistance of counsel must fail because defendant cannot establish how he was prejudiced by counsel's alleged error. Here, the case for conviction was strong. This is not a case where the State's case rested solely on the testimony of the victim; rather, three additional witnesses identified defendant as the person who struck and body-slammed the victim. See *People v. Tatum*, 389 Ill. App. 3d 656, 661 (2009) (identification by a single witness is sufficient for the trier of fact to find defendant guilty beyond a reasonable doubt if that witness saw the defendant under circumstances that allowed a positive identification). While this court recognizes that Adams, Hamida, and Mitchell were convicted felons, the record reveals that these events took place in the county jail, and the trial court acknowledged that the men were convicted felons with "slight inconsistencies" in their testimony. However, in finding defendant guilty, the trial court also noted that the testimony of the three witnesses and the victim corroborated each other as to both the unprovoked nature of the attack and its major points.

¶ 20 This court is unpersuaded by defendant's reliance on *People v. Smith*, 329 Ill. App. 3d 846 (2002). In that case, the court determined that trial counsel's representation fell below the standard of reasonable representation when although he questioned the witnesses regarding statements they made to police officers, the questioning did not resolve what exactly the witnesses said to the officers, the officers themselves were not called to testify at trial, and defense counsel made an offer of proof as to what the witnesses told the officers. *Smith*, 329 Ill. App. 3d at 855-57. While the court acknowledged that generally the decision whether to cross-examine or impeach a witness was a matter of trial strategy, in that case, "the manner, mode, and

content of the offer of proof" was an inadequate substitute for live testimony. See *Smith*, 329 Ill. App. 3d at 854, 857. There, the court concluded that it was a "close case," and, but for trial counsel's errors, there was a reasonable probability that the result of the proceedings would have been different. *Smith*, 329 Ill. App. 3d at 857.

¶ 21 Unlike *Smith*, this was not a close case, as not only did the victim identify defendant as the person who punched and kicked him, but three additional witnesses testified that defendant struck the victim then lifted him up in a wrestling move before dropping him to the floor. Even assuming that the introduction of these prior inconsistent statements would have been fatal to the victim's credibility, defendant has not established that there was a reasonable probability that the outcome of his trial would have been different considering that he was identified by three other witnesses. See *People v. Villarreal*, 198 Ill. 2d 209, 231 (2001) (a fact finder faced with conflicting versions of events is entitled to choose among those versions; it need not accept the defendant's version from those competing versions). Because defendant has not established that counsel's alleged error actually prejudiced him, his claim of ineffective assistance of counsel must fail. *Edwards*, 195 Ill. 2d at 163 (absent prejudice, there is no basis to find ineffective assistance).

¶ 22 Defendant next contends that one of his convictions for attempted murder and two of his convictions for aggravated battery must be vacated pursuant to the one-act, one-crime doctrine when there was only one uninterrupted series of events over a short period of time and the State did not charge defendant with committing separate acts. Defendant acknowledges that he has waived this issue by failing to raise it at trial or in a posttrial motion (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but asks this court to review it pursuant to the plain error doctrine (*People v. Carter*, 213 Ill. 2d 295, 299-300 (2004)).

¶ 23 The State agrees that defendant's conviction for count five, aggravated battery, must be

vacated because it was *nol prossed* prior to trial, but contends that defendant has waived his challenge to the remaining convictions because he failed to object either when the court entered a finding of guilty or at sentencing. The State does concede that our supreme court has "sometimes" vacated convictions when the State failed to apportion an accused's conduct in an indictment in order to prosecute him for multiple offenses and requests that defendant's convictions and sentences for the most serious offenses be affirmed should this court find plain error.

¶ 24 When multiple charges arise from the same act, a defendant may be convicted and sentenced only for the most serious offense. *People v. King*, 66 Ill. 2d 551, 566 (1977). One-act, one-crime analysis involves a two-step process. First, the court must determine whether the defendant's conduct consisted of multiple acts or a single act, as one physical act cannot be the basis for multiple convictions. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). For purposes of the one-act, one-crime rule, a single act is any overt or outward manifestation that will support a different offense. *King*, 66 Ill. 2d at 566. When a defendant's conduct involved multiple acts, this court must determine whether any of the offenses are lesser-included offenses, as a conviction for a lesser-included offense is improper. *Miller*, 238 Ill. 2d at 165.

¶ 25 Our supreme court has held that it would be "profoundly unfair" to permit the State to treat a defendant's conduct as separate acts for the first time on appeal. *People v. Crespo*, 203 Ill. 2d 335, 343 (2001). Rather, in order for multiple convictions to be sustained, the indictment must indicate that the State intends to treat the defendant's conduct as multiple acts. *Crespo*, 203 Ill. 2d at 344-45.

¶ 26 A careful review of the indictment in this case reveals that all counts allege that defendant "struck" the victim about the body. Here, there was one victim and a series of events taking place quickly; the State did not treat defendant's conduct as separate acts supporting more than

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one conviction for each offense. See *Crespo*, 203 Ill. 2d at 343. Accordingly, defendant's conviction for count one, attempted first degree murder, and count four, aggravated battery are violations of the one-act, one-crime rule (*King*, 66 Ill. 2d at 566), and must be vacated.

¶ 27 Accordingly, this court vacates defendant's convictions for attempted first degree murder (count one), and aggravated battery (counts four and five), while affirming the trial court in all other aspects.

¶ 28 Affirmed in part; vacated in part.