

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 4-09-0950

Order Filed 3/8/11

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from
Plaintiff-Appellee,) Circuit Court of
v.) Vermilion County
NYERE ROBERSON,) No. 09CF261
Defendant-Appellant.)
) Honorable
) Craig H. DeArmond,
) Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred
in the judgment.

ORDER

Held: Because resolution of the defendant's ineffective-assistance-of-trial-counsel claim required consideration of matters outside of the current record, the appellate court affirmed the defendant's conviction and sentence and invited the defendant to pursue his claim under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2008)), where a complete record can be made regarding his trial counsel's rationale for not tendering an accomplice-witness instruction.

Following an October 2009 trial, a jury convicted defendant, Nyere Roberson, of (1) burglary (720 ILCS 5/19-1(a) (West 2008)) and (2) theft (720 ILCS 5/16-1(a)(1) (West 2008)). The trial court later sentenced defendant to seven years in prison for burglary. (The court did not enter judgment on defendant's theft conviction, having found that it merged into his burglary conviction.)

Defendant appeals, arguing ineffective assistance of

counsel because his trial counsel failed to tender an accomplice-witness instruction. Because we conclude that the record before us is insufficient to address defendant's ineffective-assistance-of-trial-counsel claim, we affirm.

I. BACKGROUND

A. The Evidence Presented at Defendant's Jury Trial

In June 2009, the State charged defendant with (1) burglary and (2) theft from a gas station convenience store. A summary of the evidence presented at defendant's October 2009 jury trial showed the following.

1. *The Testimony of the Convenience Store Cashier*

At about 10 p.m. on May 17, 2009, a gas station convenience store cashier was reconciling her cash-drawer receipts when she noticed a man and a woman loitering in the store. The woman made two separate purchases--a lottery ticket and a soft drink--while the man walked through the store aisles. After the second purchase, the man and woman left.

A few minutes later, the cashier noticed someone run past her. As the cashier turned to see her receipts "fly into the air," someone asked her, "Where's the money?" The cashier looked up to see a black man who she described was approximately 20 years old; 5 feet, 10 inches tall; weighing about 150 pounds; with a medium-complexion; and wearing a tank-top shirt. The cashier did not (1) see the man's face because it was covered or

(2) notice any tattoos on his arms. When the cashier ducked behind the counter, the man took the cash drawer and fled. The cashier explained that the cash drawer contained \$100, which was the starting amount of new shift cash drawers. The cashier then pushed an alarm button and another cashier locked the store.

2. The Testimony of the Store Manager

After the burglary, the store's general manager retrieved a digital recording that showed, in pertinent part, (1) the patrons who had loitered in the store just prior to the burglary and (2) the burglary itself. The manager provided the digital recording to the police. (The parties stipulated to the admission of the digital recording, which was shown to the jury.)

3. The Accomplice Testimony Presented

A subsequent police investigation led to the identification of Kathy Coffey as a patron who was present on the night of the convenience store burglary.

a. Kathy Coffey's Testimony

On May 17, 2009, Robin Coffey drove her sister Kathy to a gas station convenience store to purchase cigarettes and a soda. Defendant, who was dating Robin, and his cousin, Carl Maxwell, were passengers in Robin's car. After arriving, Kathy and Carl went into the store. Kathy grabbed a soda and waited in line between 5 to 10 minutes because the cashiers were exchanging cash drawers. Kathy spoke briefly to Carl but did not otherwise

notice what he was doing as she waited. After Kathy purchased the cigarettes and soda, she left the store with Carl.

Kathy returned to Robin's car and noticed defendant and Carl were talking by the side of the store. Kathy then saw defendant, who was wearing a grey tank-top shirt, cover his head with a black shirt and run into the convenience store. When Carl returned to Robin's car, Kathy noticed that Carl was no longer wearing the black shirt he had been wearing, but instead a tank-top shirt that he had on underneath the black shirt.

A short time later, defendant ran out of the store, jumped into Robin's car, and yelled at Robin to, "[H]urry up and get out of [here]." Kathy noticed that defendant was carrying something in his hands. Robin drove to her home, which was less than a block away. During that time, Kathy heard defendant tell Carl that, "I just took their shit" and "I got him for [\$]100." Defendant also told Kathy and Robin to keep their mouths shut and that "they did not see anything."

After arriving at Robin's home, Kathy remained in the car while Robin and defendant went into Robin's home. Carl also left the car, but Kathy did not see him go into the house. As they exited the car, Kathy saw defendant throw something black and "a pretty good size" into a Dumpster. A short time later, Robin, Carl, and defendant returned to Robin's car--where Kathy had been waiting--and drove Kathy home. Kathy stated that she

did not inform the police because (1) she did not have a clear understanding of what happened that evening and (2) she was afraid of defendant.

b. Robin Coffey's Testimony

Robin testified that on May 17, 2009, she drove defendant, Carl, and Kathy to a convenience store so that Kathy could purchase cigarettes and a soda. After arriving, Carl and Kathy went into the store. Between 10 to 15 minutes later, Carl came out of the store and stood by the store's front entrance. Defendant, who had been sitting with Robin in her car, then left. As defendant approached Carl, Kathy came out of the store and returned to Robin's car.

Robin then saw Carl remove his black shirt and give it to defendant. Defendant concealed his face with the black shirt and walked into the store. Carl returned to Robin's car. A short time later, defendant returned to Robin's car, hit her in the face, and told her to "hurry up and go." Robin noticed that defendant was carrying something wrapped up in a black shirt but could not identify the item. Defendant told Robin that she "needed to keep [her] mouth shut or something was going to happen to [her]." Robin drove to her home--which was located across the street--without anyone else making any other comments. When she arrived, Robin went inside to clean off her bloody face. Defendant, Carl, and Kathy remained in the parking lot.

Afterward, defendant, Carl, Robin, and Kathy returned to Robin's car and Robin drove Kathy to her home. On the return trip, defendant did not speak. After returning to her home, Robin overheard defendant and Carl talking about a gas station and how defendant threw a cash drawer into a Dumpster. Robin also noticed that defendant possessed about \$100, which he did not have earlier that day. Robin stated that she did not inform the police of what happened because defendant had hit her on more than one occasion and as a result, she was "terrified" of him. Robin stated that defendant had one tattoo on his arm.

4. The Evidence Presented Regarding Defendant's Tattoos

A police officer testified that after arresting defendant, he noticed that defendant had a tattoo on the inside of his left elbow that read "Love Mom." The officer stated that defendant also had other tattoos on his arms but he could not specifically remember any of them because they were unremarkable.

At the close of the State's evidence, defendant, without making any statement, showed the jury the tattoos he had on each arm and his neck. (The record does not describe the tattoos or indicate the number of tattoos.)

5. A Summary of the Parties' Respective Closing Arguments

During closing arguments, the State argued that (1) the testimony of Kathy and Robin was believable and unrebutted and (2) they had no motive to lie. The defense countered that Kathy

and Robin were unreliable witnesses because their respective (1) accounts of the burglary were inconsistent and (2) claims that they did not know what happened defied logic. In addition, the defense challenged Robin's testimony that she was afraid of defendant by noting that she remained in a relationship with him despite her concerns. The defense also alleged that defendant did not commit the burglary by arguing to the jury that "[t]he only thing you can really clearly see in the video is the arms of the person taking the cash box, and they don't match [defendant's] arms."

6. *The Jury's Verdict and the Trial Court's Sentence*

After considering the evidence and arguments presented by the parties, the jury convicted defendant of (1) burglary and (2) theft. The trial court later sentenced him to seven years in prison for burglary. (The court did not enter judgment on defendant's theft conviction, having found that it merged into his burglary conviction.)

This appeal followed.

II. DEFENDANT'S INEFFECTIVE-ASSISTANCE-OF-TRIAL-COUNSEL CLAIM

Defendant argues ineffective assistance of counsel because his trial counsel failed to tender an accomplice-witness instruction. Because we conclude that the record before us is insufficient to address defendant's argument, we decline to reach the merits of his ineffective-assistance-of-trial-counsel claim.

A. *Strickland's* Two-Pronged Test for Ineffective-Assistance-of-Counsel Claims

Ineffective-assistance-of-counsel claims are judged under the now-familiar standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). "To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant." *People v. Thompson*, 359 Ill. App. 3d 947, 952, 835 N.E.2d 933, 937 (2005). To satisfy the deficient-performance prong, the defendant must show that counsel made errors so serious and his performance was so deficient that he was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). In addition, the defendant must overcome the strong presumption that the challenged action or inaction was the result of sound trial strategy. *Thompson*, 359 Ill. App. 3d at 952, 835 N.E.2d at 937.

To satisfy *Strickland's* prejudice prong, "the defendant must show that but for counsel's errors, a reasonable probability exists that the outcome of the proceedings would have been different." *People v. Johnson*, 368 Ill. App. 3d 1146, 1161, 859 N.E.2d 290, 304 (2006). A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome" of the defendant's trial. *Strickland*, 466 U.S. at 694. Both prongs of the *Strickland* test must be satisfied before a defendant can

prevail on an ineffective-assistance-of-counsel claim. *People v. Coleman*, 183 Ill. 2d 366, 397, 701 N.E.2d 1063, 1079 (1998).

B. Ineffective-Assistance-of-Counsel Claims on Direct Appeal

Initially, we note this court's preference that a defendant raise ineffective-assistance-of-counsel claims on collateral review instead of on direct appeal when the adjudication of such claims requires consideration of matters outside of the record on appeal. See *People v. Kunze*, 193 Ill. App. 3d 708, 725-26, 550 N.E.2d 284, 296 (1990) (declining to adjudicate the defendant's ineffective-assistance arguments because such claims are better made in a petition for postconviction relief where a complete record can be made and the attorney-client privilege does not apply).

In *People v. Durgan*, 346 Ill. App. 3d 1121, 1142, 806 N.E.2d 1233, 1249 (2004), this court, quoting the United States Supreme Court's decision in *Massaro v. United States*, 538 U.S. 500, 504-05 (2003), explained why it is preferable that an ineffective-assistance-of-counsel claim be brought on collateral review instead of on direct appeal, as follows:

"When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus

often incomplete or inadequate for this purpose. Under [*Strickland*], a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. See [*Guinan v. United States*, 6 F.3d 468, 473 (7th Cir. 1993)] (Easterbrook, J., concurring) ("No matter how odd or deficient trial counsel's performance may seem, that lawyer may have had a reason for acting as he did ... Or it may turn out that counsel's overall perfor-

mance was sufficient despite a glaring omission ...").'"

C. Defendant's Claim That His Trial Counsel Provided Ineffective Assistance by Failing To Tender An Accomplice-Witness Instruction

Illinois Pattern Jury Instructions, Criminal, No. 3.17, entitled, "Testimony of An Accomplice" provides as follows:

"When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000).

"If a witness admits presence at the scene of the crime, could have been indicted either as a principal or under a theory of accountability, but denies involvement, a defendant is entitled to an accomplice-witness instruction." *People v. Campbell*, 275 Ill. App. 3d 993, 997, 657 N.E.2d 87, 91 (1995).

As previously stated, the determination of whether defendant's trial counsel was ineffective is contingent upon whether counsel's inaction was based on sound trial strategy or incompetence. Assuming the latter, defendant must then show that he was prejudiced by his counsel's incompetence--that is, but for

his counsel's incompetence, the result of his jury trial would have been different. However, for the reasons we quoted in *Durgan*, we decline to address defendant's ineffective-assistance-of-trial-counsel claim because the record before us is incomplete and inadequate.

In this case, the record is devoid of any evidence concerning whether defense counsel's omission was a sound trial strategy--as we presume--or instead, rooted in incompetence. In this regard, we reject defendant's rigid claim that because his defense primarily concerned the unreliability of the testimony of Kathy and Robin, no strategic reason existed for his trial counsel's failure to tender the accomplice-witness instruction, which alerts the jury to receive such testimony with suspicion and caution.

One such strategic reason for not tendering the accomplice-witness instruction--among others--may have been because that instruction was not consistent with the manner in which trial counsel constructed the defense. Here, defense counsel's strategy was not that the testimony of Kathy and Robin was unreliable because they were involved in the burglary that defendant committed and thus, had motive to lie. Instead, defense counsel's strategy was essentially that (1) defendant did not commit the crime because the perpetrator depicted in the video was not defendant and (2) the testimony of Kathy and Robin

should not be believed because their respective accounts were not consistent and their subsequent actions defied common sense.

In response, the State argues that based on the record, defendant failed to meet his burden under both of *Strickland's* prongs. Although we believe the State's position may have merit, we nonetheless invite defendant to pursue his claim under the Post-Conviction Hearing Act (725 ILCS 5/art. 122 (West 2008)), where a complete record can be made regarding his trial counsel's rationale for not tendering an accomplice witness-instruction.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment as costs of this appeal.

Affirmed.