FOURTH DIVISION
May 10, 2012

No. 1-10-0377

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. 08 CR 856
	)	
DRERAN CRAIG,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

O R D E R

¶ 1 *HELD*: The trial court's finding that the victim's identification of defendant was a dying declaration was not against the manifest weight of the evidence. Defendant was not denied effective assistance of trial counsel when counsel presented a defense theory at trial, cross-examined the State's witnesses, and introduced evidence of the victim's intoxication.

¶ 2 After a jury trial, defendant Dreran Craig was convicted of first degree murder during which he personally discharged a firearm and sentenced to 55 years in prison. On appeal, defendant contends that the trial court's finding that the victim's statement to a paramedic identifying defendant as the person who shot him was a dying declaration was against the

manifest weight of the evidence. He further contends that the trial court abused its discretion when it admitted the statement as an excited utterance. Defendant finally contends that he was denied effective assistance of trial counsel by counsel's failure to present a defense and to investigate and present the testimony of certain witnesses. We affirm.

¶ 3 Defendant was arrested and charged by indictment with first degree murder after the victim Calvin Thompson was shot and killed on June 10, 2007.

¶ 4 Prior to trial, the defendant filed a motion in *limine* to preclude the admission of a conversation between the victim and paramedic Joseph Porter during which the victim identified "Duran" Craig as the person who shot him. The defense argued that this conversation was not a dying declaration because, at that time, the victim did not believe that death was imminent and did not possess sufficient mental faculties to give an accurate statement regarding the shooting.

¶ 5 At the hearing on the motion, paramedic Joseph Porter testified that around 12:29 a.m., he and his partner Sharita Allen received a call to respond to a gunshot wound. When they arrived, the victim was awake and alert. He had been shot in the stomach. En route to the hospital, Porter asked the victim routine questions regarding his medical history. At one point, the victim threw up quite a bit of blood, and "said something to the effect of that ain't good, is it?" Porter responded no, but assured the victim that they were going to get him to the hospital.

¶ 6 When Porter asked the victim whether the victim knew who shot him, the victim initially responded no. After the victim vomited blood, Porter told the victim if he knew who had done this, he might want to say something. The victim then said something to the effect of "Dren" or "Duren." When Porter repeated "Dorian," the victim responded, "Durian. Durian" and spelled the name as "DURIAN." The victim also stated that the person's last name was Craig.

¶ 7 After hearing argument, the trial court denied defendant's motion, finding that the conversation was admissible pursuant to the dying declaration exception to the hearsay rule. The court also determined that the statement was an excited utterance.

¶ 8 The matter then proceeded to a jury trial. Jeremiah Gogins testified that he and the victim were walking back from the liquor store when a tan or gold SUV pulled up. Gogins kept walking while the victim went over to the SUV. Gogins then heard a gunshot and the victim came running toward him. Gogins had not seen the face of the man who exited the SUV, but described him as black, bald, and wearing a tank top. Gogins then guided the victim, who had been shot, to the porch and called for an ambulance. He followed the 911 operator's instructions regarding how to help the victim. He did not ask the victim the identity of the shooter. While later meeting with the police outside his home, he saw Allen Howard, who yelled at him to shut up.

¶ 9 During cross-examination, Gogins testified that he did not remember telling police that he saw a gold Yukon. He thought that he had told officers that he did not see the face of the man from the SUV.

¶ 10 The parties then stipulated that officer Helena Williams, if called to testify, would testify that during her interview of Gogins he described a gold Yukon and did not state that he could not see the face of the vehicle's driver. The parties also stipulated that defendant's wife Patricia Craig, if called to testify, would testify that at the time of the shooting, she owned a champagne-colored Chevy Blazer that defendant would often drive.

¶ 11 Allen Howard, Gogins's next door neighbor, testified that he also knew the victim and defendant. While standing in the crowd watching the victim being placed into an ambulance, he saw Dorian Jefferson. Jefferson, who Howard had known for a few months, told him to shut up

and that he had "better" tell Gogins to shut up. Howard then yelled shut up four or five times, as Jefferson made the order "aggressively."

¶ 12 During cross-examination, Howard admitted that on the night of the shooting he had drunk alcohol and smoked marijuana with the victim and Gogins. The men had been smoking marijuana and drinking beer together for two hours before he joined them. At one point, the group separated. The victim and Gogins went to get more beer, and Howard went to buy cigarettes. When he returned, he learned that the victim had been shot.

¶ 13 Paramedic Joseph Porter then testified consistently with his testimony at the earlier hearing. He also testified that upon observing blood on the victim's shirt he asked what happened. The victim, who was awake and conscious, then explained that he had been shot. Porter observed injuries to the victim's arm and left lower abdomen. During the ride to the hospital, Porter was in the back of the ambulance with the victim while his partner drove. When Porter asked if the victim knew "who had done this," the victim responded "hesitantly," that he did not. It was only after the victim threw up a "copious amount" of blood, and said "[t]hat ain't good, is it?" that he identified the shooter. After Porter repeated the name, the victim corrected him by repeating the name twice, spelling the name, and indicating that the man's last name was Craig. Porter admitted, during cross-examination, that the victim never actually said that this person "shot" him.

¶ 14 The parties stipulated that medical personnel from the hospital, if called to testify, would testify that the victim had a blood alcohol level of 12 MG/DL, that a normal low is zero and that a normal high is 10.

¶ 15 At the close of the State's case, the defense made a motion for a directed verdict, arguing in part, that the victim's statement to Porter could not be believed when the victim had been drinking and smoking marijuana before the shooting. The trial court denied the motion. The

jury subsequently convicted defendant of first degree murder during which he personally discharged a firearm.

¶ 16 Posttrial, defendant obtained new counsel and filed an amended motion for a new trial. This motion, in addition to alleging that the trial court erred when it determined that the victim's conversation with Porter was a dying declaration, also alleged that trial counsel was ineffective, *inter alia,* because he failed to interview Porter's partner to determine whether or not she was privy to that conversation. The trial court denied the motion and sentenced defendant to 55 years in prison.

¶ 17 On appeal, defendant first contends that the trial court erred when it admitted the victim's statement as a dying declaration because the victim did not believe that death was imminent and did not possess mental faculties sufficient to give an accurate statement about the shooting at that time.

¶ 18 A trial court's decision to admit a statement pursuant to the dying declaration exception to the hearsay rule is afforded some deference and a reviewing court will not overturn that decision unless it is against the manifest weight of the evidence. *People v. Hatchett*, 397 Ill. App. 3d 495, 502 (2009). A trial court's finding is against the manifest weight of the evidence if the opposite conclusion is clearly evident. *People v. Stiff,* 391 Ill. App. 3d 494, 499 (2009). "A dying declaration qualifies as a hearsay exception because it is considered trustworthy where the likelihood of fabrication is minimal due to the declarant's belief that death is imminent." *People v. Graham,* 392 Ill. App. 3d 1001, 1006 (2009). A statement is admitted as a dying declaration when it is shown beyond a reasonable doubt, based upon an examination of the totality of the facts and circumstances surrounding the declaration, that: "(1) the declaration pertains to the cause or circumstance of the homicide; (2) the declarant must believe that death is imminent; and

(3) the declarant must possess mental faculties sufficient to give an accurate statement about the circumstances of the homicide." *People v. Georgakapoulos*, 303 Ill. App. 3d 1001, 1009 (1999).

¶ 19 Here, the parties do not dispute that the first prong is satisfied as the victim's statement pertained to the cause or circumstances of the shooting. However, defendant contends that the State failed to establish the second prong when the victim was aware of his injuries, but merely believed them to be serious and not life-threatening. With regard to the third prong, defendant contends that the victim lacked sufficient mental facilities to make a statement as to the circumstances of the shooting when he did not immediately identify the shooter and was under the influence of alcohol and drugs at the time of the statement.

¶ 20 A person's belief of his imminent death may be shown by his own statement or "from circumstantial evidence, such as the nature of the wounds or statements made in his presence." *Georgakapoulos*, 303 Ill. App. 3d at 1009. Proof of a declarant's belief can be established by either words or signs. *Georgakapoulos*, 303 Ill. App. 3d at 1010. However, the mere fact that a declarant continues to hope that he will survive his injuries does not negate his belief of imminent death. *People v. Lawson*, 232 Ill. App. 3d 284, 293 (1992).

¶ 21 Here, the victim knew of the life-threatening nature of his injuries as he had been shot in the abdomen, was bleeding, and had just vomited a "copious" amount of blood. It was after throwing up this blood that the victim stated to the paramedic "that ain't good, is it?" Under these circumstances, it was reasonable for the trial court to find that the victim believed that his death was imminent. *Georgakapoulos*, 303 Ill. App. 3d at 1009.

¶ 22 *People v. Lawson*, 232 Ill. App. 3d 284 (1992), is instructive. There, the victim, who was shot nine times and was in a ravine when the police arrived, stated " 'Help me, I'm dying. I've been shot in the back. Get me out of here.' " and " 'Bryan Lawson did this to me.' " *Lawson*, 232 Ill. App. 3d at 287. The defendant challenged the admissibility of the statement, arguing that the

victim's pleas to get him "out of there" showed that the victim had not given up on his own survival. However, on appeal the court found the statement to be admissible, as it was reasonable to conclude that the victim knew his circumstances were serious because he had been shot nine times and was "bleeding to death" when he made the statement. *Lawson*, 232 Ill. App. 3d at 293. The court further determined that the mere fact that a victim had a nebulous hope that he would survive did not negate his belief of imminent death. *Lawson*, 232 Ill. App. 3d at 293.

¶ 23 Here, the victim was bleeding and vomiting blood after having been shot in the stomach. As in *Lawson*, it was reasonable for the trial court to conclude that the victim knew that his condition was life-threatening and death was imminent when he asked about the ramifications of throwing up blood and then identified defendant. *Lawson*, 232 Ill. App. 3d at 293. The fact that he sought reassurance from Porter did not negate his belief that his death was imminent; rather, it showed his continued hope, however nebulous, that he would survive his injuries. *Lawson*, 232 Ill. App. 3d at 293. Therefore, as the victim believed death was imminent the second prong of the dying declaration requirement was met. *Georgakapoulos*, 303 Ill. App. 3d at 1009.

¶ 24 When determining whether a declarant had the mental capacity to give an accurate statement, the court may consider whether he was able to answer questions about the incident. *Hatchett*, 397 Ill. App. 3d at 504; see also *People v. Davis*, 93 Ill. App. 3d 217, 232-33 (1981) (the declarant had sufficient mental facilities when he was able to answer questions promptly and accurately, although he had gunshot wounds as well as a substantial amount of morphine and alcohol in his body). Whether the questions required more than a yes or no answer may also be considered. *Hatchett*, 397 Ill. App. 3d at 504.

¶ 25 Here, Gogins testified that he did not ask the victim the identity of the shooter. When the paramedics arrived, the victim was able to tell Porter that he had been shot and indicated that he had only heard one shot. Once in the ambulance, the victim and Porter discussed routine

questions regarding medication and allergies before Porter asked the victim who had shot him. After the victim vomited blood, he said "that ain't good, is it?" The victim subsequently named the person who shot him. Porter's mispronunciation of that name resulted in the victim repeating the name twice and then spelling it. The victim also gave Porter that person's last name. Although testimony indicated that the victim had drunk beer and smoked marijuana that night, he was able to understand and answer Porter's questions and Porter characterized the victim as awake and conscious. See *Hatchett,* 397 Ill. App. 3d at 504 (finding that although the declarant may have been drinking on the night of the shooting, he was able to understand and answer a police officer's questions and the officer testified that the declarant's responses were coherent). Here, the trial court correctly determined that the victim possessed mental faculties sufficient to give an accurate statement about the circumstances of the shooting when he was able to answer questions, asked about his condition, and identified the shooter by stating and spelling the man's name. *Georgakapoulos,* 303 Ill. App. 3d at 1009.

¶ 26 Therefore, this court finds that the trial court's admission of the victim's statement identifying defendant as the person who shot him pursuant to the dying declaration exception to the hearsay rule was not against the manifest weight of the evidence. *Hatchett,* 397 Ill. App. 3d at 502. Because we find that the victim's statement identifying defendant was properly admitted as a dying declaration, this court need not address whether the statement was properly admitted as an excited utterance. See *Hatchett*, 397 Ill. App. 3d at 506.

¶ 27 Defendant next contends that he was denied effective assistance of counsel by counsel's failure to present a defense theory at trial and to support it through the investigation and presentation of certain witnesses. He argues that trial counsel failed to present any evidence of the victim's intoxication or ability to make a statement. He further argues that Porter's partner Sharita Allen could have testified as to her observation of the victim and whether she overheard

the conversation between the victim and Porter and that Dorian Jefferson, who told witnesses not to speak to the police, "may have known the parties involved."

¶ 28 A defendant alleging ineffective assistance of counsel must establish that his attorney's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to succeed on an ineffective assistance of counsel claim, a defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy under the circumstances. *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 70. Generally, matters of trial strategy such as whether to offer certain evidence or call a particular witness, how to conduct cross-examination, and what motions to make will not support a claim of ineffective assistance of counsel (*People v. Alvarado*, 2011 IL App (1st) 082957, ¶ 44), unless counsel failed to conduct any meaningful adversarial testing (*People v. Patterson*, 217 Ill. 2d 407, 441 (2005)). A defendant's failure to satisfy either prong of the *Strickland* test defeats an ineffective assistance claim. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 29 Initially, this court notes that defendant's contention that trial counsel failed to present evidence of the victim's intoxication and ability to make a statement is incorrect. At trial, counsel cross-examined Gogins about the victim's actions immediately preceding the shooting, including the victim's use of drugs and alcohol. The parties also stipulated that, if called to testify, medical personnel from the hospital would testify that the victim's blood alcohol level measured above that of a "normal high." Additionally, the defense theory at trial focused on misidentification and attacked the reliability of the victim's statement to Porter by highlighting, as discussed above, the victim's use of alcohol and drugs on the night in question. Decisions regarding what evidence to offer at trial are matters of trial strategy (*Alvarado*, 2011 IL App (1st) 082957, ¶ 44), which only support a claim of ineffective assistance of counsel when counsel

failed to conduct any meaningful adversarial testing. As the State's case was subject to meaningful adversarial testing, this claim must fail. *Patterson*, 217 Ill. 2d at 441.

¶ 30 With regard to Allen and Jefferson, the decision whether or not to call a particular witness about a particular subject is a matter of trial strategy that is left to the discretion of trial counsel. *People v. Johnson*, 385 Ill. App. 3d 585, 601 (2008). This decision carries a strong presumption that it was the product of strategy rather than incompetence, and, as a result, this type of decision is generally immune from claims of ineffective assistance of counsel. *Johnson*, 385 Ill. App. 3d at 601-02. Additionally, in the instant case, defendant's claim is based on speculation that Allen and Jefferson would have provided information or testimony that was favorable to him. There is no support in the record for this conjecture. As this court has previously determined, a defendant cannot use speculation or conjecture to justify his claim of incompetent representation. *People v. Clarke*, 391 Ill. App. 3d 596, 614 (2009). Here, defendant cannot establish how counsel's performance fell below an objective standard of reasonableness. Accordingly, his claim of ineffective assistance of counsel must fail. See *Edwards*, 195 Ill. 2d at 163 (failure to satisfy either prong of the *Strickland* test defeats an ineffective assistance claim).

¶ 31 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.