

No. 1-10-1114

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 07 CR 20545 |
| |) | |
| MARCUS HUDDLESTON, |) | Honorable |
| |) | Stanley Sacks, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Cunningham concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where defendant was unable to show that his trial counsel's performance was deficient, or that the ultimate outcome would have been different but for counsel's alleged errors, he was unable to show he received ineffective assistance of counsel.
- ¶ 2 Following a jury trial, defendant Marcus Huddleston was convicted of first degree murder and two counts of aggravated battery with a firearm. The trial court sentenced him to 35 years in prison for the murder and 10 years each for the aggravated battery convictions, all to be served consecutively. On appeal, defendant contends he was deprived of the effective assistance of trial

counsel because his counsel failed to explain to the jury why defendant did not testify he acted in self-defense after counsel promised he would in opening statements and declined a jury instruction on witness identifications. We affirm.

¶ 3 At about midnight on September 1, 2007, five teen-aged boys, among others, were in a small sandwich shop (Super Sub) near 16th Street and Sawyer Avenue in Chicago. The group included 13-year-old Jermaine King, 18-year-old Joseph Thomas, 18-year-old Jerome Simmons, 17-year-old Jerry Lacey, and 17-year-old Dwayne Patterson. Three of this group were shot, including Dwayne Patterson, who died from a gunshot wound to his back. Thomas and Simmons sustained nonfatal gunshot wounds. All four survivors (King, Thomas, Simmons, and Lacey) testified at defendant's trial. King identified defendant as the shooter both in a photo line-up on the day of the shooting and at trial. In their trial testimony, Thomas, Simmons, and Lacey recanted their prior multiple identifications of 23-year-old defendant.

¶ 4 During opening statements, defense counsel indicated that defendant had acted in self-defense after a verbal argument with Simmons in the shop, emphasizing that defendant was by himself, was outnumbered by 10 against 1, was told that the boys in the shop were carrying weapons, and was followed out of the shop by the group, who had been drinking and were already unruly. Counsel continued:

"[Defendant] defends himself. He has a right to defend himself. It was reasonable for him to believe that had he not defended himself, he would have been dead."

¶ 5 Out of the jury's presence, counsel informed the trial court that defendant was unhappy with their defense and defendant said he did not want to claim self-defense. The court told defendant that opening statements are not evidence and he was free to choose not to testify.

Counsel explained to the court that "were there to be a self-defense in this case [defendant] would be the sole witness." Defendant maintained that he did not want to testify.

¶ 6 Jermaine King testified that he joined his friends at around 8 p.m. on August 31, 2007. The rest of the group had been together for several hours before King arrived. At Super Sub, King saw defendant enter. He recognized defendant from around the neighborhood and knew him as "Mo-Mo." King was standing outside when defendant left the shop and heard defendant say, "let me holler at you," then saw defendant pull a revolver from his pocket and shoot in the direction of King's friends as they ran away. Defendant was alone and no one else was armed. King identified defendant as the shooter in a photo lineup on September 1, 2007. In 2008, King was adjudicated a delinquent in for possession of a stolen motor vehicle.

¶ 7 Detective Patrick Thelen corroborated King's photo lineup identification of defendant as the shooter.

¶ 8 Joe Thomas testified that Simmons "got into it" with someone he did not recognize at Super Sub. The unidentified man left, followed by Simmons then Thomas. Thomas heard shots as soon as he stepped outside. He ran immediately and never saw the shooter. He was shot twice, once in the back, fell to the ground, then blacked out. He did not know Jermaine King. On September 1, 2007, at around 6:30 p.m. Thomas spoke with Assistant State's Attorney (ASA) Krista Peterson and two detectives. Thomas agreed to give a statement about the shooting. He told them that he heard gunshots as soon as he exited the shop and did not see what happened to Simmons or Patterson. Though he recalled the detectives showing him photos, they never asked him to identify the shooter. Thomas identified defendant as the person who had "gotten into it" with Simmons, but did not see that person in the courtroom at the time of trial. On September 20, 2007, Thomas testified before the grand jury, stating that he recognized defendant from the neighborhood, though he did not say defendant was the shooter. That same day, Thomas viewed

an in-person lineup. The police told him to "pick out who [he] knew" but not to identify who shot him. Thomas picked defendant. Thomas admitted that he had been escorted into court by the sheriff after failing to appear on a subpoena. In 2007 and 2009, Thomas was convicted of possession of a controlled substance.

¶ 9 Three other witnesses testified Thomas had identified defendant as the shooter. ASA Peterson testified that she interviewed Thomas in the hospital on September 1, 2007. Thomas gave a statement in writing and said that he started to run when he saw defendant shooting.

¶ 10 ASA Susan Fleming testified that on September 20, 2007, she interviewed Thomas and presented him before the grand jury where he testified that Simmons got into an altercation with defendant, whom Thomas recognized from the neighborhood. Defendant started shooting when Thomas left the sub shop. Thomas identified defendant from a photo as the person who shot him.

¶ 11 Detective Thelen testified that Thomas identified defendant as the shooter from a photo lineup while he was still in the hospital on September 1, 2007. Thelen also conducted the in-person lineup on September 20, 2007, where Thomas identified defendant as the shooter.

¶ 12 Jerome Simmons testified that he had been smoking and drinking with his friends during the day on August 31, 2007. Jermaine King was there. While they were in Super Sub, a guy who Simmons did not recognize walked in. Simmons "got into a little incident" with him, then the guy said he wanted to talk to them and walked out of the shop. Simmons followed, but blacked out once they were outside because he was intoxicated and had been consuming drugs. Simmons did not see the guy from the sub shop in the courtroom at trial. On September 1, 2007, at around 6 a.m., the police approached him at the hospital and asked him to identify the shooter. Simmons admitted his signature was on the bottom of a photo lineup and a photo of defendant, but said he did not sign the lineup. He did not remember giving a statement after he was released

from the hospital. He did not tell ASA Melin that defendant said, "why don't you come outside and let me holler at you?" He did not tell Melin that as soon as they were outside, defendant pulled out a gun and started shooting in their direction or that Simmons and his friends were unarmed. When he was shown his written statement, Simmons admitted his signature was on the bottom of each page. On September 20, 2007, Simmons testified before the grand jury but he did not testify that a guy mumbled under his breath then said "holler at me outside." Simmons did not say he knew the guy from the neighborhood. He did not testify to the grand jury that, when he went outside, he saw defendant standing there, looked away, then looked back and saw defendant with a gun that looked like a "cowboy gun" with a wheel in it. He did not tell the grand jury that detectives came to visit him at the hospital or that, when they did, he told them defendant had shot him. Simmons also viewed a physical lineup on September 20, but he could not recall who he had identified. At the time of trial, Simmons was incarcerated due to pending charges of possession of a weapon and possession of a controlled substance. No one from the State's Attorney's office had threatened him or made any promises based on his testifying at trial.

¶ 13 Three witnesses testified about Simmons' prior identifications of defendant. ASA Melin testified that when she interviewed Simmons on September 1, 2007, after they spoke about the shooting, he agreed to make a written statement. She specifically asked Simmons who had shot him. He told her that detectives came to him in the hospital and he identified defendant as the shooter in a photograph. He also said that while he was waiting at the Super Sub, defendant told him "why don't you come outside and let me holler at you" and that as soon as he walked outside, defendant started shooting. He described the gun as a "cowboy gun."

¶ 14 ASA Fleming testified that on September 20, 2007, she interviewed Simmons and presented him to the grand jury where he identified a picture as defendant. Simmons testified that while they were waiting in line, defendant mumbled under his breath then told Simmons to

"holler at him outside." Defendant left the sub shop and Simmons followed. Outside, he saw defendant standing there. He looked away, then looked back and saw defendant holding "like a cowboy gun" with a wheel on it. When the detectives showed him photos, Simmons identified defendant as the shooter.

¶ 15 Detective Thelen testified that he showed Simmons a photo lineup while Simmons was in the hospital. Simmons identified defendant as the individual who shot him. Simmons also identified defendant as the shooter in an in-person lineup on September 20, 2007.

¶ 16 Jerry Lacey testified that on the evening of August 31, 2007, he was with Simmons, Thomas, and Patterson. They were unarmed and drinking, smoking weed, and doing other drugs. Lacey did not remember if they stood in line while at Super Sub or if there were other people in the shop when they arrived. He left the sub shop after Thomas, Simmons, and Patterson. As soon as he was outside, he heard shooting and started running away. He did not see who was shooting. Lacey denied telling ASA Melin that he lived with his step-mom and little sister, that his nickname was Little Jerry, that on the night of the shooting, he and his friends had been drinking until they went to Super Sub, that the shop was crowded or that, while they were waiting in line, defendant entered and said, "let me holler at you outside." He did not tell Melin that when he walked outside he heard gunshots, saw defendant shooting a revolver, and heard defendant say something like "I told you to stop playing." Lacey never told Melin that he had identified defendant in a photo lineup detectives had shown him earlier. At trial, when Lacey was shown a picture of defendant, he said he did not know who it was and did not see the person in the courtroom. He did not recognize his written statement and denied the signature on it was his. At the time of trial, Lacey had a pending charge of attempted residential burglary. No one made any promises to Lacey in exchange for his testimony. In 2008, Lacey was convicted of possession of a controlled substance and received two years of probation for a burglary charge.

¶ 17 ASA Melin testified that she interviewed Lacey at around 9 a.m. on September 1, 2007. After she handwrote Lacey's statement, she reviewed it with him, and allowed him to make any necessary corrections. Melin published Lacey's statement to the jury.

¶ 18 According to his statement, Lacey lives with his step-mom and little sister, and his nickname is Little Jerry. The Super Sub was crowded when they arrived and, while they were waiting in line, defendant entered the shop. Lacey identified a picture of defendant. He had heard of defendant but did not know him. Earlier that day, detectives had shown him a photo array and Lacey identified defendant. Lacey saw Thomas and Simmons arguing with defendant, then defendant said, "let me holler at you outside." Defendant left, followed by Thomas, Simmons, and Patterson. Lacey followed shortly after and immediately heard gunshots. Just before the shots, he heard defendant say something like, "I told you to stop playing." Lacey looked back and saw defendant shooting a revolver in his direction.

¶ 19 Detective Thelen testified that Lacey identified defendant as the shooter when Thelen showed Lacey a photo array the morning of the shooting. Lacey also identified defendant as the shooter in a photo at the time he gave his statement.

¶ 20 Detective Thelen then testified that after defendant was identified as the shooter, he went to the residence of Vergie Huddleston, defendant's grandmother. While speaking with Vergie, defendant came out of a back room and was arrested. With Vergie's consent, Thelen searched the back room and recovered a small revolver. Thelen admitted that defendant was the only person with braids in the in-person lineup. However, both Thomas and Simmons signed a form before viewing the lineup which said, "I understand that I am not required to make an identification, and *** the suspect may or may not be in the line-up photo spread."

¶ 21 The forensic evidence at trial established that Patterson died from a gunshot wound to the back. Forensic testing established that the bullet recovered from Patterson's body was fired from the revolver which was found in defendant's home.

¶ 22 Defendant's DNA was also compared to DNA swabs taken from the revolver. Defendant could not be excluded from having contributed to the mixture of DNA profiles in the gun swabs. However, the DNA profile from the gun swabs was a very common one, as one in eight black males could not be excluded from having contributed to it.

¶ 23 After the State rested, the trial court explained to defendant that he would have to decide whether or not to testify. The next day, defendant informed the court that he wanted to testify but did not "want to testify in self-defense." The court told defendant that he could "testify to whatever" he wanted and explained:

"What the lawyers say during opening statements is not evidence, so the fact that she told the jurors in opening statement, I'm sure it was a good faith statement by her, that the jurors will hear about self-defense, the jurors won't consider that if you testify to something differently."

Defendant then stated that he did not want to testify.

¶ 24 During closing, defense counsel told the jury to "think about whether *** [the witnesses] are the kind of people that could identify something that happened this quick." She observed that the testimony showed they had been drinking together all day and that Simmons had done ecstasy and smoked marijuana. She argued that the photo lineup was suggestive because defendant was the only one wearing braids and about 15 years younger than everyone else in the lineup.

¶ 25 After closing, the trial court asked defense counsel whether she wanted an instruction on identification testimony. Counsel declined the instruction.

¶ 26 The jury found defendant guilty of first degree murder for the death of Patterson and two counts of aggravated battery with a firearm for the shooting of Simmons and Thomas. The trial court sentenced defendant to 35 years in prison for the murder, and 10 years each for the aggravated battery convictions, all sentences to be served consecutively.

¶ 27 On appeal, defendant first contends that his trial counsel was ineffective for failing to explain to the jury why he did not testify that he acted in self-defense after counsel had promised in opening statements that the evidence would show that defendant had an argument with some people inside the shop, heard that they were carrying weapons, and then shot at them in self-defense.

¶ 28 To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and he was prejudiced by the deficient performance. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To succeed on an ineffective assistance claim, a defendant must satisfy both prongs. *People v. Manning*, 334 Ill. App. 3d 882, 892 (2002). If the defendant fails to make the requisite showing for either prong, his claim will fail. *Id.*

¶ 29 Counsel's failure to provide promised testimony is not ineffective assistance *per se*. *Manning*, 334 Ill. App. 3d at 892. The defendant must show that counsel's actions were unreasonable. *Id.* Moreover, the defendant must overcome a strong presumption that counsel's decisions were the result of sound trial strategy. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998).

¶ 30 Defendant has failed to demonstrate that his counsel's performance was substandard on the basis that she advanced a self-defense theory during opening statement and did not explain to the jury during closing argument why counsel presented no evidence, including no testimony by defendant, to support this theory. Defendant's position does not withstand scrutiny for several reasons. First, counsel *never* told the jury that defendant was going to testify and most

especially, counsel never made such statement during opening. The exchange with the trial court outside the presence of the jury after opening statements clearly established that counsel and defendant had discussed the self-defense theory. Defendant personally told the court that he did not want to say he acted in self-defense and the court, in turn, told him that he did not have to. Defense counsel further stated that "were there to be a self-defense in this case he would be the sole witness and therefore, we've explained self-defense to him numerous times, Judge." The court assured defendant that "[i]f the jurors don't hear it during the course of the trial they wouldn't consider it as your defense."

¶ 31 The testimony which defense counsel did promise during opening statement was actually presented at trial. Defense counsel correctly told the jury that it would hear from King, Simmons, and Thomas. Based on their testimony, defense counsel argued that the jury would see defendant was "defending himself." The testimony in fact demonstrated that Simmons and defendant engaged in a verbal altercation in the sub shop, defendant was outnumbered, some members of the group had been drinking, and the group followed defendant out of the shop. This uncontested scenario does not exclude the possibility suggested by counsel that defendant was "defending himself" at midnight on September 1, 2007. In turn, after the State rested its case and defendant then elected not to testify, defense counsel set forth other possible defenses in her closing argument, primarily attempting to cast doubt on the witnesses' identifications of defendant. Based on the record in this case, we cannot say that defense counsel's performance was below an objective standard of reasonableness.

¶ 32 Nevertheless, even assuming that the strategy could be considered unreasonable, defendant cannot establish any prejudice. "[T]he test is not whether defense counsel fulfilled all the promises he made during his opening remarks but, rather, whether defense counsel's errors were so serious that, absent those errors, the result of the proceeding would likely have been

different." *People v. Schlager*, 247 Ill. App. 3d 921, 932 (1993). The strength of the evidence against defendant cannot be overcome. One eyewitness, Jermaine King, identified defendant as the shooter at trial as well as in a photo line-up the day of the shooting. Although Thomas, Simmons, and Lacey testified that they did not recognize defendant at trial, all three witnesses had previously identified defendant as the shooter in separate photo lineups and written statements. Testimony further showed that Thomas and Simmons also identified defendant as the shooter before the grand jury and at an in-person lineup. In addition, the revolver that was recovered from defendant's residence fired the bullet that killed Patterson and defendant could not be excluded from the DNA swab from the revolver. Most importantly, defendant has not explained how his trial result would have changed in light of counsel's opening statement and closing argument. Under these circumstances, defendant is unable to show prejudice.

¶ 33 Defendant also asserts that counsel was ineffective for declining an instruction on eyewitness identifications. Defendant's position has no merit.

¶ 34 The decision whether to include a jury instruction is generally considered to be tactical and within counsel's discretion. *People v. Mims*, 403 Ill. App. 3d 884, 890 (2010). An ineffective assistance of counsel claim generally cannot be supported by a decision that is a matter of trial strategy. *Id.* Even assuming counsel's decision not to include an instruction on identification was unreasonable, defendant cannot demonstrate prejudice. As set forth above, the evidence revealed multiple identifications of defendant from four separate witnesses and two witnesses, King and Thomas, recognized defendant from the neighborhood.

¶ 35 Defendant's reliance on *People v. Briones*, 352 Ill. App. 3d 913 (2004) is completely unavailing. Unlike the present case, the defense counsel in *Briones* declared in opening statements that the defendant was going to testify: "he's going to get up here on this witness stand and he's going to testify." *Briones*, 352 Ill. App. 3d at 915. Moreover, the court found trial

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counsel was ineffective due to the "aggregate errors of defense counsel" and the lack of overwhelming evidence against defendant at trial. *Briones*, 352 Ill. App. 3d at 921. There, trial counsel's errors included an unfulfilled promise of testimony to the jury and allowing an improper jury instruction to be given, in addition to five other tactical errors. *Briones*, 352 Ill. App. 3d at 920-21.

¶ 36 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 37 Affirmed.