

No. 1-10-2414

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).

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. 09 CR 16910
)	
JOHN HENDRIX,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant was not denied the effective assistance of counsel where defense counsel's cross-examination of witness was a matter of trial strategy; the trial court did not improperly rely on its own knowledge in rejecting defense counsel's argument that a witness was biased; defendant's convictions violated the one-act, one-crime rule; the excess convictions are vacated and the mittimus must be corrected.
- ¶ 2 After a bench trial, defendant, John Hendrix, was convicted of driving with a revoked license and was sentenced to 18 months of probation. On appeal, defendant argues, first, that his trial counsel was ineffective for eliciting an inculpatory statement from a testifying police officer

at trial. Second, defendant argues that the trial court denied him a fair trial when the trial court relied upon its own knowledge regarding insurance practices to discredit defense counsel's bias argument. Finally, defendant argues the trial court erred in imposing multiple convictions for the offense of driving with a revoked license where each conviction was based on the same physical act. We affirm in part and vacate in part.

¶ 3 Kizzie Jackson testified that on August 22, 2009 at around 10 p.m. she was driving northbound on Trumbull when a car defendant was driving pulled out from a parking space into incoming traffic and struck her vehicle. After the collision, defendant exited his car and told Jackson that there was no real damage done to his car. Jackson testified that defendant exited from the driver's seat and identified defendant as the driver of the vehicle that struck her car.

¶ 4 Jackson observed damage to her car and called the police. The police advised Jackson to drive to the police station and Jackson relayed this to defendant. However, defendant became derogatory and argumentative with Jackson, so she called the police again and requested they come to the scene of the accident. Jackson remained at the scene until the police arrived. Defendant walked to a house across the street. When the police arrived, Jackson told the officers that defendant was the driver of the other car. Defendant was standing on the porch of the house cross the street from where the car was parked.

¶ 5 During cross-examination, Jackson testified that she did not submit a claim to her insurance company because the damage amounted to \$250 while her insurance deductible was \$500. Jackson again testified that she told the officer at the scene that defendant struck her car. After the accident, Jackson pulled her car over on Trumbull, and defendant moved his car back into the parking space he was leaving at the time of the accident.

¶ 6 Officer Terrence Pratscher testified that when he arrived on the scene, he observed two cars, and that Jackson's car was damaged on the front passenger side fender. Jackson identified

defendant as the driver of the other car. Pratscher then asked defendant for his driver's license and proof of insurance, which defendant was unable to produce. Pratscher ran defendant's name in the squad car computer, discovered that his license was revoked, and placed defendant in custody. On cross-examination, Pratscher testified that he determined defendant's wife owned the car involved in the accident. In his traffic crash report, Pratscher noted that Jackson's vehicle struck defendant's. He also testified that he did not personally observe defendant driving. The following exchange occurred between defense counsel and Pratscher:

"Q. And Mr. Hendrix didn't make a statement to you about him driving did he?

A. He said it was her fault.

Q. But he never admitted to you he was driving?

A. He was in an accident and it was her fault.

Q. Can you tell me if you wrote that down anywhere?

A. No, I did not."

¶ 7 When the defense moved for directed finding, defense counsel argued that Jackson had a motive or bias to lie, namely that the cost of her insurance could increase if she were found to have caused the accident. The court denied the motion.

¶ 8 Defendant testified that at the time of the accident, he was on the porch of his daughter's home located across the street from where his wife's car was parked. From the porch, he observed Jackson's car traveling down the street with her lights off, and then observed Jackson's car hit his wife's parked car. He did not have access to his wife's car; his daughter had the keys to the car, and she was not home. He did not drive the car at any time that day.

¶ 9 On cross-examination, defendant testified that there were a lot of people on the porch with him, but that he could not identify any of them. After Jackson hit his wife's car, she stopped

and reversed. Defendant left the porch and walked to Jackson's car, and Jackson stated that she was calling the police. Defendant replied, "okay," and returned to the porch. Defendant never told the officer that he was the driver of the car. He explained that he took the bus to his daughter's house.

¶ 10 During closing argument, defense counsel again argued Jackson's bias and adopted his argument from the motion for directed finding. The trial court found that Jackson identified defendant as the driver and that her identification was corroborated by Jackson's testimony that out of everyone else on the porch, she identified defendant and he was the only person with a connection to the vehicle since it was his wife's car. The trial court further found that defendant's statement to the officer that he was in an accident also corroborated the identification. It then explained that Jackson's potential exposure to an insurance claim did not create any bias, as defense counsel argued. Specifically, the trial court found:

"Whether or not Miss Jackson was subject to a claim for insurance purposes is of no moment. A claimant would be the owner of the vehicle and not necessarily the driver based on what I have heard about this kind of accident. It sounds like a minor accident at best and it would be handled by insurance companies and the owner of the automobile, not necessarily the driver. *I don't know that her exposure in and of itself creates any bias.*" [Emphasis added.]

The trial court found defendant guilty and sentenced him to 18 months of probation, and in its discretion, gave defendant credit for time served while subject to electronic monitoring.

Defendant's motion for a new trial was denied and this appeal follows.

¶ 11 Defendant first contends that his trial counsel was ineffective for eliciting the inculpatory statement from Officer Pratscher that defendant stated he was in an accident and that the accident

was Jackson's fault. To establish a claim for ineffective assistance of counsel, the defendant must show that his counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance was so serious as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *People v. Albanese*, 104 Ill. 2d 504, 525 (1984) (adopting *Strickland*). Defendant must overcome the strong presumption that defense counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

¶ 12 Here, we find that defense counsel's conduct constituted the type of trial strategy that falls outside the scrutiny of *Strickland*. See *People v. Manning*, 241 Ill.2d 319, 326–27 (2011). Generally, the scope and methods of cross-examination are matters of trial strategy. See *People v. Watson*, 2012 IL App (2d) 091328, ¶ 32 (2012). Defense counsel did not "elicit unfavorable testimony." Rather, defense counsel received an unexpected response to a question during cross-examination. Our review of the record makes it clear that counsel anticipated an admission from the police officer that defendant had made no statements. When the police officer testified in a manner that was contrary to his police report, defense counsel used the omission to impeach the officer and properly perfected that impeachment. This may have been an unfortunate turn of events for defendant, but this unexpected testimony cannot be attributed to a deficiency in counsel's performance.

¶ 13 Defendant relies on *People v. Bailey*, 374 Ill. App. 3d 608 (2007), to support his contention that defense counsel was ineffective for eliciting damaging testimony from Pratscher. However, *Bailey* is distinguishable from defendant's case because while the defendant in *Bailey* was accused of intent to deliver narcotics, the State did not question the investigating police officer regarding any transactions he observed the defendant make with an unknown person. *Id.* at 613. However, defense counsel questioned the officer extensively on cross-examination

regarding the three transactions with the unknown person. *Id.* at 610-11. Here, however, the State initiated questioning regarding whether defendant was driving by eliciting testimony from Jackson that defendant was driving. Defense counsel's strategy was to rebut this testimony by attempting to elicit from Officer Pratscher that defendant never admitted to driving. Defense counsel received an unexpected answer to a question he believed he had the answer to. See *People v. White*, 2011 IL App (1st) 092852, ¶ 74 (2011) (distinguishing *Bailey* by noting that the witness testified unexpectedly to a general question and that counsel did not continue the questioning or highlight the testimony later at trial or in closing argument). Defense counsel also did not continue "digging the hole deeper" as counsel did in *Bailey*, 374 Ill. App. 3d at 609. Defendant has not proven that defense counsel's performance was objectively unreasonable.

¶ 14 Moreover, even if we were to find counsel's performance unreasonable, defendant has failed to establish prejudice. *Strickland.* at 694, 697. The inculpatory statement that Pratscher testified to was not the only evidence the trial court relied on in finding defendant guilty. The trial court also considered Jackson's testimony that she identified defendant as the driver. Jackson testified that defendant was driving, that she saw him exit the car from the driver's seat, and that she saw defendant leave the car and go stand on the porch. As the trial court explained, Jackson was able to identify defendant as the driver to the police despite defendant standing among a crowd of people who did not have an interest in the vehicle. We will bear in mind that the trier of fact is in the best position to judge the credibility of witnesses. *In re Jonathon C.B.*, 2011 IL 107750, ¶59 (2011). We will also give due consideration to the fact finder's observing and hearing witnesses. *Id.* Based upon this additional evidence of defendant's guilt, we cannot say that defense counsel's questioning of Pratscher and Pratscher's response that defendant made an inculpatory statement undermines our confidence in the outcome of the case. *Strickland*, 466

U.S. at 694. Based upon the foregoing, defendant has not shown that he was prejudiced from counsel's questioning of Pratscher, thus, his claim for ineffective assistance of counsel fails.

¶ 15 Defendant next contends that because the trial court relied on outside knowledge regarding insurance practices that were not relevant to defendant's case, the trial court failed to fairly balance the witnesses' credibility and denied defendant a fair trial. Because this issue involves whether defendant's right to a fair trial was violated, we review it *de novo*. *People v. McLaurin*, 235 Ill. 2d 478, 487 (2009). We may review this issue for plain error despite defendant's failure to preserve it for appeal. *People v. Enoch*, 122 Ill. 2d 176 (1988) (in order to preserve an error for appeal, the error must be objected to and included in the post-trial motion).

¶ 16 The plain error doctrine allows a reviewing court to consider an unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. Ill. S. Ct. R. 615(a) (eff. 1999); *People v. Piatkowski*, 225 Ill. 2d 551, 565, (2007); see also *People v. Woods*, 214 Ill. 2d 455, 471-72 (2005). In reviewing a plain error contention, this court first determines whether error occurred at all. See *People v. Bannister*, 232 Ill. 2d 52, 65 (2008); and *People v. Brant*, 394 Ill. App. 3d 663, 677 (2009). This requires "a substantive look at the issue." *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

¶ 17 Defendant claims the trial court erred when it improperly relied upon its own specialized perception of insurance practice. However, the trial court did not rely upon private knowledge of insurance practices to prejudge defendant's guilt or to illustrate a witness's bias or lack of credibility. See *contra*, *People v. Kent*, 111 Ill. App. 3d 733 (1982) (denial of fair trial found where trial court relied on its outside knowledge of the poor reputation of the coroner's office

where defendant's expert witness worked to discredit the witness); and *People v. Jackson*, 409 Ill. App. 3d 631, 649-50 (2011) (finding trial court relied on matters outside the record when it stated its knowledge of the use of medications, psychological diagnoses, and of IQ testing, and concluded that defendant was denied a fair trial because the trial court's reliance on these matters was untested by cross-examination and was used to discredit defendant's expert witness).

¶ 18 The trial court in defendant's case was merely responding to defense counsel's argument that Kizzie Jackson was biased because she would have had to submit an insurance claim had she been found to be at fault for the accident. This is evinced by the trial court's statement that it did not know that Jackson's exposure alone created any bias. The trial court found, as it was permitted to do, that based on the evidence and in consideration of the parties' arguments, Jackson was not biased due to a fear of making an insurance claim and risking an increased premium. "It is within the province of the trier of fact to determine the weight and credibility of each witness's testimony. In a bench trial, as here, it is for the trial judge to determine the credibility of witnesses, to weigh evidence, draw reasonable inferences therefrom, and to resolve any conflicts in the evidence." *People v. Devine*, 295 Ill. App. 3d 537, 541 (1998). The trial court did not err in responding during its findings to defense counsel's bias argument. Thus, there was no plain error.

¶ 19 Finally, defendant contends his convictions violated the one-act, one-crime rule because the trial court imposed three convictions for the offense of driving with a revoked license, and each conviction was based on the same physical act of driving on a revoked license on the date in question. The one-act, one-crime rule prohibits multiple convictions where more than one offense is based on the same physical act. See *People v. Crespo*, 203 Ill. 2d 335 (2001); and *People v. King*, 66 Ill. 2d 551 (1977). The State agrees that defendant's mittimus should be corrected to reflect a single conviction on Count 1, the most serious count. Accordingly, we hold

that defendant's three convictions for driving on revoked license were required to be merged as they were all based on the same act of driving on a suspended license. See *People v. Gordon*, 378 Ill. App. 3d 626, 642 (2007) (holding that the defendant's three convictions for felony aggravated driving under the influence of alcohol were required to be merged because they were all based on the same act of driving under the influence of alcohol). We vacate the convictions on Counts 2 and 3 and order the clerk of the circuit court to correct the mittimus to reflect a single conviction on Count 1. *Id.* at 642.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County finding defendant guilty of driving with a revoked license. We vacate defendant's convictions on Counts 2 and 3 as violative of the one-act, one-crime rule and order the clerk of the circuit court to correct the mittimus accordingly.

¶ 21 Affirmed in part; vacated in part.