

No. 1-10-3205

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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. 97 CR 5359
)	
LUIS VASQUEZ,)	Honorable
)	Clayton J. Crane and
)	Colleen McSweeney-Moore,
Defendant-Appellant.)	Judges Presiding.

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

ORDER

¶ 1 *Held:* The circuit court's denial of post-conviction relief following an evidentiary hearing is affirmed where the record shows that appellate counsel's decision not to challenge the sufficiency of the evidence on direct appeal was not unreasonable, and thus, counsel did not render ineffective assistance.

¶ 2 Defendant Luis Vasquez appeals from an order of the circuit court denying him post-conviction relief following an evidentiary hearing. On appeal, defendant contends the circuit court erred when it denied him relief because appellate counsel rendered ineffective assistance on direct appeal when he failed to challenge the sufficiency of the evidence to sustain defendant's

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conviction. Defendant claims such a challenge would have been meritorious and his conviction would have been reversed if counsel had raised the issue. We affirm.

¶ 3 At a 1999 jury trial, defendant was tried on charges of first degree murder, aggravated battery and armed robbery for his involvement in the gang-related beating of two men, which resulted in the death of Joaquin Diaz. During the beating, Diaz's leather jacket was removed from his body and taken by the offenders. The jury found defendant guilty of armed robbery based on the theory of accountability, but acquitted him of the murder and aggravated battery charges. Following the verdict, the State moved to have defendant, who was 16 at the time of the offense, sentenced as an adult. The trial court granted that motion and sentenced defendant to a term of 30 years' imprisonment.

¶ 4 On direct appeal, defendant, through appellate counsel, raised three sentencing issues. Defendant argued that (1) the sentencing statute under which he was charged as an adult was unconstitutional; (2) the trial court abused its discretion because it failed to consider all the statutory factors enumerated in the sentencing statute; and (3) his sentence was disparate to those of his three codefendants. This court rejected defendant's arguments and affirmed his convictions and sentence. *People v. Vasquez*, 327 Ill. App. 3d 580 (2001). The Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Vasquez*, 199 Ill. 2d 576 (2002).

¶ 5 In November 2002, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2002)) raising several claims of ineffective assistance of trial and appellate counsel. One of defendant's allegations was that his appellate counsel rendered ineffective assistance when he failed to argue on direct appeal that the evidence was insufficient to prove beyond a reasonable doubt that defendant was accountable for the armed robbery. The circuit court found defendant's allegations frivolous and patently without merit, and summarily dismissed his petition. On appeal, this court granted defendant's motion for summary remand because the circuit court failed to rule on defendant's post-conviction

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petition within 90 days. We remanded defendant's petition for second-stage proceedings under the Act. *People v. Vasquez*, No. 1-03-1923 (2004) (dispositional order).

¶ 6 On remand, the circuit court appointed the Cook County public defender to represent defendant. In April 2006, defense counsel filed a supplemental post-conviction petition, incorporating defendant's *pro se* petition. The only allegation raised in the supplemental petition was that appellate counsel rendered ineffective assistance when he failed to argue on direct appeal that the evidence was insufficient to sustain the armed robbery conviction. The petition argued that the evidence showed defendant was merely present at the scene, and that he did not aid or abet in the taking of Diaz's leather jacket. Consequently, had appellate counsel raised this issue on direct appeal, defendant's conviction would have been reversed.

¶ 7 The State moved to dismiss defendant's *pro se* and supplemental post-conviction petitions, arguing that neither trial nor appellate counsel rendered ineffective assistance. The State asserted that a challenge to the sufficiency of the evidence would not have been successful on direct appeal because the evidence against defendant was overwhelming.

¶ 8 The circuit court granted the State's motion to dismiss all of the claims in defendant's post-conviction petition, except for the allegation that appellate counsel rendered ineffective assistance when he failed to argue on direct appeal that the evidence was insufficient to find defendant accountable for the armed robbery. The court advanced defendant's petition for an evidentiary hearing on that issue alone.

¶ 9 At the evidentiary hearing, Assistant State Appellate Defender Michael Bennett testified he has been employed as an attorney with the Office of the State Appellate Defender (OSAD) for 13 years and is currently a supervisor in that office. Bennett oversees a team of 8 to 10 attorneys with whom he confers about cases and discusses possible issues to raise on appeal. He also reviews the briefs and pleadings before they are filed with the court. During his career at OSAD, Bennett has written 200 to 300 briefs, and as a supervisor, has reviewed 400 to 600 briefs.

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¶ 10 Bennett represented defendant on direct appeal. After receiving the case, Bennett analyzed the record and spoke with defendant over the telephone. Prior to filing the brief for appeal, Bennett conferred with a senior OSAD attorney to discuss the issues in defendant's case. After considering all the possible issues, Bennett decided to raise three sentencing issues on appeal. Bennett wrote the opening and reply briefs for defendant's appeal, which were reviewed by a senior attorney prior to being filed. Bennett also presented an oral argument to this court on September 11, 2001. Less than 10 minutes into that argument, the building was evacuated. Subsequently, the Illinois Supreme Court issued an opinion adverse to one of the sentencing issues, and the oral argument was not rescheduled.

¶ 11 Bennett acknowledged he was aware of evidence in the record which showed defendant was riding in a van with other individuals on the way to the location where the offense occurred. The people in the van saw two men they believed were members of a rival gang, and defendant and the others exited the van with the intent to engage in an altercation with these men. The evidence also showed the men exited the van to meet one of their friends. Bennett knew the record showed defendant was hit in the head with a bottle and returned to the van while the other men remained outside the van.

¶ 12 Bennett further acknowledged he was aware one eyewitness testified that someone other than defendant removed the leather jacket from Diaz. However, there was conflicting evidence from a co-offender, who indicated it was defendant who pulled the jacket off Diaz. The record also showed a belt and watch recovered in the area were allegedly taken from Diaz. Bennett was aware that the jacket itself was not part of the State's evidence at trial. He also knew defendant gave un rebutted trial testimony that all of the men in the van were wearing their own leather jackets that night. Defendant further testified that the men in the van did not intend to take a leather jacket from anyone, and that he was unaware of the robbery at the time it occurred.

¶ 13 In addition, Bennett knew the State presented testimony from Assistant State's Attorney (ASA) Kari Mason that, during an interview with defendant and his mother, defendant said he was a member of the La Raza street gang, and he and the others exited the van in order to fight with rival gang members. Defendant also told Mason he saw his friend Anthony Saucedo holding a stick or pipe, and at that point, defendant's mother ended the interview. Bennett was also aware ASA John Maher testified that Ivan Flores told him defendant returned to the van wearing the leather jacket of the boy whom "everyone was stomping."

¶ 14 Bennett testified that the issue of reasonable doubt has an extremely high standard of review on appeal because the evidence is viewed in the light most favorable to the State. He explained that, to be successful, the appellate court would have to determine that no other jury would have reached the same verdict as the jury in the instant case. Throughout his career with OSAD, Bennett raised the issue of reasonable doubt in approximately 12 cases. He testified that, although it is not an esoteric argument, the issue of reasonable doubt is not often raised by OSAD. Bennett acknowledged he was aware of the case *People v. Dennis*, 181 Ill. 2d 87 (1988).

¶ 15 Bennett explained he considered raising the issue of reasonable doubt in this case, but decided not to because there was conflicting evidence regarding the leather jacket and the extent of defendant's participation in the offense. He again noted the evidence must be viewed in the light most favorable to the State. In this case, it was the jury's responsibility to weigh the conflicting evidence. Considering that factor, together with the broad reach of the accountability law in Illinois, Bennett determined he would not be able to successfully challenge the sufficiency of the evidence, even in light of the fact defendant was acquitted of the other charges. Bennett believed the sentencing challenges he raised were the strongest issues for appeal in this case.

¶ 16 The circuit court stated that in preparing its ruling, it reviewed on numerous occasions the entire court file for this case, including the record of the trial proceedings and Bennett's testimony from the evidentiary hearing. The court determined that, had Bennett raised the issue of

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reasonable doubt on direct appeal, the outcome of this case would not have been any different. Accordingly, the circuit court denied defendant's petition for post-conviction relief.

¶ 17 On appeal, defendant solely contends the circuit court erred when it denied him relief because appellate counsel rendered ineffective assistance on direct appeal when he failed to challenge the sufficiency of the evidence to sustain the armed robbery conviction. Defendant claims such a challenge would have been meritorious and his conviction would have been reversed if counsel had raised the issue. Defendant asserts the evidence shows he returned to the van prior to the robbery of Diaz, and was unaware the robbery was occurring. Defendant argues he did not aid or abet in any conduct that was part of the armed robbery offense, but instead, was merely present inside the van when the offense occurred. Defendant also notes the jury asked three questions during deliberations and claims that shows the jurors had doubts about his guilt and could have acquitted him of the armed robbery charge after already acquitting him of the murder and aggravated battery charges.

¶ 18 To receive post-conviction relief, defendant must show that he suffered a substantial deprivation of his constitutional rights in the proceedings which resulted in his conviction and sentence. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). During the third stage of post-conviction proceedings, it is defendant's burden to establish that he suffered a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Following a third-stage evidentiary hearing that involved fact finding and credibility determinations, the circuit court's ruling on defendant's post-conviction petition will not be disturbed on review unless it is manifestly erroneous. *Id.* Manifest error is error that is plain, indisputable and clearly evident. *People v. Taylor*, 237 Ill. 2d 356, 373 (2010).

¶ 19 Claims of ineffective assistance of appellate counsel are evaluated using the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Harris*, 206 Ill. 2d 293, 326 (2002). To succeed, defendant must show that

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counsel's failure to raise the issue on direct appeal was objectively unreasonable, and that he was prejudiced by this decision. *Id.* In other words, defendant must establish that, but for counsel's error, there is a reasonable probability that his appeal would have been successful. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). Appellate counsel is not required to raise every conceivable issue on direct appeal, and if counsel concludes an issue is without merit, then his decision to refrain from raising it is not incompetence, unless his appraisal of the merits was patently erroneous. *People v. Smith*, 195 Ill. 2d 179, 190 (2000). Generally, counsel's decision not to raise an issue on appeal is given substantial deference. *Harris*, 206 Ill. 2d at 326. Unless the underlying issue is meritorious, defendant was not prejudiced by counsel's failure to raise it on direct appeal. *People v. Barrow*, 195 Ill. 2d 506, 523 (2001).

¶ 20 To prove defendant guilty of the armed robbery in this case, the State had to show that defendant took Diaz's leather jacket by the use of force while being armed with a bludgeon. 720 ILCS 5/18-2 (West 1996). To prove defendant guilty on a theory of accountability, as occurred here, the State had to show that either before or during the commission of the armed robbery, and with the intent to promote or facilitate that commission, defendant aided or abetted his codefendants in committing the offense. 720 ILCS 5/5-2(c) (West 1996). Proof that the offenders initially intended to rob the victim is not required to sustain a conviction for armed robbery. *People v. Lewis*, 165 Ill. 2d 305, 338 (1995). "The gist of armed robbery is simply the taking of another's property by force or threat of force." *Id.*

¶ 21 In this case, our review of the record reveals appellate counsel did not render ineffective assistance when he declined to challenge the sufficiency of the evidence on direct appeal because his determination that the issue lacked merit was not patently erroneous. We find that the evidence presented at trial was sufficient for the jury to find defendant guilty of the armed robbery based on a theory of accountability, and if challenged on direct appeal, defendant's conviction would not have been reversed.

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¶ 22 It is undisputed that defendant was a member of the La Raza street gang, and on the night of January 24, 1997, he was riding in a van drinking beer and smoking marijuana with several of his fellow gang members. One of those men, Ivan Flores, did not participate in the fight that night and was given immunity for his testimony. Flores testified that while they were riding in the van, they saw two men walking on the street who they believed were members of a rival gang. The record shows those two men were Joaquin Diaz and Urbano Alvarez. Flores testified that defendant and three codefendants exited the van and began fighting with Diaz and Alvarez. One of the codefendants, whom defendant later testified was Anthony Saucedo, was armed with a metal pipe, and Flores saw him striking Diaz with that pipe. Flores further testified that when defendant returned to the van he was wearing a leather jacket. Flores' testimony was corroborated by the testimony of ASA John Maher who took a written statement from Flores containing substantially the same facts as his testimony, and adding that Flores saw Diaz being beaten by three or four La Raza members who were "stomping" on him while one codefendant hit Diaz with the pipe. Flores further told Maher that defendant returned to the van wearing the leather jacket that belonged to the boy whom everyone was "stomping."

¶ 23 The record shows Flores' testimony was further corroborated by Urbano Alvarez who testified that both he and Diaz were wearing leather jackets when they were attacked by a group of men. One of those men was holding a pipe and repeatedly said "jacket" as he pulled on Alvarez's arm. As Alvarez broke away from that man and ran, he saw Diaz lying on his back on the ground with four men on their knees beating on Diaz. When Alvarez returned to the scene with Diaz's cousins, one man was still on top of Diaz. That man then fled, and Alvarez saw that Diaz was no longer wearing his leather jacket. One of Diaz's cousins, Alfredo Monroy, testified that when he arrived at the scene, one of the codefendants was hitting Diaz in the face and chest. Monroy saw that man pull the leather jacket off Diaz and run through a gangway between two houses. Other testimony showed the police recovered a watch and a long black leather belt from

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a gangway, and Alvarez identified both items as belonging to Diaz, noting the belt was from Diaz's leather jacket.

¶ 24 In addition, the record shows that much of defendant's testimony corroborated that of the other witnesses. Defendant testified that he and one of his codefendants engaged in a fist fight with Diaz and Alvarez. Defendant said that both Diaz and Alvarez were wearing leather jackets, and the only person armed with a weapon was Saucedo, who had the pipe. Defendant claimed his eye was injured during the fight, and he returned to the van before his codefendants. The rest of his codefendants returned to the van a few minutes later, except for codefendant Claudio Martinez, whom they picked up after driving the van around the block.

¶ 25 We find that this evidence was sufficient for the jury to find that defendant participated in the fight that included the taking of Diaz's leather jacket by force, and therefore, defendant was guilty beyond a reasonable doubt of the armed robbery of Diaz, based upon the theory of accountability. Based on this evidence, we further find that Assistant Appellate Defender Bennett's determination that there was no merit in a challenge to the sufficiency of the evidence was not patently erroneous. Had the issue been raised on direct appeal, it would not have been successful. We find that neither prong of the *Strickland* test was met in this case – Bennett's failure to raise the issue was not unreasonable, and defendant was not prejudiced by Bennett's decision. Defendant did not receive ineffective assistance from his appellate counsel. Accordingly, the circuit court's denial of post-conviction relief was not manifestly erroneous.

¶ 26 For these reasons, we affirm the judgment of the circuit court of Cook County denying defendant post-conviction relief.

¶ 27 Affirmed.