

2012 IL App (2d) 100702-U
No. 2-10-0702
Order filed January 24, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of Winnebago County. |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 08-CF-5086 |
| |) | |
| ALTON GIRLEY, |) | Honorable |
| |) | John R. Truitt, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Burke concurred in the judgment.

ORDER

Held: Trial court did not err in reserving ruling on State's motion *in limine* regarding certain cross-examination and requiring a sidebar prior to such cross-examination, and defense counsel was not ineffective for failing to pursue such cross-examination.

¶ 1 The defendant, Alton Girley, was convicted by a jury of one count of burglary (720 ILCS 5/19-1(a) (West 2008)) and was sentenced to 12 years of imprisonment. He appeals, contending that either the trial court erred in not permitting—or his lawyer was ineffective by not pursuing—cross-examination of the State's police witnesses regarding the fact that the victim of the burglary was the ex-wife of another police officer. We affirm.

¶ 2

BACKGROUND

¶ 3 On December 23, 2008, Elizabeth Wassner's pink and tan Coach purse was stolen from her car. The theft occurred shortly after 5 p.m., after Wassner's car became stuck in snow halfway out of her driveway. As Wassner was digging her car out, she was approached by a man who had gotten out of a vehicle, described by Wassner as a dark green or black Chevy Suburban, that had been attempting to go down her street (Dawson Avenue) but was blocked by her car. The man offered to help her dig the car out, and she agreed and turned to go get another snow shovel from her garage. She then heard her six-year old daughter, who was in the back seat of her car, begin yelling "stop, stop, don't, don't." Fearing that her daughter was being hurt, Wassner ran back to the car, where her daughter told her that the man had taken her purse. Wassner's identification, cell phone, credit cards, and checks were in the purse.

¶ 4 Wassner testified that she got her car into her garage and began calling the bank where she had her checking account and local stores where she had credit cards. Wassner then called the police station to report the theft. Although her ex-husband was a Rockford police detective, according to Wassner she did not mention this fact to the front desk when she called. Nevertheless, a "CAD ticket" logging Wassner's call included the following:

"This is Gabe Wassner's X wife and his 6 YO daughter was in the car when the purse was stolen. Who ever handles this please call Gabe's cell ***. Thanks."

A police officer came to Wassner's house later that evening to interview her about the theft.

¶ 5 Deputy Sean Hughes of the Winnebago County Sheriff's Office testified that, about 8:25 p.m. on that same evening, he was dispatched to a Family Dollar Store to investigate a forged check that had been written on Wassner's checking account. The check had been tendered by a white woman

in the company of two African-American women. The check was written for a large amount and the clerk ran it through a verification process, which resulted in the check being declined. The women then left the store. The clerk followed them outside and observed them get into a dark-colored Chevy Suburban. The clerk wrote down the license plate number and provided the number to Hughes. Hughes determined that the license plate was registered to a tan Chevy Tahoe or Suburban owned by Shakle Peyton, who lived on Longwood Avenue in Rockford.

¶ 6 The following morning, Rockford police detectives Rich Gambini and Mark Jimenez were assigned to investigate the stolen purse and attempted check passing. They went to the vicinity of Peyton's address, looking for the tan Chevy Tahoe bearing license plates with the number written down by the clerk. A few streets over, they found the Tahoe parked on Benton. The detectives watched the Tahoe, and saw two men and a child come out of 1233 Benton and get into the Tahoe. The police briefly followed the Tahoe as it drove away, and then pulled it over. They arrested the two men in the car—the defendant and Leonard Hill—and took them to the police station.

¶ 7 Between five and seven police officers then took the child that had been in the car with the defendant back to 1233 Benton, the home of the child's mother, Shameka Allen. Detective Gambini testified that Allen met them at the door and allowed them to enter. Two other women were there as well, a white woman named Samantha Swan, and an African-American woman named Keesha Davis. While the police were in Allen's home, they observed a pink and tan Coach purse matching the description of the stolen one hanging on a bedroom door, and bags of new clothing from A.J. Wright and the Burlington Coat Factory, stores where Wassner's checks had been used. According to Gambini, he then asked Allen if they could search her apartment and Allen consented. After searching the home, the police brought Allen, Swan, Davis, and the purse to the police station.

¶ 8 Gambini testified that, back at the station, he and Jimenez read the defendant his *Miranda* rights and verbally confirmed that the defendant understood them, but the defendant refused to sign the waiver form. The defendant was asked about the purse theft and told them that he knew nothing about it. The defendant said that he was living with his grandmother at 320 Howard on December 23 and 24, 2008. The detectives put the defendant in a holding cell. Gambini also spoke with Allen, who told him that she was the defendant's fiancé and that he was living with her at 1233 Benton. According to Gambini, Allen said that she had been home all day on December 23, 2008, and at about 6 p.m. the defendant came over to her house, and a few minutes later she noticed the purse sitting on her dining room table. Based on a serial number she saw inside the purse, she believed it was a genuine Coach purse. She asked the defendant where he got it, and the defendant said not to worry about it and that it was for her.

¶ 9 Detective David Paterson testified that, on December 24, 2008, he was asked to prepare a photo lineup of the defendant and Hill, the other man who had been in the Chevy Tahoe. He prepared two photo arrays of six pictures each, one with pictures of the defendant and five other men with similar features, and a second array with pictures of Hill and five others. Shortly after noon, he went to Wassner's house to show her the photo arrays. He showed her the array containing the defendant's picture first, and she identified the defendant as the man who approached her and then took her purse from her car. Paterson did not show her the second array because she had said that only one man approached her and she had already identified the defendant. Wassner later made an in-court identification of the defendant at trial.

¶ 10 According to Jimenez and Gambini, they told the defendant that he had been identified by the victim of the theft as the person who took the purse. The defendant did not initially respond, but

about a half hour later he asked to see a supervisor. He was then interviewed by Gambini and Detective Sergeant Robert Redmond. Redmond reminded the defendant that he was “still under *Miranda*,” and the defendant said he was willing to speak with them. The defendant told them that he had taken the purse. According to the police, the defendant said that he had been driving down a street and saw a woman with her car stuck in the snow, halfway in and half out of her driveway. He got out of his car intending to help her dig her car out, and walked up to her. However, when she went to get another snow shovel from her garage and he was left alone near the car, he saw her purse and was overcome by impulse. He reached into the car, grabbed the purse, and took off running, eventually meeting up with the car that he had arrived in. Asked by Gambini if he had known there was a little girl in the car when he reached inside, the defendant said he had not realized she was in the back seat until he heard her yelling as he was getting out of the car. The police asked the defendant to make a written statement but he refused. The police interviews of the defendant and Allen were not recorded.

¶ 11 The defendant was indicted on January 23, 2009, on one count of vehicular invasion (720 ILCS 5/12-11.1 (West 2008)) and one count of burglary (720 ILCS 5/19-1(a) (West 2008)). The defendant moved to suppress his arrest, the physical evidence taken from Allen’s home, and his verbal statement to police. After a hearing at which the defendant and Allen (among others) testified, the trial court denied the motions.

¶ 12 On February 11, 2010, as part of its pretrial motions, the State filed a motion *in limine* in which it sought to bar the defense from mentioning at trial the fact that Wassner was the ex-wife of a Rockford police detective. The State argued that this fact was irrelevant to the question of the

defendant's guilt or innocence. The defense argued that the fact was relevant to show that the police officers had a particular bias or motivation. The trial court reserved ruling on the motion, stating:

"I'm going to reserve ruling. We're going to listen to the testimony of each witness and then the Court will rule as to each witness, whether or not that's going to be proper for cross examination.

So before you go there, Mr. Kulkarni [the defense attorney], ask to approach and we'll readdress it on a witness by witness basis, okay?

* * *

Bottom line is this: Absent some showing that the police treated this case any differently than any other vehicular invasion and burglary offense, the fact that she's the ex-wife of a police officer is neither here nor there.

Now, as I hear the testimony, it'll be determined whether or not this appears to have been treated any differently than any other case, that's why I'm reserving the ruling and that's why you'll approach before you can go there on the questioning.

So I'm not denying it, I'm not granting it, it's going to be as the testimony develops: Does there look to be some indication of some impropriety by the officers because the victim was the ex-wife of a police officer?

So you're not going there until you approach and I've addressed it, okay? So it's reserved.

* * *

[Trial court summarizing its rulings at the end of pretrial conference:] That was the People's fifth motion bearing [*sic*] any mention that Elizabeth Wassner is the ex-wife of a

police officer. Right. And I believe I indicated that absent a showing of some impropriety in the way the investigation was handled, that it wouldn't be relevant. But as the case is developed, if you think that you've developed enough, you can ask to approach and make your offer and I'd reconsider. But that's fairly consistent with what everyone recalled?"

The State and the defense attorney agreed that it was. During the same pretrial conference, the State dismissed the vehicular invasion charge and indicated that it would be proceeding on the burglary charge only.

¶ 13 A three-day jury trial commenced on April 5, 2010. The State presented five witnesses in its case in chief: Wassner, Hughes, Jimenez, Gambini, and Paterson, who testified as described above. The defense presented four witnesses: Peyton, Allen, the defendant, and Rockford police officer Terence Peterson, who testified that he spoke with Wassner over the telephone on the night of the incident, and at that time she described the defendant as five feet ten inches tall. The defendant was in fact a few inches shorter than that.

¶ 14 Peyton testified that she was the defendant's sister and owned the Tahoe with the license plate number the store clerk wrote down on December 23, 2008. On that evening, she left work at about 5:15 or 5:20 p.m. She was picked up by her friend Keesha Davis, who was driving Peyton's Tahoe. They went together to the Travelers' Lodge, about five minutes away, and picked up the defendant. After stopping by Peyton's house on Longwood, Peyton dropped the defendant off at his grandmother's house at 320 Howard. It was about 6 p.m. by then. The defendant was with her the entire time between when they picked him up and when they dropped him off at his grandmother's, and he did not get out of the car on Dawson Avenue or accost anyone. Later that night, a friend of Allen's (Samantha Swan, although Peyton and Allen knew her by another name) called Peyton from

Allen's home. Swan asked for a ride to go shopping, and Peyton agreed. She, Swan, and Allen drove to several stores, including A.J. Wright, the Burlington Coat Factory, and Family Dollar, where Swan bought various items. The defendant was not with them. Peyton then drove to Allen's home, where Allen got out and Swan took her items inside, and then Peyton dropped Swan off on Seventh Street. Peyton got home about 11 p.m. The next morning, she was scheduled to work. The defendant wanted to borrow her car to take his son to get a haircut. She picked him up from his grandmother's house. Peyton acknowledged that she had two prior convictions for retail theft.

¶ 15 Allen testified next. She had been in a relationship with the defendant for a couple of years, but he was not living at her house on December 23 and 24, 2008. On the evening of December 23, her friend Swan (although she did not know her by that name) came over. Swan brought the pink and tan Coach purse with her. Allen, Swan, Peyton and Keesha Davis then went shopping at the Burlington Coat Factory, A.J. Wright, and other stores. The defendant was not with them. On the morning of December 24, the defendant came to pick up her son.

¶ 16 Allen had four prior convictions for retail theft and one conviction for a drug offense. Her testimony that the defendant was not living with her at the time of the incident was impeached in two ways. First, in her earlier testimony at the hearing on the motion to suppress, Allen stated that she and the defendant were living at 1233 Benton, which was "her house with" the defendant. At trial, Allen attempted to explain the inconsistency by saying that the defendant was living both at her house and at his grandmother's house, but he stayed with his grandmother on the night of December 23. Second, according to Gambini's rebuttal testimony regarding her statements to him on December 24, Allen stated that the defendant was her fiancé and was living with her at 1233 Benton. Her trial testimony that Swan brought the purse to her house was also impeached with Gambini's

testimony that Allen told him on December 24 that the defendant brought the purse when he came over on the evening of December 23.

¶ 17 Finally, the defendant testified. He admitted that he had a prior conviction for the manufacture and delivery of cocaine. On the evening of December 23, 2008, at about 5 p.m., he was at the Traveler's Lodge. His sister and Keesha Davis picked him up from there in her tan Tahoe and gave him a ride home to his grandmother's house at 320 Howard, where he was staying. He got there between 6 and 6:30. He did not go anywhere that night. The next morning, he was picked up by his sister and dropped her off at work so he could use her car to drive his son to a haircut. His sister's children were in the car, and he dropped them off at Allen's house when he picked up his son for the haircut. At Allen's house, Swan answered the door, and the defendant also saw Allen and her brother, Leonard Hill. The defendant, Hill, and the boy all left the house and drove off in the Tahoe. They were pulled over about three minutes later. The police took him to an interrogation room and read him his rights. He told them that he understood his rights, and that he didn't want to speak with them and wanted a lawyer. He never made any statement that he took Wassner's purse.

¶ 18 On cross-examination, the defendant was confronted with his testimony at the suppression hearing, during which he had testified that on December 24, 2008, he was living with Allen at 1233 Benton. The State also called, in rebuttal, Gambini and Redmond to testify that the defendant had spoken with them on December 24 and had confessed to taking the purse.

¶ 19 In its closing argument, the State emphasized the difference between the defense's version of events and the version given by the police and the victim, and argued that the credibility of the defense witnesses was low because of their relationship to the defendant and their prior inconsistent

statements. The defense argued that the police account could not be believed because it was not supported by anything: there was no recording of the interviews with Allen and the defendant; there were no written versions of the statements supposedly given during those interviews; and there was no signed consent for the search of 1233 Benton. The defense also played up the consistency of the accounts provided by its witnesses.

¶ 20 During its deliberations, the jury sent out two notes. The first one read, “There is the assumption that information was not present because it was not helpful or necessary. I questioned the truthfulness of the officers who said they were allowed to enter a home where stolen goods were in plain sight. Are there reasons why or times when an attorney might not include information that may seem to be helpful to the case.” The second note read, “Once a topic has been introduced by one of the attorneys or their witnesses, can the opposing attorney or witnesses walk through that open door by responding or refuting? Ex [*sic*] - when the officers asserted they were given verbal (not written permission) to enter 1233 Benton, could the defense have disputed that permission?” After conferring with both sides’ attorneys, soliciting suggestions on the wording of the response, and getting both sides’ approval of the wording, the trial court sent the following instructions to the jury in response to both notes: “You have received the evidence that you are to consider. You are not to concern yourselves with, or speculate on[,] matters not presented and not in evidence. Confine your deliberations to the evidence, which consists only of the testimony of the witnesses and the exhibits which the court has received.” The jury found the defendant guilty.

¶ 21 The defendant filed an initial and an amended posttrial motion. On June 10, 2010, the trial court denied the posttrial motion and sentenced the defendant to 12 years’ imprisonment. The defendant filed a timely appeal.

¶ 22

ANALYSIS

¶ 23 The sole issue the defendant raises on appeal is the lack of cross-examination of the State's police witnesses about the fact that the victim was the ex-wife of a Rockford police officer. The defendant blames two people for this lack: the trial court, which he contends should have denied the State's motion *in limine* outright instead of reserving ruling; and his attorney, who he contends was ineffective for failing to attempt such cross-examination. We consider each alleged source of error in turn, beginning with the trial court.

¶ 24 As noted above, the trial court neither granted nor denied the State's motion *in limine* pertaining to the ex-wife status of the victim, but "reserved ruling" on it, stating that it would not allow such cross-examination without its advance permission relating to the specific witness being examined. The State argues that, because the trial court did not grant the motion and indicated that it would permit such cross-examination under some circumstances, the defendant cannot complain of the ruling. We find merit in the State's argument.

¶ 25 Evidentiary motions such as motions *in limine* are within the trial court's discretion, and we will not reverse absent an abuse of that discretion. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). Generally, relevant evidence—evidence that tends to make the existence of any fact material to the determination of the case either more probable or less probable—is admissible. *Id.* However, a trial court may exclude evidence on the grounds of irrelevancy if it "has little probative value due to its remoteness, uncertainty, or possibly unfair prejudicial nature." *Id.*

¶ 26 In this case, the trial court expressed doubt that the subject of the cross-examination at issue—the victim's former status as one of their colleague's spouses—was relevant to the defendant's guilt or innocence, and effectively told the defendant that he could not cross-examine

the police witnesses about it unless the defendant could show how that information affected the police witnesses' conduct of the investigation. However, the court left the door open for the defendant to pursue this line of questioning if he wished, so long as he followed a specified procedure. It is undisputed that, at trial, the defendant's attorney never indicated to the trial court that it wished to cross-examine any of the State's witnesses about this topic. This failure to even attempt such cross-examination cannot be blamed on the trial court, which explicitly permitted the further exploration of such cross-examination in the context of each witness's testimony. Indeed, in his brief on appeal, the defendant admits that "the jury never heard that a police detective's ex-wife and small daughter had been the victims of this offense" because his own counsel "never followed through with this." Because the defendant's attorney's failure to seek the cross-examination at issue was the sole effective cause for the evidence not being heard by the jury, we reject the argument that the trial court abused its discretion in reserving ruling on the motion *in limine*.

¶ 27 We therefore turn to the issue of whether the defendant's attorney was ineffective in failing to pursue the cross-examination at issue. Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant arguing ineffective assistance of counsel must show not only that his counsel's performance was deficient but that the defendant suffered prejudice as a result. *People v. Houston*, 226 Ill. 2d 135, 143 (2007). Under the two-prong *Strickland* test, "a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been

different.” *Houston*, 226 Ill. 2d at 144. Because a defendant must satisfy both prongs of the *Strickland* test, the failure to establish either is fatal to the claim. *Strickland*, 466 U.S. at 687.

¶ 28 In this case, the defendant cannot meet the prejudice prong of the test. Even if the defendant’s attorney’s failure to attempt cross-examination on the subject of the victim-police relationship could be held to be deficient performance rather than a deliberate and reasonable trial strategy, and even if such cross-examination could have led the jury to wholly discount the police witnesses’ testimony on every point where a credibility determination was involved, there was substantial independent evidence that established the defendant’s guilt. Wassner testified that on December 23, 2008, her purse was taken by a man, and she identified the defendant (both in court and in a photo array) as the man who took it. Allen and Peyton, the defendant’s fiancé and sister, testified that they took Peyton’s Tahoe when they went shopping that evening, and the store clerk reported that the group of women who had presented an invalid check drawn on Wassner’s checking account got into a vehicle bearing license plates registered to Peyton. Wassner’s purse was later found at Allen’s home. All of this is strong direct and circumstantial evidence of the defendant’s guilt. By contrast, the primary witnesses presented by the defense—Allen, Peyton, and the defendant—had their own credibility undermined by their prior criminal records and their prior inconsistent statements at the suppression hearing. Moreover, the defense account that Swan brought the purse to Allen’s home was weakened by the fact that Wassner’s purse was stolen by a man, and the defense offered no explanation as to how Swan could have acquired it. Given the weight of the evidence favoring the State even absent all of the police testimony, we find that there is no reasonable probability that the result would have been different if the defendant’s attorney had

pursued the cross-examination at issue. Accordingly, the attorney's failure to pursue that cross-examination was not ineffective assistance.

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Winnebago County.

¶ 30 Affirmed.