

No. 1-11-3361

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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. 09 CR 21812
)	
NARCISCO GATICA,)	Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 **Held:** In opening statement before jury, trial counsel's promise of testimony from witnesses – defendant and alibi witness – who then did not testify, did not constitute ineffective assistance where evidence of defendant's guilt was so overwhelming that it nullified any prejudice.

¶ 2 Following a jury trial, defendant Narcisco Gatica was convicted of first degree murder and aggravated battery with a firearm and was sentenced to consecutive prison terms of 75 and 15 years. On appeal, he contends that trial counsel rendered ineffective assistance by giving an opening statement promising the jury that it would hear witnesses – an alibi witness and defendant– who then did not testify. We affirm.

¶ 3 Background

¶ 4 Defendant Narcisco Gatica and codefendant Berly Valladares were charged with first degree murder of Francisco Valencia, and aggravated battery with a firearm against Daisy Camacho, both allegedly committed on or about November 1, 2009. Gatica allegedly discharged the firearm causing Valencia's death. Following a separate jury trial, codefendant Valladares was convicted of first degree murder and aggravated battery with a firearm and sentenced to consecutive prison terms of 55 and 15 years. We affirmed. *People v. Valladares*, 2013 IL APP (1st) 112010.)

¶ 5 Gatica filed a motion to suppress his post-arrest statement, alleging that the two detectives who were questioning him in a recorded interview room removed him from the room and threatened to deport family members if he did not give a statement. At the motion hearing, Gatica testified to the unrecorded threat, with no testimony that the detectives provided details of the crime to use in his statement, while police detective John Valkner denied that he or Detective Michael Landando threatened Gatica. The court denied the motion to suppress.

¶ 6 Discovery included Gatica's disclosure that he "may" rely on an alibi defense provided by David Lagunas and that defendant "at the time of the shooting was nearby the shooting scene, on the street outside of where the shooting occurred, and within hearing distance of the shooting." Gatica subpoenaed Lagunas for trial, and during the motions in limine the defense disclosed that Lagunas would testify to seeing defendant pass by Lagunas's home at 525 North Pine Avenue, Chicago – several miles from the shooting scene at 1752 North Rockwell Street ("the premises") – and that nobody else was present to see Gatica.

¶ 7 Before opening statements, the jury was admonished that opening statements are "statements by the attorneys as to what they expect the evidence will show." Defense counsel gave an opening statement arguing that Gatica was a gang member trying to "drift away" from

the gang at his family's behest because he had been shot previously. But, Gatica "was asked to come out again by his fellow gang members who he had known the majority of his life and just party. It was Halloween. You will hear from the stand his reaction to this and why he felt he had to go." Counsel also argued police took clothing from Gatica which did not resemble the shooter's clothing as seen on video, and that Gatica's family would testify that he did not own a hooded sweatshirt like the shooter wore. Counsel referred to Gatica being "seen in another direction by an impartial witness who doesn't even want to come to court *** because of his fear of gangs." Counsel argued that Gatica gave a statement "after hours and hours and hours and hours" of questioning and because, outside the videotaped interview room, police threatened immigration enforcement against members of his family. Counsel argued that Gatica admittedly "isn't the most special person in the world. As a matter of fact, he said that one of the reasons – he will tell you from the stand – he originally joined the gang was because of the fact it was money. Nobody thought of him special enough to push him through school." Counsel argued that gang members would testify against Gatica without fear of reprisal because the gang felt no loyalty to a man who was trying to leave the gang. Counsel argued that Gatica "will tell you what he did. He tried to crash a party. He left and decided to go home."

¶ 8 Jacqueline Ibarra testified that she rented the premises to throw a birthday party for her boyfriend Marco Rios on Halloween 2009. The party, by invitation, began about 10:30 p.m. Most of the guests came in costume. Invited guests included Daisy Camacho, who came to the party with Valencia. Around 12:30 a.m., Ibarra noticed three uninvited young men, all wearing dark "hoodies" and one with long hair, at the party; she had never seen them before. Ibarra and Rios asked them to leave. The men lingered briefly, and were escorted out without incident. Some time later, Ibarra heard "popping noises." She then saw guest Alejandro Sanchez carrying Camacho inside, bleeding from her neck. Ibarra went outside and saw Valencia sitting against a

wall and bleeding; Ibarra called for an ambulance. Later that morning, she viewed a photographic array from which she identified the long-haired man who had attended her party uninvited. Marco Rios testified consistently with Ibarra: after escorting the three uninvited men from the party, he heard gunshots. He ran outside and saw Camacho bleeding from her neck and Valencia holding his chest. When he viewed a photographic array, he identified one of the men who had attended the party uninvited. Gatica was not identified by Ibarra or Rios.

¶ 9 Alejandro Sanchez testified that he arrived at the party around 1 a.m. expecting to meet Camacho and Manuel Molina. Before leaving his car, he saw a group of men standing near the premises, all wearing "hoodies," but did not see them as he walked towards the premises. He called Molina to open the locked side gate and was walking down the gangway with Molina, Camacho, and Valencia when he heard four to six gunshots coming from the gate. He immediately saw that Camacho and Valencia had been shot, and he carried Camacho inside. Sanchez saw the shooter, wearing a dark hooded sweatshirt, but was unable to identify him.

¶ 10 Daisy Camacho testified that she attended the party because Ibarra and Rios were her high school friends, and Valencia attended with Camacho because they attended university together. Camacho testified consistently with Sanchez regarding the events leading up to her being shot. She heard the shots but did not see the shooter.

¶ 11 Eduardo Villanueva testified that he lived at 1840 North Rockwell. At about 1 a.m., he was on his porch when he saw five persons walking southward on Rockwell, in the direction of the premises. Villanueva noticed them partly because they all wore sweatshirts with hoods up, obscuring their faces. He went inside when the group passed out of view. Villanueva was in his living room when he heard five gunshots from the south. He went outside, and saw a man walking north on Rockwell towards him, wearing "a dark hoodie with the hood pulled down" obscuring his face. When the man, who Villanueva identified as defendant, passed within a few

feet of him, they stared at each other for several seconds. As they stared, Gatica "was fumbling around in his hoodie." Gatica then hunched down near the stairs of a apartment building two lots north of Villanueva's home and was "once again fumbling with something," followed by the sound of "metal hit[ting] metal" before Gatica continued north on Rockwell. Villanueva identified Gatica as the man he saw on the street in a photographic array a day after the shooting and in a lineup a few days later. Villanueva denied being a member of the Maniac Latin Disciples (MLD) gang in the neighborhood or, of any other gang.

¶ 12 Eliezer Contreras testified that he was a member of the MLD gang and so was Gatica, whom he knew for over a decade. "Billy," another MLD member and a friend of Contreras, had possession of the MLD's guns. In the early evening of Halloween, Contreras was with Billy when he received a telephone call and also when Billy went to meet fellow gang member Rafael Martinez and others near the premises. Contreras noted that there was a party at the usually-unoccupied premises and that there were security cameras nearby. Contreras and others went to the back of the premises by the alley in an unsuccessful attempt to enter by the locked back door, while Gatica and Billy were in front with others. Contreras and most of the others, including Gatica, obscured their faces due to the cameras. Contreras saw Gatica produce a gun and fire it at the premises, then flee northward while Contreras and those behind the premises fled southward. Contreras later identified photographs of Gatica and Billy. On cross-examination, Contreras testified that the gang was threatening him, though not his family, for his cooperation. He also testified that Billy was supposed to release guns to MLD members on gang business, such as the presence of rival gang members or non-MLD drug dealers in MLD "territory." Contreras said he saw no rival gang members at the premises. But, on further examination, he admitted that disrespect of an MLD member by anyone, whether or not affiliated with a gang, is a basis for releasing a gun.

¶ 13 Dr. Valerie Arangelovich, who conducted Valencia's autopsy, testified that Valencia died from multiple gunshot wounds – one bullet passed through his arm and entered his chest, and another passed through his body from back to front – and that she recovered one bullet from his body.

¶ 14 Police officer Michael Fergus testified that he responded to the report of a shooting at the premises, 1844 North Rockwell, and saw a 9-millimeter pistol under the porch. Forensic investigator Joseph Dunigan testified that he examined the premises after the shooting and found five fired shell casings on the neighboring front yard, and a fired bullet and two bullet fragments in the gangway. A little over a block away, at 1844 North Rockwell, Dunigan recovered a 9-millimeter pistol under the porch.

¶ 15 The parties stipulated that the bullets and shell casings recovered from the scene and the bullet removed from Gatica's body were fired from the recovered gun. The parties also stipulated that (i) no fingerprints suitable for comparison were found on the gun, and (ii) DNA testing of the gun found the DNA profiles of at least three persons, and neither Gatica nor codefendant could be excluded as one of those persons, and that generally about one in two unrelated individuals could not be excluded as one of those persons.

¶ 16 In addition, the parties stipulated that three video cameras recording that night were aimed at the sidewalk and area in front of the premises, the gangway between the premises and 1754 North Rockwell, and the alley behind the premises.

¶ 17 Police detective Michael Landando testified that he was assigned to the case on November 2 and reviewed reports and the video of the premises. He and other officers concentrated their investigation on the MLD gang because the neighborhood around the premises was MLD "territory" and Martinez, an MLD member, was identifiable on the video. Detective Landando interviewed several MLD members as well as Villanueva. Gatica had been arrested by

the morning of November 3, and Detectives Landando and John Valkner interviewed him for about two or three hours.

¶ 18 Excerpts of a recording of the interview were played for the jury. In his statement, Gatica initially asserted that he was drinking with friends elsewhere in the neighborhood and had no gun that night. When the detectives accused him of lying, he claimed that Billy gave him a gun that he then disposed of or hid near "Rockwell and *** by the bridge" (Bloomingdale Avenue, which has a rail viaduct on one side, is at 1800 North) but denied that he fired it. Eventually, he admitted to shooting at the premises because he believed there were "gangbangers" at the party due to one partygoer's clothing.

¶ 19 On cross-examination, Detective Landando testified that Gatica was in custody at the police station for about 20 hours following his arrest, during which time he saw no visitors. Detective Landando made several attempts to call Gatica's girlfriend at his repeated request, but she did not answer. Detective Landando was certain that no other officers interviewed Gatica, other than to ask whether he wanted food or the like, because by law interviews must be recorded. Gatica left the interview room three or four times, twice when he asked to use the restroom, and once to make a telephone call, and either Detective Landando or Valkner accompanied him each time.

¶ 20 During the interview, Gatica said that "he was called out for Halloween" by his gang. When Detective Landando viewed the video from the premises, it was "grainy" and neither Gatica's face nor clothing could be identified. But, when Gatica initially denied that he was the shooter and suggested that the premises video would bear him out, Detective Landando told him that he recognized him in the video. While Gatica had indicated that a certain hooded sweatshirt with a panther or other animal on it was the one he was wearing, Detective Landando found the

premises video at the front was so indistinct that he could not "determine what is on anybody's clothing."

¶ 21 Gatica's girlfriend Rebecca Bustamante testified for the defense that she was present when Gatica was arrested at home on November 2. She said police took from the home two sweaters including a blue sweater and another with a tiger on it. After his arrest, Gatica phoned Bustamante to ask her to come with their baby to the police station, which she did. Bustamante waited at the station for about six hours. Gatica did not see his child.

¶ 22 Gatica's mother Felicitas Gatica testified that she was an undocumented alien.

¶ 23 After the court admonished him regarding his right to testify and granted a brief recess for consultation with defense counsel, Gatica chose not to testify.

¶ 24 Following closing arguments, the jury was instructed on the law, including that "[o]pening statements are made by the attorneys to acquaint you with the facts they expect to prove" and that "[n]either opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded." The jury found Gatica guilty of first degree murder and aggravated battery with a firearm, and that he personally discharged a firearm causing death.

¶ 25 In his unsuccessful post-trial motion, Gatica raised no allegations of ineffective assistance of trial counsel. He argued in relevant part that the court erred in denying his motion to suppress and in not allowing him to elicit that his mother had been threatened with deportation. Gatica was sentenced, and this appeal timely followed.

¶ 26 Analysis

¶ 27 On appeal, Gatica contends that trial counsel rendered ineffective assistance by giving an opening statement promising the jury that it would hear witnesses – an alibi witness and Gatica – who then did not testify.

¶ 28 To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (i) counsel's performance was objectively unreasonable under prevailing professional norms and (ii) the deficient performance caused prejudice to and affected the outcome of the trial. In other words, showing a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different. *People v. Domagala*, 2013 IL 113688, ¶ 36.

¶ 29 Counsel's failure to produce testimony that has been promised during opening statements can be particularly damaging to a defendant's case. Still, the failure to provide testimony or evidence promised during the opening statement is not per se ineffective. While it may constitute ineffectiveness, it may also be that counsel made a decision during trial to abandon a strategy that, under the circumstances, was reasonable; for instance, warranted by unexpected events. *People v. Domagala*, 2013 IL 113688, ¶ 36. It is now established that decisions regarding whether to call a certain witness, what evidence to present, and what theory of defense to pursue are matters of trial strategy that rest with the defense counsel. See *People v. Enis*, 194 Ill. 2d 361, 381 (2000). Thus, "the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *People v. Smith*, 195 Ill. 2d 179, 188 (2000). "Matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *Id.* A defendant may overcome the "strong presumption" if counsel's decision seems so irrational and unreasonable that no reasonably effective defense attorney facing similar circumstances would pursue the strategy. *People v. Jones*, 2012 IL App (2d) 110346, ¶ 82.

¶ 30 Taking all factual assertions as true, we conclude Gatica failed to overcome the strong presumption that his defense counsel's decision to hold off calling the alibi witness and defendant to the stand was other than a sound trial strategy. While we lack the benefit of knowing why defense counsel changed tactics, our review of the record demonstrates that defense counsel's

performance was not so irrational and unreasonable that no reasonably effective defense attorney would have pursued such a strategy.

¶ 31 Regarding the so-called promise that an alibi witness would testify, the pertinent portion of defense counsel's opening statement reveals she made no promise,

Defense Counsel: The second problem becomes this: We will believe [sic] there is evidence—because gunshots at that time of night or morning or whatever you want to call it are loud— that Mr. Gatica was seen in another direction by an impartial witness who doesn't even want to come to court.

Prosecutor: Objection.

Court: Overruled.

Defense Counsel: Who doesn't even want to come to court because of his fear of gangs, because of his fear of reprisals, when, in fact, the shots were being fired***.

¶ 32 Saying Lagunas "doesn't even want to come to court," which defense counsel says twice, rather than a promise, suggests the alibi witness will be unavailable to testify.

¶ 33 Furthermore, we find Gatica cannot establish prejudice from counsel's references to either the alibi or defendant's testimony in the opening statement because the evidence of Gatica's guilt was overwhelming.

¶ 34 Assuming arguendo that had Gatica testified as described in the opening statement, the jury would have given credence to the theories that Gatica gave a statement because detectives threatened his family with deportation and that the MLDs were aware that he intended to "drift away" from the gang, the most persuasive and damaging evidence remains unscathed: (i) Gatica's statement admitting to firing and disposing of the gun, (ii) the testimony of Contreras that he saw Gatica fire a gun at the premises, (iii) the forensic firearm evidence linking Gatica by

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Villanueva's testimony, (iv) the absence of any evidence linking Villanueva to the MLDs or any other gang, and (v) the testimony of Villanueva firmly placing Gatica near the scene of the murder and tying the murder weapon to Gatica and corroborating both Gatica's statement and Contreras's eyewitness testimony. Not only could the jury reasonably deem this credible inculpatory evidence, but also, Gatica has not shown a reasonable probability that the result would have been different.

¶ 35 Accordingly, the judgment of the circuit court is affirmed.

¶ 36 Affirmed.