

No. 1-12-1325

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(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	98 CR 08314
)	
HARLAND McDOWELL,)	Honorable
)	William H. Hooks,
Defendant-Appellee.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not commit manifest error by granting the defendant's postconviction petition for a new trial, because the record showed that defendant received ineffective assistance of appellate counsel when appellate counsel failed to argue that defendant received ineffective assistance of trial counsel when trial counsel failed to object to an erroneous instruction on assessing eyewitness identification testimony and trial counsel failed to object to an inflammatory closing argument.
- ¶ 2 In this appeal from the trial court's order granting Harland McDowell's postconviction petition for a new trial on a murder charge, the State argues that the evidence does not support the

trial court's finding that McDowell's trial and appellate counsels provided ineffective assistance. In particular, the State claims that the trial court based its finding of ineffective assistance of counsel on law that did not take effect until some years after McDowell's trial. We find that the trial court correctly relied on authority that predated McDowell's trial. Because the record of the trial and the evidence presented at the hearing on the postconviction petition support the conclusion that trial and appellate counsels provided ineffective assistance, we affirm the trial court's judgment.

¶ 3

BACKGROUND

¶ 4 At approximately 3 p.m., on February 27, 1998, bullets tore into Eric Washington as he stood on a street on Chicago's south side. Washington died from the gunshot wounds. Two eyewitnesses identified McDowell, in a lineup, as the shooter. A grand jury indicted McDowell for murder.

¶ 5 At the trial, held in 1999, Dwayne Dennis testified that he and Washington, a member of the Blackstones, were fixing a car when a red Ford Tempo and a blue Chrysler drove up. A man got out of the Tempo and started walking toward Washington while shooting him. The shooter came within six feet of Dennis before Dennis turned and ran to a nearby gangway. Dennis told police that the gunman, who wore a hood and a hat, had a light complexion and braided hair, and he stood between 6'1" and 6'3" tall. Dennis identified McDowell as the man he saw shooting Washington, although McDowell was only about 5'10" tall. Dennis had never seen McDowell prior to the shooting.

¶ 6 Robert White testified that when he heard a gunshot on February 27, 1998, he went to the window where he saw two men leaving their cars, a red Ford Tempo and a blue Chrysler. Both men shot Washington. The two shooters looked at each other and laughed. White told police that the man from the Tempo stood about 6'1," had a light complexion, and was dressed all in black. White

identified McDowell as the man from the Tempo he saw shooting Washington. White did not know McDowell prior to the shooting.

¶ 7 A detective testified that McDowell told him that he belonged to the Gangster Disciples. An officer testified that the Blackstones controlled the neighborhood where the shooting took place. According to the officer, the Gangster Disciples counted Blackstones as rivals. Defense counsel objected to the gang-related evidence, and the court noted counsel's continuing objection to all evidence concerning gangs.

¶ 8 Defense counsel presented no witnesses on McDowell's behalf. At the instruction conference, defense counsel did not object to the State's proffered instruction on identification evidence. The instruction explained to the jury:

“When you weigh the identification testimony of a witness you should consider all the facts and circumstances in evidence including but not limited to the following:

The opportunity the witness had to view the offender at the time of the offense or the witness' degree of attention at the time of the offense or the witness' earlier description of the offender or the level of certainty shown by the witness when confronting the defendant or the length of time between the offense and the identification confrontation.”

¶ 9 The prosecutor expounded at length, in closing argument, on gangs and retaliation, "where

cold blooded murder is nothing but a sport in the form of drive by shootings." Defense counsel did not object to any of the closing argument about gangs.

¶ 10 The prosecutor also discussed the identification instruction, and said:

“I want to point one thing out there[,] that in between each and every paragraph there’s an or. It doesn’t say and, so even if you find that one of these might not be there but the other one is, that’s okay because they say or.

There only needs to be one there.”

Again, defense counsel did not object.

¶ 11 The jury found McDowell guilty of murder. The court sentenced him to 45 years in prison. On the direct appeal, appellate counsel argued that the court should not have admitted the gang-related evidence, and improper arguments in closing prejudiced McDowell. This court affirmed the conviction and sentence. *People v. McDowell*, No. 1-99-1858 (2001) (unpublished order under Supreme Court Rule 23). With regard to the comments on gangs, the court on the direct appeal said:

“We agree with the defendant that the State’s rhetoric was inflammatory. The prosecutor’s discourse on street gangs suggests an attempt to put gangs, rather than the defendant, on trial. *** We do not need to decide whether the above passage went beyond the ‘wide latitude’ [citation] given to the prosecution in closing, however, because the defendant did not object and has waived the issue.”

¶ 12

Postconviction Petition

¶ 13 In 2002, McDowell filed his postconviction petition. After amendment, he alleged in his petition that his trial counsel provided ineffective assistance because counsel failed to object to the identification instruction and present a correct identification instruction, and because counsel failed to object to the prosecutor's extended discussion of gangs in closing argument. McDowell alleged in his petition that he also received ineffective assistance of appellate counsel because appellate counsel failed to raise on appeal the issue of whether McDowell received ineffective assistance of trial counsel, in that trial counsel failed to challenge the erroneous identification instruction and trial counsel failed to object to improper closing argument.

¶ 14 After appointing counsel to assist McDowell with his postconviction petition, the trial court granted the State's motion to dismiss the petition. The appellate court reversed the dismissal and remanded the cause for an evidentiary hearing on the postconviction petition. *People v. McDowell*, No. 1-09-0326 (2010) (unpublished order under Supreme Court Rule 23). In its order, the appellate court explained that our supreme court found that the trial court in *People v. Herron*, 215 Ill. 2d 167, 191 (2005), committed plain error by giving an identification instruction identical to the instruction used in this case. The instruction in *Herron*, like the instruction here, listed the factors the jurors should consider for assessing eyewitness identification testimony under Illinois Pattern Jury Instructions, Criminal, No. 3.15 (3d ed. 1992) (hereinafter IPI Criminal 3d No. 3.15), with "or" inserted between the factors. The appellate court said:

"Trial counsel here did not challenge the plain error the trial court committed when the court gave the instruction with 'or' between the

factors.

* * *

*** [T]he Committee Notes and User's Guide to the pattern instructions, together with the sample and the supporting case law, all show that the trier of fact must consider all of the applicable factors. We agree with Harland that an attorney may provide ineffective assistance if he fails to read and consider the Committee Notes, sample instructions and supporting case law when faced with a proposed jury instruction. See *Lotero v. People*, 203 Ill. App. 3d 160, 163 (1990); *Amador v. Quarterman*, 458 F.3d 397, 410 (5th Cir. 2006) (Counsel has a duty to research the applicable law). ***

Appellate counsel's failure to raise on direct appeal the issue of trial counsel's ineffective assistance constitutes ineffective assistance of appellate counsel only if raising the issue would have created a reasonable probability that Harland could have obtained a reversal of his conviction. Here, the conviction hinged on the identification testimony of two eyewitnesses who saw the shooter briefly, under a hood, in moments of great stress. Neither witness knew Harland. Both witnesses described the shooter as appearing to be 6'1" or taller, while Harland stood only 5'10." In *People v. Piatkowski*, 225 Ill. 2d 551, 570 (2007), our supreme court held that

an improper use of IPI Criminal 3d No. 3.15, with 'or' inserted between the factors, required a new trial, 'particularly where the witnesses were only able to view the suspect for as little as a few seconds, did not previously know the suspect, [and] some discrepancies existed in their prior descriptions' of the offender.

Here, the same factors lead us to conclude that Harland has alleged sufficient facts to require an evidentiary hearing to determine whether appellate counsel provided ineffective assistance when counsel failed to raise on appeal the issue of whether trial counsel provided ineffective assistance by failing to propose a proper identification instruction and by failing to object to the State's erroneous instruction.

*** Harland now contends that his appellate counsel provided ineffective assistance because appellate counsel failed to argue that Harland received ineffective assistance of trial counsel when trial counsel failed to object to the prosecutor's inflammatory closing argument.

*** While the failure to object to the comments, considered in and of itself, may not amount to ineffective assistance of counsel,

we find that competent appellate counsel should have raised the failure to object to these comments, together with trial counsel's other failings, as indications of ineffective assistance of trial counsel. If appellate counsel had raised ineffective assistance of trial counsel as an issue on the direct appeal, this court may well have reversed the conviction. Accordingly, on remand, the trial court must address the issue of whether Harland received ineffective assistance of appellate counsel because appellate counsel failed to argue that trial counsel provided ineffective assistance by failing to object to an improper instruction and by failing to object to inflammatory closing argument."

Evidentiary Hearing

¶ 15 At the hearing on remand, trial counsel explained that he believed his continuing objection to gang-related evidence sufficiently preserved his unvoiced objections to the inflammatory diatribe concerning gangs in the State's closing argument. In regard to the identification instruction, trial counsel testified that, "[i]f you look too quickly at it," the State's proffered instruction, which the trial court gave to the jury, appears to comport with the pattern instructions. Trial counsel admitted that "a careful reading shows" that the court's instruction did not comply with the pattern instructions. While counsel did not remember why he did not object to the erroneous instruction, he said he "never saw the instructions as prepared by the state until the instruction conference and then [he had only] a few moments to look them over."

¶ 16 Appellate counsel conceded that she had no strategic purpose for failing to argue ineffective assistance of trial counsel, and that if she noticed the problems, she would have argued that trial counsel provided ineffective assistance by failing to object to the erroneous identification instruction and by failing to object to the inflammatory closing argument.

¶ 17 The trial court held:

"Trial counsel's failure to object to the improper eyewitness-identification jury instruction was pivotal, where the instruction misstated the law, confused the jury and denied petitioner a fair trial. Further, trial counsel failed to submit a correct instruction and object during closing argument, when the prosecutor emphasized that jurors needed to find that only one of the factors listed favored the identification testimony, because the instruction included [or] between the listed factors. Moreover, counsel's testimony reveals that this decision was not based on trial strategy.

* * *

During the evidentiary hearing, trial counsel acknowledged that the gang argument was highly prejudicial. *** Counsel should have objected at the time of argument, despite previous objections. *** Thus, trial counsel's performance was deficient ***.

* * *

Here, appellate counsel's performance was deficient, where

she failed to raise the issue of trial counsel's ineffectiveness for failing to object to the improper eyewitness-identification jury instruction and failing to object to the prosecutor's overbroad inflammatory closing argument regarding gang evidence. *** [A]ppellate counsel's failures highly prejudiced the petitioner, where the appellate court noted that if both issues were properly raised on direct, petitioner's convictions likely would have been reversed on direct appeal. Moreover, appellate counsel testified at the evidentiary hearing that neither choice was strategic and acknowledged that if she could rewrite the appellate brief she would now raise both issues of ineffective assistance of [trial] counsel."

¶ 18 The trial court granted McDowell a new trial. The State now appeals.

¶ 19 ANALYSIS

¶ 20 In postconviction proceedings, the appellate court should reverse the trial court's decision to grant a new trial only if the trial court committed manifest error. *People v. Ruiz*, 177 Ill. 2d 368, 384 (1997). Our supreme court has defined manifest error as "clearly evident, plain, and indisputable" error. *Ruiz*, 177 Ill. 2d at 384-85.

¶ 21 The State argues first that the trial court did not apply the law in effect at the time of trial when it determined that trial counsel provided ineffective assistance by failing to object to the erroneous identification instruction, and that appellate counsel provided ineffective assistance by failing to argue ineffective assistance of trial counsel. The trial court relied on the pattern

instructions in effect at the time of trial, and the cases cited in those instructions, all decided well before the trial. As trial counsel admitted, if he had read the pattern instructions and accompanying materials carefully, he would have recognized the error in the instruction the court gave. And appellate counsel admitted that she would have raised the instruction issue had she recognized it. The law regarding the eyewitness identification instruction has not changed since the time of trial in 1999. See *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *People v. Slim*, 127 Ill. 2d 302, 308 (1989); *People v. Manion*, 67 Ill. 2d 564, 571 (1977). The State submitted, and the trial court gave the jury, an improper and misleading instruction that did not conform to the pattern instructions. Trial and appellate counsels gave no strategic explanation for their failure to raise the instruction issue.

¶22 As the appellate court said in the order reversing the dismissal of the postconviction petition:

"[T]he conviction hinged on the identification testimony of two eyewitnesses who saw the shooter briefly, under a hood, in moments of great stress. Neither witness knew Harland. Both witnesses described the shooter as appearing to be 6'1" or taller, while Harland stood only 5'10." In *People v. Piatkowski*, 225 Ill. 2d 551, 570 (2007), our supreme court held that an improper use of IPI Criminal 3d No. 3.15, with 'or' inserted between the factors, required a new trial, 'particularly where the witnesses were only able to view the suspect for as little as a few seconds, did not previously know the suspect, [and] some discrepancies existed in their prior descriptions' of the

offender.' "

¶ 23 Under *Piatkowski*, we find that the trial court did not commit manifest error when it ordered a new trial because of the instruction error.

¶ 24 The State also contends that the failure to object to the closing argument cannot show ineffective assistance of trial counsel, because the appellate court in the direct appeal held that the closing argument did not require reversal of the conviction. *McDowell*, No. 1-99-1858. As the appellate court said in the postconviction appeal,

"While the failure to object to the comments, considered in and of itself, may not amount to ineffective assistance of counsel, we find that competent appellate counsel should have raised the failure to object to these comments, together with trial counsel's other failings, as indications of ineffective assistance of trial counsel. If appellate counsel had raised ineffective assistance of trial counsel as an issue on the direct appeal, this court may well have reversed the conviction."

¶ 25 Again, appellate counsel had no strategic reason for failing to raise the issue of ineffective assistance of trial counsel. Trial counsel testified that he believed his continuing objection to gang-related evidence preserved an objection to inflammatory closing argument about gangs. The appellate court in the direct appeal, and the trial court in this postconviction proceeding, found trial counsel's belief mistaken. The trial court did not commit manifest error by granting McDowell a new trial on grounds that appellate counsel provided ineffective assistance by failing to argue

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ineffective assistance of trial counsel, in that trial counsel failed to object to the erroneous identification instruction and trial counsel failed to object to the inflammatory discussion of gangs in closing argument.

¶ 26

CONCLUSION

¶ 27 Trial counsel failed to object to a misleading instruction that did not conform to pattern instructions, and trial counsel failed to object to inflammatory closing argument. Counsel for the direct appeal failed to raise these failings of trial counsel as grounds for finding that McDowell received ineffective assistance of counsel. Neither trial counsel nor appellate counsel had strategic reasons for their failings. Accordingly, we find that the trial court did not commit manifest error when it granted McDowell a new trial.

¶ 28 Affirmed.