2013 IL App (2d) 120714-U
No. 2-12-0714
Order filed December 17, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSEPH J. MURRAY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 10-CF-88 Honorable George Bridges, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Trial counsel was not ineffective for failing to challenge the trial court's ruling that a State witness could not exercise her privilege against self-incrimination. Affirmed.

¶ 2 Defendant, Joseph J. Murray, was convicted of three counts of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and sentenced to 52 years' imprisonment. On appeal, defendant argues that: (1) the trial court erred where it instructed a witness that she could not exercise her privilege against self-incrimination; and (2) defense counsel was ineffective for not challenging the error. For the following reasons, we conclude that defendant's argument regarding the trial court's alleged error is forfeited and his ineffective-assistance claim fails. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with shooting and killing Curtis Pride, Jr. on January 1, 2010. On November 29, 2010, prior to trial, the State informed the court that it had not, since the case was originally charged, been able to locate a witness named Jovon Bettis. However, on February 28, 2011, (the first day of trial) Bettis was present. The court verified with Bettis that she had been subpoenaed, and it instructed her that she would "be required to testify should they decide to call you in this matter here. So if you fail to appear when the State requires your presence, a body attachment or warrant will be issued. Do you understand?" Bettis answered that she understood.

¶ 5 Evidence at trial included testimony from the victim's son, Kedre Pride, that, on January 1, 2010, he was at his father's apartment at 2712 Galilee in Zion, when, around "lunchtime," he heard a knock on his ground-level, bedroom window (Pride's apartment was a basement apartment, accessed upon entering a building common area, walking down some stairs, and then arriving at the apartment door). Kedre saw an African-American man gesture for him to come to the door. The man was wearing a red coat with white writing across the chest, blue jeans, white shoes, and a hat that was black and white (or cream) with a design. The hat "came over your ears like springs that was connected to it. It had a little ball at the top." Kedre recalled the jacket as being a jacket, not a hooded sweatshirt, possibly with white sleeves and buttons. Kedre was shown a State exhibit and testified that the photograph depicted a person wearing the clothes and hat that he saw through the window. The photograph reflects a person wearing a black and white patterned hat that comes down over the ears and has a black ball on top and a red jacket or hooded sweatshirt with gold and white writing across the chest; however, the sleeves are red with possibly gold or white writing on them and it has a zipper, not buttons.

¶ 6 Kedre nodded to the person in the window and went to get Pride. Kedre saw Pride look through the blinds and then walk out of the apartment and into the common area. Kedre returned to his bedroom, assuming that Pride was going to sell marijuana. After the apartment door closed, Kedre heard one gunshot. Pride yelled, and Kedre heard another gunshot. Kedre ran to lock the apartment door and looked through the peephole. He saw the man from the window running out the common area front door. Kedre recalled that the man was still wearing the hat when he ran out the door. Kedre called 911.

¶ 7 In addition to Pride's body, police investigators found inside the common area: (1) one $20 bill; (2) fired projectiles; and (3) a black and white patterned winter knit hat, with a black ball on top and side tassels. On the hat, forensic scientist Kelly Lawrence obtained a DNA profile originating from more than one individual. The minor profile was unsuitable for comparative testing, but appeared to come from a female. For the major profile ("essentially the person who is there more than another person"), she obtained a full, 13-loci DNA profile which matched, at all 13 loci, defendant's DNA profile. According to Lawrence, this match would occur by chance in approximately one in 25.9 quadrillion unrelated African-Americans.

¶ 8 Unique Williams testified that she dated Pride and was in Pride's apartment on January 1, 2010. She left the apartment shortly before noon (around 11:45 a.m.), and there was no clothing on the floor in the common area.

¶ 9 Robin Wade testified that, on January 1, 2010, she worked at Midwest Regional Medical Center Hospital. Wade testified that she started dating defendant in January 2009, but he left town in April 2009. In June 2009, Wade dated and had a sexual relationship with Pride. Wade's relationship with Pride lasted only a couple of months. Defendant returned to town in November 2009, and Wade and defendant resumed their relationship. About two weeks later, around

Thanksgiving, Wade told defendant about her relationship with Pride. Defendant was upset, but initially appeared understanding. However, their relationship began to deteriorate in December 2009, and defendant became more focused on Pride. Defendant learned that Pride lived around the corner from Wade, and he became "very upset." A few days before New Year's Eve 2009, Wade had a conversation with defendant regarding an incident at the library between defendant and Pride. Defendant told Wade that he saw Pride, walked up to him, and asked him if he and Wade were still seeing each other, and Pride responded that he had not seen Wade since October. Defendant said something implying that Wade and Pride must have "gotten her story straight." Wade broke up with defendant on December 30, 2009. Wade identified a photograph of defendant taken at the Midwest Regional Medical Center Hospital's emergency room entrance. Wade testified that she recognized defendant in the photograph from his hat and the clothes he was wearing, *i.e.*, "the outfit I bought him." She did not, however, buy him the hat, which defendant already owned. The photograph is that from which Kedre identified the clothes that the shooter was wearing.

¶ 10 Jovon Bettis did not appear in court on March 1, 2011. The trial court noted that Bettis had been present on the first day of trial and that, although she had been instructed to "stay" and to return, she did not do so. Accordingly, it issued a body attachment with a $100,000 bond to secure her presence. The State disclosed that it had obtained a recorded telephone conversation that occurred the previous day between defendant and Bettis, wherein defendant essentially instructed Bettis to disappear and not return. Bettis then stated in the phone conversation that she would not return to court, and, in fact, was not present in court. The court listened to the recording, found that defendant had intimidated Bettis, and had, through his own wrongdoing, forfeited any opportunity to cross-examine her. Accordingly, the court granted the State's

motion (pursuant to 725 ILCS 5/115-10.7 (West 2010)) to admit a videotaped statement that Bettis gave to detective Gianni Giamburduca on January 6, 2010. Defense counsel asked whether the taped interview would be admitted if Bettis appeared, and the court said it would not yet address that issue.

¶ 11 Ultimately, Bettis arrived in court. The court noted that there was a body attachment on her, and the State noted that "there is a warrant for her arrest in a felony case pending."[1] Bettis was taken into custody on the body attachment and was called to the stand. Bettis testified that defendant is the father of her eldest child. On January 1, 2010, Bettis was at home in Waukegan with her brother, cousin, some friends, and defendant. She awoke at 12 or 1 p.m. When asked, "why did you wake up," Bettis answered, "I plead the 5th." The court excused the jurors, and the following exchange occurred:

> "COURT: Miss Bettis, I have already issued a body attachment, brought you back here. You came in here on a body attachment. Now you have decided to take the Fifth Amendment in front of my jurors.
>
> DEFENSE COUNSEL: I did not hear her do that. Did she say - -
>
> COURT: She said 'I take the Fifth.'
>
> DEFENSE COUNSEL: I did not hear that.
>
> BETTIS: I did not understand the question then.

[1] Apparently, Bettis had a pending felony charge for "misuse of credit cards." We presume, as the record does not reflect otherwise, that the charge was completely unrelated to the charges facing defendant.

COURT: I don't know what you meant. You said 'I take the Fifth.' I will tell you when I bring them back out here, you do not have the right to take the Fifth in this case here. You are already here on a body attachment, and if you do not answer the questions in this case you may be held in contempt of Court by refusing to answer the questions.

In that situation, you could be sentenced without the benefit of a trial, that is a jury, to the Lake County jail for up to six months. Now if the State asks you further questions, are you going to answer those questions?

BETTIS: Yes."

¶ 12 Bettis then testified that defendant woke her up on January 1, 2010, asking her to take him to get his baby from his aunt's house. Bettis drove defendant to an area around 27th and Galilee in Zion and pulled her car into an alley. Defendant got out of the vehicle, and Bettis remained in the car. Bettis testified that she did not see where defendant went. Defendant returned to the car, and he was wearing a black hooded sweatshirt, jeans, and a hat. Bettis was shown the photograph of the hat found at the scene; she initially testified that she did not recognize the hat nor recall signing the photograph, but later agreed that she signed the photograph with police on January 7, 2010, and that defendant was wearing the hat when he left the vehicle. Bettis testified that defendant was wearing the hat when he returned to the vehicle, but later testified that she did not remember. They then returned to Bettis's house. Bettis was shown another photograph and identified in the photo the clothes that defendant wore on January 1, 2010, when she drove him to 27th and Galilee.

¶ 13 Bettis recalled being interviewed by detective Giamberduca on January 7, 2010, and that the interview was videotaped. She did not recall telling Giamberduca that, while she was in the alley and after defendant left the vehicle, she heard gunshots. She denied that, when defendant

returned to the vehicle, he said, "Get me the fuck out of Zion. Get me out of Zion right now." She did not remember whether defendant said, "Dude robbed me. He stole from me. He had to go." Bettis also did not remember telling Giamberduca that: (1) when defendant returned to the car, he had everything except his hat; (2) defendant said, "Fuck, I left my fucking hat in the house," and (3) when defendant returned to her vehicle, she saw the "print" of a gun in his pants. Bettis agreed that, in their telephone conversation on February 28, 2010, defendant told her to disappear and that he said, "I told you from the jump to disappear," and "I'm trying to figure out why the fuck you came when I told you not to."

¶ 14 On cross-examination, Bettis agreed that, the night before the shooting, (New Year's Eve), she stayed in her apartment and drank alcohol and smoked marijuana. Between noon on December 31, 2009, and noon on January 1, 2010, Bettis drank approximately 12 drinks containing Henessey and gin. In addition, she smoked approximately 25 blunts (about four or five inches long) of marijuana. At noon on January 1, 2010, she was still "tipsy," but not drunk, and she was high.

¶ 15 Detective Giamberduca testified that, on January 7, 2010, he interviewed Bettis at the Zion police department. Based upon his observations and experience, Bettis did not appear to be under the influence of marijuana or alcohol at the time of the interview. Giamberduca was shown the photograph of defendant from the emergency entrance to the hospital. He testified that he showed the photograph to Bettis, that she identified defendant and said that defendant was wearing the same outfit on January 1, 2010, and that she and Giamberduca both signed the photograph. Further, Giamberduca testified that he showed Bettis the photograph of the hat that was recovered at the crime scene. She said that it was the hat that defendant wore on January 1, 2010, and both she and Giamberduca signed the photograph. Giamberduca testified that the

January 7, 2010, interview was videotaped, he had reviewed the tape, and it truly and accurately depicted the interview. The trial court admitted the tape and a portion of it (approximately two minutes in length) was shown to the jury.[2] This court reviewed that clip, in which Bettis states that she heard gunshots, defendant returned to the vehicle and told her to get him "the fuck out of Zion," that she asked him what happened and he said the "dude robbed me" and "had to go," and that she could see the outline of the gun in his pants. Further, Bettis states that, when he returned, defendant was missing his hat, and he said "Fuck, I left my fucking hat in the house."

¶ 16 On cross-examination, Giamberduca agreed that he first interviewed Bettis on January 6, 2010, and, at that time, she said she awoke at 2 or 3 p.m. on January 1, 2010, and then went shopping for a few hours. Between the first and second interviews, Giamberduca confronted Bettis with inconsistencies in her story, but he did not threaten her with criminal prosecution. At the end of the second interview, he asked Bettis whether she had been truthful, and she replied, "100 percent."

¶ 17 The State rested. Defense counsel made a perfunctory motion for a directed verdict, which the court denied. Defendant called Zachariah Pitts to the stand, who testified that he is Bettis's brother and was with defendant from December 31, 2009, through January 1, 2010. On January 1, 2010, when he woke up in the morning, Bettis was out shopping. She returned around 11 a.m. with groceries and an outfit for defendant. However, Pitts never saw defendant leave the apartment that day. At the time of trial, Pitts was serving a sentence for attempt armed robbery.

[2] The State introduced two versions of the taped interview: a full version (exhibit 55) and a short clip, approximately two minutes in length (exhibit 54). Both were admitted into evidence, however exhibit 54 is what was played for the jury.

¶ 18 Defendant called Faya Shiu, a private investigator, who testified that, on January 12, 2010, she met with Bettis. Bettis told Shiu that she was intoxicated and high on marijuana when she gave her statement to the police and that she told the police several times about her condition. Bettis could not remember what she told the police in her statement. Defendant rested.

¶ 19 The jury convicted defendant on three counts of first-degree murder and found that defendant personally discharged the firearm. Defendant's posttrial motion did not allege any error with respect to Bettis having been denied the right to exercise her privilege against self-incrimination. The trial court denied defendant's posttrial motion and sentenced him to 52 years' imprisonment. This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues that his rights to due process and a fair trial were violated where: (1) the trial court erroneously instructed Bettis that she could not invoke her privilege against self-incrimination; and (2) defense counsel was ineffective for failing to object to the error.

¶ 22 Defendant's first argument, that he was denied due process of law when the trial court erroneously denied Bettis the right to assert her privilege against self-incrimination, is forfeited. Defendant did not object on this basis either at trial or in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (objection both at trial and in a posttrial motion required to preserve an issue for appeal); see also *People v. Burton*, 399 Ill. App. 3d 809, 816 (2010) (failure to object at trial or in a posttrial motion results in forfeiture on appeal). Further, on appeal, defendant does not argue that the trial court committed plain error and, therefore, he forfeits

plain-error review.[3] See *People v. Legore*, 2013 IL App (2d) 111038, ¶ 58 (citing Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (points not argued are forfeited)).

¶ 23 Perhaps recognizing this forfeiture, defendant next casts the issue as one of ineffective assistance. Specifically, defendant argues that, assuming he has standing to raise an issue regarding Bettis's right to assert her privilege against self-incrimination,[4] trial counsel was ineffective for failing to object to the trial court's ruling, not requesting a mistrial, and not including the argument in a posttrial motion. We disagree.

¶ 24 To prevail on his ineffective-assistance claim, defendant must establish *both* that: (1) counsel's performance fell below an objective standard of reasonableness (performance prong); and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different (prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failure to establish either prong is fatal to an ineffective-assistance claim. *People v.*

[3] Even if defendant had not forfeited plain-error review, any claim thereunder would fail. As we explain in our ineffective-assistance analysis, the evidence against defendant was overwhelming. Therefore, the evidence was not so closely balanced that the jury's verdict could have resulted from the alleged error, as opposed to the evidence, nor was the alleged error so serious that defendant was denied a fair trial and the integrity of the judicial process was called into question. See *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005).

[4] In their briefs, the parties discuss at length the question whether defendant has standing to raise a claim regarding the denial of a witness's right to claim the privilege against self-incrimination. However, we do not answer that question because, as explained below, even if defendant has standing to raise the claim, his ineffective-assistance claim ultimately fails.

Henderson, 2013 IL 114040, ¶ 11. As to the performance prong, there is a strong presumption that counsel's performance fell within the wide range of reasonable assistance, and decisions are presumed to be the product of sound trial strategy, as opposed to incompetence. *People v. Alfaro*, 386 Ill. App. 3d 271, 312 (2008). Where there is no merit to an objection, it cannot be said that counsel was objectively unreasonable for refraining to assert it. *People v. Murray*, 379 Ill. App. 3d 153, 158 (2008). As to the prejudice prong, a reasonable probability that the result of the proceeding would have been different means a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. We review *de novo* an ineffective-assistance claim. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004).

¶ 25 We note first that counsel was not objectively unreasonable for refraining to object to the court's order because any such objection likely would have failed. It does not appear that Bettis had any valid grounds to invoke the privilege against self-incrimination. A witness may be denied the privilege where it is clear from the circumstances that the answers sought do not have a tendency to incriminate, and the privilege may not be extended to imaginary danger. *People v. Craig*, 334 Ill. App. 3d 426, 446 (2002). While an argument could be made that Bettis theoretically opened herself up to charges when she testified she drove high and "tipsy" on January 1, 2010, nothing else in Bettis's testimony or videotaped interview suggests that she was complicit in defendant's crime or that there was anything more than an imaginary danger of prosecution. Thus, defendant's ineffective-assistance claim likely fails under the performance prong.

¶ 26 In any event, defendant's claim clearly fails under the prejudice prong. There is simply no reasonable probability that, if defense counsel had successfully objected and Bettis remained silent, the outcome of the proceeding would have been different. See *People v. Fillyaw*, 409 Ill.

App. 3d 302, 312 (2011) ("If it is easier to demonstrate that the claimed errors could not have prejudiced the defendant, a reviewing court may affirm the defendant's conviction on that basis alone.").

¶ 27 First, Bettis's videotaped interview, which was admitted at trial through detective Giamberduca and which the court ruled it would admit if Bettis did not appear, was even more damaging to defendant's case than her trial testimony. Defendant does *not* challenge the admission of that videotape (or the court's ruling that, if Bettis had not appeared, the tape would have been admitted). In the videotape portion played for the jury, the jury heard Bettis state that she drove defendant to the scene, heard gunshots, saw the outline of a gun in defendant's pants, and that, when defendant returned to the vehicle, he stated that he had left his hat inside and that the victim "had to go." Thus, counsel's alleged error in not challenging the court's ruling regarding the privilege does not undermine confidence in the trial's outcome because Bettis's videotaped statement, which was extremely prejudicial, was also shown to the jury and admitted.

¶ 28 Second, even if *both* Bettis's trial testimony *and the videotape* had been excluded, the evidence of defendant's guilt remained overwhelming. Setting aside Bettis's testimony and videotaped statement, the State presented evidence that defendant was upset that Pride had a relationship with Wade, defendant's girlfriend, and that he knew Pride lived nearby. Defendant had previously confronted Pride about the relationship. Wade ended her relationship with defendant two days prior to the murder. Wade identified a photograph of defendant from the hospital where she worked wearing clothing that she bought for him and a black and white patterned hat with ear flaps and a black ball on top. Kedre, the victim's son, identified, in the photograph of defendant from the hospital, the clothing that the shooter was wearing. There were slight discrepancies in Kedre's description of the jacket at trial and the jacket seen in the

photograph. However, those discrepancies were for the jury to weigh and, in any event, Kedre's description of the hat was consistent with the hat in the photograph and found at the scene. Furthermore, that hat was analyzed and matched defendant's DNA at 13 loci; the jury heard testimony that this 13-loci match would occur randomly in only one in 25.9 quadrillion unrelated African-Americans. Accordingly, there is no reasonable probability that, but for counsel's alleged error, the outcome of the proceeding would have been different.

¶ 29 III. CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 31 Affirmed.