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2013 IL App (3d) 120046-U

Order filed August 7, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-12-0046
)	Circuit No. 09-CF-1192
)	
PEDRO SANCHEZ,)	Honorable
)	Amy Bertani-Tomczak,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Wright and Justice Lytton concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial counsel was not ineffective for failing to request an accomplice-witness jury instruction.
- ¶ 2 Defendant, Pedro Sanchez, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and sentenced to 61 years' imprisonment. On appeal, defendant argues that he received ineffective assistance of counsel because trial counsel failed to tender an accomplice-witness jury instruction. We affirm.

¶ 3

FACTS

¶ 4 On July 9, 2009, defendant was charged by indictment with two counts of first degree murder. On March 28, 2011, the case proceeded to a jury trial. At trial, Ellissa Hinton testified that she dated the victim. The couple lived in apartment 309 at 1007 Lois Place, Joliet. On the night of May 21, 2009, Hinton and the victim went to sleep around 11 p.m. Later that night, the door buzzer sounded, and the victim got up to answer the door. Hinton heard the door open, some mumbling about a girl, and a gunshot. After the shot, Hinton ran out of the bedroom and found the victim lying on the floor, bleeding from the head.

¶ 5 Hinton testified that she recognized one of the voices as belonging to defendant. Hinton was friends with defendant, and she had sex with him on two prior occasions. Hinton denied having a dating relationship with defendant, but said that defendant was willing to take their relationship further. However, Hinton stopped defendant's advances because she was in a relationship with the victim.

¶ 6 Christian Lopez testified that on May 21, 2009, around 10:30 or 11 p.m., he rode with defendant, Jesus Zambrano, and Michael Ortiz to a McDonald's restaurant and then to an apartment complex off of Lois Place in Joliet. Zambrano parked the car in front of an apartment building; defendant got out of the car and walked up to the apartment door. Zambrano told Lopez to get out of the car. Zambrano exited the car and retrieved a gun from under the hood. Defendant and Zambrano tried to give Lopez the gun, but Lopez refused. Thereafter, the group was buzzed into the main apartment building. Inside the building, Lopez was instructed to wait on the second floor while defendant and Zambrano proceeded to the third floor. Approximately 5 or 10 minutes later, Lopez heard a gunshot and then saw Zambrano running down the stairs.

Lopez also ran to the car where he was joined by Zambrano and defendant. After the shooting, there was no discussion about the incident, and the group drove to Zambrano's house. En route, defendant repeatedly said "I love you, Jesus. I love you." At Zambrano's house, the group stayed in the basement until sunrise. Defendant and Zambrano told Lopez not to speak of the incident; however, Lopez walked home and, later in the day, he reported the incident to the Joliet police.

¶ 7 During Lopez's testimony, the State played surveillance videorecordings that showed Zambrano drive up to a McDonald's restaurant in a gray car. A second surveillance videorecording showed the same car pulling up to the Lois Place apartments. Defendant exited the passenger's side of the vehicle and Zambrano exited the driver's side. Defendant then walked out of the camera's range of view; Zambrano opened the hood and retrieved a handgun. Thereafter, Lopez got out of the vehicle and followed Zambrano toward the building. Several minutes later, the three ran back toward the car.

¶ 8 LeShundra Orsborn testified that she was the victim's neighbor. On May 22, 2009, around 1 a.m., Orsborn heard a gunshot. Orsborn looked out her front window and saw an individual run toward what she thought was a light-colored Buick in the parking lot. A second individual was standing next to the car. Thereafter, Orsborn walked down the hall and saw a person lying on the ground with blood coming out of his head.

¶ 9 Prior to Ortiz's testimony, the court read an order to the jury that granted Ortiz use immunity pursuant to section 106-2.5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/106-2.5(b) (West 2008)). Ortiz testified that on May 21, 2009, he was at Zambrano's house when defendant picked him up in a gray car. They drove to another house where they smoked marijuana and drank alcoholic beverages. At some point in the day, Ortiz recalled, defendant

was speaking on the telephone. At that time, Ortiz thought that defendant was arguing with a female because defendant's conversation referenced why the female had left. Later that night, Ortiz, defendant, and Zambrano left the house in defendant's car. Ortiz did not recall where they drove to because he was nodding in and out of sleep. When Ortiz awoke, he saw that the car hood was open, and he thought they were stopped because of car problems. Ortiz went back to sleep thinking that the others would fix the car and drive home. Thereafter, Ortiz heard a car door slam, and he saw Zambrano, defendant and another individual get into the car.

¶ 10 After closing arguments and deliberations, the jury found defendant guilty of first degree murder.

¶ 11 On July 25, 2011, defendant filed a *pro se* motion for ineffective assistance of counsel. The motion alleged that trial counsel failed to request that an accomplice-witness instruction be given to the jury. At the hearing on defendant's motion, counsel stated that she did not request the instruction because the instruction "was saying that [defendant] had something to do with the offense" and counsel's theory of the case was that the State could not prove accountability for the murder. The trial court denied defendant's motion.

¶ 12 On January 6, 2012, the trial court sentenced defendant to 61 years' imprisonment. Defendant appeals.

¶ 13 ANALYSIS

¶ 14 Defendant argues that he received ineffective assistance of trial counsel because counsel failed to tender an accomplice-witness instruction. Defendant argues that Ortiz's use immunity and Lopez's failure to withdraw from the situation provided probable cause to believe that they were accomplices. Counsel's failure to request an accomplice-witness instruction altered the

outcome of the case, defendant contends, because Ortiz provided relevant motive testimony, and Lopez testified that defendant repeatedly thanked Zambrano after the shooting.

¶ 15 To establish a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) the deficient performance so prejudiced the defendant as to deny him a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish the deficient performance prong, the defendant must overcome the presumption that counsel's action or inaction was the result of trial strategy. *People v. Perry*, 224 Ill. 2d 312 (2007). Generally, we will not second-guess counsel's strategy. *People v. Flores*, 245 Ill. App. 3d 149 (1993).

¶ 16 Defendant specifically argues that counsel was ineffective for failing to tender Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.17) which states:

"When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case."

Pattern accomplice-witness jury instructions should be given if the totality of the evidence and the reasonable inferences that can be drawn from the evidence establishes probable cause to believe that a witness participated in the commission of a crime. *People v. Wheeler*, 401 Ill. App. 3d 304 (2010). A defendant is entitled to the instruction if the witness could have been indicted as either a principal or on an accountability theory. *People v. Howard*, 209 Ill. App. 3d 159 (1991).

¶ 17 In the instant case, trial counsel's decision not to request the accomplice-witness instruction was grounded in trial strategy. The language of IPI Criminal 4th No. 3.17 presupposes that defendant was involved in the commission of a crime. This position was incompatible with trial counsel's stated trial strategy that the State could not prove that defendant or the witnesses were accountable for the victim's murder. Therefore, trial counsel's decision not to request the instruction was reasonable trial strategy.

¶ 18 Even if trial counsel's strategy was unreasonable, issuance of the accomplice-witness instruction would not have changed the outcome of the case. The instruction cautioned jurors to view the testimony of an accomplice with suspicion. Given that the potential accomplices in this case were the cohorts of a murderer, the jurors were likely to have done so anyway. The jurors were told that Ortiz was testifying under use immunity. Moreover, this court has previously held that trial counsel's failure to request an accomplice-witness instruction constitutes ineffective assistance of counsel where the evidence is closely balanced and the case turned on the accomplice-witness's testimony. See *Wheeler*, 401 Ill. App. 3d 304. Here, the evidence was not closely balanced. Apart from the testimony of Lopez and Ortiz, a surveillance camera video-recorded defendant, Zambrano, and Lopez walking toward the victim's apartment building and later running from it. Hinton testified that she recognized defendant's voice at the scene, and Orsborn stated that she heard a gunshot and saw an individual run to a car in the parking lot. Even if the jury had been instructed to view Lopez and Ortiz's testimony with caution, the above evidence established that defendant was at the scene of the murder and there was a gunshot. Defendant fled the scene and did not report the crime to police. Furthermore, Ortiz's testimony regarding defendant's telephone call with a female was of slight relevance as motive is not an

essential element of the crime of murder. See *People v. Gonzalez*, 388 Ill. Ap. 3d 566 (2008).

Therefore, we conclude that even if trial counsel's performance was deficient for failing to request an accomplice-witness instruction, defendant did not suffer prejudice.

¶ 19

CONCLUSION

¶ 20 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 21 Affirmed.