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FIRST DIVISION
April 7, 2014

No. 1-12-0637
2014 IL App (1st) 120637-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 03 CR 9664
)	
ERIC GOLDEN,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

ORDER

Held: Postconviction petition alleging ineffective assistance of appellate counsel was properly dismissed where success on the issue that counsel allegedly failed to raise would not have changed the result on direct appeal.

¶ 1 Defendant Eric Golden was convicted by a jury of solicitation of murder for hire and solicitation of murder. We affirmed his conviction on direct appeal (see *People v. Golden*, No. 1-05-0099 (2006) (unpublished order under Supreme Court

Rule 23)), and defendant then filed a postconviction petition. The circuit court dismissed the petition at the second stage of proceedings, and we affirm.

¶ 2 Our written order resolving defendant's direct appeal contains a detailed recitation of the facts of this case, and so we will recount only those that are necessary to understand the issues raised in defendant's postconviction petition. In 2002, defendant married Chicago police officer Chresse Ridley, but the marriage quickly soured. Defendant apparently developed problems with substance abuse, and by September 2002, he was arrested for domestic battery and Ridley obtained an order of protection against him. She later filed for divorce that same month.

¶ 3 While in the county jail awaiting trial on the battery charges, however, defendant came into contact with an acquaintance named James Howze, who was a fellow member of the Black Stones street gang. According to Howze, who later testified against defendant at trial, defendant told Howze that Ridley had filed charges against him and that defendant wanted to have Ridley killed. Defendant asked Howze to put him in contact with someone who could do the job, and defendant gave Howze some of Ridley's identifying information, such as her place of work and the make, model, and license plate of her car. Howze told defendant that he did know someone, and after the initial conversation defendant inquired several times whether Howze had yet contacted the individual about the job. Howze, however, instead contacted the Chicago police and agreed to help them investigate defendant. Defendant was later released from jail, and several incriminating phone calls between Howze and defendant were recorded.

¶ 4 Howze put defendant in touch with a hitman named “Rico,” who was actually undercover Chicago police officer Rahman Muhammad. After meeting with Howze several times in order to learn street terminology used by the Black Stones, Muhammad called and met with defendant. During the calls and meetings, all of which were recorded, defendant and Muhammad used coded language to arrange Ridley’s murder. Defendant provided Muhammad with information about Ridley’s location, schedule, and vehicle, and the two discussed possible dates and times for the hit. Defendant also agreed that he would arrange to be arrested on a minor charge so that he would have an alibi during the time of the murder.

¶ 5 After some additional investigation, defendant was arrested at his home on April 7, 2003. When questioned, he initially denied involvement in the scheme but later confessed. Defendant then signed a written statement in the presence of an assistant State’s Attorney. Defendant also agreed to make a recorded statement, but then changed his mind after detectives allowed him to speak with Ridley on the phone.

¶ 6 Prior to trial, both the State and the defense filed motions *in limine* regarding proposed testimony by Ridley about two incidents of domestic violence. The first incident occurred in July 2002, when Ridley was on her way to a community meeting. Defendant demanded to accompany her and indicated that he planned to disrupt the meeting. After they arrived, Ridley slipped away from defendant and called a friend to pick her up. Defendant found Ridley, however, and when Ridley and her friend drove away, defendant followed them. He eventually

began chasing the other vehicle and attempted to cut it off and run it off the road. While attempting to escape, Ridley and her friend crashed their car. Defendant stopped and ordered Ridley to get out of the car but, when she refused, defendant sped off. Ridley filed for an order of protection the next day.

¶ 7 The second incident happened several months later in September 2002. Ridley met the same friend for dinner that evening, and when she returned home defendant confronted her and demanded to know where she had been and whom she had been with. Defendant began to act aggressively, and when Ridley attempted to call 9-1-1, defendant tore the phone line out of the wall. When Ridley managed to call the police using a different phone, defendant pushed her to the ground and began to choke her. Defendant's sister arrived at the scene and helped Ridley escape. Defendant was later arrested and charged with domestic battery, and Ridley obtained another order of protection.

¶ 8 The State argued that these two incidents were admissible under what is now Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011), which prohibits evidence of other crimes unless used to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The State contended that the incidents documented the deterioration of defendant's relationship with Ridley and thus explained his state of mind, motive, and the intent behind his attempt to have her murdered. The defense, in contrast, argued that the incidents were prejudicial character evidence and should be excluded. After a hearing on the motions, the circuit court agreed with the State and denied defendant's motion.

¶ 9 Defendant was convicted of solicitation of murder and solicitation of murder for hire. On direct appeal, the only issue raised was whether defendant's right to effective assistance of counsel had been violated because his trial counsel failed to file a motion to suppress defendant's confession. We affirmed defendant's conviction, finding that such a motion would have been futile. See *Golden*, No. 1-05-0099, at 11.

¶ 10 Defendant then filed the instant postconviction petition. Among other things, defendant contended that his right to effective assistance of appellate counsel had been violated because appellate counsel had not raised the issue of the other-crimes evidence on direct appeal, despite the issue having been fully litigated in the circuit court. At the second stage of proceedings, the circuit court dismissed the petition on the State's motion. Defendant has now appealed.

¶ 11 At the second stage of proceedings on a postconviction petition, "the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. [Citation.] If no such showing is made, the petition is dismissed. If, however, a substantial showing of a constitutional violation is set forth, then the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing." *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001). Ineffective assistance of counsel claims are evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). In order to succeed, a defendant must show both that counsel's performance was deficient and that, "but for defense

counsel's deficient performance, the result of the proceeding would have been different.” *Id.*

¶ 12 We use the same standard in evaluating a claim of ineffective assistance of appellate counsel. See *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). “Appellate counsel is not required to brief every conceivable issue on appeal, however, and it is not incompetence for counsel to refrain from raising issues that counsel believes are without merit. [Citation.] For these reasons, unless the underlying issue is meritorious, a defendant cannot be said to have incurred any prejudice from counsel's failure to raise the particular issue on appeal.” *Id.* at 163-64.

¶ 13 In this case, defendant contends that there was a high probability that, had appellate counsel raised the issue of the other-crimes evidence, the circuit court’s ruling allowing the evidence would have been reversed. Defendant argues that the evidence was merely prejudicial character evidence and was only tangentially related to the crimes that defendant was actually charged with. Defendant notes that the issue was fully litigated in the circuit court and was properly preserved for appeal, and he argues that there is no reasonable basis for appellate counsel’s failure to raise the issue on direct appeal.

¶ 14 The problem with defendant’s position is that it overlooks the prejudice prong of the *Strickland* test. That is, even if we assume for the sake of argument that defendant is correct that appellate counsel could have successfully argued that the circuit court should not have admitted the other-crimes evidence, defendant must still show that the result of the appeal would have been different. Yet defendant

cannot do so in this case because the other-crimes evidence was ultimately only a collateral issue in the trial. While the State is entitled to prove the motive behind a crime, it is not required to do so. See *People v. Hale*, 326 Ill. App. 3d 455, 466 (2001).

¶ 15 This principle is crucial in this case because even if the circuit court should have excluded all of the other-crimes evidence from defendant's trial, such an error is still subject to harmless-error review on direct appeal.¹ An error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (Internal quotation marks omitted.) *People v. Nitz*, 219 Ill. 2d 400, 413 (2006). In this case, there is overwhelming evidence that defendant asked Muhammad to murder Ridley. Not only did both Howze and Muhammad testify about their extensive conversations with defendant while plotting Ridley's murder, but defendant himself confessed to the crime in both oral and written statements. Defendant does not challenge any of this evidence, and he has not argued that appellate counsel should have done so either. All of the other-crimes evidence was introduced during Ridley's testimony, so excluding that evidence would not have affected any of Howze's or Mohammad's testimony, any of the taped conversations, or either of defendant's confessions. With all of this

¹ This assumes, of course, that we would have found the issue to be preserved. Defendant contends that it was because he filed a motion *in limine* and included the issue in his posttrial motion. Merely filing a motion *in limine*, however, is not sufficient to preserve an issue for appeal. A contemporaneous objection when the evidence is offered is still required. See *People v. Denson*, 2013 IL App (1st) 110652, ¶ 9. The State does not argue that the issue was not preserved, however, so we will assume that harmless-error review would have applied on direct appeal rather than plain-error review. See *People v. Thurow*, 203 Ill. 2d 352, 363 (2003) (discussing the difference between plain- and harmless-error review).

evidence against defendant, we have no doubt that the jury would still have found defendant guilty. Thus, even had appellate counsel raised and won the other-crimes issue, defendant's conviction would still have been affirmed because the error would have been deemed harmless.

¶ 16 It is worth comparing counsel's choice on this issue with the issue that was actually raised in the direct appeal. Unlike the other-crimes issue, the issue of whether trial counsel should have moved to suppress defendant's confession could have significantly changed the outcome of the direct appeal. Had the issue been successful, a new trial might have been warranted because defendant's confession was material evidence of his guilt on the crime charged and it is conceivable that a jury might not have found him guilty if there was no evidence of a confession. The other-crimes evidence, however, is merely collateral evidence and has little if any bearing on his guilt. Under these circumstances, appellate counsel's decision to raise the issue of the lack of a motion to suppress the confessions but not raise the issue of the other-crimes evidence cannot be deemed either deficient or prejudicial.

¶ 17 Regardless of whether appellate counsel's decision not to raise the other-crimes issue on direct appeal was a calculated professional choice, success on the issue would not have changed the result. Defendant was therefore not prejudiced by appellate counsel's decision, and the circuit court was correct to dismiss his postconviction petition.

¶ 18 Affirmed.