

No. 1-12-1742

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(e)(1).

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. 11 CR 8871
)	
RAMELLE WILLIAMS,)	Honorable
)	Carol M. Howard,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was not denied effective assistance of counsel where counsel's failure to make an opening statement, closing argument, or motion to exclude prior convictions were matters of trial strategy and resulted in no prejudice to defendant; the mittimus is corrected to reflect defendant was found guilty of possession of a controlled substance with intent to deliver.

¶ 2 Following a bench trial, defendant Ramelle Williams was found guilty of possession of a controlled substance with intent to deliver (15 grams or more but less than 100 grams of heroin) pursuant to section 401(a)(1)(A) of the Illinois Controlled Substances Act (720 ILCS

570/401(a)(1)(A) (West 2010)), and sentenced to six years in prison. On appeal, defendant contends that he was denied effective assistance of counsel where trial counsel failed to make an opening statement, closing argument, or motion to exclude prior convictions. He alternatively contends that his mittimus should be corrected to reflect that defendant was found guilty of possession of a controlled substance with intent to deliver. We affirm and correct the mittimus.

¶ 3 At trial, after both the State and defendant waived opening arguments, Officer Louis Loaiza testified that on May 14, 2011 he and his partner were working surveillance in the area of 1308 South Lawndale around 1 p.m. He observed defendant pacing back and forth at the corner near 1300 South Lawndale to a point a half block to the south. Soon after, another man walked alongside defendant yelling "blows, blows" as vehicles passed. Loaiza knew that "blows" was a street term for heroin. On two separate occasions, Loaiza observed, through binoculars, an individual walk up to defendant, have a brief conversation with him, and give him money. Defendant would then enter a vacant lot, bend down, pick up a clear plastic bag that was located in a patch of grass, remove a shiny packet from inside, and place the plastic bag down on the ground. Defendant gave the shiny packets to the individuals. Loaiza believed that he was witnessing drug transactions.

¶ 4 Loaiza directed Officer Bocanegra to the vacant lot where Loaiza had observed defendant retrieve the clear plastic bag. Bocanegra retrieved the bag, which contained 39 tinfoil packets of white powder which he suspected to be heroin. Bocanegra gave the items to Officer Arnoldo Rendon, who inventoried them and placed them in a safe for transport to the Illinois Police laboratory. Defendant was subsequently arrested.

¶ 5 The parties stipulated that Illinois State Police chemist Elanie Harris weighed and tested all 39 packets. The total weight for all of the items was 17 grams and all of the items tested positive for heroin.

¶ 6 After the State rested its case, defense counsel made a motion for a directed finding that the court denied. Defendant then testified that he was walking with another individual toward Central Park, when a police car pulled up and officers jumped out with Tasers. He denied that he ever entered into a vacant lot. After defendant's testimony, the parties stipulated that Williams had three prior felony convictions — two for aggravated battery to a police officer in 2008 and 2010 and one for possession of a controlled substance with intent to deliver in 2009. Both the State and defendant waived closing argument. The trial court found defendant guilty of possession of a controlled substance with intent to deliver.

¶ 7 Defendant filed a motion for a new trial challenging the sufficiency of the evidence against defendant. Following oral argument, the trial court denied the motion, stating that there was "more than enough evidence" to find defendant guilty beyond a reasonable doubt. The court subsequently sentenced defendant to six years in prison.

¶ 8 On appeal, defendant first contends that he was denied effective assistance of counsel because trial counsel failed to make an opening statement, closing argument, or motion to exclude prior convictions.

¶ 9 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness; and (2) absent these errors, there was a reasonable probability his trial would have resulted in a different outcome. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11;

Strickland v. Washington, 466 U.S. 668, 687-94 (1984). Courts “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.’” *Strickland*, 446 U.S. at 689; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). “Where the facts surrounding the ineffective assistance claim are undisputed and the claim was not raised below, this court’s review is *de novo*.” *People v. Wilson*, 392 Ill. App. 3d 189, 197 (2009).

¶ 10 A defendant shows prejudice by showing a reasonable probability, i.e., a probability sufficient to undermine confidence in the outcome of the proceeding, that but for counsel’s errors the proceeding would have resulted in a different outcome. *Strickland*, 466 U.S. at 694. Failure to satisfy either prong of the *Strickland* test defeats a claim of ineffective assistance. *Edwards*, 195 Ill. 2d at 163. Accordingly, we need not determine whether counsel’s performance was actually deficient if we determine defendant suffered no prejudice as a result of his counsel’s alleged deficiencies. *Edwards*, 195 Ill. 2d at 163, citing *Strickland*, 466 U.S. at 697. It is the defendant’s burden to affirmatively prove prejudice. *Strickland*, 466 U.S. at 693.

¶ 11 In this case, defense counsel’s decisions to waive opening statement and closing argument and to forgo a motion to exclude prior convictions were matters of trial strategy. Defense counsel waived opening statement only after the State waived its opening statement. This court has repeatedly found that defense counsel’s decision to “waive an opening statement on behalf of defendant is a question of judgment in strategy or tactics that will not in and of itself demonstrate the ineffective assistance of counsel.” *People v. Rodriguez*, 364 Ill. App. 3d 304, 313 (2006) citing *People v. Penrod*, 316 Ill. App 3d 713, 724 (2000). Furthermore, this court has recognized

the waiver of an opening statement is "clearly a matter of trial strategy," particularly where, as here, there was a bench trial. *People v. Nunez*, 263 Ill. App. 3d 740, 752 (1994). Thus, counsel's decision to waive opening statement does not amount to ineffective assistance of counsel.

¶ 12 Defendant places much of his ineffective assistance claim on counsel's failure to make a closing argument. Specifically, he contends that defense counsel's decision to forgo a closing argument forfeited the opportunity to emphasize the alleged weaknesses in the State's case. Defendant relies on *People v. Wilson*, 392 Ill. App. 3d 189 (2009) to argue that defense counsel's failure to present a closing argument was unreasonable and ineffective. *Wilson* concerned a jury trial where the prosecutor made a closing argument and defense counsel declined to do so. *Wilson*, 392 Ill. App. 3d at 199-200. The circumstances in *Wilson*, which prompted the court to note that "it would be a rare case in which choosing not to make a closing argument in a jury trial would be sound trial strategy" (*Id.* at 200), stand in contrast to the circumstances of this case, which was a bench trial where neither side made a closing argument. We find that, in this case, defense counsel's decision to forego a closing argument, though not indicative of best practices, was a matter of trial strategy.

¶ 13 Defendant also argues that defense counsel was ineffective for failing to file a motion to exclude prior convictions. We disagree and find that this decision was a matter of trial strategy. In *People v. Montgomery*, 47 Ill. 2d 510 (1971), the supreme court adopted the Federal Rule of Evidence 609. Under the *Montgomery* rule, evidence of a witness's prior conviction is admissible to attack the witness's credibility where: (1) the crime was punishable by death or imprisonment of more than one year, or the crime involved dishonesty or a false statement; (2)

the conviction is less than 10 years old; and (3) the trial judge determines that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Montgomery, 47 Ill. 2d at 516. Defendant challenges admission of the prior conviction under the third prong; specifically, he contends that trial counsel should have filed a motion to exclude prior convictions, prompting the court to weigh the probative value of admitting each prior conviction with the prejudice to defendant's case.

¶ 14 Here, defendant's testimony at trial constituted his entire defense. The trial court correctly noted that the case was "basically a credibility contest" and credibility was therefore a central issue. A finding that a witness's credibility is an issue in the case establishes the relevance of an attack on that credibility by means of a prior conviction. *Stokes v. City of Chicago*, 333 Ill. App. 3d 272, 278 (2002). Because defendant's credibility was central in this case, we find that the probative value significantly outweighed the prejudicial effect of admitting the three prior convictions. *Montgomery*, 47 Ill. 2d at 516. We further find that his prior convictions for aggravated battery to a police officer in 2008 and 2010 and for possession of a controlled substance with intent to deliver in 2009 were properly admitted, and there was no reasonable probability that the court would have granted defendant's motion to exclude them. Therefore, we conclude that defense counsel's decision not to file a futile motion to exclude defendant's prior convictions was a matter of trial strategy immune from a finding of deficient performance.

¶ 15 However, even if defense counsel's failure to file a motion to exclude prior convictions was objectively unreasonable, defendant cannot establish that this alleged deficiency substantially prejudiced him. Specifically, defendant does not show how failing to file a motion

to exclude prior convictions resulted in prejudice when the filing of the motion, in the context of a bench trial and against the mounting evidence, would have been futile. See *People v. Givens*, 237 Ill. 2d 311, 331 (2010). As determined above, there is no reasonable probability that the outcome of the motion would have favored defendant.

¶ 16 Furthermore, we find that even if defense counsel's failure to present an opening statement, closing argument, and motion to exclude prior conviction constituted deficient performance, the cumulative effect of these alleged errors resulted in no prejudice to defendant's case. Here, Officer Loaiza provided testimony detailing his observation of defendant receiving money from two individuals, entering a vacant lot to access a bag, retrieving an item, and then tendering a shiny packet to each of the individuals. Officer Bocanegra immediately confiscated the bag defendant was seen removing items from and discovered it contained heroin. The court concluded that there was "more than enough evidence" to find defendant guilty of possession of a controlled substance with intent to deliver beyond a reasonable doubt. Under these circumstances, defendant was not prejudiced by his counsel's overall performance because the evidence against defendant was overwhelming. See *People v. Everhart*, 405 Ill.App.3d 687, 697 (2010). We find that defense counsel's performance did not fall below an objective standard of reasonableness and that there is no reasonable probability that the outcome of the trial would have been different but for counsel's actions. Therefore, defendant's claim of ineffective assistance of counsel fails.

¶ 17 Finally, defendant contends, and the State agrees, that his mittimus must be corrected to reflect that the court found him guilty of possession of a controlled substance with intent to deliver. Currently, the mittimus incorrectly reflects that defendant was convicted of

1-12-1742

manufacture/delivery of a controlled substance. Accordingly, pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)), we direct the clerk of the circuit court to amend the mittimus to reflect defendant's conviction for possession of a controlled substance with intent to deliver.

¶ 18 Affirmed; mittimus corrected.