

No. 1-12-3704

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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. 06 C6 61014
)	
ROBERT JOYNER,)	The Honorable
)	Michele M. Simmons,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

HELD: Defense counsel's brief and singular comment misstating the burden of proof regarding defendant's insanity defense did not amount to ineffective assistance of counsel based on the record before us; counsel clearly knew the appropriate burden of proof, the trial court properly evaluated his cause according to it in this bench trial, and counsel's decision not to present other witnesses in support of his defense was clearly one of strategy, and not of incompetence, and did not result in any prejudice. In addition, defense counsel's performance was not in any way deficient.

No. 1-12-3704

¶ 1 Following a bench trial, defendant Robert Joyner (defendant) was convicted of attempted first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm and aggravated battery. He was sentenced to 27 years' imprisonment. He appeals, contending that he was deprived of his right to effective assistance of counsel where defense counsel did not know the correct burden of proof for an insanity defense, which, he claims, led counsel to forgo presenting evidence that would have supported that defense. He asks that we reverse his conviction and remand his cause for a new trial. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Defendant, a Gulf War veteran, was charged with first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm and aggravated battery in relation to events that occurred on the morning of September 17, 2006, at a gas station in Dolton, Illinois. In mid-2009, a hearing was held to determine defendant's fitness to stand trial. The State presented the testimony of Dr. Nishad Nadkarni, a staff psychiatrist for Forensic Clinical Services who had evaluated defendant on six occasions between 2007 and 2009. Dr. Nadkarni had reviewed his own psychiatric summary, court proceedings, other psychiatric evaluations, and defendant's criminal history and VA records. He testified that during his evaluations, defendant appeared to have a cognitive understanding of the fitness issue at hand, his criminal charges in the instant cause, the role of courtroom personnel and the nature of legal proceedings, and that he was in touch with his surroundings and reality.

¶ 4 Dr. Nadkarni further testified that, from his review of defendant's clinical reports, particularly those from Hines VA Hospital and Cermak Health Services, it was his opinion that

No. 1-12-3704

defendant was a malingerer. Dr. Nadkarni pointed to notations in these records previously diagnosing defendant as such in both 2004 and 2007. These records described, for example, reports by defendant to those staffs that he had devices implanted inside him, but that he "bursts out laughing when questioned more closely about this," and that he "[w]as noted to be neatly groomed, laughing and joking with [staff], was coherent, logical, and relevant in his thoughts." Dr. Nadkarni stated that in the multiple records he reviewed, defendant was either given no diagnosis for mental illness or was given a diagnosis of malingering. While defendant was diagnosed with possible psychotic disorder, this was based only on his personal complaints, and the way he presented and functioned did not correlate to a diagnosis of typical or bona fide mental illness.

¶ 5 With respect to treatment, Dr. Nadkarni testified that he did not find any treatment for mental illness in any of defendant's records. While defendant had been prescribed various psychotropic medications at times, he did not continue on them. Defendant also had not received any consistent psychotropic treatment since he was remanded to jail in 2006 for the instant cause and he was not receiving any such treatment during any of the times Dr. Nadkarni examined him. Dr. Nadkarni explained that it was "very atypical for somebody with a bona fide chronic mental illness" to not receive such treatment, come to the attention of medical personnel or subjectively complain about it during his time in custody, which, for defendant, was now over three years. In addition, when defendant did report alleged symptoms, such as auditory hallucinations, he was not able to present further details about these symptoms, which Dr. Nadkarni found to be "again atypical" of someone with a bona fide mental illness. Dr. Nadkarni noted that chronic mental

No. 1-12-3704

illnesses present with early onset and the patient's functioning becomes progressively worse without medication to the point of being unable to cope; he did not see this with defendant but, rather, found him to be "fairly highly functioning" as he was married, was employed and also maintained a mistress all inconsistent with someone suffering from a chronic mental illness.

¶ 6 With respect to fitness, Dr. Nadkarni testified that defendant understood the charges against him, knew he was represented by counsel, and acknowledged he could help her by answering questions, being truthful and doing legal research. Defendant also articulated his understanding of the differences between a bench and jury trial, and between a guilty plea and a plea bargain. He was evasive, however, when Dr. Nadkarni attempted to talk to him about his criminal background which consisted of some 15 prior arrests, including domestic battery and weapons violations. Ultimately, it was Dr. Nadkarni's expert opinion that defendant was fit to stand trial.

¶ 7 Dr. Carl Wahlstrom, an expert in forensic psychiatry, testified on defendant's behalf. Dr. Wahlstrom had reviewed the police records in the instant cause along with defendant's VA and other psychological records, Dr. Nadkarni's reports, defendant's social history and a letter written by defendant, and had examined defendant four times over 10 months. Dr. Wahlstrom testified that all of defendant's medical records indicated that he suffered from mental illness, including schizophrenia, schizoaffective disorder, major depression and post-traumatic stress disorder (PTSD). He further stated that he always considers the possibility of malingering in any psychiatric case but, contrary to Dr. Nadkarni's opinion, he believed defendant was not malingering a serious mental illness based on his age, veteran status, numerous admissions to the

No. 1-12-3704

VA and his personal examinations.

¶ 8 Regarding these, Dr. Wahlstrom testified that, during his first examination of defendant, when asked about his understanding of the proceedings against him and court personnel, defendant was "very tangential" and "difficult to follow at times." While he understood some things, Dr. Wahlstrom found defendant to be unfit at that time and presenting with many symptoms indicating mental illness. During his second examination, Dr. Wahlstrom noted that defendant seemed "better;" he was more focused, not tangential and any symptoms he had were not interfering in the discussion of the instant cause. Dr. Wahlstrom opined at that time that defendant was fit to stand trial. At the third examination, Dr. Wahlstrom found defendant to be "consumed with illogical, irrational, bizarre thoughts" about his case and spoke about implanted devices in his body. Because he believed defendant could not understand the nature of the proceedings against him, Dr. Wahlstrom found him to be unfit to stand trial. During their final examination, which occurred on the day before the fitness hearing, Dr. Wahlstrom noted that while defendant still raised irrelevant issues, he was able to be redirected and understood the proceedings against him. Defendant told Dr. Wahlstrom he had been prescribed an anti-psychotic medication, but told him he was not taking it. At the end of the examination, Dr. Wahlstrom found defendant "marginally mentally fit to stand trial." He admitted that, if he evaluated defendant next week, his opinion might change, as it had in the past. Dr. Wahlstrom opined that defendant suffered from paranoid schizophrenia and he believed defendant was not a malingerer but, rather, someone who is mentally ill and in need of treatment. However, Dr. Wahlstrom admitted that defendant had been diagnosed as malingering at both Hines VA in 2004

No. 1-12-3704

and Cermak in 2007, and that he had not reviewed those records.

¶ 9 Dr. Linda Grossman, a clinical psychologist, also testified on defendant's behalf. Briefly, she stated that she met with defendant several times and found him to be preoccupied with significant delusions and fear. While he understood the legal proceedings against him, she found defendant unfit to stand trial because of his delusions, which included his beliefs that a device had been implanted in his throat and was operated by remote control, that his knee rotated 180 degrees, that there was a device locking his legs, and that his brain could be rotated inside his skull. Dr. Grossman diagnosed defendant with chronic paranoid schizophrenia and probable PTSD and, after reviewing his medical records including the notations of malingering, discredited these and found instead chronic psychotic illness. She admitted, however, that defendant refused to take any test she offered which would have measured whether he was malingering.

¶ 10 Finally, Dr. Peter Lourgos, another psychiatrist at Forensic Clinical Services, testified for the State in rebuttal. Having reviewed defendant's medical records and other evaluations, and having met with him, Dr. Lourgos found defendant fit to stand trial. He noted that, during the examinations, defendant did not exhibit any psychotic symptoms but that he was, instead, logical and coherent. And, while defendant reported auditory hallucinations, Dr. Lourgos stated he did not see any objective signs of psychotic mental illness or symptoms which defendant had reported to other doctors. Dr. Lourgos opined that defendant was malingering.

¶ 11 At the conclusion of the fitness hearing, the court found defendant fit to stand trial. The trial court noted that only Dr. Grossman had clearly concluded defendant did not understand the

No. 1-12-3704

nature of the legal proceedings against him. The court stated that it weighed her testimony against that of Drs. Nadkarni, Lourgos and Wahlstrom and found that the latter "trump[ed]" Dr. Grossman's testimony. The court then proceeded to conduct a lengthy review for the record of each of the doctors' testimony. At the end of this, it noted "one last piece of evidence," a letter from Dr. Wahlstrom to defense counsel following Dr. Wahlstrom's review of defendant's Cermak records following his testimony during which he had admitted he had previously not reviewed them. The court noted that in the letter, Dr. Wahlstrom acknowledged there is only limited information in the records and no evaluation by a psychiatrist. The court further noted that Dr. Wahlstrom stated therein that he still believes defendant is on the psychotic spectrum based on his own evaluation, but admits that "one cannot rule out at times that [defendant] may engage in partial malingering as evidence by exaggerating symptoms which do not exist for some secondary gain." Based on all the evidence and "the competing testimony of Wahlstrom/Grossman versus Nadkarni/Lourgos," the court concluded that defendant "is malingering and is fit for trial."

¶ 12 As his cause proceeded, defendant made clear that he would be raising the affirmative defense of insanity. The cause then appeared before the court on a motion for continuance. As discussion ensued, the State raised its belief that defense counsel was still interviewing doctors for trial. Defense counsel responded that there was "an issue of funding through my office" and that, while she anticipated presenting four professionals at trial, there were still two out of the four with which she had yet to "make contact." She stated that they would be testifying at trial, but noted that "[o]ur office has to approve funding" and, "as to which doctor we'll offer, I'll have

No. 1-12-3704

to speak with them first to make sure I can provide that information to the State in specifics."

Defense counsel did "have the specifics" for one of the doctors, Dr. Grossman, as to what she would provide at trial but, again, defense counsel noted "there are three others." The court asked defense counsel to file a status regarding those doctors "so we can get this case going."

Accordingly, defense counsel filed an "answer to People's motion for pretrial discovery," stating therein that "[d]efendant may also call" as witnesses Dr. Grossman, Angeles Gonzalez and Leon Kaufmann (staff psychiatrists from Jesse Brown VA Medical Center), and Dr. Laura Kordon (a medical doctor from Jesse Brown VA Medical Center). After listing these potential witnesses, defense counsel noted that her "[i]nvestigation continues." Later, on the first day of trial, defense counsel filed a supplemental answer to discovery, disclosing her addition of Dr. Wahlstrom "as part of our possible witnesses to call." The trial court acknowledged this addition following its decision to deny defendant's motion for directed finding. The court asked defense counsel how many expert witnesses she planned on calling. Defense counsel responded that while she intended to call all of those listed in her discovery answer, she anticipated two (Drs. Grossman and Wahlstrom), but not more than three; however, she also stated that "[w]e may only use one. We may use none." The trial court allowed the supplemental answer.

¶ 13 Defendant's cause then proceeded to trial. Joyce Gunn, defendant's ex-wife and mother of his two children, testified that around 10 a.m. on the morning of September 17, 2006, defendant arrived unexpectedly at her home in Dolton, Illinois. She was on her way out and, when her friend arrived to accompany her to a food stand nearby, she asked defendant to leave. Defendant left without incident, and Gunn and her friend went to the food stand. Once there, Gunn saw

No. 1-12-3704

defendant's truck parked in a nearby gas station parking lot. She noticed that the truck was rocking slowly back and forth and then, all of a sudden, she heard gunshots ricocheting off the food stand. She ran for cover and, upon heading to the gas station to check on defendant, she noted that his truck had pulled away.

¶ 14 Devin Wells, the victim in this matter, testified that on the morning in question, he was at the gas station in Dolton. He had just exited the station's store after purchasing gas and was about to get on his motorcycle when he heard gunshots. He looked around and noticed glass on the ground by the passenger side window of defendant's truck, which was parked parallel to the store. Wells then saw shots coming from inside the truck; he began to run and made his way into traffic on the main road. Wells was hit by a bullet in the back, but he continued to weave through traffic as the gunshots continued. Wells looked back and saw defendant walking after him with a gun in his hand, shooting at him. Wells ran to a bowling alley parking lot and tried to enter the alley but could not. At this point, defendant pulled up in his truck and started shooting at Wells again. After defendant stopped shooting, he left the scene and Wells was able to run inside the bowling alley and call police. Wells was treated for gunshot wounds to his back and shoulder, and he identified defendant in a police lineup. He had never met defendant before this incident and he did not exchanged any words with him during or after it.

¶ 15 Multiple eyewitnesses also testified. Darrin Bolling was at the gas station when he heard a popping noise and glass shattering. He saw the glass falling from the window of a truck parked at the station, as well as a gun aimed out the truck's window at Wells, who was on his motorcycle. Bolling heard more shots fired from the truck and saw Wells run out into the street

No. 1-12-3704

screaming for help. Defendant got out of the truck and followed Wells, walking after him and continuing to fire at him. Bolling stated that he did not hear any argument or words exchanged between defendant and Wells. Bolling then saw defendant return to the gas station, kick over Wells' motorcycle, get back into his truck and drive away. Bolling heard more gunshots after defendant left the gas station. Similarly, Dion Turley testified that he was driving near the gas station and was stopped at a traffic light when he saw Wells run into the street and weave in and out of traffic. Turley stated he saw the shooter, whom he later identified in a police lineup as defendant, following, but not running, after Wells carrying two guns: one which he fired at Wells until it was empty and another, longer one he pulled out and began to fire thereafter. Turley saw Wells run to the bowling alley and then saw defendant's truck pull into the bowling alley parking lot. Turley drove past when the traffic light changed, but returned to the bowling alley once police arrived. Turley could not identify defendant in court due to the passage of time, but he was certain of his identification at the time of the police lineup.

¶ 16 In support of his insanity defense, defendant called Dr. Grossman, who, in addition to having had interviewed him regarding his fitness to stand trial, again reviewed defendant's medical records and police documents, spoke to his mother, and conducted additional interviews with him. Dr. Grossman testified that defendant's medical records, particularly those from the VA, indicated that he had been diagnosed with chronic paranoid schizophrenia, PTSD and psychotic depression. He also reported to the VA that he experienced auditory and visual hallucinations which commanded him to do things. Defendant had been prescribed various anti-psychotic, anti-anxiety and anti-depressant medications which indicated to her that he had a bona

No. 1-12-3704

fide mental illness. Dr. Grossman admitted that there was a notation in defendant's VA records indicating malingering, but she commented that there was no affirmative finding of this.

¶ 17 Dr. Grossman further testified that she observed several signs of mental illness in her interviews with defendant, such as the appearance of responding to internal stimuli, pausing instead of answering her questions directly, and whispering and writing his answers because he believed there were microphones and cameras in the room. He also reported smelling blood in his dreams and explained that there was a device implanted in his body which was remotely controlled by someone or something else, constricting his throat or turning his brain inside his skull and causing him pain. Dr. Grossman noted that defendant's reports of hallucinations were consistent over the years. Dr. Grossman had also spoken to defendant's mother, who told her that defendant had exhibited psychotic behavior for over a decade, such as dressing up in his army fatigues and crawling around the house following his return from the Gulf War.

¶ 18 Dr. Grossman diagnosed defendant as having chronic paranoid schizophrenia and PTSD. With respect to malingering, Dr. Grossman testified that she evaluated the possibility of this in defendant's case and concluded he was not malingering. She cited the consistency of his reported symptoms and behaviors, as well as the notations in the VA records showing that he exhibited the same symptoms and had been prescribed medication over several years. Dr. Grossman admitted that she had given defendant two written tests to evaluate malingering, but he initially refused to take them and then failed to provide sufficient answers for her to evaluate them. Ultimately, however, with respect to the question of defendant's sanity at the time of the events at issue, Dr. Grossman stated that, despite her diagnosis of defendant's current condition,

No. 1-12-3704

she could not offer an opinion as to that question because she could not determine whether defendant lacked the substantial capacity to appreciate the criminality of his conduct at that time.

¶ 19 Following Dr. Grossman's testimony, the trial court asked defense counsel if she had additional witnesses to present that day; defense counsel responded, "Not today, no." The court then continued the trial for another day when all remaining witnesses could be heard. At the next court date, defense counsel told the court that she had other doctors scheduled for that day, but that they were now "unavailable for today." The State also expressed difficulty in scheduling its doctors to testify at the hearing. Accordingly, the court and parties agreed on another date and the court told them to subpoena the doctors. On that date, the parties again appeared in court; this time, the State's doctor was unavailable to testify, so the court continued the matter again. At a subsequent court date, the State appeared and gave the court a definite date on which its doctor would be able to testify, stating that, regardless, the cause would conclude on that day. The parties agreed to resume trial on that date. Defense counsel then informed the court that on that day, she would rest defendant's case, as she was "not calling any one else." When defendant's trial resumed, he waived his right to testify and rested his case.

¶ 20 In rebuttal to defendant's case, the State presented the testimony of Dr. Nadkarni who, like Dr. Grossman, had previously evaluated defendant's fitness to stand trial. Dr. Nadkarni reviewed defendant's medical records and his own interviews of him and, in an effort to determine his sanity at the time of the events at issue, he attempted to interview defendant regarding his version of what happened; defendant, however, refused to speak to Dr. Nadkarni about what occurred and told him he did not remember. Accordingly, Dr. Nadkarni, just as Dr.

No. 1-12-3704

Grossman, could not offer any medical opinion as to defendant's sanity at the time of the crimes.

¶ 21 However, Dr. Nadkarni did provide the opinion that defendant did not suffer from any major mental illness and had been malingering his psychotic symptoms. He based his opinion on the "inconsistencies" in the symptoms defendant reported to some evaluators but not to others, which indicated that defendant could not "keep straight" what he told to whom in different situations. In addition, Dr. Nadkarni noted that defendant had not received any mental health medications at all during his incarceration, which had been about six years now; he could not conceive of anyone with a true major mental illness who could function without medication or attention for such an extended period of time. Moreover, while defendant had received a short course of medication while at Cermak, Dr. Nadkarni pointed out that this had been discontinued when defendant was diagnosed as malingering, and that the other medications he had received in the past were given to him based on his self-reported symptoms. And, Dr. Nadkarni contrasted patients with schizophrenia and other major mental illnesses against defendant, who was socially functional, had been married, was employed and even had a mistress, and was otherwise very verbal and interactive during their interviews. Dr. Nadkarni further testified that, in his review of defendant's medical records, staffs, particularly those at the VA and Cermak, had reported "suspicions" that defendant was malingering on more than one occasion. Dr. Nadkarni found these reports to be "most compelling," since those staffs, specifically that of Cermak, evaluated defendant intensively on a daily basis for several years. Dr. Nadkarni also found defendant's past diagnoses of schizophrenia, affective psychosis, psychotic disorder and delusional disorder to be questionable based on these reports and the lack of any signs of mental illness. Dr. Nadkarni

No. 1-12-3704

admitted that he believed defendant had some paranoid personality features, but he clarified that these did not rise to the level of a bona fide major mental illness.

¶ 22 At the conclusion of testimony and evidence, the parties presented their closing arguments to the court. Defense counsel, as per defendant's affirmative defense, argued for a verdict of not guilty by reason of his insanity at the time of the crimes. In doing so, she began by stating that defendant, at the time of the crimes, was "insane in that he suffered from bona fide mental illnesses that rendered him incapable of intentionally committing the acts alleged, lacking the substantial capacity to appreciate the criminality of those acts alleged." Defense counsel noted that she was "relying on the definition of insanity as provided under the statute at 730 ILCS 5/5-1-11," and that "defendant only has to prove the insanity defense by a preponderance of the evidence." Defense counsel then stated that "[i]n this case, our evidence is overwhelming that [defendant] was clearly insane at the time" of the crimes, and reviewed the testimony of the witnesses and facts presented, relating them back to Dr. Grossman's diagnosis of defendant as having a major mental illness. Then, after attacking Dr. Nadkarni's testimony at length, defense counsel concluded her closing argument by telling the court that the evidence "is clear" and "compelling" that defendant "is undoubtedly suffering from now, and did on the date of the incident, from bona fide mental illnesses that rendered him legally incapable of appreciating those facts."

¶ 23 In issuing its decision, the trial court reviewed the testimony of each of the witnesses, including Dr. Grossman and Dr. Nadkarni, at length. First, the court found that, based on the evidence, the State had proven defendant guilty of all the elements of the crimes beyond a

No. 1-12-3704

reasonable doubt. Next, turning to defendant's insanity defense, the court commented that, while defense counsel had argued in closing argument that "defendant only had to show by a preponderance of the evidence that he was, in fact, insane," this is "not *** the state of the law." The court explained that this had once been the burden assigned to defendants raising the insanity defense, but that it had changed "from preponderance to clear and convincing" and, accordingly, that "the Court is analyzing this concerning whether or not [] defendant has shown his insanity defense by clear and convincing" evidence. In doing so, the trial court commented that while Dr. Grossman stated defendant suffers from mental illness, Dr. Nadkarni stated that he did not, and no doctor testified that defendant is, or was, insane at the time of the crimes. While noting that it found Dr. Grossman's testimony "credible," the court cited the "differences in the doctors" and concluded that it simply had "doubts with regards to [] defendant's suffering from a mental illness." Thus, the court held that defendant failed to prove he was insane at the time of the crimes by clear and convincing evidence.

¶ 24 Defendant filed a motion for a new trial, arguing that he had proven his affirmative defense of insanity by clear and convincing evidence. During argument on the motion, defense counsel cited the testimony of Dr. Grossman and her diagnosis of defendant as having a serious mental illness, as well as defendant's VA hospital records indicating that he had been treated for mental illness prior to the crimes. At the outset of its decision, the trial court plainly noted, again, that it "did not have any doctor tell me that [] defendant was insane." The court explained that it had reviewed the facts of the case, the law submitted and the testimony presented, "as well as the doctors who testified," and that, based on all this, "defendant did not meet his burden to

No. 1-12-3704

show me that he was insane at the time” of the crimes. Accordingly, while repeatedly acknowledging that defense counsel presented “a very good motion for new trial as well as attached memorandum of law accompanying” it, the court denied the motion.

¶ 25 The cause immediately proceeded to a sentencing hearing, during which defense counsel argued in mitigation for defendant, citing his veteran status, his psychiatric treatment, Dr. Grossman's testimony, and the fact that he was employed, he is a father to five children and he was himself raised by a single mother who attended nearly every one of his court dates. After considering all the facts in aggravation and mitigation, the court sentenced defendant only on the attempted murder conviction, imposing a sentence of 27 years' imprisonment reflecting the finding that he had personally discharged a firearm; the court merged his remaining convictions therein.

¶ 26 ANALYSIS

¶ 27 On appeal, defendant contends that he was deprived of his right to effective assistance of counsel where his trial attorney did not know the correct burden of proof for an insanity defense, which, he claims, led defense counsel to forgo presenting available evidence that would have supported that defense. Specifically, he asserts that defense counsel should have called Dr. Wahlstrom, a VA psychiatrist and his mother to testify at trial, and that her failure to do so was based on a mistake of law that clearly and substantially affected the outcome of his cause. We disagree.

¶ 28 The law regarding claims of ineffective assistance of counsel is well established. These are examined under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668

No. 1-12-3704

(1984); the defendant must demonstrate both that his trial counsel's performance was deficient and that this deficient performance substantially prejudiced him. See *People v. Enis*, 194 Ill. 2d 361, 376 (2000). To demonstrate performance deficiency, the defendant must establish that trial counsel's performance fell below an objective standard of reasonableness. See *People v. Enoch*, 122 Ill. 2d 176, 202 (1988). Meanwhile, to demonstrate sufficient prejudice, the defendant must show that there is a reasonable probability that, but for his trial counsel's unprofessional errors, the result of the proceedings would have been different. See *Enoch*, 122 Ill. 2d at 202. A reasonable probability is one sufficient to undermine the confidence in the outcome. See *Enis*, 194 Ill. 2d at 376 (trial counsel's deficient performance must have rendered the result of the trial unreliable or fundamentally unfair).

¶ 29 In addition, "there is a strong presumption that the challenged action of counsel was the product of sound trial strategy and not of incompetence" (*People v. Steidl*, 142 Ill. 2d 204, 240 (1991), quoting *People v. Barrow*, 133 Ill. 2d 226, 247 (1989)), and falls "within the 'wide range of reasonable professional assistance'" (*Steidl*, 142 Ill. 2d at 248, quoting *People v. Franklin*, 135 Ill. 2d 78, 116-17 (1990)). Significantly, we note that simple errors of judgment or mistakes in trial strategy do not make defense counsel's representation ineffective. See *People v. West*, 187 Ill. 2d 418, 432 (1999). In fact, trial tactics encompass matters of professional judgment and we will not order a new trial for ineffective assistance based on these claims. See *People v. Reid*, 179 Ill. 2d 297, 310 (1997). Specifically, the decision whether to call a witness to testify at trial is a matter of trial strategy "that is unassailable and cannot form the basis of a claim that counsel rendered ineffective assistance." *People v. Pena*, 2014 IL App (1st) 120586, ¶ 33; accord *Enis*,

No. 1-12-3704

194 Ill. 2d at 378; see also *People v. Ward*, 371 Ill. App. 3d 382, 433 (2007). In evaluating counsel's effectiveness, we look at the totality of counsel's representation. See *People v. Eddmonds*, 101 Ill. 2d 44, 69 (1984).

¶ 30 Again, the defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to succeed on his claim of ineffective assistance of trial counsel. See *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996) (failure to prove either prong renders ineffective assistance claim untenable); *People v. Albanese*, 104 Ill. 2d 504, 525-27 (1984). And, if it is determined that he did not suffer prejudice, whether trial counsel's performance was constitutionally deficient need not be decided. See *People v. Brooks*, 187 Ill. 2d 91, 137 (1999); accord *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011) (where the defendant has not suffered prejudice, examination of performance prong is not even warranted); see also *People v. Graham*, 206 Ill. 2d 465, 476 (2003) (reviewing court may reject ineffective assistance claim without reaching performance prong if it is determined the defendant has not satisfied the prejudice requirement).

¶ 31 Based upon our thorough review of the record before us, we find that what occurred in the instant cause and, namely, defense counsel's decision not to call the witnesses defendant cites to testify with respect to his insanity defense, did not amount to ineffective counsel resulting in prejudice. Moreover, the record affirmatively demonstrates that defense counsel in no way performed deficiently during defendant's trial.

¶ 32 We turn first to defendant's claim that defense counsel "did not know" the correct burden of proof with respect to his affirmative defense of insanity. As the basis for this claim, defendant cites to one phrase of defense counsel's lengthy closing argument wherein she briefly stated that

No. 1-12-3704

"defendant only has to prove the insanity defense by a preponderance of the evidence." Contrary to defendant's insistence, we find that this was merely a misstatement and that, when viewed in its entire context and under the whole of the circumstances presented, it in no way created prejudice requiring reversal of his conviction.

¶ 33 The reason for our conclusion is multi-fold and based directly on the record before us. Initially, we note it is axiomatic that in every criminal prosecution, regardless of what defense is raised, the State must prove all the elements of the crimes charged beyond a reasonable doubt. See 720 ILCS 5/6-2(e) (West 2012). But, when a defendant, as defendant here, raises the affirmative defense of insanity, he assumes a burden to demonstrate that he was insane at the time he committed the crimes. See 720 ILCS 5/3-2 (West 2012). While the weight of this burden was once a preponderance of the evidence, it is now, certifiably, a burden of proof by clear and convincing evidence, which is higher than a preponderance but still less than beyond a reasonable doubt. See *People v. Teran*, 353 Ill. App. 3d 720, 731 (2004) (discussing the statutory change); accord *In re R.W.*, 332 Ill. App. 3d 901, 907-08 (2002); see also *People v. Clay*, 361 Ill. App. 3d 310, 322 (2005) (discussing weight of the burden).

¶ 34 Clearly, defense counsel's cited comment during her closing argument was a misstatement of the burden of proof defendant bore here. However, the record in this cause affirmatively demonstrates that her misstatement was merely that a misstatement and not an indication, as he would have us believe, that counsel "did not know" the correct burden of proof that defendant had assumed by raising the insanity defense. First, there are myriad other comments counsel made during the same closing argument contrary to that indication. For example, in the same

No. 1-12-3704

breath as her misstatement of the burden, counsel specifically cited to section "730 ILCS 5/5-1-11" and stated that she was "relying on the definition of insanity as provided under the statute." Section 5-1-11 defines insanity as the lack of a substantial capacity to appreciate the criminality of one's conduct as a result of a mental disorder or mental defect. See 730 ILCS 5/5-1-11 (West 2012). Counsel specifically argued in her closing that at the time of the crimes, defendant was insane and that his mental illnesses "rendered him incapable of intentionally committing the acts alleged, lacking the substantial capacity to appreciate the criminality of those acts alleged." Obviously, defense counsel knew the legal principles of the insanity defense. Second, immediately after her misstatement, and while discussing defendant's burden of proof, counsel repeatedly referred to the evidence defendant had presented as "overwhelming," and argued that it showed he was "clearly insane at the time" of the crimes. In fact, defense counsel went so far as to attack Dr. Nadkarni's opposing testimony, rebut it with a review of Dr. Grossman's favorable testimony, and concluded her closing argument by telling the court, again, that the evidence was "clear" and "compelling" that defendant "is undoubtedly suffering from now, and did on the date of the incident, from bona fide mental illnesses that rendered him legally incapable of appreciating" his acts. Thus, the entire crux of defense counsel's closing argument was her insistence that the evidence defendant presented throughout trial regarding his mental illnesses at the time of the crimes was overwhelming, clear and compelling all in line with the clear and convincing burden of proof. Moreover, defense counsel distinctly argued in her posttrial motion that defendant proved his "insanity defense by clear and convincing evidence." She cited Dr. Grossman's testimony and the VA hospital records and attached a memorandum of

No. 1-12-3704

law to her motion regarding this indicating, again, that she was well versed in the applicable burden of proof here. Thus, based on her repeated citations to the appropriate burden of proof, we conclude that defense counsel's initial reference at the outset of her lengthy closing argument, following a trial enmeshed in much medical and psychiatric testimony attempting to decipher defendant's mental state at the time of the crimes, to a burden of preponderance of the evidence rather than clear and convincing proof was merely a misstatement which did not rise to the level of prejudice meriting reversal of defendant's conviction due to ineffective assistance of counsel.

¶ 35 In a related manner, we would also note that it is quite possible that defense counsel, at the time she made her cited comment, was referring to her alternative theory of defense, further indicating that her comment was merely a misstatement and nothing more. That is, and as the parties here only refer to in passing, at the outset of defendant's trial, he presented alternative theories, or affirmative defenses, on the case. As the record reveals, not only did defendant proceed with the defense of insanity, but he also raised a claim of guilty but mentally ill. This is more than evident from his opening argument. After proposing he was insane at the time of the crimes and asking the trial court for a verdict of not guilty by reason of insanity, defendant then asked the court that, if, after hearing the State's evidence it found the required intent, it would weigh the testimony and "render in the alternative" a verdict of guilty but mentally ill. The court clarified this with defense counsel, who repeated and explained that "in the alternative, we would be asking" for this other verdict if the court did not accept the insanity defense. In addition, reference to the defense of guilty but mentally ill was made throughout defendant's trial, and even

No. 1-12-3704

now, he refers to it as an alternative in his brief on appeal before us.¹ While a defendant must prove that he was insane at the time he committed the crimes by clear and convincing evidence, he must only show mental illness by a preponderance of the evidence if he raises the defense of guilty but mentally ill. Compare 720 ILCS 5/6-2(e) (West 2012), with 725 ILCS 5/115-4(j) (West 2012); see *People v. Weeks*, 2011 IL App (1st) 100395, ¶ 18, n3 ("[i]t should be noted that although a defendant must prove the elements of the insanity defense by clear and convincing evidence, the defendant need only prove by a preponderance of the evidence that he suffered from a mental illness in order to be found guilty but mentally ill" [citations omitted]).

Accordingly, in light of the circumstances, which more than indicate to us that defense counsel (save her one tongue slip as per the cited comment) was competent in her knowledge of defendant's burden throughout the instant cause, we conclude that it is more than probable that she simply made a misstatement in a fleeting instant of momentary confusion in presenting her multiple, and very similar, defenses at trial, and nothing more.

¶ 36 Even if it could somehow be concluded that defense counsel's cited comment amounted to more than a minor flub, we would still find that it did not result in any prejudice to defendant due to the circumstances of the instant cause. First and foremost, we note that defendant proceeded with a bench trial. As such, the trial judge, as the trier of fact, is presumed to know the law and to have considered only competent, admissible evidence in reaching its determination on the merits. See *People v. Brown*, 185 Ill. 2d 229, 258 (1998); *People v. Koch*,

¹He argues in his brief at various points that he should have been found "not guilty by reason of insanity or at least guilty but mentally ill."

No. 1-12-3704

248 Ill. App. 3d 584, 591-92 (1993). Interestingly, and critically, the trial court in the instant cause clearly did just that. In rendering its verdict, the court acknowledged defense counsel's misstatement, noting that it was "not *** the state of the law," and proceeded to clarify for the record the change in the law regarding the burden of proof for the insanity defense. Then, the court certified for the record that, regardless of what had been said in closing argument, it was evaluating defendant's insanity defense on the applicable clear and convincing standard.

Fundamentally, while it found that the State had met its burden of proving all of the elements of the crimes beyond a reasonable doubt, it also declared that defendant had failed to prove insanity by clear and convincing evidence based on the evidence presented. The court later repeated this finding while upholding its verdict during the hearing on defendant's posttrial motion, concluding again that "defendant did not meet his burden to show me that he was insane at the time" of the crimes by clear and convincing evidence. Undeniably, defendant's affirmative defense of insanity was ultimately evaluated under the appropriate burden, regardless of any passing comment made by counsel during closing argument in this bench trial.

¶ 37 Moreover, we simply do not find that defendant's contention on appeal, namely, that he was prejudiced because defense counsel's comment demonstrated she "did not know" the correct burden of proof and, had she known it was clear and convincing rather than a preponderance of the evidence she would have presented more evidence, holds any water. Defendant specifically refers to Dr. Wahlstrom, a VA psychiatrist and his mother and claims that, had defense counsel called them to testify, they would have supported his insanity defense and, in turn, their testimony would have changed the outcome of his trial. Based on our review of the record,

No. 1-12-3704

however, we do not find, as defendant would have us, that defense counsel's decision not to present such testimony was a mistake of law. Rather, the record makes clear it was one of quite reasonable trial strategy which defense counsel made in order to best defend her client on several fronts.

¶ 38 Defendant's prime example is defense counsel's failure to call Dr. Wahlstrom at trial, asserting that this amounted to ineffective assistance because he would have stated, as he had during defendant's fitness hearing, that defendant was mentally ill and in need of treatment, was not malingering and had consistent symptoms of mental illness. Defendant also insists that Dr. Wahlstrom would have undermined the State's expert (Dr. Nadkarni) and corroborated his own (Dr. Grossman). However, contrary to defendant's assertion, Dr. Wahlstrom's testimony was not supportive of his insanity defense and we find no issue in defense counsel's decision not to call him at trial.

¶ 39 Dr. Wahlstrom did testify at defendant's fitness hearing, during which he stated his belief that defendant suffered from mental illness, including schizophrenia, schizoaffective disorder, major depression and PTSD. However, at the same hearing, he also testified about four meetings he had with defendant which caused him to waver back and forth with respect to his fitness findings, twice concluding defendant was unfit to stand trial and twice concluding he was fit. He further admitted that, were he to evaluate defendant again, his findings would very likely change. In addition, Dr. Wahlstrom conceded that defendant's past medical records, specifically, those from the VA, stated that he was a malingerer one who feigns illness. Most significant, the trial court, itself, discussed Dr. Wahlstrom's testimony at the fitness hearing and made note for the

No. 1-12-3704

record a letter he had written to defense counsel following his testimony in which he admitted that, in evaluating defendant's mental state, "one cannot rule out at times that [defendant] may engage in partial malingering." In fact, in comparing all the experts who testified for both parties at defendant's fitness hearing, the trial court actually grouped Dr. Wahlstrom with Drs. Nadkarni and Lourgos the State's experts and found that these three together "trump[ed]" Dr. Grossman's testimony regarding defendant's claim of mental illness. From all this, it is quite telling why defense counsel chose not to call Dr. Wahlstrom at defendant's trial. The court had already made more than apparent at defendant's fitness hearing that Dr. Wahlstrom did not present as a strong witness in his favor. And, it was never clear that Dr. Wahlstrom would have been able to provide an opinion as to defendant's state of mind at the time of the crimes; he certainly did not do so at defendant's fitness hearing. Thus, defense counsel's decision not to call Dr. Wahlstrom was obviously trial strategy.

¶ 40 The same can also be said about defense counsel's decision not to call a VA psychiatrist or defendant's mother at trial. With respect to a VA psychiatrist, defendant claims that defense counsel originally disclosed two who were willing to testify: Angeles Gonzalez and Leon Kaufmann, both from Jesse Brown VA Medical Center, who, according to discovery disclosures, would have testified about his mental health disorders and the prescriptions he received. However, as demonstrated by the evidence that was introduced at trial, it was defendant's VA records presented in this cause that were the most detrimental to his defense. While those records listed some possible disorders and detailed some medications prescribed, those diagnoses and medications originated only from defendant's self-reported symptoms; they were not

No. 1-12-3704

consistent or long lasting. Most damning, it was in these records that several notations were made regarding defendant's malingering records that defendant would report a symptom or hallucination but then laugh and disregard it, that medical personnel would discontinue his medication based on their later evaluations, and that defendant was normal in appearance and in his communications with others. Thus, defense counsel's decision not to call a VA psychiatrist, and not to open up questioning regarding these matters, was clearly strategic.

¶ 41 With respect to his mother, defendant asserts that she would have testified that she had seen him exhibit bizarre behavior since coming home from the Gulf War 10 years ago. However, Dr. Grossman, who had spoken to defendant's mother as part of her evaluations of him, testified in detail about his mother's reports, including her recount to Dr. Grossman that defendant would dress up in his fatigues and crawl around the house for no reason. Dr. Grossman, as an expert, relayed this information to the court along with her evaluation of it as it related to defendant's mental state. Thus, it was not as if defendant's mother's reports were ignored by defense counsel; rather, she chose to present them via a medical expert instead of through his mother, who obviously would have displayed bias in his favor, thereby risking her credibility. Moreover, just like Dr. Grossman, Dr. Nadkarni, the State's expert, also testified about defendant's mother's reports; he disputed any correlation between them and defendant's medical records, thereby presenting testimony contradictory to that of Dr. Grossman. Defense counsel could have easily concluded that it was best for the medical experts to evaluate defendant's mother's reports on a medical level, which was the prime issue in this cause, rather than to subject her to cross examination in front of her son. Again, having already presented this evidence via her medical

No. 1-12-3704

expert, defense counsel's decision not to call defendant's mother was a matter of trial strategy.

¶ 42 Defendant relies heavily on *People v. Hayes*, 229 Ill. App. 3d 55 (1992), in support of his contentions on appeal. In *Hayes*, the defendant was charged with murdering his young son. He was initially found unfit to stand trial but was later restored to fitness with medication. At his bench trial, the defendant raised an insanity defense. He presented the expert testimony of a forensic psychiatrist, who stated that while he could not opine as to the defendant's sanity at the time of the crime, he diagnosed him as having schizophrenia, paranoid type psycho activity, and antisocial personality disorder. During closing argument, defense counsel claimed that the State had failed to prove its case because it had not proven that the defendant had the mental capacity at the time of the crime to form the required intent. See *Hayes*, 229 Ill. App. 3d at 59. Defense counsel further argued that it was the State's burden to prove the defendant's insanity beyond a reasonable doubt and not the defendant's burden to prove his own insanity. See *Hayes*, 229 Ill. App. 3d at 60. The trial court found the defendant guilty and stated that it did not believe the defendant was insane at the time of the crime. See *Hayes*, 229 Ill. App. 3d at 60. Defense counsel filed a motion for a new trial. In it, he admitted that he thought the measure of proof for the insanity defense was “ ‘very, very, very, very confusing,’ ” and that there had been other evidence he was aware of but did not present at trial because he did not think the defendant had to prove his insanity. *Hayes*, 229 Ill. App. 3d at 60. The trial court denied defense counsel's motion, but did state that “ ‘possibly this case was tried in an incompetent manner.’ ” *Hayes*, 229 Ill. App. 3d at 60.

¶ 43 On appeal, the defendant in *Hayes* asserted, just as defendant here, that he received

No. 1-12-3704

ineffective assistance of counsel because his attorney was under the mistaken assumption that the State had the burden of proving his sanity beyond a reasonable doubt and, because of this, failed to produce available evidence of his insanity that would have changed the outcome of his cause. See *Hayes*, 229 Ill. App. 3d at 61. The *Hayes* court agreed. In its decision, it noted extensively that the record showed not a decision of trial strategy regarding what witnesses and evidence to present but, instead, a clear misapprehension by defense counsel of the law that defense counsel “misunderstood the burden of proof for the insanity defense.” *Hayes*, 229 Ill. App. 3d at 64. Moreover, not only did defense counsel admit his mistake and confusion in his posttrial motion, but he also presented the evidence he would have presented at trial at the defendant’s sentencing hearing, which the *Hayes* court found to be potentially outcome-determinative. See *Hayes*, 229 Ill. App. 3d at 64. And, the *Hayes* court noted that although it had denied defense counsel’s posttrial motion, even the trial court, as the trier of fact, admitted there was a reasonable probability that the result of the trial would have been different had the excluded evidence been presented. See *Hayes*, 229 Ill. App. 3d at 64. Accordingly, the *Hayes* court held that defense counsel’s error was so egregious that it prejudiced the defendant, resulting in ineffective assistance of counsel and warranting a new trial. See *Hayes*, 229 Ill. App. 3d at 64.

¶ 44 While the fact pattern and argument of *Hayes* seem similar, the instant cause is wholly distinguishable and does not merit the same result. First, defense counsel in *Hayes* believed that he did not have any burden with respect to his client’s insanity defense and that it was entirely up to the State to prove his sanity; admittedly, this is why he did not present any additional evidence. In contrast, here, defense counsel knew there was a burden upon her when it came to arguing

No. 1-12-3704

defendant's insanity. She simply misstated that burden at one point in her closing argument before immediately correcting herself by arguing that the evidence she had presented was "clear," "compelling" and "overwhelming" that defendant was insane at the time he committed the crimes. Second, defense counsel here, unlike that in *Hayes*, never once indicated that she was at all confused or would have presented any additional evidence, even after the trial court noted the burden was clear and convincing evidence. In contrast, defense counsel in *Hayes* admitted he would have presented additional evidence had he not been so flagrantly mistaken and he even presented that additional evidence at the defendant's sentencing hearing. Finally, the trial court here did not conclude that the additional evidence defendant cites on appeal would have changed the outcome of his trial, and we cannot do so either. As the trial court pointed out, no one, not a single expert or witness involved in this cause Dr. Wahlstrom, the VA psychiatrists and defendant's mother included was able to present any opinion with respect to defendant's sanity at the time he committed the crimes. Thus, unlike the trial court in *Hayes*, the trial court here had no concerns that defense counsel's decisions amounted to incompetence or negatively affected the outcome of his trial. Therefore, defendant's reliance on *Hayes* is inapplicable.

¶ 45 In light of the record, we fail to find that defense counsel caused any prejudice to defendant by failing to call Dr. Wahlstrom, a VA psychiatrist or his mother. This was a battle of experts, and it was made clear by all of them at the outset that none would be able to opine as to the most critical question at trial, namely, defendant's sanity at the time he committed the crimes. These experts were tested by the parties at defendant's fitness hearing, during which it became clear that only Dr. Grossman was favorable to defendant's insanity claim. She had testified at his

No. 1-12-3704

fitness hearing that he was delusional and reaffirmed at trial her diagnosis of chronic paranoid schizophrenia and PTSD. Defense counsel presented Dr. Grossman's testimony at length and consistently referred to it throughout trial in support of defendant's claim of insanity. Quite simply, there was not much more that defense counsel could have done here.

¶ 46 It is also apparent that defense counsel was faced with some very practical considerations. Multiple references are made in the record concerning the number of experts involved here, their availability and their cost. Even though attorneys are to concentrate on the more noble and higher principles of the law in defense of their clients, these are very realistic concerns that play a large, and oftentimes significant, role in the defenses they prepare. Here, for example, while defense counsel had disclosed in discovery that she would potentially be calling four experts and, later, added Dr. Wahlstrom to her list, she also noted that she “may only use one” or that she “may use none.” She plainly admitted that funding in her office was “an issue,” as was scheduling the experts to testify. She explained to the State and the trial court that she had to consult with her office, which had to first approve funding before she could hire the experts to testify, and she had trouble “mak[ing] contact” with the experts listed, save Dr. Grossman. There were others, but, contrary to defendant’s assertions, defense counsel never promised the court that defendant’s cause would consist of the testimony of any certain number of experts; she noted early in her discovery disclosures that her investigation into defendant's cause continued. Funding and scheduling issues are typical of any cause involving expert witnesses. Interestingly, when defense counsel eventually admitted to the court that the experts she wanted to testify had become unavailable, the State, too, found itself in the same predicament, expressing its own

No. 1-12-3704

difficulty in scheduling its experts to testify. It was at this point that, in the name of efficiency and expediency, the court and the parties agreed this battle of the experts was sufficiently fought by two: Dr. Grossman for the defense and Dr. Nadkarni for the State. There is no indication that defendant was prejudiced by any of this.

¶ 47 Consequently, having determined, for all these reasons, that defense counsel's representation did not prejudice defendant in any way, we need not examine the performance prong of the test for ineffective assistance. See *Graham*, 206 Ill. 2d at 476; *Brooks*, 187 Ill. 2d at 137. However, even if defendant could somehow show sufficient prejudice here (which he cannot), he still could not demonstrate this other required prong of *Strickland*, since, based on our thorough review of the record, there is nothing therein to even remotely indicate that his counsel performed deficiently. Rather, defense counsel clearly advocated unrelentingly on defendant's behalf. She filed multiple motions and argued extensively for them, including a motion for discovery and a motion for supplemental discovery. Defense counsel participated vigorously in pretrial matters and presented a cohesive opening argument, raising alternative, and viable, theories of defense. During trial, she presented the testimony of Dr. Grossman in extensive detail, discussing her findings of defendant's mental illnesses, extracting her medical bases for these, and countering any inference that defendant was sane at the time of the crimes. She then thoroughly cross-examined the State's witnesses, challenging both Dr. Nadkarni, who was the linchpin in the State's cause in rebutting his insanity defense, on medical principles as well as the State's lay witnesses on their identifications and viewpoints of the incidents at issue. Defense counsel raised numerous objections when appropriate, focused the trial court's attention

No. 1-12-3704

on Dr. Grossman's diagnoses which were in defendant's favor, moved for directed verdict and presented a convincing closing argument in line with the theory on his case. Following trial, defense counsel filed a motion for a new trial, raising therein the very issue in question here that she met her burden of demonstrating defendant's insanity at the time of the crimes by clear and convincing evidence. The trial court considered it and, although it rejected it, the court commended defense counsel for "a very good motion for new trial as well as attached memorandum of law accompanying" it.

¶ 48 Ultimately, and in addition to our review of the totality of defense counsel's representation of defendant (see *Eddmonds*, 101 Ill. 2d at 69), which we find to have been both thorough and zealous, we hold that defendant received effective representation, and any claim to the contrary, particularly regarding defense counsel's minor misstatement as to her burden under the insanity defense and her decision not to call Dr. Wahlstrom, a VA psychiatrist and his mother, is without merit in light of the record in this cause.

¶ 49 CONCLUSION

¶ 50 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court.

¶ 51 Affirmed.