SECOND DIVISION
August 26, 2014

No. 1-13-2036

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. 09 CR 7092
	)	
KENNETH D. JOHNSON,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Harris and Simon concurred in the judgment.

O R D E R

¶ 1 *HELD*: Judgment entered on defendant's conviction of first degree murder affirmed over his claim that his trial counsel was ineffective and that the prosecutor's closing arguments unfairly prejudiced his right to a fair trial.

¶ 2 Following a jury trial, defendant, Kenneth Johnson, was found guilty two counts of first degree murder for shooting Lenneth Suggs and Antonio Cole to death. He was sentenced to the mandatory term of natural life. On appeal, defendant contends he is entitled to a new trial

because his counsel was ineffective and the prosecutor's comments during closing argument unfairly prejudiced his right to a fair trial. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On the evening of February 13, 2009, around 8:00 p.m., Lenneth Suggs and Antonio Cole were shot and killed in the area outside of the Peachy Clean Car Wash, located at 5219 West Lake Street in Chicago, Illinois. Defendant was arrested on March 17, 2009, and after a jury trial, he was found guilty of two counts of first degree murder for killing Suggs and Cole. Our discussion of the jury trial focuses on the testimony bearing on defendant's appeal.

¶ 5 During the trial, several eyewitnesses at the scene testified for the State and identified defendant as the shooter. The witnesses gave varying heights for the shooter, ranging from 5'7", 5'8", 5'11", and 6'2", and some testified that the shooter had a limp. He was observed standing on the hood of a car while he was shooting, and footprints were recovered from the hood. One of the witnesses also noted the license plate of the shooter's getaway car, a green Buick Regal, which was registered to defendant. The car was later located on March 27, 2009; its interior was burned from the inside out, and the license plates were removed, but the VIN was still intact.

¶ 6 During the State's case, Aimee Stevens, a forensic scientist with the Illinois State Police Crime Lab, testified as an expert in footwear and firearms identification. She compared footprints left by the shooter on the hood of a car near the murder scene with three pairs of Timberland boots she received ranging in size from nine to nine and a half. According to her testimony, one of the gel lifts from the footprint was consistent in pattern and design and similar in pattern and size to the right boots of the three submitted pairs shoes she received but she was unable to make an identification because the quality of the gel prints from the scene was poor.

¶ 7 After the State rested, defendant called an orthopedic surgeon, Dr. Benjamin Goldberg, who reviewed defendant's medical records concerning a hip injury defendant sustained when he previously was shot in the abdomen and the hip joint on December 1, 2008. Dr. Goldberg opined that defendant would not have been able to jog—as some of the eyewitnesses testified they had observed—and likely would have had a significant abnormality in his gait if he tried to move at a faster rate.

¶ 8 Defendant's mother, Hirseline Johnson, also testified that her son had been shot while in his green Buick Regal with his daughter in December 2008, and that he had not driven the car since the shooting. Instead, his cousin, Ted Brown, would drive the car. She further testified that during January and February 2009, she saw her son several times a week but never without crutches. She also testified that her son is 5'4" while Deontae, defendant's 27 year old son, is between 5'7" and 5'8".

¶ 9 Next, Michael McGee and defendant's brother, Abahsi Johnson, provided alibi testimony. McGee testified that he had been with defendant on the day of the shooting from approximately 11 a.m. until 8:30 p.m. and that they had not been on Lake Street near the car wash. Abahsi also testified that he was with defendant from sometime after 8:30 p.m. until after 9:00 p.m.

¶ 10 Lastly, defendant testified on his own behalf. He stated that he was 44 years old and a licensed realtor with Coldwell Banker Residential as well as a union carpenter. He was 5'4" tall, weighed 168-70 pounds, and wore size seven and a half shoes. During his testimony, defendant described when he was shot in December 2008 while in his green Buick Regal with his daughter, but stated that did not know who shot him. He also did not know either of the victims in the present case, nor did he have any reason to suspect that they were involved in the December 2008 shooting. He further stated that he no longer drove the green Buick Regal but let his cousin

Ted Brown use it. The car was later sold between February 13, 2009, and his arrest on March 17, 2009, but defendant said he did not personally sell the car. Defendant also testified that on February 13, 2009, he was not able to jog or run with a limp.

¶ 11 The jury ultimately found defendant guilty of two counts of first degree murder. Defendant filed a motion for a new trial which the circuit court denied on January 30, 2013. The circuit court sentenced defendant to the mandatory sentence of natural life. Defendant now appeals. We have jurisdiction pursuant to Illinois Supreme Court Rules 603 and 606.

ANALYSIS

¶ 12 On appeal, defendant raises two primary issues which he argues require a new trial: (1) his counsel was ineffective; and (2) the prosecutor's comments during closing arguments were prejudicial and deprived him of a fair trial. We address each issue in turn.

¶ 13 A. Ineffective Assistance of Counsel

¶ 14 With respect to his ineffective assistance of counsel claim, defendant maintains that his counsel was ineffective by (1) failing to emphasize the State's burden to prove the case beyond a reasonable doubt during closing argument; (2) failing to offer expert testimony with respect to the reliability of eyewitness identifications and defendant's height and shoe size; and (3) failing to object to Aimee Stevens testimony about her footprint analysis. None of these accused strategic decisions, however, demonstrates that his counsel was ineffective.

¶ 15 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 689 (1984). See *People v. Palmer*, 162 Ill. 2d 465, 475 (1994) (applying *Strickland* test). Specifically, a defendant must establish (1) "that counsel's performance was deficient"; and (2) that this "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. In performing this inquiry, "judicial

scrutiny of counsel's performance must be highly deferential." *Id.* at 689. Indeed, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. In other words, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). To overcome this presumption of soundness, the strategies "must appear irrational and unreasonable in light of the circumstances that defense counsel faces at the time" such that "no reasonably effective criminal defense attorney, facing similar circumstances, would pursue such strategies." *People v. Faulkner*, 292 Ill. App. 3d 391, 394 (5th Dist. 1997). We do not focus on "isolated incidents of conduct" but instead "look to the entire record to determine if under all of the circumstances counsel's assistance was ineffective." *People v. Cloyd*, 152 Ill. App. 3d 50, 57 (1st Dist. 1987). Counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Because the facts surrounding defendant's ineffective assistance of counsel claim are undisputed, our review is *de novo*. *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (1st Dist. 2008).

¶ 16 Defendant first argues that his counsel was ineffective by failing to emphasize the State's burden to prove his guilt beyond a reasonable doubt during closing arguments. We disagree. Based on our review of the record, Defendant's counsel coherently summarized the defense theories during closing argument and thoroughly addressed the testimony of the various witnesses, including highlighting any factual inconsistencies in the eyewitnesses' accounts. Whether, in hindsight, counsel's closing argument may have been more effective had he emphasized the State's burden of proof does not render his conduct unreasonable. Moreover,

defendant cannot establish any prejudice because the trial court properly instructed the jury on the State's burden of proof, explaining:

> "The defendant is presumed to be innocent of the charge against him. *** [This presumption] is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case."

¶ 17 Defendant next contends that his counsel was ineffective for failing to call an eyewitness identification expert and a "medical or otherwise qualified expert in regards to defendant's height and shoe size." Again, we disagree. In general, "[d]ecisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf" are "matters of trial strategy" which are "generally immune from claims of ineffective assistance of counsel." *People v. Reid*, 179 Ill. 2d 297, 310 (1997). As our supreme court has explained, such strategic decisions cannot form the basis of an ineffective assistance claim unless the "strategy is so unsound that counsel entirely fails to conduct any meaningful adversarial testing." *Id.*

¶ 18 Here, instead of calling an eyewitness identification expert to discuss the potential problems with witness identifications, defendant's counsel thoroughly cross-examined the State's eyewitnesses and further highlighted the inconsistencies in their testimony during closing argument. This is the type of strategic decision that does not support an ineffective assistance claim.

¶ 19 We reach a similar conclusion regarding defense counsel's decision not to call a medical expert to testify about defendant's height and shoe size. Instead, counsel presented defendant as a witness who testified that he was 5'4" tall, weighed 168-70 pounds, and wore size seven and a half shoes. Because defendant could, and indeed did, testify as to his own height, weight, and shoe size, we conclude that his counsel's decision not to offer expert testimony on this issue was strategic and reasonable under the circumstances. We further note that defense counsel did call a medical expert to support the defense theory that defendant's hip injury likely prevented him from engaging in the physical activity that some of the witnesses observed, further bolstering our conclusion that counsel's representation during trial was not deficient.

¶ 20 Lastly, defendant maintains that his counsel was ineffective for not objecting to the testimony of the State's forensic expert, Aimee Stevens, regarding her analysis of the gels lifts from the footprints at the murder scene. "As a general rule," counsel's decisions about "what matters to object to and when to object" are trial strategy." *People v. Pecoraro*, 144 Ill. 2d 1, 13 (1991). Here, we conclude that counsel's decision to attack Stevens' testimony through cross-examination rather than by challenging its admissibility is the type of reasonable strategic decision that does not support an ineffective assistance of counsel claim.

¶ 21 Overall, based on our review of the record, counsel's actions in this case were not deficient. Counsel presented a coherent opening statement and closing argument, thoroughly cross-examined the State's witnesses, which included highlighting the factual inconsistencies in the eyewitnesses' testimony, put on an alibi defense with several witnesses, and offered an expert medical witness to argue that defendant physically was incapable of doing some of the things the witnesses observed. Consequently, defendant has failed to show that his counsel was ineffective.

¶ 22 B. Prosecutor's Closing Argument

¶ 23 The defendant additionally argues that certain statements by the prosecutor during closing arguments unfairly prejudiced his right to a fair trial because they misstated the facts and attacked defendant's demeanor and appearance. But according to the State, these arguments were not properly preserved for appeal. We agree.

¶ 24 To preserve an issue for our review, "[*b*]*oth* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, the State maintains that only one of defendant's arguments concerning the prosecutor's closing argument was raised in defendant's post-trial motion, *i.e.*, that the prosecutor improperly interjected a revenge-theme into her closing arguments. But with respect to that argument, defendant's counsel failed to object to these revenge-theme comments during trial. Thus, none of the issues raised were both objected to at trial and addressed in defendant's post-trial motion. Defendant's reply brief offers no response to the State's position on this point, nor does it direct us to where in the record he preserved these arguments for appeal. Because we agree with the State that they were not properly preserved, "we may review this claim of error only if defendant has established plain error." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). He has not. "[W]hen a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review." *Id.* at 545-46. Here, defendant ignores his failure to preserve these arguments and never addresses why he is entitled to plain error review. His arguments concerning the propriety of the prosecutor's closing argument, therefore, are forfeited.

¶ 25 For the foregoing reasons, the trial court's judgment is affirmed.

¶ 26 Affirmed.