2015 IL App (1st) 123248-U

FIRST DIVISION
March 2, 2015

No. 1-12-3248

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. 10 CR 9183
	)	
TEODORO BASTIDA-DIAZ,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defense counsel's failure to request a jury instruction on the affirmative defense of necessity did not amount to ineffective assistance of counsel where his decision was a matter of trial strategy.

¶ 2 Following a jury trial, defendant Teodoro Bastida-Diaz was convicted of possession of a controlled substance with intent to deliver 900 grams or more of cocaine and sentenced to 17 years' imprisonment. On appeal, defendant contends that trial counsel was ineffective for failing to request a jury instruction on the affirmative defense of necessity. We affirm.

¶ 3 The evidence showed that police were investigating defendant's brother, Jose Diaz (Jose), who is not a party to this appeal. The police believed Jose was a drug dealer and kept him under surveillance from September 2009 through April 2010. During the course of their investigation, police arrested Manuel Martinez, who is also not a party to this appeal, for drug possession. In exchange for his drug charges being dropped, Martinez became an informant and assisted police in their investigation of Jose. On April 15, 2010, Jose and Martinez went to a garage in Berwyn where an undercover police officer showed them cocaine. Jose indicated that he intended to buy the cocaine, but needed to leave the garage to obtain money. Jose never returned, and, in his place, defendant arrived at the garage with Martinez. Defendant bought one kilogram of cocaine from the undercover officer, which resulted in him being arrested and charged with possession of a controlled substance with intent to deliver 900 grams or more of cocaine.

¶ 4 During opening statements, defense counsel argued the affirmative defense of entrapment. Counsel maintained that Martinez, an informant of the police, coerced defendant into buying cocaine from an undercover officer by stating that if he refused, his brother Jose would be harmed by drug dealers.

¶ 5 At trial, Special Agent Donald Wood testified that in September of 2009 he was conducting a long-term narcotics investigation of which Jose was the target. On December 15, 2009, Agent Wood was conducting surveillance of Jose, and saw Jose with defendant in a vehicle. On January 15, 2010, Agent Wood was conducting surveillance of defendant's Cicero residence, and saw Jose and defendant in a blue Mercury Mystique. He followed them to a condominium building in Oak Lawn. Defendant and Jose parked alongside the condominium building, and, a short time later, a green Toyota arrived driven by Martinez. Martinez exited his

car, appeared to have a conversation with defendant and Jose, and then went into the building. The garage door went up and the Mystique drove into the garage and the door closed behind it. Shortly thereafter, the garage door opened and the Mystique departed the garage with defendant and Jose inside. Police continued their surveillance of the condominium building and saw Martinez exit the building in his vehicle. The police pulled over Martinez's vehicle, searched it, and found cocaine and marijuana. The police also searched the garage where they found nine ounces of cocaine. Martinez was not charged with an offense because he agreed to assist them in their investigation. Specifically, Martinez was to introduce undercover agent Dave Zamora to Jose in order to arrange a narcotics transaction. Agent Zamora met with Jose in February, March, and April of 2010. Ultimately, Agent Zamora made a plan to sell Jose cocaine in an undercover garage located in Berwyn.

¶ 6 On April 15, Agent Zamora was inside the garage with five kilograms of cocaine obtained from the Will County Sheriff's Police Department, while Agent Wood was conducting surveillance of the garage through real-time video from inside an adjacent residence. At about 11:40 a.m., Jose and Martinez pulled into the garage and met with Agent Zamora, who showed them the five kilograms of cocaine. Jose inspected the cocaine and agreed to purchase two kilograms of it for $27,500, but indicated that he first had to leave and obtain the purchase money. Jose and Martinez left the garage without the cocaine. Later that same afternoon, Martinez and defendant, who drove separately, arrived at the garage without Jose. Defendant was driving the blue Mercury Mystique, which Agent Wood had seen him drive on numerous occasions throughout his investigation. Upon arrival, defendant and Martinez indicated that they only had money for one kilogram of cocaine. The money was tendered to Agent Zamora, who

then gave the kilogram of cocaine to defendant. After defendant took the cocaine, he entered and started his vehicle, and was then arrested. Police searched defendant's Mercury Mystique and found the kilogram of cocaine hidden in a trap compartment located in the front bumper of the vehicle. Martinez was never charged for the offense in question, and was given money to relocate because he was threatened by Jose following defendant's arrest. Agent Zamora testified similarly to Agent Wood.

¶ 7 Defendant testified that on April 15, 2010, he was at his residence with Jose and Martinez. Jose told defendant about the drug deal, and Martinez told defendant that he had to make the deal because if he refused his "brother [would be] in danger." Defendant, who was alone in his Mercury Mystique, stated that he could have driven his car anywhere, including to the police station, but drove to the garage in question to buy cocaine. Defendant noted that the money to purchase the cocaine was put into place by Martinez. At the garage, Martinez requested the money and defendant removed it from the trap compartment of his car and gave it to him. Martinez gave the money to the undercover agent in exchange for the cocaine, and defendant placed the purchased cocaine in his car.

¶ 8 After the defense rested its case, the parties presented their closing arguments. Defense counsel argued entrapment, stating that Martinez, a police informant, induced defendant to buy the cocaine from the undercover agent by telling him that if he failed to do so, Jose would be in danger. Counsel indicated that Martinez knew he had to help the police make an arrest in this case to ensure he would not be prosecuted for drug possession. During defense counsel's argument, the State repeatedly objected to counsel's statements about defendant buying the

cocaine to protect his brother, and each time the State's objection was sustained by the court because "that [was] not the evidence presented."

¶ 9 Following closing arguments, the trial court provided the jury with an instruction as to the defense of entrapment. The jury found defendant guilty of possession of a controlled substance with intent to deliver 900 grams or more of cocaine.

¶ 10 On appeal, defendant contends that defense counsel provided ineffective assistance where he argued a necessity defense at trial, and the evidence supported such a defense, but counsel failed to request that the jury be instructed on "necessity." Defendant maintains that had the jury been instructed on the defense of necessity, he would have been acquitted of the charged offense.

¶ 11 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). To establish prejudice, the defendant must show a reasonable probability that, absent counsel's alleged error, the trial's outcome would have been different. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). If the defendant fails to establish either prong, his ineffective assistance claim must fail. *People v. Enis*, 194 Ill. 2d 361, 377 (2000).

¶ 12 It is well settled in Illinois that counsel's choice of jury instructions, and the decision to rely on one theory of defense to the exclusion of others, is a matter of trial strategy. *People v. Sims*, 374 Ill. App. 3d 231, 267 (2007). "Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence," and therefore, are "generally immune from claims of ineffective assistance of counsel." *Enis*, 194 Ill. 2d at 378. However, the failure to

request a particular jury instruction may be grounds for finding ineffective assistance of counsel if the instruction was so critical to the defense that its omission "'den[ied] the right of the accused to a fair trial.'" *People v. Johnson*, 385 Ill. App. 3d 585, 599 (2008) (quoting *People v. Pegram*, 124 Ill. 2d 166, 174 (1988)).

¶ 13 A jury instruction on the defense of necessity is provided when evidence has been introduced that the accused, without blame in occasioning or developing the situation, reasonably believed his conduct, which would otherwise be an offense, was necessary to avoid a public or private injury greater than the injury which might reasonably have resulted from his own conduct. 720 ILCS 5/7-13 (West 2010). A jury instruction on the defense of entrapment is provided when evidence has been introduced that the conduct of the accused was incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, the defense of entrapment is inapplicable if the person was pre-disposed to commit the offense and the public officer or employee, or agent of either, merely afforded to that person the opportunity or facility for committing an offense. 720 ILCS 5/7-12 (West 2010).

¶ 14 Defendant maintains that the decision not to request the instruction on necessity cannot be deemed trial strategy because his attorney argued and presented evidence of said defense to the jury. In particular, he points to counsel's comments during opening statements and closing arguments that Martinez said to him, "man, if you don't come and drive that car over here, these dope dealers *** are going to kill your brother," and "[i]f you don't do it your brother's in danger." Along these same lines, defendant asserted that the evidence at trial supported a

necessity defense where he testified that he only drove his car to the garage to pick up cocaine because Martinez told him that if he did not, Jose would be in danger.

¶ 15 This court has held that "[w]here defense counsel argues a theory of defense but then fails to offer an instruction on that theory of defense, the failure cannot be called trial strategy and is evidence of ineffective assistance of counsel." *People v. Serrano*, 286 Ill. App. 3d 485, 492 (1997) (citing *People v. Lewis*, 240 Ill. App. 3d 463, 467 (1992)). The initial question before us, then, is whether defense counsel argued necessity to the jury.

¶ 16 We find no support in the record for defendant's claim that his trial attorney made argument and presented evidence to advance a necessity defense. Instead, the theory of defense in the case at bar was entrapment. In particular, counsel argued during opening statements that:

> "Here is what I think you will find: That the police got a kilo of cocaine. Listen to me, the police did. They go to some safe, they go to some drawer in their office, they take the cocaine out. *** Here, let's see if we can try to sell it to these guys and when we sell it to them, as soon as they take it we arrest them. The police are dealing the dope.
>
> ***
>
> Ultimately they set up a time when Jose goes to a garage, *** the police show him the dope, Jose looks at it, Jose says okay, I'll buy it for $27,000. The police say good, get your money Jose. Jose leaves with the informant, Martinez, and they go someplace and Jose has second thoughts. ***
>
> Now the evidence will be Martinez is pretty upset because Martinez has to have some people arrested before the coppers will give him some consideration, drop charges from him. So when Jose says no, I'm withdrawing from this, forget it, I'm not doing it,

> Martinez goes to [defendant] *** and Martinez says to him, man, if you don't come and drive that car over here, these dope dealers *** are going to kill your brother. So he goes over there, drives in, pulls in this car, and that's when they arrest him.
>
> The evidence will be that Martinez, who is an agent or employee or servant of the police, coerced him to bring that car over when his brother wouldn't, when his brother withdrew. This guy loves his brother and that's the reason he went over there. That's why our defense is entrapment. Okay, the police or their agents cannot entrap you."

Then, during closing arguments, defense counsel reiterated his entrapment defense. He specifically stated that defendant "was entrapped by that agent" and "whether it was right or wrong, he had a fear for his *** brother's safety." Counsel continued this line of argument throughout closing despite the fact that the State's repeated objections to counsel's statements that the evidence showed defendant bought the cocaine to protect the safety of his brother was sustained by the trial court.

¶ 17 Defendant only identified statements from his trial counsel and his own testimony that, in isolation, are possibly consistent with a theory of necessity. However, from a reading of these statements in the context set forth above, trial counsel was arguing and presenting evidence of the defense of entrapment. We thus find this case distinguishable from the cases relied upon by defendant, where counsel presented the jury with evidence pertaining to a necessity defense, but then failed to request jury instructions on that defense. See, *e.g.*, *People v. Unger*, 66 Ill. 2d 333, 341 (1977) (finding "some evidence" of necessity where the defendant testified that he had been assaulted and homosexually molested by other inmates and that he thereafter received anonymous death threats for having reported the incident and that it was his fear of further sexual

attacks and/or death which prompted him to escape); *People v. Kucavik*, 367 Ill. App. 3d 176, 179-80 (2006) (finding that the defendant made a sufficient showing to require the submission of the necessity instruction to the jury because she presented "some evidence" that she was without blame in occasioning the situation that forced her to drive while intoxicated, and that she acted reasonably to avoid a greater injury).

¶ 18 Having found that defense counsel did not argue necessity to the jury, we conclude that defendant has not overcome the presumption that his counsel's excluding necessity was sound trial strategy. Even if we assume that there was enough evidence to support a necessity instruction, defense counsel may have concluded that a necessity theory would have been incompatible with the theory presented, particularly where the defense of necessity would not include any mention of an agent of a public officer inducing defendant to commit an offense. Defense counsel made a strategic decision to argue entrapment and not necessity. Trial counsel will not be deemed incompetent based on his decision to advance a particular defense theory even where appellate counsel or the reviewing court would have acted differently. See *People v. Mims*, 403 Ill. App. 3d 884, 890 (2010); *People v. Bobo*, 375 Ill. App. 3d 966, 977 (2007). "Mistakes in trial strategy or tactics or in judgment do not of themselves render the representation incompetent." *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). That defendant's trial attorney was ultimately unsuccessful in his arguments "does not mean [he] performed unreasonably and rendered ineffective assistance." *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007).

¶ 19 For all the foregoing reasons, we find that defendant has failed to demonstrate that trial counsel's performance fell below an objective standard of reasonableness. We affirm the judgment of the trial court.

¶ 20 Affirmed.