2015 IL App (1st) 123825-U

FOURTH DIVISION
June 18, 2015

No. 1-12-3825



---

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. 08 CR 16695 |
| | ) | |
| TUYEN NGO, | ) | Honorable |
| | ) | Colleen Hyland, |
| Defendant-Appellant. | ) | Judge Presiding. |

---

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

**O R D E R**

¶ 1 *HELD:* Defendant's claim of ineffective assistance of counsel must fail when he cannot establish a reasonable probability that the outcome of his trial would have been different absent counsel's alleged errors.

¶ 2 Following a jury trial, defendant Tuyen Ngo was found guilty of aggravated kidnapping and residential burglary. He was sentenced to an extended-term sentence of 35 years in prison for the kidnapping and to a concurrent 15-year sentence for the residential burglary. On appeal,

defendant contends that he was denied the effective assistance of trial counsel because counsel "failed to enforce" the trial court's order limiting the introduction of other crimes evidence. Defendant argues that although the trial court limited the use of other crimes evidence only to explain the course of the police investigation and the circumstances surrounding defendant's identification and arrest, trial counsel failed to object when the State elicited testimony and made arguments that could "only be used to argue *modus operandi*." We affirm.

¶ 3 Defendant's arrest and prosecution arose of out an April 2008 incident during which the 11-year-old victim Duy Tran was confined to a bathroom in his home, and $1,000 was taken from another resident's basement bedroom.

¶ 4 The State's theory of the case was that defendant broke into the victim's home through a basement window, confined the minor victim in a bathroom, and took $1,000 from the home. The State relied on testimony from two of defendant's victims in similar unrelated offenses, Vu Tran and Kevin Ton, as well as testimony from officers of the Waukesha, Milwaukee and Burbank police departments to establish the course of the police investigation that led to the identification and arrest of defendant in the instant case.

¶ 5 In May 2011, the State filed a motion seeking to admit proof of other crimes. The motion referenced four other crimes which the State asserted would demonstrate *modus operandi*, absence of mistake, the course of the police investigation, and the circumstances leading to defendant's identification and arrest. These offenses included: (1) defendant's conviction for home invasion and aggravated kidnapping during which he pointed a .45-caliber handgun at the victim, confined someone in a bathroom by securing the door with a computer cord, and took items including a limited edition Tag Heuer watch (the Burbank matter); (2) a pending felony during which defendant was allegedly discovered with a crowbar by the victim, attempted to

lock the victim in a bathroom, but ultimately locked her in a storage room (the Chicago matter); (3) a felony pending in Wisconsin during which defendant allegedly entered a home armed with a gun, forced the victim to the floor, shot at the victim twice and was later taken into custody while in possession of the watch taken in the Burbank matter (the Wisconsin matter); and (4) a pending case in Cook County in which defendant and codefendants broke into a home while masked (the Lincolnwood matter).

¶ 6 The trial court denied the motion as to *modus operandi* holding there were not "enough" distinctive similarities between the four matters; rather, there were "glaring differences." However, the court granted the motion to allow proof of other crimes with reference to the Wisconsin and Burbank matters to show the manner in which the police in the instant case were able to identify and arrest defendant, that is "through the investigation of the Wisconsin police with regards to the color of the car, the GPS that was recovered, and in bringing Burbank in to the picture." The matter proceeded to a jury trial.

¶ 7 At trial, the victim testified that he was home alone when he heard the doorbell ring. When he looked outside, he saw a man he did not know, so he did not answer the door. After a few minutes, he heard footsteps, and upon exiting his bedroom, saw defendant. Defendant asked him, in Vietnamese, if anyone was home and after the victim said no, defendant grabbed a power cord from a computer, pushed the victim into a bathroom and used the cord to lock the door. The victim, who was scared, began to pound on the door. He heard doors being kicked open and footsteps. Eventually, he heard the power cord being untangled, and after a few seconds he tried to open the door. He was able to get out of the bathroom and immediately called his father. When the victim looked outside, he saw a "gray tannish" van driving away. Later that day, the

victim went to a police station and assisted, through an interpreter, with the creation of a sketch of the man who entered his home.

¶ 8 In May 2008, the victim viewed a photographic array and identified someone, other than defendant, that, on a scale of 1 to 10, resembled the person that entered his house at a 5. In August 2008, he viewed another photographic array and indentified defendant. He then identified defendant in a line-up.

¶ 9 Mario Vu testified, through an interpreter, that in April 2008, he lived with the victim's family. When he returned home on the night of April 19, 2008, a window in his basement bedroom and his "piggy bank" were broken. Approximately $1,000 was missing from the bank.

¶ 10 Glenn Weibust, who lived across the street from the victim, testified that he showed police officers video from his home's surveillance system and made officers a copy.

¶ 11 Vu Tran testified through an interpreter that he lives in Waukesha, Wisconsin. On the evening of June 4, 2008, he went to pick his wife up at the nail salon where she worked. Once there, he heard a "skidding brake noise," looked outside, and saw a gold Toyota minivan. Defendant exited along with a woman and several children. The woman had her nails done while defendant went next door to the video store. Two days later, Tran was home alone when the garage door opened. When he looked into the garage, he saw defendant. Defendant pushed him into the house, made him lie down on the floor, and covered him with a table cloth. Tran was able to run away through the open garage and contact the police.

¶ 12 The court gave the jury a limiting instruction with regard to the other crimes evidence (the other crimes evidence limiting instruction). Specifically, the trial court instructed the jury that it had just heard evidence that defendant was involved in offenses other than the one charged in the indictment and that this evidence related to the identification of defendant, the course of

the police investigation, and the circumstances of defendant's arrest. It was for the jury, however, to determine whether defendant was involved in those offenses and, if so, what weight to give to this evidence on those issues.

¶ 13 Tran testified that approximately a week later, he identified defendant in a photographic array.

¶ 14 The State called Detective Ed Bergin of the Waukesha Police Department. Prior to Bergin's testimony, the trial court gave the jury the other crimes evidence limiting instruction. Bergin then testified that after speaking with Tran and Tran's wife, he went to the nail salon where Tran's wife worked. He also went to the video store next door and viewed its surveillance footage. At this point, he had a still photo from the surveillance system and the name of a man he was interested in speaking with. Six days later, he went to a casino in Milwaukee with Detective Eileen Michlitz where he saw defendant sitting at a "high stakes" poker table. Bergin spoke with defendant, who admitted that he was in Waukesha on the date of the incident at Tran's home and that he drove both a champagne-colored minivan and a Mercedes. Defendant agreed to accompany the detectives to a police station and consented to a search of the Mercedes. A limited edition Tiger Woods Tag Heuer watch was recovered from defendant.

¶ 15 In August 2008, Michlitz gave Bergin a report listing the addresses downloaded from a GPS unit recovered from defendant's Mercedes. Tran's address was on the list. Bergin then began to call the jurisdictions associated with those addresses in order to determine if "any type of similar" incidents had occurred. After speaking with Detective Coakley of the Burbank Police Department, Bergin sent him photographs of defendant and the watch.

¶ 16 Detective Eileen Michlitz then testified. Prior to her testimony, the trial court gave the jury the other crimes evidence limiting instruction. Michlitz testified that defendant gave her

permission to both search the Mercedes and drive it to the police station. She recovered a GPS unit from the car, and subsequently obtained a search warrant for its data.

¶ 17 Prior to the testimony of Detective Sean Lips of the High Crimes Technology Unit of the Milwaukee Police Department, the trial court again gave the jury the other crimes evidence limiting instruction. Lips testified that he received a GPS unit from Michlitz, downloaded the 142 points of interest and addresses stored on it, and gave a copy of his report to Michlitz.

¶ 18 Kevin Ton testified that he had emigrated from Vietnam, owned a nail salon, and lived in Burbank. On the morning of May 19, 2008, Ton and a friend were at his home. At this point, the trial court gave the jury the other crimes evidence limiting instruction. Ton then testified that when the doorbell rang, he stuck his head outside to ask what the person wanted. Defendant pushed his way inside, ordered Ton to the floor and took his phone. Defendant told Ton to get up and asked him in Vietnamese if anyone else was home. Ton said he was alone. Defendant held Ton's hands behind his back and pulled him into the kitchen where Ton's friend was hiding under a table. Defendant took the men to a bathroom, made them lie on the floor and took their valuables, including Ton's limited edition Tag Heuer watch. When defendant asked where the money was, Ton told him it was in the garage. Ton thought this lie would give him an opportunity to escape. Defendant used a computer cord to tie the bathroom door to keep the other man inside. Ton was eventually able to get away, run to a neighbor's house and call the police. He gave a description of defendant to officers in order to create a sketch and later indentified defendant from a photographic array. He also identified a photograph of his watch.

¶ 19 The State then called Sergeant Thomas Coakley of the Burbank Police Department. Prior to Coakley's testimony, the court again gave the jury the other crimes evidence limiting instruction. Coakley testified that after speaking to Ton and disseminating the composite sketch

that Ton assisted in generating, he spoke with Detective Hottinger of the Orland Park Police Department. In August 2008, he spoke with Bergin and learned that defendant possessed a Tiger Woods Tag Heuer watch and that an address from defendant's GPS corresponded to an address three blocks away from Ton's home. Coakley requested photos of defendant and the jewelry. The photo of defendant was used in a photographic array which was shown to Ton. Coakley then gave a copy of defendant's photo to Hottinger.

¶ 20 Sergeant Thomas Hottinger testified that in the course of his investigation at the victim's home, he spoke to Weibust and sent an officer to Weibust's home to retrieve a copy of the surveillance video. Later, at the station, the victim gave Hottinger information from which he compiled a sketch of the person who entered the victim's house. When he viewed the surveillance video from Weibust he saw a man get into a Toyota Sienna minivan. The sketch and the information from the video were put in an in-house "critical reach flyer."

¶ 21 In May, Hottinger received the critical reach flyer from Coakley's jurisdiction. He contacted Coakley because both victims were Asian and had been forced into bathrooms. He then learned that the suspect in his case matched the physical characteristics of the suspect in Coakley's case. In August, Coakley provided Hottinger with defendant's name and a photograph. Hottinger also "ran" defendant in the Secretary of State database, obtained a photograph, and learned that a Toyota Sienna was registered to defendant's Yorkville address. After the victim identified defendant in a photographic array, Hottinger and Coakley arranged to meet at the Yorkville address to take defendant into custody. Once defendant was taken into custody, the victim identified him in a line-up.

¶ 22 In its closing argument, the State argued that although the jury heard from numerous witnesses the "most compelling" testimony was from the victim, who was face-to-face with

defendant and saw defendant's vehicle driving away. The State admitted that the color of the van was described differently by different witnesses, but that color was subjective and all the color descriptions, gray, tan, gold, champagne, "fit" the vehicle. In reviewing the testimony of Tran, Bergin, and Ton, the State reminded the jury of the court's instruction that it was to consider that testimony only as it related to the identification of defendant, the course of the police investigation and the circumstances of defendant's arrest. The State further argued that Ton had a similar experience to the victim, that is, both were accosted in their homes. The defense argued that the victim was mistaken in his identification of defendant because he only had one opportunity to see defendant and was scared. In rebuttal, the State argued that the victim never wavered in his description and identification of defendant. The State also reiterated that the reason the jury heard about other crimes was not because the State wanted to jury to find defendant guilty of those crimes, but to explain the police investigation and how defendant became the only suspect in this case.

¶ 23 In instructing the jury, the trial court stated, *inter alia,* that evidence that defendant was involved in offenses other than the one charged in the indictment was received on the issues of defendant's identification, the course of the police investigation, and circumstances of defendant's arrest and may be considered by the jury only for that limited purpose. It was for the jury to determine whether defendant was involved in those offenses and, if so, what weight should be given to the evidence on the issues of defendant's identification, the course of the police investigation, and circumstances of defendant's arrest. Ultimately, the jury found defendant guilty of aggravated kidnapping and residential burglary. He was sentenced to an extended-term sentence of 35 years on the aggravated kidnapping and to a concurrent 15-year

prison term on the residential burglary. This sentence was to be served consecutive to the sentence imposed in case number 08 CR 16696.[1]

¶ 24 On appeal, defendant contends that he was denied the effective assistance of trial counsel by counsel's failure to enforce the trial court's ruling regarding other crimes evidence. Defendant contends that counsel's failure to object to certain testimony and to the State's closing argument permitted the State to admit the "details" of the other crimes and to use evidence of those crimes as proof of defendant's guilt in this case. Defendant contends that the "blow-by-blow" explanation of the other crimes was "totally unnecessary" and permitted the State to effectively argue *modus operandi*. He also contends that the State's closing argument regarding a different victim's "similar experience" to that of the victim in the instant case was further improper argument in support of the State's *modus operandi* theory.

¶ 25 To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, a reasonable probability exists that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). If the defendant fails to establish either prong, his ineffective assistance claim must fail. *Strickland*, 466 U.S. at 687. "If it is easier, a court may proceed directly to the second prong of *Strickland* and dismiss an ineffective assistance claim on the ground that it lacks sufficient prejudice, without first determining whether counsel's performance was deficient." *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 70. To establish prejudice, the defendant must show a reasonable probability that, absent counsel's deficient performance, the trial's outcome would have been different. *People v.*

[1] Defendant's appeal in case number 08 CR 16696 is currently pending before this court. See *People v. Ngo*, No. 1-11-1468.

*Evans*, 209 Ill. 2d 194, 220 (2004). "A reasonable probability of a different result is not merely a possibility of a different result." *Id*.

¶ 26 Here, defendant contends that defense counsel failed to "prevent the State from improperly using evidence" that had been ruled inadmissible by the trial court because counsel failed to object to any testimony or argument that did not merely establish that defendant was identified by the Burbank victim and that the course of the police investigation "flowed" from the Waukesha case to the Burbank case to the instant case.

¶ 27 Initially, we note that "decisions regarding 'what matters to object to and when to object' are matters of trial strategy." *People v. Perry*, 224 Ill. 2d 312, 344 (2007), quoting *People v. Pecoraro*, 175 Ill. 2d 294, 327 (1997). Matters of trial strategy are generally immune from claims of ineffective assistance of counsel except in those cases where the trial strategy results in no meaningful adversarial testing. *People v. West*, 187 Ill. 2d 418, 432-33 (1999).

¶ 28 In the case bar, our review of defendant's argument on appeal has been hindered by his failure to identify specific objectionable evidence to which counsel should have objected, *i.e.*, facts that should have been suppressed in compliance with the court's ruling limiting the use of other crimes evidence. Initially, this court cannot say that counsel's decision not to object was not trial strategy. Even were counsel to have objected to the allegedly overly detailed other crimes testimony, without specificity in defendant's arguments it is not clear whether such objections would have been successful considering the trial court's ruling that other crimes evidence was admissible to show the course of the police identification and the circumstances of defendant's identification and arrest in the instant case. See *People v. Sm*ith, 2014 IL App (1st) 103436, ¶ 64 (counsel is not required to make futile objections in order to provide effective assistance). However, even if this court were to accept defendant's contention that trial counsel's failure to

object to this allegedly overly detailed other crimes evidence was objectively unreasonable, defendant's claim must fail because he cannot establish how he was prejudiced.

¶ 29 In the case at bar, defendant cannot show prejudice when the evidence at trial established that a window in the basement of the victim's house was broken, that defendant confined the victim in a bathroom with a computer power cord, and that $1,000 was missing from the house. The State also established, through the testimony of the other crimes witnesses, the course of the police investigation that led to the identification and arrest of defendant in the instant case. Accordingly, we reject defendant's contention that had defense counsel objected to any detail that did not "merely" establish that defendant was identified by Ton, and that the police investigation in the instant case utilized information obtained by the Waukesha, Milwaukee and Burbank police departments, the result of his trial would have been different because the victim identified defendant as the person who put him in the bathroom and money was missing from the basement bedroom.

¶ 30 Although defendant contends that the detailed other crimes testimony prejudiced the jury against him and created a trial within a trial, the record reveals that the trial court gave the jury a limiting instruction prior to the testimony of each other crimes witness and prior to deliberations. Defendant's argument also overlooks the fact that he was identified by the victim and that this identification was corroborated by evidence in the form of a surveillance video showing a van similar to one that was registered to defendant's address leaving the area of the victim's home. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) (the credible and positive testimony of a single witness is sufficient to convict a defendant).

¶ 31 Accordingly, we reject defendant's speculative assertion that the outcome of the trial probably would have been different had the evidence at trial consisted of the victim's testimony

that defendant confined him in a bathroom and less-detailed other crimes evidence. See *People v. Bew*, 228 Ill. 2d 122, 135 (2008) ("*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice").Therefore, because defendant has failed to show a reasonable probability that, absent counsel's alleged errors, the outcome of his trial would have been different (*Evans*, 209 Ill. 2d at 220), his claim of ineffective assistance of counsel must fail (see *Strickland*, 466 U.S. at 687).

¶ 32 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.