

No. 1-13-0199

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of
Plaintiff-Appellee,)	Cook County.
v.)	
DEVIN SEATS,)	No. 11 CR 7010
Defendant-Appellant.)	Honorable
	James B. Linn,
	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* The judgment of the circuit court was affirmed where the defendant's ineffective-assistance-of-counsel claims failed.
- ¶ 2 Following a bench trial, the defendant, Devin Seats, was convicted of one count each of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)), armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2010)), and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1) (West 2010)), and was subsequently sentenced to concurrent prison terms of 20 years, 12 years, and 10 years, respectively. On direct appeal, he argues that his trial counsel was ineffective for failing to perfect the impeachment of eyewitnesses with prior inconsistent

statements, and for not moving to suppress an eyewitness's identification of the defendant at a show-up in which the defendant was sitting in a squad car. For the reasons that follow, we affirm the defendant's convictions.

¶ 3 The following evidence was adduced at the defendant's bench trial, which commenced on June 7, 2012.

¶ 4 At about 7:00 p.m. on April 11, 2011, Christopher Easter, the victim, was shot while inside the Cricket Wireless store located in a strip mall at 51st Street and Cottage Grove Avenue in Chicago. The defendant fired the gun from outside the store. Nicole Randle testified that she was coming out of a nail salon three doors down from the Cricket Wireless store. She stated that she was parked in front of the Cricket Wireless store but a surveillance video taken from a location near the Cricket Wireless store showed Randle and her white car parked in front of the Sharks Restaurant located just to the right of the Cricket Wireless store.

¶ 5 Randle testified that she approached her car and entered the front driver's side door when she saw two men approach the Cricket Wireless store. One man, later identified as the defendant, was wearing a black zipper sweatshirt with a hood and was holding a gun in his right hand. Randle testified that she was able to see the defendant's face through the reflection in the Cricket Wireless store window and was able to look at him for two or three minutes. Randle saw the defendant shoot the gun multiple times in front of the window of the Cricket Wireless store. The bullets travelled through the window and struck Easter in the face. After the shots were fired, Randle saw the defendant run in the opposite direction of the Cricket Wireless store. Randle testified that she was only twelve feet from the defendant and his accomplice as they ran from the scene on foot. She also saw Easter emerge from the Cricket Wireless store bleeding

from his face and asking for help. Shortly thereafter, a car drove up to Easter, he entered, and drove away.

¶ 6 At the time of the shooting, Chicago Police Officer Gerardo Madrigal was waiting at a red light at the corner of Cottage Grove Avenue and 51st Street. He heard three gunshots fired from the direction of the strip mall and observed the defendant and another man running away from the store towards a red car. According to Officer Madrigal, the defendant was wearing a black hooded sweatshirt, a purple baseball cap, and was carrying a black object in his right hand, which he believed to be a gun.

¶ 7 Officer Madrigal saw the defendant and his companion jump into the passenger seats of the red car and drive off. Without activating his emergency lights, Officer Madrigal pursued the red car until it came to a stop at 50th Place and St. Lawrence Avenue. The defendant exited the vehicle and ran toward a parking structure. As he was running, he took off his black hooded sweatshirt and purple baseball hat and discarded these items to the ground. The defendant climbed over a fence in the rear of the parking structure, jumped in a dumpster, and closed the lid. Officer Madrigal approached the dumpster and arrested the defendant. Meanwhile, another officer recovered the sweatshirt and purple hat but was not able to find the handgun. From the time of the shooting until the time the defendant was arrested, five minutes had elapsed.

¶ 8 After the defendant was placed under arrest, officers brought Randle to the corner of 51st Street and St. Lawrence Avenue where she positively identified the defendant as the shooter.

¶ 9 Officer Kamal Judeh, a Chicago police evidence technician, processed the crime scene at the Cricket Wireless store. He photographed the scene of the shooting, collected evidence, and performed a gunshot residue test on the defendant's hands at Area One Police Headquarters.

Officer Judeh inventoried the defendant's black hooded sweatshirt, purple hat, and sealed the gunshot residue test, and sent the items to the Illinois State Police crime lab for testing.

¶ 10 Robert Berk, an evidence analyst with the Illinois State Police crime lab, testified that he received the sealed gunshot residue test that Officer Judeh performed on the defendant's hands and found particles consistent with the presence of primer gunshot residue. This indicated that the defendant either discharged a firearm, had contact with an item containing gunshot residue, or had his right hand near a firearm when it was discharged.

¶ 11 Rubin Ramos, an Illinois State Police forensic scientist, testified he performed a deoxyribonucleic acid (DNA) analysis on the black hooded sweatshirt as well as a buccal standard swab taken from the defendant. Ramos determined that the black sweatshirt contained a mixture of DNA, one of which matched the DNA taken from the buccal standard. Thus, the defendant's DNA could not be excluded from the sweatshirt.

¶ 12 A surveillance video taken from a location outside the Cricket Wireless store showed Easter standing near the front window of the store next to two employees. At approximately 6:54 p.m., the defendant approaches the store with a gun and fires three shots through the store window. The defendant and his accomplice fled the scene and Easter walked out of the store. After the video was played, Easter testified, "he doesn't know who shot him." During cross-examination, defense counsel sought to introduce an affidavit from Easter. The affidavit stated:

"To whom it may concern. I bare [*sic*] wittness [*sic*] that the person that shot me in the face on the assumed date April 11, 2011 was not Devin Seats. My assailant was much taller, much heavier then [*sic*] and possibly light skin. I wasn't forced to write this and doing this on my own free will."

¶ 13 The trial court denied the defendant's request to admit Easter's affidavit. However, on cross-examination defense counsel asked Easter if he knew who shot him and he said that he did not know. Easter also testified that he had seen and was familiar with the defendant before the date of the trial.

¶ 14 During the trial, the parties stipulated that the defendant had previously been convicted for unlawful use of a weapon and manufacture and delivery of a controlled substance.

¶ 15 After the parties rested, the trial court found the defendant guilty of aggravated battery with a firearm, armed habitual criminal, and aggravated discharge of a firearm. The court subsequently sentenced him to concurrent prison terms of 20 years, 12 years, and 10 years, respectively. The defendant filed a motion to reconsider the sentence, which the court denied. This appeal followed.

¶ 16 The defendant argues that he was deprived of effective assistance of counsel because trial counsel (1) failed to perfect impeachment of Randle with her prior inconsistent statements about her distance from the shooting; (2) failed to present as substantive evidence Easter's prior inconsistent statement that the shooter was "much taller" than the defendant; and (3) failed to file a motion to suppress Randle's identification of the defendant. We disagree.

¶ 17 Claims of ineffectiveness of counsel are judged using the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under *Strickland*, the defendant must show that: (1) his counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for the counsel's deficient performance, the result of the proceeding would have been different. *Id.* The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 18 In order to meet the first prong, the defendant must show that his attorney's performance was so inadequate that counsel was not functioning as the counsel guaranteed by the sixth amendment. *Manning*, 241 Ill. 2d at 326-27. "Counsel's performance is measured by an objective standard of competence under prevailing professional norms" and the defendant "must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *Id.* at 327. Generally, matters of trial strategy are immune from claims of ineffective assistance of counsel. *Id.* The decision of whether and how to cross-examine a witness is a matter of trial strategy, which does not support a claim of ineffective assistance. *People v. Salgado*, 263 Ill. App. 3d 238, 246 (1994). The complete failure to impeach a key witness with significant impeachment evidence is not sound trial strategy and may support a claim of ineffective assistance. *Id.* at 246-47.

¶ 19 In this case, the defendant fails to show that trial counsel's decision not to impeach Randle with her prior statement about parking directly in front of the Cricket Wireless store fell below an objective level of reasonableness and, thus, his claim cannot meet his burden under the first prong of *Strickland*.

¶ 20 We initially note the contents of Randle's statements to law enforcement are not part of the appellate record. There is no record as to the context or content of Randle's statement to law enforcement. Therefore, the record does not support the defendant's argument that his trial counsel was ineffective for failing to introduce the statement. See *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984) (an appellant has the burden of providing a sufficient record on appeal).

¶ 21 Even if the record supported the defendant's claim, we would find trial counsel's decision not to impeach Randle's testimony to be a matter of trial strategy. The surveillance video clearly depicted Randle's vehicle parked in the parking lot near the Cricket Wireless store. Whether she

parked directly in front of the store or next to the store has no bearing on the outcome of the trial because the State was able to establish Randle's location during the shooting from the video footage. Any additional testimony would have been merely cumulative. See *People v. Henderson*, 171 Ill. 2d 124, 155 (1996) (the failure to present cumulative evidence does not constitute ineffective assistance of counsel).

¶ 22 We also reject the defendant's argument that trial counsel was ineffective for failing to present Easter's inconsistent statement that the shooter was "much taller" than the defendant. Our review of the record shows the defense attorney attempted to introduce Easter's prior statement via affidavit but the trial court did not allow it. Even if Easter's affidavit, which stated that the shooter was taller than the defendant, had been admitted at trial, the defendant cannot meet his burden under the second prong of *Strickland*. He would have still been convicted because of the overwhelming evidence presented at trial of the defendant's guilt including Randle's testimony observing the shooting and Office Madrigal's testimony of hearing the shots from the direction of the Cricket Wireless store and seeing the defendant running with what appeared to be a handgun. The defendant cannot show that a reasonable probability exists that had counsel introduced Easter's statement regarding the shooter's height, the trier of fact would not have found him guilty beyond a reasonable doubt. Because the defendant cannot meet the second prong of the *Strickland* test, his claim must fail.

¶ 23 Finally, the defendant argues that his defense counsel performed deficiently by failing to file a motion to suppress Randle's identification of the defendant. More specifically, he argues Randle's identification should have been suppressed because the police conducted an improper and suggestive show up. We disagree with the defendant's argument.

¶ 24 Courts consider an attorney's decision of whether to file a motion to suppress evidence as a matter of trial strategy and give counsel "great deference" in this choice. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). If a motion to suppress would be futile, counsel is not ineffective for his failure to file it. *Id.* Again, the defendant's argument fails under the first and second prongs of the *Strickland* test.

¶ 25 In order to challenge a show-up identification procedure, "the defendant must prove that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that the defendant was denied due process of law." *People v. Ramos*, 339 Ill. App. 3d 891, 897 (2003). If established, the State must then prove that the identification is independently reliable. *Id.*

¶ 26 In the present case, the defendant argues that the show-up identification procedure was unnecessarily suggestive because there was only one person involved and such procedure has been widely condemned by our Supreme Court. However, even if the show-up was unnecessarily suggestive, Randle's identification was independently reliable. In determining the independent reliability of an identification the factors to be weighed include: (1) the opportunity of the witness to view the criminal during the crime; (2) the witness's degree of attention; (3) the accuracy of her prior description of the criminal; (4) the amount of certainty demonstrated at the identification; and (5) the length of time between the crime and the identification. *Ramos*, 339 Ill. App. 3d at 897-98.

¶ 27 Randle had a clear opportunity to view the defendant and paid a high degree of attention, as she testified that she saw the defendant fire his gun into the Cricket Wireless store window in broad daylight. Likewise, the video of the shooting shows Randle in close proximity to the shooting. Although Randle testified that the defendant was facing the Cricket Wireless store

window, she noted that she was able to see his face through the reflection and got a "good clear look" at the defendant "[f]or two to three minutes" before the shooting. Additionally, Randle was able to give a description of the shooter which sufficiently corresponded to the description of the defendant as a man wearing a black hooded sweatshirt, carrying a gun in his right hand. Randle's description was consistent with that of Officer Madrigal and Robert Beck who stated that the defendant's right hand tested positive for gunshot residue. Randle was certain in identifying the defendant as the shooter, even though he no longer was wearing his black hoodie, which he had taken off while being chased by Officer Madrigal. Finally, the length of time between the shooting and Randle's identification was only approximately seven minutes after the shooting took place. Therefore, even if the show up was suggestive, each of these factors display that Randle's identification was nevertheless reliable. Moreover, the defendant cannot prove that his trial counsel fell below an objective standard of reasonableness because Randle's identification was not "unnecessarily suggestive" and was sufficiently reliable. Any motion to suppress would have been futile.

¶ 28 Alternatively, the defendant cannot meet his burden under the second prong of *Strickland*, because the outcome of the defendant's trial would have been the same even if trial counsel had successfully suppressed Randle's identification. In addition to Randle's eyewitness testimony, the trial court heard overwhelming evidence of the defendant's guilt including Officer Madrigal's testimony that he heard shots from Cricket Wireless and saw the defendant running holding what appeared to be a gun and a swab of defendant's hand following the shooting tested positive for the presence of gunshot residue. Such overwhelming evidence leaves no reasonable possibility of a different result. The defendant most likely would have still been convicted given the remaining substantial evidence demonstrating his guilt. Therefore, there is no reasonable

probability that, but for the defense counsel's allegedly deficient performance, the result of the proceeding would have been different.

¶ 29 In sum, the defendant cannot establish either prong under *Strickland*. The outcome of the defendant's trial would have been identical even if trial counsel had filed a motion to suppress information because the motion likely would not have been granted, and even if the motion was granted, the defendant most likely would have still been convicted given the remaining substantial evidence demonstrating his guilt. As such, we cannot find that the defendant's trial counsel was ineffective for failing to file a motion to suppress Randle's identification.

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

¶ 31 Affirmed.