2015 IL App (2d) 131010-U
No. 2-13-1010
Order filed September 14, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHNNIE DANIELS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 12-CF-394 Honorable Daniel P. Guerin, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant failed to establish that his counsel was ineffective: an officer's testimony, to which counsel did not object, did not reveal the substance of a conversation and thus was not hearsay or unduly prejudicial, and the record did not reveal why counsel did not provide evidence promised in his opening statement; (2) defendant was entitled to additional sentencing credit, and we modified the mittimus accordingly.

¶ 2 Defendant, Johnnie Daniels, appeals his convictions of two counts of possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (2010)). He contends that his counsel was ineffective and that the mittimus should be modified to reflect the correct

amount of credit for time spent in presentence custody. We affirm the convictions but modify the mittimus to reflect the correct amount of credit.

¶ 3 I. BACKGROUND

¶ 4 On February 22, 2012, defendant was arrested after police officers witnessed a hand-to-hand exchange between defendant and another person in the parking lot of a hardware store and found cocaine and heroin in defendant's possession. He was later charged with two counts of possession of a controlled substance with intent to deliver. On August 20, 2013, a jury trial was held.

¶ 5 In his opening statement, defense counsel stated:

> "[Defendant] was in a vehicle that was not owned by [him]. It was owned by another individual named Harry Jenkins. Harry Jenkins requested [defendant] come with him to Ace Hardware. ***
>
> You will see on that particular morning, [defendant] went because he was going to be given some drugs. And just like drug addicts do, they do anything for drugs, so he went to this Ace Hardware store with Harry Jenkins. When Harry Jenkins, who was driving this motor vehicle, pulls into this Ace Hardware, out runs a gentleman named Kenneth. He runs out to the car and he hands [defendant] a bag."

Counsel said that police officers would not be able to say that they saw defendant receive money or give drugs to another person. He asked the jury to find that defendant possessed the drugs but did not have the intent to deliver them.

¶ 6 At trial, Detective Anthony Reda testified that, on February 22, 2012, he was on patrol in an unmarked car with Detective Greg Garofalo when they saw a Jeep with a broken taillight. They followed the Jeep to the parking lot of an Ace Hardware store, where they saw an

employee approach the Jeep. The employee walked to the passenger side of the Jeep and made a hand-to-hand exchange with someone in the Jeep and then walked back into the store. Reda could not see what was exchanged. Garofalo provided similar testimony and added that, when defendant was removed from the vehicle, he had $150 in his hand.

¶ 7 The detectives followed the Jeep and pulled it over after it changed lanes without signaling. As they approached the Jeep, they saw defendant, the passenger, making movements toward the floorboard. Under the passenger seat was a pouch containing 52 small bags of crack cocaine and seven tinfoil folds of heroin, consistent with drug dealing. The small bags had spade insignias on them. There were no weapons, police scanners, scales, or hidden drug compartments in the Jeep.

¶ 8 The detectives returned to the hardware store to speak to the employee. As they were walking with the employee, they saw him pull something out of his pocket and try to stuff it down the front of his pants. Eight bags of heroin and two bags of crack cocaine were recovered from the employee. The bags containing the cocaine had black spades on them.

¶ 9 During Garofalo's testimony, the State asked him if he knew for a fact that drugs were exchanged. Garofalo replied: "Correct, after finding that in the car and talking to—." Defense counsel objected based on hearsay, a sidebar was held, and the objection was overruled. The State then asked how Garofalo determined who was the buyer and who was the seller. Garofalo stated without objection:

> "After looking at the drugs itself, after coming back from the traffic stop and speaking to the driver, going to the Ace, finding what the Ace employee had on him, due to the fact it was similar bags, inside was similar packaging, the items that he actually

handed to him at the Ace would have been the plastic bag containing the eight bags of heroin and the two things of crack cocaine."

Counsel then asked: "So your opinion was based on all the evidence that the defendant was the dealer?" Garofalo answered: "Correct." Garofalo also stated that a person could be both a user and a seller.

¶ 10 The defense did not present any evidence. The jury was instructed that they could find defendant guilty on the lesser charge of possession of a controlled substance. During deliberations, the jury sent a note to the judge asking among other things, the approximate cost of the drugs the employee was found with and what happened to Jenkins. The court told the jury that all of the evidence had been received. The jury found defendant guilty of both counts of possession of a controlled substance with intent to deliver. Defendant's motion for a new trial was denied. On September 26, 2013, he was sentenced to 18 years' incarceration. Defendant had remained in custody from the date of his arrest through the date of sentencing, but the mittimus incorrectly stated that he was entitled to credit for time spent in presentence custody beginning on February 24, 2012, instead of February 22, 2012. Defendant appeals.

¶ 11 II. ANALYSIS

¶ 12 Defendant contends that his counsel was ineffective for failing to object to hearsay evidence from Garofalo indicating that Jenkins, who did not testify, implicated him as the seller of the drugs. The State argues that the evidence was not hearsay and that counsel was not ineffective for failing to object.

¶ 13 In determining whether a defendant was denied effective assistance of counsel, we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). 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 resulted in prejudice to the defendant. *Id*. at 687; *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). To establish deficient performance, the defendant must show that his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219 (2004). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 219-20. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 14 The sixth amendment to the United States Constitution, applicable to the states via the fourteenth amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const., amends. VI, XIV; see also Ill. Const. 1970, art. I, § 8. Testimonial hearsay statements made by a witness who is unavailable at trial may not be admitted unless the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *People v. Rodriguez*, 312 Ill. App. 3d 920, 928 (2000). Where an out-of-court statement is offered for some purpose other than to establish the truth of the matter asserted, the statement is not hearsay. *People v. Albanese*, 102 Ill. 2d 54, 70 (1984).

¶ 15 "A statement used in a criminal prosecution to detail the course of a police investigation, not to prove the truth of the matter asserted, is not hearsay." *People v. Malave*, 230 Ill. App. 3d 556, 560 (1992). "Such a statement is admissible if offered for the limited purpose of explaining why the police conducted their investigation as they did, or why they arrested defendant, or why they confronted defendant with their suspicions." *Id*. at 561. "The rationale of the rule is that a

portrayal of the events in question lessens the need of the fact finder to speculate on the reasons for the officers' subsequent actions." *Id*. Thus, an officer may testify that a conversation took place and that the officer acted on it, because such testimony is within the officer's knowledge and is not hearsay. *People v. Sample*, 326 Ill. App. 3d 914, 920 (2001). However, testimony that reveals the substance of a conversation is inadmissible hearsay. See *Id*. at 920-21 (citing *People v. Gacho*, 122 Ill. 2d 221, 248 (1988)). For example, when counsel specifically asked if an officer learned the identity of a shooter after speaking to a witness, the officer's affirmative response clearly revealed the substance of the conversation and was inadmissible hearsay. *People v. Armstead*, 322 Ill. App. 3d 1, 7 (2001). But when an officer testified that he spoke with the victim and then went to look for the defendant, the testimony was not hearsay, as the testimony explained the officer's actions during the investigation and did not reveal the substance of the conversation. *Gacho*, 122 Ill. 2d at 248.

¶ 16 Here, Garofalo merely stated that he spoke with Jenkins during the events that ultimately led him to believe that defendant was the seller of the drugs. He never stated what Jenkins said, nor did he specifically indicate that Jenkins implicated defendant. Defendant argues that Garofalo's "speaking to the driver" was the only factor he mentioned that could definitively show that defendant gave the drugs to the employee, such that Garofalo revealed the substance of the conversation. But that was not the only factor. Garofalo testified that defendant had 52 bags of crack cocaine, which was typical of drug dealing, and that the employee had 2. He also specifically stated that he made the determination "after looking at the drugs itself" and based on all of the evidence. Given the amount of drugs found in defendant's possession as compared to the employee's and given defendant's possession of $150, Garofalo reasonably could have made the determination based on those factors and not on any statement made by Jenkins. That

Jenkins implicated defendant is purely speculative. Thus, Garofalo's statement that he spoke to Jenkins was not hearsay, and counsel was not ineffective for failing to object.

¶ 17 Defendant next argues that, even if the evidence was not hearsay, his counsel should have objected because its probative value was outweighed by its prejudicial effect. Evidence is admissible if it is relevant to an issue in dispute and if its prejudicial effect does not substantially outweigh its probative value. *People v. Gonzalez*, 142 Ill. 2d 481, 487 (1991). Here, the evidence was a minor part of a greater statement showing that Garofalo reached his determination based on all of the evidence, including the strong evidence of guilt based on defendant's possession of 52 bags of crack cocaine. In that context, it was not unduly prejudicial, and counsel was not ineffective for failing to object to it.

¶ 18 Defendant next contends that his counsel was ineffective for promising during his opening statement to show that defendant went with Jenkins to obtain drugs and then failing to present any evidence of that. When, contrary to counsel's promise in opening statements, the defendant does not testify, and the failure to present the promised testimony cannot be attributed to unforeseeable events, the attorney's broken promise can be unreasonable. *People v. Briones*, 352 Ill. App. 3d 913, 918 (2004). However, "[a] counsel's failure to provide promised testimony is not ineffective assistance *per se*." *People v. Manning*, 334 Ill. App. 3d 882, 892 (2002). The defendant must show that his counsel's decisions were unreasonable and that there was a reasonable probability that an error affected the outcome of the proceeding. *Id*.

¶ 19 Here, counsel did not explicitly promise that defendant would testify. Further, the record does not show why counsel did not present evidence of defendant's reasons for accompanying Jenkins. For example, there is no evidence that counsel advised defendant not to testify, that counsel made the opening remark without first asking whether defendant wished to testify, or

that counsel failed to obtain witnesses. See *id*. at 893. The record does not reveal discussions between defendant and counsel, nor is it clear from the record why defendant did not testify or whether he ever intended to testify. See i*d*. When an ineffective-assistance claim is raised on direct appeal, the court should not reach the merits if to do so would require the consideration of evidence outside the record. See *People v. Kunze*, 193 Ill. App. 3d 708, 725-26 (1990). In such a situation, the claim of ineffectiveness is properly raised in a collateral proceeding in which a sufficient record can be made. *Id*. at 725-26. Accordingly, we determine that defendant has not established error.

¶ 20 Finally, defendant contends that he is entitled to a total of 582 days of credit for time spent in presentence custody. A defendant is entitled to credit against his prison term for each day or part of a day spent in jail before the imposition of the sentence. 730 ILCS 5/5-4.5-100(b) (West 2010). Here, the record reflects that defendant is entitled to credit from February 22, 2012, to the date of sentencing on September 26, 2013. The State agrees. Accordingly, we modify the mittimus to reflect a total of 582 days' credit.

¶ 21 III. CONCLUSION

¶ 22 Defendant has not shown that counsel was ineffective. Accordingly, the judgment of the circuit court of Du Page County is affirmed. However, we modify the mittimus to reflect the proper amount of presentence credit. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178-79 (1978).

¶ 23 Affirmed as modified.