2015 IL App (2d) 140854-U
No. 2-14-0854
Order filed November 6, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KIRK SWAGGERTY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 05-CF-289 Honorable Robbin J. Stuckert, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Schostok and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was not ineffective: as to his alleged trial-advocacy errors, which defendant in any event overstated, defendant did not claim any specific prejudice; his stipulations were on minor points and were reasonable strategy; and, as the trial court confirmed in ruling on his motion to reconsider the sentence, the failure to submit defendant's willingness to testify in other cases as mitigating evidence at sentencing would not have produced a lesser sentence.

¶ 2 Defendant, Kirk Swaggerty, appeals from his conviction of first-degree murder (felony murder) (720 ILCS 5/9-1(a)(3) (West 2004)). He asserts that trial counsel's representation of him was ineffective in that, among other things, counsel mishandled hearsay objections and stipulated to facts that were harmful to defendant. We hold that defendant has failed to show

prejudice from any unreasonable actions of trial counsel, who was, in any event, rather more competent than defendant has suggested. We thus hold that defendant has not shown that he received ineffective assistance and we therefore affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with first-degree murder, home invasion (720 ILCS 5/12-11(a)(3) (West 2004)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2004)). The pretrial proceedings brought out that the State's theory was that defendant had planned the home invasion at issue—the predicate felony for the murder—and that the death involved was that of defendant's accomplice, Michael Kappa. The intended victim, Michael Mason, shot Kappa with the gun that another accomplice, Jason Middlekauf, brought into Mason's house.

¶ 5 In pretrial proceedings, trial counsel indicated that defendant intended to raise the defense that another person, John Stark, had the role in the home invasion that the State attributed to defendant. Defendant further wanted to convey that he and other witnesses feared Stark, which fear was a reason for both defendant's flight to Mexico—where he was arrested—and for other witnesses' testimony against defendant.

¶ 6 Both parties' theories required them to make extensive use of third-party out-of-court statements. Thus, hearsay exceptions and the definition of hearsay were at issue throughout the trial.

¶ 7 The interactions during the defense's opening statement began a pattern of extended discussions with the court over evidentiary matters, particularly hearsay rulings. Much of this discussion occurred as trial counsel told the jury that it would learn about a dispute between Stark and Mason and about Stark's dealings with defendant.

¶ 8 The core of the State's evidence came from testimony by Mason, Jaime Villarreal—who testified to being the getaway driver—and Mason's then-girlfriend, Amy Crosby, who testified to the events of the home invasion.

¶ 9 Mason testified that, as of February 2005, defendant had a friendly relationship with him and had been buying marijuana in bulk from him for about six months. Mason's practice was to advance the marijuana without requiring payment at the time of delivery, but to require payment before advancing more marijuana. As of that February, defendant had been unable to make payment for marijuana he had already received. On February 3, 2005, Mason received a shipment of somewhat more than 100 pounds of what he deemed to be exceptionally high-quality marijuana. He invited defendant to come examine it, intending to give defendant a large sample that he could use to generate sales and pay off his debt. Defendant was the only one who knew that the marijuana was at Mason's house; Mason did not usually keep his stock at home. Defendant came, he saw the marijuana in Mason's basement, and the two negotiated how much Mason would advance, with defendant wanting more than Mason was willing to provide.

¶ 10 Mason and Crosby gave largely consistent descriptions of what happened the next night at about 10 p.m. According to Mason, Mason was at his house in Genoa with Crosby and the couple's two children. Someone knocked at the door and yelled, alarming Mason to the extent that he armed himself with a nearby samurai sword.

¶ 11 Someone kicked down the door, and Kappa and Middlekauf entered. Middlekauf threatened Mason with a handgun while Kappa ran up the stairs. Mason put down the sword on Middlekauf's order. He and Middlekauf then struggled over the gun as Middlekauf tried to restrain him with duct tape. Middlekauf yelled for help, and Kappa returned. Kappa was initially unarmed and struck at Mason, but then picked up the sword from where Mason had left

it. Mason got control of the gun and shot Middlekauf in the stomach. Middlekauf remained on his feet. Kappa threatened Mason with the sword, and Mason shot Kappa several times, disabling him.

¶ 12 Mason told Middlekauf to get out and take Kappa with him. Middlekauf said that he was too injured to move Kappa; he suggested that he could get the driver outside to help. He went out to the vehicle but did not come back. The vehicle, a conversion van, drove away, leaving Kappa lying on the floor of Mason's house. Mason told Crosby to call 911, which she did. The police and paramedics arrived.

¶ 13 Villarreal's testimony was also consistent concerning the events at Mason's house. He described riding in the van to Mason's house with Middlekauf and Kappa, but staying outside until Middlekauf emerged alone and bleeding from a gunshot wound.

¶ 14 Villarreal further testified that defendant had suggested robbing Mason and had told the others that Mason had a great deal of marijuana and cash at his house. Defendant had also participated directly in preparations for the planned robbery. In particular, the afternoon before the planned robbery, Villarreal and defendant went to a hardware store and purchased gloves and duct tape.

¶ 15 Villarreal further testified that defendant had met with Kappa, Middlekauf, and Villarreal in Genoa and watched them drive away to Mason's house. As Villarreal and Middlekauf drove away from Mason's house, Villarreal made a call to defendant, who was waiting in a parking lot when they came back. Villarreal called 911 to get aid for Middlekauf, and then he and defendant drove away in defendant's car. He and defendant then fled to Mexico; defendant remained there after Villarreal returned home.

¶ 16 Finally, Villarreal testified that he first saw the gun that Middlekauf had carried when he watched someone—Villarreal could not recall whom—loading the gun with ammunition taken from a safe in defendant's garage.

¶ 17 Middlekauf also testified. He said that he was mostly unable to remember the incident and the time surrounding it. However, he agreed that his statements to the police at the time of the incident correctly reflected what he remembered at the time. Those statements were largely consistent with Villarreal's testimony.

¶ 18 Jesus Paz also gave testimony consistent with Villarreal's. Villarreal recruited him to tow a van with his tow truck, but he was not aware that the tow was part of the plan for a robbery. (According to other testimony, the planners thought that someone could tow a van out of Genoa late at night without attracting police attention, whereas they thought that the police would look for a reason to stop a van leaving town on its own under the same conditions.) Paz met with defendant, Villarreal, and men who matched the descriptions of Middlekauf and Kappa at a McDonald's parking lot in Genoa. Villarreal, Middlekauf, and Kappa drove off in a van and defendant and Paz went to wait in a bar, leaving the tow truck in the parking lot. They were at the bar for a short time when defendant received a call that caused him to become agitated. The two then drove at high speed back to the parking lot. The van arrived; Villarreal got out and told Paz to leave.

¶ 19 The parties stipulated to evidence of calls received and made by defendant's cell phone and the towers involved. That evidence placed his phone in or near Genoa during the attempted robbery. Villarreal's number was the source of two calls shortly after 10 p.m. They also stipulated to fingerprint evidence, in particular that defendant's fingerprints alone were found on six items, most notably a Tru-Value Hardware bag from the van, a Tru-Value receipt otherwise

linked to the purchase of gloves and duct tape, and the wrapping for a roll of duct tape from the van.

¶ 20 Law enforcement officers from three jurisdictions also testified.

¶ 21 Trial counsel cross-examined all witnesses, largely focusing on what each witness knew about Stark. Mason testified that Stark had been his partner in selling marijuana for years but that they fell out over a debt Stark owed Mason. Mason, not long before the incident, had stolen a classic car belonging to Stark. Mason said that this was partly debt collection and partly revenge. Trial counsel tried to question the law-enforcement witnesses about their interest in Stark as a suspect. The court largely sustained the State's objections to this line of questioning. However, a few answers suggesting police interest in Stark and his relationship to the incident came in.

¶ 22 Defendant was the primary defense witness. He testified that Stark was his marijuana supplier before he started buying from Mason. Just before the incident, Stark approached him and suggested that Stark could supply marijuana in the quantities he wanted. Because of Stark's offer, defendant went to Genoa on the evening of February 4. He was there when the van arrived with the injured Middlekauf. He searched though the material in the van, looking for something to stanch Middlekauf's bleeding. In the process, he touched many items in the back of the van and dumped a first-aid kit on the floor.

¶ 23 On cross-examination, the State pressed defendant about his flight from the jurisdiction. Trial counsel repeatedly tried to question defendant about his having heard that Stark had threatened him. The court excluded most of this testimony as hearsay.

¶ 24 Trial counsel also attempted to use defense witnesses to impeach the State's main witnesses. Some of these attempts appeared to show inexperience with the rules of impeachment. Further, some of them were on peripheral issues.

¶ 25 The jury found defendant guilty on all counts and trial counsel filed a motion for a new trial. After denying the motion, the court sentenced defendant to 33 years' imprisonment on the murder count. Trial counsel filed a motion to reconsider the sentence.

¶ 26 Before the court addressed trial counsel's sentencing motion, defendant filed *pro se* motions to reduce his sentence and to vacate the verdicts. The latter was based in part on a claim that trial counsel had provided ineffective assistance. At that point, new counsel appeared for defendant and trial counsel therefore withdrew with the court's leave. The court struck all parts of defendant's motion except the ineffective-assistance claim.

¶ 27 On November 26, 2013, defendant filed his "Amended Motion to Vacate Jury Verdict Based on Ineffective Assistance of Counsel." The first part of the motion was largely directed to defendant's complaint that he had expected trial counsel's more experienced colleague to represent him at trial. He further asserted that counsel's lack of competence was evident from counsel's behavior at trial. He specifically noted 29 points in the trial transcripts that he asserted showed counsel's insufficient familiarity with trial-advocacy techniques.

¶ 28 Further, counsel had failed to review relevant witnesses or employ an investigator, an expense that defendant suggested his family could have covered. Moreover, counsel failed to convey a plea offer from the State.

¶ 29 Attached to the motion were three affidavits. One, from defendant's mother, stated that trial counsel had admitted a lack of experience with murder cases and that she had offered to pay for an investigator. Another, from defendant's brother, Chad Swaggerty, stated that well after

the incident Villarreal and Stark had come to Swaggerty's house and threatened the lives of defendant and defendant's son if defendant spoke to the police. He averred that a further threat to defendant was delivered to him through a family member of Villarreal's. Trial counsel told Swaggerty that, because Swaggerty was defendant's brother, trial counsel thought that the jury would not credit the testimony. Finally, John Sliwa averred that Stark was living off and on at Sliwa's house at the time of the incident. A few weeks before the incident, Mason and Sliwa got into a "pushing match" at Sliwa's house over money. Stark then talked about robbing Mason and said that Mason was "a dead man."

¶ 30 The court made a preliminary ruling pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), that the matter should proceed to an evidentiary hearing. Defendant had retained counsel at the hearing.

¶ 31 Defendant testified. A primary focus was his contention that he had expected trial counsel's more experienced partner to represent him at trial. He further testified that trial counsel had failed to investigate potentially exculpatory evidence to which defendant alerted him. In particular, trial counsel had also failed to investigate Swaggerty and Sliwa as possible witnesses. Trial counsel had failed to consider using Mason's "drug ledgers," which defendant said would show that more people had been to Mason's house while the marijuana was there than Mason had said. Trial counsel had failed to seek out information about the first-aid kit from the van.

¶ 32 Defendant suggested to the court that trial counsel had failed to negotiate with the State effectively. He testified that, about three weeks before the trial, he had given trial counsel a written statement for use in negotiations with the State concerning testimony he could provide in other murder prosecutions. Trial counsel initially told him that the State was interested, but he

later said that the State had said that the information had come too late. Further, trial counsel did not bring this attempted cooperation to the court's attention at defendant's sentencing. After trial and sentencing, defendant spoke to several attorneys in the State's Attorney's office. He gave them information that led to his testifying at the murder trial of Jack McCullough[1] and another murder trial. At that time, defendant received information from a police officer that led him to conclude that trial counsel had not conveyed to him a plea offer.

¶ 33 The State argued that both Swaggerty's and Sliwa's proposed testimony would be hearsay, and not admissible under the exception for statements against penal interest. The State further argued that trial counsel's choices might have been influenced by a desire to avoid opening the door to the admissibility of certain post-arrest statements of defendant's.

¶ 34 The court refused to deny defendant's motion at the close of defendant's evidence. It stated that it could not do so while unrebutted evidence existed that trial counsel had failed to convey a plea offer from the State to defendant.

¶ 35 The State's first witness was trial counsel. He testified that he had initiated plea discussions with the State but that those discussions never produced a concrete offer. This was because defendant had expressed an unwillingness to accept an agreement that would lead to a sentence of more than about 8 years' imprisonment, whereas the State wanted a first-degree-murder conviction, which carries a 20-year minimum sentence. Moreover, trial counsel had relayed to the State before trial that defendant had information relevant to other cases. The response was that the information was not sufficiently specific to be the basis for an agreement

[1] The reference is clearly to the case of *People v. McCullough*, 2015 IL App (2d) 121364; defendant's name appears repeatedly in that decision as a witness who, while in jail heard McCullough make inculpatory statements.

and that, in any event, not enough time remained before trial. Trial counsel was aware that defendant had testified for the State in another matter, but only because counsel read about it in a newspaper.

¶ 36 Also testifying was the police officer whose comments led defendant to believe that trial counsel had failed to convey a plea offer. The officer testified that he had never told defendant that the State had made an offer.

¶ 37 Philip Montgomery, one of the State's trial attorneys, testified that he was second chair in defendant's murder prosecution. He stated that it was office practice that all plea offers would go through the first chair, here, Stephanie Klein. Montgomery had not gone against that practice in this matter.

¶ 38 Klein testified that she took over the case from another assistant State's Attorney. She met with defendant's trial counsel from time to time to try to work out an agreement, but the State never made a specific offer. This was because Klein was unwilling to reduce the charge and defendant was unwilling to plead guilty to first-degree murder. She had conveyed to trial counsel a willingness to negotiate the sentence, however.

¶ 39 The court filed a written order denying defendant's motion. It ruled that defendant had failed to show that he had been prejudiced by trial counsel's conduct of the trial. Further, defendant's failure to call Swaggerty or Sliwa at the evidentiary hearing precluded a finding of ineffective assistance based on trial counsel's failure to call those two witnesses, but, in any event, defendant had failed to explain the significance of the testimony of either. Finally, it ruled that the evidence was contrary to defendant's claim that trial counsel had failed to convey a plea offer.

¶ 40 The court then ordered a hearing on the pending motion to reconsider the sentence. At the hearing, defendant asserted that he had "reached out" to the State about his willingness to testify in the McCullough prosecution and in the prosecution of a Michael Greenwell. He argued that that willingness should count as mitigating.

¶ 41 The court stated that it had considered all the statutory mitigating and aggravating factors and would not change defendant's sentence in light of defendant's willingness to testify. It thus denied defendant's motion, and defendant filed a timely notice of appeal.

¶ 42 II. ANALYSIS

¶ 43 On appeal, defendant asserts that we should reverse his conviction or his sentence because trial counsel was ineffective. He first points to what he frames as an admission by trial counsel that he lacked sufficient experience to try the case and thus acted unethically in taking it. He further argues that he expected counsel's more experienced partner to try the case. Finally, he points to trial counsel's conduct at many points throughout the trial as showing his incompetence. He cites 29 points in the record that he asserts show counsel's lack of familiarity with basic trial-advocacy principles. He further points to areas of confusing or pointless impeachment questioning.

¶ 44 Defendant also argues that trial counsel erred in stipulating to certain evidence: defendant's fingerprints on objects located in the van and his cell phone's use in or near Genoa on the night of the incident. Moreover, he asserts that trial counsel stipulated that defendant and Villarreal went to the Tru-Value. Finally, he argues that he was prejudiced at sentencing by trial counsel's failure to bring out his offer to assist the State in the McCullough and Greenwell murder cases.

¶ 45 We start with defendant's claim that his agreement with trial counsel's law firm called for his representation by trial counsel's more experienced partner. That claim is essentially one of contract law and thus has no place in a direct appeal of a criminal conviction. We address only the question of whether trial counsel met the constitutional standards of effectiveness as set out in *Strickland v. Washington*, 466 U.S. 668, 687-97 (1984). Whether defendant expected more experienced counsel is not relevant to trial counsel's meeting of the constitutional effectiveness standard.

¶ 46 Beyond that, we hold that defendant has failed to show that he was prejudiced by trial counsel's assertedly unreasonable behavior, and that, in any event, the representation was significantly more competent than defendant's description suggests.

¶ 47 To succeed on a claim of ineffective assistance of counsel, a defendant must show both (1) that counsel's performance was objectively unreasonable; and (2) that it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694; *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "In demonstrating, under the first *Strickland* prong, that his counsel's performance was deficient, a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct might be considered sound trial strategy." *People v. Houston*, 226 Ill. 2d 135, 144 (2007). If the reviewing court "concludes that [the] defendant did not suffer prejudice, [it] need not decide whether counsel's performance was constitutionally deficient." *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 48 Before starting our analysis under *Strickland*, we note that defendant's brief overstates the problems with trial counsel's performance. In particular, defendant leaves a misimpression

of trial counsel's grasp of evidentiary issues by implying that trial counsel's repeated interactions with the court on the hearsay issues were entirely the result of counsel's misapprehension. Indeed, of the 29 places in the record that defendant cites as showing trial counsel's incompetence, about 14 relate to hearsay issues. (For some of defendant's record citations, the nature of the issue is not clear.) Under Illinois Rule of Evidence 801(c) (eff. Jan. 1, 2011),[2] " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"; under Rule 801(a) (eff. Jan. 1, 2011), a " 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Of the 14 citations relating to hearsay, no more than 4 are clear-cut instances of counsel's asking a question which called for an inadmissible hearsay statement in the answer. A number are instances in which reasonable argument might occur about whether trial counsel was offering the evidence at issue for a non-hearsay purpose. In as many as 3 other instances of the 29, trial counsel's question called for an answer that would not be expected to contain any assertion, and so could not be hearsay.

¶ 49 One example from defendant's list will adequately illustrate the point. During trial counsel's questioning of defendant, the following exchange occurred:

"Q. At some point did you receive a phone call from Jaime Villarreal?

A. Yes, I did.

Q. Did he direct you to do anything?

[2] The Rules of Evidence did not become effective until January 1, 2011, well after defendant's trial. However, with exceptions not affecting the definition of hearsay, the Rules of Evidence are a codification of Illinois's then-existing evidence principles as expressed in its case law. Ill. R. Evid., Committee Commentary, (1).

A. He told me to go wait out front.

MS. KLEIN: Objection.

THE COURT: Sustained."

Further discussion with the court made clear that its basis for sustaining the objection was purely one of hearsay. However, a direction to "wait out front," because it contains no possible assertion, cannot be hearsay, as trial counsel attempted to explain to the court. As this example suggests, defendant's citations of trial counsel's errors are intermixed with instances that show trial counsel's sound grasp of basic hearsay principles.

¶ 50 More critically, however, defendant has failed to show the prejudice required under *Strickland*.

¶ 51 Defendant makes no specific argument as to how trial counsel's alleged trial-advocacy difficulties were prejudicial, instead seeming to expect that the sheer quantity of examples will make the point. We are not persuaded. First, as we just noted, not all the examples defendant gives suggest ineptitude. On that point, we can go further and note that, even in some instances in which trial counsel was attempting to bring in clearly inadmissible evidence, those attempts were associated with an aggressive approach to the defense, and, in particular, the attempt to implicate Stark. That choice of defense was a matter of trial strategy. On the other hand, we agree that the difficulties trial counsel had with impeachment were not a consequence of strategic choices. Instead, they suggested insufficient practice. However, we do not see, and defendant does not explain, how it caused concrete harm to the defense.

¶ 52 Defendant points to trial counsel's stipulations as clearly prejudicial. The fingerprint and cell-phone evidence to which trial counsel stipulated was largely consistent with defendant's own testimony. Defendant testified to using his cell phone while in or near Genoa, although he

did not remember as many calls as the stipulated evidence tended to show. Defendant characterizes that discrepancy as impeaching him. If so, it is on a minor point. Further, defendant provided an explanation for the evidence placing defendant's fingerprints in the getaway van when he testified to rummaging through items in the back of the van while seeking material to stanch Middlekauf's bleeding. Finally, defendant mischaracterizes the stipulation as to defendant's visit to the hardware store. Trial counsel did not stipulate that defendant went to the store with Villarreal—defendant's characterization of what occurred. Rather, trial counsel agreed to stipulate that Villarreal *told the police* that such a trip occurred, a minor stipulation. Defendant cannot show prejudice from any of these stipulations. Indeed, the choice to introduce the evidence as stipulations was reasonable trial strategy. Nothing in the record suggests that trial counsel would have been able to exclude the evidence. Thus, it was reasonable for trial counsel to allow it to be admitted in a format that would make it less memorable.

¶ 53 Defendant suggests that he was prejudiced by trial counsel's failure to use his willingness to testify in other murder cases as a mitigating matter in sentencing. On the evidence provided by defendant, we do not see a reasonable probability that that would have led to another outcome in sentencing. Defendant did not show that anything that a reasonable court would predictably take as mitigating occurred when he cooperated with the State in the other cases. Moreover, defendant has not tried to argue that the specific publicly known facts of his cooperation in *McCullough* would have persuaded the court to give him a lesser sentence. Finally, the court addressed defendant's willingness to testify when it heard defendant's motion to reconsider his sentence. It stated that it had based the sentence on the statutory mitigating and aggravating factors. That ruling strongly weighs against defendant's suggestion that the lack of that evidence at his original sentencing hearing was prejudicial.

¶ 54 III. CONCLUSION

¶ 55 For the reasons stated, we affirm defendant's conviction and sentence. 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, 179 (1978).

¶ 56 Affirmed.