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2015 IL App (3d) 130736-U

Order filed August 24, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0736
)	Circuit No. 08-CF-903
RAYMOND J. STINDE,)	Honorable
Defendant-Appellant.)	F. Michael Meersman, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's third-stage dismissal of defendant's postconviction petition was proper where the defendant, in making an ineffective assistance of counsel claim, failed to establish that he was prejudiced by counsel's allegedly deficient performance.

¶ 2 A jury found the defendant, Raymond J. Stinde, guilty of first degree murder (720 ILCS 5/9-1(a)(3) (West 2008)). The court sentenced the defendant to a term of 35 years' imprisonment. After his conviction was affirmed on direct appeal (*People v. Stinde*, No. 3-09-0317 (2011) (unpublished order under Supreme Court Rule 23)), the defendant filed a

postconviction petition alleging that he received ineffective assistance of counsel. The trial court dismissed the petition at the third stage of postconviction proceedings, and the defendant appeals. Because we find that any deficient performance on the part of the defendant's counsel was not prejudicial, we affirm.

¶ 3

FACTS

¶ 4

The defendant was charged by information with first degree murder (720 ILCS 5/9-1(a)(3) (West 2008)). The charging instrument made clear that the State would proceed on an accountability theory, alleging that the defendant, "while acting with another for whom he is legally responsible, without lawful justification, while committing a forcible felony, *** shot Gary Alonzo Bourrage," causing his death.

¶ 5

Prior to trial, the parties and the trial court discussed the videotape of the defendant's police interrogation. All parties agreed that certain segments of the tape that would be inadmissible as evidence would need to be redacted prior to the video being shown to the jury. Defense counsel indicated that he had watched the tape. The trial court noted on multiple occasions that both parties intended to rely on the video.

¶ 6

The matter proceeded to a jury trial on January 20, 2009. On direct appeal (*Stinde*, No. 3-09-0317), we summarized the facts adduced at the defendant's trial as follows.

¶ 7

Officer Tyson Nichols testified that in the early morning hours of September 13, 2008, he responded to the scene of a deceased individual in a vehicle parked in Rock Island. Nichols participated in a "canvas" of the surrounding neighborhood, however, no witnesses to the crime were located. The deceased individual was later determined to be Bourrage. Bourrage succumbed to a gunshot wound in the neck. The bullet passed through his neck in a downward trajectory. A 9 mm. projectile was recovered from the dashboard of the vehicle in which he was

seated. A weapon was not recovered. Forensic evidence suggested the shot that killed Bourrage was fired from behind the driver through an open rear window. Blood stain pattern analysis indicated that at the time Bourrage was shot, he was sitting in the driver's seat and there was no one sitting in the passenger seat.

¶ 8 Felicia Ann Stinde, the defendant's sister, testified that Bourrage had been her boyfriend. Felicia noted that the defendant and Bourrage did not associate. The night before his death, Bourrage spoke with Felicia. He asked her where he could buy one-quarter pound of marijuana. Felicia phoned the defendant and related the request to him. After speaking with the defendant, Felicia contacted Bourrage and told him the defendant could get the drugs but he needed a ride. Felicia gave Bourrage the defendant's phone number. Bourrage indicated he would pay no more than \$200 for the marijuana. She knew that a few days prior to the shooting, Bourrage had \$300. Felicia never spoke with Bourrage again.

¶ 9 Felicia recalled that at some point during her conversations with the defendant about the drug buy, the defendant said to her, "I hope you don't like him." Felicia stated the defendant routinely said "stupid things." Felicia also recalled that she told the defendant that Bourrage had a gun. Felicia described the phone calls as "phone tag" and admitted she was taking pain medication during the time she was conversing with the defendant and Bourrage. She stated that when she was interviewed by the police after the shooting, she told them it never occurred to her when she was setting up the connection between the defendant and Bourrage it would result in a shooting. Felicia stated there were people who disliked Bourrage and that he was "cautious."

¶ 10 Karen Hudson, Bourrage's aunt, testified that on the night of September 13, 2008, she overheard Bourrage arranging to buy some marijuana. It was her understanding that Bourrage was speaking to Felicia about the defendant "setting something up with somebody for [Bourrage]

to meet to get something." Hudson thought the arrangement was that Bourrage would pick up the defendant at Maple Ridge and then meet another person at Douglas Park. Hudson thought Bourrage had approximately \$200 in his pocket.

¶ 11 Detective Leo Hoogerwerf testified that physical evidence collected from Bourrage after the shooting included \$126 in a wallet. Evidence collected from the defendant included a wallet containing \$200 and \$42 in his pants pocket.

¶ 12 Detective Shawn Slavish, the lead detective in the murder investigation, interviewed the defendant on September 16, 2008, for several hours at the Rock Island police station. A second interview took place the following day. Slavish stated that at one point during the interviews the defendant stated he was currently "high" on ecstasy. The interviews were audio and video recorded. Slavish testified that the recording introduced in the trial court did not contain the entire interview as the tapes were edited to remove portions the jury would not be permitted to hear under the rules of evidence. A transcript of the videotaped interview was published to the jury with the caveat, as explained by the trial court, that defense counsel could still object to any portion of the tape when it was played, due to the possibility it had not been adequately "cleaned up." The videotape was played for the jury.

¶ 13 After the first tape was played, the jury was excused to lunch and the trial court, the State, and the defense revisited the issue of the redacted portions of the tape. The trial court explained to the defendant that he had a right to include portions that had been excised with the understanding that redacted portions related to his prior record could be prejudicial to him if he waived the right to have those portions removed. The record does not indicate the defendant chose to reinsert any redacted portions of the tapes. Several audio misinterpretations were corrected in the transcript and portions of the interview that were missing from the tape were

read into the record. The defense participated in the corrections and supplementation of the record.

¶ 14 The record indicates that during the taped interview, the defendant initially told the police that although he knew who Bourrage was, he did not have a relationship with him, did not kill him and did not know anything about the crime. The defendant acknowledged that others were saying he was involved. Early in the questioning, the interrogating officer stated:

"I already know. Okay? I already know what went down and who was involved. *** What I need from you. Is why. Okay? *** Why did this go down the way it went down? *** Maybe it's because they were shooting at you the other day. Somebody was. Okay. *** "

The defendant then posed the question: "So you think that I would kill a man?" The officer responded: "I think you did. I think you did. I know you did. Okay?" The officer made other similar remarks.

¶ 15 Later in the interview, the defendant admitted Bourrage had called him to ask about "some weed." Bourrage had received the defendant's phone number from Felicia. The defendant stated he referred Bourrage to someone else. Eventually, the defendant admitted Bourrage picked him up and they ostensibly went to buy marijuana from the "weed man." The defendant admitted that he never connected with "the weed man" on Bourrage's behalf and that telling him he had was a ruse. The defendant stated that either "Gotti" or "Pills" came up to the vehicle and shot Bourrage. The defendant "jumped up and ran." Shortly after this statement, the defendant admitted he knew Pills was going to take Bourrage's money because Pills had stated that was the plan. Pills followed Bourrage and the defendant from Maple Ridge to an alley near the "weed

man's" house. Bourrage and the defendant were "waiting for the guy" when Pills came up and shot Bourrage.

¶ 16 After the shooting, the defendant ran away from the scene, Gotti picked him up, and they went to a hotel where they met with Pills. They argued with Pills about the shooting and whether it was necessary. The defendant stated he did not know why Pills shot Bourrage, that it "wasn't supposed to *** go down like that." The defendant thought Pills was going to offer Bourrage some "bunk weed," or inferior marijuana. The defendant knew that Pills was desperate for money and that his way of "hustling" was to rob and steal. When the interrogating officer suggested money in the defendant's possession could have Bourrage's fingerprints on it, the defendant said that the \$80 he had on him was money he received from selling Bourrage crack cocaine. The defendant agreed to give up his clothing, which he indicated was the same clothes he wore on the night of the shooting.

¶ 17 The defendant continued to rely on his last version of events despite repeated questioning by the officers. At one point, the questioning officer stated:

"You're just going to rob him. *** If I'm going to trade him some huff and stuff for some bad. Or some bad weed for some money, I don't care if he knows I'm in Maple Ridge. *** If, if I rob him, now it brings all the heat down. All right. So let's get the hell away from there and let's go somewhere else. *** I'll ride with him. I'll get him down here. You know, you guys come up and rob him."

In a reference to Felicia, the interrogating officer told the defendant: "She said lately you've been robbing people. She said lately you've been talking about, you've been shooting at people. *** She's saying you're out there just, you know, hitting licks." The tape also contained the

defendant's own reference to getting "out of the joint," the interrogating officer's reference to the defendant's DNA being on file, and various references to the defendant's use and sale of drugs.

¶ 18 The defendant did not testify, nor did the defense present any evidence. In closing arguments, defense counsel argued that the defendant was present at what he thought to be a drug deal. The defendant's only intent was to swindle Bourrage, and he had no idea what Pills was planning to do. The jury found the defendant guilty of first degree murder based on attempted robbery.

¶ 19 The defendant filed a posttrial motion in which posited, *inter alia*, that the videotape was excessively prejudicial. At the hearing on the motion, the defense argued the videotape depicted the defendant as involved in "all kinds of criminal activity." The defense asserted that the prejudice in the tape was "pervasive throughout it" and that the entire tape should have been excluded because it could not be cleaned up. To this portion of the defendant's posttrial argument, Judge Michael Meersman—who presided over the trial—responded that he considered the decision of the defense to allow the tape was a tactical decision to avoid having the defendant take the stand to rebut evidence of the interrogation being introduced through the officers' testimony. The trial court denied the defendant's posttrial motion and sentenced him to a term of 35 years' imprisonment.

¶ 20 On direct appeal to this court, the defendant argued that the evidence was insufficient to support a conviction for first degree murder. *Stinde*, No. 3-09-0317. He also argued that the introduction of improper, prejudicial evidence in the videotaped interrogation denied him a fair trial. *Id.* We rejected both arguments and affirmed the defendant's conviction. *Id.* In regard to the defendant's second argument, we held that the defendant had waived his right to challenge the introduction of other-crimes evidence found in the videotape, reasoning that he had an

opportunity to redact those portions of the videotape and knowingly relinquished the right to do so. *Id.*

¶ 21 On March 28, 2012, the defendant filed a *pro se* petition for postconviction relief. In his petition, the defendant alleged that trial counsel was ineffective for failing to participate in the redaction of the confession tape before it was admitted, and failing to object to those portions of the tape that should have been redacted. The defendant further alleged that appellate counsel had been ineffective for failing to raise those issues on appeal. Judge Meersman presided over the postconviction proceedings.

¶ 22 The defendant's petition was advanced to the second stage of postconviction proceedings, where appointed counsel filed an amended petition. The amended petition, in pertinent part, reiterated the defendant's initial claims. The State responded to the amended petition, alleging that counsel did participate in redacting some of the videotape, and that much of the substance of the tape was exculpatory. Accordingly, the State argued that any portion of the tape not redacted was a strategic decision on counsel's part.

¶ 23 A third-stage hearing on the defendant's petition was held on September 27, 2013. No witnesses were called to testify, but the parties argued their positions to the court. The trial court found that the admission of the videotape was a matter of trial strategy, and did not constitute ineffective assistance of counsel. The court opined that the defendant—due to his extensive criminal background—would have been ill-advised to testify, and that the videotape was the only other way to introduce his version of events to the jury.

¶ 24 ANALYSIS

¶ 25 On appeal, the defendant argues that the trial court erred in denying his postconviction petition. The defendant contends that the record establishes that defense counsel's failure to

further redact the videotape to omit remaining references to the defendant's other crimes constituted ineffective assistance of counsel. The defendant also maintains that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness. Because we find that the defendant failed to establish that he was prejudiced by the alleged deficient performance of counsel, we affirm the trial court's dismissal of the petition.

¶ 26 At a hearing at the third stage of postconviction proceedings, "the defendant bears the burden of making a substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Where, as here, a ruling on counsel's performance is made by the judge who presided over the trial, the court's decision should be reviewed for manifest error. *People v. Johnson*, 206 Ill. 2d 348, 360 (2002). A decision is manifestly erroneous where an error is "clearly evident, plain, and indisputable." *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997).

¶ 27 We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); see *People v. Manning*, 241 Ill. 2d 319, 326 (2011). To establish ineffective assistance of counsel, a defendant must show: (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-96. The Supreme Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. When an ineffective assistance of counsel claim is more easily disposed of on the grounds of lack of sufficient prejudice, the court should do so. *Id.* at 697.

¶ 28 Upon review, we find the defendant was not prejudiced by counsel's failure to redact from the interrogation video every reference to the defendant's prior crimes. For the reasons set forth below, we find it is improbable that the jury's verdict would have been different had

defense counsel further redacted the videotape. Though the trial court dismissed the defendant's petition on the trial strategy grounds,¹ a reviewing court may affirm the trial court's decision on any grounds supported by the record. *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 74.

¶ 29 The defendant insists that the State's case was "not strong," and that counsel's failure to redact references to his other crimes from the videotapes tipped the scales against him. Specifically, he contends that the State's evidence connecting him "to the criminal purpose of robbing or killing Bourrage was not overwhelming."

¶ 30 Accountability for a felony murder exists if the defendant is deemed legally responsible for the felony that accompanies the murder. *People v. Shaw*, 186 Ill. 2d 301, 325 (1998). A person is legally accountable for another's criminal conduct when "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2008). Any criminal act done in furtherance of the planned and intended act is conduct for which the accountable person will be held responsible. *People v. Kessler*, 57 Ill. 2d 493, 497 (1974). Moreover, proof that the defendant was present during the perpetration of the offense, that he fled from the scene, that he maintained a close affiliation with his companions after the commission of the crime, and that he failed to report the

¹ Notably, the trial court found that the decision to enter the videotape as a whole into evidence was a matter of trial strategy. The court's ruling did not speak to the narrower issue of whether counsel's decision not to make further redactions to the tape constituted trial strategy. Because we find the matter more easily disposed of on the grounds of lack of sufficient prejudice (*Strickland*, 466 U.S. at 697), we need not take a direct stance on the propriety of counsel's decisions.

crime are all factors that the trier of fact may consider in determining the defendant's legal accountability. *People v. Redmond*, 341 Ill. App. 3d 498, 513 (2003).

¶ 31 Where a defendant has been charged under a theory of accountability, the State may prove the defendant possessed the intent to promote or facilitate the crime through evidence establishing beyond a reasonable doubt that either the defendant shared the criminal intent of the principal, or there was a common criminal design. *Redmond*, 341 Ill. App. 3d at 511. "Where two or more persons engage in a common criminal design or agreement, any acts in furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of the further acts." *Id.* Once an underlying common design is established, no additional common designs need be established for all of the individual acts committed during the commission of a planned offense. *Redmond*, 341 Ill. App. 3d at 514. Under Illinois law, one can be held accountable for a crime different than the one planned. *Id.* at 510.

¶ 32 The testimony of Felicia and Hudson established that the defendant agreed to engage in a drug deal with Bourrage on the night of his murder. Their testimony further established that Bourrage picked up the defendant and they went to meet a third person. Felicia testified that the defendant ominously cautioned her: "I hope you don't like [Bourrage]." Moreover, even if counsel made the asserted redactions, the jury still would have seen the defendant's initial confession that Pills' plan was to rob Bourrage. The defendant fled the scene and was picked up by Gotti. The two then reconvened with Pills at a hotel. This evidence is probative of the defendant's legal accountability for Bourrage's murder. See *Redmond*, 341 Ill. App. 3d at 513. Given the evidence against the defendant, the inclusion of some references to other crimes in the

interrogation video does not undermine confidence in the jury's verdict. See *Strickland*, 466 U.S. at 694.

¶ 33 Having found that the defendant did not receive ineffective assistance of trial counsel, it follows that appellate counsel was not ineffective for failing to raise that claim. A defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). The defendant, therefore, did not receive ineffective assistance of counsel from either trial counsel or appellate counsel. Accordingly, we affirm the trial court's dismissal of his postconviction petition.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Rock Island County is affirmed.

¶ 36 Affirmed.