2016 IL App (1st) 133877-U

THIRD DIVISION
April 20, 2016

No. 1-13-3877

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 13542
	)	
LARRY RINGER,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm defendant's convictions for aggravated vehicular hijacking and aggravated battery with a firearm where counsel was not ineffective and no prejudice resulted to defendant. Remanded for resentencing in the applicable statutory range.

¶ 2 Following a jury trial, defendant Larry Ringer was convicted of aggravated vehicular hijacking and aggravated battery with a firearm and sentenced to concurrent prison terms of 30 years and seven years, respectively. On appeal, defendant contends that defense counsel was ineffective for (1) failing to impeach a witness with pretrial testimony; (2) eliciting prejudicial testimony from a witness; (3) failing to object to the ruling that other-crimes evidence was

admissible to show lack of mistake; (4) failing to object to unnecessary detail regarding defendant's other crimes; (5) failing to object to the State's closing argument, which allegedly used defendant's other crimes as evidence of propensity; and (6) misinforming the court regarding the felony classification of aggravated battery. Additionally, defendant contends that his case must be remanded for resentencing where the trial court relied on an incorrect sentencing range in imposing the sentence for aggravated battery with a firearm. We affirm defendant's convictions and remand for resentencing in the applicable statutory range.

¶ 3 Defendant was charged with aggravated vehicular hijacking and aggravated battery with a firearm stemming from an incident in Chicago on June 8, 2010. Prior to trial, defendant, through the Cook County Public Defender, filed a motion *in limine* to exclude the circumstances of his arrest on June 24, 2010, which had resulted in a separate conviction for unlawful use or possession of a firearm by a felon. Subsequently, the State filed a motion to admit proof of defendant's other crimes. The State's motion alleged:

> "*** [The] victim, Terrence Woods was driving his 1998 Cadillac El Dorado near 6300 S. Halsted when he noticed he was being following by a blue Chevy Alero with a black bumper. Woods pulled into the parking lot of Church's chicken, parked his car and was seated in the driver's seat. The defendant approached the car and pointed a large brown rusty .357 revolver at [Woods'] head and stated, "give me the car." Defendant struck Woods about the head and face with the gun. Victim then excited the vehicle and defendant got in the driver's seat and left with victim's car. Victim recognized defendant as someone he had seen for several years in the area of 5700 S. Princeton. Victim went to that area on a later date and observed defendant and the blue Chevy Alero. On June 18, 2010, victim identified defendant in a photo array ***.

> On June 24, 2010 defendant was observed by Chicago Police Officers driving a blue Chevy Alero with a black bumper at 6600 S. Union. Officers observed defendant commit traffic violations and attempted to stop the vehicle. As the officers were behind the car attempting to curb it, they observed the rear passenger throw two .357 revolvers out the rear passenger window. The guns were recovered and the car curbed at which time defendant fled on foot and was placed in custody. Defendant made statements to Officer Gemignani that one of the guns, the Smith and Wesson, was his and identified the gun. On June 25, 2010 both of the guns that were thrown from defendant's car were shown to Terrence Woods. Terrence Woods identified the Smith and Wesson revolver as the gun that defendant put to his head during the vehicular hijacking."

¶ 4 At the hearing on the parties' motions, defense counsel argued the State could not show that either the gun or the vehicle from defendant's arrest were the same gun and vehicle that Woods saw during the carjacking. Counsel also alleged the State sought to use the other-crimes evidence to improperly establish defendant's criminal propensity. The trial court granted the State's motion to admit proof of defendant's other crimes and denied defendant's motion *in limine*. The court stated:

> "In my discretion I believe that the probative value outweighs the prejudice where *** [the State] indicated that the victim is going to identify the gun that was thrown from a car that the defendant was in as the gun [used in the carjacking]. It is very probative to show identity, lack of mistake, and the circumstances of the defendant's arrest."

¶ 5 Subsequently, defendant obtained private counsel and the case proceeded to jury trial.

¶ 6 At trial, Terrence Woods testified that he was driving his car around 63rd and Lowe in Chicago about 6 p.m. on June 8, 2010. In the rearview mirror, he noticed a blue and white Oldsmobile Alero with mismatched doors and fenders. He parked at a restaurant and the Alero drove past. Woods bought food, returned to his car, and rolled a marijuana blunt but did not smoke it. Defendant ran to the driver's side door with a surgical mask over his mouth, pointing a small, rusty, blue or black revolver at Woods' face. Woods recognized defendant. He had previously seen defendant around 57th and Princeton six or seven times over a period of several months, sometimes from a distance of 5 to 10 feet. Defendant said "[y]ou know what it is," which Woods understood to be an order to leave the car. He attempted to hit the gun away, but defendant used the butt to hit Woods in the mouth and head. Defendant opened the driver's side door, Woods exited, and defendant drove away in the car. As a result of the attack, Woods "slightly" lost consciousness and required four or five stitches.

¶ 7 When police arrived, Woods stated that defendant had a .38 caliber revolver and was wearing a white t-shirt, black jeans, rusty tan Timberland shoes, and a surgical mask. He described defendant as "black," with a medium complexion, bald, five feet seven inches tall, and weighing 165 to 185 pounds. Sometime between June 9, 2010, and June 18, 2010, he mentioned to an officer that defendant had teardrop tattoos on his face. Woods had not mentioned the tattoos on the day of the carjacking because no one had asked him. On June 9, 2010, he learned that the police found his car, which had been stripped.

¶ 8 On June 18, 2010, Woods flagged Officer Flaherty on the street and related more information about the carjacking. Later, Woods went to the police station and identified defendant in a photo array based on his teardrop tattoos. On June 25, 2010, Woods identified defendant in a physical lineup. He recognized him as the person that robbed him and from "57th

[and] Princeton." Officers then showed Woods two guns and he recognized one of them, later identified as a Smith and Wesson, as the gun that defendant used during the carjacking. Woods recognized the gun because it was a rusty revolver made from blue steel, with a gold "nimble" on the grill.[1] Woods acknowledged having prior convictions for possession of a controlled substance and aggravated unlawful use of a weapon.

¶ 9 On cross-examination, Woods denied that he was on drugs during the carjacking or that he visited defendant's neighborhood to purchase drugs. He denied that he attempted to locate defendant or that he asked friends if they knew defendant's identity.

¶ 10 Firefighter Odufuye testified that he treated Woods for injuries to his jaw and lip. Odufuye did not recall whether Woods said he was inside or outside his car when he was injured.

¶ 11 Officer Fiene testified that he dusted Woods' car for fingerprints after it was found in a vacant lot on June 9, 2010. Fiene gathered and inventoried two prints from the trunk area and two from the doors.

¶ 12 Leo Cummings, a latent print examiner for the Chicago Police Department, testified that he received the prints from Woods' car but they did not match either Woods or defendant. Cummings stated that not every instance of contact leaves recoverable prints.

¶ 13 Outside the jury's presence, the State tendered to the court a proposed instruction limiting the use of other-crimes evidence to the issues of identification, lack of mistake, and circumstance. The court struck, *sua sponte*, the instruction pertaining to circumstance. Trial counsel then argued that Woods' description of defendant's car and gun differed from the description of the car and gun that, according to the State's pretrial motion to admit proof of

[1] A photograph of the gun, included in the trial record, shows a small gold symbol on the handgrip.

defendant's other crimes, defendant had in his possession on the night of his arrest. Counsel stated:

> "*** I would renew a motion to deny [the State's] motion based upon the fact that now we've heard the testimony of this witness who's testified that it was an Oldsmobile Alero, different make. And that, in fact, it had mix matching doors *** which certainly would be distinctive. And I would think that if they had stopped the Chevy Alero with mix matching doors or an Oldsmobile Alero with mix matching doors that was blue, then we could see how it would be lack of mistake. Here this doesn't show that there is a lack of mistake. This just says that the defendant was arrested in a different car with nothing that made it distinctive that it was the same car.
>
> * * *
>
> [The State's motion] also state[s] a large, brown, rusty, .357 revolver. And as you know, Judge, this gun is not brown and it's not a .357.
>
> The State said it was a .38-caliber. That's what [Woods] said, it was a .38-caliber, and he said it was a black revolver.
>
> So none of the facts that are listed [in the State's motion] were testified as to—and the man on the stand [*sic*]. So the State's motion should be denied because the facts are inconsistent with what they say."

The court queried the State as follows:

> "THE COURT: State, as an offer of proof, is the officer who arrested the defendant going to testify that he was driving an Alero?
>
> ASSISTANT STATE'S ATTORNEY (ASA): Yes, Judge.
>
> THE COURT: A blue Alero?

ASA: Yes, Judge.

THE COURT: And he's going [to] identify the gun which has been identified by the victim as one of the guns recovered during that arrest?

ASA: Yes, Judge."

¶ 14 The court found that "the probative value [of the other-crimes evidence] does outweigh the prejudice to the defendant," and permitted the State to present the evidence. The court asked trial counsel if he wanted the jury instructed to only consider that evidence for the limited purpose of identification and lack of mistake. Counsel responded affirmatively. Prior to the other-crimes testimony, the court told the jury:

"Ladies and gentlemen, evidence is about to be received that the defendant has been involved in offenses other than those charged in the information. This evidence will be received on the issues of the defendant's identification and lack of mistake and may be considered by you only for that limited purpose.

It is for you to determine whether the defendant was involved in those offenses and, if so, what weight should be given to this evidence on the issues of the defendant's identification and lack of mistake."

¶ 15 Officer Flaherty testified that Woods flagged him down in Chicago on June 18, 2010, and related information about the carjacking. Flaherty and Woods went to the police station, where a detective prepared a photo array. Woods viewed the array and identified defendant. Afterwards, Flaherty went to defendant’s address but did not find him. On June 24, 2010, about 11:25 p.m., Flaherty responded to a report of an individual fleeing from police near 87th Street and the Dan Ryan Expressway. Flaherty arrived at the scene and saw defendant in custody.

¶ 16 On cross-examination, Flaherty testified that he reviewed the police report for Woods' carjacking. The report did not mention defendant's name, or whether he had teardrop tattoos, or whether an Alero was involved in the incident. Flaherty further testified that Woods mentioned the neighborhood where defendant "stayed," but did not indicate that defendant had tattoos or was driving an Alero with mismatched doors. The following colloquy occurred:

"DEFENSE COUNSEL: Okay. Now, [Woods] gave you some information. Did he say where he got this information from?

THE WITNESS: He said he did his own—I forget the exact words he used. His own homework or his own—he was looking for the individual himself.

* * *

DEFENSE COUNSEL: *** [Woods] must have given you a name, correct?

THE WITNESS: I believe he did give me a name.

DEFENSE COUNSEL: Did he tell you where he got that name from?

THE WITNESS: No.

DEFENSE COUNSEL: And based upon that name which you got ten days [after the carjacking], that's how you generated these [photo array] pictures, correct?

THE WITNESS: Not just the name, but, yes, with the information that Mr. Woods related to me."

Flaherty's testimony on cross-examination contradicted statements that he made during a pretrial hearing, when he testified that Woods told him he did not know defendant's name but that he had "seen him a time or two before." At the hearing, defendant was represented by the Cook Count Public Defender. Trial counsel did not impeach Flaherty with his earlier testimony.

¶ 17 Officer Gemignani testified that while on patrol with Officer Lau, he observed defendant driving a blue Oldsmobile Alero with three passengers near Union and 66th Street about 11:30 p.m. on June 24, 2010. Defendant swerved between lanes and was not wearing a seatbelt, so Gemignani activated his lights and followed defendant 10 to 14 blocks to the Dan Ryan Expressway.[2] After merging onto the highway, defendant's vehicle slowed from 65 to 10 miles per hour. The highway was well-lit and Gemignani could see inside defendant's car. He pulled alongside the rear passenger-side window and observed the two backseat passengers holding guns. One of the passengers bundled both guns into a t-shirt and threw them out the window. Gemignani stopped the car and Lau recovered the guns, later identified as a Smith and Wesson and a Ruger. Defendant then drove onto an embankment and fled on foot.

¶ 18 Later, at the police station, Gemignani read defendant the *Miranda* rights. Defendant indicated that he lived on the 5700 block of Princeton and that one of the guns recovered from the expressway was his. Gemignani showed both guns to defendant, who identified the Ruger as his own. Gemignani stated that a .357 gun could fire .357 rounds or .38 rounds.

¶ 19 On cross-examination, Gemignani testified that he did not recall whether the doors of the Alero were different colors but would not have mentioned that information in his police report. Following Gemignani's testimony, the court again admonished the jury regarding the limited admissibility of other-crimes evidence.

¶ 20 Officer Lau substantially corroborated Gemignani's description of their encounter with defendant's vehicle, the chase on the expressway, and the recovery of the two guns.[3] When

[2] The court interrupted the direct examination to admonish the jury regarding the limited admissibility of other-crimes evidence.

[3] The court interrupted the direct examination to admonish the jury regarding the limited admissibility of other-crimes evidence.

defendant fled, Lau pursued him across the expressway, over the El tracks, and across the opposite lanes of traffic. Defendant ran up an embankment, climbed a gate, and entered an alley. Soon afterwards, Lau and other officers noticed a garage where the side door had been kicked open and found defendant inside. Photographs of the garage were published to the jury.

¶ 21 Detective Cieciel testified that he prepared a physical lineup after defendant was in custody. Cieciel had defendant cover his facial tattoo with a bandage, and also had each of the fillers place a bandage on the same location. Woods viewed the lineup and identified defendant. He also told Cieciel that defendant had a "large, rusted, .357 revolver." Cieciel showed Woods the firearms recovered the night of defendant's arrest and Woods identified the Smith and Wesson as the gun used in the carjacking.

¶ 22 On cross-examination, trial counsel asked Cieciel whether Woods claimed to know defendant by name. Cieciel answered that Woods had "recognized" defendant. The following colloquy occurred:

"DEFENSE COUNSEL: *** How did he recognize the defendant?

THE WITNESS: The victim stated that after several days he recalled the defendant, Mr. Ringer, performed illegal business transactions around, I believe, 57th and Princeton.

DEFENSE COUNSEL: What type of illegal business transactions?

ASA: Objection.

THE COURT: Sustained.

DEFENSE COUNSEL: Okay. And how long did he say he had observed Mr. Ringer doing this?

THE WITNESS: I didn't get any specifics.

DEFENSE COUNSEL: I think if you look at your police report you will see that it's—I believe it says that over several years. Maybe I'm wrong, but why don't you take a look at it.

* * *

THE WITNESS: Over some time, yes.

* * *

DEFENSE COUNSEL: *** [D]id Mr. Woods say how long he had known this defendant?

THE WITNESS: Several years.

DEFENSE COUNSEL: Several years. And in this several years did he say that he had talked to the defendant?

THE WITNESS: He had stated that he had exchanged some words with the defendant."

During a pretrial hearing, Cieciel testified that Woods had stated that "he had already *** [known] who the guy was" when he identified defendant in a physical lineup. Cieciel did not mention whether Woods had claimed that defendant had engaged in illegal activity. At the hearing, defendant was represented by the Cook Count Public Defender.

¶ 23 The State rested and the court denied defendant's motion for directed finding. During closing arguments, the prosecutor told the jury that "[y]ou are here because of the choices the Defendant made on June 8, 2010 and June 24, 2010." The prosecutor stated:

"The Defendant earned that seat in this courtroom with each and every choice he made back in June, 2010. It was his choice on June 8, 2010 to walk up to Terrence Woods and point a gun at him. It was his choice to threaten Terrence Woods with that

gun. It was his choice to demand Terrence to get out of that car. It was his choice to take that gun and hit Terrence in the face with it when he didn't get out of the car. It was his choice to get into Terrence's car and drive off in it.

On June 24, 2010 it was his choice to not pull over when the police were trying to pull him over for a traffic violation. It was his choice to keep driving that car, failing to stop. It was his choice to jump out of that car and run on both northbound and southbound traffic of the Dan Ryan, over the el tracks. It was his choice to keep running from the police. It was his choice to go into that garage, to kick the door open and then to hide in that garage from the police.

And today it is your day to make the Defendant take responsibility for all of those choices he made."

¶ 24 The prosecutor then reviewed the circumstances of the carjacking and defendant's arrest, along with the witnesses' testimony and the elements of the charged offenses. The prosecutor concluded:

"Now, as I stated earlier, you are here because of all of the choices of the Defendant back in June, 2010. Like I said, today you have a choice. A choice to find the Defendant guilty. Guilty for all of the decisions, all of the choices, guilty for the behavior that he did on June 8, 2010 and June 24, 2010."

During closing arguments, trial counsel described Woods as "not credible," not "believable," and "unreliable." Counsel stated:

"*** [T]he funny thing about this case is most of the evidence took place *** two weeks [after the carjacking].

* * *

*** All this case took place on June 8th. Most of the testimony you heard was June 24th. Why is that[?]

* * *

*** June 18th, ten [days] later [after the carjacking], now [Woods] knows the defendant's name. How did he get his name. Remember, I asked him on the stand. After this crime, did you go back to the scene[?] No, no. I never went back, no. Now, not only does Flaherty testify that he knows the name, but he's known him for several years. So, if he knew his name and he knew him at the time, how come he didn't tell the police that[?]

You see how Terrence Woods is not credible. Not at all, ladies and gentlemen. If you were robbed, and you knew this person's name, you are going to give it. ***

*** Cieciel *** said [Woods claimed] he's known [defendant] for several years. That's not what Terrence Woods said. Terrence Woods said on the stand I knew him maybe six or seven months. I saw him once a month.

He also said something about illegal business. I don't know what that is. But you know Terrence Woods has been convicted of two crimes. That doesn't make him a liar. But it sure throws his credibility into disrepute.

* * *

We don't know anything about [Woods] other than he is not credible. That's all this case is about, ladies and gentlemen. I don't care what the State argues. They are going to argue stuff about the arrest. You know you are not supposed to consider that other than for this trial.

Come on, the guy gets arrested for another charge. He must have committed more. In fact, that's not the evidence. The Judge will read you that instruction."

After closing arguments, the court again instructed the jury that other-crimes evidence was admissible only for the issues of identification and lack of mistake.

¶ 25 The jury found defendant guilty of aggravated vehicular hijacking and aggravated battery with a firearm. Defendant filed a motion for new trial, alleging that he did not receive a fair trial due to the admission of other-crimes evidence. At the hearing, trial counsel argued that, as a result of the other-crimes evidence, "this became a trial of that [other] case" and that "75 percent of all the evidence in this case was on that case." Counsel acknowledged the court repeatedly admonished the jury regarding the limited purpose of other crimes evidence, but claimed the admonishments had no effect. The court denied defendant's motion for new trial, stating:

> "*** I believe I was correct in my ruling in allowing the other crimes evidence. It was highly probative and relevant to show that the defendant was in possession of the weapon which was described by the witness in this matter. The jury was properly in my option instructed as to the limited nature of the evidence and I believe that the defendant did receive a fair trial."

¶ 26 At sentencing, the court asked trial counsel whether aggravated battery is a Class 2 felony and counsel answered affirmatively. The court sentenced defendant to concurrent sentences of 15 years' imprisonment plus a 15-year enhancement for aggravated vehicular hijacking, and 7 years' imprisonment for aggravated battery with a firearm.

¶ 27 Defendant raises two arguments on appeal. He first contends that trial counsel was ineffective for (1) failing to impeach Flaherty when he stated at trial that Woods identified defendant by name, but during pretrial proceedings, stated that Woods did not know defendant's

name; (2) eliciting prejudicial testimony from Cieciel that the victim had known defendant for several years, had spoken with him, and had seen him engage in illegal conduct; (3) failing to object at trial to the ruling that other-crimes evidence was admissible to show lack of mistake; (4) failing to object to unnecessary detail regarding defendant's other crimes; and (5) failing to object to the State's closing argument, which used defendant's other crimes for propensity.

¶ 28 According to defendant, these errors caused prejudice by undermining his misidentification defense at trial, particularly where testimony from Woods and the police officers was inconsistent and contradictory. Defendant observes that Woods told officers the offender was five feet seven inches tall and bald, while defendant's arrest report indicated that he was five feet ten inches tall and had hair.[4] Defendant also notes that Woods initially did not tell police that defendant had teardrop tattoos or that he was familiar with defendant prior to the carjacking, and further, told police that defendant was armed with a blue .38 caliber gun, but at trial identified a black .357 caliber gun. Moreover, defendant notes that Woods claimed to have seen an Alero with mismatched doors before the carjacking, but police officers who saw the Alero on the date of defendant's arrest did not recall or record in a report whether the vehicle had mismatched doors.

¶ 29 A claim for ineffective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11. Under this test, a defendant must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*.

[4] The arrest report is included in the trial record, but defendant's height and hair style at the time of his arrest were not mentioned at trial.

With respect to the first prong, the defendant must overcome the “strong presumption” that counsel's action or inaction was the result of sound trial strategy and not of incompetence. *People v. Clendenin*, 238 Ill. 2d 302, 317 (2010). Regarding the second prong, the defendant must establish that "but for counsel's deficient performance, there is a reasonable probability that the result of the trial court proceeding would have been different." *Id*. Failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance. *Id*. at 317-18.

¶ 30 Defendant’s first two claims of ineffective assistance involve counsel’s performance in failing to impeach Flaherty and in cross-examining Cieciel. Whether to cross-examine or impeach a witness are generally matters of trial strategy and will not support a claim for ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). "[A] reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344 (2007). Even if trial counsel errs in a matter of strategy, counsel's performance is not necessarily constitutionally defective. *Id*. at 355. Rather, ineffective assistance of counsel occurs "[o]nly if counsel's trial strategy is so unsound that he entirely fails to conduct meaningful adversarial testing of the State's case." *Id*. at 355-56.

¶ 31 Turning to defendant's first ineffectiveness claim, we cannot say that trial counsel was deficient for failing to impeach Flaherty when he testified at trial that Woods identified defendant by name, but during pretrial proceedings, stated that Woods did not know defendant's name. To the contrary, the trial record establishes that counsel elicited Flaherty's testimony in order to discredit Woods, the complaining witness. Initially, counsel asked Woods whether he attempted to locate defendant or asked friends if they knew defendant's identity following the

carjacking. Woods denied taking either action. Later, during Flaherty's cross-examination, the following colloquy occurred:

"DEFENSE COUNSEL: Okay. Now, [Woods] gave you some information. Did he say where he got this information from?

THE WITNESS: He said he did his own—I forget the exact words he used. His own homework or his own—he was looking for the individual himself.

* * *

DEFENSE COUNSEL: *** [Woods] must have given you a name, correct?

THE WITNESS: I believe he did give me a name."

Here, Flaherty contradicted Woods' claim that he did not investigate defendant's identity following the carjacking. Counsel emphasized this contradiction during closing argument, stating:

"*** June 18th, ten [days] later [after the carjacking], now [Woods] knows the defendant's name. How did he get his name. Remember, I asked him on the stand. After this crime, did you go back to the scene[?] No, no. I never went back, no. Now, not only does Flaherty testify that he knows the name, but he's known him for several years. So, if he knew his name and he knew him at the time, how come he didn't tell the police that[?]

You see how Terrence Woods is not credible. Not at all, ladies and gentlemen. If you were robbed, and you knew this person's name, you are going to give it. ***"

Counsel's closing argument demonstrates that he elicited Flaherty's testimony to attack Woods' credibility. *People v. Jimerson*, 127 Ill. 2d 12, 33 (1989) (where a defendant challenges trial counsel's failure to impeach a witness, "[t]he value of the potentially impeaching material must

be placed in perspective"). Since counsel's failure to impeach Flaherty was a matter of trial strategy, this claim of ineffective assistance lacks merit.

¶ 32 Defendant next contends that trial counsel was ineffective in cross-examining Cieciel regarding Woods' familiarity with defendant. According to defendant, counsel "took a risk" in asking Cieciel what basis Woods had for recognizing defendant, as Cieciel testified that Woods claimed defendant had engaged in illegal activity. Defendant directs us to the following colloquy:

"DEFENSE COUNSEL: *** How did he recognize the defendant?

THE WITNESS: The victim stated that after several days he recalled the defendant, Mr. Ringer, performed illegal business transactions around, I believe, 57th and Princeton.

DEFENSE COUNSEL: What type of illegal business transactions?

ASA: Objection.

THE COURT: Sustained.

DEFENSE COUNSEL: Okay. And how long did he say he had observed Mr. Ringer doing this?

* * *

THE WITNESS: Over some time, yes.

* * *

DEFENSE COUNSEL: *** [D]id Mr. Woods say how long he had known this defendant?

THE WITNESS: Several years.

DEFENSE COUNSEL: Several years. And in this several years did he say that he had talked to the defendant?

THE WITNESS: He had stated that he had exchanged some words with the defendant."

¶ 33 Viewing the record as a whole, we find that counsel's cross-examination of Cieciel did not constitute ineffective assistance. As Woods provided the only identification testimony at trial, his credibility was central to the case. Therefore, counsel's initial question to Cieciel regarding how Woods claimed to have known defendant was objectively reasonable. Moreover, nothing in the record indicates that counsel had reason to know that Cieciel would testify that Woods claimed defendant had engaged in illegal activity. To the contrary, Cieciel's pretrial testimony indicated that Woods merely claimed that "he had already *** [known] who the guy was" when he identified defendant in a physical lineup. See *People v. Watson*, 98 Ill. App. 3d 296, 301 (1981) (trial counsel "cannot be held responsible for the witness's unresponsive and unexpected answer to [a] question").

¶ 34 Notably, trial counsel's subsequent questions to Cieciel exposed inconsistencies between Woods' testimony at trial and his statement to Cieciel. During closing argument, counsel used these inconsistencies, along with Woods' criminal record, to attack Woods' credibility. Counsel stated:

"*** Cieciel *** said [Woods claimed] he's known [defendant] for several years. That's not what Terrence Woods said. Terrence Woods said on the stand I knew him maybe six or seven months. I saw him once a month.

> He also said something about illegal business. I don't know what that is. But you know Terrence Woods has been convicted of two crimes. That doesn't make him a liar. But it sure throws his credibility into disrepute."

Here, counsel's attempt to discredit Woods by contrasting his testimony with Cieciel's constituted reasonable trial strategy and did not amount to deficient performance under *Strickland.* Moreover, we cannot say that counsel's performance prejudiced defendant where the outcome of the trial would not have been different had counsel not elicited Cieciel's testimony. Woods identified defendant in a photo array, physical lineup, and at trial, and his testimony was sufficient to sustain defendant's conviction. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) (testimony of a single witness, if positive and credible, is sufficient to sustain a conviction). Therefore, this claim for ineffective assistance fails.

¶ 35 Next, defendant contends that trial counsel was ineffective for failing to object to the ruling that other-crimes evidence was admissible to show lack of mistake. As the intentional character of the charged offenses (aggravated vehicular hijacking and aggravated battery with a firearm) was not at issue, defendant submits that the court's instruction permitting the jury to consider other-crimes evidence for lack of mistake created the possibility that the jury would consider his flight and arrest as evidence that he had committed the carjacking and battery. In response, the State argues that trial counsel expressly objected to lack of mistake as a basis for admitting the other-crimes evidence.

¶ 36 Evidence of a defendant's other crimes is inadmissible to show criminal propensity. *People v. Wilson*, 214 Ill. 2d 127, 135 (2005). Other-crimes evidence is admissible for other purposes, however, including to show *modus operandi*, intent, motive, identity, or "absence of mistake with respect to the crime with which the defendant is charged." *People v. Pikes*, 2013 IL

115171, ¶ 11. The trial record shows that during the State's case, prior to the police testimony regarding defendant's other crimes, the State tendered to the court a proposed jury instruction limiting the use of other-crimes evidence to the issues of identification, lack of mistake, and circumstance. The court struck, *sua sponte*, the instruction pertaining to circumstance. Defense counsel then argued that Woods' description of defendant's car and gun differed from the description of the car and gun that, according to the State's pretrial motion to admit proof of defendant's other crimes, defendant had in his possession on the night of his arrest. Counsel stated:

> "*** I would renew a motion to deny [the State's] motion based upon the fact that now we've heard the testimony of this witness who's testified that it was an Oldsmobile Alero, different make. And that, in fact, it had mix matching doors *** which certainly would be distinctive. And I would think that if they had stopped the Chevy Alero with mix matching doors or an Oldsmobile Alero with mix matching doors that was blue, then we could see how it would be lack of mistake. Here this doesn't show that there is a lack of mistake. This just says that the defendant was arrested in a different car with nothing that made it distinctive that it was the same car."

Subsequently, the court instructed the jury that evidence of defendant's other crimes may be considered only for the issue of "defendant's identification and lack of mistake," and that the jury had the duty to determine "what weight should be given to this evidence on [those] issues."

¶ 37 Although counsel argued that "lack of mistake" was not a basis for admitting other-crimes evidence, in substance, his argument appears to have been directed to whether evidence of defendant's other crimes was admissible for purposes of identification. We note that on appeal, defendant does not claim that counsel was ineffective for not arguing against the

admissibility of other-crimes evidence for purposes of identification, and the record shows the other-crimes evidence was properly admitted for that purpose. Consequently, counsel's performance was not deficient because the failure to challenge properly admitted evidence is not ineffective assistance. *People v. Rutledge*, 409 Ill. App. 3d 22, 25 (2011) (counsel not ineffective for failing to object to properly admitted evidence of other crimes). Additionally, we cannot say that counsel's performance prejudiced defendant, as evidence of defendant's other crimes would have been properly admitted for purposes of identification regardless of whether counsel objected on the issue of lack of mistake.

¶ 38 Defendant next contends that trial counsel was ineffective for failing to object to unnecessary detail in the testimony regarding defendant's other crimes. According to defendant, the circumstances of his arrest were relevant only to the extent that the vehicle he was driving, and one of the guns thrown from the vehicle, resembled the vehicle and gun that Woods had seen on the day of the carjacking. Defendant argues, however, that Flaherty, Gemignani, and Lau testified to the "minutiae" of defendant's flight, including the traffic lanes, his car's speed and how it stopped on an embankment, the foot chase across the highway and El tracks, and defendant's attempt to hide in a garage. According to defendant, the officers' testimony was prejudicial for emphasizing unlawful behavior unrelated to the charged offenses.

¶ 39 In this case, counsel's failure to object to the level of detail in the other-crimes testimony did not amount to ineffective assistance. Decisions regarding what matters to object to and when to object are questions of trial strategy, and the failure to object to testimony does not necessarily prove that counsel was deficient. *People v. Evans*, 209 Ill. 2d 194, 221 (2004). In this case, where the officers' testimony provided a cogent explanation of how defendant's flight and arrest established his connection to the gun and vehicle involved in the charged offenses, counsel

reasonably could have decided that an objection would have been overruled or would have unduly emphasized the importance of the testimony to the jury. *Rutledge*, 409 Ill. App. 3d at 26 ("there is no rule that requires the State to present a watered-down version of events simply because otherwise highly probative evidence is unflattering to defendant"); see also *People v. Hart*, 214 Ill. 2d 490, 519 (2005) ("flight and resistance upon apprehension constitute circumstances from which the trier of fact could infer consciousness of guilt"). Moreover, in view of Woods' detailed testimony describing the charged offenses, the evidence at trial was sufficient to sustain defendant's conviction and he was not prejudiced by counsel's failure to object to the other-crimes evidence. *Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 40 Defendant next contends that trial counsel was ineffective for failing to object to the State's use of other-crimes evidence during closing argument to show criminal propensity. Defendant notes that the prosecutor reviewed his conduct on the night of the arrest in detail, emphasizing that it was defendant's choice to not curb his car for the police, but to keep driving, flee across the highway and El tracks, and break into a garage to hide. Additionally, defendant observes that the prosecutor repeatedly asked the jury to find him guilty for all of his "decisions," "choices," and "behavior" on June 8, 2010, the date of the carjacking and battery, and also on June 24, 2010, the date of his arrest. According to defendant, the prosecutor improperly encouraged the jury to use the other-crimes evidence as a reason to find him guilty of the charged offenses, and trial counsel was unreasonable to not have objected to these remarks.

¶ 41 We do not believe counsel was ineffective for failing to object during closing argument. Like the decision whether to object to trial testimony, whether to object to a closing argument is generally a matter of trial strategy that will not establish ineffective assistance of counsel. *People v. Beard*, 356 Ill. App. 3d 236, 244 (2005). Notably, during the defense's closing argument,

counsel criticized the State for focusing its case on defendant's other crimes. Counsel told the jury that "the funny thing about this case is most of the evidence took place *** two weeks [after the carjacking]" and "[m]ost of the testimony you heard" described the circumstances of defendant's arrest rather than the charged offenses. Counsel specifically warned the jury against using the other-crimes testimony as evidence of criminal propensity, stating that:

> "*** I don't care what the State argues. They are going to argue stuff about the arrest. You know you are not supposed to consider that other than for this trial.
>
> Come on, the guy gets arrested for another charge. He must have committed more. In fact, that's not the evidence. The Judge will read you that instruction."

In view of this record, we cannot say that counsel's performance was deficient. Even if a different response to the State's closing argument might have proved more beneficial, it would be inappropriate to second-guess counsel's decision here. *People v. Fuller*, 205 Ill. 2d 308, 331 (2002) ("the fact that another attorney might have pursued a different strategy, or that the strategy chosen by counsel has ultimately proved unsuccessful, does not establish a denial of the effective assistance of counsel").

¶ 42 Finally, defendant contends, and the State correctly concedes, that his sentence for aggravated battery with a firearm must be vacated and his case remanded for resentencing where the trial court imposed a term of imprisonment in the incorrect sentencing range. Defendant was convicted of aggravated battery with a firearm, a Class 3 felony with a sentencing range of two to five years. 720 ILCS 5/12-4(b)(1), (e)(1) (West Supp. 2009); 730 ILCS 5/5-4.5-40(a) (West 2010). However, counsel for defendant told the court that aggravated battery with a firearm was a Class 2 felony, which has a sentencing range of three to seven years. 730 ILCS 5/5-4.5-35(a) (West 2010). The court subsequently sentenced defendant to seven years' imprisonment.

¶ 43 Defendant did not raise this issue in a posttrial motion, but contends that a sentence that does not conform to statutory requirements is void. See, *e.g.*, *People v. Thompson*, 209 Ill. 2d 19, 24 (2004). But, *People v. Castleberry*, 2015 IL 116916, abolished the void sentence rule. *Id*. ¶ 19. In this case, however, we note that the trial court's misinterpretation of the proper sentencing range constitutes plain error. See *People v. Nodal*, 89 Ill. App. 3d 538, 543 (1980) (finding plain error where trial court misinterpreted sentencing statute). Consequently, we remand this matter to the trial court for resentencing in the proper statutory range. *Id*. Because we find plain error, we need not address whether defendant received ineffective assistance of counsel with respect to sentencing.

¶ 44 For the following reasons, we affirm defendant's convictions and remand for resentencing in the applicable statutory range.

¶ 45 Affirmed and remanded.