

2016 IL App (1st) 141797-U
No. 1-14-1797
June 14, 2016

SECOND DIVISION

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
Plaintiff-Appellee,)	Of Cook County.
v.)	No. 98 CR 30103
ERIC BLACKMAN,)	The Honorable
Defendant-Appellant.)	Mary Margaret Brosnahan,
	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The postconviction petition included sufficient allegations to support a finding that the petitioner's appellate counsel provided ineffective assistance when counsel failed to argue that prosecutorial misconduct required reversal, when the prosecutor used other crimes evidence as a basis for an assertion that the evidence proved the defendant "capable of killing."

¶ 2 A jury found Eric Blackman guilty of murder and this court affirmed the conviction. *People v. Blackman*, 2012 IL App (1st) 103206-U. In a postconviction petition, Blackman alleged that his appellate counsel provided ineffective assistance by failing to argue that

prosecutorial misconduct in closing argument required reversal. The trial court dismissed the petition as frivolous. We find that, arguably, effective appellate counsel would have raised the issue of improper closing argument, and, arguably, Blackman would have achieved a better result on the direct appeal if appellate counsel had not erred. Therefore, we reverse the dismissal of the postconviction petition and remand for further proceedings on the petition.

¶ 3

BACKGROUND

¶ 4

Around 10 p.m., on October 15, 1998, Wanda Vickers heard loud moans near her home. She went to the window and heard more groans coming from an abandoned car near her home. She saw the flash of a gunshot in the car. She watched a man get out of the car and climb over a fence. Police found Lawrence Strong in the car, dead from a contact gunshot wound to the head. Later that night, Vickers described to police the man she saw leaving the car. She did not name the man. Police also spoke to Jermon Murphy at the scene.

¶ 5

A week later, around midnight on October 22, 1998, Blackman and another man kicked in the door of Vickers's home and Blackman asked Vickers, "[W]ho said I did that?" Also on that night, Blackman and the other man kicked in the door of Murphy's home, and Blackman said to Murphy's mother, Annette McCauley, "tell him I didn't do it."

¶ 6

The next day, October 23, 1998, Vickers told police about the home invasion, and she said that she saw Blackman get out of the abandoned car right after she saw the gunshot on October 15. Police arrested Blackman and charged him with murder and home invasion. Blackman pled guilty to charges that he invaded Vickers's home and Murphy's home.

¶ 7 Before trial, Blackman moved to exclude evidence of the home invasions. The trial court denied the motion, but agreed to instruct the jurors that they could use the testimony only as evidence of Blackman's consciousness of guilt.

¶ 8 Courtney Crosby testified that on October 15, 1998, he drank alcohol and smoked marijuana with his friends, Blackman, Murphy and Jovan Madden. Blackman showed them he had a gun. Strong drove up and made gang signs to them. Blackman said, "We ain't folks." Strong drove over to his girlfriend's home and got out of his car. Blackman and Madden started walking towards Strong before Crosby left the scene.

¶ 9 Murphy testified that he, too, noticed that Strong drove past and Blackman walked towards Strong's car. Murphy saw Blackman push Strong into an abandoned car. Loud moaning preceded a gunshot within the car. Police officers arrived shortly after the shooting. Murphy told one of the officers that Blackman shot Strong, but Murphy did not admit that he saw the shooting. Murphy testified that he did not tell the police what he saw because he feared Blackman. The day after Blackman kicked in the door to his home, Murphy told the police he saw Blackman shoot Strong.

¶ 10 Vickers also testified that she feared Blackman, and that explained her decision not to tell police at first that she saw the gunshot and she saw Blackman get out of the car where police found Strong's corpse. Vickers knew Blackman from the complex where they both lived. She testified that on October 22, 1998, when Blackman kicked in her door, she ran from her bedroom to the door to protect her children. She saw Blackman and the other man waiting for her. Blackman held a gun to her head when he asked, "[W]ho said I did that?" The

police put her family in protective custody once she identified Blackman as the shooter. The state paid more than \$20,000 for her family's living expenses while they remained in protective custody.

¶ 11 Blackman testified that he stayed with his girlfriend Laura on October 15, 1998, at her home. He did not remember Laura's last name, but he remembered her address as 422 East 42nd Place. When Blackman heard that Murphy said he killed Strong, he became upset and went to confront Murphy in his home. He kicked in the door when no one responded to his knock. He left when he learned that Murphy was not at home. He went to Vickers's home the same night to confront Vickers's son, Tyrone Stallworth, and asked why Stallworth said Blackman killed Strong when Stallworth knew that was not true. Blackman said he did not carry a gun to his confrontations with Vickers and McCauley.

¶ 12 In rebuttal, prosecutors presented a fax on a letterhead of the Cook County Assessor's Office, purportedly showing assessment records for 422 East 42nd Place. The fax indicated that the land stood vacant from before 1994 through 2008. Blackman's counsel did not object to the exhibit.

¶ 13 The prosecutor, in closing, argued:

"Ms. Vickers certainly didn't tell the police that night what she had seen. ***

Ms. Vickers told you, she was afraid. And quite frankly with good reason, the event of October 22nd. *** She had to tell the police, not only who invaded her home, but who killed that boy in that parking lot.

[Murphy] is the same thing. He told you he is afraid. *** That's why [Murphy] didn't say what he saw until his mother was invaded by the defendant because he no longer could risk – there is one thing when he is worrying about [himself], but now this guy is going into his mother's apartment and putting a gun on his mother, threatening, demanding to know who said I killed that boy, tell them I didn't do it."

¶ 14 Defense counsel did not object. Defense counsel objected later when the prosecutor argued:

"The defense wants you to believe that someone who is capable of committing those two home invasions in the fashion and manner in which those women testified to isn't also capable of first degree murder."

¶ 15 The court overruled defense counsel's objection, and the prosecutor continued:

"[Defense counsel argued that h]e is incapable of killing a total stranger after he acted in the manner in which he did to those two women, neighbors, mothers of his friends.

Ladies and gentlemen, the evidence has proven that he is exactly capable of that, capable of killing Larry Strong."

¶ 16 The jury found Blackman guilty of first degree murder. The court sentenced Blackman to 55 years in prison. Blackman appealed. Appellate counsel argued a sentencing issue, lack of foundation for the fax concerning the address of Blackman's girlfriend, and improper admission of excessive evidence concerning the home invasions. Because Blackman's trial

counsel had not raised the necessary objections to preserve all of the alleged errors for review, appellate counsel also argued plain error and ineffective assistance of trial counsel. This court affirmed the judgment. *Blackman*, 2012 IL App (1st) 103206-U.

¶ 17 Blackman filed a postconviction petition in February 2014, alleging that he received ineffective assistance of appellate counsel when counsel failed to argue for reversal based on the prosecutor's statement in closing that the other crimes evidence proved Blackman capable of murder. The trial court dismissed the postconviction petition as frivolous. Blackman now appeals.

¶ 18 ANALYSIS

¶ 19 "To prevail on a claim of ineffective assistance *** a defendant must show both that counsel's performance 'fell below an objective standard of reasonableness' and that the deficient performance prejudiced the defense. [Citation.] At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 20 The trial court should not permit prosecutors to use evidence of other crimes to "lead the jury to convict defendant solely upon the belief that he is a person of bad character and thus likely to have committed the crime charged." *People v. Nunley*, 271 Ill. App. 3d 427, 431 (1995). In *People v. White*, 407 Ill. App. 3d 224 (2011), the prosecutor argued that the defendant's prior convictions showed he was a thief. The *White* court found the argument

"clearly improper and contrary to the law governing admission of prior convictions." *White*, 407 Ill. App. 3d at 235 (citing *People v. Williams*, 161 Ill. 2d 1, 39-40 (1994)). The prosecutor here similarly misused the evidence of the home invasions to support the inference that Blackman was "capable of killing Larry Strong." The trial court exacerbated the error when it overruled defense counsel's objection to the argument. *People v. Faysom*, 131 Ill. App. 3d 517, 522 (1985). We note that trial counsel did not preserve the issue for appellate review, as counsel did not mention the closing argument in Blackman's motion for a new trial. However, appellate counsel could have raised the issue despite the omission, either as plain error or as an additional indication of ineffective assistance of trial counsel. Especially because appellate counsel argued the overuse of other crimes evidence, and no obvious strategy explains the failure to object to the improper use of that evidence in closing argument, we find that, arguably, appellate counsel's performance fell below an objective standard of reasonableness. See *People v. Simpson*, 2015 IL 116512, ¶¶ 35-36.

¶ 21 Next, we must determine whether the error arguably prejudiced Blackman. In our order on the direct appeal, we noted that the State's evidence did not overwhelmingly prove Blackman's guilt. *People v. Blackman*, 2012 IL App (1st) 103206-U, ¶ 35. No physical evidence tied Blackman to the crime scene or the murder weapon. The prosecutors relied on the testimony of two eyewitnesses who said they saw Blackman at the murder scene at the time of the murder. Murphy, a convicted felon, admitted that he had consumed some alcohol and smoked marijuana before the murder, and this admission may make his testimony less credible. See *People v. Di Maso*, 100 Ill. App. 3d 338, 342 (1981). Vickers admitted that

when she first reported the crime, she did not tell police she saw Blackman get out of the car, and once she named him as the offender, the State relocated her and provided her \$20,000 in living expenses. Blackman also presented his own testimony that he stayed with his girlfriend at the time of the murder, although he could not remember his girlfriend's last name, and he also misremembered her address.

¶ 22 By overruling defense counsel's cogent objection to the prosecutor's closing argument, the trial court encouraged the jurors to consider the evidence of the home invasions as proof that Blackman's bad character made him capable of committing murder. We find that, arguably, Blackman might have achieved a better result on the direct appeal if appellate counsel had raised the issue of improper prosecutorial closing argument. At the first stage of postconviction proceedings, the threshold for survival is low (*People v. Delton*, 227 Ill. 2d 247, 254 (2008)), and Blackman has presented sufficient detail in his petition to state the gist of a constitutional claim. *People v. Porter*, 122 Ill. 2d 64, 73-74 (1988). Accordingly, we must reverse the trial court's judgment and remand for further proceedings on Blackman's postconviction petition. We need not address the other issues raised in Blackman's appeal. See *People v. Cathey*, 2012 IL 111716, ¶ 34; *People v. Rivera*, 198 Ill. 2d 364, 371 (2001).

¶ 23 CONCLUSION

¶ 24 Blackman has adequately alleged facts that arguably support the conclusion that his appellate counsel performed below an objective standard of reasonableness and that Blackman might, arguably, have achieved a better result on appeal if his counsel had not

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erred. Accordingly, we reverse the trial court's judgment and remand for further proceedings on Blackman's postconviction petition.

¶ 25 Reversed and remanded.