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2016 IL App (3d) 140039-U

Order filed February 18, 2016

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0039
v.	)	Circuit No. 08-CF-1050
	)	
LEVERSUS A. MABRY,	)	Honorable
	)	Stephen Kouri
Defendant-Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.  
Justice McDade concurred in the judgment.  
Justice Schmidt dissented.

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**ORDER**

¶ 1 *Held:* Defendant was denied effective assistance of counsel where counsel failed to present testimony of an alibi witness.

¶ 2 Following a third trial, defendant Leversus Mabry was convicted by a jury of aggravated battery with a firearm and unlawful possession of a weapon by a felon. The first trial ended in a mistrial and the guilty verdict in the second trial was reversed by this court on appeal and the

cause remanded. In the first two trials, Mabry's girlfriend testified as an alibi witness. In the third trial, Mabry had new counsel, who did not present a defense. On appeal, Mabry argues his trial counsel was ineffective for failing to present his alibi witness. We agree, and reverse and remand.

¶ 3

### FACTS

¶ 4

Defendant Leversus Mabry was charged with aggravated battery with a firearm and unlawful possession of a firearm. 720 ILCS 5/12-4.2(a)(1) (n/k/a 720 ILCS 5/12-3.05 (West 2015), 720 ILCS 5/24-1.1(a) (West 2008). The charges arose from an August 21, 2008, incident in which Jerome Ashford was shot. Ashford was the father of Mabry's girlfriend's daughter. Mabry's girlfriend, Aneisha Smith, and Ashford had been involved in a dispute over custody and other issues concerning their daughter. Both Ashford, and his girlfriend, Tamara Ward, identified Mabry as the shooter.

¶ 5

The case proceeded to a jury trial. The State's witnesses included Ashford, Ward, the responding police officer Shannon Parnell, the crime scene investigator Paul Tuttle, and the lead investigating detective Steve Garner. Smith and Garner testified in the defense case. According to Smith, Mabry was in bed with her sleeping when Ashford was shot. In October 2008, she told the information to defense counsel and signed a statement that Mabry was with her. She told the alibi to the police in December 2008 after she was informed they were looking for her. The parties stipulated to the testimony of the forensic scientist who examined the bullets and casings and the doctor who treated Ashford's gunshot wound, and that Mabry was previously convicted of a forcible felony. The jury deadlocked and the trial court declared a mistrial.

¶ 6

A second trial took place. Prior to the presentation of evidence, the defense moved *in limine* to question Garner about a prior inconsistent statement made by Ashford, and to introduce

evidence Ashford was a drug dealer who was shot again during the period when Mabry was in jail. The trial court granted the first motion and denied the second motion. The State and defense offered the same witnesses as the first trial and they testified consistent with their testimonies in the first trial with some variations. Smith stated that she was sleeping on Mabry when the shooting took place and would have known if he had gotten up.

¶ 7 Smith gave a signed statement to defense counsel in August 2008 and counsel was going to forward it to the assistant state's attorney handling the case. She said she was not contacted by the police until after Ashford was shot a second time. The State objected and the trial court sustained the objection. The trial court instructed the jury to disregard the testimony and it was stricken as irrelevant. The defense again moved for a mistrial, which the trial court denied. During jury deliberations, the jury notified the court that it was unable to reach a verdict. The judge gave a *Prim* instruction and the jury returned guilty verdicts on both counts.

¶ 8 Mabry filed a *pro se* motion for a new trial and claimed ineffective assistance of counsel. New counsel was assigned, and Mabry's motion was heard and denied. Sentencing took place and the trial court sentenced Mabry to a 48-year term of imprisonment for aggravated battery with a firearm. Mabry appealed, arguing evidentiary issues and ineffective assistance of counsel. This court reversed and remanded for a new trial, finding that the trial court erred when it denied Mabry's motion for a mistrial after Smith stated that Ashford had been shot a second time. *People v. Mabry*, 2011 IL App (3d) 100042-U. In finding that the error would have prejudiced Mabry, this court described that the evidence was closely balanced and "essentially came down to a credibility determination" between Ashford and Smith. *Id.*, ¶ 27.

¶ 9 On remand, new counsel represented Mabry. In answering discovery, defense counsel stated that Smith would testify but did not offer any affirmative defenses. A subpoena issued to

secure Smith's presence was returned unserved, as Smith was not found at the address provided. Mabry filed an amended answer to the State's discovery motion, stating that he would present an alibi defense that he was not present when the shooting occurred and that Smith would testify as an alibi witness consistent with her testimony at the previous trials. The defense witness list included only Smith. Mabry moved to sever the charges, which the trial court granted. The trial court ordered the proceedings be bifurcated, and that after a verdict was reached on the first count, the second count would be presented to the jury. The defense asked the trial court to adopt all previous defense motions filed in the two other trials, including the alibi defense to be presented by Smith. Defense counsel assured the trial court that he would tell Smith not to testify again that Ashford was shot a second time. The court adopted the motions and parties agreed that the prior rulings on the motions would also stand.

¶ 10           A third trial ensued. In opening statements, defense counsel told the jury that Mabry did not commit the offense and that Ashford identified him as the shooter out of jealousy regarding Mabry's relationship with Ashford's daughter. Defense counsel also told the jury that the child's mother would testify in support of the defense jealousy theory. Counsel said: "We're going to talk to the mother and ask her what happened. Where was she at? What happened? What transpired? And then you're going to make a conclusion, ladies and gentlemen."

¶ 11           The State presented the testimony of Ashford, Ward, Parnell, Tuttle, Ashford, Garner, and forensic scientist Linda Yborra. Ashford testified that he and Mabry had prior confrontations over Ashford's daughter calling Mabry, "dad." On the morning of August 21, 2008, he saw a younger man with a light complexion and an Afro breaking out the windows on his vehicle, which was parked in front of the house. He moved to the back door as the man ran to the back yard. Ashford cracked open the back door and saw a man standing to his left.

Ashford was between the screen door and the back door. Ashford saw another older man standing directly in front of him. The man, who was wearing a half-mask, shot at Ashford twice. Ashford identified Mabry as the shooter.

¶ 12 On cross-examination, Ashford clarified that he kept the screen door shut but opened the inner door. He closed the inner door after he was shot. The second bullet lodged in the door. Ashford sat in the kitchen before moving to the living room. The paramedics moved him from there through the front door to the ambulance. At the hospital, Garner showed him a photo array and he identified Mabry as the shooter.

¶ 13 Ward testified that the shooter wore a mask that covered the outline of his face. She was able to see his eyes and the top of his head. Ward was aware that Ashford was in a dispute with a man who fit the description she provided. She saw Ashford go to the back door and open it, an older man looked at Ashford for a few seconds and then shot him. Ward identified the younger man from a photo array. She knew him because they went to school together.

¶ 14 Garner testified that he visited Ashford at the hospital after the shooting. Ashford identified Mabry as the shooter from a photo array and in a written statement. Ashford told Garner that Mabry had been wearing a mask.

¶ 15 The defense rested without presenting any evidence. In closing argument, defense counsel challenged Ashford's credibility, arguing that the evidence established the shooting occurred at the front door, not the back door as Ashford testified. Counsel argued that Ashford's testimony that he held the back door open was inconsistent with him being shot in the left arm and that the bullet trajectory would have been different if Ashford was shot at the back door. Counsel told the jury it would have to reconstruct the evidence like in the cases of who shot President Kennedy or J.R. Ewing. Counsel asserted that Ashford and Ward made up the story

that Mabry was the shooter because Ashford was angry that his daughter called Mabry, “dad.” In rebuttal, the State argued the defense theory that the shooting occurred at the front door was ridiculous and that the evidence established the shooting took place at the back door.

¶ 16 The jury found Mabry guilty of aggravated battery with a firearm and unlawful possession of a firearm by a felon. Mabry filed a *pro se* motion to vacate the judgment and defense counsel filed motions for judgment notwithstanding the judgment (JNOV) and for a new trial. Mabry thereafter indicated he wished to proceed *pro se* and asserted that his trial counsel was ineffective for failing to consult him on posttrial motions. The trial court admonished Mabry pursuant to Illinois Supreme Court Rule 401 (eff. July 1, 1984), Mabry waived counsel, and the trial court granted his request to proceed *pro se*. Mabry filed a *pro se* posttrial motion for a new trial, asserting that he received ineffective assistance of counsel based on counsel’s failure to call Smith as an alibi witness. Mabry’s motion was heard and denied. A sentencing hearing took place. The trial court sentenced Mabry to a 48-year term of imprisonment for aggravated battery with a firearm. Mabry moved to reconsider his sentence, which was heard and denied. He timely appealed.

¶ 17 ANALYSIS

¶ 18 The issue on appeal is whether Mabry was denied effective assistance of counsel. As an initial matter, the State argues that this issue is properly decided in a postconviction petition rather than on direct appeal. It asserts the record is insufficient to decide the claim and postconviction proceedings are a better vehicle for relief.

¶ 19 In *People v. Parker*, 344 Ill. App. 3d 728, 737 (2003), this court declined to decide defendant’s ineffective assistance of counsel claim, finding the record was inadequate to resolve the claim, and determining it was more appropriately addressed in postconviction proceedings.

The defendant in *Parker* argued his counsel was ineffective for failing to call the defendant as a witness at a motion to suppress hearing and no sound strategy existed for the failure. *Id.* at 736. The court concluded that, on the record before it, there was no way to determine whether defense counsel employed reasonable trial strategy in not calling the defendant as a witness. *Id.* at 737.

¶ 20 As discussed in detail below, the record here establishes there was no sound strategy for defense counsel's failure to call Smith as a witness at the third trial. Under the circumstances of this case, because the record includes what her testimony was at the prior two trials, this court has a sufficient basis to determine the ineffective assistance of counsel claim. Under these facts, it is appropriate to resolve Mabry's claim of ineffective assistance of counsel on direct appeal.

¶ 21 Turning to the merits of his claim, Mabry argues that counsel's failure to call Smith as an alibi witness denied him effective assistance of counsel, where defense counsel told the trial court, the State, and the jury that Smith would testify. Mabry also challenges counsel's failure to impeach Ashford's identification, counsel's focus on irrelevant and prejudicial evidence, and counsel's presentation of a defense theory not supported by the evidence.

¶ 22 A defendant is entitled to effective assistance of counsel. US. Const., amends. VI, XIV; Ill. Const. of 1970, art. I, § 8. To prevail on a claim of ineffective assistance of counsel, the defendant must establish that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). A defendant must satisfy both *Strickland* prongs. *Patterson*, 217 Ill. 2d at 438. A defendant's claims of ineffective assistance of counsel are reviewed using a bifurcated standard: the trial court's factual findings will not be overturned unless they are against the manifest weight of the

evidence but the ultimate issue of whether Mabry received ineffective assistance is reviewed *de novo*. *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008).

¶ 23 A defendant alleging ineffective assistance of counsel must overcome the presumption that counsel's conduct is presumed to be the result of sound trial strategy. *Nowicki*, 385 Ill. App. 3d at 81-82. The presumption of trial strategy can be overcome when counsel's strategy seems so irrational and unreasonable that no reasonably effective defense attorney would pursue it under the circumstances. *People v. King*, 316 Ill. App. 3d 901, 916 (2000). Only the most egregious strategic errors provide the basis for an ineffective assistance claim. *People v. Briones*, 352 Ill. App. 3d 913, 918 (2004). When defense counsel promises the jury in opening statements that a witness will testify and then fails to present that witness, the failure may constitute ineffective assistance. *Briones*, 352 Ill. App. 3d at 918-19. It is counsel's responsibility to establish in the record that the failure to call the witness was not the result of ineffective assistance but rather the result of the "fickleness" of the witness or sound strategy based on unexpected events. *Briones*, 352 Ill. App. 3d at 919.

¶ 24 Trial counsel's failure to call Smith as an alibi witness or offer an explanation for her absence cannot be considered sound strategy. In the prior trials, Smith presented an alibi that Mabry was with her at the time Ashford was shot. She was sleeping on top of him and would have known if he had gotten up during the night. In both prior trials, Smith was the only defense witness and Mabry's alibi defense relied on her testimony. In the third trial, defense counsel argued in opening statements that Ashford was lying that Mabry was the shooter because he was jealous of Mabry's relationship with Ashford's daughter. Counsel then stated the jury would hear from Smith about what happened, although he did not expressly mention that she would offer an alibi.



¶ 25 The State presented two witnesses who identified Mabry as the shooter and other witnesses and evidence establishing the shooting occurred at the back door and that Ashford was shot in the arm. The defense rested without putting on any evidence. Counsel offered no explanation why Smith was not called as a witness. The record indicates that Smith's subpoena was returned unserved but there is no evidence defense counsel pursued alternate service or brought to Mabry, the State, and the court's attention that Smith was unavailable. Rather, defense counsel thereafter amended the answer to assert an alibi defense based on Smith as the sole defense witness. He also assured the judge he would admonish Smith that she was not to mention that Ashford was shot on another occasion as she did in the second trial.

¶ 26 Although there was an alibi witness whose testimony, if believed by the jury, would have been exculpatory, defense counsel did not explicitly argue in opening statement that Smith would be an alibi witness and did not seem to pursue an alibi theory in closing argument. Smith might not have been the best witness but she was the only witness the defense had to corroborate the alibi defense. The credibility theory pursued by defense counsel was so unreasonable and irrational that no reasonable defense attorney would have used it. There was no evidence the shooting occurred at the front door. Even if it had, Mabry could still be the shooter. Mabry thus satisfied the first *Strickland* prong. He also satisfied the second prong. In Mabry's prior appeal, this court found that the evidence against Mabry was closely balanced. *People v. Mabry*, 2011 IL App (3d) 100042-U, ¶ 27. Specifically, this court found "it essentially came down to a credibility determination" between Ashford and Smith. *Id.* Based on this finding, the failure to present Smith's testimony prejudiced Mabry.

¶ 27 Mabry established that his trial counsel's performance was deficient and that he was prejudiced by the deficiency. The trial court erred when it denied his posttrial motion alleging

ineffective assistance of counsel. We find that Mabry properly raised his ineffective assistance of counsel claim on direct appeal, established that he was denied effective assistance of counsel and is entitled to a new trial.

¶ 28 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and the cause remanded.

¶ 29 Reversed and remanded.

¶ 30 JUSTICE SCHMIDT, dissenting.

¶ 31 For the reasons that follow, I respectfully dissent. Direct appeal is not the proper venue for defendant's ineffective assistance of counsel claim. *People v. Winkfield*, 2015 IL App (1st) 130205, ¶ 5. Unlike the majority, I find no basis for finding trial counsel ineffective simply because the alibi witness' testimony was known. *Supra* ¶ 20. The majority's holding does not give deference to trial counsel's decision, as is required. *People v. Enis*, 194 Ill. 2d 361, 378 (2000). Defendant's claim should be addressed in a postconviction petition. On direct appeal, only the trial record is available for review and that record is often incomplete or inadequate for the purpose of analyzing trial counsel's performance. *People v. Durgan*, 346 Ill. App. 3d 1121, 1142 (2004) (citing *Massaro v. United States*, 538 U.S. 500, 504-05 (2003)). Trial records frequently will not disclose the facts required for a court of review to decide either prong of a *Strickland* (466 U.S. 668 (1984)) analysis; the issue is appropriately addressed in a postconviction petition. *Durgan*, 346 Ill. App. 3d at 1142.

¶ 32 Such is the case here. Generally, there is no presumption that defense counsel's failure to call an alibi witness at trial is the result of ineffective trial strategy. In fact, the presumption of effectiveness lies with trial counsel. *Supra* ¶ 23. Moreover, not calling Smith may have been a sound trial maneuver. Smith's credibility was lacking and she possessed an obvious bias toward

the defendant. Regardless, on the record before this court, any claim on this topic is speculative. Presently, we do not know the context of Smith's failure to testify and should not rule until we do. What if Smith told defense counsel that she had a change of heart about defendant and, if put on the stand, would recant prior testimony? Would we expect defense counsel to advise the jury that was the reason for not calling her?

¶ 33 The majority finds that since Smith's testimony at the previous trials is in the record, there is a sufficient basis to conclude that trial counsel was ineffective for not calling her at the third trial. *Supra* ¶ 20. By definition, every alibi witness claims the defendant was not present to commit the charged offense. Thus, every alibi witness' testimony is, to some extent, known.

¶ 34 To establish prejudice derived from trial counsel's failure to call a witness, defendant is required to demonstrate that the outcome of the trial would likely have been different as a result of counsel calling the witness. *People v. Gale*, 376 Ill. App. 3d 344, 351 (2007); *Strickland*, 466 U.S. 668. "The test is not whether defense counsel fulfilled every promise made during opening statements, but whether any error by counsel was so grave that had the error not occurred, the result of the case would likely have been different." *Winkfield*, 2015 IL App (1st) 130205, ¶ 20 (citing *People v. Manning*, 334 Ill. App. 3d 882, 884 (2002)).

¶ 35 This court reversed and remanded defendant's case for a new trial after finding that the evidence was "closely balanced" in defendant's second trial. *Mabry*, 2011 IL App. (3d) 100042-U, ¶ 27. I disagree with this court's previous finding, as well as the majority's reliance on it in this appeal. *Supra* ¶ 8, 26. Here, there has been a new trial, so any finding regarding evidence in prior trials is irrelevant. It is "unreasonable" for a reviewing court to conclude that a credibility contest is automatically a case with closely balanced evidence. *People v. Naylor*, 229 Ill. 2d 584,

609 (2008). Defendant's trials were credibility battles. The evidence against defendant at those trials, however, was not closely balanced.

¶ 36 The shooting occurred while defendant's girlfriend was on the phone with the 911 dispatcher. The victim and his girlfriend immediately identified and described, respectively, the defendant as the shooter. The victim testified for the State and identified defendant on the witness stand. This stands in stark contrast to the defendant's alleged alibi.

¶ 37 A month after the shooting, Smith provided defense counsel with a signed statement, alleging that defendant was with her and asleep at the time of the crime. Then, at defendant's request, Smith attempted to set up a meeting between defendant and the victim. The alleged purpose of the meeting was to allow defendant to explain to the victim that he was not the shooter. After the victim declined to attend this meeting, Smith told police defendant was not the shooter—three months after the incident.

¶ 38 At defendant's third trial, the State presented essentially the same evidence as it did in the first two, but the parties—namely the defendant—did not stipulate to any of the evidence. The evidence technicians testified to all of their efforts in processing the crime scene while defense counsel attempted to poke holes in that evidence, arguing that the victim was fabricating a story (because of his ongoing feud with defendant) and that the shooting actually happened in another area of the home.

¶ 39 Ineffective assistance of counsel claims must be assessed from the "totality of counsel's conduct, not from isolated incidents." *People v. Spann*, 332 Ill. App. 3d 425, 430 (2002). Defense counsel meticulously highlighted every discrepancy between the State's witnesses' testimony in each of the trials. In closing, defense counsel argued that Ashford was not credible

by asserting that the shooting could not have happened in the front of the house as he alleged. A losing argument is not the same as ineffective assistance of counsel.

¶ 40 If defendant wishes to pursue an ineffective assistance claim, he should do so in a postconviction petition. There, a record can be developed to allow a ruling based upon something more than speculation.

¶ 41 For the reasons state above, I would affirm the trial court's ruling.