2019 IL App (5th) 160019-U

NO. 5-16-0019

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jefferson County.
	)	
v.	)	No. 11-CF-211
	)	
AARON BURTON,	)	Honorable
	)	Thomas J. Dinn III,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Barberis and Boie concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for drug-induced homicide is affirmed where the State proved him guilty beyond a reasonable doubt of the delivery of the fatal dose of heroin to the victim; where he was not denied effective assistance of counsel; and where the trial court did not improperly consider his unemployment as a factor in aggravation.

¶ 2 This is a direct appeal from the circuit court of Jefferson County. The defendant was convicted of drug-induced homicide and sentenced to 17 years' imprisonment, followed by 3 years of mandatory supervised release. The defendant raises three issues on appeal: (1) that the State failed to prove beyond a reasonable doubt the offense element of delivery, (2) that he was denied effective assistance of counsel, and (3) that

the trial court committed plain error by improperly considering his unemployment as a factor in aggravation. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 16, 2011, the defendant was charged by information with drug-induced homicide for knowingly delivering heroin to the victim, Lacey Kimpel, which, after she later injected it, caused her death. On February 28, 2012, a three-day jury trial commenced on the charge. The State's first witness was Dr. John Allen Heidingsfelder, a forensic pathologist. Dr. Heidingsfelder testified that he assisted in the autopsy of the victim. Prior to performing the examination, he was informed that she was found on the floor of a Huck's Convenience Store bathroom in Mt. Vernon on June 13, 2011, slumped over in a seated position. After reviewing the clinical history, lab report, and performing both an external and internal autopsy, he concluded that the cause of death was a pulmonary edema and congestion due to heroin toxicity.

¶ 5 Dr. George Behonick, a forensic toxicologist, testified that he tested a specimen from the victim and found it positive for morphine derived from heroin, as well as other controlled substances. Joel Gray, a forensic scientist for the Illinois State Police crime lab, testified that a small piece of a plastic bag recovered from the crime scene tested positive for heroin.

¶ 6 Jeff Bullard, a detective captain for the Mt. Vernon Police Department, testified that the police department received a call from the local Huck's manager because she believed there was a person in the store's women's restroom that had been in the facility for a long period of time and was not answering the door. The store was requesting

assistance in getting the door open and checking on the person. Uniformed officers responded to the scene and breached the door, where they found a deceased woman on the floor. After she was found, Bullard was contacted by his sergeant to report to the scene. He arrived at Huck's at approximately 6:45 p.m. He entered the women's bathroom and observed a Caucasian female sitting with her legs crossed with her upper torso falling forward. There were hypodermic syringes near her right hand, a plastic cap lying upside down with clear liquid in it, and her purse lying next to her. He interviewed the Huck's employees and watched the store's surveillance footage as part of his investigation. The surveillance footage showed the woman arriving at the store and then sometime later two males arriving. One of the employees identified one of the males as Josh Ellis and told the officers that the two men drove off in a black Ford Mustang. Officers interviewed relatives of Ellis, who informed them that he had been with the victim and the defendant. Officers located the black Mustang outside the residence of Holly Stewart. During the search of her residence, officers found Ellis hiding. The defendant was inside the Mustang parked outside of the residence and agreed to go to the police station for questioning. Stewart's residence was searched, but officers did not find any illicit substances. The defendant's black Mustang was also searched. In it officers found plastic bottles containing different prescription pills.

¶ 7 Holly Stewart testified that on the weekend on June 10, she went to Chicago with the defendant, the victim, and Ellis for a weekend of sightseeing and to purchase heroin. She was aware that the victim had a fairly severe drug problem. Upon arriving in Chicago, the defendant made a phone call. She assumed the purpose of the call was to

purchase heroin because she knew the victim wanted the drugs. After making the call, the defendant dropped her, Ellis, and the victim at a bus station and left for approximately 30 minutes. After he returned, they went to a hotel and the defendant had "foils." The four of them stayed in the room and consumed Xanax and alcohol. The defendant and the victim were also snorting white powder. She assumed it was heroin because that was the victim's drug of choice. The victim also took long trips to the bathroom in the room.

¶ 8 When the group eventually returned to Mt. Vernon on either Sunday night or Monday morning, Stewart went to bed in the living room of her residence. She woke up Monday evening and saw Ellis and the defendant pacing in her house. The defendant told her that the victim "stole his shit." She figured he was referring to the heroin. The victim had previously told her that "she liked to run off and do the stuff behind [the defendant's] back because he didn't like her doing a bunch of it." She told officers in her interview that the victim liked going to Chicago because she could purchase heroin there and during this particular trip, the victim and the defendant wanted to purchase enough to take back to Mt. Vernon.

¶ 9 Joshua Ellis testified that on the weekend of June 10, he travelled to Chicago with Stewart, the victim, and the defendant so they could go sightseeing. At some point on the drive up, they stopped the car under an overpass because of inclement weather. During the stop, the defendant made a phone call where he told the person on the other end of the line that the group was going to be arriving late to the city because of the storm. When they first arrived in Chicago, the defendant dropped the three of them off at a train station. The defendant was gone for 30 to 45 minutes. The four of them then went to a

hotel room. In the room he observed aluminum foil packets of heroin lying on the table. He was aware that the victim, his cousin, was addicted to drugs and used heroin that weekend. He thought that when she would go to the bathroom for long periods of time she was shooting up heroin out of sight because the defendant did not like her to shoot it up. She also snorted heroin, as that was how the defendant preferred they ingest it. He observed the defendant also ingesting heroin that weekend. At some point, he also observed a little Ziploc bag that contained a powder.

¶ 10 After returning from Chicago, he slept all day Monday instead of reporting to work. That afternoon, he was awakened by the defendant who told him that the victim was gone. The two wanted cigarettes, so they started walking to the BP Amoco and the defendant told him that the victim "took [his] shit." On their way to get cigarettes, they spotted the defendant's car at the Huck's across the street. It was still running. They went to the Huck's and began beating on the door of the women's restroom. It was locked and there was no response, so they went to the counter and asked an employee to open the door. The employee said they would have to call the police in order to open the door. Because there was nothing more they could do, the two men left.

¶ 11 The defendant called one witness, Dr. John Bederka, an expert in pharmacology and toxicology, for his opinion on the toxicology report of the victim and whether there were lethal levels of other drugs in her system. He testified that there were other drugs in her system that may have increased the heroin's toxic effects and there was no way of knowing whether the lethal dose of heroin in her system was injected a few minutes or a few hours prior to her death.

¶ 12 After the close of the evidence, counsel presented closing arguments. The State argued that the victim died of a heroin overdose and that the heroin that killed her was "delivered to her from the defendant ***." The State further argued that the defendant and the victim brought heroin back from Chicago to Mt. Vernon and that the defendant admitted he had used heroin with the victim in Mt. Vernon on the Monday morning after returning from Chicago. In reference to how the heroin came to be in her possession, the State argued:

> "Now, I suspect that you may be tried to give this [*sic*], well, she's connected somehow. I think that was mentioned in the opening, [the victim's] connected. There's no evidence brought up at trial that she's connected. The only connection she has to heroin is to the defendant. That's her connection. She relies on him to use his car. It's his city. It's where his mom lives. She's from here. It's his connections in Chicago. It's him all the way. That's where—that's her connection to heroin."

At no point during the above quoted statements did defense counsel object.

¶ 13 After closing arguments, the trial court instructed the jury. Included in the jury instructions was Illinois pattern instruction 7.28, which reads as follows:

> "To sustain the charge of drug induced homicide, the State must prove the following propositions:
>
> *First Proposition*: That the defendant knowingly delivered to another a substance containing heroin, a controlled substance; and
>
> *Second Proposition*: That any person injected any amount of that controlled substance; and
>
> *Third Proposition*: That [the victim] died as a result of that injection.
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." (Emphases in original.) Illinois Pattern Jury Instructions, Criminal, No. 7.28 (3d ed. 1992).

¶ 14 On March 1, 2012, the jury returned a verdict of guilty on the count of drug-induced homicide and judgment was entered on the verdict. On April 20, 2012, the trial court held a sentencing hearing. One witness in aggravation was called; the State then argued the relevant factors in aggravation, and defense counsel argued the relevant factors in mitigation. The defendant offered a statement of allocution. The court then took a recess to consider an appropriate sentence. Upon retaking the bench, the court stated that it had considered the evidence adduced at trial, the presentence investigation report, the financial impact of incarceration, the evidence offered by the State in aggravation, the arguments of counsel, and the statement by the defendant. It found the following factors in aggravation: the defendant's history of prior delinquency or criminal activity, and the necessity of the sentence to deter others from committing the same crime. In mitigation, the court found that the defendant did not contemplate that his criminal conduct would cause or threaten serious harm to another. As for the factors argued by defense counsel that the defendant's conduct was the result of circumstances unlikely to recur, and that the character and attitude of the defendant indicated he was unlikely to commit another crime, the court stated as follows:

> "This is where you are very frustrating to me, Mr. Burton.
>
> I have seen you in court on a number of occasions, sat through trial with you. You have a very pleasant demeanor. You are an intelligent man. You know where you're—we are the same age and I just—I marvel at the fact that you have ended up where you're at. Really. Someone who is obviously intelligent as you are and I—and apparently a very pleasant person. I—that's what I see.
>
> Your actions speak of a different Aaron Burton, the one that I don't see and one that I don't know. What I—what I can say is that the life you've led, the world you've lived in, the path that you've taken, life is held very cheap.
>
> ***

> You have children but you owe a tremendous amount of back child support. There's been nothing that's going to keep you from having a job over the years. I don't know why you weren't gainfully employed. I'm inclined to believe [defense counsel] when he makes the argument. It's—all of your troubles are—or the bulk of them are because of the use of drugs. But I'm not going to blame drugs or alcohol because you're the one that ingests them."

The court then sentenced the defendant to 17 years' imprisonment, to be served at 75%, and followed by 3 years of mandatory supervised release. On January 5, 2016, the defendant filed a timely notice of appeal.

¶ 15 II. ANALYSIS

¶ 16 On appeal, the defendant makes three contentions. First, the defendant argues that the State did not prove beyond a reasonable doubt that he delivered the fatal dose of heroin to the victim. Second, he contends that he was denied effective assistance of counsel where counsel made three errors of omission. Third, he asserts that the trial court improperly considered his unemployment as a factor in aggravation.

¶ 17 A. Beyond a Reasonable Doubt

¶ 18 If the State fails to prove a defendant guilty beyond a reasonable doubt, the conviction must be overturned. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). On review, a jury's finding of fact will not be disturbed if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A reviewing court will not reweigh the evidence or make any credibility determinations regarding witnesses. *People v. Thomas*, 178 Ill. 2d 215, 232 (1997).

¶ 19 Here, the defendant argues that the State failed to prove beyond a reasonable doubt that he delivered the fatal dose of heroin to the victim. We disagree. He purchased the heroin in Chicago intending to supply her and knowing she was addicted to drugs. According to the State's witnesses, she did not participate in the purchase of the heroin. She stayed behind while the defendant left to purchase heroin. Upon his return, he supplied her with drugs throughout the weekend in Chicago. Additionally, according to the defendant, he continued to supply her with drugs in Mt. Vernon the morning they returned from Chicago. The jury could infer that continued use and supply of heroin to the victim included the lethal dose. The fact that the jury did not give credence to hearsay testimony that she stole the drugs does not require reversal. A rational trier of fact could find that the defendant delivered drugs to the victim all weekend in Chicago and continued to do so upon their return to Mt. Vernon, thereby delivering the lethal dose.

¶ 20 B. Ineffective Assistance of Counsel

¶ 21 The defendant next argues that he was denied effective assistance of counsel where trial counsel made three errors of omission. First, the defendant argues that counsel failed to provide effective assistance by not making the argument presented in the first part of his brief in that the defendant never delivered the lethal dose of heroin to the victim, but rather that she stole it; second, by failing to tender a jury instruction on the definition of "delivery"; and third, by failing to object to statements made by the State in closing argument that the defendant was the victim's connection to heroin.

¶ 22 Our review of ineffective assistance of counsel claims is guided by the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To succeed on a claim of ineffective assistance of counsel under the *Strickland* standard, one must show both that (1) counsel's representation fell below an objective standard of reasonableness (deficient performance prong) and (2) a reasonable probability exists that, but for the error, the result would have been different (prejudice prong). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). A defendant must satisfy both prongs of the *Strickland* test to succeed on a claim of ineffective assistance of counsel. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Thus, the defendant's failure to establish either deficient performance or prejudice will be fatal to the claim. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000).

¶ 23 To establish deficiency under the first prong of the *Strickland* test, "defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy." *People v. Evans*, 186 Ill. 2d 83, 93 (1999). The reviewing court must 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). An evaluation of counsel's conduct cannot extend into matters involving the exercise of judgment, trial tactics, or strategy. *People v. Penrod*, 316 Ill. App. 3d 713, 722 (2000). "Reviewing courts should hesitate to second-guess counsel's strategic decisions, even where those decisions seem questionable." *Manning*, 241 Ill. 2d at 335.

¶ 24 Here, the defendant identifies three errors made by counsel. First, he argues that counsel's performance was deficient where he did not argue that the State failed to prove

there was a delivery. Defense counsel presented a theory of the case that the drugs procured in Chicago were not the drugs that caused the victim to overdose as all of the drugs purchased in Chicago were consumed in Chicago. In closing, he argued that during the two hours that the defendant was gone in the defendant's car, she bought more heroin herself from her own supplier in Mt. Vernon. The defendant's argument that this made counsel ineffective fails as the presented theory of the case by defense counsel is clearly trial strategy. The fact that the strategy was ultimately unsuccessful does not render counsel's performance deficient.

¶ 25 Next, the defendant argues that counsel was deficient for failing to proffer a jury instruction on the definition of delivery, as it was an essential element of the charge that the State was required to prove beyond a reasonable doubt. Even assuming that counsel's failure to proffer the jury instruction was unreasonable, the defendant was not prejudiced by this error. To establish prejudice, the defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Richardson*, 189 Ill. 2d at 411.

¶ 26 Here, the jury received an instruction that in order "[t]o sustain the charge of drug induced homicide, the State must prove the following propositions: *First Proposition*: That the defendant knowingly delivered to another a substance containing heroin, a controlled substance ***." (Emphasis in original.)

¶ 27 The defense's theory of the case was that the heroin purchased in Chicago was not the same heroin that caused the victim to overdose. The defense argued that she bought her own heroin and caused her own overdose. The definition of delivery would not have

affected how the jury considered the defense's proposed theory of the case. Therefore, the defendant was not prejudiced.

¶ 28 Lastly, the defendant argues that his counsel's performance was deficient where he failed to object to statements made by the State in closing argument that the defendant was the victim's connection to heroin. We again find that counsel's failure to object did not rise to ineffective assistance of counsel as defined in *Strickland*. First, it is apparent from the record that counsel's performance at trial was driven by his theory of the case and how he strategized in arguing and presenting that theory to the jury. Defense counsel did object to other statements made by the State during closing argument, though he did not object during the section of the argument quoted *supra*. Counsel's failure to object to statements by the State that the defendant was the victim's connection to heroin does not fall below an objective standard of reasonableness.

¶ 29 C. Unemployment as a Factor in Aggravation

¶ 30 The third and final issue raised by the defendant on appeal is that the trial court improperly considered his unemployment as a factor in aggravation. Because he failed to preserve this claim of error in his amended motion for new trial, it is considered forfeited unless we deem it to be plain error. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 11.

¶ 31 The plain error doctrine allows a reviewing court to consider an unpreserved sentencing error when a clear or obvious error occurred and the evidence at the sentencing hearing was closely balanced or that error was so egregious as to deny a defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Under

either prong of the plain-error analysis, the burden of persuasion remains with defendant. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 32 It is well settled that a trial court is given broad discretion in fashioning a sentence. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). When a sentence falls within the statutory sentencing range for an offense, it may not be disturbed absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it. *People v. Abrams*, 2015 IL App (1st) 133746, ¶ 32. The trial court is given such deference because it is in a better position to consider, among other things, defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Id*. A proper sentence balances the seriousness of the offense with the objective of restoring a defendant's rehabilitative potential. Ill. Const. 1970, art. I, § 11.

¶ 33 The Unified Code of Corrections permits the trial court to consider certain statutory factors in aggravation and mitigation when imposing a sentence of imprisonment. 730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2012). In fashioning the appropriate sentence, the court must carefully consider all of the factors in aggravation and mitigation, which include defendant's age, demeanor, habits, credibility, criminal history, social environment, and education as well as the nature and circumstances of the crime and of defendant's conduct in the commission of the crime. *People v. Calhoun*, 404 Ill. App. 3d 362, 385 (2010). A court has wide latitude in sentencing a defendant, as long as it neither ignores relevant mitigating factors nor considers improper factors in

aggravation. *People v. Flores*, 404 Ill. App. 3d 155, 157 (2010). When reviewing a trial court's sentencing decision, the reviewing court should not focus on a few words or statements of the trial court. *People v. Ward*, 113 Ill. 2d 516, 526 (1986). Instead, the determination of whether the sentence was improper must be made by considering the record as a whole. *Id.* at 526-27. The decision of whether the trial court relied on an improper factor in imposing a sentence ultimately presents a question of law to be reviewed *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 34 It is clear from the trial court's statements, and from the record as a whole, that the court was not considering the defendant's unemployment as a single factor in aggravation. Instead, the court was explaining to the defendant as to why he considered agreeing with defense counsel's argument in mitigation that the defendant's troubled history was due to his drug use and that if he received treatment for his addiction he would be unlikely to reoffend. Therefore, we find that the trial court did not rely on an improper factor in sentencing the defendant and affirm the sentence.

¶ 35 III. CONCLUSION

¶ 36 For the foregoing reasons, we hereby affirm the defendant's conviction and sentence for drug-induced homicide.

¶ 37 Affirmed.