

No. 1-13-0687

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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. 09 CR 22235
)	
DESEAN LEWIS,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's claim of ineffective assistance of counsel must fail when he cannot establish that the outcome of his trial would have been different absent counsel's alleged errors.

¶ 2 Following a jury trial, defendant Desean Lewis was convicted of first degree murder and armed robbery. He was sentenced to a total of 55 years in prison for the murder conviction and to a consecutive term of 6 years for the armed robbery. On appeal, defendant contends that he was

denied the effective assistance of trial counsel because counsel failed to object to certain arguments made by the State and to a witness's testimony. We affirm.

¶ 3 Defendant's arrest and prosecution arose out of the shooting death of the victim, Marvin Poole, on August 11, 2009. The matter proceeded to a jury trial.

¶ 4 During opening statements, the State argued that defendant shot the victim over \$10. The State then "suggest[ed]" that the only reason that defendant's actions were not "more lethal" was due to the fact that defendant had a "crummy" gun that "basically broke apart." The State also argued that defendant did not try to hide his identity because he "wanted the people out there to know what he was about." In other words, "if you were disrespectful to him or stole something from him" there would be consequences. The State further argued that people "out there" knew defendant, but that the jury would not hear from everyone because "there's a lot of people who don't like coming into courtrooms and indentifying people who shoot other people." The defense, on the other hand, argued that the only evidence the State had was the testimony of eyewitnesses who "did not come forward voluntarily."

¶ 5 Shundwall Russell, the victim's best friend, admitted that he had previously not come to court with regard to this case because he was afraid and would be receiving relocation expenses from the State. He was present at a party when defendant and the victim argued over a \$10 bet arising out of a dice game. Defendant told the victim that if the victim did not give defendant the money, defendant would take it. When defendant attempted to "snatch" the money from the victim, the victim grabbed defendant by the shirt, shook him, and then released him. Defendant responded by taking off his shirt and "getting loud like he wanted to fight." A man then came up and tapped defendant on the back. Defendant reached back and when he pulled his hand back he

was holding a gun. Defendant then said "you ain't tough now," and demanded the "mother fu*** money." Although the victim denied owing defendant any money, he gave defendant \$10.

Defendant then took all of the victim's money. At that point, defendant said he might as well go ahead and "knock" the victim off. Russell understood that to mean that defendant was going to kill the victim. The victim asked whether defendant was "serious" as "all this" was over \$10.

Russell then heard two shots and ran away. He later observed the victim in the street with two bullet holes in the chest. Russell called paramedics and followed the victim to the hospital.

¶ 6 A few days later, Russell went to a police station and viewed a photographic array. He did not pick anyone out because "the mug shot was kind of fuzzy, because it was an old mug shot." He told officers that he would be better able to identify the shooter in person in part because the man had a "funny haircut, like a Mohawk with designs on it." He subsequently identified defendant in a line up. During cross-examination, Russell acknowledged that his statement to the police did not indicate that the shooter had a "funny haircut."

¶ 7 James Coaks, who knew defendant from the neighborhood and had a prior felony conviction for possession of a controlled substance, testified consistently with Russell that defendant removed his shirt in order to fight and that the man standing next to defendant gave him something. Once defendant had a gun, the victim told defendant to take all the money. However, the victim was shot. Although defendant tried to shoot a second time, the gun did not "go off" and defendant ran away. Two days later, Coaks spoke to officers at his house and identified defendant in a photographic array. During cross-examination, Coaks testified that he drank two beers at the party.

¶ 8 Joseph Hammond, another party guest, acknowledged that he had previously been convicted of, *inter alia*, drugs and weapons offenses. He lived across the street from defendant's father and had known defendant for many years. Hammond testified that he heard "maybe two" gunshots and observed defendant run past with a gun. Four days later, he went to a police station and identified defendant, from a photographic array, as the shooter. During cross-examination, Hammond admitted that he had consumed two or maybe three beers the night of the shooting.

¶ 9 Codefendant Sherard Nance testified that he had been indicted, along with defendant, on the charge of first degree murder; however, he asserted he was framed. He did not remember being at a party where someone was shot or making a statement to the police indicating that defendant shot the victim. Although codefendant acknowledged that he entered a plea of guilty to the charge of conspiracy to commit first degree murder and was sentenced to 12 years in prison, he did not recall identifying defendant, during his plea hearing, as the person who shot the victim.

¶ 10 Prior to closing arguments, the trial court explained to the jury that "just like the opening statements, what the lawyers say during argument is not evidence and should not be considered *** evidence." The State then argued that defendant shot the victim over a "preconceived notion of disrespect." The defense argued, *inter alia*, that the State's witnesses were not credible, as no one was present at the scene when the police arrived or came forward to speak to the police. In rebuttal the State argued that defendant committed a crime about four blocks away from his home, and that he had "no fear" that anyone would identify him because "he had the gun." The State then questioned whether "people are in a big rush to come into these courtrooms, an open proceeding and point out people who they've watched gun down [a person] in cold blood over a

ten dollars [*sic*] debt he thinks is owed?" Rather, the State contended that "[w]hen you fire a weapon at a barbeque people run, they take off and they don't wait in line in Englewood, sad to say, to testify against someone they just observed murder someone who's from Englewood who just displayed his capacity to kill people." The State finally argued that although there might have been "other people out there who saw what happened," the jury had to confine its deliberations to what it heard at trial.

¶ 11 The jury convicted defendant of armed robbery and first degree murder. The jury also found that defendant personally discharged a firearm that proximately caused death to another person. Defendant was subsequently sentenced to 30 years in prison for the murder with an additional 25 years because a firearm was used in the commission of the offense. He was also sentenced to a consecutive 6-year prison term for armed robbery.

¶ 12 On appeal, defendant contends that he was denied the effective assistance of trial counsel by counsel's failure to object to certain argument by the State and to a witness's testimony. Specifically, defendant contends that counsel failed to object when the State argued, during its opening statement and closing argument, that other individuals could have identified defendant as the shooter but were too afraid to come to court and when the State suggested during opening statements that defendant would have shot more people but for the malfunction of his gun. Defendant also argues that counsel should have objected when Russell testified that he was shown an old mug shot of defendant, as this implied that defendant had previously been arrested.

¶ 13 To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, a reasonable probability exists that the result of the proceeding would have been

different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). If the defendant fails to establish either prong, his ineffective assistance claim must fail. *Strickland*, 466 U.S. at 687. "If it is easier, a court may proceed directly to the second prong of *Strickland* and dismiss an ineffective assistance claim on the ground that it lacks sufficient prejudice, without first determining whether counsel's performance was deficient." *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 70. To establish prejudice, the defendant must show a reasonable probability that, absent counsel's alleged error, the trial's outcome would have been different. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). "A reasonable probability of a different result is not merely a possibility of a different result." *Evans*, 209 Ill. 2d at 220.

¶ 14 Initially, we note that the complained-of errors, counsel's failure to object during opening statement, a witness's testimony and closing argument, can relate to trial strategy and generally may not form the basis of a claim of ineffective assistance of counsel. See *People v. Perry*, 224 Ill. 2d 312, 344 (2007) (the decision whether to object is a strategic one); *People v. Graham*, 206 Ill. 2d 465, 478-79 (2003) (failing to object can be a matter of trial strategy and does not necessarily establish deficient performance). However, in the instant case, the State went too far in its opening and closing, and defense counsel should have objected. Defense counsel also was deficient in not moving to strike the witness' reference to a mug shot.

¶ 15 We agree with defendant that counsel's performance was deficient; however, we find that defendant cannot establish the prejudice prong of the *Strickland* test. To satisfy the prejudice prong, defendant must show that there is a reasonable probability that, but for counsel's complained-of errors, the result of the proceeding would have been different. See *Strickland*, 466

U.S. at 694. In the case at bar, defendant cannot make that showing because he cannot show how he was prejudiced by counsel's failure to object to the State's arguments and Russell's testimony.

¶ 16 Here, defendant cannot show prejudice when the State established, through the testimony of Russell and Coaks, that defendant shot the victim after an argument. In addition to the testimony of two eyewitnesses, the State also presented the testimony of Hammond who heard gunshots and observed defendant run past holding a gun. Although defendant attacks the credibility of Hammond and Coaks based upon their prior felony convictions and consumption of beer at the party, both men admitted to their criminal records and acknowledged that they drank at the party. Hammond also testified that he lived across the street from defendant's father and had known defendant for many years, and Coaks testified that he knew defendant from the neighborhood. Although the credibility of the State's witnesses was certainly affected by their prior involvement in criminal activity and use of alcohol, the record also reveals that the State's witnesses had ample opportunity to observe defendant during and immediately following the argument between defendant and the victim. In other words, although some of the State's witnesses were convicted felons who had been drinking, their testimony was not "so wholly incredible or so thoroughly impeached" that it was incapable of being used as evidence against defendant. *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 15; see also *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60 (in weighing the evidence, the fact finder need not disregard inferences that flow normally from the evidence or seek all possible explanations consistent with a defendant's innocence and elevate them to a reasonable doubt).

¶ 17 Ultimately, the State established, through the testimony of Russell, Coaks, and Hammond, that defendant shot the victim. See *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23

(a single eyewitness's identification can sustain a conviction). Although defendant contends on appeal that the State's argument regarding other potential witnesses and his broken gun, combined with Russell's testimony that he observed defendant's old mug shot, prejudiced the jury against him, he ignores the clear testimony of two eyewitnesses who identified him as the shooter. Accordingly, we reject defendant's speculative assertion that the outcome of the trial would have been different had counsel objected to the State's argument or Russell's testimony. See *People v. Bew*, 228 Ill. 2d 122, 135 (2008) ("*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice").

¶ 18 Therefore, because defendant has failed to show a reasonable probability that, absent counsel's alleged errors, the outcome of his trial would have been different (*Evans*, 209 Ill. 2d at 220), his claim of ineffective assistance of counsel must fail (see *Strickland*, 466 U.S. at 687).

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.