SECOND DIVISION
June 30, 2011

No. 1-08-1871

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. 02 CR 1526202
	)	
ALEXANDER VALENCIA,	)	Honorable
	)	Marcus R. Salone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.

Justices Connors and Harris concurred in the judgment.

HELD: Defendant's conviction for felony murder predicated on attempt aggravated kidnaping, attempt residential burglary and attempt aggravated unlawful restraint is affirmed. The evidence established beyond a reasonable doubt that defendant took substantial steps toward committing each of the predicate felonies and did not make an overt withdrawal from the conflict prior thereto. Defendant's counsel was not ineffective for failing to request a jury instruction on self defense.

ORDER

Following a jury trial, defendant Alexander Valencia was convicted of felony murder (720 ILCS 5/9-1(a)(3) (West 2002)). Defendant was also found to have been armed with a firearm during the commission of the offense. Defendant was sentenced to 45 years' imprisonment. On appeal, defendant argues: (1) the State failed to prove him guilty beyond a reasonable doubt; and (2) counsel was ineffective for failing to request a jury instruction on self-defense. For the following reasons, we affirm defendant's conviction.

BACKGROUND

Defendant and co-defendant Carlos Santos were tried simultaneously before separate juries. On May 3, 2002, defendant and co-defendants Carlos Santos, John Lavelle and Estaban Perkins[1] went to the home of James Smith armed with handguns. A shootout occurred. Two days later James Smith's son, Jeffrey, died from the gunshot wounds he received on May 3rd. Defendant and his co-defendants were subsequently charged in a 39 count indictment. The State chose to proceed to trial on three counts of felony murder predicated on attempt aggravated kidnaping, attempt residential burglary and attempt aggravated unlawful restraint.

Ortancia Smith testified that on May 3, 2002, at approximately 9:30 she heard someone pounding on the living room window. She heard her brother Jeffrey say,

[1]Co-defendants Santos, Lavelle and Perkins are not parties to this appeal. We affirmed Santos' and Lavelle's convictions on appeal. See *People v. Santos*, No. 1-07-2007 (2009) (unpublished order pursuant to Supreme Court Rule 23); *People v. Lavelle*, 396 Ill. App. 3d 372 (2009).

"James [sic] not here." She looked out the window and saw a grey Jeep Cherokee with its headlights on, parked outside. She heard more pounding on the window and went upstairs to her bedroom to look out the window. She met Jeffrey at the top of the stairs and followed him down. Ortancia opened the blinds and looked out the living room window. She saw two men standing in front of the bushes holding guns and she yelled at Jeffrey not to open the door. Before she could get to him, Jeffrey opened the door.

Ortancia heard approximately 8 gunshots. After the shooting started, she looked out the window and saw Santos holding a gun outside her front door. Santos ran and Ortancia saw Jeffrey fall backwards. His eyes were open but blood was coming from the side of his neck. She put pressure on his wound and called an ambulance.

On cross-examination, Ortancia testified that Jeffrey had gotten a gun from a closet upstairs. She also testified that she did not know what kind of gun it was and did not know if Jeffrey fired any shots.

The day after the shooting Ortancia viewed a photo line-up at the police station and positively identified Santos as the person she saw outside of her home. Ortancia also stated that Santos had come to the house at least twice looking for James. On May 9, 2002, she also viewed a photo of defendant and stated that prior to the shooting, she saw defendant in front of her house on at least 5 occasions.

Tanya Jeffries testified that she and Jeffrey Smith had a son together and that she was at Jeffrey's house on May 3, 2002. At about 9:30 p.m. she heard a knock on the living room window. She peeked through the blinds and saw three or four men

wearing all black standing on the porch. Tanya told Jeffrey what she saw, and Jeffrey went upstairs.

When Jeffrey came back downstairs he asked the men through the window what they wanted. They stated that they wanted to know if James was home. Jeffrey told them that James wasn't there. Ortancia told Jeffrey that the men had guns. Jeffrey told Tanya to call the police so Tanya called 911. She then heard gunshots. When she walked to the door she saw Jeffrey lying on the ground bleeding.

Tanya testified that she saw Santos in front of Jeffrey's house once prior to May 3, 2002. The day after the shooting she went to the police station and viewed a photo lineup. She positively identified Santos. On cross-examination, Tanya testified that she did not tell the police that Jeffrey walked to the door with a gun.

The parties stipulated that, if called to testify, Deputy Cook County Medical Examiner Dr. Kendall Crowns would testify that the cause of Jeffrey Smith's death was a gunshot wound to the chest and the manner of death was homicide.

Sergeant Anthony Wojcik of the Chicago police department was present at the scene of the crime. The following day, Sergeant Wojcik spoke with Ortancia and Tanya separately. Both girls stated that Jeffrey had opened the door with a gun in his hand. In addition, both girls identified Santos from a photo array.

Based on these interviews, the police began looking for Santos and "Alex" who was an associate of Santos. Further investigation revealed that "Alex" was defendant. Santos was arrested on May 14, 2002, and had a duffel bag in his possession and

indicated to police that he was on his way to Miami to visit family. Defendant was arrested on May 15, 2002, and taken to Area 5, where he agreed to speak with Detectives Barz and Trahanas after being advised of his *Miranda* rights.

Defendant stated that he and Santos agreed to sell James Smith a kilo of heroin on consignment. One kilo was worth $70,000. Smith never paid for the kilo. Defendant tried to collect the money from Smith several times by going to his house and even talking to his wife. Defendant finally located Smith and Smith told defendant that he did not have the money, and he would kill defendant if he came around again.

Defendant stated that he sought the help of Morris Richardson from the Cook County Sheriff's Office to collect the money from Smith. Defendant was going to pay Richardson $5,000 to collect the debt. Defendant and Richardson drove to Smith's house. Richardson talked to Smith and arranged for Smith to pay the following Monday. Smith never made the payment.

Defendant decided to return to Smith's house but Richardson wasn't available because he had to work. Richardson told them to meet with his friend John Lavelle, who was also a Cook County Sheriff. After meeting with John Lavelle, they decided to recruit the help of another Cook County Sheriff, Esteban Perkins, whom Lavelle knew. Lavelle agreed to help for $5,000.

On May 3, 2002, defendant, Santos, Lavelle and Perkins drove in two cars to Smith's house. Defendant stated that when they arrived at Smith's house, he remained in the car while Santos, Lavelle and Perkins went to the door. Defendant stated that he

stayed in the car because he did not want to have any problems with Smith. Lavelle carried two guns and Perkins had one gun, and Santos had one gun. Santos knocked and a black male answered the door holding a big gun in his hand. Perkins turned and ran and got into defendant's car and said "he's got a gun." Santos and Lavelle backed off the porch. Defendant saw the machine gun and drove away. As he drove away, he heard gunshots and called 911. The four men reunited at a restaurant where Lavelle demanded $5,000 each for himself and Perkins. Defendant's mother-in-law brought $2,000 to the restaurant, which defendant gave to Lavelle.

Detective Barz spoke with defendant again later. During that interview, defendant admitted that he went to Smith's home with Santos, Lavelle and Perkins to collect a drug debt. Defendant stated that the plan was to kidnap Smith until somebody paid the debt and if Smith was not home, they were going to forcibly enter the home to search for money and drugs. Defendant stated that he sold his BMW about a week after the shooting to friends in Florida and that his wife threw Santos' gun into Lake Michigan on May 4th, because Lavelle called and said to get rid of the gun.

Later, after again being *Mirandized*, defendant spoke with Assistant State's Attorney Arunas Buntinas and Detective Barz. Defendant gave a 45-minute oral statement and then agreed to give a videotaped statement. The videotaped statement was generally consistent with his prior statements to police. In the videotaped statement defendant spoke of his drug deal with Smith, the plan to collect the debt and the events of the shooting. Defendant stated that he, Santos, Lavelle and Perkins went

to Smith's house on May 3, 2002, they intended to collect a drug debt. If Smith did not have the money, they were going to take the drugs or were going to kidnap Smith until Smith paid the money. Also, defendant stated, if there were people inside Smith's house with guns, they were going to shoot them to defend themselves. The videotaped statement was played for the jury at trial.

The parties stipulated that Illinois State Police forensic scientist Kurt Murray, an expert in the field of firearm and tool mark examination, would testify with a reasonable degree of scientific certainty, that the .45 auto discharged cartridge case recovered from the crime scene was fired from the firearm components recovered from Lavelle's house following his arrest.

Tremayne Davis was called to testify for defendant. Davis testified that he was at his grandmother's house on May 3, 2002, which is located across the street from the Smith house. Davis, who was 15 years old, was on the porch of his grandmother's house and saw three men near the front of Smith's house. One man rang the doorbell and then it was a "shootout." Davis saw Jeffrey with a gun but did not know who shot first. Davis testified that he did not remember telling defense counsel and an assistant state's attorney that the person who opened the door at the Smith house started shooting first.

Defendant's testimony was generally consistent with his statements. However, defendant testified that he did not see Santos, Perkins or Lavelle with guns in their hands as they walked onto Smith's porch, although each man was armed. Defendant

testified that they were there just to collect the debt and denied that they planned to kidnap or restrain James Smith or to take anything from the Smith house. Defendant stated that neither Santos, Lavelle nor Perkins had guns in their hands as they backed off Smith's porch. Defendant stated that he saw Jeffrey standing in the doorway holding a machine gun with a flashlight on it and that Jeffrey was the only one he saw fire a shot. Defendant further testified that later, Lavelle said that he shot Jeffrey in self-defense. Defendant stated that he never agreed to give a videotaped statement to police. Defendant testified that detectives tricked him into giving the videotaped statement telling him that if he helped to get Lavelle and Perkins off the street, that they would let him go home.

On cross-examination, defendant testified that Perkins wore his officer belt with a gun on the date of the incident. Defendant also admitted that Santos removed defendant's wife's gun from the glove box of the BMW before Santos walked up to Smith's house.

The State called Detective Barz in rebuttal. Detective Barz testified that no one ever told defendant that he would be let go if he helped the police. Assistant State's Attorney Buntinas also testified in rebuttal that he did not tell defendant that he was defendant's lawyer, did not train defendant on what to say during his videotaped statement or promise that defendant could go home if he helped the police.

After hearing all of the evidence, the jury found defendant guilty of felony murder, in addition to finding that the defendant was armed with a firearm during the

commission of the first degree murder. Defendant was sentenced to a total of 45 years' imprisonment. It is from this judgment that defendant now appeals.

ANALYSIS

Defendant first claims that the state failed to prove him guilty of felony murder predicated on attempt aggravated kidnaping, attempt residential burglary and attempt aggravated unlawful restraint beyond a reasonable doubt. Defendant contends that the evidence established that he did not take a substantial step toward committing attempt aggravated kidnaping, attempt aggravated unlawful restraint or attempt residential burglary. Furthermore, defendant maintains that he made an overt withdrawal prior to taking a substantial step toward the commission of any of the predicate felonies.

When a defendant is challenging the sufficiency of the evidence, the relevant inquiry is whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). The trier of fact is in the best position to determine the credibility of the witnesses, to resolve any inconsistencies or conflicts in their testimony, to assess the proper weight to be given to their testimony and to draw reasonable inferences from all of the evidence. *People v. Cochran,* 323 Ill. App. 3d 669, 679 (2001). A guilty verdict should be given deference and "shall not be disregarded on review unless it is inconclusive, improbable, unconvincing or contrary to human experience." *People v. Schorle*, 206 Ill. App. 3d 748, 758 (1990).

A person commits the offense of felony murder when he commits first degree murder while attempting or committing a forcible felony other than second degree murder. 720 ILCS 5/9-1(a)(3) (2002). The felony murder in the instant case was predicated on the offenses of attempt aggravated kidnaping, attempt residential burglary and attempt aggravated unlawful restraint. "A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (2002). A person commits the offense of aggravated kidnaping when he, while armed with a dangerous weapon, knowingly and secretly confines another person against his will by force or threat of force or carries another person from one place to another with intent to secretly confine him against his will. 720 ILCS 5/10-2(a)(6) (West 2002). A person commits residential burglary when he knowingly and without authority enters the dwelling place of another with the intent to commit the offense of aggravated kidnaping. 720 ILCS 5/19-3 (West 2002). Finally, a person commit the offense of aggravated unlawful restraint when he knowingly and without legal authority detains another person while using a deadly weapon. 720 ILCS 5/10-3.1 (West 2002).

Thus, in this case, the state had the burden of proving that defendant committed first degree murder while attempting to burglarize, kidnap and unlawfully restrain James Smith and took substantial steps toward that end. Although "mere preparation" does not qualify as a substantial step, the State need not prove that "defendant complete[d] the last proximate act in order to be convicted of attempt." *People v. Smith*, 148 Ill. 2d

454, 459 (1992). To determine what is a substantial step, a fact-specific analysis is required; the facts can be placed on a "continuum between preparation and perpetration." *People v. Terrell*, 99 Ill. 2d 427, 434 (1984).

The evidence in this case showed that the intended victim James Smith owed defendant and codefendant Santos a substantial sum of money for drugs and that defendant and Santos had been unsuccessful in collecting it. Defendant, along with Santos, enlisted the assistance Cook County sheriffs officers to help them collect the debt. According to defendant's confession, the plan was for the four men to go to Smith's house and collect the money. If Smith did not have the money or the drugs, they were going to kidnap Smith and hold him until someone paid the debt. After hatching this plan, the four men drove to Smith's home. While defendant remained in the car, Santos, Lavelle and Perkins, each armed with at least one handgun, approached Smith's house. Jeffrey answered the door with a machine gun.

Defendant claims that because his co-defendants just knocked on the door without their guns drawn and asked for Smith, they did not perform a substantial step towards committing any of the charged offenses.

In *People v. Burleson*, 50 Ill. App. 3d 629 (1977), the defendant and an accomplice approached a bank while in disguise and carrying shotguns and a suitcase. A bank employee bolted the front door to the bank as defendant and his accomplice approached thereby preventing the completion of the armed robbery. Although defendant and his accomplice did not actually enter the bank building, the *Burelson*

court found that their acts were "sufficient to constitute a 'substantial step' toward the commission of an armed robbery in the bank." *Burleson*, 50 Ill. App. 3d at 633.

Similarly, in *People v. Terrell*, 99 Ill. 2d 427 (1984), the police observed the defendant hiding in the weeds behind a gas station that was adjacent to two other buildings, a construction company and a tool company. The defendant was carrying a revolver and a black nylon stocking that was knotted at one end. The police apprehended him. The defendant claimed that he was going to the gas station to purchase cigarettes although the defendant had no money on his person. Citing *Burleson*, the *Terrell* court found:

> "The defendant, in the case at bar, was in possession of the materials necessary to carry out an armed robbery and was near the place contemplated for its commission. He was armed with a loaded revolver, a disguise and the assistance of an accomplice, whose presence and identical disguise indicated a prearranged plan. He was lying in wait, only 25 to 30 feet from his target, with gun in hand. It was only the arrival of the police, which caused him to abandon his plan." *Terrell*, 99 Ill. 2d at 435.

Like the defendants in *Burleson* and *Terrell*, defendant took substantial steps toward the commission of the forcible felonies. Defendant hired two armed Cook County sheriff's officers, and hatched a plan to collect the drug money owed him. After establishing that the men would either take the drugs, money or Smith until they received the money, defendant drove to Smith's home. Defendant waited in the car

while his armed co-defendants approached Smith's house and knocked on the door. If Smith was home, the plan was to restrain or kidnap him for ransom. If Smith was not home, the men were going to enter the house and search for the drugs and the money. Instead, Jeffrey answered the door with a machine gun in his hands.

Without question, defendant's actions were a substantial step, where he had both the firepower and the plan necessary to carry out a residential burglary, unlawful restraint and kidnaping. It was only the unexpected appearance of Jeffrey Smith and the machine gun that caused him to abandon his plan.

Similarly, defendant's claim that he "withdrew from the incident before he could take a substantial step" is also without merit. Defendant suggests that because Santos, Lavelle and Perkins "merely knocked on the front window of the Smith home, asked for James, and then ran away across the street to an area of safety behind some parked cars" without their guns drawn, they effectively withdrew from the situation before they had an opportunity to take the required substantial step toward committing any of the three alleged attempt crimes.

However, as discussed above, defendant hired Lavelle and Perkins, and drove to Smith's house in the presence of three other armed men. Defendant remained in the car while his three armed co-defendants knocked on the door with the intent to take the drugs, the money or James Smith. Furthermore, the evidence established that at least two of the men had guns in their hands when the approached the Smith's porch. Ortancia testified that when she looked out the window she saw that two of the men

had guns. Tanya also testified that she her Ortancia tell Jeffrey that the men had guns.

There was no overt withdrawal in this case. Defendant and his co-defendants took substantial steps toward the forcible felonies before Jeffrey opened the door. It was only when Jeffrey opened the door with a machine gun in hand that the plan was thwarted.

Defendant next argues that trial counsel was ineffective for failing to request Illinois Pattern Jury Instructions (IPI) 4th, Criminal, No. 24-25.09. IPI 4th Criminal No. 24-25.09 states:

> "24-25.09 Initial Aggressor's Use of Force.
>
> A person who initially provokes the use of force against himself is justified in the use of force only if
>
> [1] the force used against him is so great that he reasonably believes he is in imminent danger of death or great bodily harm, and he has exhausted every reasonable means to escape the danger other than the use of force which is likely to cause death or great bodily harm to the other person.
>
> [or]
>
> [2] in good faith, he withdraws from physical contact with the other person and indicates clearly to the other person that he desires to withdraw and terminate the use of force, but the other person continues or resumes the use of force."

To prevail on a claim of ineffective assistance of counsel, a defendant must

satisfy the two prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, and (2) there exists a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 687; *People v. Albanese*, 104 Ill. 2d 504, 525 (1984).

Under the first prong of the *Strickland* test, defendant must overcome a "strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, defendant must overcome the presumption that under the circumstances, the challenged action, 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101(1955).
A defendant satisfies the second prong of *Strickland* if he can show that a reasonable probability exists that, had counsel not erred, the trier of fact would not have found him guilty beyond a reasonable doubt. *People v. Caballero*, 126 Ill. 2d 248, 260 (1989). Where the defendant fails to prove prejudice, the reviewing court need not determine whether counsel's performance constituted less than reasonable assistance. *Strickland*, 466 U.S. at 697; *People v. Flores*, 153 Ill.2d 264, 284 (1992).

Generally, self defense cannot be asserted as a defense to felony murder. *People v. Moore*, 95 Ill. 2d 404, 411 (1983). The rationale for prohibiting a defendant from asserting self defense to a felony-murder charge is that “an individual cannot claim that he was provoked by a person against whom he has already committed or attempted to commit a forcible felony. “ *People v. Williams*, 164 Ill. App. 3d 99, 109

(1987). Therefore, "a defendant cannot raise a justification defense if he or she sets into motion a course of felonious conduct." *People v. Mills*, 252 Ill. App. 3d 792, 799; See also 720 ILCS 5/9(a)(3) (West 2002); 720 ILCS 5/7-4(a) (West 2002).

At the instructions conference, defense counsel requested that the jury be instructed using IPI Criminal 4th No. 24-25.06, which reads:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend [(himself)(another)] against the imminent use of unlawful force.
>
> [However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent [(imminent death or great bodily harm to [(himself) (another)]) (the commission of ____)].]" IPI Criminal 4th No. 24-25.06.

The trial court denied defense counsel's request for 24-25.06.

We find *People v. Chapman*, 381 Ill. App. 3d 890 (2008), dispositive here. In *Chapman*, the court found error where IPI Criminal No. 24-25.09 was submitted to the jury without IPI Criminal 24-25.06. The court reasoned:

> "The jury was given an impossible truncated understanding of self-defense in that IPI Criminal 4th No. 24-25.09 was not accompanied by IPI Criminal No. 24.25.06. IPI Criminal 4th No. 24-25.09 is subject to a predicate fact, that defendant was the initial aggressor. IPI Criminal 4th NO. 24-25.09 includes

no alternative standard of self-defense to be applied if the predicate is absent; rather, the predicate is stated as a given. Where IPI Criminal 4th No. 24-25.09 is submitted without IPI Criminal 4th NO. 24-25.06 (the default or basic standard of self-defense), the jury is compelled to assume that the defendant was the initial aggressor and therefore had a diminished right of self-defense."

Chapman, 381 Ill. App. 3d at 901.

Pursuant to *Chapman*, even if defense counsel had requested IPI Criminal 4th No. 24-25.09, it would have been error to give IPI Criminal 4th No. 24-25.09 without IPI Criminal 4th No. 24-25.06. See also *People v. Lavelle*, 396 Ill. App. 3d 372 (2009). Therefore, we cannot say that defendant suffered prejudice as a result of defense counsel's failure to request IPI Criminal 4th No. 24-25.09.

Based on the foregoing, the judgment of the trial court is affirmed.

Affirmed.