2012 IL App (1st) 090669-U

SIXTH DIVISION
September 7, 2012

No. 1-09-0669

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 20164
	)	
BRUCE ERVIN,	)	
	)	Honorable William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Rochford concurred in the judgment of the court.

O R D E R

¶ 1 ***Held:*** (1) The defendant was not denied the effective assistance of counsel where he failed to establish defense counsel's representation was deficient; and (2) this court ordered the mittimus corrected to reflect the vacation of one of the defendant's two convictions and sentence for first degree murder and his three convictions and sentences for aggravated discharge of firearm.

¶ 2 Following a bench trial, defendant Bruce Ervin was found guilty of the first degree murder of Tanisha McCray, the attempted first degree murder of Jada Garnett and Khalila Ervin, aggravated discharge of a firearm as to all three victims, aggravated battery with a firearm and unlawful possession of a firearm. The trial court imposed sentences totaling 102 years' imprisonment. Defendant Ervin appeals contending that: (1) defense counsel was ineffective, and (2) one of his convictions for first degree murder and his three convictions for aggravated discharge of a firearm must be vacated. The State agrees with defendant Ervin as to his claim of error as to the convictions and sentences imposed.

¶ 3 We conclude that defendant Ervin failed to establish that he was denied the effective assistance of counsel. We order his convictions and sentences on one count of first degree murder and on the three counts of aggravated discharge vacated. As modified, we affirm the judgment of the circuit court.

¶ 4 BACKGROUND

¶ 5 On April 7, 2006, what started out to be a celebration of defendant Ervin's birthday with friends and family turned deadly when defendant Ervin discharged a firearm, killing Ms. McCray and wounding Ms. Garnett. Ms. Ervin was also present but escaped injury. As result of the shooting, defendant Ervin was charged with multiple offenses, including first degree murder, attempted murder and aggravated discharge of a firearm.

¶ 6 For the State

¶ 7 Jada Garnett testified as follows. Defendant Ervin and she had been dating for two years prior to April 7, 2006. They had made plans to celebrate his birthday on April 7 by going to Club

Chromium (the club), a nightclub located at Lake and Halsted Streets. Accompanied by her friend Ms. McCray, Ms. Garnett drove her SUV to defendant Ervin's apartment at Princeton Avenue and 22nd Street where they picked up defendant Ervin and his sister, Ms. Ervin. The four people knew each other from prior meetings, and were friends.

¶ 8 Ms. Garnett noticed that defendant Ervin appeared to be intoxicated when he got into the SUV. He was walking peculiarly and slurring his words, though she could still understand him. At the club, they stood in line for about 30 minutes. During that time, defendant Ervin appeared intoxicated and was falling on other people, prompting a confrontation with the club bouncer. Defendant Ervin and the three women got back in Ms. Garnett's SUV. Defendant Ervin sat in the front passenger seat next to Ms. Garnett; in the rear passenger area, Ms. McCray sat behind Ms. Garnett, and Ms. Ervin sat behind defendant Ervin. Between the time she picked him up at his residence and leaving the club, Ms. Garnett did not see defendant Ervin drink anything.

¶ 9 Ms. Garnett and the two other women decided to get something to eat. They did not want the defendant to accompany them because he was intoxicated. As Ms. Garnett drove back to defendant Ervin's residence, defendant Ervin and she argued because he was insisting on going with the women. When they arrived at his residence, defendant Ervin did not want to get out of the SUV, still arguing that he wanted to go with them. Finally, after exchanging words with Ms. Ervin, defendant Ervin exited the SUV. He walked about four or five feet away, turned and pulled a silver-looking gun from his waistband. Defendant Ervin fired shots at the front passenger-side window, shattering the window. While trying to get the SUV in gear, Ms. Garnett saw him shoot into the air. As she drove away, defendant Ervin shot at the rear passenger-side

window of the SUV.

¶ 10 Ms. Garnett drove two blocks when she saw a police officer and pulled over. As she spoke to him, the officer pointed out that she had been shot in the arm. She was taken to the hospital where she was treated for a gunshot wound.

¶ 11 On cross-examination, Ms. Garnett testified as follows. She denied that she picked defendant Ervin up at a friend's residence. She also denied that he had a champagne bottle with him when he got into the SUV. Between getting into the SUV and leaving the club, defendant Ervin began slurring his words. Ms. Garnett denied that defendant Ervin sustained a blow to his head; his confrontation with the club bouncer was a verbal one. At defendant Ervin's residence, he continued to argue about going out with the women, even as he exited the SUV.

¶ 12 Ms. Garnett acknowledged that there was no one in the front passenger seat when defendant Ervin fired at the front passenger-side window. She agreed that defendant Ervin shot first at the front passenger-side window, that he fired the second set of shots into the air, and that he fired the third set of shots at the rear passenger-side window as the SUV was moving away.

¶ 13 Khalila Ervin testified as follows. On April 7, 2006, Ms. Garnett picked her up at her mother's residence on Princeton Avenue; Ms. McCray was also in the car. Defendant Ervin was picked up at a friend's residence at a different address on Princeton Avenue. Defendant Ervin appeared to be intoxicated; he was barely able to walk, he slurred his words, and he was drinking from a cup. After parking the SUV, the women headed toward the club, but defendant Ervin walked off in the wrong direction, and they had to go after him. After waiting in line for about 30 minutes, the women declined to pay the cover charge of $30 and decided to get something to

eat. As they walked back to the SUV, defendant Ervin followed, stumbling rather than walking.

¶ 14 During the return trip, defendant Ervin and Ms. Garnett argued as to whether he was going with the women to get something to eat. Even after they arrived at his residence, defendant Ervin continued to argue about it. He finally exited the SUV, and Ms. Garnett began to talk about where they were going to go to eat. As they talked, Ms. Ervin noticed that Ms. Garnett had "like a crazy look on her face," causing Ms. Ervin to turn around. As she turned around, Ms. Ervin heard shots and ducked down. While she did not see who was shooting, the shots came from where defendant Ervin had exited the SUV. Ms. Ervin looked at Ms. McCray; her head was back, and her eyes were closed.

¶ 15 Ms. Ervin denied seeing defendant Ervin with a gun. She acknowledged that, on April 8, 2006, she signed a written statement in which she stated that she saw defendant Ervin with a gun pointed at Ms. Garnett's SUV. However, she maintained that part of her statement was untrue. She further maintained that she lied because she was threatened by James Murphy, an assistant State's Attorney, and the police. They confronted her continually with what Ms. Garnett had told them and would not allow her to leave until she said what they wanted her to tell them. ASA Murphy threatened her with jail and that her son would be taken away from her. Jennifer Bagby, another assistant State's Attorney, also threatened to have her son taken away from her unless Ms. Ervin testified before the grand jury and confirmed her written statement.

¶ 16 In July 2006, Ms. Ervin went to Minnesota to pick up defendant Ervin. He had contacted her and told her that he wanted to turn himself in to police. Ms. Ervin did not believe that defendant Ervin had anything to do with the shooting.

¶ 17 Ms. Ervin acknowledged that, while she was at the police station, she spoke with Roxanne Smith, a Chicago police officer and her mother's first cousin. While she initially did not remember whether it was before or after she gave her statement, she then maintained that she spoke with Officer Smith after she gave the statement and told Officer Smith how she was being treated by the police officers and that they had forced her to lie. She denied being alone with Officer Smith. Other than defense counsel, Ms. Ervin never complained to anyone about the threats by the police or by the assistant State's attorneys because nothing ever came of a prior complaint she made against the police.

¶ 18 On cross-examination, Ms. Ervin testified as follows. Ms. Garnett picked up defendant Ervin at his friend, Linnell Dean's, residence. When defendant Ervin came out, he was carrying a bottle of champagne and a bottle of cognac; he also had a cup of "Remy" in his hand. He continued to drink during the drive to the club and was even more intoxicated by the time they walked back to the SUV. Once Ms. Garnett arrived at defendant Ervin's residence, he kept arguing but finally got out of the SUV.

¶ 19 Ms. Ervin maintained that the only "lie" in her written statement and her grand jury testimony was her statement that she saw defendant Ervin with a gun; the rest of her written statement and grand jury testimony was true. She maintained that her trial testimony was truthful and that she lied to the grand jury because she was scared and did not know her rights.

¶ 20 Chicago police officer Roxanne Smith testified as follows. On April 8, 2006, Officer Smith met with Ms. Ervin at the police station. Ms. Ervin complained that one of the detectives was very aggressive in his questioning and was being rude to her. She was upset by all the

questions. Officer Smith did not recall Ms. Ervin telling her that she had been threatened with the loss of her son unless she stated that defendant Ervin did the shooting. Officer Smith was alone with Ms. Ervin for a few minutes, so nothing prevented Ms. Ervin from telling Officer Smith anything.

¶ 21 Assistant State's Attorneys, James Murphy and Jennifer Bagby, and Chicago police detective, Michael Rose, testified on behalf of the State. The witnesses denied that Ms. Ervin's statement that she saw defendant Ervin with a gun was the result of their threats to her. Chicago police officer Kathleen Gahagan, a forensic investigator, testified that no physical evidence was found in Ms. Garnett's car.

¶ 22 The parties stipulated to testimony that Ms. McCray's death was caused by a gunshot wound to her head and that the bullets and cartridges found at the scene and recovered from Ms. McCray and Ms. Garnett were fired from the same handgun. They further stipulated to testimony that the coat, which the defense stipulated was worn by defendant during the shooting, tested positive for gunpowder residue. The State rested its case in chief.

¶ 23 In moving for a directed finding, defense counsel noted that the State was required to prove that defendant Ervin acted intentionally and knowingly in committing the offenses charged in this case and that, based on the testimony of Ms. Garnett and Ms. Ervin, defendant Ervin was extremely intoxicated at the time of the shooting. Counsel argued that defendant was intoxicated enough "so that he did not know or could not possibly have formed the intent in his mind to commit any act at all, further evidenced by the fact that the sequence of events showed he shot at the car, and then started shooting the gun off in the air and then shot at the car again." Based on

the testimony and evidence, counsel asserted that defendant Ervin "did not have the capability of having the intent to commit the crime." In response, the prosecutor questioned whether voluntary intoxication was an appropriate defense in this case, but in any event, he maintained that defendant Ervin was not intoxicated to the point where he could not appreciate what he was doing. The trial court denied the motion for a directed finding.

¶ 24 For the Defendant

¶ 25 Linnell Dean testified as follows. Mr. Dean had known defendant Ervin for 15 years. Around 7 p.m. on April 7, 2006, defendant Ervin arrived at Mr. Dean's apartment; there were four or five other people in the apartment. Mr. Dean believed that defendant Ervin was intoxicated; he was drinking from a bottle containing alcohol and slurring his words. Defendant Ervin talked about going out later and continued to drink the fifth of Remy Martin he brought, some Hennessy brandy and champagne. Between 9:30 p.m. and 10 p.m., defendant Ervin's girl friend arrived to pick him up to go out. When he left, defendant Ervin's speech was slurred, and he stumbled out the door.

¶ 26 On cross-examination, Mr. Dean testified as follows. Defendant Ervin was wearing a white mink coat, which he took off in the apartment. Mr. Dean denied seeing a gun on defendant Ervin. Mr. Dean acknowledged his prior convictions for possession of a controlled substance and unlawful use of a weapon by a felon.

¶ 27 Kathleen Ervin, defendant Ervin's mother, testified as follows. On April 7, 2006, Mrs. Ervin was at her apartment with her daughter, Khalila Ervin. Defendant Ervin was in and out of the apartment. However, he was not there when at 9:30 p.m., Ms. Ervin left.

¶ 28 Closing Argument

¶ 29 In closing argument, defense counsel stated as follows:

"The real issue, Judge, here is fairly simple. 720 ILCS 5/9-3 is the definition of involuntary manslaughter. Section A. 'A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which caused the death are such as are likely to cause death or great bodily harm to some individual and he performs them recklessly.' That is the classic definition and this is the classic case that fits that definition. The lawful or unlawful acts that we're talking about, and clearly in this case it's an unlawful act, and that's the firing of the weapon into the vehicle, and clearly in this case it's an unlawful act.

* * *

There is no intent to kill, and how we know that there is no intent to kill goes back to the issue of [defendant Ervin] himself and his condition at the time that this is all transpiring."

¶ 30 Based on the extensive evidence of defendant Ervin's extreme intoxication, counsel maintained as follows:

"Now, no one in their right mind would believe that he's formed the intent to kill anybody *** and one of the reasons we know this is because [Ms. Garnett] testified that he starts shooting up straight up in the air. First he shoots at the car, then he starts shooting up in the air, and then as she's driving off he shoots at the car again, okay. The only reason he's shooting up in the air, the only conclusion you can draw is that he's

wildly shooting the gun. He's not necessarily shooting to do something to somebody. *** He's mad, he's shooting off the gun, he's being reckless. That is the definition, very definition of his being reckless.

* * *

But Judge, again it comes down to that very simple definition of involuntary manslaughter and the reckless conduct that led to the death of Tanisha McCray. *** Clearly this set of circumstances arose out of his drunken condition. ***Any of the things that would draw you towards a conclusion of first degree murder just don't exit [*sic*]."

Counsel concluded by asserting that the evidence did not establish that defendant Ervin brought a gun with him to shoot anyone

¶ 31 The following colloquy then took place.

"THE COURT: Voluntary intoxication is your defense?

MR. KATZ (defense counsel): Well, it is not a question of voluntary intoxication at all. It's still a question of reckless behavior, Judge.

THE COURT: Because of the drinking?

MR. KATZ: Yes, that's correct.

THE COURT: Well, wasn't that voluntary intoxication?

MR. KATZ: Well, I suppose in part it is voluntary. I mean, people are feeding him alcohol, he's drinking, he's getting drunk, there's no question about that, but it still comes down to reckless behavior. And even if he weren't drunk it would still be reckless behavior, shooting into a car without any provocation or any fights or any ill will ***. It's

a classic definition, Judge."

¶ 32 In finding defendant Ervin guilty of the offenses in this case, the trial court observed that it was clear from the evidence that defendant Ervin had been drinking, but found that the testimony of Ms. Garnett and Ms. Ervin differed as to the level of intoxication. The court noted that no bottles of alcohol were found in the SUV. The court further observed that when defendant Ervin exited the SUV, he pulled the gun from his waistband and "points the gun directly at the car occupied by three other human beings and fires several shots. The defendant then fires shots into the air. [Ms. Garnett] tries to pull the car away from the scene and the defendant takes aim and fires again at the moving vehicle," leaving Ms. McCray dead and Ms. Garnett wounded.

¶ 33 The court found Ms. Garnett's testimony to be "clear, concise and very credible," and "[s]he was not impeached in any significant fashion." The court noted that Ms. Ervin's testimony was impeached by her prior inconsistent statements and that it appeared she was attempting to minimize defendant Ervin's involvement in the shooting. The court found the only credible portions of her testimony were those corroborated by Ms. Garnett's testimony and the physical evidence.

¶ 34 The trial court then addressed the parties as follows:

"The defense asserts that he, the defendant, acted recklessly in shooting these two individuals; and therefore, he is guilty of involuntary manslaughter.

But there was also a tremendous amount of testimony as to the defendant's drinking and the fact that he was intoxicated. This caused me to ask the question if the defense

was voluntary intoxication. It was then asserted or maybe perhaps more clearly asserted that the defendant was reckless and that this reckless act was due to the intoxication."

The court then compared the provisions of involuntary manslaughter statute (720 ILCS 5/9-3 (West 2008)) and the involuntary intoxication defense statute (720 ILCS 5/6-3 (West 2008)) and found that the evidence did not support a finding that defendant Ervin was involuntarily intoxicated. Recounting the evidence as to defendant Ervin's conduct immediately before and after the shooting, the trial court concluded that "[c]ontrary to the defense contentions, these are not reckless acts under the law, even if the defendant was intoxicated."

¶ 35 After defense counsel had filed a motion for new trial, new counsel appeared for the defendant and filed a motion to reopen the trial and later, a supplemental motion for a new trial. The trial court denied the motions.

¶ 36 Afer merging several of the counts of the indictment, the trial court sentenced defendant Ervin to consecutive terms of 45 years for the murder of Ms. McCray, 31 years for the attempted murder of Ms. Garnett and 26 years for the attempted murder of Ms. Ervin. Defendant Ervin was also sentenced to three-concurrent terms of four years for aggravated discharge of a firearm, a four-year term for aggravated battery with a firearm, and a one-year term for unlawful possession of a firearm; these sentences to be served concurrent with each other and with his sentences for murder and attempted murder. Following the denial of his second supplemental motion for a new trial and reconsideration of sentence, the defendant filed a timely notice of appeal.

¶ 37 ANALYSIS

¶ 38 I. Ineffective Assistance of Counsel

¶ 39 Defendant Ervin contends that defense counsel was ineffective when he relied on an invalid defense, for failing to impeach Ms. Garnett with her grand jury testimony, and for eliciting testimony favorable to the State from Ms. Garnett.

¶ 40 A. *Standard of Review*

¶ 41 Where the facts relevant to an ineffective assistance of counsel claim are not disputed, our review is *de novo*. *People v. Bew*, 228 Ill. 2d 122, 127 (2008).

¶ 42 B. *Discussion*

¶ 43 We apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine if a defendant has been denied his right to the effective assistance of counsel. Under the first prong of the test, a defendant must demonstrate that his counsel's performance was deficient by showing that " 'counsel's representation fell below an objective standard of reasonableness.' " *People v. Cunningham*, 376 Ill, App. 3d 298, 301 (2007) (quoting *Strickland*, 466 U.S. at 688). The second prong of the test requires the defendant to demonstrate that he was prejudiced by counsel's deficient performance by showing that " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Cunningham*, 376 Ill, App. 3d at 301 (quoting *Strickland*, 466 U.S. at 694). We need not consider both prongs of the *Strickland* test if the defendant fails to satisfy one prong of the test. *Cunningham*, 376 Ill, App. 3d at 301.

¶ 44 Under the deficiency prong, counsel is afforded wide latitude when making tactical

decisions. *Cunningham*, 374 Ill. App. 3d at 301. There is a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance. *People v. Berrier*, 362 Ill. App. 3d 1153, 1166 (2006). The presumption will give way if no reasonably effective criminal defense attorney would engage in similar conduct under the same circumstances. *People v. Fletcher*, 335 Ill. App. 3d 447, 453 (2002).

¶ 45 All three of the alleged errors by defense counsel in his representation of defendant Ervin fall within the range of trial strategy. See *People v. Alvarado*, 2011 IL App (1st) 082957, ¶ 44 (matters of trial strategy include how to conduct cross-examination); *Cunningham*, 374 Ill. App. 3d at 301-02 (trial strategy includes counsel's choice of one theory of defense over another); *People v. Williams*, 329 Ill. App. 3d 846, 854 (2002) (decision whether to impeach a witness is a matter of trial strategy). "[C]hoices of trial strategy are virtually unchallengeable because such a choice 'is a matter of professional judgment to which a review of counsel's competency does not extend.' " *Cunningham*, 374 Ill. App. 3d at 301-02 (quoting *People v. Cundiff*, 322 Ill. App. 3d 426, 435 (2001).

¶ 46 1. Invalid Defense

¶ 47 Defendant Ervin argues that he received ineffective assistance when defense counsel relied on the defense of voluntary intoxication. He correctly notes that the defense of voluntary intoxication was repealed in 2002. See Pub. Act 92-466 §5, eff. Jan. 1, 2002 (amending 720 ILCS 5/6-3 (West 2000)).[1] Where counsel chooses a trial strategy that is based on a

[1]Under certain circumstances, involuntary intoxication may be a defense. See 720 ILCS 5/6-3 (West 2006).

misapprehension of the law, counsel may have been ineffective. *People v. Lemke*, 349 Ill. App. 3d 391, 399 (2004). Defendant Ervin points to three instances in the record to support his contention that, notwithstanding its repeal, defense counsel chose to use the voluntary intoxication defense as part of his trial strategy: defense counsel's argument in support of the motion for a directed finding; counsel's closing argument; and the exchange between the trial court and counsel at the end of the trial.

¶ 48 In our statement of facts, we set forth in detail the portions of the record relied on by defendant Ervin. While referring to voluntary intoxication, we disagree that those portions of the record establish that defense counsel raised voluntary intoxication as a defense. Counsel did not argue that voluntary intoxication excused the shooting by defendant Ervin, thus rendering him innocent of the death of Ms. McCray and the wounding of Ms. Garnett. Rather, defense counsel used the evidence of defendant Ervin's intoxicated condition to argue that his acts could not have been knowing or intentional, as required for a conviction for first degree murder, but, under the circumstances were, in fact, reckless. The record in this case demonstrates that, in an effort to avoid a conviction for first degree murder, defense counsel's strategy was to convince the trial court that defendant Ervin's acts were reckless, not knowing or intentional and therefore constituted involuntary manslaughter. See 720 ILCS 5/9-3 (West 2008) (defendant performed the acts causing the death recklessly).

¶ 49 We conclude that defendant Ervin failed to establish that defense counsel relied on the voluntary intoxication defense as part of his trial strategy. Therefore, defense counsel's representation was not deficient on that ground.

¶ 50 2. Failure to Impeach Ms. Garnett's Testimony

¶ 51 Defendant Ervin contends that defense counsel was ineffective for failing to impeach Ms. Garnett's trial testimony with her grand jury testimony. At trial, Ms. Garnett testified that defendant Ervin fired the first set of shots at the SUV; he fired the second set of shots in the air; and he fired the third set of shots into rear passenger-side of the SUV. When questioned before the grand jury on April 13, 2006, Ms. Garnett testified as follows:

> "Q. And what did [defendant Ervin] do with the gun after he pulled it out?
>
> A. As soon as he pulled out the gun, he shot in the air. When he shot in the air, I got kind of nervous. I tried to put the car in drive. As I was putting the car in drive, he shot through the passenger window, and that's when he shot me in my right arm."

¶ 52 "[T]he complete failure to impeach the sole eyewitness when significant impeachment is available is not trial strategy and, thus, may support an ineffective assistance claim." *People v. Salgado*, 263 Ill. App. 3d 238, 246-47 (1994). In order to assess the importance of the failure to impeach for a *Strickland* claim, " '[t]he value of the potentially impeaching material must be placed in perspective.' " *Salgado*, 263 Ill. App. 3d at 247 (quoting *People v. Jimerson*, 127 Ill. 2d 12, 33 (1989).

¶ 53 In this case, Ms. Garnett's grand jury testimony did not provide impeachment of any significant value. Had defense counsel attempted to impeach Ms. Garnett on cross-examination with the portion of her grand jury testimony quoted above, on redirect, the prosecutor would likely have brought out that immediately prior to the testimony relied on by defendant Ervin, Ms. Garnett testified as follows:

"Q. And did you happen to look over to the passenger side window after [defendant Ervin] got out of the car?

A. Yes, I did.

Q. What did you see when you looked over to the passenger side of the car?

A. He was pointing a gun, and he shot through the passenger window."

See *People v. Harris*, 123 Ill. 2d 113, 142 (1988) ("where a witness has been impeached by proof that he has made prior inconsistent statements, he may bring out all of the prior statements to qualify or explain the inconsistency and rehabilitate the witness").

¶ 54 The purpose of impeachment is to damage the witness's credibility, not to establish the truth of the evidence used to impeach the witness. *Salgado*, 263 Ill. App. 3d at 247. Defense counsel's decision not to undermine Ms. Garnett's credibility by impeaching her testimony was in accord with his trial strategy. Ms. Garnett's trial testimony that defendant Ervin fired first at the SUV and then in the air, was stronger evidence of his "recklessness" in firing the shots, than if he had first shot into the air and then at the SUV. In considering new counsel's argument that defense counsel failed to cross-examine Ms. Garnett properly, the trial court found the scenario in which defendant Ervin fired first into the air and then shot at the SUV, more harmful to the defense than the evidence presented at trial. Finally, even if defense counsel had used the grand jury testimony to impeach Ms. Garnett, the trial court concluded that the sequence of the shots made no difference to its determination of guilt.

¶ 55 Mistakes in trial strategy or tactics or an error in judgment does not render counsel's representation deficient, unless the trial strategy is so unsound that there is no meaningful testing

of the State's case. *People v. Perry*, 224 Ill. 2d 312, 355-56 (2007). In the present case, defense counsel's decision not to impeach Ms. Garnett with her grand jury testimony was in keeping with his trial strategy to emphasize both the lack of intent and how recklessly he fired the shots. Though ultimately counsel's trial strategy was unsuccessful, it was neither unreasonable nor irrational. See *People v. Mabry*, 398 Ill. App. 3d 745, 753 (2010) (reviewing court will not second-guess defense counsel's strategy or how the strategy was implemented).

¶ 56 Since defense counsel's decision not to impeach Ms. Garnett with her grand jury testimony was reasonable trial strategy, counsel's representation was not deficient on that ground.

¶ 57 2. Deficient Cross-examination of Ms. Garnett

¶ 58 Defendant Ervin contends that defense counsel provided deficient representation in his cross-examination of Ms. Garnett. Defendant Ervin asserts that defense counsel's cross-examination of Ms. Garnett served only to further establish that he shot first at the SUV and then shot into the air, thereby supporting the State's theory that he fired the shots intentionally.

¶ 59 In *People v. Nunez*, 263 Ill. App. 3d 740 (1994), the defendant contended that "the adversarial process was totally lacking" where defense counsel's cross-examination of the State's witnesses "merely parroted the prosecutor's line of questioning, the result being a reinforcement and resubstantiation of the State's evidence." *Nunez*, 263 Ill. App. 3d at 750. Finding that defense counsel's cross-examination was a matter of trial strategy, the reviewing court pointed out that counsel's questioning was not limited to the questions asked by the prosecutor, that asking questions in the same sequence could have revealed inconsistencies by having the witness tell the same story twice, and if there were no inconsistencies, such questioning could have the

effect of making the witness appear "overrehearsed." *Nunez*, 263 Ill. App. 3d at 750.

¶ 60 Similarly, in the present case, defense counsel's questions to Ms. Garnett were not limited to the State's questions about the sequence of the shots fired by defendant Ervin. He also cross-examined her on defendant Ervin's drinking and his behavior, in furtherance of the defense theory that defendant Ervin was too intoxicated to act intentionally or knowingly and that his acts of firing the shots constituted recklessness.

¶ 61 Finally, this is not a case where defense counsel conceded the defendant's guilt and then failed to provide an effective defense. Defendant Ervin points out that defense counsel failed to question Ms. Garnett as to the location he was shooting from or that the shots were actually fired at the SUV. He further points out that only Ms. Garnett testified that he had a gun. However, despite her denial that she saw defendant Ervin with a gun, Ms. Ervin testified that the shots came from the direction of where defendant Ervin had exited the SUV. It was also not a case in which defense counsel's cross-examination proved an element critical to the State's case. See *People v. Moore*, 338 Ill. App. 3d 11, 17 (2003). Given the physical and testimonial evidence in this case, defense counsel's decision not to challenge defendant Ervin's role as the shooter but to present a case under which he would be found guilty of involuntary manslaughter rather than first degree murder was reasonable. Compare *Nunez*, 263 Ill. App. 3d at 751 (where the defendant signed a statement admitting firing a shot into a car aware that it contained three people, it was reasonable for defense counsel to have the defendant testify to support his claim of self-defense).

¶ 62 We conclude that defense counsel's cross-examination of Ms. Garnett was reasonable trial strategy and therefore, defendant Ervin failed to establish deficient representation on this ground.

¶ 63 Since the defendant has failed to establish the deficiency prong of the *Strickland* test, we need not address the prejudice prong. We conclude that defendant Ervin failed to establish that he was denied his constitutional right to the effective assistance of counsel.

¶ 64 II. Correction of the Mittimus

¶ 65 The State agrees with defendant Ervin that his three convictions for aggravated discharge of a firearm and one of his two murder convictions must be vacated. Remand is unnecessary since we have authority under Illinois Supreme Court Rule 615(b) to directly order the clerk of the circuit court to correct the mittimus. See Ill. S.Ct. R. 615(b)(1); *People v. Walker*, 2011 IL App (1st) 072889-B, ¶ 40.

¶ 66 We direct the clerk of the circuit court to vacate defendant Ervin's murder conviction and sentence on count 6 (murder where there is a strong probability of death or great bodily harm). See *Walker*, 2011 IL App (1st) 072889-B, ¶ 41 (court vacates the less serious count of murder). We further order the clerk to vacate defendant Ervin's three convictions and sentences for aggravated discharge of a firearm. Defendant Ervin's remaining convictions and sentences for murder, attempted murder, aggravated battery with a firearm and unlawful use of a weapon are affirmed.

¶ 67 CONCLUSION

¶ 68 As modified, the judgment of the circuit court is affirmed.

¶ 69 Affirmed as modified.