No. 1-09-2609

SIXTH DIVISION
APRIL 29, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois
	)	
v.	)	07 CR 22898 (01)
	)	
CHEVES DEMBRY,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROBERT E. GORDON delivered the judgment of the Court.

JUSTICES CAHILL and MCBRIDE concurred in the judgment.

ORDER

Held: A defendant is not denied effective assistance of counsel where defense counsel elicits evidence unfavorable to defendant during cross-examination but the evidence does not prejudice defendant so a reasonable probability exists that, but for defense counsel's cross-examination, the results of the proceedings would be different.

Following a bench trial, Defendant, Cheves Dembry, was convicted of delivery of a controlled substance and sentenced as a Class X offender to 9 years in the Illinois Department of

Corrections. The trial court denied Defendant's posttrial motion for new trial. Defendant argues on appeal that he received ineffective assistance of counsel when his trial attorney introduced prejudicial evidence on cross-examination.

I. Background

At trial, Chicago Police Officer Matthew Bouch testified on direct-examination that on October 10, 2007, at approximately 8:00 p.m., he was conducting a narcotics surveillance near 4100 West End Avenue. At that time, Bouch was working with two partners, Officers Todd Reykjalin and Kevin Ebersole.

Bouch testified that he observed an individual, later identified as co-arrestee Stafford, shouting "rocks, blows" to passing motorists and pedestrians. Bouch testified that "rocks" and "blows" are street terms for crack-cocaine and heroin, respectively. Bouch testified that he observed another individual, later identified as co-arrestee Murray, standing nearby. Bouch testified that on three separate occasions, unidentified individuals approached Murray, engaged in a brief conversation, and then handed an unknown amount of United States currency to Murray. Bouch testified that Murray then accepted the currency, relocated down the block to the base of a fence on

West End, recovered a small item, and then tendered the item to the unidentified individual.

Bouch testified that after he observed this same sequence of events three times, he observed Murray approach Defendant outside a nearby residence on West End Avenue. Bouch then testified that, after engaging in a brief conversation, Murray handed to Defendant a "large bundle" of United States currency. Defendant then accepted the currency and relocated to the base of the nearby porch. Defendant then recovered a "golf-ball sized" item from the base of the porch and tendered this item to Murray.

Bouch further testified that he observed this transaction from a distance of 100 to 120 feet using binoculars. Also, nothing obstructed his view and, although it was night, the area was well lit with artificial lighting.

Bouch further testified that, after observing this transaction, he broke surveillance and relocated to the police vehicle where his two partners were waiting. Bouch and his partners then proceeded to the area near 4100 West End that he had observed. Upon arriving, the three officers exited their vehicle and detained Murray, Stafford, and Defendant. Bouch testified that between 90 seconds and two minutes elapsed from when he broke surveillance to when the individuals were detained.

Bouch then testified that he directed Officer Ebersole to proceed to the fence down the block on West End where he had observed Murray retrieve the small items on three occasions. Bouch testified that he observed Ebersole bend over and recover items at the location. The prosecution then asked the following question and Officer Bouch gave the following answer:

"Q: What, if anything, did you observe [Ebersole] do when he came back to your location?

A: He showed me what he had recovered."

Officer Bouch then testified that he directed Officer Reykjalin to investigate the base of the porch at Defendant's residence on West End Avenue. This was the place where Bouch observed Defendant retrieve the "golf ball-sized" item. The prosecution then asked the following questions and Officer Bouch gave the following answers:

"Q: What did you observe the officer do when he got to the porch area?

A: He bent over, but I didn't see him physically recover anything, but I did see him go to that location.

Q: Did he subsequent [*sic*] relocate to where you were [on W. West End Avenue]?

A: Yes, he did.

Q: When he relocated to your location, what if anything, did he show you?

A: He showed me what he recovered from the porch area."

On cross-examination, defense counsel asked Officer Bouch questions about his observation of the co-arrestees. Concerning the item observed by Bouch at the base of Defendant's porch, defense counsel asked the following questions and Officer Bouch gave the following answers:

"Q: You said there was something on the ground at the base of the stairs on the west side of the building?

A: Yeah, on the west side of the porch.

Q: But at the base of the stairs?

A: Yes, sir.

Q: Could you see what that something was?

A: No, I couldn't.

Q: What was preventing you from seeing what was at the base of the stairs?

A: I couldn't tell exactly what was at the stairs. I could just see where his hand had reached to."

Defense counsel then asked Bouch questions concerning Defendant's actions. Defense counsel asked the following questions and Officer Bouch gave the following answers:

"Q: When he reached, he picked something up?

A: Yes, sir.

Q: Could you see what that was?

A: Yes.

Q: What did you see?

A: It looked like a large golf ball sized item.

Q: What did he do with it?

A: He then walked back to the co-arrestee, Mr. Murray.

Q: And the object he had, he gave it to Mr. Murray?

A: Yes, he did.

Q: Murray put it down by [the fence on West End Avenue]?

A: Yes, he did.

Q: Did you loose sight of whatever he put down?

A: After he placed it there, yes, I did."

Officer Ebersole later testified on direct examination that at the base of the fence he recovered a clear, plastic bag, which contained 13 tinfoil packets wrapped in clear, plastic tape containing what he suspected to be heroin. It was later

stipulated that a forensic chemist from the Illinois State Crime Lab would testify that he tested 4 of the 13 items found by Officer Ebersole at the base of the fence, and that each item tested positive for heroin. The total weight of the 13 items was 3.7 grams.

Officer Reykjalin later testified on direct-examination that at the base of the porch he recovered a large, clear, plastic bag containing suspect narcotics. The large bag contained three smaller bags with a total of 39 tinfoil packets. Each tinfoil packet contained a white, powder substance. Reykjalin testified that he suspected the substance to be heroin. Another clear plastic bag found at the base of the porch contained 13 clear, knotted, plastic bags, each containing a white, rock-like substance. Reykjalin testified that he suspected the substance to be crack-cocaine. Still another plastic bag contained a white, chunky substance. Reykjalin testified that he suspected that substance to be crack-cocaine.

After these items were recovered, Murray, Stafford, and Defendant were placed under arrest and taken into custody. At the police station, Officer Ebersole conducted a custodial search of Defendant and the co-arrestees. Ebersole testified that he

found $500 in United States currency on Defendant's person and $60 on Murray's person.

Following closing arguments, the trial court found Defendant guilty of delivery of a controlled substance, namely the heroin found by Officer Ebersole at the base of the fence. Before making a ruling the trial court asked the following questions and the State gave the following answers:

> "Q: And then allegedly [Defendant] comes from the porch with what the police say were, was a golf ball-size item and they put it at the base of the base of the fence. Right?
>
> A: Yes. It was placed there by Mr. Murray.
>
> Q: He got it from [Defendant]?
>
> A: Yes Judge."

Shortly thereafter, the court stated:

> "As to count 4, delivery of [*sic*] controlled substance, on or about October 12, 2007, that [Defendant] knowingly and unlawfully delivered otherwise than authorized in the Controlled Substances Act, then in force and effect, one or more grams, but less than 15 grams of a substance containing heroin. The testimony of the police officers in terms of their surveillance

> and recovery of the 13 packets given to Murray and put at the base of the fence and then recovered by the police tested positive for more than one gram, to be correct, convinces me beyond a reasonable doubt that [Defendant] is responsible for the delivery to Mr. Murray of the heroin recovered from the base of the fence."

The court in coming to this conclusion also relied on the evidence that there was $500 found on Defendant's person.

Defendant's motion for new trial was subsequently denied. Following a sentencing hearing where aggravation and mitigation were considered, he was sentenced to 9 years' imprisonment.

II. Analysis

Defendant now argues on appeal that he was denied effective assistance of counsel because his lawyer brought out prejudicial evidence the State did not offer. Where the effectiveness of a defendant's trial counsel is questioned, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687-88, (1984); People v. Albanese, 104 Ill. 2d 504, 525 (1984). There are two components to an ineffective assistance claim: (1) deficient performance and (2) prejudice. People v. Jackson, 318

Ill. App. 3d 321, 326, (2000), citing Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

In order to prove both prongs, a defendant must show his lawyer's deficient representation created "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Albanese, 104 Ill. 2d at 525; People v. Caballero, 126 Ill. 2d 248, 259-60 (1989). The defendant must then overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," that is, that "the challenged action might be considered sound trial strategy." People v. Pecoraro, 175 Ill. 2d 294, 319-20 (1997). Further, the failure to satisfy either prong precludes a finding of ineffective assistance of counsel; therefore, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697; Albanese, 104 Ill. 2d at 525.

Defendant argues that but for his attorney's elicitation of the evidence 1) that Murray took the "golf ball sized" item he received from Defendant and placed it at the base of the fence and 2) that Officer Bouch then observed the item at the location, the evidence presented by the State was insufficient to sustain a

conviction for delivery of a controlled substance. See Caballero, 126 Ill. 2d at 259-60. We find this argument unpersuasive.

When reviewing the sufficiency of evidence in a criminal case, the reviewing court must determine, after viewing the evidence in the light most favorable to the State, whether any rational trier of fact could have found the essential elements of the crime upon which the defendant was convicted beyond a reasonable doubt. People v. Ross, 229 Ill. 2d 255, 272 (2008). "The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact." People v. Sutherland, 223 Ill. 2d 187, 242 (2006).

To sustain a conviction for the unlawful delivery of a controlled substance, the State must prove that defendant knowingly delivered a controlled substance. People v. Brown, 388 Ill. App. 3d 104, 107-108 (2009) *citing* 720 ILCS 570/401 (West 2006). Delivery is defined as "the actual, constructive, or attempted transfer of possession of a controlled substance, with or without consideration, whether or not there is

an agency relationship." Brown, 388 Ill. App. 3d at 108 *citing* 720 ILCS 570/401 (West 2006).

Here, without the evidence solicited by defense counsel, the State presented sufficient evidence to support Defendant's conviction for delivery of a controlled substance. Officer Bouch testified on direct-examination that he observed Stafford shouting the street names of heroin and crack-cocaine on West End Avenue. Bouch testified that he also observed Murray take money from three individuals and tender to each of those individuals a small item in exchange. Bouch testified that Murray retrieved the tendered items from the base of a nearby fence. Bouch then testified that he observed Murray engage in a transaction with Defendant. Defendant delivered to Murray a "golf ball sized" item in exchange for a "large bundle" of United States currency.

Further, Officer Bouch testified that between 90 seconds and two minutes elapsed from when he broke surveillance until he and his partners apprehended Defendant, Murray and Stafford. Officer Ebersole then testified that he recovered suspect heroin and crack-cocaine from the base of the same fence from which Murray had retrieved items for other customers. Officer Reykjalin then testified that he recovered suspect heroin and crack-cocaine from

the base of the same porch from which Defendant recovered the "golf ball sized" item tendered to Murray.

It was reasonable for the trial court to infer from this evidence offered by the State that the officers had observed and recovered narcotics from a three-man sales enterprise. See Sutherland, 223 Ill. 2d at 242. The enterprise involved an advertiser, a salesman, and a distributor. Defendant played the role of distributor. The State presented circumstantial evidence of Defendant's role through the observations of Officer Bouch, the recovery of narcotics by Officers Ebersole and Reykjalin, and the $500 found on Defendant at the police station. See People v. Pintos, 133 Ill. 2d 286, 291 (1989) (holding that proof beyond a reasonable doubt test should be applied in reviewing sufficiency of evidence in criminal cases whether evidence is direct or circumstantial). Therefore, when viewing the totality of this evidence in the light most favorable to the prosecution, we cannot say a reasonable possibility exists that a rational trier of fact would find the State's evidence insufficient to sustain Defendant's conviction. Ross, 229 Ill. 2d at 272; see Brown 388 Ill. App. 3d at 108 *citing* 720 ILCS 570/401 (West 2006). We cannot say that the result of the proceeding would not have been different without the unfavorable evidence elicited by defense

counsel. As a result, Defendant was not prejudiced. Albanese, 104 Ill. 2d at 525.

Defendant's reliance on People v. Moore to support his argument that defense counsel prejudiced him is also unpersuasive because Moore is inapposite to this case. 356 Ill. App. 3d 117 (2005).

First, in Moore, defense counsel introduced inadmissible hearsay evidence without objection by the State, which provided a reasonable explanation for the absence of physical evidence necessary for the conviction. Moore, 356 Ill. App. 3d at 123. But for defense counsel's actions in Moore, no rational trier of fact could have convicted defendant. 356 Ill. App. 3d at 123. Here, unlike in Moore, the State introduced circumstantial evidence, which created reasonable inferences unfavorable to Defendant, which allowed a rational trier of fact to find Defendant's guilt beyond a reasonable doubt. See Pintos, 133 Ill. 2d at 291. Although the trial court considered the evidence elicited by defense counsel, the court relied on Officer Bouch's direct-examination testimony of the drug transactions that he observed, the recovery of the narcotics, and the $500 found on Defendant's person. Therefore, unlike in Moore, the trial court here relied on circumstantial evidence offered by the State to

prove Defendant's guilt beyond a reasonable doubt. 365 Ill. App. 3d at 127.

Second, in Moore, defense counsel violated defendant's right to be confronted with the witnesses against him. 365 Ill. App. 3d at 127. Defense counsel elicited hearsay evidence on cross-examination of the State's primary witnesses by allowing them to testify to the actions and words of other people. Moore, 356 Ill. App. 3d at 127. These other people never actually testified. Moore, 356 Ill. App. 3d at 127. Here, unlike in Moore, defense counsel did not violate any of Defendant's rights. Rather, defense counsel's cross-examination of Officer Bouch can be reasonably construed as a failed impeachment attempt. Defense counsel was attempting to show that the officer did not have an unobstructed view of the transaction. Unlike Moore, defense counsel's questions can be viewed as "sound trial strategy" because they can be reasonably construed as part of a failed impeachment attempt. Pecoraro, 175 Ill. 2d at 319-20. Therefore, Defendant was not denied effective assistance of counsel and this case is distinguishable from Moore.

III. Conclusion

For the foregoing reasons, we cannot say that the totality of the circumstantial evidence offered by the State,

notwithstanding the evidence elicited by defense counsel on cross-examination, was insufficient to support a conviction for delivery of a controlled substance. Further, we cannot say that defense counsel's cross-examination of Officer Bouch was deficient because it can be reasonably construed as a failed impeachment attempt. But most importantly, Defendant was not prejudiced because the State proved their case without the evidence elicited by defense counsel. As such, Defendant was not denied effective assistance of counsel and we therefore affirm his conviction.

Affirmed.