2012 IL App (1st) 102090-U

THIRD DIVISION
November 30, 2012

No. 1-10-2090

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee	)	Cook County
	)	
v.	)	No. 09 CR 98
	)	
JUAN GARCIA	)	Honorable
	)	Lawrence Fox,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE SALONE delivered the judgment of the court.
Justice Neville concurred in the judgment.
Justice Sterba, dissenting.

O R D E R

Held: Defendant appeals his convictions by a jury for first degree murder and aggravated discharge of a fireman. Defendant was denied a fair trial due to the ineffective assistance of his counsel in failing to object to the admission of other crimes evidence. Defendant's convictions are reversed and this cause is remanded for a new trial.

¶ 1 Defendant, Juan Garcia, was convicted of the first degree murder of Raul Velez and the aggravated discharge of a firearm for firing at Emmanual Serpa. Defendant was sentenced to 55

years' incarceration in the Illinois Department of Corrections (IDOC) for the murder and a consecutive 10 year term for the aggravated discharge conviction. Defendant now appeals his convictions, contending, *inter alia*, that his trial counsel was ineffective for permitting the State to introduce irrelevant and prejudicial other crimes evidence. For the reasons that follow, we agree with defendant. Therefore, we reverse the judgment of the circuit court and remand this cause for a new trial.

¶ 2 BACKGROUND

¶ 3 In light of our disposition of this case, we relate only those facts which are relevant to our ruling.

¶ 4 On November 26, 2008, at 12:30 p.m., Emmanuel Serpa and his mother's cousin, Raul Velez, left the family home on the 1700 block of North Karlov to go to the store. They decided to use Velez' car, which was parked on Karlov, a few doors down. As they approached that car, Serpa noticed a white box-type truck drive by, and saw that the passenger was a dark-skinned Hispanic male with eyes that looked "kind of Chinese." Serpa then heard Velez say that someone had a gun, and saw an unknown, heavyset man wearing a red jacket standing in the middle of the street pointing a gun at him. Serpa ducked behind some parked cars, and heard multiple shots fired. He poked his head up from behind the cars to see where the shooter was, and also saw the shooter through the car windows. After the shooting stopped, Serpa saw Velez wounded, lying face down in the grass. Later, Velez died from the gunshot wounds.

¶ 5 After emergency personnel arrived at the scene, Serpa described the shooter and the truck to police. Approximately 30 minutes later, the officers took Serpa to an area near Karlov and

Potomac where he identified the white box truck. While there, Officer Ustaszewski ran a search on his computer, located a photo of defendant, and showed it to Serpa. Serpa identified defendant as the shooter. After being taken to the police station, Serpa identified defendant from a photographic array, and later in a live lineup. On cross-examination, Serpa admitted that when he first spoke to police, he told them the shooter was wearing a hooded red sweat shirt, rather than a red jacket. In addition, he also told the police that the shooter had a shaved head.

¶ 6 Emmanual Serpa's mother, Blanca Serpa, testified that shortly after her son and Velez left her house, she heard gunshots. She ran to her front door and saw her son hiding behind parked cars and an unknown man standing in the street firing a gun towards him. She testified that the shooter was wearing a red jacket that was open with a black shirt underneath. On cross-examination, she admitted that at the time of the incident, she told officers that the shooter was wearing a white jacket over a red, zip-up hooded sweatshirt. She also did not mention that the shooter was wearing a black shirt.

¶ 7 Blanca Serpa further testified that when the shots ended, she saw the shooter get into the passenger side of a white box truck with writing on the back and grafitti on the side, and that the truck drove southbound on Karlov. When police arrived, she described the getaway truck and shooter to them, stating he was a young, short, heavyset "Chinese looking" man with "different" eyes. Police then took her to the intersection of Karlov and Potomac, where she indentified the getaway truck. She was then taken to the police station where she was shown a photo array and identified defendant as the shooter. Later, she also identified defendant in a live lineup.

¶ 8 David Olavarria also testified on behalf of the State. He was doing construction work in

a home near that of the Serpa family when he heard gunshots. He ran to the front window of the house and saw a man standing in the street near the passenger door of a white box truck shooting at another man. He described the shooter as a young, husky Hispanic male with short hair, wearing a red jacket. After the shooting ended, the shooter got back into the white truck and drove away. Olavarria told police that although he saw the shooting, he did not see the shooter's face and could not identify him. He was taken by police to Potomac and Karlov, where he identified the truck because of the writing on its side.

¶ 9 Elida Herrera testified that she was a neighbor of the Serpa family. She was working on her computer when she heard several gunshots outside the front of her house. When she looked out the window, she saw Emmanuel Serpa ducking behind a car, and a Hispanic, "chunky" man with short hair wearing a red coat or jacket standing in the street next to a white truck and shooting. When the shooting ended, the man got into the truck, which had writing on the side, and drove away. Herrera could not identify the shooter's face and could not pick him out of a live lineup which took place later that day. On cross-examination, Herrera stated that defendant had lighter skin than what she had initially described to police.

¶ 10 The State also called Norman Lata, office manager for S&S Panel Sales Corporation in Bensenville. Lata testified that on November 18, 2008, one of its fleet of delivery trucks, a white Ford cube van, was stolen. Lata stated that he had driven that vehicle before it was stolen, and that when he drove it, he would smoke cigarettes and place the butts in the vehicle's ashtray. Lata was shown photographs of the white truck recovered at Karlov and Potomac and identified it as the truck which had previously been stolen.

¶ 11 Two Chicago Police officers then testified. Officer Ustazewski testified that he was tasked with searching for the white box truck which the shooter used to make his getaway. After a helicopter spotted a similar vehicle at Karlov and Potomac, the officer traveled to that location. Officer Kruger then testified that once the truck was located, he transported Emmanuel Serpa to its location to identify it. At approximately 2:20 p.m. that afternoon, Kruger went to a residence located at 4152 W. Potomac and arrested defendant. At that time, he also recovered and inventoried a red jacket which he found at that address hanging on a hook near the back porch. On cross-examination, Kruger testified that defendant was not the only person in the home at the time he was arrested, and that defendant was not near the area where the jacket was recovered.

¶ 12 Officer Kruger also testified regarding two videos from a police surveillance "pod" camera located at 1232 North Karlov. The videos were taken on the day of the shooting, starting at 12:31 p.m. As the camera panned, it showed a white box truck traveling southbound on Karlov before parking near Potmoac and Karlov. The second video showed the truck parked at that location at 12:57 p.m.

¶ 13 The State also called Illinois Police forensic scientist Scott Rochowicz. After the parties stipulated that he was an expert forensic scientist specializing in gunshot residue, Rochowicz testified that based upon his testing of the red jacket recovered from defendant's residence, "the areas that I sampled may not have contacted either an object or a person who had come in contact with primer gunshot residue." Rochowicz was thus unable to form a conclusion as to whether the jacket had been in the vicinity of a fired weapon.

¶ 14 The parties then stipulated that no latent fingerprints were discovered inside the white

truck or on the cartridge casings recovered from the scene of the shooting. In addition, the parties also stipulated that the steering wheel of the truck had no human DNA, and that cigarette butts found in the truck's ashtray contained Norman Lata's DNA. The State then rested.

¶ 15 The defense then presented its case, which consisted of the testimony of three alibi witnesses. Reyna Garcia, defendant's sister, testified that she arrived at the Garcia family home around 1:15 p.m. to pick up defendant because he was going to babysit for her at her home in Melrose Park. She stated that defendant lived in the basement of the home, and that when she arrived, defendant was asleep in his room, wearing only boxer shorts. She stated that she woke him up and then left him alone to get dressed. Shortly thereafter, police arrived and arrested defendant.

¶ 16 Isidro Escobar, defendant's cousin, testified that he lived on the first floor of the home. He stated that on the date of the shooting, he was in the basement using the computer while defendant was asleep on the bed. Escobar testified that defendant was still asleep on the bed at 1:40 p.m. when he left to pick up his little sister from school.

¶ 17 Sara Escobar, defendant's aunt, testified that she also lived on the first floor of the home. She stated that the red jacket recovered by police from the home was hers, and it was given to her as a recent birthday gift by her family. She testified that on the date of the shooting, she wore that jacket when she left home around 8:00 a.m. until she returned at around 1:00 p.m. When she came home, she hung it on the hook, where it remained until police took it. She testified that defendant did not wear her clothes and that he did not wear her jacket that day. On cross-examination, she admitted that she did not know what defendant had done during the morning

while she was out of the house. The defense then rested.

¶ 18 The jury returned a verdict of guilty on the charges of first degree murder and aggravated discharge of a firearm. Defense counsel's motion for a new trial was denied. Following arguments in aggravation and mitigation, the court sentenced defendant to 55 years for murder, and a consecutive sentence of 10 years for the aggravated discharge conviction. Defendant's motion to reconsider sentence was denied, and this appeal followed.

¶ 19 We will discuss additional pertinent facts as needed during our analysis.

¶ 20 DISCUSSION

¶ 21 Defendant challenges his convictions on four grounds: (1) defendant was denied the right to effective assistance of counsel where his trial attorney erroneously allowed admission of irrelevant and prejudicial other crimes evidence that the white getaway truck had been stolen; (2) the State failed to present a proper foundation for the admission of the police surveillance "pod" video; (3) defendant was denied the effective assistance of counsel where his attorney failed to investigate and adequately challenge the testimony of the State's gunshot residue expert; and (4) defendant was denied the right to a fair trial before an impartial, unbiased jury. Because we find reversible error on the first argument raised by defendant, we limit our discussion to that specific issue and need not address the remaining challenges to his conviction.

¶ 22 Defendant contends he was denied the right to a fair trial when his counsel failed to challenge the admission of irrelevant, other crimes evidence. Defendant observes that although he was on trial for a shooting, his counsel allowed the State to repeatedly introduce evidence that the getaway truck used by the shooter had been stolen a week earlier, leaving the jury with the

inference that it was defendant who stole the truck in preparation for the shooting. Defendant contends that this other crimes evidence was irrelevant to the charged offenses, and was unfairly prejudicial because it allowed the jury to infer that defendant had committed this crime despite the fact that there was nothing connecting defendant to the theft.

¶ 23 The State counters that the record demonstrates that defense counsel's choice not to object to the introduction of this evidence was a tactical decision which was the product of a sound trial strategy. Further, the State contends that defendant was not prejudiced by his counsel's decision to refrain from objecting to the evidence. We disagree with the State's position.

¶ 24 Criminal defendants have a constitutionally protected due process right to the effective assistance of counsel. U.S. Const. Amends VI, XIV; Ill. Const. 1970, art. 1, §8. To establish that counsel was ineffective, a defendant must satisfy both prongs of the two-part test developed in *Strickland v. Washington*, 466 U.S. 668, 694 (1984). A defendant must demonstrate: (1) that counsel's representation was deficient in that it fell below an objective standard of reasonableness; and (2) that this deficiency resulted in prejudice to the extent there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id*., *People v. Albanese*, 104 Ill. 2d 504, 525 (1984).

¶ 25 We thus begin our analysis by determining whether counsel's agreement to allow the State to introduce evidence of other crimes - specifically, that the white truck had been stolen a week prior to the shootings - constituted deficient performance which fell below an objective standard of reasonableness. A defendant is entitled to have his guilt or innocence determined

solely with reference to the crimes with which he is charged. *People v. Donoho*, 204 Ill. 2d 159, 170 (2009). Therefore, generally, evidence of offenses other than those for which a defendant is being tried is inadmissible. *People v. Cruz*, 162 Ill. 2d 314, 348 (1994). The exclusion of such evidence is animated by the principle that this type of evidence is objectionable because it has "too much" probative value (*People v. Manning*, 182 Ill. 2d 193, 213 (1998)), in that "'[t]he law distrusts the inference that because a man has committed other crimes he is more likely to have committed the current crime. And so, as a matter of policy, where the testimony has no value beyond that inference, it is excluded.'" *Cruz*, 162 Ill. 2d at 348, quoting *People v. Lehman*, 5 Ill. 2d 337, 342 (1955).

¶ 26 In other words, "courts generally prohibit the admission of this evidence to protect against the jury convicting a defendant because he or she is a bad person deserving punishment." *Donoho*, 204 Ill. 2d at 170. Accordingly, evidence of other crimes can only be admitted if it is relevant to establish a material fact other than propensity to commit crime, such as intent, *modus operandi*, identity, motive or absence of mistake. *Id*. "'However, even where the State has good reason to introduce other crimes evidence *** an inference of criminal propensity will necessarily accompany its use and will require the trial judge to weigh the probative value of such evidence against its potential for producing an improper prejudicial effect.'" *People v. Lenley*, 345 Ill. App. 3d 399, 405-06 (2003), quoting *People v. Hale*, 326 Ill. App. 3d 455, 462 (2001).

¶ 27 At the start of defendant's trial, the State informed the jury about the challenged other crimes evidence. During his opening statement, the prosecutor referred to the getaway truck as a

"stolen moving truck" without objection from defense counsel. Upon conclusion of opening statements and prior to the testimony of the State's first witness, the judge called counsel for both sides into his chambers. The judge asked defense counsel why he did not object to the State's reference that the truck was stolen. Counsel replied that he had previously discussed the matter with the prosecutor and told him that he had no objection to the State's introduction of evidence regarding the theft of the truck. The court then inquired of the prosecutor as to when the State would present this other crimes evidence in its case-in-chief, so that the jury could be admonished at that time regarding the limited use of this evidence. The following colloquy then occurred:

> "DEFENSE COUNSEL: Here is my view. Okay. I don't want you to admonish them at the time that the [witness who will testify regarding the theft of the truck] hits the stand. We can do the instruction [later].
>
> THE COURT: We have to do an instruction.
>
> DEFENSE COUNSEL: My point being is that there is nothing taken from the truck that connects the defendant to being in that truck.
>
> THE COURT: And your position is that he wasn't in the truck. *** Clearly, that could be a tactical decision on your part.
>
> DEFENSE COUNSEL: It is a tactical decision. Why would I object to the fact that the truck was stolen when I am saying

that the defendant was in his house and I have an alibi. I am not going to do it.

THE COURT: Fine. We have made the record. You will prepare an instruction. I won't admonish the jury unless you tell me otherwise.

DEFENSE COUNSEL: I don't want you to."

¶ 28 Thereafter, during its case-in-chief, the State presented to the jury evidence that the truck was stolen through the testimony of Norman Lata. Lata's testimony referred solely to the circumstances of the truck's theft and its recovery by the police. Upon conclusion of Lata's testimony, the court held a sidebar during which the following colloquy occurred:

"THE COURT: Okay. Again, at this point, evidence of another crime has been offered against the defendant. And just for the record, counsel, I am perfectly willing to admonish the jury and give them the other crimes instructions that I am supposed to give at this point if you want me to give it.

DEFENSE COUNSEL: I don't.

THE COURT: Okay. Fine. Just so the record is clear and now [would] be the time that I would give the jury that limiting instruction. And if you don't want me to give it, I won't, but we will give an instruction at the end of the trial."

¶ 29 At the conclusion of the trial, the court held a jury instruction conference during which

the State proposed Illinois Pattern Jury Instruction Criminal (2nd) 3.14 (IPI), which is the standard instruction given when evidence of other crimes has been admitted. The State's version of this instruction stated that the evidence of the theft of the truck was admitted as part of the circumstances that led to defendant's arrest. Defense counsel objected to the form of the instruction, and made the unusual request that the name of the specific offense for which the other crimes evidence was admitted be included in the instruction. The following exchange then occurred:

> "DEFENSE COUNSEL: Judge, I would ***request that the State place the offense that was proof of other crimes [in the instruction] ----
>
> THE COURT: That is not how the instruction reads.
>
> DEFENSE COUNSEL: [The way it is written] is basically open-ended, and I would object to it.
>
> THE COURT: But this is the standard IPI instruction on other crimes. This is the way it is suppose[d] to be done, and I think I have to give it.
>
> DEFENSE COUNSEL: I know you have to give it, but do you have to give it in this form?
>
> THE COURT: I think so. That is the standard form. It doesn't say you are suppose[d] to specify what offense it was.
>
> * * *

DEFENSE COUNSEL: Over my objection, please.

THE COURT: Fine. I think I have to give it, so I will give it over your objection. I have never seen a case where the defense can object to me giving it.

DEFENSE COUNSEL: I would like to object to it.

THE COURT: I wish there was a case that you could present that says if you don't want it given, I wouldn't have to give it. I think we are inviting error if we don't give it.

DEFENSE COUNSEL: *** I would like it given in a different form.

THE COURT: Well, you can explain it to the jury in argument. That will be given over defendant's objection ***."

¶ 30 Thereafter, the jury was provided with the following instruction regarding its consideration of the evidence of the truck's theft:

"Evidence has been received that the defendant has been involved in an offense other than that charged in the indictment. This evidence has been received on the issue of the circumstances leading up to the defendant's arrest and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in that offense, and, if so, what weight should be given to this evidence on the issue of the circumstances

leading up to the defendant's arrest."

¶ 31 We agree with defendant that counsel's performance was deficient when he acquiesced in the admission of evidence that the truck used as the getaway vehicle for this shooting was stolen. The failure of counsel to object to inadmissible evidence is unreasonable where there is no strategic purpose for doing so. Under such circumstances, it represents a breakdown in the adversary system. See *People v. Jura*, 352 Ill. App. 3d 1080, 1093-94 (2004)(counsel's acquiescence in the use of inadmissible hearsay throughout trial was ineffective).

¶ 32 Here, the fact that the truck was stolen was irrelevant to the issues presented in this murder trial. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid 401 (eff. Jan. 1, 2011). Although the truck itself is relevant because it was used as the getaway vehicle from the shooting and it was later discovered near defendant's home, the additional fact that the truck was stolen is not relevant. The evidence of the truck's theft was presented to the jury through the testimony of Norman Lata. Lata's testimony was unrelated to the murder charges; instead, it related entirely to the status of the truck prior to it being stolen, and then after it was returned. Because the fact that the truck was stolen does not make any material issue concerning the murder charges more or less likely, it should not have been presented to the jury. See *People v. Spiezio*, 105 Ill. App. 3d 769, 772 (1982)(reversible error to admit other crimes evidence that defendants were arrested for unrelated car theft where this was unneccessary to explain defendant's presence at the scene of the offense).

¶ 33 Although the State agrees with defendant that, generally, the admission of other crimes

evidence is prohibited, it asserts that the evidence of the truck's theft was not offered to demonstrate defendant's propensity to commit crime. Rather, the State asserts, the evidence was relevant and admissible because it helped to explain the steps in the investigation of the crime and also connected defendant to the crime for which he was being tried. The State further argues that, in addition, this evidence explained why another individual's DNA that was not defendant's was found on cigarettes inside the getaway truck, and why no other forensic evidence was found in the truck that would link defendant to it. We reject the State's contentions.

¶ 34 The fact that the truck was stolen was unrelated to defendant's arrest and the circumstances of the investigation were not in issue. The police identified the truck because it fit the description of the getaway vehicle, not because it was stolen. In addition, defendant's arrest was not connected to the truck. Instead, he was arrested after a database search yielded his photograph, which was thereafter identified by Emmanuel Serpa. Although the State maintains that the evidence of the truck's theft "explain[ed] the steps in the investigation of the crime," it proffers nothing in support of this conclusory statement. Our Supreme Court has held that "evidence of other crimes is not admissible to show how the investigation unfolded unless such evidence is also relevant to specifically connect the defendant with the crimes for which he is being tried." *People v. Lewis*, 165 Ill. 2d 305, 345 (1995).

¶ 35 The State further contends that evidence of the truck's theft was relevant and admissible because it provided the jury with an explanation of why another person's DNA was found in the truck. The State, however, could have explained the presence of Lata's DNA in the truck without mentioning its theft by having Lata testify that the last time he drove the truck, he

smoked the cigarettes which were found in the ashtray. "Assuaging possible jury curiosity does not justify the risk of admitting potentially prejudicial other crimes evidence." *People v. McCray*, 273 Ill. App.3d 396, 401 (1995).

¶ 36 The evidence that the truck was stolen was also inadmissible because the State did not connect defendant to the theft of the truck in any way. Unless there is a relevant purpose for the evidence which connects the defendant to the offense he is being tried for, there is no exception allowing the admission of other crimes evidence to merely provide a narrative of events leading up to defendant's arrest. *McCray*, 273 Ill. App. 3d at 401. Where the relevance of evidence depends upon unproven assumptions or speculation, it is inadmissible. *People v. Salazar*, 126 Ill. 2d 424, 455 (1988). As stated, the evidence of the theft of the truck was introduced through Lata's testimony, which did not establish who was responsible for the crime. In addition, no evidence pointed to defendant as committing the theft and he was not charged with the crime. The State presented no evidence that defendant was in Bensenville or had been seen driving this truck, and it stipulated that no fingerprints were found in the truck and that no human DNA was found on the steering wheel. Indeed, the State candidly concedes this point, stating that "no witness or prosecutor ever linked defendant to the theft of the truck." Yet, despite any evidence actually connecting defendant to the theft, the State was able to use Lata's testimony to imply that defendant was somehow responsible for the theft of the truck and committed that crime in anticipation of the subsequent shooting. Although the State never alleged that defendant stole the truck, this inference permeated the trial. Where the State failed to connect defendant to the theft of the truck, the evidence of other crimes was improper. *Lewis*, 165 Ill. 2d at 346.

¶ 37 Although defense counsel explicitly stated that his acquiescence in the State's introduction of this other crimes evidence was a tactical decision, such a decision must also be reasonable when viewed within the context of the specific case. We hold it was not.

¶ 38 We agree with the State that a defendant is entitled to competent, not perfect, representation. *People v. Stewart*, 104 Ill. 2d 463, 492 (1984). We also agree that there is a strong presumption that counsel's "conduct falls within the wide range of reasonable professional assistance," and that "the challenged action or inaction of counsel was the product of sound trial strategy and not incompetence." *Strickland*, 466 U.S. at 689-90, *People v. King*, 316 Ill. App. 3d 901, 913 (2000). Counsel's assistance is evaluated in its totality and in light of all the circumstances surrounding the case (*Strickland*, 466 U.S. at 689-90), and during that evaluation, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id*., at 690.

¶ 39 We hold that under the circumstances presented, counsel's performance was deficient, in that it fell below an objective standard of reasonableness. Counsel's ready acquiescence to the introduction of irrelevant other crimes evidence can hardly be characterized as a sound trial strategy. Counsel's apparent strategy was that objecting to the evidence of the truck's theft would unduly draw the jury's attention to that crime and would undermine his alibi defense. This strategy is unreasonable, however, because had counsel raised an objection to the State's introduction of this evidence, it is likely that the jury would never have heard this evidence at all. The record reveals that the trial judge repeatedly stopped the proceedings and expressed concern regarding counsel's failure to challenge the State's introduction of this evidence. As discussed

above, the evidence was irrelevant and inadmissible, and, had counsel made this argument, it is likely he would have prevailed. Because he did not, the jury was repeatedly reminded of the theft of the truck and was left to draw the unsupported inference that defendant was responsible for it. In addition, counsel compounded the error by refusing the trial court's repeated offers to provide the jury with a limiting instruction regarding this evidence until the end of the trial. Counsel apparently believed that if he simply ignored evidence of the theft of the truck, the jury might do so, as well. We find such a belief to be unreasonable. A reasonable defense strategy would strive to prevent the jury from using the other crimes evidence as proof of a defendant's propensity to commit crimes when deciding the defendant's fate, and would not agree to allow the State to maximize the quantum of evidence against his client. We hold, therefore, that counsel's failure to challenge this irrelevant and prejudicial other crimes evidence reflects an unsound strategy and amounts to objectively deficient performance.

¶ 40 After having determined that defendant has established the first prong of the two-part *Strickland* test, we now turn to whether defendant has also established that counsel's deficient performance resulted in prejudice, to the extent that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. With regard to the second prong of the *Strickland* analysis, we look not to whether a different verdict would have been rendered, but, rather, we consider whether the defendant received a fair trial, meaning a trial resulting in a verdict worthy of confidence. *Strickland*, 466 U.S. at 687; *People v. Perez*, 148 Ill. 2d 168, 194 (1992). A "reasonable probability that the result would have been different" is a "probability sufficient to undermine

confidence in the outcome, or, put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill.2d 194, 220 (2004).

¶ 41 We conclude that defense counsel's unreasonable performance prejudiced defendant. As stated, this other crimes evidence should not have been presented to the jury at all, as it was irrelevant with no admissible purpose. The inference that defendant was responsible for the theft of the truck unfairly allowed the jury to connect him with the truck prior to the shooting. Notably, this inference worked to damage the credibility of defendant's alibi defense before it was ever presented, because if the jury believed defendant stole the truck prior to the shooting in anticipation of that event, it would be absurd to believe he was not the person getting in the truck when the shooting was over. Without the evidence that the truck was stolen a week earlier, however, defendant's connection to the truck would be far more limited, supporting the credibility of his alibi.

¶ 42 In addition, because of counsel's agreement to allow this evidence to be introduced, it was appropriate for the court to give IPI Criminal (2^{nd}) 3.14, the standard jury instruction when other crimes evidence is introduced. *People v. Vincent*, 92 Ill. App. 3d 446, 458 (1980). However, the instruction itself was prejudicial because it further linked defendant to the theft of the truck by informing the jury that "evidence has been received that the defendant has been involved in an offense other than that charged in the indictment." Had the jury been wondering how the theft of the truck was related to the shooting, the jury instruction had the practical effect of informing the jury that defendant was responsible for the theft of the truck.

¶ 43 In addition to these two important points, we also note that not all of the eyewitnesses to the shooting were able to identify defendant as the shooter. In addition, with respect to the two who did, their descriptions of the shooter changed between the time they first spoke with police and the time they testified at trial. In court, Blanca Serpa testified that the shooter was wearing a red jacket that was open with a black shirt underneath. On cross-examination, however, she acknowledged that at the time of the incident, she told officers that the shooter was wearing a white jacket over a red, zip-up hooded sweatshirt. She also did not mention that the shooter was wearing a black shirt.

¶ 44 Similarly, Emmanuel Serpa testified in court that the shooter was wearing a red jacket. However, on cross-examination, he admitted that when he first spoke to police, he told them the shooter was wearing a hooded red sweat shirt, rather than a red jacket. In addition, he also told the police that the shooter had a shaved head.

¶ 45 The State placed great emphasis on the recovery of the red jacket from defendant's home in an effort to establish him as the shooter. However, the State's witness, Illinois Police forensic scientist Scott Rochowicz, was unable to form a conclusion as to whether the jacket had been in the vicinity of a fired weapon, stating "the areas that I sampled may not have contacted either an object or a person who had come in contact with primer gunshot residue."

¶ 46 In fact, no evidence linked defendant to the shooting. The parties stipulated that no latent fingerprints were discovered inside the white truck or on the cartridge casings recovered from the scene of the shooting. In addition, the parties also stipulated that defendant's DNA was not found inside the white truck.

¶ 47 Contrary to the State's assertion that defense counsel's failure to object to this evidence was not prejudicial, because it had "minimal bearing on the outcome of the trial," we hold that the unsupported inference that defendant had a propensity to commit crime, and, that, specifically, he had committed the theft of the truck in anticipation of the shooting, permeated the trial and called the fairness of those proceedings into question. We thus determine that, absent counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. Defendant, therefore, has also satisfied the second prong of the *Strickland* test.

¶ 48 Because defendant has shown that his trial counsel's performance was deficient and that this deficiency resulted in prejudice to defendant, we reverse the judgment of the trial court, and remand this cause to that court for a new trial.

¶ 49 CONCLUSION

¶ 50 For the foregoing reasons, the judgment of the circuit court is reversed. This cause is remanded for a new trial.

¶ 51 Reversed and remanded.

¶ 52 JUSTICE STERBA, dissenting:

¶ 53 I cannot join in today's decision because I do not agree with the majority that trial counsel's failure to object to the State's introduction of other crimes evidence satisfied both prongs of *Strickland* since counsel's alleged deficiency did not result in prejudice to defendant. Accordingly, I would address defendant's remaining claims of error on appeal.

¶ 54 The majority engages in an analysis under both prongs of *Strickland* and concludes that

defendant satisfied both prongs. Even assuming *arguendo* that the first prong is met, defendant's claim of ineffective assistance of counsel fails the second prong of *Strickland*. Because the State presented evidence of consistent eyewitness identification testimony of defendant as the shooter and evidence that the shooter's getaway vehicle was located in close proximity to defendant's home, any alleged error by trial counsel was not prejudicial under the second prong of *Strickland*. Specifically, the State presented the testimony of four eyewitnesses who described the shooter with sufficient detail to identify defendant as the shooter. Blanca Serpa, Olavarria and Herrera provided a consistent description of the shooter as a young, short, heavyset Hispanic male with short hair, who wore a red upper garment. Thus, the witnesses' testimony was corroborated regarding the shooter's youth, build, ethnicity, gender and hairstyle, which were consistent with defendant's characteristics. The witnesses' testimony was also consistent regarding the color of an upper garment that the shooter wore. When the State showed these witnesses a photograph depicting a red garment, all of the witnesses affirmatively identified that red color as the color of the garment that the shooter wore.

¶ 55 Especially significant were Serpa's and Blanca's descriptions of the shooter as a dark-skinned Hispanic male with the particularly distinguishing feature of having "Chinese eyes" or being "Chinese looking," which again is distinctively descriptive of defendant. These same two individuals not only saw the shooter's face when the shooting occurred, but also independently identified defendant in a photo array, a physical line-up and made an unequivocal in-court identification of defendant as the shooter. Although Serpa's and Blanca's description of what the shooter wore differed between their statements to the police in the immediate aftermath of the

shooting and what they testified to during trial, the discrepancy is not significant considering their testimony was consistent regarding the color of an upper garment the shooter wore and both witnesses saw the shooter's face in the daylight on the day of the shooting. Moreover, Serpa explained that he was in the line of fire and he did not know the exact type of material that the shooter was wearing at the precise time shot were being fired. Blanca also clearly explained that she saw the shooter wearing a garment that had a hood on it, regardless of whether she characterized it as a hoodie or a jacket. In any event, the difference between the witnesses' testimony and their initial statements to the police are inconsequential considering the other details and identification of the shooter that these witnesses provided to the police and during their testimony. Importantly, the witnesses' testimony unequivocally and consistently identified defendant as the shooter.

¶ 56 The evidence also establishes that the witnesses consistently identified the shooter's getaway vehicle, which was located in close proximity to defendant's home. All four witnesses described the getaway vehicle as a truck. Blanca, Olavarria and Herrara described the truck as having lettering on it. Olavarria and Serpa described the truck as white and Blanca and Serpa described the truck as "box like." Serpa, Blanca and Olavarria all identified the getaway truck near the intersection of Potomac and Karlov on the day of the shooting. Also, all four witnesses recognized the truck that the shooter got into to flee the scene from a photograph shown to them on the stand.

¶ 57 Collectively, this evidence establishes that the result of defendant's trial was not unreliable or fundamentally unfair regardless of trial counsel's failure to object to the State's

introduction of the getaway vehicle as being stolen. In other words, even assuming *arguendo* that trial counsel's representation fell below an objective standard of reasonableness, this did not result in prejudice to defendant for purposes of *Strickland*. There is no reasonable probability that, but for counsel's arguably unprofessional errors, the result of the proceedings would have been different. Accordingly, I would hold that defendant failed to satisfy the second prong of *Strickland* and his ineffective assistance of counsel claim must fail. I therefore respectfully dissent.