2012 IL App (1st) 102101-U

SIXTH DIVISION
June 22, 2012

No. 1-10-2101

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 07 CR 25142
	)	
MICHAEL PARISH,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice R.E. Gordon and Justice Garcia concurred in the judgment.

O R D E R

¶ 1 ***Held*:** Defendant's conviction for robbery is affirmed over defendant's contention that his trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of theft. Defendant's mittimus is amended to reflect the correct number of days he spent in presentence custody.

¶ 2 Following a jury trial defendant Michael Parish was found guilty of robbery and sentenced to 25 years' imprisonment. On appeal, defendant contends that: (1) his trial counsel

was ineffective for failing to request a jury instruction on the lesser-included offense of theft; (2) the trial court erred in denying his motion *in limine* seeking to bar the State from introducing his prior attempt to commit aggravated robbery conviction for purposes of impeachment; and (3) his mittimus must be amended to reflect the correct number of days he spent in pre-sentence custody. We affirm and correct defendant's mittimus.

¶ 3 Defendant was arrested on November 11, 2007, in connection with the robbery of Rodney Lipscomb. He was charged with one count each of armed robbery, unlawful use of a weapon by a felon and aggravated restraint. The State nolle prosequied the charges of unlawful use of a weapon by a felon and aggravated unlawful restraint.

¶ 4 Before trial, defense counsel filed a motion *in limine,* seeking to bar the State from introducing into evidence for purposes of impeachment defendant's August 2000 conviction for attempt (aggravated robbery). At the hearing on the motion, defense counsel noted that defendant had four other drug-related offenses that were more recent than his attempt (aggravated robbery) conviction and that the State could impeach him with those four convictions. Counsel argued that allowing the State to inform the jury of defendant's attempt (aggravated robbery) conviction would be unfairly prejudicial and would raise the inference that defendant was more likely than not involved in the charged offense. The trial court noted that defendant's attempt (aggravated robbery) conviction was less than 10 years old and that he had been sentenced to 4 years' imprisonment for that offense. The court then noted that it had "weighed the probative versus [the] prejudicial value" of admitting the conviction into evidence and would allow the State to introduce it should defendant choose to testify. The court further noted that it would

give a limiting instruction to the jurors at the close of the State's case.

¶ 5 Despite the court's ruling, counsel insisted that defendant could be impeached with four other convictions and that allowing the State to also impeach him with his attempt (aggravated robbery) conviction would be unfairly prejudicial. The court reiterated that it had "weighed the probative versus the prejudicial value of the prior convictions" and that it would allow the State to introduce the conviction if defendant chose to testify.

¶ 6 At trial, Rodney Lipscomb testified that on November 2, 2007, he cashed in a lottery ticket purportedly worth $500 that he had purchased the previous day. Lipscomb then returned to his housing complex and went to an apartment building to buy $25 worth of cigarettes from an unidentified person. Lipscomb said that defendant was present at the time he purchased the cigarettes. Lipscomb also said that after purchasing the cigarettes, he had a total of $520 on his person. Lipscomb returned to his apartment and as he put his key in the door, he was touched from behind on the shoulder by a man who said, "give it up." The man placed what Lipscomb believed to be a gun to the back of his head. Lipscomb retrieved the money from his pocket and gave it to the man. When Lipscomb turned around, he recognized the man as defendant, who then fled the building and entered the one next door.

¶ 7 On cross-examination, Lipscomb testified that he may have told investigators that he temporarily pursued defendant as he fled the building. After defendant fled, Lipscomb "banged" on the door to his apartment and told his wife to call the police, who, to the best of his knowledge, did so immediately. Lipscomb acknowledged that he knew defendant from the neighborhood but denied that either he or his wife had ever purchased drugs from defendant.

¶ 8 Chicago police officer Jason Murdoch testified that nine days after the robbery, he was assigned to the case and conducted a phone interview with Lipscomb. Lipscomb told Murdoch that he was robbed by a person who went by the nickname of "Black Rob." Murdoch said he was familiar with "Black Rob" and knew his real name to be Michael Parish. Murdoch compiled a photo array and presented it to Lipscomb, who identified defendant as the offender. Murdoch then went to the housing complex in question, where he located and arrested defendant.

¶ 9 Detective David Sipchen testified that on November 12, 2007, he was present when Lipscomb identified defendant from a lineup as the offender. Detective Sipchen said that Lipscomb told him that Lipscomb chased defendant after the robbery.

¶ 10 The State introduced into evidence a letter sent by defendant to Lipscomb. In the letter, defendant denied holding a gun to Lipscomb's head or being in possession of one on the day in question. He also said that the amount of money involved was $370, not $520. Defendant asked Lipscomb to "tell the truth about what happened." Forensic analysis confirmed that the DNA profile of the saliva used to seal the envelope matched that of a sample obtained from defendant's cheek.

¶ 11 Defendant testified that he knew Lipscomb from the housing complex where they both lived. Defendant said that he had previously sold drugs to Lipscomb. Defendant acknowledged that he had been convicted of drug-related offenses on three previous occasions. Defendant said that he was released from jail for his most recent drug offense on the date of the robbery. Defendant said that he went to his aunt's house after leaving the jail. There, defendant took various over-the-counter pills and ground them to resemble crack cocaine. He packaged the

ground pills into small plastic baggies so that they could be sold. Defendant said he made about 50 such baggies.

¶ 12 Defendant then went to the housing complex and sold 37 of the baggies to Lipscomb for $370. Defendant said that after Lipscomb learned that the substance was not crack cocaine, he returned and demanded that defendant refund his money. When defendant refused, Lipscomb became angry and said "don't worry about it. I got you." Two weeks later, defendant was arrested. Defendant said that upon learning what he was arrested for, he wrote to Lipscomb in an effort to "resolve the whole issue." Defendant denied that he robbed Lipscomb or that he had a gun in his possession on the date in question.

¶ 13 In rebuttal, over defense counsel's objection, the trial court allowed the State to introduce into evidence certified copies of defendant's five prior felony convictions, including his conviction for attempt (aggravated robbery). The court instructed the jury to consider defendant's prior convictions only as they may affect his credibility and not as evidence of his guilt. After hearing closing arguments, the jury found defendant guilty of robbery. Defendant was then sentenced to 25 years' imprisonment.

¶ 14 On appeal, defendant first contends that he received ineffective assistance of trial counsel based on counsel's failure to request the trial court to instruct the jury on the lesser-included offense of theft. Defendant claims that in light of his admission to theft and the jury's acquittal on the charge of armed robbery, trial counsel's failure to request a theft instruction left the jury with no choice but to convict him of robbery. Defendant maintains that had counsel requested a theft instruction, there is a reasonable probability that he would have been convicted of theft

rather than robbery because the jury rejected Lipscomb's version of events that defendant was armed with a gun or used force.

¶ 15 In setting forth this argument, defendant asserts that an ineffective assistance claim is reviewed *de novo*. See *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008) (citing *People v. Berrier*, 362 Ill. App. 3d 1153, 1166-67 (2006). This is generally, but not always, true. We note that determining whether defense counsel provided ineffective assistance may involve a bifurcated standard of review. *People v. Stanley*, 397 Ill. App. 3d 598, 612 (2009). When a trial court addresses a claim of ineffectiveness of trial counsel, we review the trial court's ruling based on the manifest weight of the evidence. *People v. Walker*, 403 Ill. App. 3d 68, 79 (2010); *People v. Taylor*, 237 Ill. 2d 356, 373 (2010). However, where, as here, the trial court does not address the issue, the standard of review is, as defendant suggests, *de novo*. *Walker*, 403 Ill. App. 3d at 79.

¶ 16 To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To show prejudice, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Rucker*, 346 Ill. App. 3d 873, 885 (2001) (citing *Strickland*, 466 U.S. at 694). If either prong of the *Strickland* test is not satisfied, a defendant's ineffective assistance claim fails. *People v. Perry*, 224 Ill. 2d 312, 342 (2007).

¶ 17 We note that counsel's decision of whether to request an instruction on a lesser-included

offense is a matter of trial strategy that is generally not subject to attack on the grounds of ineffectiveness of counsel and has no bearing on counsel's competence. See *People v. Brocksmith*, 162 Ill. 2d 224, 232-33 (1994) (Freeman, J., concurring); *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006). " 'Matters of trial strategy are generally immune from claims of ineffective assistance of counsel.' " *Evan*s, 369 Ill. App. 3d at 383 (quoting, *People v. Smith*, 195 Ill. 2d 179, 188 (2000). This is so because it is virtually impossible for a reviewing court to assess with any certainty the potential effect of one trial tactic versus another. As explained by Justice Freeman in his concurrence in *Brocksmith*, the decision to tender a lesser-included offense instruction is a:

> "calculated risk on the part of defense counsel based on his or her assessment of the evidence and the perceived likelihood the jury will convict the defendant rather than acquit altogether. If the instruction is given to the jury that would have chosen to acquit on the greater offense, then counsel has effectively subjected defendant to the risk of conviction on an uncharged offense when the client might otherwise have avoided any conviction. Alternatively, if defense counsel fails to request the instruction defendant may be found guilty of the greater offense because the jury, in considering closely balanced evidence, believed it should find defendant guilty of a crime under the circumstances. It is these types of strategic calculations that a court will not second-guess." *Brocksmith*, 162 Ill. 2d at 232-33 (Freeman, J., concurring).

¶ 18 Here, we refuse to second-guess or find unreasonable counsel's decision not to request a

theft instruction. Counsel may have not submitted the instruction hoping the jury would accept an "all-or-nothing approach." Counsel may have decided that it was better strategy to not give the jury a third option, theft. See *Evans*, 369 Ill. App. 3d at 384. We cannot say this decision is unreasonable where, as here, without a theft instruction, defendant had the possibility of being acquitted of all charged offenses had the jury acquitted him of robbery. See *People v. McIntosh*, 305 Ill. App. 3d 462, 471 (1999). Conversely, as pointed out by Justice Freeman, had counsel requested a theft instruction, counsel would have subjected defendant to the risk of conviction on an uncharged offense when defendant might otherwise have avoided any conviction. *Brocksmith*, 162 Ill. 2d at 232-33 (Freeman, J., concurring). In that case, we can easily imagine that defendant would then be before us arguing ineffectiveness based on counsel's decision to request the instruction because, given the jury's verdict, he would have been acquitted were it not for counsel's request. It is worth noting that even in that case we would not find counsel's decision unreasonable because we will not second-guess "the exercise of judgment, discretion, trial tactics or strategy even where appellate counsel or the reviewing court might have handled the matter differently." *People v. Schmidt*, 168 Ill. App. 3d 873, 882 (1988). As a result, we do not find counsel ineffective on the basis of his failure to request a theft instruction.

¶ 19 Defendant next contends that the trial court erred in denying defense counsel's motion *in limine*, seeking to bar the State from introducing into evidence for purposes of impeachment defendant's prior conviction for attempt (aggravated robbery). Defendant claims that in weighing the probative versus the prejudicial value of the prior conviction, the trial court performed a balancing test that was "cursory at best." He maintains that given the similarity of the prior

conviction to the charged offense, the court erred in finding the conviction more probative than prejudicial.

¶ 20 A trial court's decision to admit evidence for the purpose of impeachment is reviewed for an abuse of discretion. *People v. Jennings*, 279 Ill. App. 3d 406, 410 (1996). In exercising its discretion, the trial court is required to conduct the balancing test set forth in *People v. Montgomery*, 47 Ill. 2d 510, 516-17 (1971).

¶ 21 "*Montgomery* is the seminal case in Illinois on the admissibility of earlier convictions for the impeachment of a testifying witness." *People v. Barner*, 374 Ill. App. 3d 963, 969 (2007). The *Montgomery* rule provides that evidence of a prior conviction is admissible for purposes of attacking a witness's credibility if the crime was punishable by death or imprisonment in excess of one year or the crime involved dishonesty or false statements. *Barner*, 374 Ill. App. 3d at 969. However, the evidence is inadmissible if the trial judge determines that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, or if more than 10 years has elapsed since the date of conviction or release of the witness from confinement, whichever is later. *Montgomery*, 47 Ill. 2d at 516.

¶ 22 Here, defendant does not dispute that his prior conviction for attempt (aggravated robbery) was punishable by more than one year imprisonment and that it was within 10 years of trial. Rather, he solely claims that the court did not weigh the probative versus the prejudicial value of the conviction. We find defendant's claim belied by the record.

¶ 23 The record shows that the court twice reiterated that it had "weighed the probative versus the prejudicial value of the prior convictions" and that it would allow the State to introduce the

conviction if defendant chose to testify. Although defendant's prior conviction and the charged offense were similar, it is well-settled that this alone does not amount to an abuse of discretion. See *People v. Evans*, 92 Ill. App. 3d 874, 878 (1981). Here, the trial court made its ruling after arguments of both parties and properly considered all the *Montgomery* factors, including that: defendant's prior conviction was within 10 years of trial; the conviction was punishable by more than 1 year of imprisonment; and the probative value of the conviction outweighed the potential prejudice to defendant. The court also instructed the jury to consider the prior conviction only as it related to defendant's credibility and not as evidence of his guilt. *Evans*, 92 Ill. App. 3d at 878. Given this record, we cannot say that the trial court abused its discretion in denying defendant's motion *in limine* to bar the State from introducing his prior attempt (aggravated robbery) conviction.

¶ 24 In reaching this conclusion, we are unpersuaded by defendant's reliance on *People v. McGee*, 286 Ill. App. 3d 786 (1997). In *McGee*, the trial court's decision to admit into evidence the defendant's prior aggravated battery conviction was reversed because the court based its decision solely on the fact that the prior conviction was dissimilar to the charged offense of murder. *McGee*, 286 Ill. App. 3d at 793. Here, as mentioned and unlike *McGee*, the court properly considered all the *Montgomer*y factors before ruling on defendant's motion.

¶ 25 Defendant finally contends, and the State agrees, that his mittimus must be amended to reflect the correct number of days he spent in presentence custody. A defendant is entitled to credit for time spent in custody before sentencing. See 730 ILCS 5/5-8-7(b) (West 2006). The record shows defendant was in custody from the date of his arrest on November 11, 2007, until

the day he was sentenced, June 7, 2010, for a total of 939 days. Defendant's mittimus, however, shows he was in custody for 927 days. Because the mittimus does not reflect the correct number of days defendant was in custody, it must be amended. See *People v. Miller*, 363 Ill. App. 3d 67, 80-81 (2005).

¶ 26 By our authority under Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615(b)(1) (eff. Dec. 1, 1984)), we order the clerk of the circuit court to amend defendant's mittimus to reflect 939 days of credit, the number of days defendant spent in presentence custody. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995). We affirm the judgment of the trial court in all other respects.

¶ 27 Affirmed.