THIRD DIVISION
August 22, 2012

No. 1-10-2734

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 4911
	)	
MAURICE PLEDGER,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.
Neville and Salone, JJ., concurred in the judgment.

O R D E R

¶ 1 Held: Where defendant did not receive ineffective assistance of counsel, we affirmed the judgment of the circuit court; affirmed.

¶ 2 Defendant Maurice Pledger appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2004). On appeal, defendant contends that his petition made a substantial showing that he was denied effective assistance of trial counsel based on counsel's failure to call defendant's mother as a witness. We affirm.

¶ 3 Following a jury trial, defendant was convicted of first degree murder. The conviction was based on evidence showing that on December 8, 1998, defendant stabbed Danielle Dubose

in the head with scissors and shot her five times in his Chicago apartment, which he shared with his girlfriend Arnetta Ross.

¶ 4 At trial, the evidence revealed two conflicting versions of what occurred on the night of the murder. The State relied on a statement defendant made to police, a summary of which was transcribed and signed by defendant. In the statement, defendant indicated that on the night of the murder he argued with Ross in their apartment and then left to go to a nearby gas station. Defendant encountered Dubose at the gas station, whom he knew through Ross, and she asked him if he wanted a "date," which he took to be an invitation to have sexual intercourse for money. Defendant and Dubose negotiated a price and went to defendant's apartment. When they entered the bathroom to have their "date," Ross knocked on the door. Defendant told Ross he was using the bathroom and would be right out, and then completed his "date" with Dubose. During the "date," defendant thought that Dubose was going through his pants pockets, so he looked into his pockets and saw that Dubose had taken $100.

¶ 5 Defendant confronted Dubose about the missing money, but she denied taking any from defendant and tried without success to leave the bathroom. Dubose grabbed a pair of scissors and the two struggled. When defendant got the scissors away from Dubose, he stabbed her in the forehead and threw the scissors into the sink. As Dubose left the bathroom, defendant pushed her toward the kitchen and went to his bedroom. Defendant asked Ross to get him his gun and she complied. Defendant confronted Dubose who again denied taking any money. Defendant then shot Dubose five times and removed the money from her brassiere. Shortly thereafter, defendant and Ross exited the apartment building and went to a motel. From that point, defendant and Ross lived out of a car and with the aid of friends.

¶ 6 The State also presented testimony from two tenants in the apartment building. Sherry Cunningham testified that she heard cries for help, cries that "they are going to kill me," and gunshots. Roberto Fleming testified that his apartment shares a wall with defendant's bathroom and that he heard defendant and Dubose talking. Sometime later, he heard fighting in the

bathroom, and, when defendant, Ross, and Dubose emerged from the bathroom, Fleming testified he heard Dubose state "[Ross], I didn't do nothing." Ross told Dubose to shut up and not say her name, and Dubose screamed for help. Defendant made a grunting sound, ordered Ross to get something, and then Fleming heard gunshots.

¶ 7 The State further presented testimony from Officer Ben Jones and forensic investigator Carl Brasic who were at the scene of the crime and saw Dubose's body. They both testified that they did not recall seeing clothing in the bathroom. Brasic further testified that Dubose had no clothing on the lower part of her body and was not wearing a brassiere. An autopsy of Dubose's body revealed that one of her gunshot wounds was a contact wound.

¶ 8 Defendant testified to a different version of events. He denied the accuracy of his incriminating statements to police, asserting that they were fabrications he made up in order to deflect blame from Ross, whom he was protecting because he believed she was carrying his child. Defendant's testimony was consistent with his statement to police until he and Dubose were in the bathroom. He specifically testified that the bathroom door was unlocked and Ross entered. Upon seeing defendant and Dubose in the bathroom, Ross pushed Dubose into the bathtub and the two started fighting. Ross reached onto the bathroom shelf, grabbed the scissors, and stabbed Dubose in the head. Defendant took the scissors and threw it into the sink. While Ross attempted to throw Dubose out of the apartment, Dubose was screaming for help and said, "[Ross], I didn't do nothing." Ross told Dubose to shut up and not say her name. At that point, Ross withdrew the gun from her pocket and shot Dubose five times. Following the shooting, defendant and Ross fled and Ross told defendant that she was pregnant with his child.

¶ 9 The jury found defendant guilty of first degree murder and the court sentenced him to 35 years' imprisonment. On direct appeal, this court amended defendant's mittimus to reflect the correct amount of time he served in presentence custody, and affirmed his conviction and sentence in all other respects. *People v. Pledger*, No. 1-01-1670 (2003) (unpublished order under Supreme Court Rule 23).

¶ 10 On February 4, 2004, defendant filed a *pro se* post-conviction petition alleging that he was denied effective assistance of trial counsel. As pertinent to this appeal, defendant alleged that counsel failed to talk to, or call as a witness, Mary Howard (defendant's mother). In support of his petition, defendant attached an affidavit from Howard. Howard averred that on May 27, 1999, Ross left a message on her answering machine, stating that she had been trying to contact defendant's attorney and that she knew defendant was innocent. Ross also stated in the message that she wanted to find out if she could "plead the 5th" if she was called to testify, which Howard understood to mean that she wanted to know a way to testify on defendant's behalf without implicating herself.

¶ 11 Howard further averred that Ross called her again and that they had a conversation. During the conversation, Ross stated that she was searching for a way to help defendant because she knew he was innocent, but was afraid that if she helped him she would be charged with the crime. Ross indicated that she did not want to testify because she knew there was more evidence against her than defendant. Howard told defendant's lawyer about the answering machine tape and the phone conversation, and indicated that she would be willing to testify about both. However, defendant's lawyer never asked her for a copy of the tape and failed to call her to testify.

¶ 12 On May 11, 2004, the trial court summarily dismissed defendant's petition after finding it frivolous and patently without merit. We vacated the trial court's order dismissing defendant's petition and remanded it for further proceedings under the Act because the trial court summarily dismissed the petition more than 90 days after it was filed. *People v. Pledger*, No. 1-04-1891 (2006) (unpublished order under Supreme Court Rule 23).

¶ 13 On remand, defendant's court-appointed counsel filed a certificate of compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984). Counsel indicated therein that he did not make any amendments to defendant's petition for post-conviction relief because defendant's *pro se* petition adequately set forth his claims. The State filed a motion to dismiss defendant's petition,

which was granted by the circuit court. In doing so, the circuit court found that counsel's decision not to call defendant's mother was trial strategy, Howard's statements about Ross' message may have been excluded as hearsay, and defendant failed to show prejudice from counsel's decisions.

¶ 14 In this appeal, defendant challenges the propriety of that dismissal, arguing that he made a substantial showing that he received ineffective assistance of trial counsel for counsel's failure to talk to or call his mother as a witness.

¶ 15 The dismissal of a post-conviction petition is warranted at the second stage of proceedings only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). We review the court's dismissal of a post-conviction petition without an evidentiary hearing *de novo*. *Coleman*, 183 Ill. 2d at 389.

¶ 16 To prevail on a claim of ineffective assistance of counsel at the second stage, defendant must make a substantial showing that counsel's representation fell below an objective standard of reasonableness and the defendant was prejudiced by counsel's substandard performance. *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005), citing *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 17 It is well established that the decision whether to call a witness to testify at trial is a matter of trial strategy (*People v. Enis*, 194 Ill. 2d 361, 378 (2000)), and the decisions that counsel makes regarding matters of trial strategy are "'virtually unchallengeable'" (*People v. McGee*, 373 Ill. App. 3d 824, 835 (2007), quoting *People v. Palmer*, 162 Ill. 2d 465, 476 (1994)). In fact, even mistakes in trial strategy or tactics will not, of themselves, establish that counsel was ineffective. *Palmer*, 162 Ill. 2d at 476. There is a strong presumption that counsel's conduct falls within the range of reasonable assistance. *McGee*, 373 Ill. App. 3d at 835.

¶ 18 In this case, counsel's decision not to call defendant's mother was a matter of sound trial strategy. Howard was not present at defendant's apartment when the offense occurred, and thus she did not witness the offense and had no direct knowledge of how the victim was killed.

Instead, Howard's affidavit indicates that she could only testify about statements that Ross allegedly made months after the offense. As the State argues in its brief, however, such testimony would have constituted inadmissible hearsay. See *People v. Morales*, 339 Ill. App. 3d 554, 565 (2003) (stating that hearsay affidavits are insufficient).

¶ 19 In so finding, we reject defendant's contention that Howard's statements in her affidavit were not hearsay. Defendant specifically maintains that Ross' statements to Howard would be admitted as an exception to the hearsay rule because Ross' declarations of her guilt to Howard beared adequate assurances of trustworthiness and was critical to the defense.

¶ 20 "Generally an extrajudicial declaration not under oath, by the declarant, that he, and not the defendant on trial, committed the crime is inadmissible as hearsay though the declaration is against the declarant's penal interest." *People v. Bowel*, 111 Ill. 2d 58, 66 (1986). However, "where there are sufficient indicia of trustworthiness of such extrajudicial statements, a declaration may be admissible under the statement-against-penal-interest exception to the hearsay rule." *Bowel*, 111 Ill. 2d at 66. Specifically, a declaration is admissible where there were sufficient indicia of trustworthiness in that (1) the statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the statement was corroborated by other evidence; (3) the statement was self-incriminating and against the declarant's interest; and (4) there was adequate opportunity for cross-examination of the declarant. *Bowel*, 111 Ill. 2d at 66-67, citing *Chambers v. Mississippi*, 410 U.S. 284, 300-01 (1973). We note that the existence or nonexistence of these four factors is not determinative of the issue but, rather, the ultimate decision as to admissibility is determined by the totality of the circumstances. *People v. Jones*, 302 Ill. App. 3d 892, 898 (1998).

¶ 21 Despite defendant's contentions to the contrary, Ross' alleged statements to Howard did not have sufficient indicia of trustworthiness to be admitted at trial. The statement was not made spontaneously to a close acquaintance shortly after the crime occurred. Rather, the crime occurred in December 1998, and Ross allegedly made these statements to Howard in May 1999.

More importantly, Ross' alleged statement was made to defendant's mother, and thus even if defendant's mother testified at trial, such testimony would have been unreliable. See *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003) (testimony from members of the defendant's family carries little weight). Also, aside from defendant's testimony at trial, there is no corroborating evidence that Ross, and not defendant, committed the offense. Howard failed to submit a copy of the message Ross allegedly left on her answering machine, no records were submitted from the telephone company to support the affidavit, and defendant failed to submit an affidavit from Ross. Furthermore, there would have been no opportunity to cross-examine Ross. Howard asserts in her affidavit that Ross stated that she did not want to testify because she knew that there was more evidence implicating her than defendant, and, if she was called to testify, she would assert her right not to testify. See *People v. Caffey*, 205 Ill. 2d 52, 101 (2001) (a declarant who asserts her right not to testify is not available for cross-examination in the context of the fourth *Chambers* factor).

¶ 22 Nevertheless, even assuming that counsel erred in failing to call Howard as a witness, defendant has failed to make a substantial showing that the result of the trial would have been different if Howard testified in a manner consistent with her affidavit. The evidence indicating that defendant shot Dubose was substantial. Defendant made an inculpatory statement to police. He specifically stated that when Dubose did not return the money she took from him he stabbed her with a scissors and shot her five times. Although defendant maintains that the testimony from two tenants in the apartment (Cunningham and Fleming) support his trial testimony and Ross' assertions in Howard's affidavit, we find otherwise. The testimony of Cunningham and Fleming essentially showed that there was a fight in defendant's apartment, Dubose was screaming, and gunshots were fired. Neither tenant, however, was able to identity the shooter. We further note that the minor inconsistencies between defendant's statement to police and the physical evidence at trial, *i.e.*, whether Dubose was wearing a brassiere and whether one of the gunshots was a contact wound, were not significant.

¶ 23 Moreover, Howard's testimony would not have exonerated defendant because her affidavit did not indicate that Ross was the shooter. Instead, Howard's affidavit merely states that Ross indicated that she did not want to testify "because she knew that there was more evidence implicating her than there was implicating [defendant]." Therefore, at best, Howard's proposed testimony establishes that both defendant and Ross were responsible for Dubose's death.

¶ 24 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 25 Affirmed.