

No. 1-10-3448

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	Nos. YP 329354, YP 329355,
)	YP 329356
)	
NOEH GOMEZ,)	The Honorable Jill Cerone Marisie,
)	Judge Presiding.
Defendant-Appellant.)	

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

ORDER

¶ 1 *Held:* Trial counsel's representation of defendant was effective despite defendant's individual and cumulative claims of ineffective assistance, including claims that counsel failed to present sufficient evidence to corroborate an alleged alibi.

¶ 2 Following a bench trial, defendant Noeh Gomez was convicted of driving while his license was suspended or revoked, leaving the scene of a personal injury accident, and failure to reduce speed to avoid a collision, and was sentenced to 10 days in jail. On appeal, defendant

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contends that he received ineffective assistance of trial counsel. We affirm.

¶ 3 This appeal arises from a hit and run vehicular collision that occurred at approximately 6 p.m. on April 16, 2010, in the area of Lee Street between I-90 and Higgins Road in Rosemont, Illinois. The State's evidence established that defendant was driving a brown Infiniti, which collided with the back of Kevin Styter's car, a Toyota, while the Toyota was stopped at a traffic light. Styter's car then rolled forward into Ali Faraj's car, a Mercedes, which was also stopped at the traffic light. Styter's car had no passengers, but Faraj's brother was in the front passenger seat of the Mercedes. The powerful impact of the collision pushed Faraj and his brother forward and back, injured Faraj's neck, and chipped his brother's tooth when his brother's head hit the dashboard. Faraj jumped out of the Mercedes and watched as the Infiniti, with front end damage, sped past. Faraj had two or three seconds to see the driver's head and the front of his face as the Infiniti sped past, and he was sure that the driver of the Infiniti was defendant. Styter also saw that the car that had struck his Toyota was an Infiniti. Styter and other eyewitnesses cooperated to provide a license plate number to the police. Faraj reported the incident to the police and then was taken to a hospital and treated for severe neck pain. Rosemont police officer Michael Dore took statements from Styter and Faraj at the Rosemont police station.

¶ 4 Between 5:30 and 6 p.m. on April 16, 2010, Officer Angie Pawinski, a dispatcher for the Rosemont police, was at home near Higgins and Schaeffer at Executive Estates Condominiums, and was preparing to walk her dogs when she saw a man park a brown Infiniti in a way that it took up two parking spaces. The Infiniti had damage to the front end and smoke appeared to be coming out of the front end. Pawinski saw a little girl, around three years old, jumping up and

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down in the back seat. When Pawinski left her home at around 6:10 or 6:15 p.m. to go to work, she saw a red car pull up with two female occupants, one or both of whom she believed rented in the building. Defendant spoke with them. At around 6:30 p.m., at the Rosemont police station, Pawinski checked a plate for Officer Dore and was surprised because the vehicle matched the description of the vehicle that was in the condominium parking lot. Pawinski told Dore that the vehicle was possibly in the condominium parking lot and that he might want to check on that. Dore then proceeded to the condominiums, which were located at 9600 Higgins Road in Rosemont, and he saw the brown Infiniti in the parking lot. It had front end damage, the radiator was still smoking, and the license plate matched the description of the third vehicle involved in the hit and run incident. Another officer was assigned to watch the Infiniti in case anyone tried to enter it.

¶ 5 Later that evening, after Dore had returned to the station, he received a call that someone had tried to enter the Infiniti. Dore returned to the condominiums and found two women with the keys that matched the Infiniti. The women were entering the vehicle and gathering some belongings out of it. One of the women gave the keys to Dore and stated that her friend Noeh Gomez had been in an accident. Defense counsel objected to that testimony as hearsay. The court sustained the objection. Dore tried the key in the Infiniti and it worked.

¶ 6 During Dore's patrol on April 17, Dore received a call from dispatch stating that there was someone who wanted to file a report that his car had been stolen. There was no description of the kind of car it was over the radio. Defendant appeared at the Rosemont police station and claimed that the car had been stolen. The dispatcher stated that defendant was the man who had

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gotten out of the vehicle the previous day, and Dore identified defendant in court. Dore discovered that defendant's driver's license had been revoked, and arrested him. Dore testified that the name of one of the women who had entered the vehicle in the parking lot was Katarzyna Zeranski, who told Dore that defendant had been in an accident and needed a ride, and that she was a friend of defendant. Dore also testified that Zeranski gave the car key to him. Defense counsel objected to Dore's hearsay testimony about his conversation with Zeranski during direct examination, but elicited similar hearsay testimony from Dore during cross-examination.

¶ 7 Pawinski also worked on April 17, 2010, and she was at the front desk of the Rosemont police department when she recognized defendant, who was in the lobby. Pawinski identified defendant to a Rosemont police officer and she said that she recognized him from the condominium where she had seen the car. Pawinski identified defendant as the driver of that car.

¶ 8 The defense presented several witnesses, Katarzyna Zeranski, Rosalie Figueroa, and Georgina Rodriguez, to establish an alibi defense. The State rebutted the defense with testimony of Michael Dore and Robert Riordan.

¶ 9 The gist of the defense was that the Infiniti had been stolen and that defendant was not driving it at the time of the incident. Instead, defendant, his wife, and a friend's young daughter were having soup at a restaurant at 3020 North Central Avenue in Chicago at the time of the incident, as reflected by a handwritten receipt dated April 16 and timed 5:30. The date and time appeared to have been written in a marker or a darker pen than the rest of the receipt. To return home to Des Plaines, they traveled on the tollway in a Nissan Pathfinder while defendant blew into a BAIID (Breath Alcohol Ignition Interlock Device), but the court refused to allow the

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tollway I-Pass records and the BAIID printout into evidence. The court also refused to allow the defense to call Lauren Gahala as a witness. Gahala appears to have been the woman who was with Zeranski when she was seen entering the brown Infiniti. Despite a motion to exclude witnesses from the courtroom, Gahala had been sitting in the courtroom during Zeranski's testimony.

¶ 10 Zeranski testified that the man who was with the Infiniti in the condominium parking lot was not defendant, but rather a stranger named Josh who was with two young children, and that she gave them a ride in her red Altima and dropped them off in an alley somewhere. Zeranski claimed that she had never heard of defendant and that she never told the police that defendant had been in an accident and needed a ride.

¶ 11 Rosalie Figueroa testified that she was a manager at the restaurant and that defendant was a customer of the restaurant. A receipt dated April 16 reflected that soup was ordered, and that it was served at 5:30 p.m. The food was for consumption at the restaurant and not to carry out. Other restaurant workers were subpoenaed to testify, but they did not appear in court because they had to be at work. Figueroa was a convicted felon for retail theft in Du Page County.

¶ 12 Georgina Rodriguez testified that she was defendant's wife. She also was a convicted felon for witness intimidation and retail theft. She and defendant resided in Des Plaines.

Rodriguez owned three vehicles, including the brown Infiniti and a Nissan Pathfinder. On April 17, Rodriguez noticed, and reported, that the Infiniti had been stolen. She had left the key in the Infiniti. She made a claim with her insurance carrier. Defendant had a revoked driver's license, but he had a permit to drive with a BAIID in his vehicle. Defendant drove Rodriguez to the

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restaurant in their Nissan Pathfinder, and he blew into the BAIID. There was no BAIID in the Infiniti, and defendant could not drive the Infiniti. According to Rodriguez, the Des Plaines police called her and told her that Rosemont police wanted to talk to her.

¶ 13 During rebuttal by the State, Officer Dore testified that defendant's wife, Georgina Rodriguez, did not give a restaurant receipt to him. Dore had never previously seen the restaurant receipt. After Dore learned about the vehicle getting into an accident on April 16, there was "[a]bsolutely" no way for the Des Plaines police department to have found out about this. "All we did was run the license plate." There also was "[a]bsolutely" no broadcast out to other police departments that the vehicle was wanted or stolen.

¶ 14 Robert Riordan testified during the State's rebuttal that he was an investigator with the Cook County State's Attorney's Office and that pursuant to an assignment, he went to the restaurant at approximately 7 p.m. on October 7, 2010, and ordered soup. Riordan requested a copy of a handwritten receipt, but instead was given a cash register generated printout as a receipt.

¶ 15 During closing arguments, defense counsel made the following arguments. The Infiniti was involved in the accident, but it had been timely reported as stolen to the police and the insurance company. Defendant's wife admitted to the police and the insurance company that she had left the key in the Infiniti. Defendant and his wife and a 10-year-old were at the restaurant from approximately 5 p.m. to approximately 6 p.m., the time of the incident involving the Infiniti. The restaurant manager was not impeached, and her testimony was clear. She had no bias. Zeranski also had no bias. The dispatcher corroborated Zeranski, although the dispatcher

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believed that the man she saw was defendant. Defendant's wife and the restaurant manager testified that they were at the restaurant. Zeranski testified that the man was not defendant, and she was amazed at the remarks that the police put in their report that she never said. There was no personal injury.

¶ 16 The assistant State's Attorney made the following arguments. Ali Faraj had significant neck pain, and his brother lost a tooth, from the impact. Faraj was an eyewitness to the accident, concentrated on the driver of the Infiniti, and identified defendant as the driver. Pawinski was a very strong circumstantial eyewitness who saw defendant very shortly after the accident and near the location of the accident, leaving his car and entering another car. Dore's testimony was credible and established that defendant went to Rosemont to report the car as stolen, where he was recognized by Pawinski. The driver's abstract showed that defendant's driver's license had been revoked.

¶ 17 The assistant State's Attorney argued further that defense witness Zeranski's testimony was completely impeached. Defendant's wife was a convicted felon, and there was no corroboration that the car was reported as stolen in Des Plaines. Also, the restaurant manager was a convicted felon and she was not credible. She testified that after the customer was served the food, the time was placed on the check, which was not rational. It would be rational to note the time that the order was placed, not the time that the food was served. The handwriting was different on the receipt. Riordan in rebuttal showed that the defense witnesses were not credible. He asked the restaurant for the handwritten receipt, but he was given a computer-generated receipt that had the date and time on it. Defendant did not have a computer-generated receipt

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because defendant was not in the restaurant at 5:30 p.m. ordering soup. If he had been there, he could have returned to the restaurant and requested the computer-generated receipt, which would have been more credible than a handwritten receipt with different handwriting for the date and time.

¶ 18 The court found defendant guilty of all three charges. The court stated the following. There was no question that the car involved in the accident was the Infiniti. Ali Faraj had ample opportunity to view the driver in good lighting conditions, and he clearly and adamantly identified defendant as the driver. He received therapy for neck injuries, and his brother had a broken tooth when his head hit the dashboard as a result of the accident. When Pawinski was told to run a plate, it matched the one that she had seen around 15 minutes earlier. Zeranski said that it was defendant's car, and that he was involved in an accident. However, Zeranski's testimony and the defense witnesses were not credible. In the court's words, "It's very convenient to report a stolen vehicle within 12-plus hours after an accident." The court expressed doubt that Zeranski would pick up a complete stranger with two young children and drop them off in an alley. Restaurant manager Figueroa's testimony was suspect. The person who allegedly wrote the receipt was not in court, and Figueroa did not mention the computer-generated receipt, which clearly stated the date and time. Defendant's wife, Rodriguez, was biased and lied because defendant was her husband. The court did not believe her.

¶ 19 Defendant contends that he was denied effective assistance of trial counsel because counsel failed to present exculpatory evidence and failed to exclude hearsay evidence. He argues that counsel's ineffectiveness damaged the credibility of the defense witnesses. Specifically, he

argues that counsel failed to present tollway I-Pass records, which would have corroborated Rodriguez's testimony that she drove home on the tollway after supper; counsel failed to present the BAIID printout, which would have corroborated Rodriguez's testimony that defendant blew into the device on the way to and from the restaurant; reinforced Dore's hearsay testimony that Zeranski said the brown Infiniti belonged to defendant and that defendant had been in an accident; counsel did not request a continuance or make an offer of proof after the restaurant workers disregarded a subpoena to appear in court, and counsel thereby failed to corroborate Figueroa's testimony and the receipt; counsel failed to discover that Lauren Gahala had favorable testimony for the defense that would have corroborated Zeranski's testimony, failed to present Gahala as a witness, and failed to exclude her from the courtroom during Zeranski's testimony. Defendant maintains that this court should consider "the cumulative impact of multiple errors."

¶ 20 The standards set forth in *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984), govern claims of ineffective assistance of counsel. Pursuant to *Strickland*, the defendant must establish both deficient representation by his attorney, and resulting prejudice. See *People v. Manning*, 227 Ill. 2d 403, 412 (2008); *People v. Hall*, 217 Ill. 2d 324, 335 (2005); *People v. Graham*, 206 Ill. 2d 465, 476 (2003). A showing of prejudice sufficient to support a claim of ineffective assistance of counsel consists of a reasonable probability that, but for the attorney's errors, the outcome would have been different. *Hall*, 217 Ill. 2d at 336; *Graham*, 206 Ill. 2d at 476. A reasonable probability undermines confidence in the outcome. *Graham*, 206 Ill. 2d at 476; *People v. Irvine*, 379 Ill. App. 3d 116, 129 (2008). "[P]rejudice is not presumed for purposes of an ineffective assistance of counsel claim." *People v. Peterson*, 311 Ill. App. 3d 38,

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52 (1999). If a claim of ineffective assistance can be disposed of because the defendant suffered no prejudice, it is not necessary to consider whether counsel's performance was deficient.

Graham, 206 Ill. 2d at 476. Moreover, strategic decisions are generally not reviewable. *Irvine*, 379 Ill. App. 3d at 129.

¶ 21 In this case, some of the alleged errors involve nonreviewable trial strategy. Defendant cannot demonstrate prejudice from other alleged errors because there was overwhelming evidence of his guilt and therefore no reasonable probability that the trial court would have acquitted him or given him a more lenient disposition if counsel had acted differently.

¶ 22 More particularly, the I-Pass records would not have made Zeranski's preposterous testimony believable. State's investigator Riordan impeached Figueroa's testimony, and the receipt was not shown to be from the restaurant where she worked. The date and time on the receipt did not match the other writing on the receipt, and Riordan was given a receipt printed from the cash register, not a handwritten one. Rodriguez was biased because she was defendant's wife; her testimony was also impeached because she was a convicted felon and her testimony was contradicted by Officer Dore's testimony. Neither the I-Pass records nor the BAIID printout would have placed defendant, as opposed to only Rodriguez, in the Nissan Pathfinder at the time of the incident, and would not corroborate the alleged restaurant alibi. Under these circumstances, defendant has not shown a reasonable probability that the trial outcome would have been different if trial counsel had acted differently. Therefore, defendant was not prejudiced by counsel's failure to lay a foundation for the I-Pass records as business records and counsel's failure to present the BAIID records. Moreover, counsel's failure to present the BAIID

records and to call officials to testify from the Department of Transportation were unreviewable decisions involving trial strategy. The BAIID records did not identify the person who blew into the machine, and therefore could not have corroborated defendant's alibi theory. Counsel's cross-examination of Dore was also a strategic decision. Defendant did not specify what the contents of Lauren Gahala's testimony would be, only that it would be favorable, which is based on matters *dehors* the record and cannot be evaluated on direct appeal. Finally, defense counsel provided effective representation because he presented an opening statement and a closing argument, he presented witnesses, he cross-examined the State's witnesses, he asserted objections, and he subjected the State's case to meaningful adversarial testing.

¶ 23 In contrast to the incredible defense case, the State's evidence against defendant was overwhelming. Kevin Styter identified the car that hit him as an Infiniti. Ali Faraj identified the car as a dark Infiniti and identified defendant as the driver who drove the Infiniti away after the collision. Angie Pawinski saw a brown Infiniti with front-end damage in her parking lot, and she saw defendant, whom she positively identified, parking that vehicle. Pawinski also saw defendant at the police station where defendant had gone to file a false report that the Infiniti had been stolen to hide his involvement in the hit-and-run incident.

¶ 24 We have considered, and rejected, all of defendant's arguments on appeal, and we are unpersuaded by defendant's claim of ineffective assistance of counsel, even considering defendant's arguments cumulatively. *Strickland*, 466 U.S. at 690, 694.

¶ 25 The judgment of the circuit court is affirmed.

¶ 26 Affirmed.

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