2012 IL App (1st) 103651-U

SECOND DIVISION
September 18, 2012

No. 1-10-3651

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. 09 CR 10841
	)	
BOBBY SINGLETON,	)	Honorable
	)	Sharon M. Sullivan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial evidence established beyond a reasonable doubt defendant's guilt of attempted first-degree murder, including his intent to kill the victim; and defendant's trial counsel was not ineffective for withdrawing a previously filed motion to suppress defendant's custodial statements.

¶ 2 Following a bench trial, defendant Bobby Singleton was convicted of attempted first-degree murder and sentenced to 40 years in prison. On appeal, defendant contends that the State failed to establish that he intended to shoot the victim where evidence indicated the gun went off accidentally during his attempt to rob the victim. Defendant also contends his trial counsel was

ineffective for withdrawing a previously filed written motion to suppress defendant's inculpatory post-arrest statements. We affirm.

¶ 3 Defendant was charged by information with multiple felonies, including five counts of attempted first degree murder and attempted armed robbery of Jose Arteaga. Prior to trial, defendant's counsel filed written motions, including a motion to suppress statements. Subsequently, counsel withdrew the motions.

¶ 4 The trial evidence revealed the following. At about 1 a.m. on June 1, 2009, Antonia Guerrero and her brother-in-law, Jose Arteaga, left the back door of their place of employment, a restaurant on West Devon in Chicago. Guerrero testified that defendant approached them in the alley behind the restaurant and asked Arteaga for money. Defendant pulled a handgun out of a pocket of his blue Cubs jacket with his left hand and pointed the gun at Arteaga's chest. Defendant was about five feet away from Arteaga. At trial, Guerrero demonstrated the motion defendant made with his right hand, pulling something back and sliding it forward, as if racking or chambering the handgun. Defendant fired the gun, and Arteaga grabbed his leg and ran around a parked van. Defendant ran after Arteaga, chasing him around the van and firing two more shots at him. Then defendant went down the alley toward Devon and turned west. Jesus Arteaga, the gunshot victim's brother and Guerrero's husband, came out of the restaurant, and he and Guerrero ran to Devon where they hailed an officer in a police car. The officer pursued and seized defendant and brought him back to the restaurant where an ambulance had arrived for Arteaga. Guerrero pointed out defendant to the police as the one who fired the gun.

¶ 5 Jose Arteaga testified that when he and Antonia Guerrero left the restaurant, defendant approached him and said something in English that he did not understand. Then defendant pointed a gun at his chest. Arteaga heard the gun fire and felt a pain at the top of his right leg in the groin area. Then he ran to a van. Defendant chased him around the van and shot at him two

more times. Defendant was holding the gun with both hands. Then defendant ran toward Devon. Arteaga and his brother ran to get help from an officer in a police car at Devon and Broadway. The officer chased defendant. Arteaga went back to the restaurant. An ambulance came and he was placed inside. From the ambulance, Arteaga saw defendant beside a police car and told the police defendant was the man who had fired at him. Arteaga was treated at a hospital for the bullet wound. The bullet entered his upper right leg but only part of it exited beneath the right buttock. Two months later he had surgery for the removal of the remaining bullet fragment from his body. He was unable to walk on the leg for five months and was unable to return to work for more than eight months after the shooting.

¶ 6 Sergeant Hans Keller testified that he saw defendant come out of an alley and quickly run westbound on Devon. Then two men and a woman came out of the alley and motioned to Keller that the running man had a gun. Keller pulled his police car up in front of defendant, who was now walking. Keller ordered defendant twice to stop, but defendant kept walking. Defendant was not swaying or staggering and did not trip. Then defendant crouched down between two parked cars and placed something on the ground. Keller pulled defendant out from between the parked cars, called for assistance, and turned defendant over to responding officers. Then Keller returned to the two parked cars where defendant had been crouching and recovered a .22 caliber semi-automatic pistol. Keller did not remember how many rounds were in the firearm. Defendant was taken to the restaurant and then to the police station.

¶ 7 The parties stipulated that evidence technician Angel Mosqueda processed the crime scene and recovered one live round, a .22 caliber bullet. He also recovered one expended .22 caliber shell.

¶ 8 Detective Ed Heerdt testified that he and his partner, Detective Mark Regel, investigated the shooting. Heerdt testified how someone would fire a semi-automatic weapon. The person

would put his hand over the top portion of the gun, known as the rack, while holding the gun handle and would pull back the slide, which would move forward with a spring action. At the same time, a live ammunition round inside the magazine would fly out from the ejection port of the rack and another bullet from the magazine would pop up into the chamber. The action is commonly referred to as racking the slide. When a semi-automatic weapon is fired, the cartridge case is ejected because the force of the bullet being fired racks the slide, the return of the slide causes the ejection of the spent cartridge, and another bullet is pushed from the magazine into the chamber. The live bullet and the spent cartridge found at the scene were .22 caliber. The gun recovered was a Smith and Wesson .22 caliber semi-automatic handgun. A blue Cubs jacket with a hole ripped in the lower right lining was also recovered. When Heerdt spoke to defendant, he did not notice slurred speech, bloodshot eyes, the smell of alcohol on his breath, or any other sign of intoxication.

¶ 9 Defendant testified that he was in the alley on the night in question, carrying a loaded gun with the intent on robbing someone. Earlier that night, defendant and his cousin had consumed a gallon of gin. He encountered Arteaga in the alley and asked him for money. When Arteaga did not respond, defendant attempted to pull his gun out of his jacket, but the gun "got caught and discharged accidentally" and made a hole in his jacket. He did not mean to shoot the gun and did not fire two or more shots. Arteaga ran around to the other side of the van but defendant did not follow him. Defendant panicked and ran down Devon. Defendant did not rack the gun; it was ready to fire. He did not recall telling a detective that he racked the gun or demonstrating how he racked it. He did not recall telling the detective the gun discharged one or two times.

¶ 10 Defendant remembered speaking with ASA Denise Loiterstein. He told her what had happened, and she typed it out and read "parts of it." Defendant admitted signing the "majority" of the pages. Defendant was shown the typed statement and agreed that his signature was at the

bottom of the *Miranda* warning paragraph and at the bottom of every page. Defendant admitted that the statement said, "Bobby walked up to the Mexican and his wife with the gun pointed at the Mexican man and told the man to give him his money. * * * Bobby states he moved the gun and pointed it lower and then the woman screamed; * * * Bobby accidentally pulled the trigger, and the woman kept screaming." The ASA added the word "accidentally" on page two at defendant's direction, and defendant initialed the addition. He did not remember telling the ASA that he pulled the trigger again when putting the gun away and it made a hole in his sweatshirt. Defendant did not recall telling the ASA that he was not under the influence of drugs or alcohol.

¶ 11 In the State's rebuttal, Detective Heerdt was recalled and testified that at the police station he spoke to defendant shortly after his arrest and recited the *Miranda* warnings, which defendant said he understood. Defendant told Heerdt that he had walked up to a man and a woman and told the man, "Give me all your money." Defendant racked his gun, the gun accidentally discharged while in his hand, and the gun discharged again one or two times when he put it under his coat. Defendant demonstrated with his hands to Heerdt how he had racked the gun. Defendant signed each page of the typed statement in Heerdt's presence and the ASA read the entire statement out loud to defendant. Heerdt heard defendant tell the ASA that he went up to the man and woman with the gun already pointed at the Mexican man, moved the gun and pointed it lower, and the woman screamed; and he pulled the trigger again while trying to put the gun away.

¶ 12 In its findings of fact at the conclusion of the trial, the court stated that Arteaga and Guerrero had testified credibly that defendant had the gun out and pointed at Arteaga's chest, and that defendant's testimony that the gun accidentally discharged in his pocket was incredible. The court concluded that the State proved beyond a reasonable doubt that defendant intended to kill: "The very fact of firing a gun at a person supports the conclusion that the person doing so acted with an intent to kill." Subsequently, in denying defendant's posttrial motion, the court reiterated

that Arteaga credibly testified that defendant displayed and racked his gun while standing two to five feet from Arteaga. The court concluded that the State had proven the element of intent and entered guilty findings on the five counts of attempted first-degree murder, as well as on aggravated battery with a firearm, aggravated discharge of a firearm, attempted armed robbery and aggravated battery. The court entered final judgment only on one count of attempted first-degree murder and sentenced defendant to a total of 40 years in prison, 15 years for attempted first-degree murder plus 25 years for personally discharging a firearm that proximately caused great bodily harm.

¶ 13 On appeal, defendant first claims that the State failed to prove all the elements of attempted first-degree murder, including the element of intent to kill, beyond a reasonable doubt.

¶ 14 When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not this court's function to retry the defendant. *People v. Castillo*, 372 Ill. App. 3d 11, 20 (2007). Rather, after viewing the evidence in the light most favorable to the prosecution, we determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Leonard*, 377 Ill. App. 3d 399, 403 (2007).

¶ 15Under this standard, a reviewing court will not substitute its judgment for that of the trier of fact on issues of the weight of evidence or the credibility of witnesses. *People v. Cooper*, 194 Ill.2d 419, 431 (2000).

¶ 16 Defendant was found guilty and sentenced on one count of attempted first-degree murder which charged "that he, without lawful justification, with intent to kill, did an act, to wit: shot Jose Arteaga about the body while armed with a firearm, which constituted a substantial step towards the commission of first degree murder, and during the commission of the offense, he personally discharged a firearm that caused great bodily harm to Jose Arteaga." A person commits first-degree murder if he performs the acts that cause the death of another with the

intent to kill or do great bodily harm to that individual. 720 ILCS 5/9-1(a) (West 2008). Defendant concedes he shot Arteaga while attempting to rob him but contends that the State failed to establish the element of intent to kill where the gun went off accidentally.

¶ 17 Viewing the evidence in a light most favorable to the State, a rational trier of fact could find beyond a reasonable doubt that defendant intended to kill or do great bodily harm to Arteaga, or that his acts created a strong probability of death or great bodily harm to Arteaga. Defendant admitted at trial that he attempted to rob Arteaga while armed with a loaded weapon and that in doing so he shot Arteaga. Defendant claimed, however, that when he reached into his jacket to pull out his gun, the gun accidentally discharged while still in his jacket. He contends that the fact he discharged his handgun in that manner, and only one time, establishes that he committed only the offense of aggravated discharge of a firearm, not attempted first-degree murder. However, defendant's intent to kill can be inferred from the act of firing a bullet at Arteaga from a short distance. The trial testimony and physical evidence established that defendant pointed a loaded firearm at Arteaga's chest while standing only a few feet in front of him, racked the slide, and pulled the trigger, sending a bullet into Arteaga's upper right leg in the groin area. " 'The intent to murder can be inferred from the act of firing a gun at a person because the natural tendency of such an act is to destroy another's life.' " *People v. Garcia*, 407 Ill. App. 3d 195, 201 (2011), quoting *People v. Smith*, 258 Ill. App. 3d 1003, 1027 (1994). Guerrero testified how defendant racked the handgun before firing it, and shortly after the shooting she described to police the motion defendant used in racking the weapon. Her testimony was supported by physical evidence found at the scene, both an unfired bullet that would have been ejected from the handgun when it was racked and also an expended shell casing from a fired bullet. "Evidence of a defendant's firing a gun once would be sufficient to support the inference of an intent to kill." *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 41. In

announcing its factual findings, the trial court confined its remarks to the first shot that was fired at Arteaga and struck him in the groin. The court concluded that the State's witnesses were credible, defendant's trial testimony was not credible, and the initial shot that struck Arteaga was sufficient to prove the requisite element of intent to kill. Given the facts presented at trial, it was reasonable for the court to conclude that defendant intentionally fired his weapon at Arteaga and that he did so with the intent or knowledge required of an attempt to commit first-degree murder.

¶ 18 Moreover, Arteaga and Guerrero both testified that, after initially shooting and wounding Arteaga, defendant chased after Arteaga and fired his weapon twice more. Defendant's continued assault on Arteaga was additional evidence of his intent to kill. *People v. Mendoza*, 402 Ill. App. 3d 808, 818 (2010). Defendant claims that the prosecution witnesses' testimony that he fired two additional shots was unconvincing where no physical evidence of additional fired shots was recovered at the scene. However, defendant admitted to police that one or two additional shots were fired when the gun discharged after he returned it to his jacket. Whether or not defendant fired additional shots at Arteaga and Guerrero was a matter for determination by the court as the trier of fact, which was responsible for the determination of the credibility of witnesses and the weight to be given their testimony, the resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the evidence. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 16. In reviewing the evidence, we will not substitute our judgment for that of the trier of fact. *People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007).

¶ 19 Defendant's second assignment of error is that he received ineffective assistance of counsel when his trial counsel withdrew his previously filed pretrial motion to suppress the statements he made to a police detective and an ASA.

¶ 20 A defendant’s claim of ineffective assistance of counsel is guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires that defendant

prove both that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Id.* at 687; *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). As to the first prong, a defendant asserting a claim of ineffective assistance of counsel must overcome a strong presumption that the challenged action or inaction of counsel was the product of sound strategy and not of incompetence. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). Under the second prong, the defendant must show that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007).

¶ 21 In the instant case, defendant has shown neither that his trial counsel's failure to litigate the motion to suppress constituted ineffective representation nor that defendant was prejudiced. The motion to suppress statements alleged that (1) defendant was not adequately informed of his *Miranda* rights prior to interrogation, and (2) any resulting statements were not knowingly or voluntarily made because defendant was intoxicated by alcohol and illicit drugs. We find that defense counsel's withdrawal of the motion to suppress statements did not constitute deficient performance. It was apparent defendant's testimony probably would be required at a hearing on the motion. It was also probable that defendant's only defense to the charges would hinge on his testifying again at trial and, in fact, he did exercise his right to testify at trial. Counsel's decision not to have the defendant testify at a hearing on a motion to suppress has been held to be a tactical decision. *People v. Follins*, 196 Ill. App. 3d 680, 691 (1990). Here, counsel's decision to withdraw the pretrial motion may be viewed as a sound tactical decision to avoid defendant giving pretrial sworn testimony that might be used at trial for impeachment purposes.

¶ 22 Defendant refers us to *People v. Brinson*, 80 Ill. App. 3d 388 (1980) in support of his claim that his trial counsel was ineffective for not litigating his motion to suppress. In *Brinson*, defendant's counsel's ineffectiveness was egregious on two fronts: failure to seek to suppress

both the defendant's statements and the highly questionable identification of the defendant as the offender. *Brinson* is distinguishable because, here, defense counsel did file a pretrial motion to suppress defendant's post-arrest statements, and counsel's failure to proceed to a hearing on the motion is defendant's only claim of ineffective counsel.

¶ 23 We also note that there was little likelihood the motion to suppress would have succeeded if it went to a hearing. Defendant asserts on appeal that "the record does not contain a complete recital of the facts relevant to analyzing a motion to suppress." On the contrary, the trial evidence belied the claims in his motion to suppress. The evidence revealed that defendant was given adequate *Miranda* warnings and that he signed a written form acknowledging he had been cautioned pursuant to *Miranda*. As to defendant's claimed intoxication, the fact that defendant may have been under the influence of alcohol would not render his statements inadmissible unless the evidence clearly established that he was so grossly intoxicated he no longer had the capacity to waive his rights. *People v. Shoultz*, 289 Ill. App. 3d 392, 396 (1997). Defendant testified at trial that on the day prior to the attempted robbery and murder of Arteaga, he and his cousin consumed a gallon of gin and that he was drunk when he shot Arteaga. However, Sergeant Keller, who apprehended defendant near the crime scene shortly after the shooting, testified that defendant did not appear drunk, and, when attempting to elude capture, he was running fairly fast, was not swaying or staggering, and did not trip. Detective Heerdt testified that he spoke to defendant immediately after his arrest and did not recall smelling alcohol on defendant nor notice defendant displaying slurred speech or bloodshot eyes, and that defendant exhibited no signs of intoxication when he and Heerdt conversed. Other testimony and the documentary evidence adduced at defendant's trial demonstrated that following his arrest, he examined and signed each page of his statement, and he corrected the statement by instructing the ASA to insert the word "accidentally." This evidence did not establish that defendant was so

grossly intoxicated that he did not have the capacity to waive his rights. We find nothing in the record to suggest that the pretrial motion to suppress defendant's statements would have had a reasonable probability of success.

¶ 24 Even if a hearing had been held on defendant's motion to suppress statements and the court were to have held the statements inadmissible, the admissible trial evidence overwhelmingly established defendant's intent to kill Arteaga, both through the testimony of Arteaga and Guerrero and the physical evidence, even without the evidence of defendant's post-arrest statements. Consequently, because defendant has not established a reasonable probability that he would have achieved a better result if his counsel had not withdrawn the motion to suppress, he has not shown that he received ineffective assistance of counsel. See *People v. Martin*, 408 Ill. App. 3d 44, 51-52 (2011). We conclude that counsel's decision to withdraw the previously filed motion to suppress was a reasonable tactical decision and that defendant sustained no prejudice.

¶ 25 For the reasons stated above, we affirm the judgment of the trial court.

¶ 26 Affirmed.