

FIFTH DIVISION
November 21, 2012

No. 1-11-0255

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 10 CR 3446
)	
NICOLAS OAKS,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's ineffective assistance of counsel claim fails where he could not establish prejudice as a result of trial counsel's failure to tender an accomplice-witness instruction.

¶ 2 Following a jury trial, defendant Nicolas Oaks was found guilty of vehicular hijacking and sentenced to eight years in prison, with a recommendation for boot camp. On appeal, defendant contends he was denied effective assistance of counsel at trial because his counsel

failed to ask for an accomplice witness instruction regarding the testimony of Miguel Gomez, a witness for the State. We affirm.

¶ 3 Najmuddin Rafay testified that he was sitting in his parked car on West Thome Avenue in Chicago around 5 a.m. on January 24, 2010. Rafay admitted that he had been out with friends but denied drinking alcohol. Four individuals approached his car, and one of the men reached through the driver's side window and grabbed Rafay, pulling him out of the car and began beating him. This same man then sat down in the driver's seat and drove off in Rafay's car with the other men. Rafay testified that, when shown a photo array on the afternoon following the hijacking, he immediately identified defendant, noting, "the minute I seen this picture, I said, this is the guy." Later that day, Rafay again identified defendant when shown the same photo array at the police station. Rafay also identified defendant in a lineup later that evening and in court during the trial.

¶ 4 Miguel Gomez testified that he met defendant for the first time on January 24, 2010, around 4 a.m. outside a building located at 6464 North Clark Street. Gomez, who came from Cicero and was thus in an unfamiliar neighborhood, stated that defendant offered to allow Gomez to use a phone at his home to call someone to pick him up. The two began to walk toward defendant's home, along the way running into two of defendant's friends. The group of four purchased items at a gas station and continued to walk. Defendant and his two friends then observed and approached Rafay's car, which was parked, running and had its lights on. Gomez claimed not to have approached the vehicle, but stated that he observed from across the street as a "skinny" man pulled Rafay out of the car and entered the car, along with the friends. The men then told Gomez to follow them on foot to an apartment and drove away.

¶ 5 Though Rafay was still in the street and looked "dazed," or "drunk," Gomez walked passed him and followed the directions given to him. A few blocks away, Gomez observed Rafay's car apparently ransacked in an alley, and then followed defendant and his friends into a

nearby apartment, where Gomez called his girlfriend six times in an attempt to secure a ride home, to no avail. Gomez's multiple calls aroused the suspicions of another man in the apartment who accused Gomez of calling the police and then stabbed him in the face and neck with a kitchen knife. Gomez ran outside and was subsequently taken to the hospital in an ambulance. Gomez did not identify defendant in a show-up conducted soon after he was stabbed and while he was sitting in the ambulance, but identified defendant in a lineup conducted the evening following the hijacking as a man he had observed getting into Rafay's car.

¶ 6 Willie Jones, a security guard, testified that he observed four or five men, all of whom he believed to be black, first looking into cars on Thome, then standing around Rafay's car. After trying to position himself to get a better view, he was unable to observe anything further, except for Rafay's car later leaving the scene.

¶ 7 Cabdriver Constantin Rabrean was sitting in his cab nearby on Thome. He observed a "young black tall guy" looking into cars on the street, then heard noises. Rabrean got out of his cab and observed a skinny black man¹ pushing and kicking another man and pushing him away from a car. The skinny black man then got into the driver's seat and drove away with several other men in the car. He also saw someone who was either white or Hispanic run after the car and jump in before the car left the scene.

¶ 8 Officer Joseph Agosta confirmed that defendant had been identified by Rafay and Gomez. He also noted that Rafay told him that he had been out with friends during the evening before the hijacking and had been drinking alcoholic beverages, and Rafay had initially told him that one man pulled him from his car and another man drove the car away.

¶ 9 The jury was instructed, *inter alia*, as follows:

¹ A Chicago police criminal history report contained within defendant's presentence investigative report (PSI) describes defendant as being 5'10" tall and weighing 160 pounds.

"Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case. Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000).

The jury found defendant guilty of vehicular hijacking.

¶ 10 On appeal, defendant contends that he was denied effective assistance of counsel because counsel at trial failed to request an accomplice witness instruction regarding Gomez's testimony. He argues that, contrary to the State's assertion, the evidence at trial showed there was probable cause Gomez was involved in the vehicular hijacking, and because the State's case "hinged" upon Gomez's testimony, failure to tender the accomplice instruction was sufficiently prejudicial to warrant a new trial. We disagree.

¶ 11 To prove ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the deficient performance caused him prejudice. *People v. Albanese*, 104 Ill. 2d 504, 526 (1984), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not determine whether counsel's performance was deficient before examining whether the alleged deficiency caused prejudice to the defendant. *People v. Echols*, 382 Ill. App. 3d 309, 313 (2008), citing *Albanese*, 103 Ill. 2d at 527. Prejudice is shown if there is a reasonable probability that, but for the alleged error by counsel, the result of the trial would reasonably have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007).

¶ 12 The accomplice witness instruction to which defendant directs us provides:

"When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case."

Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000).

¶ 13 The test for determining whether a witness meets the requirements of the accomplice witness instruction is whether there is probable cause to believe that the witness was guilty of the underlying offense either as a principal or under a theory of accountability. *People v. Kirchner*, 194 Ill. 2d. 502, 541 (2000). Active participation in a crime is not required to establish accountability where a defendant shares a common criminal design or agreement with a principal. *People v. Taylor*, 164 Ill. 2d 131, 140 (1995); 720 ILCS 5/5-2(c) (West 2010). A defendant's presence at a crime scene, knowledge that a crime is being committed, voluntary attachment to and close affiliation with his companion before and after the crime was committed, failure to report the crime and flight from the scene are circumstances which may be considered to determine if a defendant shared a common criminal design or agreement with a principal. *Taylor*, 164 Ill. 2d at 140-41.

¶ 14 Defendant claims there was probable cause that Gomez was guilty under a theory of accountability for the hijacking because he shared a common criminal purpose with the group by, *inter alia*, being present when the group encountered Rafay, observing the crime occur, failing to assist Rafay or call the authorities, then meeting up with the group after the hijacking had taken place. We disagree. There was no evidence in the record which suggested Gomez was involved in the planning or execution of the hijacking or that Gomez approached the car. It is arguable that Gomez was an accessory to the hijacking after the fact. However, there was no probable cause to show Gomez was an accomplice.

¶ 15 Assuming, *arguendo*, that trial counsel should have tendered the accomplice witness instruction regarding Gomez's testimony, we find defendant cannot show that the result of the trial would reasonably have been different. Rafay testified that he immediately recognized and identified defendant in a photo array conducted hours after the hijacking as the man who pulled him out of his car, hit him and then got into the car's driver seat. Later that day and evening, he again identified defendant in another photo array and a lineup. He also identified defendant in court, and denied drinking alcohol before the attack.

¶ 16 Officer Agosta's testimony drew into focus several inconsistencies in Rafay's testimony, including that Rafay initially told him he had been drinking alcohol the evening before the attack and that one man pulled him from his car and another man then drove the car away.

¶ 17 Gomez also testified he was present at the crime scene. Gomez's testimony established that he had identified defendant in a lineup as one of the men who approached Rafay's vehicle and observed the defendant getting into Rafay's vehicle. After the hijacking had taken place, Gomez walked passed a "dazed" Rafay after the attack and observed Rafay's "ransacked" car in an alley before meeting up with defendant and his friends, evidence which the jury could have weighed to determine his involvement in the crime and possible bias. Gomez did not identify defendant in a show-up conducted soon after the crime had taken place as a person who attacked him.

¶ 18 Jones and Rabrean provided further testimony which corroborated defendant's involvement in the hijacking. Jones saw a group of black men surrounding Rafay's car. Rabrean saw a skinny black man pulling Rafay from his car then sitting in the car's driver seat, and defendant's PSI shows him to be a black man who is 5'10" tall and weighs 160 pounds. Rabrean also noted that he possibly saw a white or Hispanic man getting into Rafay's vehicle once it had

been taken from Rafay, which could have been considered by the jury to undercut Gomez's credibility.

¶ 19 The jury was instructed to weigh the believability and consider the motives and biases of all witnesses, and it concluded that defendant was guilty. In sum, we find the defendant has not established that his trial counsel was ineffective by failing to request the accomplice witness instruction.

¶ 20 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 21 Affirmed.