FIRST DIVISION
October 28, 2013

No. 1-11-2692

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. 07 CR 17339
	)	
KENYATTA BROWN,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant failed to overcome presumption that trial counsel's decision not to call alibi witness was sound trial strategy rather than incompetence; even if alibi witness had testified, result of trial would not have been different in light of strong evidence against defendant; affirmed.

¶ 2 Following a jury trial, defendant Kenyatta Brown was convicted of first degree murder and attempted first degree murder, and was sentenced to 120 years in prison. On appeal, defendant contends his trial counsel was ineffective for failing to call an alibi witness who testified at a post-trial hearing that defendant was in the witness's home at the time of the offense. We affirm.

¶ 3 The record reveals that defendant and Dwight Thomas, who was tried separately and is not part of this appeal, were charged with shooting Frank Lucas[1] and Gloria Patterson in the early morning hours of February 4, 2007, at 12053 South Indiana Avenue in Chicago. Defendant was later arrested in Sioux Falls, South Dakota. At trial, the State's theory was that defendant shot the victims in retaliation for an earlier confrontation between Lucas and codefendant Thomas. The State supported this theory with the testimony of the surviving victim, Patterson, and two long-time friends of defendant, Katahnna Washington and Nicholas Griffin. The defense presented no testimony. Instead, the defense strategy was to attack the credibility of the State's witnesses by showing they were motivated to testify falsely or biased.

¶ 4 At trial, Patterson testified that she was 27 years old and that Lucas was the father of her children. She said she had known defendant since they were 12 years old, and she also knew Thomas was defendant's friend. Patterson then described the events surrounding the shooting. In early February 2007, Lucas and Thomas had an argument. They went outside to fight, and Thomas gave some belongings to an individual with the nickname of "Buddha." After they fought, Thomas did not receive back all of his belongings, and demanded that Lucas pay for the missing items. Lucas and Patterson, however, refused. Defendant was not present at this incident.

¶ 5 On the afternoon of February 3, 2007, Patterson attended her older son's birthday party at Odyssey Fun World in Tinley Park. Around 9 p.m., she noticed her younger son was missing. She had left him at Odyssey Fun World and learned he had been transported to a Tinley Park police station. Lucas and Patterson picked him up about 1 a.m. They then went to a liquor store and proceeded on to Rhonda Wilson's house at 120th and Indiana. While Lucas was on the phone telling Wilson they had arrived, Patterson observed defendant and Thomas with guns coming out of a gangway. These men approached the car and shot into the passenger window, hitting both Patterson and Lucas. Patterson took her son into Wilson's house and then returned to check on Lucas, who was shot in the heart, walked a few steps outside the car and then fell to the ground.

[1] Lucas is also spelled "Lucus" in the record. We use the spelling set forth in the indictment.

When the police arrived and asked Patterson if she knew the shooters, she named defendant and Thomas, though at the time she knew Thomas only by his nickname, "Westside." While at the hospital receiving stitches for minor injuries to her lip and jaw, Patterson re-identified defendant as one of the shooters from a police photograph. She had gone to elementary school with defendant and had known him for 15 years. Lucas later died of his injuries.

¶ 6 On cross-examination, Patterson admitted that other than her family members, she did not see anyone she recognized at Odyssey Fun World, the police station, or while driving to the liquor store. She also stated that she had made the plan to visit Wilson while at the liquor store. Patterson maintained that she kept looking straight at the shooters after they had begun firing and looked straight at them until she was hit. Patterson admitted she knew someone named Timothy Christmas who was a friend of Thomas.

¶ 7 Officer Victor Creed testified that after responding to a call at 1:35 a.m. of a man shot at 12053 South Indiana, he spoke with Patterson, who indicated that defendant and Thomas ran out of a gangway, shot at her and her boyfriend, and left in the direction of a vacant lot and gangway. Officer Spiegel testified that after he arrived at the scene and followed footprints through the snow down a gangway, he recovered a cell phone resting in a fresh depression in the snow.

¶ 8 Katahnna Washington's testimony described defendant's behavior after the incident. Washington had known Patterson and Lucas for 9 years, defendant for about 7 years, and Thomas for 10 or 11 years. On February 4, Washington received calls from a private number, but no one said anything when she answered. On February 5, Washington received another phone call from a blocked number and recognized defendant's voice; he asked what happened and where Patterson was. While meeting with police detectives, Washington recognized a cell phone on a desk, and when she dialed defendant's number, the phone on the desk rang. Additionally, Washington saw her nickname listed in the phone's recent calls and contact lists. Detective Stover testified that the phone was the one Officer Spiegel recovered at the scene.

¶ 9 On cross-examination, Washington stated that defendant had more than one phone number, and that when she called either phone, someone else might answer, such as defendant's brother or another friend. Additionally, Washington admitted that defendant sometimes loaned his phone to others. Defense counsel also questioned Washington about her criminal history, which led to her admitting that in the past she had broken promises to comply with the terms of probation and that she had previously given false names to the police. Defense counsel also elicited that Washington had been romantically involved with both Patterson and Lucas.

¶ 10 Nicholas Griffin testified that he spoke to defendant after the shooting and defendant subsequently stayed with him in Iowa. He and defendant had known each other for 12 or 13 years and had been so close they were almost like family. On February 4, 2007, Griffin returned home from a club around 2 a.m. and noticed he had missed some calls from defendant. Shortly afterwards, he received another call from defendant, who this time called from Thomas's number. A few days later, defendant arrived in Iowa. Defendant admitted to Griffin that he had been with Thomas, saw Lucas and Patterson, come through a gangway and fire shots at their car. Defendant also told Griffin he thought he may have dropped his cell phone when running from the scene and that he had not known that "the baby was in the car." After defendant had stayed with Griffin for a couple of days, Griffin took defendant to Sioux Falls, South Dakota, where Griffin's daughter and her mother lived. In March 2007, the mother of defendant's children moved to Sioux Falls as well.

¶ 11 At trial, Griffin examined the recovered cell phone and saw that defendant's unique nickname for him was listed in the phone's contacts. Additionally, Griffin observed that recent calls had been made from the phone to Griffin, Washington, Thomas, and defendant's mother.

¶ 12 On cross-examination, defense counsel sought to suggest that Griffin was angry with defendant. Defense counsel showed Griffin a letter he had written to his daughter's mother that accused her of criticizing Griffin to defendant. Griffin also stated in the letter that he could have slept with the mother of defendant's children. Griffin denied that the letter showed he was jealous or angry.

¶ 13 Defense counsel's cross-examination also suggested that Griffin had a motive to testify against defendant because Griffin had been seeking a reduced sentence on an unrelated matter. Before testifying, Griffin had been in custody for a parole violation and was facing a potential prison sentence in Iowa. While in custody, Griffin testified before a grand jury regarding this case. Defense counsel presented a letter from Griffin to a Cook County State's Attorney, which reminded the State's Attorney to notify a prosecutor in Iowa that he had cooperated with the grand jury proceeding and stated that Griffin was seeking probation.

¶ 14 In its closing argument, the State argued that Patterson's identification of defendant was credible. Just after she had been shot, she told police that defendant was the shooter and where he had come from, and later police found defendant's cell phone in the same location. The State noted that Washington received a call from defendant the next day, and that Griffin would not have known where the phone was dropped unless he had been told by someone who was present. The State also argued that it would take only a second for Patterson to recognize defendant because she had known him for 15 years.

¶ 15 Defense counsel argued that Patterson's, Griffin's, and Washington's accounts were isolated and not corroborated. Defense counsel also attacked these three witnesses' credibility, stating their behavior was inconsistent with what would be expected from responsible, truthful persons. Patterson admitted she had forgotten her child at a birthday party, and after she picked him up from the police station, decided to go out drinking. Washington had violated her probation and lied to the police. Griffin, having heard that defendant was fleeing a murder, took defendant to live with his girlfriend and child. Further, there was no evidence that defendant and Thomas had communicated between Lucas's and Thomas's fight and the shooting. Because it was a spur-of-the-moment decision, no one knew that Lucas and Patterson planned to go to Wilson's house. Defense counsel contended it did not make sense that someone plotting a retaliation murder would wait in a gangway at a house when there was no reason to believe the targets would be arriving there later. Defendant also argued that Patterson's testimony that she stared at the shooters the entire time was

not credible because doing so would have resulted in an entirely different set of injuries, and that people other than defendant had access and possession of the recovered phone.

¶ 16 Following closing arguments, the jury found defendant guilty of first degree murder, attempted murder, and aggravated battery with a firearm.

¶ 17 On January 13, 2010, defendant asked that his trial counsel, Thomas Peters, be given leave to withdraw. On February 11, 2010, defendant accepted the public defender as counsel for post-trial motions and sentencing. On September 9, 2010, defendant's new counsel filed a motion for a new trial, alleging in part that defendant's trial counsel, Peters, was ineffective for not calling certain forensic experts and witnesses.

¶ 18 Yolanda Franklin was a previously-uncalled alibi witness who testified at the hearing on the motion. In response to counsel's question whether she saw defendant anytime after 10 p.m. on February 7, 2007,[2] Franklin responded that at 9 or 10, defendant had gone to retrieve his children and their mother, Veronica Washington, returned around 10 or 10:30, and then remained in Franklin's home. Franklin's room was by the stairs and defendant was in the back bedroom. Franklin stayed up until 2 a.m. that night, and due to the layout of her home, it would not have been possible for defendant to leave without her knowledge. Franklin could see "anybody who comes out of any room, *** except the room next to [hers], and that's only if they [are] going to the washroom," and she did not see defendant leave his room. When asked if she had ever been contacted by Peters about a shooting that occurred on February 7, she said she had, and had related to Peters what she had just described. Peters told her she would be a witness.

¶ 19 Attorney Peters, who had practiced for 34 years and tried several dozen murder trials, testified that defendant had discussed the existence of Franklin as an alibi witness. Peters represented defendant's family for about 20 years. Peters spoke to Franklin before defendant's trial, but did not think it would be a good idea to call her as a witness because Franklin did not provide

[2] Defense counsel subsequently maintained that he made a mistake when referring to February 7 instead of February 4.

"a very convincing alibi." While the shooting occurred in the early morning hours, the best Franklin could say is that defendant "had come over to her house around that time," that she went to bed in one room and he in another, and "she then saw him again many hours later," resulting in a gap in time that she could not account for. Franklin could not say with certainty what time she saw defendant and what time she next saw him. Peters testified cogently, and at some length, regarding his strategy, explaining:

> "In putting on an alibi, I think what you have to *** weigh as the defense attorney is [whether] this alibi [is] going to be good enough or are you better off resting the case without presenting the alibi and just saying the State didn't prove its case. If you are a defense attorney and start putting on a case, jurors tend to say, well, the State put on more evidence than the defense did and that hurts your client.
>
> So sometimes frequently it is better to put on no case and say we win because they didn't prove their case beyond a reasonable doubt and you don't have to weigh it against any other testimony."

Peters also stated that Franklin had some bias toward defendant because at the time of the incident, she was the girlfriend of defendant's brother. Further, Franklin had no particular reason to remember the night in question, and when Peters asked questions on the topic, her first responses were very uncertain and vague. In Peters's view, when the State would ask why she recalled that particular night and those hours, she would undercut defendant's case if she did not have an answer. Additionally, Franklin had said that defendant was with Veronica Washington on the night of the shooting, but Veronica never mentioned the alibi during the five or six conversations Peters had with her. Peters did not think it would help defendant's case to call Franklin as a witness.

¶ 20 Defendant testified that the trial strategy was to prove that Timothy Christmas committed the murder, not defendant, but defense counsel did not follow through on this strategy. Peters told

defendant that Franklin's testimony was not needed, and defendant admitted he had agreed with the strategy not to present the alibi witness.

¶ 21 In denying defendant's motion for a new trial, the trial court stated Franklin's testimony provided only a partial alibi. Franklin was in a bedroom by herself and defendant was allegedly in another bedroom by himself, "but she could never verify at the time of occurrence that he was in fact there. She just said he might have been in the bedroom." Further, the trial court found it significant that Franklin adopted the date of February 7. While defense counsel had indicated this was a mistake on his part and had asked her about the wrong date, Franklin was in a position to correct him and did not do so, which verified Peters's testimony that her alibi would be of little use. The trial court did not find Franklin to have a good command of the dates or the alibi, and she "would have probably just parroted anything that was said to her." The trial court believed Peters was "probably tactically correct" in not calling her, and found that although defendant now complained about a lack of an alibi defense, he had tactically agreed with that course from the beginning.

¶ 22 Defendant was sentenced to consecutive 75- and 45-year prison terms for murder and attempted murder, each of which included a mandatory 15-year firearm enhancement because defendant was armed with a firearm during the offense.

¶ 23 On appeal, defendant contends his trial counsel was ineffective for failing to call Franklin as an alibi witness because her testimony at the post-trial hearing established that defendant was in her home at the time of the offense. Defendant argues that counsel's proffered reasons for not calling Franklin—she was biased, she could not say with certainty when she saw defendant, she may have been cross-examined on why she recalled that particular night, and it was better to rely on the State's inability to meet its burden of proof—were so unsound as to violate defendant's right to effective assistance of counsel. Defendant also argues that Franklin's exculpatory testimony would have corroborated the defense strategy to imply that Timothy Christmas was the shooter. According to defendant, because the defense introduced no other evidence, there is a reasonable probability that

Franklin's alibi testimony combined with the defense's attack on the State's witnesses would have caused the jury to find that the State failed to meet its burden of proof.

¶ 24 To prevail on a claim of ineffective assistance of counsel, a defendant must prove: (1) his counsel's performance was deficient because it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not incompetence. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). Counsel's performance must be viewed at the time of his actual performance, rather than in hindsight. *People v. Whittaker*, 199 Ill. App. 3d 621, 627 (1990). Further, counsel's competence should be judged from the totality of his conduct and not on the basis on what appellate counsel might have done in his stead. *People v. Nunez*, 263 Ill. App. 3d 740, 748 (1994). As to prejudice, a defendant must show a reasonable probability that, but for counsel's errors, the result would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

¶ 25 Generally, whether to call a particular witness is a matter of trial strategy (*People v. Flores*, 128 Ill. 2d 66, 85-86 (1989)), and strategic choices made after thorough investigation of law and facts relevant to plausible options are "virtually unchallengeable" (*Strickland*, 466 U.S. at 690). An exception to this rule is when counsel's chosen strategy is so unsound that counsel entirely fails to conduct any meaningful adversarial testing. *People v. Reid*, 179 Ill. 2d 297, 310 (1997). Counsel's tactical decisions may also be deemed ineffective when they result in counsel's failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense. *People v. King*, 316 Ill. App. 3d 901, 913 (2000). A defendant bears the burden of overcoming the strong presumption that his counsel's decision was the product of sound trial strategy. *People v. Gacy*, 125 Ill. 2d 117, 126 (1988).

¶ 26 Here, defendant has failed to overcome the presumption that counsel's decision not to call Franklin was sound trial strategy. Failure to call a witness will not support an ineffective assistance

of counsel claim where the circumstances show that the testimony would likely have been harmful or would have had no probative value to a determination of guilt or innocence. *People v. Ashford*, 121 Ill. 2d 55, 74-75 (1988). Additionally, a defense attorney may choose not to call a witness who could be subject to severe impeachment (*People v. Smado*, 322 Ill. App. 3d 329, 335 (2001)), or if he reasonably believes that under the circumstances the individual's testimony is unreliable or would likely have been harmful to the defendant (*Flores*, 128 Ill. 2d at 106). Here, Peters explained that Franklin did not provide "a very convincing alibi" and calling her as a witness would not help defendant's case. Franklin testified at the post-trial hearing that defendant returned to her home around 10 or 10:30 and that she did not see him leave afterwards. However, she was not physically present with defendant during the entire evening. Cross-examination would have highlighted this fact and the possibility that she could not account for his whereabouts at the exact time of the offense. Peters offered other valid reasons for not calling her—jurors might see her as biased and she was vague and uncertain about why she remembered that night in particular, which would also leave her vulnerable on cross-examination. Additionally, Franklin's claim that defendant was with Veronica Washington that night was not mentioned by Veronica during the multiple conversations Peters had with her. That Peters's decision not to call Franklin was the product of sound trial strategy is supported by other cases where defendants unsuccessfully challenged their counsels' decision not to call a witness. See *People v. Kubat*, 114 Ill. 2d 424, 433-34 (1986) (counsel could conclude testimony about the defendant's whereabouts before the crime would be of questionable value where it would not have provided an alibi for the time the crime was committed); *People v. McKenzie*, 263 Ill. App. 3d 716, 722 (1994) (defendant testifying would have subjected her to "full brunt of adversarial cross-examination" and could have produced liabilities which outweighed the benefits of her testifying); *People v. Consago*, 170 Ill. App. 3d 982, 988 (1988) (certain portions of testimony could have been harmful to the defendant).

¶ 27 Moreover, defendant's reliance on *People v. King*, 316 Ill. App. 3d 901 (2000) is unpersuasive. In *King*, this court declined "to assume, without any explanation," that trial counsel's

failure to call an available alibi witness was the product of sound trial strategy. *Id.* at 916. There, trial counsel recalled that he spoke to the alibi witness on the phone once and interviewed her, but could not recall why he had not called her as a witness. *Id.* at 906. Here, in contrast, at the post-trial hearing, Peters provided a detailed and reasoned explanation for why he did not call Franklin. Under these circumstances, we find that defendant has failed to overcome the presumption that Peters's decision was sound trial strategy.

¶ 28 Even assuming that defendant could demonstrate that the failure to call Franklin was unreasonable, defendant cannot demonstrate that he was prejudiced by his counsel's decision. The State's main witnesses were hardly paragons of virtue. Viewed as a whole, however, the State's evidence against defendant was strong. Patterson identified defendant, whom she had known since elementary school, as a shooter. Griffin testified that defendant admitted he shot Lucas and Patterson's car, and Griffin's account was corroborated by the fact that defendant was apprehended in Sioux Falls, where Griffin stated he had taken him. The recovered cell phone also provided substantial evidence against defendant. While meeting with the police, Washington dialed defendant's phone number and observed the recovered phone ring. Additionally, defendant's unique nickname for Griffin was listed in the phone, and recent calls included Griffin, Thomas, defendant's mother, and Washington, who testified that defendant called her the day after the shooting. Standing alone, Franklin's testimony would have only raised a theoretical possibility that defendant was at her home sometime during the night of the shooting. Defendant cannot establish that the result of the trial would not have been different if Franklin had testified.

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

¶ 30 Affirmed.