

2013 IL App (1st) 113106-U

THIRD DIVISION
NOVEMBER 13, 2013

No. 1-11-3106

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. 09 CR 18010
)	
NELSON VASQUEZ,)	Honorable
)	Carol M. Howard,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

O R D E R

¶ 1 *Held:* Where trial counsel's decision to call a particular witness did not constitute ineffective assistance, defendant's conviction for aggravated battery with a firearm is affirmed, and his duplicative \$200 DNA fee is vacated.

¶ 2 Following a bench trial, defendant Nelson Vasquez was convicted of aggravated battery with a firearm and sentenced to 10 years' imprisonment. On appeal, defendant contends his trial counsel rendered ineffective assistance because counsel proceeded with an unsound trial strategy by calling a witness whose testimony provided devastating evidence against defendant which prejudiced defendant. Defendant also contends, and the State agrees, that he was erroneously

assessed a \$200 DNA ID System fee. We vacate the DNA fee and affirm defendant's conviction and sentence in all other respects.

¶ 3 Defendant was tried on four counts of attempted first degree murder, and one count each of aggravated battery with a firearm and being an armed habitual criminal. At trial, Mark Castrejon testified that about 11:15 p.m. on November 24, 2008, he was driving home from work with his father and his brother Francisco in his father's van. As they arrived near their house, Mark saw two gang members in a Ford Expedition parked at a liquor store at the corner of Kimball Avenue and Irving Park Road. Mark knew the men were gang members because they were flashing the gang sign for the Simon City Royals street gang and saying "Royal love." Mark was familiar with the hand signal from living in the neighborhood for nine years, but he was not a gang member. Mark parked the van in front of the family's house on Kimball Avenue and dropped off his father and Francisco. The men in the Ford Expedition drove north on Kimball Avenue, then left the area. Mark waited inside the van in front of his house, and then he and his girlfriend Marisol drove his sister's friend home.

¶ 4 A short time later, Mark returned home and was looking for a parking space when he saw the same two gang members in an alley a block north of his house. The Ford Expedition was parked on the street. The men were drinking and again made gang signs. Mark called his brother Francisco and told him to watch for him because there were gang members outside. Mark found a parking space about five houses north of his house and parked the van. Immediately after exiting the van, the gang members approached Mark and Marisol on the street. Mark told Marisol to call 911, and Marisol ran inside the house. The two men asked Mark what gang he belonged to, and he replied he was not in a gang. Mark's brother Francisco then joined Mark in the street, holding a baseball bat down at his side in his right hand. Francisco told the men that

he and Mark did not want any trouble. The two men then whistled, and 8 to 12 men and women came out of a nearby building.

¶ 5 Mark and Francisco began walking backwards toward their house. The group continued approaching the brothers, and a man from the building hit Mark in the head with brass knuckles. That was the first punch thrown that night. At the same time, Mark's younger brother, Jose, arrived in the street. Mark saw Francisco being pushed by people in the group, and Jose was being beaten by three people. Mark testified that he did not see if Francisco was still holding the bat, but later testified that Francisco dropped the bat a few moments later. Francisco never raised the bat above his waist or shoulder, never swung the bat at anyone, and never threatened anyone with the bat. Mark then heard a gunshot. Mark turned around and saw defendant standing four feet away from him, holding a revolver pointed up in the air. Defendant then pointed the gun toward Francisco's knee and from a distance of about one foot, fired a second shot, shooting Francisco. Defendant then ran to Jose, who was lying on the sidewalk being beaten, pointed the gun at Jose's head, and asked "should I shoot him too." Mark then heard police sirens, and the entire group that confronted the brothers fled the scene.

¶ 6 Mark helped Francisco walk to their house and an ambulance transported Francisco to the hospital. The following day, Mark identified defendant in a photo array as the man who shot Francisco. Ten months later, Mark identified defendant in a lineup. Defendant was not one of the two men Mark initially saw on the street, but was one of the people who came from the building. Mark had never seen defendant before that night.

¶ 7 Francisco Castrejon testified substantially the same as his brother Mark regarding their drive home from work and seeing two men on the corner displaying gang signs. Francisco stayed home while Mark and Marisol drove their sister's friend home. A short time later, Mark called Francisco and asked him to wait outside because the two men were in the alley. Francisco stood

on his front porch and saw Mark park the van several houses north of their house. When Mark exited the van, the two men crossed the street, approached Mark and started talking to him. Francisco did not recall seeing Marisol at this time. Francisco grabbed a baseball bat from inside his house and walked to where Mark was standing on the street. He held the bat down at his side in his right hand. The men asked the brothers what gang they belonged to, and the brothers replied that they had just come home from work. Francisco testified that he was not in a gang at the time of this incident, but was a member of the Sinisters street gang for a year and a half when he was in high school. Francisco denied raising the bat, threatening the men with the bat, striking anyone with the bat, or using the bat in any way. He brought the bat with him to scare the men, and in case an altercation started.

¶ 8 Similar to Mark's testimony, Francisco testified that one of the men whistled, and a group of 8 to 12 people, including defendant, came out of a building. When the group approached the brothers, Francisco recognized one of the men from high school named "C-Ball." Francisco told C-Ball to tell his friends to calm down and "chill out," but C-Ball said he could not do anything. Francisco tried to diffuse the situation because there were a lot of people in the group and the brothers did not want any trouble. The men in the group then started punching Mark and Francisco. Francisco denied that he or Mark threw the first punch. While he was being punched by three men, Francisco dropped the bat. As the men continued hitting him, Francisco saw defendant pull out a gun and fire one shot into the air. Francisco was not certain what type of gun defendant had, but testified it was a small gun and thought it was a .22-caliber. Defendant then pointed the gun down at Francisco's knee and shot him in the leg. Francisco saw the hole in his pants and tried to walk home, but had difficulty walking. Francisco then saw his brother Jose lying on the sidewalk with three men hitting him, one of whom hit Jose with a brick. Francisco was unable to help Jose because he was shot.

¶ 9 When Francisco got home, he told his mom to call an ambulance, and he then saw a hole in his right leg near his knee that was bleeding. The ambulance took Francisco to Swedish Covenant Hospital where the medical staff told him nothing was wrong and sent him home. Francisco was still in pain, and his mother then took him to Illinois Masonic Hospital where he was admitted for a week and underwent surgery to have a bullet removed from his leg. Francisco showed the trial court a scar above his knee, at which time the court commented "I'm looking at a very small light scar." Ten months after the shooting, Francisco viewed a lineup at the police station and identified defendant as the man who shot him. Francisco acknowledged that he had a misdemeanor charge pending for driving under the influence, but testified that the State did not make him any promises or offers in regards to his case in exchange for his testimony in this case.

¶ 10 Jose Castrejon testified that he was 14 years old at the time of this incident and was sleeping when his sister woke him up and told him there was a problem with his brothers. Jose went outside and saw his brothers and a group of about 10 men on the street. As he approached the group, Jose saw Francisco holding a baseball bat down at his side in his right hand. Jose did not have any bottles with him. Jose heard men in the group tell his brothers that it was their neighborhood. Jose then heard a gunshot and was hit in the back of his head with a brick. Jose fell to the ground and four or five men started kicking him. Jose did not see where the gunshot came from, but while he was lying on the sidewalk, he saw defendant point a gun at Francisco and shoot Francisco in the knee. Jose was still lying on the ground being beaten when he heard someone say "should I shoot him too, should I shoot him too." Jose did not know which man said that. Jose then heard police sirens, and everyone from the group fled. Ten months later Jose viewed a lineup at the police station and identified defendant as the man who shot Francisco.

¶ 11 Chicago police detective Arthur Taraszkievicz testified that Mark viewed a photo array and identified defendant's brother, John Vasquez, as the man who struck him during the

altercation. Mark and Jose also identified defendant in separate photo arrays. Several months later, Mark, Francisco and Jose viewed separate lineups at the police department and they all identified defendant as the man who shot Francisco.

¶ 12 During his motion for a directed finding, defense counsel argued that as to the charges of attempted first degree murder, the State failed to show defendant had an intent to kill. Counsel further argued the evidence failed to show defendant was armed with a firearm because no weapon was recovered, no bullet was introduced, and it could have been a pellet gun that was fired. In addition, counsel argued that Francisco did not suffer great bodily harm. The court denied counsel's motion.

¶ 13 Luis Candelaria, defendant's friend for over 10 years, testified for the defense that he and defendant drove to a liquor store in Candelaria's Ford Expedition, bought some liquor, then drove back to an apartment where they had been drinking. Candelaria parked his truck on Kimball Avenue, and when he exited the vehicle, a van coming down the street nearly hit him, causing him to jump out of the way. A verbal altercation ensued between Candelaria and defendant and the men in the van. The men exited their van holding bats and bottles, and approached Candelaria and defendant. Candelaria recognized the men from the neighborhood and knew they lived on Kimball Avenue. The men rushed towards Candelaria and defendant, throwing bottles at them, which immediately erupted into a fight. Some of Candelaria's friends came out of an apartment building across the street. A couple of men ran towards defendant and swung a bat at him. Candelaria believed the men attacked defendant because defendant was a smaller man. Candelaria then heard gunshots, but he did not see a gun on the scene.

¶ 14 On cross-examination, Candelaria acknowledged that he had a prior felony conviction for aggravated battery with a firearm. He further acknowledged that he and defendant were both members of the Simon City Royals street gang since they were in seventh grade, and that

particular block of Kimball Avenue is within the territory controlled by their gang. Candelaria testified that after the van nearly hit him, he yelled at the men inside "[w]hat the fuck. What the fuck y'all on man?" The men then pulled their van over to the side of the street and exited the van. Candelaria testified that there were more than four men fighting with him and defendant. Two of those men had baseball bats and the others had bottles. Candelaria could not recall everything that happened because a couple years had passed, and he was under the influence of alcohol on the night of the fight. Candelaria testified that he was not fighting the men, but instead, was dodging them, trying not to get hit by the bats and bottles. He did not flee the area and run into the apartment building because he was concerned about his truck parked on the street. When asked by the prosecutor where the gunshot came from, Candelaria responded "Nelson Vasquez." When Candelaria heard the gunshots, he knew it was a handgun being fired. Candelaria testified that defendant had a gun on him, but Candelaria did not see the gun at the time of the shooting. After the shots were fired, Candelaria learned defendant had a gun.

¶ 15 During closing argument, defense counsel asserted that Candelaria's testimony was credible and that he did not try to hide "what he was" or that he had been drinking that night. Counsel argued that Candelaria's testimony showed that the men in the van approached him and defendant, and counsel asked the court to consider that the State's witnesses were initially the aggressors. Counsel repeated his earlier arguments that there was no evidence defendant had an intent to kill, that he caused great bodily harm, or that a firearm was the weapon used.

¶ 16 The trial court stated that it believed defendant had a gun and that he fired that gun, and therefore found defendant guilty of aggravated battery with a firearm. The court found defendant not guilty of attempted murder and being an armed habitual criminal, stating that the evidence did not prove beyond a reasonable doubt that defendant had an intent to kill or that the elements of being an armed habitual criminal had been met. The trial court subsequently sentenced

defendant to a term of 10 years' imprisonment and assessed him various court costs and fees, including a \$200 DNA ID System fee.

¶ 17 On appeal, defendant first contends his trial counsel rendered ineffective assistance because counsel proceeded with an unsound trial strategy by calling Luis Candelaria as a witness. Defendant argues that Candelaria's testimony provided devastating evidence that defendant was the gunman and a member of the gang controlling the victim's neighborhood, which proved the State's theory of the case. Defendant asserts that counsel either failed to investigate Candelaria before calling him as a witness, or made an unsound decision to present an extremely risky witness. Defendant claims Candelaria's testimony was not relevant or necessary, and therefore, there was no reasonable strategy for calling him as a witness.

¶ 18 The State argues that counsel's decision to call Candelaria as a witness was sound trial strategy because his testimony supported defendant's theory of the case that he and defendant were not the aggressors, but were the ones being attacked. The State asserts that defendant is merely second-guessing trial counsel, and has failed to overcome the strong presumption that counsel was effective. In addition, the State argues that defendant was not prejudiced by Candelaria's testimony because the evidence against defendant was overwhelming where three eyewitnesses each testified that they saw defendant shoot Francisco in the leg.

¶ 19 Claims of ineffective assistance of counsel are evaluated under the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11. To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that counsel's representation was deficient, and as a result, he suffered prejudice. *Strickland*, 466 U.S. at 687; *People v. Givens*, 237 Ill. 2d 311, 331 (2010). Specifically, defendant must show that counsel's performance was objectively unreasonable, and that there is a reasonable probability the outcome of the proceeding would have been different if

not for counsel's error. *Henderson*, 2013 IL 114040, ¶ 11. If defendant cannot prove he suffered prejudice, this court need not determine whether counsel's performance was deficient. *Givens*, 237 Ill. 2d at 331. It is well established that decisions regarding which witnesses to call on defendant's behalf are considered matters of trial strategy within trial counsel's discretion, and as such, are generally immune from claims of ineffective assistance of counsel. *People v. Banks*, 237 Ill. 2d 154, 215 (2010).

¶ 20 Here, we find that defendant has not demonstrated that he was prejudiced by counsel's decision to call Candelaria as a witness where the evidence presented by the State was overwhelming. All three of the Castrejon brothers testified that they saw defendant point a gun at Francisco's knee and saw defendant shoot Francisco in the leg. The day after the shooting, Mark identified defendant in a photo array. The brothers and Detective Taraszkiewicz all testified that ten months after the shooting, the brothers viewed separate lineups, and each of them identified defendant as the man who shot Francisco. In light of this testimony from the State's witnesses, Candelaria's testimony that defendant was in possession of a gun and fired the gunshots did not prejudice defendant such that he would not have been convicted but for Candelaria's testimony. Even without Candelaria's testimony, the State's evidence was more than sufficient to convict defendant of aggravated battery with a firearm.

¶ 21 The record reveals that trial counsel called Candelaria as a witness in an attempt to show that the testimony from the Castrejon brothers was not credible, and that the brothers were the aggressors. Candelaria testified that the men in the van nearly ran him over on the street. He further testified that the men exited the van and rushed at him and defendant while swinging baseball bats and throwing bottles. Candelaria testified that he did not engage in a fight with the men, but instead, tried to dodge them and avoid being hit by the bats and bottles. During closing argument, trial counsel argued that Candelaria's testimony was credible and showed that the

State's witnesses were initially the aggressors. The record thereby shows that counsel made a strategic decision within his discretion to call Candelaria as a witness in an attempt to discredit the State's witnesses. Accordingly, counsel's decision did not constitute ineffective assistance.

¶ 22 Defendant next contends, and the State agrees, that the \$200 DNA ID System fee under section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2008)) was erroneously assessed to him because he was previously assessed the fee and submitted a DNA sample in April 2003 as the result of a prior conviction. See *People v. Marshall*, 242 Ill. 2d 285 (2001). We therefore vacate the \$200 DNA fee from the Fines, Fees and Costs order.

¶ 23 For these reasons, we vacate the \$200 DNA ID System fee from the Fines, Fees and Costs order and affirm defendant's conviction and sentence in all other respects.

¶ 24 Affirmed as modified.