2014 IL App (1st) 120489-U

First Division
Order filed: February 3, 2014

No. 1-12-0489

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CR-17815
TERRANCE WEATHERSPOON,	)	Honorable Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's ineffective assistance of counsel claims failed under *Strickland*, and the imposition of the DNA and electronic citation fees were vacated.

¶ 2

¶ 3 In the direct appeal of his home invasion and armed robbery convictions, the defendant, Terrance Weatherspoon, argues that his trial counsel rendered ineffective assistance for: (1) failing to review discovery material before trial which resulted in counsel's failure to conduct a pretrial interview of the State's identification witness and failure to file a motion *in limine*

to bar his testimony; (2) failing to adequately cross-examine the State's identification witness at trial; and, (3) making false and prejudicial statements to the jury in opening and closing arguments. In addition, the defendant argues, and the State concedes, that the circuit court improperly assessed a $200 DNA analysis fee and a $5 electronic citation fee. We, therefore, vacate that portion of the circuit court's order requiring the defendant to pay those fees, and, for the reasons which follow, we affirm the defendant's conviction in all other respects.

¶ 4

Along with Randy Johnson and Cashell Williams, the defendant was charged with home invasion with a firearm (720 ILCS 5/12-11(a)(3) (West 2010)) and armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2010)) for a September 15, 2010, incident in which the State alleged that the three offenders and a fourth unknown offender, armed with firearms, entered the home of Jason and Rekisha Macon and used force against Jason to steal $1,800 in cash, Jason's cell phone, and Rekisha's purse. The defendant's case was severed from the cases against Johnson and Williams and proceeded to a jury trial on November 1, 2011.

¶ 5

During opening statements, the State summarized the facts of the case anticipating the testimony of the victims and the arresting police officers, highlighting the fact that the defendant was caught shortly after the robbery fleeing in an SUV with two other offenders and was found with the victim's cell phone. In his opening statements, defense counsel told the jury that the defendant was an innocent man in the wrong place at the wrong time. He stated that "no gunshot residue" was found on the defendant's hands and "[n]o proceeds of

the robbery" were found on him. Defense counsel continued that no DNA or fingerprint evidence connected the defendant to the crime and neither victim identified the defendant. He asked the jury to listen to all of the evidence and look at the lack of evidence before making a decision.

¶ 6

Rekisha Macon testified that, on September 15, 2010, she lived in a second-floor apartment on East 69th Street with her husband Jason and her sons, ages 3 and 6. Upon returning from the grocery store with her younger son, she saw four armed men by the wall outside her apartment door; three men concealed their faces with hoodies and scarves and one did not. One masked man told her to "shut up,"and put a gun at her side, while another grabbed her son and told her to open the door. Rekisha unlocked the door and the men ran inside. Three men went into the master bedroom where Jason was playing video games with their older son, while one masked man held her by the door. Her younger son walked toward the room with Jason and began screaming. Rekisha entered the master bedroom and saw Jason on the ground bleeding. The men kept asking Jason where he kept his money. At one point, Jason and three robbers walked toward the rear bedroom, but Jason quickly entered the room and shut the door, locking himself in the room. The four robbers then ran outside, and Rekisha called police. After a short while, Jason called to her from outside and asked for his car keys, which Rekisha threw over the balcony to him. At the police station, after the offenders were arrested, Rekisha identified her purse, which was taken during the robbery. On cross-examination, she admitted that she did not identify the defendant in a lineup.

¶ 7

Jason Macon testified that he was playing video games with his son in the master bedroom when Rekisha walked into the apartment screaming his name. He looked to his left and saw a man with a gun. The man wore a black hoodie with no face mask and threatened to shoot him if he moved. The man hit him with the gun, knocking him unconscious for a moment. Jason testified that he woke up to stomps and kicks. Two of the men wore masks concealing their faces. One of the robbers took money from Jason's top drawer. Jason stated he had two months' rent money, about $1,800, in the dresser drawer. One man asked for more money, so Jason lied and said that there was more money in the back bedroom. Not finding the money, the man returned and told the others to "kill him." Jason told the robbers that he would show them the other money, and he stepped out of the master bedroom with three of the robbers. He saw another masked man with Rekisha near the door. Seeing that the window of the back bedroom was open, Jason quickly entered the room and closed and locked the door before the robbers could enter. He then jumped out of the window. He ran to the alley between Stony Island and Harper Avenue, where his car was parked. Jason testified that two of the robbers ran past the alley toward 69th Street and Harper Avenue. He then collided with a third robber in the alley. Jason tried to grab the man's gun but failed, and the man shot the gun at him. Jason fell to the ground and then saw the fourth robber running toward Stony Island.

¶ 8

Jason testified that he next ran toward Harper Avenue to follow three of the robbers, who had

entered a dark color SUV. He called to Rekisha to throw him his car keys, which she did. Jason then drove in reverse to Harper, blocking the SUV. Police officers arrived and approached Jason's car from behind, as the SUV pulled out and drove away. Jason told the police that the men in the SUV had just robbed him, and the police chased the vehicle. Jason followed the police for a few blocks but then went home. When he returned home, Rekisha informed him that the police had arrested the men. Jason later identified a cell phone retrieved from the defendant's person as his cell phone which was stolen during the robbery. On cross-examination, Jason admitted that he did not identify the defendant in any police lineup.

¶ 9

Officer Jeffrey Caribou testified that he saw a green Land Rover being chased by another police car traveling on South Chicago. Officer Caribou put his lights on and chased after the Land Rover; the chase ended in the parking lot of Parkway Gardens, a housing complex. He saw one passenger throw a gray bag out of the front passenger window of the Land Rover. Officer Caribou jumped from his vehicle to recover the bag, which contained drugs and a .38 caliber pistol. The Land Rover then crashed into an unmarked police vehicle, and the three male occupants fled on foot.

¶ 10

Officer Roshaun Hughey testified that, while on duty with his partners Officer Roderick Dillard and Officer Robert Henderson, he heard a gunshot in the area of 65th and Stony Island and proceeded to find a dark green Land Rover and another vehicle in the alley. The

Land Rover drove off, and Jason told them that the men in the Land Rover had just robbed him. Officer Hughey chased the Land Rover, which proceeded to crash into another police car in the parking lot of Parkway Gardens. He saw three males exit the vehicle and begin to run. Officer Hughey testified that he was about five feet from the vehicle when he saw the men. He stated that the area was well-lit because it was a housing complex. He identified the defendant as one of the men that exited the Land Rover. Officer Hughey testified that other officers chased the men and apprehended them. Officer Hughey advised the arresting officers that the defendant was one of the passengers he saw exit the Land Rover. At the police station, Officer Hughey searched the defendant and recovered two cell phones, one of which was later identified as Jason's phone.

¶ 11

On cross-examination, defense counsel extensively questioned Officer Hughey regarding his recovery of the cell phone from the defendant's person. He admitted that officers conducted a pat down search of the defendant at the scene of his apprehension to insure he was not carrying a gun and that the cell phone was not discovered during that search. He also admitted that he returned the phone to Jason and did not inventory the phone as evidence. Defense counsel did not cross-examine Officer Hughey regarding his identification of the defendant as a passenger in the Land Rover.

¶ 12

Officer Roderick Dillard testified that he participated in the chase of the Land Rover with Officer Hughey and Officer Henderson. After the chase, he recovered several hoodies from

the inside of the Land Rover, along with a black bandana, a black scarf, and a black purse which was later identified by Rekisha as the one stolen from her apartment. He testified that he saw the driver exit the Land Rover but that he was not in a position, like his partner Officer Hughey, to see the passengers exit. Officer Dillard testified that he identified one of the apprehended men,Williams, as the driver of the Land Rover. On cross-examination, he admitted that he did not see the defendant.

¶ 13

The defendant testified that, on the night of the crime, he was in the parking lot of Parkway Gardens with his uncle fixing his cousin's vehicle. The defendant was trying to jump start the car as its battery was dead. The defendant stated that he was at the complex because his cousin's girlfriend lived there. He testified that he walked about 15 feet away from the cars to urinate on a fence. He stated that he was alone in the area which was very dark and not well-lit. When asked where his cousin and uncle were while he was urinating, the defendant stated he did not "have the slightest idea where they went," but that they probably went inside the building. While urinating, the defendant saw some lights and heard someone say "freeze." The defendant testified that he was not doing anything illegal and was unaware of any police chase or police activity in the area. He did not understand why the police were arresting him. At the police station, he heard officers speaking about a robbery. The defendant denied that he had a cell phone on his person.

¶ 14

On cross-examination, the defendant stated that he chose to urinate on the fence rather than

go inside with his uncle and cousin to his cousin's girlfriend's apartment because he often urinates outdoors. He stated that he did not see his cousin, who he identified as Marcus Walls, or his uncle, who he identified as Ronnie Jackson, after he was arrested. He stated that he told the police that he was with Jackson and Walls that night, but he did not have their contact information. He was only able to tell the police that Jackson lived in the area of 75th and Dorchester. The defendant stated that the police left to locate Jackson, but returned and told him that they were unable to find Jackson. He denied that the police showed him pictures of houses from the assessor's office website and had him identify his uncle's house.

¶ 15

The State called Detective Brian Cunningham as its rebuttal witness. Detective Cunningham testified that the defendant told him that he was at Parkway Gardens, fixing a car with his uncle, when he was approached by 50 armed officers as he was urinating. Detective Cunningham testified that the defendant never mentioned Walls, but mentioned Jackson, who he did not have contact information for other than that he lived on the 7400 or 7500 block of Dorchester. Detective Cunningham printed out photographs of the homes in that area from the tax assessor's website, and the defendant identified a house as his uncle's. However, when Detective Cunningham went to the home to speak to Jackson, the house was boarded up and abandoned. Detective Cunningham admitted that the defendant denied being a passenger in the Land Rover.

¶ 16

During his closing argument, defense counsel attempted to discredit the testimony of Jason

and pointed out the mistakes made by the police, namely that no DNA or fingerprints were taken from the Macon residence. At one point, defense counsel stated that the jury's duty was to decide whether the State met its burden when the defendant "was not picked out of the line-up and was never tied to any sort of –any sort of firearms or any proceeds of the crime." Defense counsel also attempted to discredit Officer Hughey's identification of the defendant by arguing that it was unbelievable that he saw the defendant but Officer Dillard, seated next to him, was unable to see the passengers exit the SUV. Regarding the cell phone, counsel stated that Officer Hughey was not the officer who recovered the cell phone from the defendant's person and argued that it was unbelievable that the cell phone was not discovered during the pat down search of the defendant at the scene, even though the phone was about the size of a gun. Finally, counsel asked the jury if there was any evidence that the defendant was armed with a firearm and said "No." He then stated "I told you about the evidence of the cellular phone. That's for you to decide." Counsel referred to the $1,800 cash that was stolen and pointed out that it was not found in the car or the gray bag, and he asked the jury: "Where's the money? Where are the proceeds of this robbery?"

¶ 17

In rebuttal, the State noted that Officer Hughey actually did recover the phone from the defendant's person, stating "I don't know what trial [defense counsel] was listening to, but Officer Hughey was quite consistent and credible and clear that ***[he] collected and found that cell phone on his person."

¶ 18

The jury found the defendant guilty on both counts, and the defendant moved for a new trial. He argued, in relevant part, that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), when it failed to disclose in any discovery materials that Officer Hughey would identify the defendant. The defendant contended that, because of the State's *Brady* violation, his defense was prejudiced as his counsel was unprepared to adequately cross-examine the officer and he did not have the opportunity to file a pretrial motion *in limine* to bar the testimony.

¶ 19

On January 25, 2012, at the hearing on the defendant's motion, the State denied the information was withheld, and defense counsel admitted that "there was vague information from Officer Hughey that he observed the occupants." However, defense counsel stated that "there was no specific information that [Officer Hughey] observed [the defendant] specifically exiting the vehicle and where he went until we heard it at trial." In fact, in his grand jury testimony, which was turned over to the defense, Detective Cunningham testified that Officer Hughey observed and identified the defendant as one of the passengers who exited the Land Rover. The circuit court denied the motion and sentenced the defendant to two concurrent terms of 40 years' imprisonment. The defendant was also assessed a $200 DNA analysis fee and a $5 electronic citation fee. This appeal followed.

¶ 20

The defendant first contends that he was denied effective assistance of counsel because, as a result of his attorney's obvious failure to review discovery materials, specifically the grand

jury testimony, counsel failed to conduct a pretrial interview of Officer Hughey, failed to file a motion *in limine* to bar Officer Hughey's testimony, and failed to adequately cross-examine Officer Hughey at trial. We disagree.

¶ 2 1

In determining whether a defendant was denied the effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *People v. Deleon*, 227 Ill. 2d 322, 337-38, 882 N.E.2d 999, 1008 (2008). To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Id.* More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a " 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* (quoting *Strickland*, 466 U.S. at 694). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Id.* at 338.

¶ 2 2

First, the defendant fails to establish that he was prejudiced by counsel's alleged errors in failing to conduct a pretrial interview of Officer Hughey and failing to file a pretrial motion *in limine* to suppress his testimony. The defendant does not allege what information counsel would have discovered from a pretrial interview which would have led to a different outcome at trial. He also does not argue any basis upon which the circuit court would have granted a

motion to suppress the identification testimony. Although it appears that counsel overlooked discovery materials, there is no evidence that the defendant was prejudiced by this error. Accordingly, these claims do not satisfy the prejudice prong of *Strickland*.

¶ 2 3 Second, the defendant's claim that counsel failed to adequately cross-examine Officer Hughey regarding his identification also does not satisfy the prejudice prong of *Strickland*. While counsel did not cross-examine Officer Hughey regarding his identification, the defendant has failed to demonstrate that the outcome of the proceeding would have been different if he had. The defendant argues that counsel could have impeached Officer Hughey with his police report which did not state that he identified the defendant. However, the omission from the police report would have done little to affect the outcome of the trial, especially where defense counsel attacked Officer Hughey's credibility and argued extensively that no other officer, including Officer Dillard, and neither victim had identified the defendant. Further, the remaining circumstantial and physical evidence against the defendant was overwhelming. See *People v. Kiertowicz*, 2013 IL App (1st) 123271, ¶ 20, 995 N.E.2d 512, 518 (circumstantial evidence is sufficient to sustain a conviction where it proves the elements of the crime beyond a reasonable doubt). Here, the victims and police officers testified to an uninterrupted, short chain of events in which four armed men stole $1,800, Rekisha's purse, and Jason's cell phone, and three fled in a green Land Rover, chased by police until crashing in the parking lot of Parkway Gardens. The police saw three men flee the vehicle, who were chased and detained shortly thereafter, and recovered Rekisha's

purse from the vehicle and Jason's cell phone from the defendant's person. The defendant's version of the events went uncorroborated by his alleged cousin and uncle and still placed him in the area of the Land Rover. Other than his blanket denial that he did not have a phone, his possession of Jason's cell phone went unexplained. Under these facts, the jury could have inferred, even if it found Officer's Hughey's identification lacked credibility, that the defendant was guilty beyond a reasonable doubt.

¶ 2 4 Next, the defendant claims he received ineffective assistance of counsel when counsel erroneously stated during his opening and closing arguments that the defendant was not found with any of the proceeds of the robbery and that Officer Hughey did not actually recover the phone from the defendant's person. He contends that these statements to the jury were highly prejudicial. We disagree.

¶ 2 5 Closing arguments of both the State and the defendant must be examined in their entirety and the complained-of comments must be placed in their proper context. *People v. Cisewski*, 118 Ill. 2d 163, 176, 514 N.E.2d 970, 976 (1987). Reading defense counsel's opening and closing statements in their entirety, it is easily discerned that he used the term "proceeds," while perhaps not the best choice of words given the facts of the case, to refer to the $1,800 cash taken in the robbery. Defense counsel extensively discussed the facts in evidence in his closing, clearly highlighting the fact that no "proceeds," *i.e.*, the money, was found on the defendant and attacking the credibility of Officer Hughey's recovery of the cell phone during

the second search. Thus, we cannot find that defense counsel's performance was deficient when he commented that no "proceeds" were tied to the defendant.

¶ 26

Regarding counsel's erroneous comment that Officer Hughey did not recover the phone from the defendant, we do not find that that the error prejudiced the defendant. Counsel's erroneous comment was brief and isolated in the context of his overall argument and, therefore, the comment likely had no impact on the jury verdict. See *People v. Runge*, 234 Ill. 2d 68, 142, 917 N.E.2d 940, 982 (2009) (in review of prosecutorial misconduct claim, the court stated that a significant factor in assessing the impact of improper closing remark on a jury verdict is whether the comments were brief and isolated in the context of otherwise lengthy arguments). Defense counsel's overall argument contained numerous attacks on the State's case, including the lack of DNA, fingerprint and gunshot residue evidence, the victim's failure to identify the defendant, the lack of cash found, and the credibility of the defendant's identification by Officer Hughey and the discovery of the cell phone, specifically the fact it was not discovered at the scene during the pat-down search of the defendant. Thus, the defendant's contention that he was deprived of effective assistance of counsel when his attorney erroneously remarked that Officer Hughey was not the officer that recovered the victim's cell phone fails under the prejudice prong of *Strickland.*

¶ 27

Finally, the State concedes that the DNA and electronic citation fees imposed on the defendant should be vacated. The defendant's DNA has previously been collected as a result

of an earlier offense (see *People v. Marshall*, 242 Ill. 2d 285 (2011) (imposition of DNA fee allowed only where that defendant is not currently registered in the DNA database)), and the electronic citation fee does not apply to felony convictions such as the defendant's convictions (see 705 ILCS 105/27.3e (West 2012) (applies to defendants in any traffic, misdemeanor, municipal ordinance or conservation case)). We, therefore, vacate that portion of the circuit court's order requiring the defendant to pay the two fees.

¶ 28

For the reasons stated, we vacate that portion of the circuit court's order requiring the defendant to pay the DNA analysis and electronic citation fees, and we affirm the defendant's conviction in all other respects.

¶ 29

Affirmed in part and vacated in part.