2015 IL App (1st) 131363-U
No. 1-13-1363
September 1, 2015
Modified Upon Denial of Rehearing November 10, 2015

SECOND DIVISION

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. 09 CR 3581
	)	
TIFFANY COX,	)	The Honorable
	)	Lawrence Edward Flood,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel provided ineffective assistance when he failed to introduce into evidence the videorecording of a co-defendant's statement, where the co-defendant's statement supported defendant's arguments and apparently had no detrimental effect on the defense.

¶ 2 The trial court found Tiffany Cox and three co-defendants guilty of murder and armed robbery. In this appeal, Cox argues that the prosecution failed to prove her guilty, and her trial counsel provided ineffective assistance. We hold that the prosecution presented

sufficient evidence to hold Cox accountable for her co-defendant's stabbing of the victim, and the evidence sufficiently supports the finding that Cox and her co-defendants committed armed robbery. However, we find that Cox's attorney provided ineffective assistance when he failed to introduce into evidence the videorecorded statement of a co-defendant, where the statement would have helped with Cox's defense in several ways, and would have had no detrimental effect on her defense. We reverse the convictions and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 On January 31, 2009, Cox, Miesha Nelson, Roslind Ball and Carmelita Hall went to a liquor store where they bought gin. Nelson noticed Morris Wilson, whom she had known for several months. Nelson invited Wilson to go with Ball, Hall and Cox to Cox's apartment near 82nd Street and Drexel Avenue. After 1 a.m. on February 1, 2009, Wilson got into an argument that turned into a fight. When Wilson left the apartment, Cox, Nelson, Ball and Hall followed him. The four women caught up with Wilson in the courtyard of an apartment building near 81st Street and Drexel Avenue. The ensuing commotion drew the attention of several persons nearby. All four of the women hit and kicked Wilson. Hall stabbed Wilson. The women returned to Cox's apartment.

¶ 5 Police found Wilson dead from multiple stab wounds. They found a cell phone charger and a bag of marijuana near Wilson, and they found Wilson's jacket and a bloody knife less than a block away, near the corner of 82nd Street and Drexel Avenue. Following a trail of blood, police went to Cox's apartment. They arrested Cox in her apartment and Hall, Ball and Nelson on a stairway behind the back door to Cox's apartment.

¶ 6 All four women spoke to police about the incident. Police videorecorded the interviews. Prosecutors charged all four women with murder and armed robbery. The trial court granted the defendants' motions to sever the trials.

¶ 7 All four defendants elected to have bench trials. At the simultaneous trials, five eyewitnesses described what they saw. Defense counsel impeached all five witnesses with inconsistencies between their testimonies at trial and their statements made to police within a day of the stabbing. The witnesses contradicted each other on several details. However, all five witnesses saw the four women beating and kicking Wilson in the courtyard, and none saw Wilson striking the women. The witnesses also heard some of the words the women said, but no two witnesses heard any of the same words.

¶ 8 Helen Jones, who dropped off a relative across the street from the beating, testified that she saw the four women walking across the street, all underdressed for the cold weather. She divided her attention between the women pursuing the man and her relative going into her apartment.

¶ 9 Christina Roberts, who lived in the building that surrounded the courtyard where Wilson died, testified that she heard one of the women say Wilson tried to rape her. Roberts heard another women say she had blood on her hands, and she heard Wilson yell for help. Bruce Thornton, who also lived in the building, heard yelling and saw the beating, but he did not remember any words. He saw two women leave while two others continued to attack.

¶ 10 Etta Kelly, who lived in the building, testified that she heard Wilson say, "oh, you gone stab me now" while all four women stood over him, hitting him. She saw one woman stab

Wilson and then pass the knife to another woman who also stabbed Wilson. No evidence corroborated Kelly's testimony that the knife passed from one woman to another during the attack, and no evidence corroborated Kelly's testimony that two women stabbed Wilson. Kelly testified that she yelled out of her window to "stop it before somebody really [gets] hurt." One of the women told Kelly, "mind your own business." After the stabbing, Kelly saw two women rummage through Wilson's pockets and take his jacket.

¶ 11 Bernetta Coker testified that she had called police from a gas station to report her own domestic disturbance. As she walked back towards 82nd Street and Drexel Avenue, she saw Wilson running and the four women running after him into the courtyard. She went up to the courtyard. She heard a neighbor yell at the women to stop, and she heard one of the women threaten to beat the neighbor. The women looked in Wilson's pockets. Coker testified that she heard Cox say, "Shit. He don't have no money anyway." No evidence corroborated Coker's testimony that Cox said Wilson had no money. Coker testified that the women took Wilson's jacket. Cox and Nelson then came up to Coker. Cox grabbed Coker's collar and asked whether Coker had seen anything. Coker said no, but pointed out an approaching police officer. Nelson told Cox to let Coker go, and Cox did. The women ran off.

¶ 12 Apart from evidence of the police investigation and forensic evidence confirming that Cox had Wilson's blood on her clothes, the State presented only Cox's videorecorded statement. Cox told police she did not hear how the argument between her friends and Wilson began. According to Cox, Hall and Ball managed to get Wilson out of the apartment. Cox heard a glass bottle break against the outside of her door. Hall went out first and Cox

left last from Cox's apartment. Cox saw Wilson attack Hall and then run. When the women caught up with Wilson in the courtyard, Hall hit Wilson and Wilson hit her back. Then all four women started hitting Wilson. Cox did not see the stabbing.

¶ 13 The four defendants and the State stipulated to evidence of Wilson's violent and aggressive behavior on prior occasions. Wilson had punched, kicked and beaten several persons in incidents over a number of years. He also threatened to shoot another person. Hall asked the court to consider Nelson's statement as evidence in Hall's case. The court granted the request. Cox's attorney did not ask the court to consider Nelson's statement in Cox's case.

¶ 14 The trial court found Cox guilty of murder and armed robbery. The presentence investigation showed that Cox had an extensive history of psychological trauma. A relative and a neighbor had molested Cox, separately, before she turned eleven. Cox attempted suicide several times. She suffered from posttraumatic stress syndrome and depression, and her condition led to several hospitalizations. She was 25 years old at the time of Wilson's stabbing, with no prior convictions. She had held several jobs since high school.

¶ 15 The trial court said:

> "Whatever happened in that apartment was over. It was over. He left.
>
> The four of you decided you didn't want to end it and continued on, confronted him, and he was murdered, senselessly, for no reason at all. Stabbed at least in excess of 20 times. His jacket was taken. He was left to die there.

> In considering the evidence in this case and considering the evidence in sentencing, I am aware of the fact that you did have a difficult life. ***
>
> That does not, however, justify your participation in what occurred, and in ending the life of Mr. Wilson.
>
> Obviously, alcohol was involved. All of you were drinking.
>
> But again, it doesn't justify what happened. It doesn't justify the brutality of what occurred to Mr. Wilson."

¶ 16 The court sentenced Cox to 35 years in prison for murder and 10 years for armed robbery, with the sentences to run consecutively. Cox moved for reconsideration of the sentence and the court denied the motion. Cox now appeals.

¶ 17 ANALYSIS

¶ 18 Sufficiency of the Evidence

¶ 19 Cox contends first that the evidence does not prove her guilty of murder, because she participated only in a beating, not the fatal stabbing. When a defendant challenges the sufficiency of the evidence, we must determine whether any reasonable trier of fact could find that the prosecution proved all the elements of the offense beyond a reasonable doubt. *Jackson v.* Virginia, 443 U.S. 307, 319 (1979); People *v. Cooper*, 194 Ill. 2d 419, 424-25 (2000).

¶ 20 The prosecution argued that the court should find Cox accountable for the stabbing because the four women acted pursuant to a common design to beat Wilson. Agreement to participate in one offense does not make the defendant responsible for a co-defendant's acts

unless those acts are in furtherance of the common design. See *People v. Johnson*, 2014 IL App (1st) 122459-B, ¶¶ 6-7, 161 (agreement to buy marijuana did not make defendant accountable for co-defendant's act of murdering victim); *People v. Morrow*, 303 Ill. App. 3d 671, 679 (1999) (common design to engage in prostitution with victim did not make witness accountable for murder committed by defendant in the course of prostitution). But "when a defendant intends to aid in the commission of a battery, and that battery culminates in a murder, the defendant's intent to aid the battery may render him liable for the murder, even if he did not share the principal's intent to kill the victim." *Monroe v. Davis,* 712 F.3d 1106, 1120 (7th Cir. 2013). We hold that a reasonable trier of fact could find that the stabbing was in furtherance of the common design to beat Wilson. Therefore, we find the evidence sufficient to support the conviction for first degree murder.

¶ 21 Second-Degree Murder

¶ 22 Next, Cox argues that we should reduce the conviction to second-degree murder because she acted under intense provocation and she believed (albeit unreasonably) that Wilson put her and her friends in danger of sustaining great bodily harm. See 720 ILCS 5/9-2 (West 2008). Because a conviction for second-degree murder requires proof of all the elements of first-degree murder, plus a mitigating factor, "we consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present." *People v. Blackwell,* 171 Ill. 2d 338, 358 (1996).

¶ 23 To sustain her burden of proving a mitigating factor, Cox relies on her videorecorded statement to police and evidence of Wilson's past violent behavior. We find that a reasonable trier of fact could have disbelieved Cox's statement. The trier of fact could have found that Wilson's past misconduct did not show that Cox believed Wilson posed a danger, because Cox did not know about Wilson's violent past. The trier of fact could have found that Wilson's act of throwing a bottle at the door did not constitute the kind of provocation needed to reduce the degree of the offense. See *People v. Garcia*, 165 Ill. 2d 409, 429 (1995). Therefore, we find that a reasonable trier of fact could have found that Cox failed to prove by a preponderance of the evidence any mitigating factor sufficient to reduce the crime from first-degree murder to second-degree murder.

¶ 24 Armed Robbery

¶ 25 Cox also argues that the evidence did not prove that any of the women committed armed robbery, because the prosecution did not show they intended to keep Wilson's jacket and they took nothing else. Our supreme court held that " 'the intent [to permanently deprive the wronged party of the property] is logically presumed in the charge of robbery.' " *People v. Jones*, 149 Ill. 2d 288, 298 (1992), quoting *People v. Romo*, 85 Ill. App. 3d 886, 894 (1980) (the *Jones* court added the bracketed language to quote from *Romo*). The women removed Wilson's jacket and dropped it less than a block away. The women left Wilson with a phone charger and a bag of marijuana that they presumably could have taken if they intended to rob Wilson.

¶ 26 While we find the evidence very closely balanced, we hold that a reasonable trier of fact could find that the women intended to rob Wilson of his jacket. Coker testified that she heard Cox say, "He don't have no money anyway." Coker also pointed out the approaching officer before the women dropped the jacket near the corner of 82nd Street and Drexel Avenue. The trier of fact could infer that the women intended to keep the jacket, but they hastily tried to rid themselves of evidence of the crime when they saw the officer.

¶ 27 Ineffective Assistance of Counsel

¶ 28 Cox contends that her counsel provided ineffective assistance when he made the inexplicable decision not to ask the court to consider Nelson's statement to police as evidence in Cox's case. In her statement, Nelson explained that when Wilson started "talking crazy" at her, she and her friends told him to leave. They got him out of the apartment, but "he was trying to push back through the door." All four of the women pushed, but "he was pushing all of [them] back." Nelson picked up an empty gin bottle. Wilson backed down the stairs, away from the door. Nelson threw the bottle at Wilson, hitting him in the face. The women locked the apartment door before Wilson could get back in. Wilson smashed the bottle against the door. Nelson said to police, "[Wilson] said he was gonna beat our ass. He goin see us on the street he gonna beat our ass."

¶ 29 Nelson said that Hall then looked around and could not find a cell phone she had put on the table. Nelson thought she had seen Wilson grab something off the table. Wilson had left by the time Hall decided to follow him to retrieve her cell phone. Nelson thought Wilson might try to beat them up, so she grabbed a knife from a counter top. Hall took the knife

from Nelson. Ball led the way out of the apartment and caught up to Wilson. Nelson told police that Wilson "tackled [Ball] to the ground and she be pregnant." Nelson started hitting and kicking Wilson, and the other women joined her. Only Hall stabbed Wilson. Nelson told Hall to stop. As they started to go, Wilson stood and said, "y'all stabbin me?" Hall asked where her phone was. Wilson fell. Nelson took off Wilson's jacket and went through his pockets looking for Hall's phone. She found the phone charger but no phone. She dropped the jacket on the ground when she found no phone in its pockets.

¶ 30 Notably, Nelson's account accords fairly well with the physical evidence and the eyewitness testimony. The witnesses who lived by the courtyard looked out only after they heard a commotion. By that time, Nelson was already hitting Wilson, possibly after he knocked Ball down. Jones had her attention divided at the start of the fight, and Coker was still walking up the street when the fight started in the courtyard. Although none of the eyewitnesses explicitly corroborated Nelson's testimony that Wilson tackled Ball before the women started hitting him, none of the witnesses could contradict that part of Nelson's account. No two witnesses heard the same words from any of the women. When Kelly thought she heard Wilson say "you gone stab me," she may have heard him say, "y'all stabbin me." When Coker thought she heard "He don't have no money," she may have heard Nelson saying that Wilson had no phone.

¶ 31 Nelson's statement provided evidence of considerable provocation, and that the women may have believed that they needed to protect themselves from Wilson: Wilson, who had a history of physical violence, tried to push his way into Cox's apartment, smashed a bottle

against the door, threatened to beat up the women, and tackled Ball, who was pregnant. If a reasonable trier of fact had taken Nelson's statement into account in the case against Cox, the trier of fact could have found that an unreasonable belief in the need to protect Ball, or violent provocation, mitigated the crime to second-degree murder. See *People v. Hawkins*, 296 Ill. App. 3d 830, 837-38 (1998); *People v. Beathea*, 24 Ill. App. 3d 460, 465 (1974).

¶ 32 Nelson's statement also provided evidence that the women did not commit robbery. According to Nelson, Hall thought Wilson had stolen her phone, and the women pursued Wilson and went through his jacket pockets only to retrieve the stolen phone. They dropped the jacket once they realized it held no phone. The evidence helps explain why the women left next to Wilson the phone charger and the marijuana, both of which probably would have had some value to anyone trying to rob Wilson. The acts Nelson described do not show the intent to rob Wilson. See *People v. Falkner*, 61 Ill. App. 3d 84, 89-90 (1978); *T.D.W. v. State*, 42 So. 3d 959, 960 (Fla. Dist. Ct. App. 2010).

¶ 33 To show ineffective assistance, Cox must first show that her attorney's representation fell below an objective standard of reasonableness (*People v. Patterson*, 192 Ill. 2d 93, 107 (2000)), and, to do so, Cox must overcome the presumption that her counsel made reasonable strategic choices. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). "[T]rial counsel's decision whether to present a particular witness is within the realm of strategic choices that are generally not subject to attack on the grounds of ineffectiveness of counsel. [Citation.] However, *** counsel's tactical decisions may be deemed ineffective when they result in

counsel's failure to present exculpatory evidence of which he is aware." *People v. King*, 316 Ill. App. 3d 901, 913 (2000).

¶ 34 Nelson's statement has considerable exculpatory effect and no adverse effect on Cox's defense. The statement confirmed the essentially uncontested evidence that Cox participated in the beating and that Hall stabbed Wilson. Nothing in Nelson's statement (or any other evidence) showed that, before the stabbing, Cox knew Hall had a knife. We see no strategic purpose for failing to present to the court the exculpatory evidence of Nelson's statement. See *King*, 316 Ill. App. 3d at 914-15; *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999).

¶ 35 The prosecution contends that counsel's unprofessional error had no prejudicial effect. We find the evidence on the charge of armed robbery very closely balanced, and Nelson's statement would have significantly helped the defense. The error had prejudicial effect on that charge and the charge of felony murder based on armed robbery. We also find a reasonable probability that if counsel had not committed an unprofessional error, the trier of fact might have found Cox guilty of second degree murder instead of first degree murder. Thus, we find that Cox has shown she did not receive effective assistance of counsel. *Coleman*, 183 Ill. 2d at 397.

¶ 36 CONCLUSION

¶ 37 The prosecutor presented sufficient evidence to hold Cox accountable for first-degree murder and armed robbery. Cox's evidence did not require the court to reduce the crime to second-degree murder. However, Cox received ineffective assistance of counsel when her attorney failed to introduce into evidence Nelson's statement to police, where the statement

could support findings that none of the women intended to commit robbery, and the statement could support findings that the defendants committed only second-degree murder because of the provocation by the victim or because the co-defendant had an unreasonable belief in the need to act in defense of another. Because of our resolution of the issue concerning ineffective assistance of counsel, we need not address Cox's claim that the court imposed an unjustifiably harsh sentence. Accordingly, we reverse the convictions and remand for a new trial.

¶ 38 PETITION FOR REHEARING

¶ 39 In a petition for rehearing, the State asks us to retain jurisdiction and remand the case for a hearing limited to the issue of ineffective assistance of counsel. In support, the State cites *People v. Marshall*, 237 Ill. 2d 577 (2010), *People v. Cokley*, 211 Ill. 2d 589 (2004), and *People v. Davis*, 211 Ill 2d 590 (2004). In all three cases, the appellate court held that defense counsel provided ineffective assistance when counsel failed to file a pretrial motion to suppress evidence. *People v. Marshall*, 399 Ill. App. 3d 626, 636 (2010); *People v. Davis*, 349 Ill. App. 3d 93, 99-100 (2004); *People v. Cokley*, 347 Ill. App. 3d 292 (2004). In all three cases, our supreme court held that the appellate court should have retained jurisdiction, and remanded the cause for the filing of a proper pretrial motion, with a new trial to follow only if the trial court granted the pretrial motion to suppress evidence. *Marshall*, 237 Ill. 2d 577; *Cokley*, 211 Ill. 2d 589; *Davis*, 211 Ill 2d 590; see also *People v. Spann*, 332 Ill. App. 3d 425, 446 (2002); *People v. Moore*, 307 Ill. App. 3d 107, 114 (1999); *People v. Steels*, 277 Ill. App. 3d 123, 129 (1995); *People v. Stewart*, 217 Ill. App. 3d 373, 376-77 (1991). But when

the ineffective assistance occurs during a trial, and not pretrial when motions are filed, this court should vacate the conviction and remand for a new trial. *People v. Williams*, 329 Ill. App. 3d 846, 856-57 (2002); *People v. Young*, 306 Ill. App. 3d 350, 355-56 (1999); *People v. Clamuextle*, 255 Ill. App. 3d 504, 509-12 (1994). Because defense counsel committed a prejudicial unprofessional error at trial, we reverse the convictions and remand for a new trial. Accordingly, we deny the State's petition for rehearing.

¶ 40 Reversed and remanded.