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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. 12 CR 3910
)	
GERARDO QUEZADA,)	Honorable
)	Paula M. Daleo,
Defendant-Appellant.)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's ineffective assistance of counsel claim for failure to investigate a witness was better suited for postconviction review where the details of counsel's investigation were outside the record on appeal.

¶ 2 Following a bench trial, defendant Gerardo Quezada was found guilty of armed robbery and aggravated battery. The trial court sentenced him to a six-year term of incarceration for armed robbery and a concurrent five-year term for aggravated battery. On appeal defendant contends that his trial counsel was constitutionally ineffective for failing to investigate and call a witness to the altercation. He also contends that his mittimus should be corrected. We affirm and correct the mittimus.

¶ 3 Defendant was charged with one count of armed robbery and three counts of aggravated battery. The charges stemmed from a fight between defendant and Octavio Ramos early in the morning on January 28, 2012.

¶ 4 Ramos testified that he was waiting in a truck outside of Angelita Alvarez's home after midnight on January 28, 2012. When Alvarez left the house, she slipped on the front porch and Ramos left the truck to help her. As he crossed the street, defendant quickly approached him and began to punch him in the head without provocation. The two began to "struggle," exchanging more punches before falling to the ground. After the fall, defendant left and Ramos got into his truck. Five to ten seconds later, defendant returned and began to punch Ramos through the truck's window. He demanded money. After Ramos gave him money, defendant reached into the truck and removed the keys from the ignition and continued to punch Ramos. Eventually, a police car arrived and defendant fled.

¶ 5 Cicero police officer Frank Diaz testified that he saw defendant striking the driver of a truck early in the morning on January 28, 2012. When Diaz approached and announced himself, defendant fled. Diaz chased him, eventually capturing him. During the chase, defendant dropped a glove containing brass knuckles and cash. The parties stipulated that blood found on the recovered cash matched Ramos's DNA profile.

¶ 6 Cicero police detective Robert DeCianni testified that defendant gave a statement during a subsequent investigation that was memorialized in a signed document. In the statement, defendant stated he had met Ramos at a bar prior to the altercation. While walking home from the bar, he saw Ramos and asked him for a cigarette. Ramos "got upset," began yelling, and made a vulgar comment directed at defendant's mother twice. Defendant "snapped" and punched Ramos in the face. He put on a pair of brass knuckles and continued to punch him. The two

fought and Ramos's wallet fell to the ground. Defendant picked it up and placed it in his pocket. Subsequently, Ramos got into his truck and started the engine. Defendant reached through the window and attempted to turn off the truck, all the while still punching Ramos in the face. Once police officers arrived, defendant fled.

¶ 7 Defendant testified that he was walking to his cousin's house when he saw Alvarez slip and fall. He went to help her and saw Ramos. Recognizing Ramos from a bar earlier in the night, defendant asked to borrow Ramos's cell phone. In response, Ramos twice directed an obscene insult at defendant's mother and "barg[ed]" at him. Defendant punched Ramos and the two began to fight. During the altercation, defendant's wallet and cash fell out of his pocket and he placed it back in his pocket. After five minutes, the two stopped fighting and Ramos walked towards his truck. Still angry, defendant put on brass knuckles and continued to attack Ramos through the truck window. He never asked for or took money from Ramos.

¶ 8 The trial court found defendant guilty of armed robbery and three counts of aggravated battery.

¶ 9 Prior to sentencing, defendant's initial trial counsel withdrew and defendant secured private counsel. Private counsel filed a motion for new trial alleging, *inter alia*, that defendant's original counsel was ineffective for failing to call Alvarez as a witness. In the motion, and subsequently during oral argument, posttrial counsel alleged that defendant's original counsel had never tried to contact Alvarez.

¶ 10 New counsel attached a police report to the motion. The report indicated that Alvarez told officers that an unknown man had begun "yelling at Ramos in English before physically attacking him." After leaving to call the police, Alvarez returned and watched the men fighting until the police came.

¶ 11 The trial court denied the motion and sentenced defendant to a term of six years' incarceration for armed robbery and a concurrent five-year term on the three aggravated battery counts, which the court ordered merged. Defendant appeals.

¶ 12 Defendant first contends that trial counsel was ineffective for failing to interview and introduce the testimony of Alvarez. He asserts that she was the only other witness to the incident and argues that her testimony "could have cast doubt" upon the State's theory of the case. The State responds that defendant's claim must be rejected because it is based upon matters outside of the record. Alternatively, it argues that defendant has failed to show any prejudice based upon trial counsel's alleged ineffective representation.

¶ 13 A claim of ineffective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). Under this test, a defendant must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that the result of the proceeding would have been different without counsel's deficient representation. *Ramsey*, 239 Ill. 2d at 433.

¶ 14 Generally, the selection of witnesses "is a tactical decision which will not be reviewed and cannot support a claim of ineffective assistance of counsel." *People v. Bell*, 152 Ill. App. 3d 1007, 1012 (1987). However, "[a]ttorneys have an obligation to explore all readily available sources of evidence that might benefit their clients." *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002). A failure to investigate and call potential witnesses can indicate unreasonable performance when "trial counsel knows of the witnesses and their testimony may be exonerating." *Bell*, 152 Ill. App. 3d at 1012; see also *People v. Makiel*, 358 Ill. App. 3d 102, 107

(2005) (failure to investigate and develop a defense has been found to be ineffective assistance of counsel).

¶ 15 Because an ineffective assistance of counsel claim typically requires consideration of matters outside the record on appeal, a postconviction proceeding is a better venue for the determination of an ineffectiveness claim. *People v. Phillips*, 383 Ill. App. 3d 521, 544 (2008). An appellate court may decline to adjudicate such a claim on direct appeal. *Id.* Accordingly, where the record is devoid of information regarding the extent of counsel's investigation of witnesses and communications with defendant, an appellate court need not consider counsel's effectiveness on direct appeal. See *People v. Morris*, 229 Ill. App. 3d 144, 166 (1992).

¶ 16 The record before this court contains no evidence of the efforts made by defendant's original trial counsel to investigate Alvarez's potential as a witness. In his reply brief, defendant notes that his posttrial motion, filed by subsequent posttrial counsel, argued that his original trial counsel did not investigate Alvarez. However, that allegation was not substantiated by any affidavit, testimony, or other evidence. Because the record is devoid of any evidentiary indication of trial counsel's investigation of witnesses, we decline to address defendant's claim on direct appeal. See *Morris*, 229 Ill. App. 3d at 166.

¶ 17 Defendant next contends that his mittimus is in error because it reflects three separate convictions for aggravated battery, despite the trial court's oral pronouncement that the counts would merge. The State responds that the mittimus makes clear that the three aggravated battery counts were merged, and thus does not need to be corrected.

¶ 18 Where the mittimus conflicts with the oral judgment of the trial court, an appellate court will correct the mittimus to mirror the oral pronouncement. *People v. Mitchell*, 234 Ill. App. 3d 912, 921 (1992). Such a correction may be made without remand. *People v. Harper*, 387 Ill.

App. 3d 240, 244 (2008). Defendant's mittimus reflects three separate counts of aggravated battery with three separate sentences. Though the document notes that the counts merge, it subsequently indicates that the three counts run concurrently with the armed robbery sentence. Because the mittimus is inconsistent with the trial court's oral pronouncement and internally inconsistent, we find it to be in error. Therefore, we order the correction of defendant's mittimus to reflect one count of armed robbery and one count of aggravated battery.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County and direct the clerk of the circuit court to correct the mittimus.

¶ 20 Affirmed; mittimus corrected.