No. 2—09—0827
Order filed March 2, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 07—CF—3835
JOHN B. DAVIS,	)	Honorable Rosemary Collins,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

Held: Defense counsel was not ineffective for failing to move to sever the charges of unlawful use of a weapon by a felon and aggravated battery with a firearm; although the motion would have been granted, there was no reasonable probability that, had the jury not heard about defendant's prior unspecified felony, it would have acquitted him of battery; the sole issue was identity, and the evidence was strong.

ORDER

After a jury trial, defendant, John B. Davis, was convicted of aggravated battery with a firearm (720 ILCS 5/12—4.2(a)(1) (West 2006)) and unlawful use of a weapon by a felon (720 ILCS 5/24—1.1(a) (West 2006)) and sentenced to concurrent prison terms of 12 and 3 years, respectively.

Defendant appeals, arguing that his trial counsel was ineffective for failing to move to sever the charges. We affirm.

The indictment against defendant alleged that, on September 26, 2007, he committed (1) aggravated battery with a firearm, by shooting Nancy Moctezuma with a handgun and (2) unlawful use of a weapon by a felon, in that he knowingly possessed a firearm and had been convicted of aggravated battery in case No. 07—CF—343 in Winnebago County. Defendant did not move for separate trials.

We summarize the trial evidence. Rockford police officer Jesse Washington testified that, on the evening of September 26, 2007, he was on patrol on Cameron Avenue in the Concord Commons housing project. He saw Moctezuma putting her children into their father's car. About 10 minutes later, Washington was called back. He pulled in at the grassy area between 214 and 220 Cameron. Moctezuma and several other people were standing there. Moctezuma told Washington that she had been shot and showed him a wound in her right lower back.

LaTonya Sawtelle testified as follows. On September 26, 2007, she lived at 214 Cameron. That evening, she left her building to buy cigarettes at an apartment in the building across the street. On the way, she met Moctezuma and another woman (later identified as Jorgina Torres). They crossed the street and then the parking lot on the way to the building. Sawtelle approached the doorway; she saw several people outside, including a tall man in a blue shirt and dark pants, another man in a dark hooded jacket (hoodie) and dark pants, and a woman. As Sawtelle went to knock on the door, one of the men said, "Bitch, don't knock on that door." Sawtelle responded defiantly, entered, walked down the hallway, and exited at the other end. She went through the parking lot and crossed the street. As she reached the sidewalk, she heard a gun go off five or six times and saw

people scatter. Sawtelle looked back. A man in a hoodie was "bouncing around" and shooting at her. He was dressed the same as the man who had talked to her earlier, but, in court, Sawtelle could not say for sure that they were the same man. After the shooting started, Sawtelle heard Moctezuma, who was in the parking lot, shout that she had been shot.

Charity Morse testified as follows. On September 26, 2007, she lived at 214 Cameron. That evening, she was out walking with her boyfriend, Mike Jones. Across the street from 214 Cameron, they were approached by a man and got into an argument over five dollars that they owed him. In court, Morse identified defendant as the man. She testified that defendant pulled out a small gun and pointed it at Jones and then at Morse. Defendant called Morse "a B." Jones and Morse walked away. Morse walked back toward her building. She saw Sawtelle, Moctezuma, and a third woman. Morse told them about the incident. The three women expressed indifference and kept walking toward the building where they could buy cigarettes. Morse went to her apartment, got her cordless phone, went outside, and called her brother. After she hung up, she saw the three women returning, and she met them in the middle of the street.

Morse testified that the women told her about the encounter at the doorway. The four women then walked toward 214 Cameron. Morse saw a man, who was wearing a black hoodie "with silver all over it" and black or blue jeans, jump around and point a gun at them. She could not see his face, but he was wearing the same clothing as defendant, with whom she and Jones had just argued. Bullets flew; one narrowly missed Morse, and she hid behind a tree. The man then took off. Moctezuma had taken off running and was hiding between two cars. Morse came over, saw that Moctezuma had been shot, and called 9-1-1. Later, she spoke to police detectives, viewed a photo lineup, and identified defendant as the man whom she and Jones had confronted and as the man who

had shot at her and the other women. She also wrote a statement in which she said that she had seen defendant shooting in her direction. She did not learn defendant's name until after the incidents.

Moctezuma testified as follows. On September 26, 2007, she lived at 214 Cameron. At about 6 p.m. that day, she saw her children off, then joined Sawtelle and Torres. They crossed the street to the building where Sawtelle wanted to buy cigarettes. At the front of the building were two men. One man was wearing dark pants and a black and silver hoodie. In court, Moctezuma identified defendant as this man. Defendant got into an argument with Sawtelle. The three women entered but left the building out the other end of the hallway. Outside, they met Morse, who told them about her confrontation with the man she later identified as defendant. Sawtelle told Morse about her argument with defendant. Moctezuma heard shots, started running, and ducked between two cars. Torres approached, discovered that Moctezuma had been shot, and called 9-1-1.

Jorgina Torres testified as follows. On September 26, 2007, she, Moctezuma, and Sawtelle crossed the street from 214 Cameron to the building where cigarettes were sold. In the doorway was a man dressed all in black, including a black hoodie with some silver. Two or three other people were with him. Sawtelle got into an argument with one man, but Torres could not remember which one. As Sawtelle stayed behind, Torres and Moctezuma exited by the back door and crossed the street. Torres heard shooting and started running; Moctezuma ran to the parking lot. Torres looked back and saw a man running and shooting. She did not see a gun, but she saw that his arm was extended, and she heard shooting coming from his direction. He was wearing a black hoodie with some silver. Torres soon discovered that Moctezuma had been hit, and she called 9-1-1.

At trial, Torres was not positive that the shooter was the man who had argued with Sawtelle, although he was also wearing a hoodie and was about the same size. She could not identify the man whom she had seen outside the building.

Rockford police detective David Lee testified that, on September 28, 2007, he and another detective spoke to Morse at the police station. She viewed a photographic lineup and picked out defendant as the man who had confronted her and Jones and as the man who had shot Moctezuma. On October 15, 2007, Morse spoke to Lee again, and he typed out a statement that she reviewed and signed. The statement was admitted into evidence. It includes the words, "I saw John Davis jumping and shooting a gun in our direction." Lee testified that Morse had actually used these words.

The prosecutor told the jury that the parties stipulated that "the defendant, John Davis, is a convicted felon, having pled guilty to [*sic*] case No. 2007—CF—343 on August 27, 2007."

For defendant, Ladonna Johnson testified as follows. In 2004, she moved to Concord Commons and stayed there for two years before relocating to a gated community in Poplar Grove. While at Concord Commons, she got to know defendant, who was a friend of her son. After Johnson moved out, defendant often visited her and her son; she would drive him to and from her home. About in mid-September 2007, defendant moved in with Johnson and stayed until about the week before Thanksgiving. At times, he left the community and went to Concord Commons. On September 26, 2007, Johnson left for work at about 8:15 a.m. When she returned at about 4:30 p.m., defendant was there. About an hour later, he and Johnson's son left to play basketball at a building in the complex. They returned shortly afterward and stayed home the rest of the night. Johnson admitted that, when she heard about the charges against defendant, she did not contact the police.

Defendant was convicted and sentenced as noted. We allowed him to file a late notice of appeal. On appeal, defendant contends that his trial attorney was ineffective for failing to move before trial to sever the two charges. He argues that having the two charges tried together prejudiced his defense against the charge of aggravated battery with a firearm. Defendant notes that his prior felony was irrelevant to that offense, making it improper other-crimes evidence on that charge. He contends that, had his attorney moved to sever the charges, the motion would have been granted and it is reasonably probable that the trial would have turned out differently.

To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance was objectively unreasonable; and (2) it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006). A defendant must meet both prongs of the *Strickland* test to prevail on an ineffective-assistance claim. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). Here, we hold that defendant has failed to satisfy the prejudice prong.

Defendant is on strong ground in arguing that, had his trial counsel moved to sever the charges, the motion would have (and should have) been granted. In *People v. Edwards*, 63 Ill. 2d 134 (1976), the defendant was convicted of armed robbery and unlawful use of weapons, the latter conviction requiring proof that the defendant had had a prior felony conviction. The supreme court held that trying the charges together created such a danger of unfair prejudice on the armed robbery charge that the trial court reversibly erred in declining to sever them. *Id.* at 140.

In *People v. Bracey*, 52 Ill. App. 3d 266 (1977), the defendant was convicted of felonious unlawful use of weapons, which required proof of prior convictions, and attempted murder and

aggravated battery. The appellate court held that the trial court reversibly erred in denying the defendant's motion to sever the weapons charge from the two other charges *Id.* at 275; see also *People v. Strong*, 215 Ill. App. 3d 484, 486 (1991) (State conceded that trial court erred reversibly in not severing charge of unlawful use of weapons by prior felon from other charges).

Although we see no valid reason for defendant's counsel to have forgone a motion to sever, we must still examine whether it is reasonably probable that, had the charges been severed, the result of the proceeding would have been different. We agree with the State that there is no such reasonable probability, because the properly-admitted evidence of defendant's guilt of aggravated battery was extremely strong and consistent. (Defendant has not maintained that severance would have aided his defense against the charge of unlawful use of a weapon.)

The sole issue at trial was identity. After viewing the photographic lineup, and again at trial, Morse positively identified defendant as the shooter. As of June 26, 2007, she was familiar with defendant, having owed him money. She viewed defendant at close range when she and Jones confronted him, minutes before the shooting. Morse also testified that defendant had a gun right before the shooting (and that he was not afraid to display it). Sawtelle's, Morse's, and Torres' descriptions of the shooter matched each other and also matched Moctezuma's description of defendant. These descriptions also matched the descriptions of the man who stood in the doorway and exchanged angry words with Sawtelle. Defendant's alibi witness admitted that defendant sometimes visited Concord Commons even after he allegedly moved out, and she conceded that she did not give the police her exculpatory information. The jury, which did not deliberate long, was in all likelihood persuaded by Morse's positive and well-founded identification testimony and the corroboration, and proof of motive and means, supplied by several State witnesses.

We see no reasonable likelihood that omitting the brief stipulation to defendant's commission of a prior unspecified felony would have changed the outcome of his trial. Therefore, we reject his claim of ineffective assistance, and we affirm the judgment of the circuit court of Winnebago County.

Affirmed.