2013 IL App (2d) 120196-U
No. 2-12-0196
Order filed September 12, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-582
JOHNNY TAYLOR,	)	Honorable George J. Bakalis,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's postconviction petition, which alleged that defense counsel was ineffective for wrongly promising in his opening statement that defendant would testify: given the strong evidence against defendant, there was no reasonable probability that the outcome otherwise would have been different.

¶ 2 Following a jury trial, defendant, Johnny Taylor, was found guilty of retail theft (720 ILCS 5/16A-3(a) (West 2008)), and he was sentenced to four years' imprisonment. He appealed his conviction, arguing, among other things, that his trial counsel was ineffective because counsel promised in his opening statement that defendant would testify. We declined to address defendant's

claim, noting that it would be better for defendant to raise his claim in a postconviction petition. *People v. Taylor*, No. 2-09-0502 (2011) (unpublished order under Supreme Court Rule 23). Defendant subsequently raised his claim in a postconviction petition, and the petition was advanced to the third stage of postconviction proceedings. Following an evidentiary hearing, at which no new evidence was presented, the trial court, which was the same court that had presided over defendant's trial, denied defendant's petition, finding that, because there was a vast amount of credible evidence supporting defendant's guilt, defendant failed to establish that he was prejudiced by counsel's opening statement. Defendant timely appeals, arguing that the trial court's finding that defendant did not suffer any prejudice because of counsel's remarks was manifestly erroneous. We affirm.

¶ 3 The following facts are relevant to the issue raised. Before the jury was impaneled, defense counsel advised the court that defendant was not going to testify. However, once the trial began, defendant's other counsel suggested in his opening that defendant would testify. Specifically, counsel asserted:

> "[Defendant] is here sitting in this seat because of what two other female companions did on March 4th[, 2008,] at a Walmart located in Naperville, Illinois. Now, [defendant] will tell you that he knew a Wanda Langston and Patricia Johnson. And he at that time was dating Wanda Langston. And he told the police officer this. And he will tell you that Wanda asked him to take her to Walmart in order to basically shop, and he did that. She couldn't drive. He has a valid license. He drove her—both to Walmart."

¶ 4 In the rest of his opening statement, counsel referred to how the evidence, including a video from a surveillance camera, would show that defendant followed the women through Walmart and shopped with them, tried to get Langston to buy a nightgown, and eventually left the store without

any merchandise when the women began chitchatting. While defendant was standing outside, Langston and Johnson ran out of the store with merchandise for which they did not pay. At the end of his opening statement, counsel asked the jury to "find [defendant] not guilty not because the State didn't prove their case, but because [defendant] didn't do anything wrong."

¶ 5 At trial, Jeff Prignano, who had worked at Walmart in loss prevention for around eight years, testified that he was working on March 4, 2008. Prignano was monitoring the surveillance cameras when he saw defendant walk to the men's department and put a suit jacket in a shopping cart. Referring to the video, Prignano described how "[defendant was] not even looking at the jacket." Rather, "[defendant was] just taking it off [the rack] and putting it in the cart while he's looking up[,] glancing." Prignano found this "unusual."

¶ 6 After defendant took the jacket, he proceeded with one of the women to the lingerie department. There, Prignano saw defendant hold up a "long nightgown" in front of the shopping cart and "[w]hile he was looking backwards over his shoulders, [one of the women] bagged the jacket at that time." Prignano explained that the woman opened her purse, which contained several white plastic Walmart bags, and put the jacket in one of those white bags.

¶ 7 Prignano then saw the trio go to the infant department and return to the lingerie department a short time later. When they were in the lingerie department for the second time, Prignano saw defendant "[take] the nightgown back off the hanger, h[o]ld it up, blocking and shielding the cart with the other person." While defendant held the nightgown, Prignano saw that items in the cart were being placed in white plastic Walmart bags.

¶ 8 Prignano then phoned the police and proceeded to obtain visual contact with defendant. He saw:

> "[One of the women] was somewhat in front [of defendant] as they *** walked out. The cart had got pushed out from towards the front end. It was left. [White plastic Walmart b]ags were taken by the female. And then she proceeded to exit the building passed [*sic*] self checkouts followed by [defendant]."

¶ 9 The police arrived and found defendant in a car in the parking lot with one of the women. Prignano identified several items found in the car as Walmart merchandise for which no one had paid. This merchandise included the men's suit jacket that Prignano saw defendant put in the cart.

¶ 10 Defendant never testified at trial, the jury found him guilty, defendant was sentenced, and he appealed. Based on his counsel's opening statement, defendant claimed on direct appeal that counsel was ineffective for promising that defendant would testify. In addressing that issue, we determined that, because we did not know the reasons why defendant did not testify, his claim would be more appropriately addressed in a proceeding for postconviction relief and that any such claim would not be barred by *res judicata*. *Taylor*, No. 2-09-0502 , slip op. 12. On another issue, we noted that "[t]here is no dispute as to defendant's presence and conduct but merely whether his conduct satisfied the elements of retail theft." *Id.* at 8. We then observed that "[t]he quantum of evidence pointed to defendant having participated in the retail theft, namely the videotape of his conduct." *Id.*

¶ 11 Pursuant to this court's decision, defendant filed a postconviction petition raising the claim that his trial counsel was ineffective for promising that he would testify. Defendant asserted in his petition that he and counsel had agreed that he would not testify. Postconviction counsel was appointed to represent defendant, and counsel realleged that trial counsel was ineffective for promising that defendant would testify. Attached to the amended petition were affidavits that

defendant's two trial attorneys prepared. In the one from the attorney who did not make the opening statement, counsel indicated that defendant had decided prior to trial not to testify, that cocounsel was there when the trial court was advised about this, that cocounsel asserted in his opening statement that defendant would testify, and that defendant did not testify. Cocounsel indicated in his affidavit that he could not recall whether he knew before making the opening statement that defendant was not going to testify.

¶ 12 The cause proceeded with a hearing at which only arguments were made. The trial court, which was the same court that presided over defendant's trial, denied the petition. In doing so, the court found that, although counsel's conduct in making the statement fell below an objective standard of reasonableness, defendant was not prejudiced. Specifically, the court noted:

> "This was not a case of what would have amounted to the testimony of the State's witnesses versus the defendant's testimony. The primary evidence in the case was the video tape. The video tape and other evidence established that defendant was present at the scene, established his association with the individuals actually seen taking the items and established his presence in the car with these associates, the presence in the car of the stolen items, including items which defendant had been picked out. No evidence established defendant actually taking any items or leaving the store with any items. ***
>
> The testimony and video further established that [defendant] was seen on at least two separate occasions working as a 'blocker.' [Defendant] is seen holding up negligee items to shield his companion while she steals various items. [Defendant's] testimony would have been the only evidence to dispel the strong implication of the video that he was an accomplice in the thefts. The Appellate Court disagreed with defendant's contention that the

evidence was closely balanced. The court pointed out that the quantum of evidence pointed to defendant having participated in the retail theft. ***

The question becomes whether[,] if the defendant had been called to testify[,] his testimony would have been sufficient to establish a reasonable probability that the verdict in question would have been different. To a large extent this would depend on the credibility of [defendant] in the eyes of the jury. His testimony would have to overcome the evidence depicted in the video. If he had testified, [defendant's] testimony would have been impeached by at least some of his prior convictions. Given the nature of the video and other testimony regarding the defendant's involvement in the theft[,] the court cannot conclude that even if the defendant had testified in this case there is a reasonable probability that the verdict would have been different."

¶ 13 At issue in this appeal is whether the trial court erred in denying defendant's petition. The Act provides a three-stage procedure for the adjudication of postconviction petitions. This appeal concerns the denial of a petition at the third stage. At the third stage, the court generally holds an evidentiary hearing. 725 ILCS 5/122-6 (West 2010). Relief is granted or denied based on that hearing. *Id.*

¶ 14 In this case, although no new evidence was presented at the evidentiary hearing, the trial judge who presided over that hearing was the same judge who presided over defendant's trial, and the court denied defendant's petition based on its assessment of the evidence presented at defendant's trial. Accordingly, we review under a manifest-error standard the denial of the petition. See *People v. English*, 2013 IL 112890, ¶ 24; *People v. Stark*, 365 Ill. App. 3d 592, 598 (2006).

"Manifest error" is an error that is clearly evident, plain, and indisputable. *Stark*, 365 Ill. App. 3d at 598.

¶ 15 In his petition, defendant contended that his trial counsel was ineffective, because counsel promised in his opening statement that defendant would testify. To determine whether defendant was denied his right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must show that "counsel's representation fell below an objective standard of reasonableness" and that he was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; see *People v. Briones*, 352 Ill. App. 3d 913, 917 (2004).

¶ 16 To prevail on a claim of ineffective assistance, a defendant must satisfy both prongs of the *Strickland* test. If we can dispose of the defendant's ineffective-assistance claim because the defendant suffered no prejudice, we need not address whether counsel's performance was objectively reasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 17 Here, the trial court found that, although it was objectively unreasonable for counsel to promise that defendant would testify, defendant was not prejudiced by these remarks. The evidence, and in particular the videotape, established that defendant participated in taking items from the store without paying for them. Although defendant himself did not leave the store with any of the merchandise stolen, defendant was present at the scene, was with the woman who actually possessed the stolen items (some of which defendant picked out), and was found in the getaway car with the woman and the stolen goods. Moreover, as the trial court found, the videotape showed defendant

acting as a " 'blocker' " while the woman concealed the merchandise in white Walmart bags so that the items could be taken undetected out of the store. Given the abundance of evidence establishing defendant's guilt, we must conclude that the trial court's finding that defendant was not prejudiced, which finding was the basis to deny defendant's petition, was not manifest error.

¶ 18 Defendant cites *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002), and *Briones* in support of his position that his counsel was ineffective for promising in his opening statement that defendant would testify. In *Ouber*, the defendant was convicted of a drug-trafficking charge after two prior juries could not reach a verdict. *Id.* at 22-23. At the first two trials, the defendant did not testify. *Id.* However, in the opening statements for the third trial, defense counsel repeatedly emphasized that the defendant would testify. *Id.* at 22. On appeal, the defendant claimed that her counsel was ineffective for promising that she would testify, and the reviewing court agreed. *Id.* at 35-36. In doing so, the court, in addressing the prejudice prong of *Strickland*, noted that the case was "exceedingly close." *Id.* at 33. In *Briones*, the defendant's trial attorney was accused of several acts of ineffective assistance, and the evidence against the defendant was not overwhelming. *Briones*, 352 Ill. App. 3d at 921. Accordingly, the reviewing court found that counsel was ineffective for promising that the defendant would testify. *Id.* Here, unlike in either *Ouber* or *Briones*, the evidence against defendant, which included a videotape detailing his exact actions, was strong. Thus, we find neither of those cases persuasive.

¶ 19 For these reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 20 Affirmed.