2011 IL App (3d) 090574-U

Order filed July 7, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
	)	Knox County, Illinois
Plaintiff-Appellee,	)	
	)	Appeal No. 3--09--0574
v.	)	No. 09--CF--95
	)	
LONNIE D. HOOTS,	)	
	)	Honorable Stephen C. Mathers,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's ineffective assistance of counsel claim fails where evidence of his guilt is overwhelming. The trial court did not err in refusing to give an accomplice witness instruction.

¶ 2 A Knox County jury found defendant, Lonnie Hoots, guilty of six counts of

methamphetamine-related offenses. Defendant filed a posttrial motion which the trial court denied. Defendant appeals, claiming ineffective assistance of trial counsel, that the trial court erred when instructing the jury, and that his sentencing order should be amended to reflect a $725 credit for time served in pretrial custody. The State concedes the credit issue. We affirm defendant's convictions, finding his ineffective assistance and jury instruction claims to be without merit. We further amend his sentencing order to reflect a proper credit for time spent in pretrial custody.

¶ 3 FACTS

¶ 4 The State charged defendant with aggravated participation in methamphetamine manufacturing with the intent to produce more than 400 grams in a structure protected by a surveillance system (720 ILCS 646/15(b)(1)(D) (West 2008)), participating in methamphetamine manufacturing of more than 900 grams (720 ILCS 646/15(a)(2)(E) (West 2008)), unlawful possession of methamphetamine of more than 900 grams (720 ILCS 646/60(b)(6) (West 2008)), unlawful possession with intent to distribute methamphetamine of more than 900 grams (720 ILCS 646/55(a)(2)(F) (West 2008)), aggravated unlawful possession with intent to deliver methamphetamine of more than 100 grams in a structure protected by a surveillance system (720 ILCS 646/55(b)(1)(c) (West 2008)) and possession of methamphetamine manufacturing materials (720 ILCS 646/30(a) (West 2008)). The information alleged that the acts constituting those offenses occurred on or about February 20, 2009.

¶ 5 The matter proceeded to a three-day jury trial during which defense counsel informed the

jury in opening arguments that a central issue in the case concerned who controlled the garage where the methamphetamine lab was located. Counsel continued his opening by noting that defendant would testify that defendant was not inside the garage when officers arrived and that he had not lived at the residence in question since December of 2008.

¶ 6 Evidence at trial showed that on February 20, 2009, Galesburg police officers executed a search warrant at 575 East Second Street, Galesburg, Illinois, as well as for the person of defendant. After entering the residence, the police found Tracy Ryner and defendant there. While searching defendant and the residence, police found defendant's Illinois identification card indicating his residence to be 575 East Second Street, Galesburg. Police also found a low-income energy assistance form dated January 6, 2009, for that residence listing Tracy Rener as the applicant and defendant as the second resident.

¶ 7 Police found a digital scale and drug paraphernalia but no materials used in the production of methamphetamine inside the residence. A detached garage is also located on the property. The parties stipulated that a search of the garage produced: HCL generators, lithium battery strips, Coleman fuel, a pill grinder, empty packs of pseudoephedrine pills, starting fluid, coffee filters, salt, a crock pot, ammonia test kits, a makeshift ventilation system, TV monitors and several plastic jugs containing more than 900 grams of liquid that tested positive for methamphetamine. The parties further stipulated that those items were used to manufacture methamphetamine, that more than 900 grams of methamphetamine was being manufactured inside the garage and that more than 900 grams of a substance containing methamphetamine was

located inside the detached garage.

¶ 8 Jason Weedman testified that the last time he was in the garage was the day before the police searched the property. He had helped defendant install the ventilation system in the garage and had been in the garage over a dozen times from approximately September 2008 until February 2009. Every time he was in the garage, defendant was also present. On the day before the search of the premises, the garage was cluttered and smelled of ammonia. Weedman knew that the items in the garage were intended to manufacture methamphetamine. The side door to the garage had a padlock and Weedman had seen no one other than defendant with the key to it. Weedman never saw Tracy Ryner with the key to the padlock, but he did know Ryner lived with defendant as defendant's wife.

¶ 9 The trial court took judicial notice of the fact that unrelated charges pended against Weedman for possession of anhydrous ammonia, possession of methamphetamine and unlawful procurement of methamphetamine precursor. The court advised the jury that the State filed the charges against Weedman on December 5, 2008, that they could consider the charges when weighing Weedman's testimony, and that "the weight to be given to any evidence is entirely up to you."

¶ 10 Tracy Ryner testified that she lived with defendant at 575 East Second Street since 1994. She did not frequent the garage for the year prior to February 20, 2009, as defendant locked her out of it. Defendant had the only key to the padlock on the door. She stated defendant still lived with her at the property on February 20, 2009. She has two children with defendant but they

never officially married. Defendant had not moved out nor had he taken any of his clothes or belongings from the house, although there were a lot of nights when he was not there. Ryner noted the deed to the property is in her name and that she signed the application for energy assistance.

¶ 11 Defendant's 23-year-old daughter, Lacey Cecil, testified that she frequented the residence at 575 East Second Street three to four times a week since September of 2008. Defendant's belongings were at the house. He spent a great deal of time in the garage during her visits but she never asked defendant what he did in the garage. On the morning of February 20, 2009, Cecil dropped one child off at the residence as she had to take another child to the dentist. She collected her child by 10:30 a.m. that morning and left before the police arrived.

¶ 12 Ellen Ray testified as the only witness for the defense. She met defendant in September of 2008 and he was, at the time of her testimony, her fiancé. Sometime in December of 2008, defendant moved in with her at 857 East First Street, Galesburg, Illinois. Before moving in with her, he spent every night at her house in November and December of 2008. Defendant had clothing and other belongings at her residence. Defendant was not with her on February 20, 2009, as he had to go babysit.

¶ 13 During the jury instruction conference, defense counsel argued Tracey Ryner's testimony warranted instructing the jury that the testimony of an accomplice should be viewed with suspicion pursuant to Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000) (hereinafter IPI Criminal 4th). The trial court refused, noting no testimony indicated Tracy Ryner

was involved in any of the criminal acts with which the State charged defendant.

¶ 14 Ultimately, the jury returned a verdict of guilty to all six charges. Defendant filed a motion for a new trial which the trial court denied. The trial court entered judgment of conviction for three counts, finding the other three were lesser-included offenses, and sentenced defendant to concurrent terms of incarceration of 15, 15 and 3 years and imposed a "$3,000 assessment" plus court costs. This is defendant's direct appeal.

¶ 15 ANALYSIS

¶ 16 On appeal, defendant specifically claims: (1) his trial counsel was constitutionally ineffective for failing to call him to the stand after indicating in opening arguments that defendant would testify in his own defense; (2) the trial court erred in refusing to give IPI Criminal 4th No. 3.17 which would have instructed the jury to view the testimony of an accomplice with suspicion; and (3) his sentencing order should be amended to reflect a credit of $725 for the 145 days spent in pretrial custody.

¶ 17 A. Ineffective Assistance of Counsel

¶ 18 The right to effective assistance of counsel is guaranteed by both the United States and Illinois Constitutions. U.S. Const., amends, VI, XIV; Ill. Const. 1970, art. I, §8; *Glasser v. United States*, 315 U.S. 60 (1942). *Strickland v. Washington's* (466 U.S. 668 (1984)) familiar two-prong test mandates that to establish a valid claim of ineffective assistance of counsel, a defendant must show: (1) his attorney's conduct fell below an objective standard of reasonableness; and (2) he was prejudiced by the deficient performance. *Strickland v.*

Washington, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697. To show sufficient prejudice, a defendant must show that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

¶ 19 When bringing an ineffective assistance of counsel claim, the defendant bears the burden of overcoming a strong presumption in favor of finding that counsel's advocacy was effective and that the challenged inaction may have been the product of competent trial strategy. *Albanese*, 104 Ill. 2d 504; *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). Inquiries of counsel's effectiveness may not extend into areas of trial strategy or tactics. *People v. Gapski*, 283 Ill. App. 3d 937 (1996).

¶ 20 A "counsel's failure to provide promised testimony is not ineffective assistance *per se*." *People v. Manning*, 334 Ill. App. 3d 882, 892 (2002). In *People v. Parker*, 344 Ill. App. 3d 728 (2003), this court noted:

> "Counsel's decision whether to present a particular witness is generally a strategic choice which cannot support a claim of ineffective assistance of counsel. [Citations.] However, 'counsel may be deemed ineffective for failure to present exculpatory evidence of which he is aware, including the failure to call

> witnesses whose testimony would support an otherwise uncorroborated defense.' [Citation.] Put another way, to overcome the presumption that defense counsel's choice of strategy was sound, his decision must appear irrational and unreasonable such that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." *Parker*, 344 Ill. App. 3d at 736-37 (quoting *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999)).

¶ 21 At the outset, we note defendant is not claiming that his right to testify on his own behalf was infringed upon in any way. Defendant simply claims his right to effective assistance of counsel was denied when his counsel did not call him to testify at trial after informing the jury in opening statements that "Mr. Hoots will testify that he was inside the house. He will testify, ladies and gentlemen, that in December of last year he moved out and *** we're going to hear Mr. Hoots testify - testify that he wasn't there, didn't live there but he was there at the time the search warrant went down."

¶ 22 The court in *People v. Everhart*, 405 Ill. App. 3d 687 (2010), faced a similar situation in which defense counsel informed the jury during opening statements that defendant would testify but never called defendant to the stand. *Everhart*, 405 Ill. App. 3d at 695. Given the fact that "the State's evidence was overwhelming," the *Everhart* court found it "need not reach the question of whether trial counsel's performance was deficient because we conclude that

defendant failed to show prejudice such that the result of the proceeding would have been different." *Everhart*, 405 Ill. App. 3d at 697. This was so even though defense counsel stated in his opening that defendant would testify that the sex between defendant and the victim was consensual and no other evidence was adduced at trial indicating the encounter was consensual. *Id*. at 695.

¶ 23 Like the *Everhart* court, we find that defendant has failed to meet his burden to show that, but for counsel's alleged error, the outcome of the proceeding would have been different. We arrive at this conclusion given: (1) the fact that the evidence to which defendant was going to testify was actually admitted through other witnesses; (2) the trial court's instructions to the jury; and (3) the overwhelming evidence of defendant's guilt.

¶ 24 Counsel's statements about defendant's purported testimony were very limited. Counsel indicated defendant would testify that he was not in the garage at the time of the arrest and had moved out of the house months before the arrest. As noted above, Ellen Ray testified that defendant moved in with her in November or December of 2008 and both Tracy Ryner and Officer Damaon Shea testified that defendant was in the residence, and not in the garage at the time of arrest. Had defendant testified, his purported testimony would have simply been cumulative.

¶ 25 Moreover, the record indicates that the court properly instructed the jury that opening statements are not evidence (IPI Criminal 4th No. 1.03) and the "fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict." IPI Criminal 4th

No. 2.04. The State never commented on defendant's failure to testify.

¶ 26 Finally, the evidence of Hoots' guilt is overwhelming. The evidence of the methamphetamine lab constructed in defendant's garage was not just overwhelming but stipulated to by the parties. Defendant's own daughter, Lacey Cecil, testified that she frequented the property almost every night until 2008 and three to four nights a week thereafter. Defendant was there "usually every time." She observed his belongings there, his personal effects such as toothbrush, hygiene materials and his clothes. Lacey also noted he "showered there." Sometimes when she visited the house, her father was either "in the garage or gone." When asked how often her father would be in the garage during her visits, she replied, "Usually every time." Lacey continued her testimony noting she did not go into the garage because it was padlocked.

¶ 27 These factors lead us to conclude that defendant cannot meet his burden of showing that, but for any alleged error by counsel, the outcome of the proceeding would have been different. As such, we hold defendant's ineffective assistance of counsel claim is without merit.

¶ 28 Citing to *People v. Briones*, 352 Ill. App. 3d 913 (2004), defendant invites us to find that the burden is on the State to show that it was defendant's choice not to testify or sound trial strategy not to call a defendant to testify after his counsel informed the jury he would testify. Defendant submits that the State has failed to make such a showing and, as such, the holding of *Briones* mandates we find his counsel constitutionally ineffective. We need not address *Briones* since we find that defendant cannot meet the second prong of *Strickland* (466 U.S. 668 (1984)) even assuming he could meet the first.

¶ 29 B. Jury Instruction

¶ 30 I. Ryner

¶ 31 Defendant next contends that the trial judge erred in refusing to give the jury defendant's tendered accomplice witness instruction. IPI Criminal 4th No. 3.17. Defendant submits that his theory of the case and defense was predicated on the allegation that it was not him but, instead, Tracy Ryner and Jason Weedman actually running the methamphetamine lab. Defendant claims he was entitled to have the instruction given as "the evidence at trial showed that Tracy Ryner and Jason Weedman could have been responsible for the crimes either as a principal or under a theory of accountability."

¶ 32 We will not overturn the refusal to give an accomplice witness instruction absent an abuse of discretion. *People v. Harris*, 182 Ill. 2d 114 (1998). A trial court abuses its discretion when the trial judge's ruling is arbitrary, fanciful and unreasonable, or where no reasonable person would take the view adopted by the trial judge. *People v. Patrick*, 233 Ill. 2d 62 (2009).

¶ 33 IPI Criminal 4th No. 3.17 states as follows:

> "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." IPI Criminal 4th No. 3.17.

¶ 34 In *People v. Kirchner*, 194 Ill. 2d 502 (2000), our supreme court noted:

"The test for determining whether a witness is an accomplice for purposes of the accomplice witness instruction is whether there is a probable cause to believe that the witness was guilty of the offense at issue as a principal or as an accessory under a theory of accountability. [Citation.]

'Thus, an accomplice-witness instruction should be given to a jury if the totality of the evidence and the reasonable inferences that can be drawn from the evidence establish probable cause to believe not merely that the person was present and failed to disapprove of the crime, but that he participated in the planning or commission of the crime; if probable cause is established the instruction should be given despite the witnees' protestations that he did not so participate.' [Citation.]" *Kirchner*, 194 Ill. 2d at 541.

¶ 35 In *Kirchner*, the court found no err in refusing to give the accomplice witness instruction. *Id*. This was so even though "the murder weapon belonged to [the witness], defendant had asked [the witness] for a weapon and had said he would do whatever it took to get money, [the witness] helped defendant burn his bloody clothing, [the witness] threw the knife into the Kaskaskia River, and [the witness] did not speak to police for five days after the murders." *Id.* at 541. Despite all that evidence from which one could infer, the *Kirchner* witness was complicit in the murder, our supreme court held the circuit court did not abuse its discretion in denying

defendant's request for the accomplice witness instruction. *Id*. In doing so, the court focused on the witness's "uncontradicted testimony ***[that he] was not present at the murder scene." *Id.* at 542.

¶ 36 Given the applicable test as set forth by our supreme court, our deferential standard of review and the application of these principles in *Kirchner*, we cannot say the trial court abused its discretion when refusing to give defendant's tendered accomplice witness instruction.

¶ 37 Ryner testified that she was not involved in the commission of any crime with the defendant, even though she owned the premises with defendant and both had lived there since 1994. Defendant kept the detached garage locked and had the only key to it. She had not entered the garage in several years. While defendant did not testify at trial, he told the police during his interview that neither he nor Ryner knew nothing about the items found in the garage. Substantial testimony adduced at trial contradicted his claim that he had no knowledge of the items in the garage, but there was no evidence that contradicted the statements indicating Ryner took no part in the crimes. Given the uncontradicted testimony and our supreme court's focus on similar testimony in *Kirchner*, we cannot say the trial judge abused his discretion in denying defendant's request to give the jury the accomplice witness instruction.

¶ 38 ii. Weedman

¶ 39 Defendant further maintains that probable cause existed to believe that Weedman was guilty of the offenses charged as a principal or accessory. As such, defendant posits, the trial court erred in failing to give the accomplice witness instruction. The State correctly notes that

defendant never mentioned Weedman nor his testimony when tendering the accomplice witness instruction. Therefore, the State contends defendant cannot now claim the trial court erred in refusing to give the instruction on the basis that it applied to Weedman's testimony. Defendant acknowledges he failed to mention Weedman's testimony when tendering the instruction, but responds that he did mention Weedman's testimony as it pertained to the instruction in his posttrial motion. As such, defendant submits he preserved the issue for review. Alternatively, defendant requests we review the matter for plain error if we find he has forfeited it. Familiar principals regarding jury instructions lead us to conclude defendant has forfeited this issue as it pertains to Weedman.

¶ 40 Our supreme court has consistently maintained that the burden of preparing instructions is primarily on the parties and not the trial court. *People v. Barnard*, 104 Ill. 2d 218 (1984); *People v. Parker*, 223 Ill. 2d 494 (2006). As such, a trial court is generally under no obligation either to give instructions or to rewrite instructions tendered by counsel. *Barnard*, 104 Ill. 2d at 232; *Parker*, 223 Ill. 2d at 508. "A party may not raise on appeal the failure to give an instruction unless he shall have tendered it." *Barnard*, 104 Ill. 2d at 232 (citing *People v. Underwood*, 72 Ill. 2d 124 (1978)). Defendant did not discuss the possibility of tendering an accomplice witness instruction pertaining to Weedman at any time during the jury instruction conference and, as such, we find the issue is forfeited.

¶ 41 Furthermore, we find defendant has failed to meet his burden to persuade us that failing to give the instruction amounted to plain error. In *People v. Herron*, 215 Ill. 2d 167 (2005), our

supreme court reiterated that "the plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence." *Herron*, 215 Ill. 2d at 186-87. The *Herron* court went on to note that for a "jury instruction error" to rise "to the level of plain error," a defendant must meet his "burden of persuasion and convince[] a reviewing court that there was error and that the evidence was closely balanced." *Id.* at 193. Here, defendant has failed to convince us that error occurred or that this is a closely balanced case.

¶ 42 Again, given our supreme court's holding in *Kirchner*, we cannot say failing to give the accomplice instruction as it pertains to Weedman is error. We acknowledge that testimony indicated Weedman had knowledge of the manufacturing of methamphetamine taking place inside the garage and even that he "did dope" in the garage with defendant. However, for purposes of giving the accomplice witness instruction, the evidence failed to indicate that Weedman was an accomplice to or accessory in defendant's methamphetamine manufacturing operation. As such, we find the trial court did not error in failing to give the accomplice witness instruction as it pertained to Weedman.

¶ 43 Finally, even if we were to find the trial court erred in failing to give the instruction, defendant is only entitled to relief if he proves error "and that the evidence was closely balanced." *Herron*, 215 Ill. 2d at 193. As noted above, this is far from a closely balanced case.

¶ 44 Defendant's claims that only Ryner's and Weedman's testimony tied him to the garage is

simply inaccurate. Defendant's state-issued identification card listed the premises as his legal residence and he was also listed as an owner on the low-income energy assistance form. Defendant's own daughter testified that his belongings were still at the residence and she put him in the garage on an almost daily basis for a significant time period prior to his arrest. The parties stipulated to the significant amount of materials found in the garage and that those materials were used to manufacture more than 900 grams of methamphetamine.

¶ 45 This is not a close case in which a defendant accused of possession claims some unknown person merely slipped a gram of a controlled substance in his pocket or her purse. Even ignoring Weedman and Ryner's testimony, evidence of defendant's guilt is overwhelming. Given the overwhelming evidence of defendant's guilt, we cannot find failing to give the accomplice witness instruction amounted to plain error and, therefore, we must honor defendant's procedural default of the matter.

¶ 46 C. Monetary Credit Against Assessment

¶ 47 Defendant's final contention is that the trial court improperly calculated his statutorily prescribed monetary credit for time spent in pretrial custody. The State concedes the issue and we agree that the record reveals defendant served 145 days in pretrial custody entitling him to a $725 credit pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963. 725 ILCS 5/110-14(a) (West 2008). That amount may be credited against the $3,000 drug assessment imposed against the defendant. See *People v. Jones*, 223 Ill. 2d 569 (2006); *People v. Gathing*, 334 Ill. App. 3d 617 (2002). The sentencing order is hereby modified to reflect a credit of $725.

¶ 48 CONCLUSION

¶ 49 For the foregoing reasons, the judgment of the circuit court of Knox County is affirmed as modified.

¶ 50 Affirmed as modified.