2011 IL App (3d) 090915-U

Order filed October 5, 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 12th Judicial Circuit, Will County, Illinois
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-09-0915 Circuit No. 08-CF-1301
CALVIN GRIFFIN,	)	Honorable Stephen D. White,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was denied effective assistance of trial counsel in attempted first degree murder case when defense counsel tendered an erroneous jury instruction on the issue of identification and allowed the jury to be instructed pursuant to that instruction. Identification of the offender was the key issue in the case and the evidence on identification was closely balanced. The appellate court, therefore, reversed defendant's conviction and sentence and remanded the case for a new trial.

¶ 2 After a jury trial, defendant, Calvin Griffin, was convicted of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2008)) and sentenced to 23 years' imprisonment.[1] Defendant

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[1]Defendant was also found guilty of aggravated battery with a firearm arising out of the same incident. However, based on the one-act, one-crime rule, defendant was not sentenced on

appeals, arguing that: (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt; (2) his trial counsel was ineffective in tendering and allowing the jury to be instructed with an erroneous jury instruction on identification; and (3) he is entitled to two additional days of sentence credit. We agree with defendant's second argument. Therefore, we reverse defendant's conviction and sentence and remand this case for a new trial.

¶ 3 FACTS

¶ 4 On May 13, 2008, just before 7 p.m., 65-year-old Johnnie Money was shot numerous times at close range, while seated in her vehicle in Joliet, Illinois.[2] For the past 15 years, Money had been traveling from Chicago to the east side of Joliet to sell shoes and clothing out of her vehicle to the local residents. From that activity, she was well known in the area. On the day of the shooting, Money was on one of her trips to Joliet. Florasten, her daughter, was with her. Just before 7 p.m., Money stopped in the 1100 block of Magnolia to see a customer about some shoes. Florasten got out of the vehicle to get the shoes out of the trunk, and Money remained seated in the driver's seat. The assailant pulled a gun on Florasten and pointed it at her head. A shot rang out, and Florasten ran away screaming, although she was not hit by the bullet. Standing at the passenger's side of the vehicle, the assailant turned, pointed the gun in Money's direction, and fired numerous shots into the door and passenger's side window. Money was hit several times and suffered severe injuries. She did not, however, lose consciousness. Money turned and looked at the assailant and told him that he had shot her and that he might as well leave. The assailant ran away. About a month later, defendant was charged with the crime.

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that offense.

[2]Money was 65 years old as of the date of the trial.

¶ 5 Defendant's case proceeded to a jury trial in August and September of 2009. The only real issue at the trial was identification–was defendant the person who had committed the crime. On that issue, the State presented the testimonies of Money and Florasten. Money testified clearly and unequivocally that from doing business in the area, she had known defendant for over 10 years by the nickname of "Smack," that she recognized defendant's face on the day of the shooting, and that defendant was the person who had shot her. In addition, when she was at the hospital shortly after the shooting, Money told the police either that "Boo-Boo's" brother had shot her or that "Boo-Boo's" brother, "Smack," had shot her. "Boo-Boo" was the nickname of defendant's brother, Joseph Gray, who was a previous customer of Money, as well. Money also identified defendant as the shooter in a photographic lineup that was presented to her about two weeks after the shooting. After looking at the line-up for about five seconds, Money immediately identified defendant's photograph as that of the shooter. However, in her initial statement at the hospital, after she had been given pain medications and was receiving emergency treatment, Money had told police that "Boo-Boo" had called them that day about the shoes and that while "Boo-Boo" was outside the vehicle with Florasten, defendant approached with a gun and committed the shooting. It was later determined that "Boo-Boo" was in prison on the date of the shooting.

¶ 6 Florasten was not able to identify the shooter and could only provide the police with a general description. In addition, in her initial statement to police, Florasten stated that the shooter was wearing a mask over the bottom half of his face and that the shooter approached with a gun while she was responding to another subject, the customer who had called them and had directed them to that area.

¶ 7 Defendant did not testify in his own behalf. Rather, at trial, the defense attacked the

identification by pointing out in cross-examination the inconsistencies between Money's trial testimony and her statement at the hospital to police, the inconsistencies between Florasten's trial testimony and her initial statement to police, and the inconsistencies between Florasten's initial statement about what had occurred and Money's testimony of the same. In addition, the defense presented the testimony of four alibi witnesses, who were either related to or friends of defendant, who testified that defendant was with them at a child's birthday party when the shooting took place. Most of those witnesses, however, had prior felony records, and despite being friends of defendant, did not make a statement about defendant's alibi until shortly before defendant's trial, well after defendant had been charged with the crime. In addition, defendant presented the testimony of some of the residents in the area who did not see the shooting itself but did see one or more persons running away in the area of the shooting. Some of those witnesses said that the subject running away was carrying a gun. Most or all of those witnesses described the person that they had seen as a light-skinned male African American or Hispanic subject and testified that defendant was not that person. In addition, a witness named Freddy Duncan testified that he was the person who had contacted Money that day to inquire about some shoes, that he met with Florasten at the side of the vehicle, that another subject approached with a gun and wearing a mask and began shooting, and that he (Duncan) ran away when the shooting started. Duncan had known defendant for a long time and testified that defendant was not the person who had committed the crime. Duncan, however, also had a felony record and also did not go to the police to make a statement, despite claiming to be a friend of defendant.

¶ 8 At the jury instruction conference, defense counsel tendered to the court an erroneous version of the Illinois Pattern Jury Instruction on identification. The instruction that was tendered provided

that:

"When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:

[1] The opportunity the witness had to view the offender at the time of the offense.

[or]

[2] The witness's degree of attention at the time of the offense.

[or]

[3] The witness's earlier description of the offender.

[or]

[4] The level of certainty shown by the witness when confronting the defendant.

[or]

[5] The length of time between the offense and the identification confrontation." See Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.15); see also *People v. Herron*, 215 Ill. 2d 167, 188 (2005).

The instruction was erroneous in that it contained the word "or" after each enumerated factor, except the last one. See IPI Criminal 4th No. 3.15; *Herron*, 215 Ill. 2d at 190-92 (error for trial court to read jury IPI Criminal 4th No. 3.15 with "or" between each factor because case law had established that all of the facts and circumstances should be considered and the jury could have mistakenly

believed that they could find an identification to be credible based upon a single factor). The State did not object to that instruction, and neither side brought up the instruction in closing arguments. When instructing the jury, the trial court read to it the erroneous instruction that defense counsel tendered.

¶ 9 The jury later found defendant guilty of attempted first degree murder. The jury-instruction issue was not raised in defendant's posttrial motion. Following a sentencing hearing, defendant was sentenced to 23 years' imprisonment. Defendant's motion to reconsider sentence was denied, and this appeal followed.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant argues that: (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt; (2) his trial counsel was ineffective in tendering and allowing the jury to be instructed with the erroneous jury instruction on identification; and (3) he is entitled to two additional days of sentence credit. We address defendant's second argument initially because it is dispositive in this case.

¶ 12 In support of his second argument, defendant asserts that his trial attorney was ineffective in tendering the erroneous jury instruction and in failing to ensure that defendant's case was decided by a properly instructed jury. Defendant asserts further that the error in this case was not harmless because the evidence was closely balanced and because the erroneous instruction went to the issue of identification, which was the key issue in this case. Defendant asks, therefore, that we reverse his conviction and sentence and that we remand this case for a new trial. The State argues that defendant was not provided ineffective assistance and that a new trial is not required. The State asserts that although the instruction was erroneous, defendant was not prejudiced by that instruction

because the evidence of defendant's guilt was so clear and convincing as to render the error harmless beyond a reasonable doubt. In making that assertion, the State submits that Money's identification of defendant as the person who had committed the crime was clear and steadfast, while the testimonies of defendant's alibi and occurrence witnesses were conflicting.

¶ 13 On appeal, a claim of ineffective assistance of trial counsel is subject to a two-part standard of review. See *People v. Bailey*, 375 Ill. App. 3d 1055, 1059 (2007). To the extent that the trial court's findings of fact bear upon the determination of whether counsel was ineffective, those findings must be given deference on appeal and will not be reversed unless they are against the manifest weight of the evidence. *Bailey*, 375 Ill. App. 3d at 1059. However, the ultimate question of whether counsel's actions support a claim of ineffective assistance is a question of law that is subject to *de novo* review on appeal. *Bailey*, 375 Ill. App. 3d at 1059.

¶ 14 A claim of ineffective assistance of counsel is analyzed under the two-pronged, performance-prejudice test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that defense counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant to the extent that he was deprived of a fair proceeding. *Patterson*, 217 Ill. 2d at 438. A defendant's failure to satisfy either prong of the *Strickland* test prevents a finding of ineffective assistance of counsel. *Patterson*, 217 Ill. 2d at 438.

¶ 15 In the instant case, the State agrees with defendant that defense counsel's performance was deficient when defense counsel tendered and allowed the jury to be instructed with the erroneous jury instruction on identification. Therefore, the only question before this court is whether defendant was prejudiced by defense counsel's deficient performance. To establish prejudice, a defendant must

show that there is a reasonable probability that the result of the trial would have been different, but for counsel's deficient performance. *People v. Davis*, 353 Ill. App. 3d 790, 795 (2004). No prejudice occurs, however, if despite the erroneous instruction, the evidence of defendant's guilt was so clear and convincing as to render the error harmless beyond a reasonable doubt. See *Herron*, 215 Ill. 2d at 192-94; *People v. Gonzalez*, 326 Ill. App. 3d 629, 636-37 (2001); *People v. Martinez*, 389 Ill. App. 3d 413, 416 (2009); *People v. Furdge*, 332 Ill. App. 3d 1019, 1032 (2002).

¶ 16 In the present case, we cannot say that the evidence of identification was so clear and convincing as to render the error that occurred from the erroneous jury instruction harmless beyond a reasonable doubt. See *Herron*, 215 Ill. 2d at 192-94; *Gonzalez*, 326 Ill. App. 3d at 634-41. The evidence that was favorable for the State was Money's clear and steadfast identification of defendant as the shooter. In contrast, however, was the evidence that was favorable for the defense on that issue: the inconsistencies between Money's trial testimony and her statement to police at the hospital; the inconsistencies in Florasten's own statements; the inconsistencies between Florasten's initial statement about what had occurred and Money's statement of the same; and the numerous alibi and occurrence witnesses, who indicated, either directly or circumstantially, that defendant was not the person who had committed the crime.

¶ 17 The State's argument that the evidence is overwhelming is misplaced. While the evidence that the crime in question was committed is overwhelming, the evidence that defendant was the person who committed that crime is not. Because identification was the key issue in this case and because the evidence on that issue was closely balanced, we find that defendant was prejudiced by defense counsel's deficient performance in tendering and allowing the jury to be instructed with the erroneous jury instruction on identification. See *Herron*, 215 Ill. 2d at 192-94; *Gonzalez*, 326 Ill.

App. 3d at 634-41. Having reached that conclusion, we reverse defendant's conviction and sentence for attempted first degree murder and remand this case for a new trial. See *Patterson*, 217 Ill. 2d at 438.

¶ 18 Before we conclude, however, we must briefly comment upon defendant's first argument, the sufficiency of the evidence. We do so out of fairness to defendant because if defendant's argument is correct, his conviction and sentence must be reversed outright. That being said, and although we do not address the issue at length, we note that under the *Collins* standard, Money's clear and steadfast identification of defendant as the shooter was sufficient to establish that defendant was the person who had committed the crime. See *People v. Collins*, 106 Ill. 2d 237, 261 (1985); *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). Thus, defendant is not entitled to an outright reversal in this case.

¶ 19 For the foregoing reasons, we reverse defendant's conviction and sentence for attempted first degree murder and remand this case for a new trial.

¶ 20 Reversed and remanded.