2015 IL App (3d) 130790-U

Order filed August 4, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0790 Circuit No. 12-CF-130
AARON S. FRAZIER,	)	Honorable Kevin W. Lyons,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's claim of ineffective assistance of counsel fails where defendant failed to establish that counsel's performance resulted in prejudice. Defendant's fines are modified to reflect the proper $5-per-day credit.

¶ 2 A jury found defendant, Aaron S. Frazier, guilty of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)), aggravated battery (720 ILCS 5/12-3.05(e)(1) (West 2012)), and attempted armed robbery (720 ILCS 5/8-4(a), 18-2(a) (West 2012)). Defendant was

specifically found guilty on a theory of accountability. Defendant was found not guilty of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)).

¶ 3 On appeal, defendant argues that trial counsel was ineffective for failing to move to sever the charge of unlawful possession of a weapon by a felon, thereby allowing the jury to hear that defendant had a prior felony conviction. We affirm, finding that any potential deficiency on the part of trial counsel did not result in prejudice to defendant. In addition, we modify defendant's fines.

¶ 4 FACTS

¶ 5 At defendant's jury trial, Peoria Police Department Sergeant Steven Cover testified that on January 12, 2012, he was dispatched to 3710 West Hedgehill in the Hedgehill apartment complex (Hedgehill). When he arrived, he found a man, later identified as Jason Lindsay, lying in the snow outside the apartment building. Lindsay was bleeding from a head wound. Cover found a plastic bag containing cannabis in Lindsay's waistband. Cover did not find anyone inside the apartment.

¶ 6 Lindsay testified that his friend, Lakisha Taylor, had told him that Juan Nesbit wanted to buy cannabis from Lindsay. Lindsay knew Nesbit from the neighborhood. Lindsay agreed to sell Nesbit one-quarter of a pound of cannabis for $400. An acquaintance named Aubree Mitchell drove Taylor and Lindsay to Nesbit's residence in Hedgehill. They parked in front of Nesbit's apartment and waited for him to arrive. When Nesbit arrived on foot, Lindsay exited the car, and he and Nesbit entered the apartment. Mitchell and Taylor stayed in the car.

¶ 7 Once Nesbit and Lindsay entered the apartment, Nesbit pushed Lindsay into the kitchen. In the kitchen there was a man wearing a mask, who pointed a revolver at Lindsay. Lindsay grabbed the gun and tried to push it away. Nesbit ran upstairs. The man fired the gun, shooting

Lindsay in the midsection. Lindsay tried to run out of the apartment but fell down near the front doorway. As he lay on the floor, Lindsay noticed two men standing on the stairway inside the apartment. The man with the gun came up behind Lindsay and shot him twice in the back and once in the head. Lindsay crawled out the front door of the apartment and lay down in the snow.

¶ 8 Emergency responders arrived and took Lindsay to the hospital. At the hospital, police showed Lindsay a photo array. Lindsay identified a photo of defendant as the man with the gun. His testimony did not address how he was able to identify a masked man. Lindsay also identified a photo of Nesbit as the person who arranged the cannabis sale. Lindsay could not identify the two other men he saw in the apartment. He testified that he had blood in his eyes and could not see them clearly. Lindsay made an in-court identification of defendant as the man with the gun.

¶ 9 On cross-examination, Lindsay testified that he could not remember whether he originally planned to meet Nesbit at a Casey's gas station rather than at Nesbit's apartment. He admitted that he was high on cannabis on January 12, 2012. Lindsay testified that the man with the gun was five feet, eight inches tall although he told police that the man was six feet tall. Lindsay also remembered telling police at the hospital that Nesbit was the person who shot him.

¶ 10 Nesbit testified that he arranged the cannabis sale with Lindsay with the intent of robbing him. He also testified that defendant and Andre Ewing planned to assist him in robbing Lindsay. On January 12, 2012, Tonica Fullilove drove Nesbit, defendant, Ewing, and Emetric Carpenter to Nesbit's apartment. Nesbit testified that Carpenter was unaware of the robbery plans. Defendant had a .357 firearm and Ewing also had a gun. The four men arrived at the apartment and entered through the back door. Nesbit exited the apartment through the back door and walked around to the parking lot to meet Lindsay.

¶ 11 Nesbit met Lindsay in the parking lot and walked with him through the front door toward the kitchen. Ewing jumped out from a hiding place and pointed his gun at Lindsay. Lindsay grabbed the gun and tussled with Ewing. Defendant came up behind Lindsay and hit him in the head with his gun. Nesbit ran outside the apartment and heard at least four gunshots as he was leaving. Eventually, all four men exited the apartment, and Fullilove drove them to a different apartment complex.

¶ 12 Nesbit called Taylor and told her that someone had robbed Lindsay and him. Nesbit also went to the police station and gave a statement that Nesbit and Lindsay were robbed by an unknown person. Nesbit later gave a recorded statement to the same effect. Nesbit testified that he lied about what happened in order to avoid being implicated in the robbery. On cross-examination, Nesbit testified that he was initially unaware the Ewing was carrying a gun.

¶ 13 Nesbit further testified on direct examination that he received a plea deal in exchange for his testimony in the present case. He was initially charged with attempted murder, aggravated battery with a firearm, and attempted armed robbery. Under his plea deal, the attempted murder and aggravated battery charges would be dismissed, and Nesbit would receive a sentencing range of 10 to 30 years' imprisonment.

¶ 14 Fullilove testified that she was defendant's girlfriend at the time of the alleged robbery and at the time of trial. On January 12, defendant contacted her and requested that she give defendant and some friends a ride to Hedgehill. Fullilove agreed and drove defendant, Nesbit, Ewing, and Carpenter to Hedgehill. Fullilove did not testify to having any knowledge that the men intended to commit a robbery. At Hedgehill, the men exited the car and entered Nesbit's apartment. When the men later returned to the car, Carpenter was acting frantic, and Ewing appeared to be injured. Fullilove drove them to a different apartment complex.

¶ 15 Carpenter testified that he met with defendant, Nesbit, and Ewing to buy $10 worth of cannabis. Carpenter did not know of any plan to commit a robbery. Fullilove picked up Carpenter, defendant, Nesbit, and Ewing in her car and drove them to Hedgehill. While parked outside Nesbit's apartment, Carpenter saw Nesbit give Ewing a revolver. Carpenter did not know whether defendant had a gun. The four men entered the apartment through the back door. Carpenter went upstairs to use the bathroom. While upstairs, he heard gunshots and jumped out the bathroom window. He ran back to Fullilove's car and waited for the others. When defendant arrived back at the car, defendant said that he thought he had shot someone inside. In a prior recorded statement given to police, Carpenter stated that he thought defendant had a gun because he always carried one, but Carpenter did not actually see defendant with a gun.

¶ 16 After the close of testimony, the parties stipulated that defendant was a convicted felon, but did not disclose the specific felony for which he had been convicted. The jury returned guilty verdicts on attempted first degree murder, aggravated battery, and attempted armed robbery; it returned a not guilty verdict on unlawful possession of a weapon by a felon. In addition, the jury returned an interrogatory finding that defendant, or one for whose conduct he was legally responsible, was armed with a firearm while committing attempted first degree murder. The jury also found the allegation that defendant was personally armed with a firearm during the attempted first degree murder was not proven.

¶ 17 The court sentenced defendant to 38 years' imprisonment for attempted first degree murder, to be served consecutively to 12 years' imprisonment for attempted armed robbery. The court did not enter a sentence on the aggravated battery conviction. In addition, the court imposed various assessments totaling $3,346.85.

¶ 18 ANALYSIS

¶ 19 On appeal, defendant claims that counsel was ineffective for failing to move to sever the charge of unlawful possession of a weapon by a felon. Defendant argues that the jury's knowledge that defendant had been convicted of a prior felony prejudiced its decision in returning guilty verdicts on the other counts. In addition, defendant argues that he is entitled to a $5-per-day credit against his fines pursuant to section 110-14 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-14 (West 2012)).

¶ 20 A. Ineffective Assistance of Counsel

¶ 21 In order to establish ineffective assistance of counsel, a defendant must show: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Where an ineffective assistance claim can be disposed of on the grounds that the defendant did not suffer prejudice, a reviewing court need not determine whether counsel's performance was deficient. *Id.* at 697.

¶ 22 To establish prejudice, a defendant must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. The prejudice inquiry is more than an "outcome-determinative test"; rather, a defendant must show that counsel's performance rendered the result of the trial unreliable or the proceeding unfair. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000).

¶ 23 In the present case, we find that any potential deficiency for failing to sever the unlawful possession of a weapon by a felon charge did not prejudice defendant. The jury found defendant guilty of attempted first degree murder, aggravated battery, and attempted armed robbery based on a theory of accountability. A person is legally accountable for the conduct of another when "either before or during the commission of an offense, and with the intent to promote or facilitate

that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2012). A defendant may be held accountable where there is a "common criminal plan or purpose." *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995). A common purpose may be inferred from the circumstances surrounding the conduct. *Id.* at 141.

¶ 24 Here, Nesbit testified that he, defendant, and Ewing planned the robbery of Lindsay. In addition, he testified that defendant accompanied him in Fullilove's car and hid in the apartment to await Lindsay. Carpenter's testimony placed defendant downstairs in Nesbit's apartment, although Carpenter denied any knowledge of a robbery. Fullilove testified that defendant was the person who called her to arrange transportation to the apartment. Based on that testimony, the jury was justified in finding a "common criminal plan or purpose." *Taylor*, 164 Ill. 2d at 140-41.

¶ 25 We acknowledge there was conflicting testimony from Nesbit and Lindsay about whether defendant was in possession of a firearm and about who pointed the gun at Lindsay in the apartment. The jury resolved those inconsistencies to find that defendant was not in possession of a firearm beyond a reasonable doubt. Significantly, however, there were no inconsistencies surrounding the evidence that defendant planned and participated in the robbery. Based on its verdicts, the jury found that defendant was present in the apartment and had participated in the robbery. Because defendant was found guilty on a theory of accountability, it was unnecessary for the State to prove who actually shot Lindsay. Instead, the State needed to prove that Lindsay was shot during the attempted robbery and that defendant solicited, aided, abetted, agreed, or attempted to aid the group in the planning or commission of the robbery. See 720 ILCS 5/5-2(c) (West 2012). Even if the jury disregarded Lindsay's identification of defendant as the shooter,

there was additional evidence from the other witnesses to establish defendant's accountability. In light of the consistent evidence establishing defendant's accountability, we cannot say that there is a reasonable probability that, absent evidence of defendant's prior felony conviction, the jury would have acquitted defendant of attempted first degree murder, attempted armed robbery, or aggravated battery.

¶ 26 B. $5-per-day Credit

¶ 27 Defendant claims he is entitled to $3,810 in credit pursuant to section 110-14 of the Code, which should be applied to satisfy the following fines: $25 "Crimestoppers Fee"; $15 "State Police Operation Assistance Fund" fine; $10 "State Police Services Fund" fine; $10 "State's Attorney Juvenile Expenses"; $10 "Clerk Oper/Admn Fine"; $30 "Child Advocacy Center" fine; $50 "Court Usage" fine; $4.75 "Drug Court Fund" fine; $10 "Drug Court Operation" fine; and $10 "Probation Operation Fees" fine.[1] The State concedes that the credit should be applied to satisfy those assessments. We accept the State's concession and order the $5-per-day credit to be applied to the assessments listed above.

¶ 28 CONCLUSION

¶ 29 The judgment of the circuit court of Peoria County is affirmed as modified.

¶ 30 Affirmed as modified.

[1] We note that the parties assert that the listed assessments total $179.75. Our math results in a total sum of $174.75. The discrepancy does not affect our decision.