2014 IL App (4th) 130419-U

NO. 4-13-0419

FILED
April 2, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
JUVON F. MAYS,	)	No. 08CF2293
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed the trial court's decision, finding trial counsel was ineffective by conceding defendant's guilt, leaving the jury with no choice but to convict defendant of the charged offenses. The court reversed defendant's convictions and remanded for a new trial.

¶ 2 Defendant, Juvon F. Mays, appeals from the judgment of the trial court entered after an evidentiary hearing on the issue of whether trial counsel rendered ineffective assistance of counsel. Defendant claims the trial court erred in concluding that counsel was not ineffective. His claims of ineffective assistance relate to the State's decision to file new charges against defendant on the day of trial, charges of which he was found guilty. Defendant argues the new charges would not have been filed but for counsel's written communication with the prosecutor, which defendant claims contained confidential information. Defendant also contends the letter, as well as counsel's conduct at trial, demonstrates that counsel could not have fully understood

the felony-murder rule or the law relating to accomplice liability because counsel effectively admitted defendant had committed the offenses. He claims counsel's misapprehension of the law was further demonstrated when he failed to explain the felony-murder rule to defendant before he took the witness stand and, in effect, confessed to the offenses. For the reasons that follow, we reverse, finding counsel rendered ineffective assistance of counsel.

¶ 3 I. BACKGROUND

¶ 4 In December 2008, defendant was charged with three counts of first degree murder for the shooting death of Corinthian "Shawn" Spinks. On the day of defendant's jury trial in August 2009, the State filed three additional charges against defendant—two for felony murder (one of the two on a theory of accountability) and one for home invasion. The State filed these charges at this late date after receiving a letter five days earlier from defendant's attorney, G. Ronald Kesinger. The letter, which the prosecutor characterized as "tantamount to a confession to felony murder," informed the State defendant would be presenting a defense that the shooting was accidental, and it was defendant's cousin, Brian Shaw, who had the gun which accidentally discharged when Shaw and defendant stood outside Spinks' apartment door. According to Kesinger, defendant would demonstrate at trial he and Shaw were at Spinks' residence in an attempt to recover defendant's personal property that had been stolen earlier that day. Shaw and defendant believed Spinks was responsible. Kesinger said when Spinks saw Shaw and defendant at his door, he began to close it, but defendant forced his arm through the door opening "to get in." The gun accidentally discharged when Spinks pushed the door into Shaw's hand, which held the gun. Kesinger wrote: "After Spinks slumped to the floor, both [defendant] and Shaw went into the apartment briefly and it was Shaw who asked Ms. Spinks

'Where is it?' " The stated purpose of Kesinger's letter was to request the prosecutor reinterview the witnesses and offer immunity "in order to obtain the truth."

¶ 5 As stated, the State filed the new charges on the day of trial. During the jury instruction conference, the State dismissed the original three first degree murder charges and proceeded only on the counts related to felony murder. A jury found defendant guilty of the three new charges. The trial court sentenced defendant to 60 years in prison. Defendant appealed, claiming, *inter alia*, (1) the new charges violated his right to a speedy trial, and (2) Kesinger was ineffective for sending the prosecutor the letter, which violated the attorney-client privilege and demonstrated his misunderstanding of the theories of accountability and felony murder. *People v. Mays*, 2011 IL App (4th) 090840-U, filed Nov. 7, 2011; *modified on denial of reh'g* Dec. 15, 2011; *vacated* May 9, 2012, pursuant to Illinois Supreme Court supervisory order. This court held the new charges were not "new and additional" for purposes of a speedy-trial analysis and, thus, there was no violation. *Mays*, 2011 IL App (4th) 090840-U, ¶ 50. With regard to the ineffective-assistance-of-counsel claims, we held the claims would be better presented in a collateral proceeding so a complete record could be made. *Mays*, 2011 IL App (4th) 090840-U, ¶ 49.

¶ 6 The supreme court, pursuant to its supervisory authority, directed this court to vacate our judgment and address the merits of defendant's claim or address the issue of whether the trial court failed to conduct a *Krankel* inquiry. *People v. Krankel*, 102 Ill. 2d 181 (1984). See *People v. Mays*, No. 113685 (Mar. 28, 2012) (nonprecedential supervisory order on denial of petition for leave to appeal). We did so and remanded the cause to the trial court for a preliminary investigation into defendant's claims to determine whether the appointment of new counsel was appropriate and necessary. *People v. Mays*, 2012 IL App (4th) 090840, ¶ 60.

¶ 7 On remand, the trial court appointed counsel, Randall Rosenbaum, to represent defendant and proceeded to an evidentiary hearing on May 17, 2013. Prior to the presentation of evidence, Rosenbaum asked the trial court to "consider the court file and its contents, as well as the transcripts of all the prior proceedings" in the case. The court obliged. Defendant testified he had hired Kesinger approximately five or six months prior to his August 2009 trial. During one of their meetings, defendant told Kesinger his apartment had been burglarized. He said he initially told Kesinger he believed a maintenance man had burglarized his apartment. A week prior to the trial, defendant again met with Kesinger. Defendant testified as follows:

"Q. And what was it that you added this time that was different from before?

A. Basically that it was somebody that went with me.

Q. Okay. And who was that person?

A. Brian Shaw.

Q. Is that your cousin?

A. Yes.

Q. And did you indicate to Mr. Kesinger—and this was about a week before trial—that your cousin had gone around trying to find out on his own who had burglarized your apartment?

A. Yes.

Q. And did you tell Mr. Kesinger that the next morning he came to your apartment, he had a gun with him?

A. Yes.

Q. And did you tell—what did you tell Mr. Kesinger happened at that point?

A. That he had a gun with him, and eventually it led on that morning that he went next door to talk to him about the situation.

Q. Did the both of you go together?

A. Yes.

Q. And whose apartment were you going to?

A. The victim, Spinks.

Q. And you testified here at the trial, do you recall that?

A. Yes.

Q. And is what you testified to in court, the same thing you told Kesinger a few days before the trial?

A. It's similar, but no, I didn't tell him that I ever went inside the apartment.

Q. When you testified at trial, did you say you went into the apartment?

A. No.

Q. Well, did you tell him a few days before that you had gone into the apartment?

A. No.

Q. So at the trial Mr. Kesinger gave an opening statement and said you had gone in?

A. Yes.

Q. During this conversation with Mr. Kesinger, did you believe that what you were telling him was confidential information?

A. Yes.

Q. Did you believe that he was going to be relaying that information to anybody?

A. Oh, no.

Q. Did you give him permission to relay it to anybody else?

A. No.

Q. Did you trust Mr. Kesinger?

A. Yeah, I mean, me and my family give him all our money, so yeah.

Q. And did he indicate to you that he had been practicing criminal law since 1973 and had tried about a dozen murder cases?

A. Yeah, that's exactly what he said.

Q. During that conversation with him a few days before trial, did he indicate—did Mr. Kesinger indicate that he was going to use that information to try and get you a better plea bargain of any sort?

A. Yeah, he told me basically the same thing. He wrote the prosecutor, like he said on—that's in the evidence right now. He told me that I had to take the stand, and that if I didn't take the stand, that I was sure to be found guilty. And he told me if I took

the stand then, that's the only chance I had to get second degree or involuntary manslaughter.

Q. Did he indicate to you, though, he was going to make a counter[]offer, a plea bargain counteroffer to the State, based on what you had said?

A. Oh, no."

¶ 8 Defendant testified he did not learn Kesinger had written a letter to the prosecutor until the day of trial, when the trial court announced additional charges had been filed against him. Defendant said he did not realize until trial that Kesinger had also written letters to witnesses Kathleen Faber and Roger Brown. He did not see the letters until after the trial. Defendant said Kesinger told him he "had to testify" because otherwise the jury would find him guilty. Kesinger never mentioned "felony murder" to defendant. He had never heard the phrase until the trial court announced he had been charged with the offense. He said Kesinger only explained to him what felony murder was *after* he had been found guilty.

¶ 9 Defendant said before trial, Kesinger wanted to withdraw, citing "irreconcilable differences." When asked to reiterate those differences, defendant said (1) Kesinger wanted a bench trial and defendant did not want to testify, (2) Kesinger wanted defendant to testify and defendant did not, (3) defendant owed Kesinger money, and (4) Kesinger wanted a continuance and defendant did not want any further delay. Defendant explained he had told the trial judge he wanted to testify only because he trusted Kesinger, who told him if he did not testify he would be found guilty. Although he understood the court's admonition regarding his right to testify, he took the stand on Kesinger's advice. Defendant made it clear he did not want to testify and Kesinger had not explained the offense of felony murder. Defendant said he did not realize his

testimony, in effect, was "conceding felony murder." He said had Kesinger explained the elements of felony murder to him, he would not have testified. He filed a complaint against Kesinger with the Attorney Registration and Disciplinary Commission (ARDC). As a result of defendant's complaint and that of another person, Kesinger was suspended from practice for six months.

¶ 10 Defendant said the "majority" of the contents of Kesinger's letter to the prosecutor were accurate. However, defendant said he did not tell Kesinger he had entered Spinks' apartment. He did not put his hand into the apartment. Defendant said he and Kesinger met a few days before the trial, and they discussed the facts of the case. Defendant said Kesinger spoke of involuntary manslaughter and second degree murder, but not accomplice liability. Defendant agreed he wanted the jury to hear his version of the events, but he did not necessarily want to be the one to tell them. The following exchange on cross-examination occurred:

> "Q. And you understand that the only way for the jury to hear it would be for you to testify, correct?
>
> A. No. I thought at that time, like closing argument or something. I didn't think he was going to go into—I didn't know how he was going to proceed, like I'd be lying. I honestly didn't know.
>
> Q. That's fair. But you wanted the jury to hear the information you told Mr. Kesinger; is that correct?
>
> A. Yeah, the information that I told him, yeah, not—yeah, that I told him.

Q. So really, your problem with Mr. Kesinger was that he gave the information to Mr. Harris [(the prosecutor)]—

A. Yeah, because I—

Q. —before he would have given it to the jury; is that fair to say?

A. Well, I mean, besides the fact of him violating my constitution, I trusted him. I didn't think he was just going to give it to, I mean, I understand I thought I would tell him my side of the story, and he would basically translate in a legal sense, but not get me in more trouble, or so to speak, or get me more charges.

Q. Tell me if this is fair to say. So you were hoping that by giving this information to Mr. Kesinger he would use it to help you; is that fair?

A. Yeah, definitely, yes."

¶ 11 On redirect, defendant clarified the letter Kesinger sent to the prosecutor had "some inaccuracies based on the conversation" he had with Kesinger and he did not have an opportunity to review the letter for accuracy before it was sent. Defendant's counsel questioned defendant as follows:

"Q. Okay. And finally, when you had this conversation a few days before the trial with Mr. Kesinger and you gave him more of the details, could you describe his demeanor and the way he was acting once you told him all this information?

A. To be honest, he was acting rather excited, like we mandatory was going to win something, like that. He had me fooled, like we was going to be like, at the very minimum, get second degree, like involuntary manslaughter. That's how he was acting. Never like it was more charges in the works.

Q. And so the issues that you have with him are the first one, that he sent the letter to Mr. Harris without your permission. Is that a concern of yours?

A. Yeah, that's the major concern.

Q. And also that he never informed you of what felony murder was?

A. Yeah, that's a major concern as well."

¶ 12 At the close of defendant's testimony, Rosenbaum informed the court he had subpoenaed Kesinger for this hearing, but Kesinger did not appear. The State indicated it "would have had some questions for Mr. Kesinger, based upon testimony he gave at the ARDC, relating to this conversation." The following exchange occurred:

"THE COURT: Well, do you have a transcript of his testimony before the ARDC?

MS. WEBER [(Assistant State's Attorney)]: I do, Your Honor.

THE COURT: Mr. Rosenbaum, any problem with my considering that?

MR. ROSENBAUM: Judge, it was under oath, he was subject to cross-examination. I think the issue was slightly different than here.

THE COURT: Well, let me take a look at it.

MS. WEBER: And Judge, the question that I'm particularly interested in that the appellate court had is, why did Kesinger send Harris the letter? I think that gives us a little insight into that.

THE COURT: Okay, thank you. All right. Mr. Rosenbaum, it appears from the transcript, which I'm going to mark as People's exhibit No. 1, that Mr. Kesinger sent the letter to Mr. Harris as an opening for some form of negotiation to a lesser offense and possibly a plea. Quite frankly, that was the court's understanding of what was going on with all of this. Mr. Rosenbaum, anything else you want to present?

MR. ROSENBAUM: Judge, I don't think the State has any objection, these documents may already be in the court file. But our exhibits, [Nos.] 1, 2, and 3, the three letters that Mr. Kesinger wrote to Mr. Harris, Ms. Faber, and Mr. Brown.

THE COURT: All right. Anything else, counsel?

MR. ROSENBAUM: No other evidence, Judge."

¶ 13 Kesinger's testimony from the October 2011 hearing before the ARDC can be summarized as follows. He had been involved in 13 murder cases during his 45 years of

practicing law. As to his evaluation of the evidence against defendant, Kesinger opined defendant had "no defense." The State had more than sufficient evidence to place defendant at Spinks' apartment at the time of the shooting, but defendant insisted they should present the theory that whoever broke into defendant's apartment and stole his belongings was the same person who killed Spinks "to make [defendant] look bad." Kesinger told defendant such a defense was "preposterous." In a meeting a few days before trial, defendant told Kesinger the "real story," involving his cousin, Brian Shaw. He said they were both armed with guns and confronted Spinks. Shaw's gun discharged when the door knocked into Shaw's arm. Defendant's arm was near the gun when it fired, which explained the gun powder found on defendant's arm. Kesinger said he told defendant regardless of who fired the gun, "either way, [he was] an accomplice." However, he told defendant the shooting appeared to be an accident. Kesinger said, "So I was excited actually that I had some defense that it was an accident rather than premeditated or anything like that and we discussed that and I told him that, about the lesser included offenses, the involuntary manslaughter or reckless homicide fit the crime." He said he and defendant talked about the accomplice liability theory, but there was nothing discussed related to felony murder, since that "was not charged." Kesinger said he told defendant it "might be possible" to get the State to agree to a lesser-included offense. Kesinger did advise defendant he would be the only person who could tell the jury what happened.

¶ 14 Kesinger said after their meeting, he composed a letter to the prosecutor, explaining "what [he] expected the evidence to be and suggested it was accidental and that a lesser-included offense would more appropriately fit." When the State filed the felony-murder charges on the day of trial, Kesinger asked for a continuance and defendant asked for new counsel. Both requests were denied. Kesinger explained to defendant the evidence

demonstrated he was the one with the gun and if he was going to testify otherwise, he would have to be his own witness because, ethically, Kesinger could not perpetuate perjury.

¶ 15 Kesinger testified defendant "fully understood," after their meeting, that Kesinger was going to contact the prosecutor about evidence supporting a lesser-included offense. Kesinger said: "I think he is, I won't say playing dumb, but he's, I just think he's being selective in what he's saying. Let's put it that way, but he fully understood." Kesinger concluded his testimony, saying he tried his best to formulate a defense "that would at least have some reason of succeeding." On cross-examination, Kesinger admitted he did not realize the information he relayed to the prosecutor would be the basis for home invasion and felony-murder charges.

¶ 16 After considering all of the evidence, the trial court stated as follows:

> "THE COURT: All right. Well, this is a *Krankel* hearing. The appellate court sent it back for that purpose, to determine whether or not, basically, Mr. Kesinger's performance fell below the standard, and if it did, was prejudice attached to that deficient performance?
>
> First and foremost, the testimony in the case was that two people pounded on the door. A shot was fired through the door, killing the victim. And then the individual wearing a ski mask and a camouflage jacket came into the apartment, armed with a firearm, and basically threatened the individual inside, and then left. The Rantoul Police Department recovered the camouflage jacket, and in the pocket of that jacket was a blank deposit slip with the defendant's name, an envelope with a house key inside

with the name Mays on it, and 1404 Hobson Drive, Apartment D, a pair of latex gloves. Other officers—and then two handguns were found, which is very interesting, because the indication was that it was only the cousin that fire the shot. But two handguns were recovered. The DNA analysis on the items of clothing could not—several forensic scientists testified regarding various testing he or she performed on the items of evidence. The extent of the incriminating evidence revealed that the defendant could not be excluded as one of the three contributors to the DNA found on both stocking caps, one of the two contributors to the DNA found on the white glove, and one of two contributors to the DNA found on a pair of tennis shoes found at the defendant's residence. The tennis shoes matched the impression left in the kitchen of the victim's apartment. There were no latent prints. There was also a video from Wal-Mart several hours prior to this, showing the defendant wearing that very distinctive camouflage outfit.

So it was apparent from the testimony in this case before the defendant ever testified that he entered the apartment. He claims today and has maintained all along that he didn't, and I guess his explanation is, my cousin was wearing my coat, and I was wearing my cousin's hoodie. But the fact remains that the evidence and circumstantial evidence would indicate that it was the defendant that entered the apartment.

Now the letter that Mr. Kesinger sent to Mr. Harris was not in any way, shape, or form admissible, it couldn't be made known to the jury. Mr. Harris chose to file felony murder counts. In Illinois, there's one charge of murder, that's it, no matter how the State charges it. Depending on how the evidence comes in and as it came in in this case, the court is then obligated to instruct the jury on whether it's felony murder, intentional, likely to cause death or great bodily harm, etc., etc., etc.

Given the evidence that was presented, I think felony murder was appropriate. Now when Mr. Spinks [*sic*] got ready to testify, Mr. Kesinger tried to withdraw, because he was of the opinion that the defendant's testimony was not going to be truthful, based upon some information that Mr. Kesinger had.

I would not allow the defendant [*sic*] to withdraw. On the transcript at page 30, it looks like volume six, 'Mr. Kesinger, your client has the absolute right to decide to testify or not testify, that's his choice. If he chooses to testify and you believe that there may be a problem with his testimony, I'm not going to let you withdraw, but then I'm going to let you tell him to state his name, whatever biographical information you want from him, and then say what happened.' And then I indicated to Mr. Harris that I wouldn't tolerate objections during the testimony of the defendant.

Then I discussed the issue with the defendant. I started out, 'Mr. Kesinger, you've discussed with your client whether or not in your opinion he should testify. Based upon his discussions with you, it is his intention to testify; is that correct?'

'Yes, Your Honor, I've advised him that he has a right not to testify, but I advised him that he has a right to testify, and if he does, he must testify truthfully.' And I believe at that point Mr. Kesinger was concerned about the fact that all the evidence pointed to this defendant entering the apartment, which the defendant steadfastly denied he did; the stocking cap, the tennis shoes, the camouflage jacket, two guns. So then I indicated 'Right, but it's his decision to testify?'

'Mr. Kesinger: Yes.'

'THE COURT: Is that correct, Mr. Mays, it's your decision to testify?' And the defendant said 'No, I mean, I'm forced to believe that I don't have no choice. I mean, I've been—I mean, I fired my counsel Monday, I don't know how he even here, he not even representing me right now. I got absolutely no objections. I got no cross-examination. I fell like right now'—and I said, 'Mr. Mays, I'm going to ask you'—and then he said, 'I'm sitting here being railroaded.'

'Mr. Mays, I'm going to ask you a real simple question. You have a right to testify. You have a right not to testify. It's your choice, do you choose to testify, yes or no?'

'Yes, because I believe I'm'—and I think he was going to say being railroaded—'all right, forced to.' That's how he finished it. And then with that, the defendant testified.

Mr. Kesinger may not have had, nor did Mr. Harris, apparently, an adequate understanding of felony murder. Mr. Kesinger's letter to Mr. Harris in no way, shape, or form affected the outcome of this trial. Had the State not filed additional charges, had they stuck with the original murder charge, based upon the testimony presented, the jury was going to be instructed on felony murder.

It's very simple. There's only one murder in the State of Illinois, and then it's up to the judge to determine what instructions are to be given to the jury. The fact that the defendant chose to testify, and Mr. Kesinger was concerned about the truthfulness of his testimony, would indicate that Mr. Kesinger was concerned that the defendant, had he testified, I suppose as Mr. Kesinger anticipated, that there was the element of sympathy. We got into the testimony of being on parole, getting a job, getting his life in order, getting the Christmas presents, being burglarized. And all

> of these—all of this testimony, that would engender some sympathy for the defendant.
>
> But Mr. Kesinger's concern was, the evidence points to him going in the apartment, and all of this sympathetic testimony is going to be for no avail, because he's obviously lying about that incident, that portion of the trial.
>
> Mr. Kesinger, I cannot say that his, first of all, his performance fell below the appropriate standard, and even if it did, based upon the evidence presented, based upon the evidence of the eyewitnesses, based upon all that was presented, I believe that there was no prejudice to this defendant. That will be the order of the court, and since this is a *Krankel* hearing, that's the decision of the court."

This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Defendant contends the trial court erred in finding that Kesinger was not ineffective and defendant was not entitled to a new trial. He claims the evidence presented at the evidentiary hearing demonstrated Kesinger (1) violated the attorney-client privilege by supplying the State with confidential information, which led to additional charges of which defendant was found guilty; (2) did not understand the theories of accomplice liability and felony murder; and (3) did not properly advise defendant regarding the offense of felony murder so that defendant could make an informed decision of whether to testify. Based on this record, we find it apparent from his letter to the prosecutor before trial, as well as his conduct during trial, that defense

counsel did not comprehend the elements of felony murder or home invasion, or the theory of accountability. As a result, this court cannot find defendant received the due process to which he was entitled. Kesinger's letter to the prosecutor, which attempted to minimize defendant's involvement in the crime, actually served as the functional equivalent to a confession to the newly charged offenses of felony murder and home invasion. Further, his opening and closing statements left the jury "no choice but to convict" defendant of the charged offenses. Thus, we conclude defendant received ineffective assistance of counsel.

¶ 19 Generally, claims of ineffective assistance of counsel are evaluated under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

> " 'To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient *and* that the deficient performance prejudiced the defendant.' (Emphasis added.) [Citations.] Failure to satisfy either prong of this test precludes a reviewing court from concluding that counsel was ineffective. [Citation.] We review a defendant's claim of ineffective assistance of counsel in a bifurcated fashion, deferring to the trial court's findings of fact unless they are contrary to the manifest weight of the evidence, but assessing *de novo* the ultimate legal question of whether counsel was ineffective. [Citation.]" *People v. Manoharan*, 394 Ill. App. 3d 762, 769 (2009).

¶ 20 Deficient performance means counsel's conduct fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. This means "the defendant must overcome the

'strong presumption' that his counsel's representation fell within the 'wide range of reasonable professional assistance.' " *People v. Franklin*, 135 Ill. 2d 78, 117 (1990) (quoting *Strickland*, 466 U.S. at 689). The sixth amendment requires, at a bare minimum, that defense counsel act as a true advocate for the accused. *United States v. Cronic*, 466 U.S. 648, 656 (1984).

¶ 21 In certain situations, the two-part *Strickland* test need not be applied and prejudice may be presumed. See *Cronic*, 466 U.S. 648. Where " 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.' " *People v. Hattery*, 109 Ill. 2d 449, 461 (1985) (quoting *Cronic*, 466 U.S. at 659). Thus, if a concession of guilt is made by defense counsel, as was done in *Hattery*, "ineffectiveness may be established; however, the defendant faces a high burden before he can forsake the two-part *Strickland* test." *People v. Johnson*, 128 Ill. 2d 253, 269-70 (1989). We find the circumstances of this case is one such instance where a defendant has met that high burden and where prejudice may be presumed.

¶ 22 In *Hattery*, a case in which our supreme court applied the *Cronic* standard, the defendant pleaded not guilty to the murders of three people. *Hattery*, 109 Ill. 2d at 458. However, during defense counsel's opening statement, he conceded the defendant committed the murders and stated the only issue was whether the defendant should receive the death penalty. *Hattery*, 109 Ill. 2d at 458-59. During the trial, defense counsel did not present a viable defense. Rather, he attempted to demonstrate that a codefendant forced the defendant to kill the victims. *Hattery*, 109 Ill. 2d at 459. Compulsion may be a mitigating factor during the sentencing phase, but it is not a defense to murder. *Hattery*, 109 Ill. 2d at 459.

¶ 23 The supreme court held defense counsel did not subject the State's case to meaningful adversarial testing as required under the sixth amendment. *Hattery*, 109 Ill. 2d at

464. The court noted counsel's strategy, which attempted to show the defendant was guilty of murder but undeserving of the death penalty, was inconsistent with the defendant's plea of not guilty. *Hattery*, 109 Ill. 2d at 464. The court held defense counsel "may not concede his client's guilt in the hope of obtaining a more lenient sentence where a plea of not guilty has been entered, unless the record adequately shows that defendant knowingly and intelligently consented to his counsel's strategy." *Hattery*, 109 Ill. 2d at 465.

¶ 24 In *Hattery*, our supreme court relied partly on *Cronic*, in which the United States Supreme Court held that, at minimum, defense counsel is required to act as a true advocate for the accused pursuant to the sixth amendment. *Cronic*, 466 U.S. at 656. Our supreme court stated:

> "Where 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.' [*Cronic*, 466 U.S. at 659]. The court in *Cronic* explained:
>
> > '[T]he adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." [*Cronic*, 466 U.S. at 656 (quoting *Anders v. California*, 386 U.S. 738, 743 (1967))]. The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a

> true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.' [*Cronic*, 466 U.S. at 656-57]." *Hattery*, 109 Ill. 2d at 461-62.

¶ 25 Defendant relies on our supreme court's decision in *People v. Chandler*, 129 Ill. 2d 233, 256 (1989), where the court reversed the defendant's conviction due to his attorney's apparent misapprehension of the law. In *Chandler*, the defendant's attorney conceded the defendant had entered the victim's house but argued he did not stab the victim. Rather, he argued his codefendant had stabbed the victim. *Chandler*, 129 Ill. 2d at 239. Counsel apparently mistakenly believed the jury could find the defendant not guilty if it believed he had not personally inflicted the fatal wounds. *Chandler*, 129 Ill. 2d at 247. However, the jury was instructed on both felony murder and accountability, and thus, "had no choice but to find [the] defendant guilty of murder." *Chandler*, 129 Ill. 2d at 247. The court held: "Defense counsel's performance left the jury with no choice but to convict defendant of the offenses charged. This constitutes ineffective assistance of counsel." *Chandler*, 129 Ill. 2d at 248. The court went further: "By failing to comprehend the law of accountability and felony murder, counsel's strategy and actions amounted to no real defense at all. The prosecution's case, therefore, was not subject to meaningful adversarial testing, and defendant was deprived of a fair trial." *Chandler*, 129 Ill. 2d at 249.

¶ 26 The circumstances of this case bring it within the holdings of *Cronic* and *Hattery* in terms of forgoing the two-part *Strickland* test. As in those cases, defense counsel's concession of defendant's guilt was such that prejudice could be presumed. *Cronic*, 466 U.S. at 659; *Hattery*, 109 Ill. 2d at 461. Although Kesinger's theory of the case was similar to that of the defendant's attorney in *Chandler*, this case is distinguishable from *Chandler* only to the extent the *Chandler* court utilized the two-part *Strickland* test, finding counsel's statements at trial, standing alone, were not enough to forgo the prejudice prong. *Chandler*, 129 Ill. 2d at 246. This is not such a case.

¶ 27 We cannot say defendant received a true adversarial trial. First, beginning with Kesinger's letter, it was clear he was not acting as a competent advocate. Kesinger wrote the letter intending to inform the prosecutor the shooting was an accident, hoping to open the door to plea negotiations on a lesser-included offense, such as involuntary manslaughter. However, while relaying his reported version of the facts, Kesinger revealed to the prosecutor defendant tried to push his way into Spinks' apartment, as Spinks was trying to close the door, when the gun accidentally discharged in Shaw's hand. When Spinks "slumped to the floor," defendant and Shaw entered Spinks' apartment to inquire about defendant's belongings.

¶ 28 The prosecutor accurately described Kesinger's letter as a confession to felony murder and, in fact, on the first day of trial, charged defendant with felony murder and home invasion. It is apparent from the content of this letter Kesinger did not understand the elements of either the felony-murder rule, accountability theory, or the offense of home invasion. Not only did he induce the State into filing the new charges, he effectively conceded defendant's guilt to those charges.

¶ 29 Second, Kesinger's opening statement and closing argument at trial clearly revealed he did not consider the concepts of accomplice liability and felony murder. In his opening statement, Kesinger told the jury defendant and Shaw confronted Spinks at Spinks' apartment door. He said defendant placed his arm "in the door to try to get in" the apartment, and after a struggle, the gun accidentally discharged in Shaw's hand. Again, Kesinger effectively conceded defendant was guilty of home invasion, thereby leaving the jury "no choice but to convict [defendant] of home invasion and murder." He said: "When it's all said and done, yes, a crime was committed, but we believe it's involuntary manslaughter, and that's reckless conduct of [defendant] of bringing or introducing or allowing to be introduced guns into a situation where he just went to get his property."

¶ 30 Prior to giving his closing statement, Kesinger learned the State was proceeding only on the charges of home invasion and felony murder. Therefore, his argument and position changed from his opening statement. During his closing statement, Kesinger claimed the jury would "either have to find [defendant] guilty of first degree murder or turn him loose, nothing in between." He could not reasonably argue defendant did not commit home invasion after he had conceded defendant's guilt of that offense. Kesinger's entire defense was based on convincing the jury defendant had not planned to shoot Spinks, did not expect Shaw to shoot Spinks, and that he only confronted Spinks in order to retrieve his property. However, while trying to explain this to the jury in his opening statement, Kesinger unwittingly told the jury that defendant and Shaw initially attempted to enter the apartment by sticking their arm or leg through the door opening and then completely entered after Spinks was shot. However, during closing, Kesinger said:

> "I told you in my opening argument or statement that indeed I thought [defendant]—the evidence would show that he was guilty of something, that something being involuntary manslaughter, reckless conduct, something. He's not innocent of everything. However, the current state of the law allows the State's Attorney to decide what cases to present to you. There was originally a half a dozen cases, different theories, but he narrowed it down to two, first degree murder and home invasion.
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> But most recently, our state legislature has passed a law which says essentially *** that if you commit the offense of home invasion and someone dies in that transaction or event, then the person committing home invasion is automatically guilty of first degree murder. No other choice. And that's what we have."

¶ 31 Kesinger attempted to argue neither defendant nor Shaw had committed home invasion at the time Spinks was shot, because the accidental shooting occurred at the door during a struggle before either had entered the apartment. He said after Spinks was shot, "[s]omebody went in and did confront and threatened Mrs. Spinks. No doubt about it. That is home invasion. But there's a distinction that before—up unto the time the bullet was fired, there was no home invasion." He then told the jury it was in a "bad dilemma *** [based on the choices it had in terms of offenses.] Because I believe he did do it but it was accidentally. It was just a bad situation."

¶ 32 The jury found defendant guilty of felony murder and home invasion. It is interesting to note that, after the trial, a juror wrote a letter to the trial judge, complaining that Kesinger "was unprepared and ineffective as counsel for [defendant]." He said Kesinger misrepresented the evidence, contradicted his client's testimony, and failed to effectively cross-examine or present evidence. The juror said: "I could easily look back on the trial and the testimony and see some instances where further questioning of witnesses would have possibly provided reasonable doubt." He stated: "The final nail was having Mr. Kesinger place [defendant] in the Spinks' apartment after the shooting. Again this not only contradicted his client's testimony but showed his client as heartless and confirmed the home invasion charge." He concluded his letter with the following: "It is unfortunate that I am left with the feeling of rendering the correct verdict based on the evidence presented to me but being unsettled that the result for [defendant] could have been different with a more adequate defense."

¶ 33 The fact that Kesinger, throughout the trial, blatently tried to convince the jury defendant committed involuntary manslaughter, not murder, by promoting the fact that defendant and Shaw tried to enter Spinks' apartment when the gun accidentally discharged, effectively constitutes no representation at all for defendant. Kesinger, by his letter to the State, not only prompted it to file the additional charges of which defendant was convicted, but he repeatedly and unequivocally conceded defendant's guilt. As in Chandler, "[t]he jury, however, having been instructed on both felony murder and accountability, had no choice but to find defendant guilty of murder" and home invasion. *Chandler*, 129 Ill. 2d at 247. By his conduct, Kesinger denied defendant the right to have the jury decide the issue of guilt or innocence. See *Hattery*, 109 Ill. 2d at 464. There is no question the State's case "was not subjected to the 'meaningful adversarial

testing' required by the sixth amendment." *Hattery*, 109 Ill. 2d at 464 (quoting *Cronic*, 466 U.S. at 656).

¶ 34 We hold defendant was denied the effective assistance of counsel in violation of the sixth amendment. Accordingly, we reverse defendant's convictions and remand for a new trial.

¶ 35 III. CONCLUSION

¶ 36 For the foregoing reasons, we reverse the trial court's judgment, finding Kesinger rendered ineffective assistance of counsel, reverse defendant's convictions, and remand for a new trial.

¶ 37 Reversed and remanded.