2024 IL App (5th) 220335-U

NO. 5-22-0335

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Macon County.
	)	
v.	)	No. 21-CF-1302
	)	
BRADLEY S. COLLIER,	)	Honorable
	)	James R. Coryell,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Moore and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant was not provided with ineffective assistance of counsel when his trial counsel failed to tender a jury instruction on the offense of escape as a Class B misdemeanor because he was not entitled to such an instruction and was not prejudiced by counsel's failure to tender such instruction.

¶ 2 The defendant, Bradley Collier, appeals his conviction of escape, a Class 3 felony (730 ILCS 5/5-8A-4.1(a) (West 2022)). He contends that his counsel rendered ineffective assistance where counsel failed to tender a jury instruction on the lesser included offense of escape as a Class B misdemeanor (*id.* § 5-8A-4.1(b)). For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 25, 2021, the State charged the defendant with one count of escape (*id.* § 5-8A-4.1(a)) in that, after being convicted of a felony and while on conditional release from the

supervising authority through an electronic monitoring program, he knowingly violated a condition of the program by removing his electronic monitoring device (count I). Pursuant to section 5-8A-4.1 of the Unified Code of Corrections, a defendant may be convicted of escape as a misdemeanor or felony depending on the charges that defendant faced at the time of enrollment in the electronic monitoring program. *Id.* § 5-8A-4.1(a), (b). If a defendant was previously charged with a felony, the escape offense would be a Class 3 felony. *Id.* § 5-8A-4.1(a). On the other hand, if a defendant was previously charged with a misdemeanor, the escape offense would be a Class B misdemeanor. *Id.* § 5-8A-4.1(b). Thus, the State here alleged that the defendant was previously convicted of a felony, so he was charged with the felony offense of escape.

¶ 5 The State also charged the defendant with one count of criminal damage to government supported property in that he knowingly damaged property, *i.e.*, the electronic monitoring device, belonging to the Macon County Probation Department by cutting off the device (count II).

¶ 6 On March 16, 2022, the defendant filed a motion to dismiss, or in the alternative, amend count I, in which he argued that, although the State's information alleged that he was conditionally released after being convicted of a felony offense, he was placed on electronic monitoring as a result of a misdemeanor violation of an order of protection (a pending charge). Thus, the defendant argued that he could not be charged with the felony offense of escape and requested that the trial court either dismiss count I or amend it to reflect the misdemeanor offense. Attached to the motion was a copy of the May 21, 2021, electronic monitoring order, which indicated that the defendant was placed on electronic monitoring as a condition of release and marked the offense as a violation of an order of protection.

¶ 7 On March 22, 2022, the State filed an amended information regarding count I, which indicated that the defendant was previously charged with a felony, not convicted of a felony as

stated in the original information. Before the jury trial, held that same day, the defendant's counsel indicated that she was withdrawing her previously filed motion to dismiss or amend. Then, the parties discussed, outside the presence of the jury, how to present the information about case number 21-CF-605, which was the case in which the defendant was placed on electronic monitoring. The trial court indicated that it would be sufficient to just tell the jury that the defendant was charged with a felony and that it was unnecessary to provide the jury with a certified copy of the information. Defense counsel stated that she did not want the information "coming in." The court then asked defense counsel if she wanted to stipulate to the fact that the defendant was either released on a felony or charged with a felony, and she did not. The court responded, "Okay. Then, we'll just put it in." The court then proceeded to the trial, at which the following evidence was presented.

¶ 8 Karen Johnson, a Macon County probation officer, testified that she was supervising the defendant's pretrial release when she noticed that at 9:03 p.m. on October 20, 2021, he had a strap tamper on his electronic monitoring device. She explained that a strap tamper occurred when something came between the individual's body and the global positioning system (GPS) device, and the notification showed a computer icon of scissors, which indicated that the strap had been cut. However, she noted that the device could have been cut off, slipped off, or something could have been slipped between the body and the device, but the device was still on the person. She called the last two phone numbers on record for the defendant but received no response. She also attempted to communicate with him through the GPS device, and a woman answered. Johnson explained who she was and where she was calling from. In response to that conversation, Johnson contacted a field officer and asked them to go by the defendant's last known home address.

¶ 9 Officers Lillian Mantay and Whitney Wallace went to the defendant's address, but he was not there, and neither was the device. Since the device was still active, Johnson was able to discover the address of its location. Officers Mantay and Wallace then went to that address, and they found the device. The GPS device and the cut strap were entered into evidence. The defendant never came to Johnson in an attempt to have the strap replaced.

¶ 10 Officer Mantay, a Macon County probation officer, testified that she was a field officer, and in that position, she conducted home visits and did community contacts for clients. On the morning of October 21, she was contacted by Johnson and told that it appeared that the defendant had cut off his electronic monitoring device. Johnson said that she was trying to contact him and asked Mantay to check his last known address. Neither the defendant nor the device was at that address. Johnson then gave her a different address to check, and the device was found there. Mantay placed it in a bag and returned the device to Johnson. Mantay was not involved in placing the device on the defendant. She noted that the device appeared to have been cut off, but she acknowledged that she did not see anyone actually cut it off or find any scissors or other instrument that would have been used in cutting it off.

¶ 11 During a short recess, and outside the presence of the jury, the trial court discussed whether the May 20, 2021, order for electronic home monitoring (exhibit 3); the information on case number 21-CF-605, showing that the defendant was charged with one count of unlawful possession of methamphetamine with intent to deliver, one count of residential burglary, and one count of unlawful violation of an order of protection (exhibit 4); and the bond form showing that bond was paid on May 26, 2021 (exhibit 5) should go back with the jury. Regarding exhibit 3, the State indicated concern that the electronic home monitoring order talked about complying with an order of protection when an element of escape was that he was on release for a felony.

¶ 12 After some discussion, the trial court noted that it would advise the jury that, in case number 21-CF-605, the exhibits showed that the defendant was released on bond and that a condition of his bond was that he wear the electronic monitoring device. The State then noted that the jury should be told that the defendant was released on bond for a felony offense, and the court responded, "Well, I think *** the record is clear because the bond is for a felony offense. And the exhibit [(exhibit 4)] which had been received is a felony offense." Defense counsel then indicated that the defendant was placed on electronic monitoring because of the violation of the order of protection, which was a misdemeanor. The court responded, "He's placed on electronic monitoring because he's released on bond in case number 21-CF-605. And among the conditions of his bond are, among others, that he have no contact with this person, comply with the [order of protection], but he's also on bond for the drug charge." Defense counsel agreed that the defendant was released on bond for a felony. The court then indicated that it would show that the defendant was released on bond for a felony and that a condition of his bond was that he wear the electronic monitoring device, but the exhibits would not be sent back with the jury.

¶ 13 After the jury returned to the courtroom, Robert Kindermann, who was previously employed with CAM Systems Incorporated, testified that CAM Systems was an electronic monitoring company that contracted with various counties to provide electronic monitoring services. He installed the electronic monitoring device on the defendant's ankle. When he met with the defendant, he had the defendant electronically sign a GPS program participant agreement that explained the terms and conditions of the service; one condition was that the defendant could not remove the device in any way. He normally did not go through the entire document with the participants, but he encouraged them to read the document. Also, some of the conditions required the participants initial next to the condition to acknowledge that they had read and understood the

specific conditions. The defendant signed the document and initialed next to the required conditions. After Kindermann placed the device on the defendant's ankle, he made sure it was communicating properly and showed the defendant's location. The replacement cost of the device was $1400, and the replacement cost of the strap was $20.

¶ 14 After the State rested its case, the defendant's counsel argued for a directed verdict, arguing, in pertinent part, that the defendant was placed on electronic monitoring for the charge of violating an order of protection, which was a misdemeanor. Counsel indicated that it was filed in the felony case along with an unrelated methamphetamine charge but argued that the defendant was placed on the monitor for the misdemeanor offense. Counsel noted that the order for electronic monitoring specifically referenced the violation of an order of protection as the underlying basis for the electronic monitoring order. Thus, counsel argued that, to the extent that the defendant committed escape, it should be misdemeanor escape and not felony escape. In response, the State argued, in pertinent part, that the defendant was placed on pretrial release for 21-CF-605 not just for a violation of an order of protection. The substance of the charges alleged that the defendant committed residential burglary of the residence of Heather Sabottka, who was a protected person and whose residence was a protected residence. Thus, the State argued that the electronic monitoring was for all of the counts in 21-CF-605, and consequently, the defendant was on pretrial release pending a felony.

¶ 15 After hearing arguments, the trial court noted that the defendant was released on bond in 21-CF-605. As conditions of that bond, the defendant was required to do electronic monitoring services, he was prohibited from having contact with Sabottka, he was prohibited from going to 1572 Buena Vista, and he was to comply with the order of protection. The court noted that the electronic monitoring order stated that the defendant would not go to an excluded zone, which

included the identified address; he would comply with the order of protection; and he would not have any contact with Sabottka. The court indicated that, although the order stated that the offense was a violation of an order of protection, the bond in 21-CF-605 stated that this was a condition of his bond. Thus, the court denied his directed verdict. After deliberations, the jury found the defendant not guilty of criminal damage to government supported property but guilty of escape.

¶ 16 On April 26, 2022, the defendant filed a motion for judgment notwithstanding the verdict, which again contended that the defendant's escape conviction should only be a Class B misdemeanor. That same day, before the sentencing hearing, the trial court denied the defendant's motion for judgment notwithstanding the verdict, noting that it disagreed with the defendant's position and indicating that "it was [the felony] that he was escaping on." The trial court then sentenced the defendant to seven years' imprisonment to be followed by a one-year period of mandatory supervised release. The defendant appeals.

¶ 17 II. ANALYSIS

¶ 18 On appeal, the defendant argues that his trial counsel was ineffective for failing to tender a jury instruction on the lesser included offense of escape as a Class B misdemeanor where there was available evidence introduced at trial that would allow the jury to reduce the crime from a felony to a misdemeanor.

¶ 19 To establish that counsel was ineffective, defendant must show that (1) counsel's performance was objectively unreasonable and (2) defendant suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To satisfy the first prong, defendant must show that his counsel's performance was deficient because it fell below an objective standard of reasonableness. *People v. Harris*, 206 Ill. 2d 1, 16 (2002). In order to establish deficient performance, defendant must overcome the strong presumption that the challenged action or

inaction may have been the product of sound trial strategy. *People v. Smith,* 195 Ill. 2d 179, 188 (2000). Matters of trial strategy are generally immune from claims of ineffective assistance of counsel. *Id.* "However, this is not the case where trial counsel's strategy was so unsound that no meaningful adversarial testing was conducted." *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24.

¶ 20 To meet the second prong, defendant must demonstrate prejudice by showing a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different. *Smith*, 195 Ill. 2d at 188. If an ineffective assistance of counsel claim can be disposed of because defendant suffered no prejudice, then we need not decide whether counsel's performance was deficient. *People v. Villanueva*, 382 Ill. App. 3d 301, 308 (2008).

¶ 21 The determination of whether counsel provided ineffective assistance is a mixed question of fact and law. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004). Thus, the reviewing court defers to the trial court's findings of fact but makes an independent judgment about the ultimate legal issue. *Id.* Where the ineffective assistance claim was not raised in the trial court, our review is *de novo*. *Lofton*, 2015 IL App (2d) 130135, ¶ 24.

¶ 22 In general, a defendant cannot be convicted of an offense for which he was not charged. *People v. Cardamone*, 381 Ill. App. 3d 462, 508 (2008). However, a defendant may be properly convicted of an uncharged offense where (1) the uncharged offense is identified by the charging instrument as a lesser included offense of the one charged, and (2) the evidence adduced at trial rationally supports a conviction of the lesser included offense. *Id.* The purpose of an instruction on a lesser included offense is to provide a third option to a jury who believes that defendant is guilty of something but is uncertain of whether the charged offense was proven and might otherwise convict rather than acquit defendant of the greater offense. *Id.*

¶ 23 A lesser included offense is one which is established by proof of the same or less than all of the facts or a less culpable mental state (or both) than that which is required to establish the charged offense. *People v. Hamilton*, 179 Ill. 2d 319, 324 (1997). An instruction on a lesser included offense is required only when the evidence reveals that the jury could rationally find defendant guilty of the lesser offense yet acquit defendant of the greater offense. *Cardamone*, 381 Ill. App. 3d at 508. In contrast, a lesser included offense instruction is not required when the evidence shows that defendant is either guilty of the greater offense or not guilty of any offense. *Id.*

¶ 24 The defendant here contends that the uncharged offense of escape as a Class B misdemeanor was a lesser included offense of escape as a Class 3 felony because both offenses require that the defendant commit the exact same act, *i.e.*, knowingly violate a condition of electronic monitoring for at least 48 hours, and the only difference is the type of charge the defendant is facing while released on electronic monitoring. Thus, the defendant argues that, to prove either offense, the State would have to prove the same elements, except for the defendant's status as being charged with a misdemeanor or a felony. The defendant further argues that the absence of a statutory element in the information—that the defendant was also charged with a misdemeanor—did not prevent a finding that an offense is a lesser included offense because the missing element can be inferred from the same proof required to satisfy the felony element of the greater offense.

¶ 25 In other words, the defendant contends that the same document that would prove the defendant was charged with a felony, *i.e.*, the information, would also demonstrate that he was charged with a misdemeanor.

¶ 26 In making this argument, the defendant acknowledges that there is no automatic right to have the jury instructed on the lesser included offense as the reviewing court must examine the evidence adduced at trial to determine whether the evidence rationally supports a conviction for the lesser included offense. The defendant notes that the information containing his charges in 21-CF-605 indicated that he was charged with a misdemeanor and two felonies, but the electronic monitoring order demonstrated that the order for electronic monitoring was based on the misdemeanor offense, rather than the felonies. Thus, the defendant contends that, because there was some evidence that the relevant charge for purposes of the escape statute was the misdemeanor charge, his trial counsel was ineffective for failing to tender a jury instruction on misdemeanor escape. See *People v. Blan*, 392 Ill. App. 3d 453, 458 (2009) (only slight evidence is needed to prove the lesser offense rather than the greater offense).

¶ 27 Moreover, the defendant argues that his trial counsel pursued a faulty trial strategy in arguing that he could only be charged with the misdemeanor offense where the State here had the discretion to charge him with the Class 3 felony or Class B misdemeanor, and the trial court did not have the power to reduce the charge. The defendant then argues that, in pursuing this faulty strategy, counsel ignored the likelihood that the jury might have found him guilty of the misdemeanor offense and acquitted him of the felony charge if they had been instructed on the lesser offense. The defendant contends that he was prejudiced by his counsel's inaction because the request for a jury instruction on the lesser included offense would have likely been granted where there was evidence to support a conviction on that offense. Also, had the jury been presented with the lesser included offense, there was a reasonable probability that a different result would have been reached.

¶ 28 In response, the State argues that the defendant was not entitled to an alternative jury instruction on the lesser included offense where escape as a Class B misdemeanor was an uncharged offense and was not included in the charging instrument as a lesser included offense of the one charged. The State also argues that the defendant was not entitled to the instruction where the State had proven him guilty beyond a reasonable doubt of the offense of Class 3 felony escape. See *People v. Washington*, 375 Ill. App. 3d 243, 249 (2007) (where the evidence is sufficient to convict a defendant of the greater offense, it is not reversible error to instruct the jury only as to that offense). Additionally, the State argues that the defendant's trial counsel's performance was not ineffective where counsel argued, on several occasions, that the defendant was placed on electronic monitoring as a result of a misdemeanor violation of an order of protection, and this argument was rejected by the trial court. The State also contends the defendant suffered no prejudice where he was proved guilty beyond a reasonable doubt of felony escape.

¶ 29 Here, even assuming *arguendo* that the misdemeanor offense of escape is a lesser included offense of the felony offense of escape, we conclude that the defendant's trial counsel was not ineffective for failing to tender a jury instruction on misdemeanor escape. To prove felony escape, the State must prove the following four elements: (1) defendant was charged with (or convicted of) a felony, (2) defendant was conditionally released from a supervising authority through an electronic monitoring or home detention program, (3) defendant knowingly violated a condition of that electronic monitoring program (here, by cutting off his electronic monitoring device), and (4) defendant remained in violation for at least 48 hours. 730 ILCS 5/5-8A-4.1 (West 2022).

¶ 30 At trial here, the State presented evidence to satisfy each of these four elements. The State's exhibits and the trial testimony established that the defendant had been charged with the felony offense of unlawful possession of methamphetamine with intent to deliver in case number 21-CF-

605, he was placed on electronic monitoring as a condition of his pretrial release, he had violated a condition of his electronic monitoring program by cutting off his monitoring device, and he was in violation of a condition of the program for at least 48 hours. Thus, the State proved that the defendant committed felony escape beyond a reasonable doubt.

¶ 31 As for the defendant's argument that the electronic monitoring was ordered pursuant to a charge of a violation of an order of protection, which was a misdemeanor, the record indicates that the defendant was charged with one count of unlawful possession of methamphetamine with intent to deliver (felony), one count of residential burglary (felony), and an unlawful violation of an order of protection (misdemeanor) in case number 21-CF-605. The bond order entered in case number 21-CF-605 identified the offenses that the defendant had been charged with, prohibited the defendant from having any contact with Sabottka and from going to 1572 Buena Vista, and noted that "GPS was needed." Although the electronic monitoring order in 21-CF-605 marked the offense as violation of an order of protection and referenced the order of protection case, complying with the order of protection was a condition of the defendant's bond in 21-CF-605 (as indicated in the bond order). Thus, like the trial court, we disagree with the defendant's position that he was placed on electronic home monitoring solely because he was charged with violating an order of protection.

¶ 32 Based on the evidence in this case, a rational jury could not have found the defendant guilty of misdemeanor escape, yet have acquitted him of felony escape. Once the jury found that the defendant was charged with a felony, and he had knowingly violated a condition of his electronic monitoring program by cutting off his monitoring device, a guilty verdict on the greater offense was clearly and inescapably indicated. See *Blan*, 392 Ill. App. 3d at 458 (a defendant is entitled to a lesser included offense instruction only if the evidence would permit a jury rationally to find him

guilty of the lesser included offense and acquit him of the greater offense). Accordingly, defense counsel cannot be ineffective for failing to tender a misdemeanor escape instruction. See *People v. Phillips*, 383 Ill. App. 3d 521, 544 (2008) (when a rational jury could not have acquitted the defendant of the greater offense and found him guilty of the lesser included offense—thus, defendant was not entitled to an instruction on the lesser included offense—defense counsel cannot be ineffective for failing to request an instruction on the lesser included offense).

¶ 33 Moreover, even assuming *arguendo* that counsel's failure to tender the jury instruction for misdemeanor escape was error, we disagree with the defendant's contention that he was prejudiced. First, the record contains multiple instances where the trial court rejected the defendant's contention that the electronic home monitoring was solely based on the misdemeanor charge of violating an order of protection and found that the escape charge was based on a Class 3 felony charge for delivery of methamphetamine. Second, as we explained above, the State proved the defendant guilty of felony escape beyond a reasonable doubt, so the defendant cannot establish that there was a reasonable probability that the result of the proceeding would have been different if counsel had tendered the jury instruction on misdemeanor escape. Thus, we also conclude that the defendant's ineffective assistance of counsel argument fails because he was not prejudiced by trial counsel's failure to tender an instruction on misdemeanor escape.

¶ 34 III. CONCLUSION

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Macon County.

¶ 36 Affirmed.