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FILED
Oct 13 2010, 9:34 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

JESSICA HAYLETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-1002-CR-64
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Rubick, Judge Pro-Tem
Cause No. 49F10-0906-CM-55429

October 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Jessica Haylett appeals her conviction for Class A misdemeanor criminal mischief. We affirm.

Issues

Haylett raises four issues, which we consolidate and restate as:

I. whether the trial court properly denied her request for a continuance;

II. whether the prosecutor improperly failed to disclose certain evidence; and

III. whether she received ineffective assistance of counsel.

Facts

On May 30, 2009, Haylett and her sister, Ivette Haylett, went to Sherrell Humphries-Strong's house. Haylett threw a brick and shattered the rear window of a car belonging to Humphries-Strong's sister, Cherish Wimberly. Ivette also threw a brick at Humphries-Strong's door. Humphries-Strong reported the incident to police.

On June 2, 2009, the State charged Haylett with Class A misdemeanor criminal mischief for the damages to the rear window, alleging that she caused a pecuniary loss of at least $250 but less than $2,500. On June 25, 2009, the State also charged Haylett with Class B misdemeanor criminal mischief for the damage to the door.

On the morning of the January 8, 2010 bench trial, Haylett's attorney moved for a continuance, arguing that Haylett intended to present an alibi defense. Defense counsel noted that the State had not been put on notice of the proposed defense. The trial court denied the motion. At the close of the State's evidence, Haylett moved for the

involuntary dismissal of the Class B misdemeanor charge because the evidence showed that Ivette, not Haylett, threw the brick at the door. The trial court granted the motion and dismissed the Class B misdemeanor charge. Haylett and Ivette then testified that they were at a birthday for their brother-in-law during the incident. At the conclusion of the trial, the trial court found Haylett guilty of the Class A misdemeanor charge and sentenced her accordingly.

On April 23, 2010, the trial court held a restitution hearing at which it ordered Haylett to pay $248.85 in restitution. Haylett now appeals her conviction.

Analysis

I. Motion for Continuance

Haylett contends the trial court improperly denied her motion for a continuance to pursue an alibi defense. When a motion is not based upon statutory grounds, the determination of whether to grant a continuance lies within the sound discretion of the trial court.[1] Williams v. State, 891 N.E.2d 621, 628 (Ind. Ct. App. 2008). "There is a strong presumption that the trial court properly exercised its discretion." Id.

Haylett compares her case to Barber v. State, 911 N.E.2d 641 (Ind. Ct. App. 2009), in which the defendant sought a continuance on the morning of the bench trial because defense counsel had just located key witnesses and needed time to secure their presence for trial. In that case, we concluded:

> In light of Barber's right to present a defense, the strong presumption in favor of allowing the testimony of even late-

[1] Haylett acknowledges that her motion was made well past the statutory deadline for notifying the trial court and the State of her intent to offer an alibi defense. See Ind. Code § 35-36-4-1.

> disclosed witnesses, the lack of substantial prejudice to the State, and the resultant prejudice to Barber, we conclude that the trial court abused its discretion in denying Barber's motion to continue and therefore remand for a new trial.

Barber, 911 N.E.2d at 647.

The case before us is easily distinguishable from Barber. First, Haylett did not make an offer of proof. Haylett argues that even without an offer of proof regarding the alibi defense, "it is clear from the context that potential alibi witnesses would have been fellow partygoers who would confirm Jessica's presence at the party." Appellant's Br. p. 17. Nevertheless, it is not clear who Haylett wished to call as an alibi witness or what that witness's testimony would be. Moreover, there is no indication that the alibi defense was based on the testimony of a "late-disclosed witness" as was clearly the case in Barber. Unlike Barber, Haylett was aware of the possible defense and the identity of possible alibi witnesses when the case was initiated. Based on the record before us, Haylett has not established that the trial court abused its discretion by denying her last-minute motion for a continuance.

II. Disclosure of Evidence

Haylett was charged and convicted of Class A misdemeanor criminal mischief based on the amount of the pecuniary loss, which was alleged to be between $250 and $2,500. See Ind. Code § 35-43-1-2(a). The offense is a Class B misdemeanor if the pecuniary loss is less than $250. See id. At the conclusion of the sentencing, which immediately followed the trial, that prosecutor stated, "Your Honor, we do have specific evidence with regards to the amount, the restitution." Tr. p. 51. The trial court then set

the matter for a hearing. At the April 23, 2010 restitution hearing, the trial court summarized the requested restitution as $248.85.

Relying on Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), Haylett alleges that the State violated her right to due process when the State failed to provide her with information that would have reduced the class of misdemeanor for which she could be convicted from a Class A misdemeanor to a Class B misdemeanor. To establish a Brady violation, Haylett must show (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to her; and (3) that the evidence was material to an issue at trial. See Stephenson v. State, 864 N.E.2d 1022, 1056-57 (Ind. 2007), cert. denied.

Haylett argues, "because the State had specific evidence of the actual amount of pecuniary loss as of the date of Jessica's trial, such evidence was exculpatory and the State had a duty to disclose it to the defense." Appellant's Br. p. 19. She concedes, however, that the record is silent regarding whether this evidence was disclosed to the defense. She claims that, because the defense did not admit this exculpatory evidence at trial and did not object to the elevation of the offense, the only logical conclusion is that the State did not disclose the evidence.

At the conclusion of the trial, the trial court noted, "though the State did not produce evidence of damages, the probable cause affidavit was submitted into evidence. The probable cause affidavit states that the cost of repair to the back window was between two hundred and fifty and three hundred dollars ($250 -- $300) which meets the threshold for a Class A misdemeanor." Tr. pp. 50-51. Haylett moved to admit the probable cause affidavit during the presentation of her defense, and the State objected.

The trial court overruled the State's objection and admitted the probable cause affidavit into evidence.

There is no indication that the State had the evidence it presented at the restitution hearing at the time of trial. Further, even if the State had this evidence there is no evidence that the State failed to disclose it to the defense in a timely manner. The record simply does not support Haylett's claim that a Brady violation occurred.

Alternatively, Haylett argues that she was denied due process because the State failed to correct evidence it knew to be false, namely the estimation of damages in the probable cause affidavit. Haylett cites Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177 (1959), in which the Supreme Court observed:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Again, Haylett's argument is simply not supported by the record. It is unclear when the State received detailed information about the damages and whether it disclosed that information to the defense prior to trial. It also is unclear whether the damages requested at the restitution hearing was a complete computation of pecuniary loss suffered by Wimberly. Haylett has not established that her due process rights were violated.

III. Ineffective Assistance of Counsel

Haylett also argues that she received ineffective assistance of counsel. When evaluating an ineffective assistance of counsel claim, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Carter v. State, 929 N.E.2d 1276, 1278 (Ind. 2010). Haylett must show that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See Pruitt v. State, 903 N.E.2d 899, 905-06 (Ind. 2009).

As for the first component of an ineffective assistance claim, counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference. Id. at 906. There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. Regarding the second prong, in most circumstances, deficient performance of counsel will only be prejudicial when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. (quotation omitted).

Although a defendant is not prohibited from raising an issue of ineffective assistance of counsel claim on direct appeal, a post-conviction proceeding is usually the preferred forum for adjudicating claims of ineffective assistance of counsel. Rogers v. State, 897 N.E.2d 955, 964 (Ind. Ct. App. 2008), trans. denied. This is because such claims often require the development of new facts not present in the trial record. Id. at

964-65. "Although a defendant may choose to present a claim of ineffective assistance of counsel on direct appeal, if he so chooses, the issue will be foreclosed from collateral review." Id.

Haylett first argues that counsel was ineffective for failing to timely file a notice of alibi defense. She claims, "the omission was likely due to oversight, miscommunication, or both." Appellant's Br. p. 25. Haylett's argument is based on speculation, not the record. There are a variety of reasons counsel may have chosen not to pursue an alibi defense, including the possibility that Haylett did not raise the issue with counsel in a timely manner or that the unidentified alibi witnesses were not credible. Pursuing an ineffective assistance of counsel claim in a post-conviction relief proceeding, instead of on direct appeal, would have allowed Haylett to establish a record to support her claim. In the absence of such a record, she has not rebutted the presumption that trial counsel rendered adequate assistance.

Haylett's claim that counsel at the restitution hearing was ineffective for failing to object on the grounds that the State failed to prove actual damages exceeding $250 or to request that the trial court amend its entry of conviction to a Class B misdemeanor is also unavailing. As the State asserts, "there is no requirement that a victim demand restitution for all allowable costs incurred pursuant to the crime. While the State presented receipts totaling $248.85, there is no evidence that this represented all the costs of repair." Appellee's Br. p. 18. Again, a more complete record could have been established in a

post-conviction relief proceeding. In the absence of such evidence, Haylett has not rebutted the presumption that trial counsel rendered adequate assistance.[2]

Conclusion

Haylett has not established that the trial court abused its discretion in denying her request for a continuance or that the State failed to disclose certain evidence. She also has not established that she received ineffective assistance of counsel. We affirm.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.

[2] Haylett briefly argues, "However, if this Court should find that the State did disclose the evidence, then defense counsel's failure to utilize such evidence rendered his assistance ineffective." Appellant's Br. p. 21. A record has not been established to support this claim.