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2019 IL App (3d) 170554-U

Order filed June 18, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-17-0554
JERRY M. NICHOLS,)	Circuit No. 13-CF-221
Defendant-Appellant.)	Honorable David M. Carlson Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Lytton concurred.
Presiding Justice Schmidt dissented.

ORDER

- ¶ 1 *Held:* Defendant was entitled to a new trial where trial court failed to properly instruct the jury and trial counsel provided ineffective assistance for inexplicably failing to call a promised witness.
- ¶ 2 Defendant Jerry Nichols was found guilty by a jury of the first degree murder of his wife and sentenced to a 39-year term of imprisonment. He appeals his conviction and sentence. We reverse his conviction and remand.

FACTS

¶ 3

¶ 4 Defendant Jerry Nichols was charged with two counts of first degree murder, one count of reckless homicide and one count of aggravated domestic battery. 720 ILCS 5/9-1(a)(1), (a)(2) (West 2016); 720 ILCS 5/9-3(a), (f) (West 2016); 720 ILCS 5/12-3.3(a) (West 2016). The charges arose from an incident in which Nichols twice hit his wife, Diane, with his car, ultimately pinning her against the wall of their garage and then stomped on her head while she laid on the garage floor. The complaint was later superseded by indictment.

¶ 5

Nichols was evaluated by Orest Eugene Wasyliw, Ph.D. to determine if he suffered from a mental disorder at the time of the homicide. Wasyliw diagnosed Nichols with post-traumatic stress disorder (PTSD) and authored a report indicating his diagnosis. Wasyliw concluded, in part, that Nichols did not have an intent to kill or injure his wife when he kicked her in the head but that his reaction was caused by PTSD. The State moved to bar Wasyliw's testimony and several hearings on the issue took place. The trial court initially barred his testimony. Prior to jury selection, the State nol-prossed the reckless homicide and aggravated domestic battery charges, at which time the court determined the testimony was admissible to rebut the State's theory of intent and state of mind regarding Nichols's act of stomping on his wife's head.

¶ 6

The trial ensued. In Nichols's opening statement, defense counsel informed the jurors that Wasyliw would testify about PTSD and explain how it accounted for Nichols's act of stomping on his wife's head, adding that the PTSD was triggered by an incident in Vietnam where a fellow soldier died in Nichols's arms. According to Wasyliw's report, Nichols experienced the "same focus" when he saw his wife pinned against the garage wall. In Wasyliw's view, Nichols

stomped on Diane's head because he could not handle stress and was angry with himself for injuring his wife, which he could not control.

¶ 7 The State presented its case. The 911 operator who took Nichols's call testified. The 911 tape was played for the jury. On the tape, Nichols said he thought his car was in park, but it was in drive. He was revving the engine and Diane was caught between the car and the garage wall. Afterward, she was not breathing and without a pulse. He said blood was coming from Diane's nose after he started cardiopulmonary resuscitation (CPR).

¶ 8 Frank Blaskey, a fire department battalion chief with the Lockport fire department, testified. He was near the Nichols's home when he heard the radio call. He drove up to the house, he saw Nichols hunched over a person lying on the floor of the garage in front of a car that was partially backed out of the garage. As he approached the garage, he saw Nichols twice stomping on the face and head area of the person on the ground. On cross-examination, he stated he included in his report that he saw Nichols giving chest compressions to the victim. He had believed CPR was in progress because of what he heard on the 911 call. Nichols was not enraged and did not try to flee.

¶ 9 Jeffrey Reick, a patrol sergeant with the Crest Hill Police Department, testified. He responded to the scene where paramedics were working on the victim. He saw a Honda Accord with damage to its front end, damage to other items in the garage, and a hole in the back wall of the garage. Nichols told him that he was warming up the car so he and Diane could go shopping. He tried to warm it faster by stepping on the gas. His left foot was on the brake and his right foot on the gas. He thought the car was in park but it was in gear. Diane entered the garage, he took his foot off the brake, stepped on the gas, and the car went forward and hit her. Nichols did not identify any issues with the car. Reick talked to Nichols again 30 minutes later. This time,

Nichols said he backed the car up because his wife parked too close to the stairs into the house. He tried to warm the car up faster by giving it more gas. He thought the car was in park or neutral. When Diane entered the garage, he stepped on the gas, which caused the car to move forward and hit her. He backed up, got out of the car and checked on her. Reick described that Nichols was very cooperative and answered questions appropriately.

¶ 10 Crest Hill police detective Douglas Hicks testified. He was a patrol officer when the incident occurred and arrived at the scene when the victim was being transported. He secured the garage and took pictures, which were presented to the jury. Nichols was cooperative and answered Hicks's questions appropriately.

¶ 11 Crest Hill police officer Ryan Dobczyk, who also responded to the scene, testified. He talked to Nichols, who said he had been revving the engine of his car to warm it up. He had one foot on the brake and one on the gas. He thought the car was in neutral and when his wife came into the garage, his foot must have slipped off the brake and the car hit her. Nichols appeared upset but answered questions appropriately. The officer had Nichols recount the events again. Nichols said Diane had parked the car too far forward so he backed it up. He thought the car was in neutral. The officer observed blood on the tops and sides of Nichols's shoes and on the sidewalk where he was standing. He collected Nichols's shoes and transported Nichols to the police station. On cross-examination, the officer described that Nichols was upset and distraught.

¶ 12 Another Crest Hill detective, Jason Opiola, testified. He searched Nichols's house and recovered items from an upstairs office. He found a computer and printouts about how to manufacture and create ricin, how to get castor beans to make ricin and the formula to extract ricin from castor beans. On cross-examination, he stated that he did not find any castor beans, ricin or other poisons. The documents he found were not hidden.

¶ 13 The State introduced a printout of the recipe for ricin, a poison, which was discovered near Nichol's computer, records of internet searches on the computer using search terms such as "how to make ricin poison," "ricin recipe," "how to make ricin" and "how much is enough nicotine poison" and evidence a Google search had been conducted for pure nicotine poison six days before the homicide. The State also introduced evidence that 20 castor beans had been ordered on Nichols's Amazon account in August 2012 and were shipped in mid-September 2012.

¶ 14 Crest Hill Police Department detective Renee Maly testified. She had reviewed Amazon and bank records and determined that castor beans were ordered from Amazon in September 2012. The charges matched Nichols's bank records and the billing phone number matched Nichols's cell phone number.

¶ 15 Maly conducted a video interview of Nichols. The video was played for the jury and depicted Nichols admitting the following. He and Diane had no marital issues. He was diagnosed with PTSD and Diane made him seek help for the PTSD. The Veteran's Administration (VA) determined he was 70% disabled. He took medication for it. It caused him to have nightmares from war movies and made him nervous on the Fourth of July. The day of the incident, he and Diane were going shopping and he went out to warm up the car. She had parked too close to the garage cabinets so he backed up the car so she could access the passenger door. He assumed the car was in neutral. He had his foot on the brake and was giving it gas to warm it up faster. Diane came out, threw something in the trash can and walked to the front of the car, which lurched forward. He heard Diane say "back up," which he did. He hit the gear shift lever the wrong way as the car went forward again. He panicked and heard the tires squeal. He backed up, got out, checked on his wife and called 911. He went to get a neighbor who was a nurse but she was not home. He attempted CPR as directed by the 911 operator. He thought he could perform it better

if he kneeled down. He moved some stuff with his foot and began CPR when a paramedic arrived.

¶ 16 The video showed Nichols sobbing and talking to himself after the detectives left the interrogation room. The officers returned and Nichols gave a second statement. He again spoke about his marriage and his PTSD. He explained Diane went to the trash can and walked to the front of the car to go around. His foot was on the brake and his other foot was on the gas. He was revving the engine up “a little bit” and trying to warm the car. He thought the car was in neutral. Nichols was not sure he hit his wife the first time the car lurched forward but she was leaning on the car when she told him to back up. He became worried, backed up, and thought he put the car in park but it again moved forward. He did not know if he thought he was hitting the brake when he was actually hitting the gas. When the car moved forward the second time, he heard the tires squeal. He backed up, shut off the car and called 911. When he was performing CPR, blood emerged from Diane’s mouth and nose when he compressed her chest. He first stood up to attempt CPR but then kneeled down when the paramedic showed up.

¶ 17 The detectives asked about the injuries to Diane’s face, particularly her broken jaw, which were inconsistent with the collision. Nichols denied experiencing an episode of PTSD, explaining that he and his wife were enjoying their morning. He admitted it was possible that he kicked his wife in the head because he was not sure what was going through his mind. He did not remember. Nichols then acknowledged he could have experienced a PTSD episode. He had had several episodes since November. The prior year he thought he saw a soldier in his living room. He also had nightmares from helicopters flying overhead and from fireworks. Movies about Vietnam also triggered episodes and Diane banned him from watching them. He recalled an incident in Vietnam where he dragged his friend whose leg had been blown off and said that

pulling his wife off the wall “like pulling [his Vietnam] buddy to the evac.” He also admitted it was possible he unconsciously stomped on Diane’s stomach but he had no idea what he was doing. He would have assumed the paramedic who initially approached him was in the military except he was carrying a medical bag.

¶ 18 Nichols was asked again to describe what happened. He said his foot slipped off the brake because his shoes were slippery from the snow. He received a text from his stepdaughter and was checking it when his foot slipped. He thought the car was in neutral. He did not know his wife was in front of the car until she ordered him to back up. He noticed she was not standing right, panicked and hit the gas again. He hit the gear selector and heard the tires squeal. The car was standing still when the tires squealed. Nichols said it was possible he stomped Diane’s head once because he was mad he had injured her. He then admitted he stomped on her twice due to his anger.

¶ 19 Another interview took place. Nichols said Diane threw something away in the garbage can in the garage and when she walked in front of the car, he hit the gas to play with her. He did not plan to hit her. His foot slipped off the brake and he hit the gas pedal harder than he anticipated. He heard Diane tell him to back up. He did so, and “I just sort of you know just play” and the car went forward. He heard the tires squeal. He backed up again, put the car in park, shut it off, exited and called 911. He admitted it was possible, and after continued questioning, acknowledged that he stomped on Diane’s head twice, surmising he was mad because he hurt her. Nichols explained that he did not stomp on Diane with the intent to injure her.

¶ 20 Nichols then stated that he did not intentionally run into Diane but lunged forward to scare her and the car went too fast. His foot slipped and he hit the gas harder than he intended.

He just wanted to scare her. After he hit her, he panicked and tried to back up but went forward again. The tires squealed. He explained that he hit the gearshift lever, panicked, hit the gas and ran into Diane again. He had only planned “just to give her something more.” After the first hit, he thought Diane was also playing so the second time forward he was just “jacking around.” He did not initially share the story with the detectives because he did not think anyone would believe that he and Diane were playing.

¶ 21 Michael Rogers, a consulting engineer specializing in vehicle issues, testified regarding tests he performed on the Honda. He found no problems or defects, particularly regarding the brakes, transmission, throttle and gear selector. A video of the tests he conducted was shown to the jury. He conducted his testing in July, seven months after the January incident took place, under different conditions than when the incident occurred.

¶ 22 David Simenson, an investigator for the Will County State’s Attorney’s Office, testified. He specialized in computer forensics and examined the computers seized from Nichols’s house. He testified regarding the searches related to ricin, nicotine and other poisons that took place between June and November 2012 and an Amazon search and order for castor beans. A “favorites” tab was created in December 2011 and last accessed on January 23, 2013, and included information on poison, ricin and cyanide. On cross-examination, he acknowledged that the computer was not password protected. He did not know how many people lived in the house.

¶ 23 The forensic pathologist who autopsied Nichols’s wife testified to her injuries. An aortic tear was the fatal injury. The cause of death was multiple injuries due to blunt force trauma. Other injuries were consistent with stomping and were not life threatening.

¶ 24 The State rested and Nichols moved for directed finding, which the trial court denied. Prior to presentation of the defense’s case, the trial court inquired as to whether the defense was

planning to call Wasyliw as a witness. Counsel responded the witness would not be called. The defense then presented its case. Its first witness was an independent contracting forensic pathologist for Lake and McHenry counties, who testified that she reviewed the autopsy report, police photographs and reports, and Nichols's statements. In her opinion, the cause of death was multiple injuries due to blunt trauma resulting from a motor vehicle strike and that death occurred within minutes of the collision. She disagreed with the pathologist's opinion that the victim's facial injuries were caused by stomping. In her view, the blood discharged during CPR indicated the skull was fractured before CPR was started. On cross-examination, the witness said that if stomping occurred, it did not contribute to Diane's death.

¶ 25 Nichols presented three greeting cards and three letters between himself and his wife. He declined to exercise his right to testify, stipulations were entered and the defense rested. The defense sought to have the jury instructed regarding reckless homicide. The court rejected Nichols's request, finding that Nichols's statements indicated the second forward motion of the car was an accident, rather than a reckless act, and that recklessness was not indicated by the facts. Closing arguments took place, in which Nichols argued that his actions after he hit his wife with the car, including the stomping, were caused by PTSD. Following deliberations, the jury found Nichols guilty of first degree murder.

¶ 26 Nichols moved for a new trial, arguing the court erred in rejecting his reckless homicide jury instruction. The trial court found that the evidence did not support the instruction and denied Nichols's motion. Sentencing ensued. The State presented two victim impact statements and Nichols presented two letters to the court. Nichols emphasized his lack of criminal history, veteran status and PTSD as mitigating factors and gave a statement in allocution. The trial court imposed a 39-year term of imprisonment.

¶ 27 Nichols moved to reconsider his sentence. Arguments took place. The court asked whether Nichols was asserting an ineffective assistance of counsel claim based on counsel's failure to present the PTSD witness. The hearing was continued and when it resumed, Nichols opted not to argue ineffective assistance but argued instead that his PTSD was a factor in mitigation. The trial court denied the motion to reconsider, finding that it had contemplated Nichols's PTSD, as well as lack of criminal history, military service and the facts presented at trial, and that its midrange sentence was appropriate. Nichols timely appealed.

¶ 28 ANALYSIS

¶ 29 There are three issues on appeal: whether the court erred in refusing to instruct the jurors regarding reckless homicide, whether Nichols received ineffective assistance of counsel and whether his sentence was excessive.

¶ 30 The first issue is whether the trial court's rejection of Nichols's instruction on reckless homicide was error. Nichols argues the trial court should have instructed the jury on reckless homicide. He maintains the court failed to see there was some evidence to support the instruction as a response to the State's claims regarding Nichols's stomping of the victim. He also submits that the court improperly weighed the evidence and made credibility determinations in denying his request for the reckless homicide instruction.

¶ 31 A defendant cannot be convicted for an offense for which he has not been charged but in some circumstances, the defendant may have the jury instructed on a less serious offense than the charged offense. *People v. Ceja*, 204 Ill. 2d 332, 359 (2003). A defendant is entitled to a jury instruction on a lesser-included offense when there is some evidence in the record that would reduce the charged crime to a lesser offense if believed by the jury. *People v. McDonald*, 2016 IL 118882, ¶ 25. When determining whether the trial court erred in denying a jury instruction,

this court reviews the decision for an abuse of discretion. *People v. Green*, 2016 IL App (1st) 134011, ¶ 30.

¶ 32 A person is guilty of first degree murder when he kills an individual without lawful justification if, in performing the acts which cause the death: (1) he intends to kill or cause great bodily harm or knows his acts cause death to another, or (2) he knows his acts create a strong probability of death or great bodily harm. 720 ILCS 5/9-1(a)(1), (2) (West 2016). A person who unintentionally kills another with a motor vehicle without lawful justification commits reckless homicide where his acts, whether lawful or unlawful, are performed recklessly. 720 ILCS 5/9-3(a) (West 2016). The difference between first degree murder and reckless homicide is the defendant's mental state accompanying the conduct causing death. *People v. Pollard*, 2015 IL App (3d) 130467, ¶ 27.

¶ 33 Here, the trial court focused on a distinction between the first time Nichols hit his wife and the second time, finding that the second time Nichols hit the gearshift or the gas pedal constituted an "intervening act" negating the reckless nature of Nichols's first advance toward his wife with the car. The court stated it would only give the reckless homicide instruction if Nichols had attempted to scare his wife again. Nichols explained that he initially "played" with Diane by hitting her with the car. In his final statement, he added that he attempted to continue playing with her by revving the engine and described that the second forward motion as "jacking around." It was the jury's province to decide if Nichols's statements that he was "playing" with his wife demonstrated he was reckless and negated the mental state required for first degree murder. By rejecting Nichols's jury instruction submission, the trial court made a credibility determination about Nichols's versions of events and in doing so, the court invaded the jury's province.

¶ 34 Nichols argues, and we agree, that if believed, the evidence demonstrates there was some indication of reckless conduct. Nichols maintains that the amount of pressure he applied to the gas pedal to rev the engine constituted reckless conduct. The trial court characterized Nichols's conduct of "playing" with Diane as accidental but not reckless. We consider the force with which he revved the engine shifted his conduct from accidental to reckless. Nichols exerted enough pressure on the gas pedal that the car shot forward forcefully enough to smash Diane into the garage wall. The autopsy revealed extensive and traumatic injuries, also supporting a reckless instruction. Because there was some evidence to support a reckless homicide conviction, we find the trial court erred when it refused to instruct the jury on reckless homicide per Nichols's request.

¶ 35 The next issue is whether Nichols received ineffective assistance of counsel where counsel failed to call his expert witness, Wasyliw, to testify. Nichols argues that he was provided ineffective assistance by trial counsel when counsel informed the jury that it would hear from Wasyliw on PTSD, but failed to provide the witness. Nichols submits the expert's testimony was necessary to explain why he stomped on his wife after hitting her with the car to negate the State's theory that it demonstrated a continuing course of conduct to kill Diane and consciousness of guilt.

¶ 36 To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced him so to deny him a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel is afforded broad leeway in determining what witnesses to present and his decisions are presumed to be sound trial strategy. *People v. West*, 187 Ill. 2d 418, 432 (1999). However, where counsel promises that a witness will testify and then fails without explanation to present the witness,

counsel's performance may be deficient. *People v. Briones*, 352 Ill. App. 3d 913, 919 (2004). It is counsel's responsibility to demonstrate on the record that the witness's absence was due to fickleness, unexpected events or sound trial strategy. *Id.* A trial court's factual findings on an ineffective assistance of counsel claim will not be overturned unless they are against the manifest weight of the evidence but the court's ultimate determination on an ineffective assistance claim is reviewed *de novo*. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. Where the trial court does not rule on the ineffective assistance claim, review is *de novo*. *Id.*

¶ 37 In *People v. Minnis*, 118 Ill. App. 3d 345, 352-53 (1983), the defendant killed and dismembered her husband. The State presented evidence of dismemberment to prove consciousness of guilt. *Id.* at 356. The defense sought to introduce evidence that the dismemberment was explainable by battered woman syndrome. *Id.* at 353. According to the defense, it was entitled to present evidence to explain why the defendant dismembered her husband to help the jury understand her otherwise incomprehensible behavior. *Id.* The reviewing court agreed and determined that the defendant was entitled to submit evidence on the syndrome, finding the defendant had a right to rebut the State's claims regarding her consciousness of guilt. *Id.* at 356. The *Minnis* court considered the evidence vital to the defendant's claim of innocence. *Id.* at 357.

¶ 38 In response to the State's pretrial motion to bar Wasyliv's testimony, defense counsel maintained that the testimony was necessary to aid the jury in understanding the effects of PTSD and would help the jurors to determine Nichols's state of mind when he stomped on his wife. At trial, defense counsel informed the jury in opening statements that it would hear the testimony of Wasyliv regarding Nichols's PTSD. We cannot accept the dissent's explanation that defense counsel's decision not to call Wasyliv or explain his absence to the jury was trial strategy

because the charge of aggravated domestic battery was dismissed before jury selection. The defendant was not facing that charge when defense counsel promised the jury would hear from the expert, Wasyliw, about PTSD. Specifically, counsel argued the testimony would demonstrate that he stomped on his wife as a result of PTSD because he was angry, not because he was trying to kill her. The proposed testimony was directed at Nichols's state of mind after he hit Diane with the car. During the trial, defense counsel informed the court without explanation that Wasyliw would not be called to testify. Defense counsel discussed PTSD in its closing argument, submitting that PTSD caused Nichols to stomp on Diane after hitting her with the car.

¶ 39 Counsel did not explain how Wasyliw's testimony was no longer needed during the trial even though the defense theory had not changed. The State presented evidence establishing Nichols stomped on his wife's head as support for its theory that Nichols intended to kill Diane. Blaskey, the battalion chief who arrived first at the scene, told the jury that he saw Nichols stomping on Diane's face. The video of Nichols's statements includes frequent references to the stomping and Nichols's statements that he stomped on Diane out of frustration and anger resulting from his PTSD. As in *Minnis*, this evidence was directed at consciousness of guilt and Nichols was entitled to rebut it. Without the PTSD evidence and Wasyliw's explanation of it, the jury was left only with the State's evidence that Nichols stomped on Diane's head in support of its theory that Nichols intended to kill her. The PTSD testimony was vital to support Nichols's theory that he did not intend to kill Diane but was only "playing" with her.

¶ 40 We find counsel provided deficient performance in not producing Wasyliw or explaining his absence. The deficient performance prejudiced Nichols in that the jury was left with unfulfilled promises regarding PTSD and an expert witness to explain it. Nichols's theory that he did not mean to strike his wife with the car and that he stomped her as a result of PTSD would

have been supported by Wasyliw's testimony. Counsel presented no explanation why the witness was not called at trial. Wasyliw's absence was emphasized by counsel's references to PTSD in both opening and closing statements, claims that ultimately went without support at trial. We find counsel's ineffective assistance denied Nichols a fair trial. Remand on this issue is also necessary.

¶ 41 The final issue is whether Nichol's 39-year sentence was excessive. Nichols asserts that his 39-year sentence is excessive, the result of the trial court's failure to properly emphasize his lack of criminal background, status as a veteran, age and PTSD in fashioning a sentence. Because we remand for a new trial, we need not determine this issue.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, the judgment of the circuit court of Will County is reversed and the cause remanded.

¶ 44 Reversed and remanded.

¶ 45 PRESIDING JUSTICE SCHMIDT, dissenting:

¶ 46 With respect to rejecting defendant's proposed reckless homicide instruction, I agree with the trial court that while the first time defendant struck his wife with the car could have been reckless, the second time was either intentional or accidental. Furthermore, the evidence of intent is so overwhelming in this case that any error was harmless beyond a reasonable doubt. Defendant, who was researching poisons and had even ordered ingredients to make poison, struck his wife with the car, not once, but twice. The second time he struck her, it was hard enough to almost push her through the garage wall into the kitchen, severing her aorta. A first responder found defendant stomping on his wife's head. No reasonable jury is going to acquit defendant of first degree murder.

¶ 47 Where, as here, the evidence of intent to kill is overwhelming, it is not error to refuse defendant's request for a lesser-included offense instruction. See, e.g., *People v. McDonald*, 2016 IL 118882; *People v. Evans*, 369 IL App. 3d 366 (2006); *People v. Castillo*, 188 Ill. 2d 536 (1999).

¶ 48 With respect to the ineffective assistance of counsel argument in failing to call Wasyliw, that failure, too, is harmless beyond a reasonable doubt. At trial, the State's evidence established that defendant's wife died as a result of a severed aorta caused by being struck with the car. The defendant's act of stomping on his wife's head did not result in her death. This was the main issue to be addressed by witness Wasyliw. This is undoubtedly why defense counsel decided not to call Wasyliw. Putting him on the witness stand would accomplish little other than draw more attention to the post-accident head stomping. Wasyliw's testimony was, in a nutshell, "If one with PTSD accidentally hits someone twice with his car, the PTSD would cause him to get out and stomp on the victim's head." The cross-examination would have been brutal. No doubt the State used the head stomping as evidence of intent to kill with the vehicle. The State used the evidence of defendant's poison searches and purchases to do the same. To establish ineffective assistance, the defendant must show that but for counsel's deficient performance, the result would have likely been different. That is, defendant must establish prejudice. *People v. Domagala*, 2013 IL 113688, ¶ 36. There is no doubt that in many cases failure to call a promised witness prejudices a defendant. I would like to know where defendant thinks he is going to find a juror to buy Wasyliw's testimony. Failing to call Wasyliw or explain the failure to do so did not change the outcome in this case. Without prejudice, there can be no ineffective assistance of counsel. *People v. Veach*, 2017 IL 120649, ¶ 30.

¶ 49 Likewise, I would affirm the sentence in this case and therefore respectfully dissent.