

Final Copy

284 Ga. 830

S08A1802. FREEMAN v. THE STATE.

**Hines**, Justice.

Thomas Ray Freeman appeals his convictions for felony murder and possession of a firearm during the commission of a crime in connection with the death of Rodney Dixon. For the reasons that follow, we affirm.<sup>1</sup>

Construed to support the verdicts, the evidence showed that Freeman was the stepfather of Patrick Phillip Stahl, his co-defendant. See *Stahl v. State*, 284 Ga. 316 (699 SE2d 655) (2008). Stahl's sister needed money for a divorce, and

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<sup>1</sup> Dixon was killed on May 14, 2002. On September 12, 2002, a Gordon County grand jury indicted Freeman and Patrick Phillip Stahl for malice murder, felony murder while in the commission of aggravated assault, felony murder while in the commission of burglary, felony murder while in the commission of attempted armed robbery, two counts of burglary, attempted armed robbery, and two counts of possession of a firearm during the commission of a crime; Stahl was also indicted for possession of a firearm by a convicted felon. Freeman and Stahl were tried before a jury November 3-7, 2003; Freeman was acquitted of malice murder and found guilty of all the other crimes for which he was charged, and Stahl was found guilty of all charges except for possession of a firearm by a convicted felon, to which he pled guilty. On December 17, 2003, Freeman was sentenced to life in prison for felony murder and five years in prison for possession of a firearm during the commission of a crime, to be served consecutively to the life sentence; the court declared that one count of possession of a firearm during the commission of a crime merged with the other count of that crime, and that all other crimes merged with the felony murder. See *Malcolm v. State*, 263 Ga. 369, 372-374 (5) (434 SE2d 479) (1993). Freeman moved for a new trial on December 17, 2003, and amended the motion on January 29, 2008. The motion was denied on April 17, 2008, and Freeman filed a notice of appeal on May 15, 2008. The appeal was docketed in this Court on July 15, 2008, and submitted for decision on September 8, 2008.

Stahl believed that Dixon had large amounts of cash in his house; Stahl occasionally worked at Dixon's car sales business and assisted him in selling illegal drugs. Late in the evening of May 13, 2002, or early in the morning of May 14, 2002, Freeman and Stahl resolved to rob Dixon. Stahl gathered a pistol, mask, and gloves for himself, and Freeman drove him to a store where they bought a mask and gloves for Freeman. Freeman drove Stahl to a location near Dixon's residence, Stahl exited the vehicle, went alone to the house, entered the home through a window, encountered Dixon, fatally shot him in the face, and searched the home.

Prior to being implicated in the crimes, Stahl told his cousin that Freeman approached him about getting money for Stahl's sister's divorce; Stahl said they could rob Dixon, and, after initial reluctance, Freeman agreed to participate. Other family members learned of the crimes, and telephoned law enforcement officers. Stahl first told investigating officers that he had gone to Dixon's home to sell him a pistol, and during a dispute, the pistol accidentally discharged. The officers noted that he had told family members a different version of the events, and Stahl then told the officers that: Freeman did not know of Stahl's plan to rob Dixon; because of a ruse of Stahl's, Freeman drove Stahl to a store that was

open all night, from which Stahl walked to Dixon's home; after committing the crimes, Stahl telephoned Freeman to pick him up at a game room; and that he continued to tell Freeman lies about what he was doing there. He later said that he did not walk from the store to Dixon's house, but was given a ride by a stranger he met in the store parking lot.

Freeman first told the investigators that he had taken Stahl to the game room, and that when Stahl telephoned, he drove there to get him. Three days later, he told the investigators that: he took Stahl to a store, supposedly to buy a work shirt; Stahl bought some gloves; when Freeman asked Stahl why he had bought gloves, Stahl did not give a clear answer, but said that he bought them for someone; Stahl directed Freeman to drive to a location where Stahl exited the automobile; Freeman returned home, later received a telephone call from Stahl, and went to the game room to get him; Stahl told Freeman that he had shot Dixon; Stahl requested that Freeman drive him to the store to return the gloves; Freeman did not know what Stahl planned when Freeman drove Stahl to the location where Stahl exited the automobile; and Freeman could not recall what he thought when Stahl bought gloves and asked to be let out at a certain location at midnight or later.

At trial, Stahl testified that: he and Freeman discussed a robbery; he obtained a .380 pistol belonging to his sister; he first resolved to rob Dixon's grandfather, but at the last moment aborted that plan because he became afraid; Freeman said he was disappointed in Stahl; late at night, he and Freeman resolved to take money from Dixon, although Freeman was reluctant; shortly after midnight he and Freeman went to a store and bought a mask and gloves for Freeman; Freeman decided not to actively participate in the robbery; Freeman asked Stahl why he had a pistol, and Stahl said it was to intimidate Dixon; Freeman drove Stahl to a location from which he could gain access to Dixon's home by crossing some unoccupied land; Stahl reached the house and telephoned Freeman, telling him that if he had not heard from Stahl within 20 minutes, that Freeman should go home; Stahl broke into the house and had a confrontation with Dixon, during which he shot him; Stahl left the house, walked to a convenience store, and telephoned his home so he could speak with Freeman; his mother answered and told him Freeman was not there; either Freeman then telephoned him or he telephoned Freeman; he told Freeman to come pick him up; Freeman arrived; in the car, he told Freeman that things had gone awry and he had shot Dixon; he said "Daddy, I'm not lying, I really did go

in the house. I didn't let you down. I really did try, I really did try. I didn't find no money"; he and Freeman returned Freeman's mask and gloves to the store where they had bought them and got a refund; they returned to their home at 5:00 a.m.; when first questioned by the police, Stahl told them the story that he and Freeman had previously decided to maintain if he was arrested, so as to protect Freeman, to wit, that Freeman had taken him to the store and retrieved him from the game room; his later statement to the police contained lies because he was angry with Freeman for not maintaining the first agreed-upon version of events; and he never told the police the truth. See *Stahl*, supra.<sup>2</sup>

1. The evidence was sufficient to enable a rational trier of fact to find Freeman guilty beyond a reasonable doubt of the crimes of which he was convicted. *Jackson v. Virginia*, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. Freeman contends that his trial should have been severed from Stahl's.

A defendant who seeks a severance must show clearly that he will be prejudiced by a joint trial, and in the absence of such a showing, this Court will not disturb the trial court's denial of a severance motion. [Cit.] The trial court is to consider whether a joint trial will create confusion of the evidence and law, whether there is a danger

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<sup>2</sup> Freeman did not testify at trial.

that evidence implicating only one defendant will be considered against a co-defendant despite limiting instructions, and whether the defendants are asserting antagonistic defenses. [Cit.]

*Denny v. State*, 281 Ga. 114, 115-116 (1) (636 SE2d 500) (2006).

Freeman contends that his defense was hampered by being tried with Stahl, because, unlike Stahl, Freeman did not enter the house where Dixon was killed. However, the defendants were not pursuing antagonistic defenses, the evidence of each defendant's role was clear, and the jury was instructed on the law of criminal intent and participation, parties to a crime, conspiracy, and a defendant's mere presence at the crime scene. See *Jackson v. State*, 284 Ga. 484, 485 (1) (668 SE2d 700) (2008). Although Freeman argues that Stahl was essentially a State's witness against him, this is not so; the State rested its case, and Stahl took the stand in his own defense, contending that he had no intention to harm Dixon, or even to confront him, as he believed Dixon was not home.

The jury was instructed that a statement of one defendant was to be used only against the defendant who made the statement, and that the guilt or innocence of each defendant must be decided separately. That the joint trial did not produce any confusion on the jury's part regarding the evidence against each

defendant is seen in the fact that the jury found Stahl guilty of malice murder while acquitting Freeman of that charge. See *Simmons v. State*, 282 Ga. 183, 185-186 (4) (646 SE2d 57) (2007). There was no abuse of the trial court's discretion in denying Freeman's motion to sever his trial from Stahl's. *Denny*, supra.

3. Freeman contends that the State failed to disclose exculpatory material in violation of *Brady v. Maryland*, 373 U. S. 83 (83 SC 1194, 10 LE2d 215) (1963). In order to demonstrate a *Brady* violation, a defendant must show that: the State possessed evidence favorable to the defendant; the defendant did not possess the evidence and could not obtain it himself with reasonable diligence; the prosecution suppressed the favorable evidence; and if the evidence had been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different. *Zant v. Moon*, 264 Ga. 93, 100 (3) (440 SE2d 657) (1994).

Freeman contends that, prior to his trial, the Georgia Bureau of Investigation had notes of an investigator's interview with Cunningham, an inmate who had been incarcerated with Stahl. The interview was prompted by a handwritten statement of Cunningham's, which was in the possession of

Freeman's counsel. In that statement, Cunningham reported that Stahl stated that Freeman was not responsible for Dixon's killing; Freeman did not know why he was giving Stahl a ride, but that Stahl intended to make Freeman a scapegoat for the crime; and if Stahl had to suffer, so did his family. The notes of the interview stated the same things, with additional detail. Freeman argues that the notes of the interview would have bolstered Cunningham's credibility and allayed counsel's fear of calling Cunningham to testify on behalf of Freeman. But, counsel testified at the hearing on the motion for new trial that his decision not to call Cunningham to testify was based not upon concerns about Cunningham's credibility and prospects of impeachment, but upon counsel's desire to preserve the right to final closing argument, which would have been forfeited under the statute operative at the time of trial had Freeman introduced evidence. See *Adams v. State*, 283 Ga. 298, 301 (3) (d) (658 SE2d 627) (2008). Accordingly, assuming that the notes of the interview were evidence favorable to Freeman that was suppressed by the State, Freeman fails to show either that the notes were not available to him through reasonable diligence, or that the course of his trial would have been any different had they been produced, and thus there was no error in the trial court's denial of



Freeman's motion for new trial based upon *Brady*.

4. Finally, Freeman claims that trial counsel failed to provide effective representation. In order to prevail on this claim, Freeman must show both that counsel's performance was deficient, and that the deficient performance was prejudicial to his defense. *Smith v. Francis*, 253 Ga. 782, 783 (1) (325 SE2d 362) (1985), citing *Strickland v. Washington*, 466 U. S. 668 (104 SC 2052, 80 LE2d 674) (1984). To meet the first prong of the required test, the defendant must overcome the "strong presumption" that counsel's performance fell within a "wide range of reasonable professional conduct," and that counsel's decisions were "made in the exercise of reasonable professional judgment." *Id.* The reasonableness of counsel's conduct is examined from counsel's perspective at the time of trial and under the particular circumstances of the case. *Id.* at 784. To meet the second prong of the test, the defendant must show that there is a reasonable probability that, absent any unprofessional errors on counsel's part, the result of his trial would have been different. *Id.* at 783. "'We accept the trial court's factual findings and credibility determinations unless clearly erroneous, but we independently apply the legal principles to the facts.' [Cit.]" *Robinson v. State*, 277 Ga. 75, 76 (586 SE2d 313) (2003).

Freeman asserts that trial counsel should have called Cunningham to testify, but as noted above, Division 3, *supra*, counsel did not believe that Cunningham's testimony would be helpful to an extent worth giving up the right to final closing argument, which, at the time of trial, was recognized as a reasonable defense strategy. See *Nix v. State*, 280 Ga. 141, 143 (3) (b) (625 SE2d 746) (2006). "The fact that present counsel would pursue a different strategy does not render trial counsel's strategy unreasonable. [Cit.]" *Nhek v. State*, 271 Ga. 245, 248 (3) (517 SE2d 521) (1999). Effectiveness of trial counsel is not judged by hindsight or result. *Jackson v. State*, 276 Ga. 94, 96 (6) (575 SE2d 447) (2003).

Similarly, Freeman argues that trial counsel should have conducted a more extensive cross-examination of Stahl, and confronted Stahl with his prior statements that Freeman did not know before the crimes were committed that Stahl intended to rob Dixon. "The scope of cross-examination is grounded in trial tactics and strategy, and will rarely constitute ineffective assistance of counsel." (Footnote omitted.) *Simpson v. State*, 277 Ga. 356, 359 (4) (b) (589 SE2d 90) (2003). Stahl's inconsistency in his various versions of events was addressed on direct examination, and his statements to the police were placed

before the jury. Trial counsel testified that he did not consider Stahl to be a believable witness, the weight of the evidence was clearly against Stahl, and counsel's strategy was to try to keep Freeman in the background and avoid responsibility for the crimes. It was not error to deny the motion for new trial on the ground of ineffectiveness of trial counsel.

Judgments affirmed. All the Justices concur.

**Decided January 26, 2009.**

Murder. Gordon Superior Court. Before Judge Howell.

Cook & Connelly, Bobby Lee Cook, Todd M. Johnson, for appellant.

T. Joseph Campbell, District Attorney, Thurbert E. Baker, Attorney General, David A. Zisook, Assistant Attorney General, for appellee.