

2012 IL App (2d) 110219-U
No. 2-11-0219
Order filed November 14, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-2517
)	
RAUL V. CASAS,)	Honorable
)	Marmarie J. Kostelny,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* Defense counsel was not ineffective for failing to attempt to impeach a witness with an alleged prior inconsistent statement, as the statement was not necessarily inconsistent and the attempted impeachment might have elicited damaging bolstering testimony.

¶ 2 Defendant, Raul V. Casas, appeals from his conviction of aggravated domestic battery (strangling) (720 ILCS 5/12-3.3(a-5) (West Sup. 2009)), asserting that counsel was ineffective because he failed to impeach the victim with what he asserts is a prior inconsistent statement that was paraphrased in a Department of Children and Family Services (DCFS) report. We hold that,

even ignoring the technical issue of how counsel could have perfected this impeachment, an attempt at impeachment based on the statement would not have benefitted defendant. Therefore, defendant can satisfy neither prong of the *Strickland* standard (*Strickland v. Washington*, 466 U.S. 668, 687 (1984)): counsel’s choice not to attempt the impeachment appears as sound trial strategy—it was not deficient—and the absence of the attempt did not prejudice defendant. We therefore affirm defendant’s conviction.

¶ 3

I. BACKGROUND

¶ 4 Defendant was charged with aggravated domestic battery (strangling), domestic battery causing bodily harm (720 ILCS 5/12-3.2(a)(1) (West 2008)), and domestic battery making contact of an insulting or provoking nature (720 ILCS 5/12-3.2(a)(2) (West 2008)). The charges arose out of a September 3, 2009, incident between defendant and his teenage son, J.C.

¶ 5 According to a motion to increase defendant’s bond, on April 1, 2010, the police arrested him for a new instance of domestic battery: “it is alleged that the defendant called [J.C.] a ‘piece of shit’ and pushed him in the chest.” In the transcript, the court and parties refer to this as “the CM case” or “the misdemeanor case.”

¶ 6 Delays occurred in the run-up to trial when defendant (and the court) saw suggestions that original defense counsel was unreliable. Defendant, with new retained counsel, opted for a bench trial.

¶ 7 On March 9, 2011, the State answered “ready,” but defense counsel initially did not. He said that he had subpoenaed a DCFS report “returnable today,” but to a different courtroom. The court responded that it had the report (which DCFS had delivered for *in camera* examination), but that it would be subject to a protective order. The court gave defense counsel 10 minutes to review the

report and the proposed protective order. After review, defense counsel asked for a short continuance. He explained that he had deliberately subpoenaed the report from the misdemeanor case, apparently because that was the report that he knew existed. Based on that report, he had become certain that a report existed for the incident that led to the felony charge. He believed that *that* report would be material to the felony defense.

¶ 8 The State objected to any further delay and argued that the reports were not material. Defense counsel said that the report that had been tendered was clearly material to the misdemeanor case. Further, he had been aware for only three days that DCFS had done an investigation in the felony case. He noted that the report from the misdemeanor case stated that J.C. had reported that “he’s never been hit or pushed or shoved by his father.”

¶ 9 The court said that, while it did not fault defense counsel, defendant himself must have known that DCFS had interviewed him about the felony case. The court commented that “these documents” had “only a potential for materiality.” The court further stated: “There’s no indication that there is anything material in there for impeachment purposes, and there has been no showing of the exercise of due diligence; and for those reasons, your motion to continue is denied.”

¶ 10 The tendered DCFS report is a part of the record and bears the label “Def 1.” However, nothing in the record suggests that either party introduced the report into evidence. The report states that someone made an initial incident report to DCFS on April 2, 2010, at 12:46 a.m. DCFS had previously made an “indicated” finding on September 3, 2009, and had closed that file on November 2, 2009. Therefore, as the colloquy suggested, the report in the record pertains to the misdemeanor case.

¶ 11 A DCFS social worker (Raymundo Romero) interviewed J.C. for the report; the interview resulted in the following summary:

“[J.C.] did not have any marks or bruises; he stated that [defendant] never hit him or hurt him in any ways [*sic*]; [J.C.] stated that he and [defendant] were just arguing and yelling at each others [*sic*]; [J.C.] said that [defendant] just pushed him away from him, because [J.C.] was getting to [*sic*] close to him as he was yelling at [defendant] in his face.

[J.C.] denied corporal punishment by any [*sic*] of the parents; he stated that he is not afraid of [defendant].”

¶ 12 Upon the court’s denial of defendant’s motion for a continuance, the trial commenced. The first witness, a 911 dispatcher, testified that she had received a call from someone identifying herself as Diana Casas, who was “frantic.”

¶ 13 Diana Casas testified that she was defendant’s wife and the mother of J.C.. J.C. was 17 on September 3, 2009, the day of the incident. She started drinking beer at about 5 p.m.; she thought that she drank about eight beers over the course of the evening. At around 9 p.m., she got into a loud argument with defendant. Defendant threw a beer over her head and some of it spilled on her. J.C., who had been in the room, responded to this by telling defendant to leave his mother alone. Defendant and J.C. began to yell at each other at close range. The next thing she could describe was that the two were on the floor wrestling, with defendant holding J.C. down by his arms. It was then that she called 911. About then, the family dog started biting defendant on the leg.

¶ 14 J.C. testified that his parents were arguing; defendant threw a beer at his mother, and J.C. objected. His father grabbed him by the upper arms, and he grabbed back. He thought that defendant was trying to pull him to the ground, so he threw defendant over a table. Both rolled, and

defendant came out with J.C. pinned beneath him. Defendant squeezed J.C.'s neck for about 30 seconds, making breathing impossible for J.C. After releasing his grip on J.C., defendant got up, telling J.C. to get up too. When J.C. tried to do so, defendant got back down and started squeezing J.C.'s neck again. The struggle ended when the dog bit defendant. The whole of the struggle lasted about four minutes.

¶ 15 J.C. stated that police photographs showing red marks on his neck accurately depicted his neck after the fight. He said that he had no recollection of statements that he had made that night and did not think that anything would help him recall.

¶ 16 On cross-examination, he agreed that he had said that he wished his father would hit him and agreed that he was happy that the case prevented his father from having disciplinary authority over him.

¶ 17 Called as a rebuttal witness by the State, J.C. testified that defendant had said "who's your daddy" and "I will kill you" while holding him down.

¶ 18 Officer Lawrence Dickman of the Elgin police testified to responding to a domestic violence call. He arrived and saw defendant outside the house at the address to which dispatch had sent him. Defendant smelled noticeably of alcohol and had scratches and puncture-like marks on his arms.

¶ 19 Scott Williams of the Elgin police also responded and saw both defendant and Diana Casas. In his opinion, both were intoxicated. Called as a rebuttal witness, Williams said that defendant had admitted to using both hands around J.C.'s throat. Williams was with defendant when defendant sought medical treatment. He remembered that a doctor put defendant's arm in a sling; his report said that the arm went in a splint. The State rested after the testimony of another officer.

¶ 20 Defendant testified that he had been working on a car, had come in, and had drunk three or four beers. He, his wife, and his mother-in-law (who lived with them) were all in the family room. A conversation he was having with his wife turned into a loud argument and he “smashed” a beer can and “tossed it.” J.C. entered the room about that time, and after defendant tossed the beer, J.C. told defendant to leave his mother alone. Those two started arguing, and J.C. grabbed him by the arms. After some struggle, J.C. “flipped [him] on top of the coffee table.” A big glass vase broke. Defendant thought that J.C. was “getting too wild” and tried to restrain him. The fall over the coffee table injured defendant’s right arm so that he could not use it. He felt that he had to hold J.C. down; he was afraid to let him up. The dog never bit him. He later went to the hospital where a doctor put a cast on the arm.

¶ 21 The court found defendant guilty on all counts. Defendant filed a posttrial motion in which he asserted, among other things, that the court should have given him a continuance to review the DCFS material. The court denied the posttrial motion and sentenced defendant to 30 months’ probation (including 90 days in jail) for the aggravated domestic battery (strangulation) conviction. Defendant timely appealed.

¶ 22

II. ANALYSIS

¶ 23 On appeal, defendant argues that defense counsel was ineffective because he failed to use J.C.’s statement to DCFS to impeach J.C. The two-prong ineffectiveness-of-counsel standard of *Strickland* applies here: that is, to state a claim for ineffective assistance, a defendant must show (1) that counsel’s performance was deficient, and (2) that the deficient performance prejudiced him or her (*Strickland*, 466 U.S. at 687). An attempt to assert that counsel was ineffective for failing to present evidence that is not clearly beneficial to the defendant will fail both prongs: counsel’s choice

not to use such evidence is not deficient, and a defendant cannot show prejudice from the failure to present it. J.C.'s statement in the DCFS report (even leaving aside the mechanics of impeachment) is evidence of this sort.

¶ 24 Defendant's assertion that J.C.'s statement to the DCFS worker, Romero, could have served to impeach J.C. has a degree of superficial plausibility, but closer examination of the statement suggests that his statement was most likely consistent with his testimony. We first note that, although the DCFS report did not purport to be a verbatim transcription of J.C.'s words, defendant's claim stands on a literal reading of the report. Specifically, it requires that one take literally the "never" in the report's statement that J.C. "stated that [defendant] never hit him or hurt him in any ways [*sic*]." In any event, the context of this purported statement was a description of the misdemeanor incident. Thus, the probability is that J.C. told Romero that defendant did not hit or hurt him *during that incident*.

¶ 25 Moreover, if one insists on a strict reading of "never," consistency should require one also to use a strict meaning of "hurt" and "hit." In this incident, defendant did not hit J.C., and he arguably did not "hurt" him; J.C. described discomfort during the choking, but no pain.

¶ 26 A strong presumption exists that a choice by counsel is sound trial strategy, a presumption that can be overcome only when the defendant can show that "no reasonably effective criminal defense attorney, confronting the circumstances of the defendant's trial, would engage in similar conduct." *People v. Fillyaw*, 409 Ill. App. 3d 302, 312 (2011). Given that the statement at issue most likely pertains to the misdemeanor incident only (and thus did not conflict with J.C.'s testimony), defendant cannot overcome the presumption.

¶ 27 Defendant implies that defense counsel should have at least taken the preliminary step of asking J.C. whether he had told Romero that defendant never hit him. But defense counsel might have reasonably decided that the answer would be neutral for defendant at best and damaging at worst. Defendant would gain little if J.C. made the obvious point that the report did not quote him directly. Moreover, counsel would have had to have taken great care to avoid eliciting an answer that included J.C.'s recollection of what he said during the DCFS investigation of the felony event. Had J.C. proven to be confused about the distinction, counsel would have been hard-pressed to avoid testimony of J.C.'s report of the choking. Had counsel tried to perfect the impeachment, the likelihood of eliciting damaging bolstering statement would have only increased. See Ill. R. Evid. 613(b) (eff. Jan. 1, 2011) ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is first afforded an opportunity to explain or deny the same and the opposing party is afforded an opportunity to interrogate the witness thereon."). Thus, counsel's failure to attempt the impeachment both was proper trial strategy and did not cause demonstrable prejudice; that is, counsel was not ineffective.

¶ 28

III. CONCLUSION

¶ 29 For the reasons stated, we affirm defendant's conviction.

¶ 30 Affirmed.