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2012 IL App (3d) 100687-U

Order filed May 16, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-10-0687 Circuit No. 09-CF-217
GREGORY W. WALKER,	)	Honorable Stanley B. Steines,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Schmidt and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant did not prove his claim of ineffective assistance of counsel because he failed to show that he was prejudiced by counsel's performance.

¶ 2 Following a bench trial, defendant, Gregory W. Walker, was convicted of aggravated battery (720 ILCS 5/12-4(b)(8) (West 2008)) and sentenced to eight years of imprisonment. On appeal, defendant argues that his counsel rendered ineffective assistance in that she bolstered the victim's credibility by: (1) failing to object to a police detective who testified for the State being

allowed to sit at the State's counsel table during trial; (2) failing to object to the police detective's testimony regarding the victim's prior consistent statements; and (3) presenting the victim's prior consistent videotaped statement while cross-examining the police detective. We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant with aggravated battery. The State alleged that, on May 17, 2009, defendant committed battery on B.P. by grabbing her hand and forcefully attempting to place her hand on his exposed penis while in a parking lot. At the time of the alleged incident defendant was 53 years old, and B.P. was 16 years old.

¶ 5 Prior to trial, the State requested that the investigating officer, Detective James Sanders, sit at the State's counsel table throughout trial. The trial court granted the motion. Both parties joined in a motion to exclude all other witnesses, which the trial court also granted.

¶ 6 During the bench trial, B.P. testified that she lived with her mother but spent a lot of time at the home of Lisa Stern. B.P.'s close friend, Carl McNinch, lived with Stern. Defendant knew B.P., Stern, and McNinch because defendant often visited a friend in Stern's apartment building.

¶ 7 According to B.P., on May 17, 2009, McNinch asked defendant to drive him to Discount Liquor so he could purchase cigarettes. B.P. went along, and defendant instructed her to ride in the front seat. B.P. and defendant stayed in the car while McNinch went into the store. Defendant started rubbing B.P.'s left leg and pulling on her pants. B.P. told defendant to "knock it off" and "stop." A few seconds later, defendant took his penis out of his pants and began to masturbate. Defendant pulled B.P.'s left forearm toward himself and told her to "touch it[.]" B.P. said "no" and told defendant to "stop it." B.P. testified that she told defendant to stop "close to ten times." Defendant put his penis back inside his pants when McNinch came out of the

store and acted like nothing had happened.

¶ 8 On cross-examination, B.P. confirmed that she lived with her mother, stepfather, and sisters. B.P. denied that she lived with Stern. She also denied that McNinch was her boyfriend. On the day of the incident, B.P. arrived at Stern's home at 10 a.m. Defendant talked with B.P., Stern, and McNinch on Stern's porch. At 5 p.m., B.P., defendant, and McNinch went to get cigarettes. After they returned, B.P. told Stern about the incident, who told B.P. to call police. B.P. called her mother, and her mother took her to the police station.

¶ 9 Sanders testified that when B.P. came to the police station she was "very emotional" and "very upset." B.P. did not show any signs of intoxication. B.P. reported to Sanders that defendant rubbed her leg and grabbed her wrist in an attempt to get her to touch his penis while he was masturbating. B.P. identified defendant in a photograph lineup.

¶ 10 The same day, Sanders spoke with defendant. Sanders asked defendant whether he had been involved in an incident with a 16-year-old girl earlier in the day. Defendant smiled and told Sanders that he touched B.P.'s leg and pulled on her pants, and B.P. told him to knock it off. Defendant also told Sanders that he told B.P. that she was pretty and that he and B.P. had been flirting for the past few weeks.

¶ 11 On cross-examination, Sanders explained that he conducted a follow-up interview with B.P. because there was some "conflicting minor statements" regarding the details of what B.P. had done earlier on the day of the incident. Defense counsel asked Sanders, "[w]hat other parts were inconsistent from the first incident?" The State's Attorney objected as to the relevancy of B.P.'s activities "during the rest of the day absent some kind of foundation." Defense counsel stated:

"Judge, the victim gave two different statements, two different inconsistent statement, so inconsistent that the officer had to go and recontact her and pull her in.

*** [T]his is a matter of the victim's credibility, and so if there is inconsistencies I think the Court needs to hear about them."

¶ 12 The trial court overruled the State's objection, indicating that "[t]he credibility of any witness is always relevant" and even though Sanders had testified that B.P.'s statement was consistent with her trial testimony, "if there [were] any other inconsistent statements, particularly that day, it [went] towards the credibility of [B.P.]"

¶ 13 Defense counsel questioned Sanders as to whether B.P.'s story differed during the second questioning. Sanders indicated that B.P.'s statement regarding the alleged incident did not change, but she had first told him that she was at Stern's home all day and in the second statement said that she was at a carnival most the day. In the second statement, B.P. indicated that when she arrived at Stern's residence, until 3 or 4 p.m. she cleaned the room she was staying in at Stern's home. Sanders testified that B.P. told him that she requested that defendant stop 10 times. After defense counsel asked Sanders to review B.P.'s videotaped statement to refresh his recollection, he testified that B.P. said in the videotaped statement that she told defendant to stop five times.

¶ 14 Defendant testified that at 1:30 p.m. on the day of the alleged incident he spoke with Stern and B.P. on Stern's front porch. At that time, defendant did not know B.P. personally. Defendant indicated that Stern, B.P., and McNinch had just moved into the building two weeks prior to the incident. Stern had told defendant that B.P. was 19 years old. Defendant believed that B.P. was 19 years old because he saw her drink alcohol and smoke marijuana. Defendant

testified that McNinch was B.P.'s boyfriend and they were living with Stern. Defendant saw McNinch and B.P. kissing on one occasion and heard them arguing about whether B.P. was cheating on McNinch on another occasion. On two occasions B.P. and McNinch "part[ied]" and drank beer with defendant across the alley from Stern's home.

¶ 15 According to defendant, on the day of the incident, B.P. insisted that defendant drive her and McNinch to the liquor store to buy cigarettes. McNinch was only in the liquor store for one minute. At no time did defendant unzip his pants or pull them down. Defendant did not touch B.P.'s leg. Defendant never told Sanders that he pulled on B.P.'s pants, touched her leg, or told B.P. that she was pretty. In his statement to Sanders, defendant said that B.P. had brushed against him at Stern's house and that he and B.P. had been flirting. Defendant testified that he was not attracted to B.P. because he was gay. After questioning defendant, the State's attorney impeached defendant by introducing evidence of defendant's 2004 burglary conviction.

¶ 16 The trial court indicated that in weighing the credibility of the witnesses in this case, which was a "he said she said type story," the court found that "credibility certainly weigh[ed] in favor of [B.P.]" The trial court found defendant guilty of aggravated battery and sentenced him to eight years of imprisonment. Defendant appealed.

¶ 17 ANALYSIS

¶ 18 On appeal, defendant argues that he was deprived effective assistance of counsel because counsel: (1) failed to object to Sanders sitting at the State's counsel table; (2) failed to object to Sanders' testimony regarding B.P.'s prior consistent statements; and (3) presented B.P.'s prior consistent videotaped statement while cross-examining Sanders. We disagree.

¶ 19 To demonstrate ineffective assistance of counsel, defendant must establish that: (1)

counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). Defendant must overcome a strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence. *People v. Coleman*, 183 Ill. 2d 366 (1998). A determination of whether defense counsel's performance was deficient must be based upon an evaluation of defense counsel's performance as a whole and not upon a single isolated aspect of their performance. *People v. Cloyd*, 152 Ill. App. 3d 50 (1987). Under *Strickland*'s second prong, defendant must show that, but for defense counsel's alleged errors, a reasonable probability exists that the outcome of the proceedings would have been different. *People v. Colon*, 225 Ill. 2d 125 (2007).

¶ 20 First, defendant contends that he was prejudiced by Sanders' presence at the counsel table for the State. Defendant additionally argues that "[b]ecause Sanders was present when B.P. took the stand, the State was able to tie B.P.'s trial testimony to the statement she had previously made to [Sanders] at the police station." Defendant additionally complains that his counsel bolstered B.P.'s credibility by allowing Sanders to testify as to B.P.'s prior consistent statements without objection and presenting B.P.'s prior consistent videotaped statement while cross-examining Sanders.

¶ 21 In general, prior consistent statements are inadmissible to corroborate trial testimony or rehabilitate a witness unless the prior statement is necessary to rebut an inference of recent fabrication or motive to lie. *People v. McWhite*, 399 Ill. App. 3d 637 (2010). The basis for the rule is that the fact finder is likely to unfairly enhance a witness's credibility simply because the

statement has been repeated. *Id.*, citing Michael H. Graham, Cleary & Graham's Handbook of Illinois Evidence § 611.14 (9th ed. 2009). The mere introduction of contradictory evidence, without more, does not constitute an implied charge of fabrication or motive to lie. *McWhite*, 399 Ill. App. 3d 637. Even where admissible, prior consistent statements may only be used for rehabilitative purposes but not as substantive evidence. *Id.*, citing Michael H. Graham, Cleary & Graham's Handbook of Illinois Evidence § 611.14 (9th ed. 2009).

¶ 22 In this case, because there was no indication that B.P. had recently fabricated her testimony or had a motive to lie about the incident, her prior consistent statements were not admissible and could have been objected to by defense counsel. Additionally, it is apparent from the record that defense counsel's strategy in presenting Sanders with B.P.'s prior statement on cross-examination was to highlight the minor inconsistencies between B.P.'s prior statements and her trial testimony in an attempt to diminish B.P.'s credibility. Unfortunately, by doing so, counsel introduced and highlighted B.P.'s prior consistent statement as to the underlying allegations in the case. Nonetheless, defense counsel's decision to not contest evidence of the prior statements and instead argue the inconsistencies between the statements was a matter of trial strategy, and we are reluctant to second-guess counsel on this point.

¶ 23 In addition, defendant was not prejudiced by counsel's performance. Even without B.P.'s prior consistent statements, the outcome of the case would not have been different. The trial court acknowledged that this case was based upon the credibility of B.P. and defendant. Defendant's testimony was significantly impeached by his prior inconsistent statement to Sanders, wherein he admitted to flirting with B.P., telling her that she was pretty, pulling on her pants, and touching her leg. Defendant was further impeached by his prior burglary conviction.

Additionally, the trial court found that B.P. was credible by her demeanor on the witness stand and the fact that she immediately reported the incident.

¶ 24 For these same reasons, there is no indication that defendant was prejudiced by Sanders sitting at the State's counsel table. It is within the trial court's discretion to permit a material witness to remain in the courtroom to assist the State's Attorney. *People v. Leemon*, 66 Ill. 2d 170 (1977); *People v. Elliot*, 337 Ill. App. 3d 275 (2003). Absent a showing of prejudice by defendant, no abuse of discretion will be found in allowing a material witness to remain in the court. *People v. Jones*, 108 Ill. App. 3d 880 (1982). There is no indication in the record that defendant was prejudiced by Sanders remaining in the courtroom at the State's counsel table.

¶ 25 Furthermore, in a bench trial, the judge is presumed to have only considered competent and admissible evidence in reaching a verdict. *People v. Cunningham*, 2012 IL App (3d) 100013. The record shows that the trial judge allowed B.P.'s prior statements into evidence for the purposes of considering the inconsistencies between her prior statement and her trial testimony regarding the day of the incident.

¶ 26 Defendant argues that "the judge specifically referenced [B.P.'s] prior consistent statements *** as a reason for his ruling." Our review of the record indicates that in the court's ruling the trial judge referenced B.P.'s prior statements in discussing "[s]ome of the inconsistencies that [defense counsel] point[ed] out," such as the issues of whether B.P. was at Stern's home all day or at a carnival, whether McNinch was B.P.'s boyfriend, and whether B.P. was smoking marijuana or drinking alcohol. In discussing B.P.'s prior statements, the trial court was simply noting that the inconsistencies pointed out by defense counsel were insignificant in regard to the allegations. There is no indication that the trial court considered B.P.'s prior

statements in weighing B.P.'s credibility or in reaching a verdict.

¶ 27 Consequently, defendant has failed to demonstrate that he was prejudiced by counsel's performance. Defendant's sentence and conviction are affirmed.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Whiteside County.

¶ 30 Affirmed.