

NOTICE  
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2014 IL App (5th) 120188-U

NO. 5-12-0188

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Monroe County.
	)	
v.	)	No. 10-CF-92
	)	
JOKER GREATHOUSE,	)	Honorable
	)	Dennis B. Doyle,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE GOLDENHERSH delivered the judgment of the court.  
Justices Cates and Schwarm concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in finding the victim competent to testify, and defense counsel was not ineffective for failing to attempt to impeach the victim with her testimony from the competency hearing. However, defendant is entitled to additional credit for time served in pretrial custody.

¶ 2 After a jury trial in the circuit court of Monroe County, defendant, Joker Greathouse, was found guilty of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)) and sentenced to three years in the Department of Corrections. The issues raised by defendant in this direct appeal are: (1) whether the trial court erred in finding the victim, E.H. (d.o.b. 9/14/2000), was competent to testify at trial; (2) whether defense counsel was ineffective for failing to impeach the victim with testimony from her

competency hearing; and (3) whether defendant is entitled to additional credit for time served in pretrial custody. For the following reasons, we affirm the judgment of the circuit court, except we order correction of the mittimus to reflect 22 days' credit for time served in pretrial custody rather than the 14 days ordered by the trial court.

¶ 3

### FACTS

¶ 4 On August 25, 2010, defendant was charged by information with two counts of aggravated criminal sexual abuse for improperly touching two separate victims, E.H. and S.H., the daughters of his former girlfriend who were both under the age of 13. A competency hearing was conducted on October 6, 2011, after which both victims were found competent to testify. On January 20, 2012, the State moved to dismiss the count in which S.H. was the alleged victim, and only the count against E.H. proceeded to trial.

¶ 5 At the competency hearing, E.H. first testified she was 10 years old, but then correctly noted she was 11. One of her family members who was present in the courtroom attempted to explain E.H.'s confusion by noting that her birthday was two weeks prior to the court date. Defense counsel also noted that E.H. raised her left hand rather than the right hand she was told to raise when being sworn to tell the truth. E.H. explained that she gets confused sometimes. When asked how old she was in November 2008, E.H. correctly replied that she was eight. E.H. could not remember anything about taking pills to help her remember despite the fact that when she was interviewed at the Child Advocacy Center (CAC) she told the interviewer she was taking memory pills. She did, however, testify that she remembered defendant touched her.

¶ 6 The evidence adduced at trial showed that defendant met the victim's mother, Nicole, in a bar in March 2007 while he was visiting his sister in Georgia. They had sex and Nicole became pregnant. The two stayed in touch, but defendant went back to Ohio and Nicole went back to Illinois where she lived. In August 2007, defendant came to Illinois and the two began living together in Waterloo, along with Nicole's three daughters, E.H., who was the oldest, S.H., and G.H. Nicole and defendant's daughter was born on November 25, 2008.

¶ 7 Nicole testified she and defendant lived together from August 2007 until July 2008, when they broke up and defendant moved out of the apartment. The two got back together in November 2008 and lived together until February 2009, when defendant returned to Ohio to take care of his son from a previous relationship. Defendant and Nicole maintained a relationship until July 2009 when they broke up permanently after Nicole learned defendant had been cheating on her with another woman. Nicole later had a relationship with defendant's cousin, James. Nicole testified James lived with her from September 2009 until February 2011. Nicole then had a relationship with Jack, who is also defendant's cousin. At the time of trial, Jack and Nicole were married.

¶ 8 Nicole testified that in December 2009, E.H. came into the bathroom while she was taking a bath and told her that defendant came into her room one night while he was living with them and pulled down her underwear and spread her legs apart and touched her with his finger. Nicole asked E.H. why she waited so long to tell her, and E.H. said she wanted to make sure defendant was gone. Nicole made an appointment with E.H.'s doctor who told her that the incident needed to be reported to the police, and that if

Nicole did not report it, the doctor would. Nicole called the police and reported the incident.

¶ 9 On December 29, 2009, E.H. was interviewed by Elizabeth Liszewski at the CAC. The interview was recorded and was played for the jury. Liszewski also testified at trial. E.H. correctly gave her date of birth and told Liszewski that the house she shared with her mother, sisters, and defendant had three bedrooms and two bathrooms. E.H. told Liszewski that defendant came into her room and spread her private part. She told him to stop, and he stopped. Defendant then went back into the bedroom and went to bed where E.H.'s mother was already sleeping. E.H. said defendant only touched her on one occasion and that it happened sometime between November 2008 and February 2009.

¶ 10 At trial, E.H. testified, "[Defendant] came into my room one night, pulled my panty underwear down and spread my legs apart and he touched me down there with his finger." She said that even though it happened around February 2009, she did not tell her mom about it until December 2009 because she was "scared at the time." In December 2009, defendant was no longer living with her. E.H. said her mom called her doctor and then the doctor told her mother to call the police. She remembered that she also began talking to a counselor, Rebecca Bakke. E.H. also testified that she remembered going to the CAC and talking to Elizabeth Liszewski. E.H. said she told Liszewski "the same thing I told you guys."

¶ 11 Defense counsel cross-examined E.H. about the "memory pills" she said she had taken, and E.H. explained: "[T]hey weren't memory pills. I don't know like I was so

young I thought they were memory pills. They were actually something to keep my attitude down." She did remember telling Elizabeth Liszewski that the pills were meant to help her remember things about defendant. She said she took the pills for about eight months. E.H. said that after she told her mother about the incident with defendant, she only talked about the incident one other time with her mother and that was the week after she went to the doctor.

¶ 12 On redirect, E.H. testified that in December 2009, she told her stepfather that she had some important news to tell her mom. After that she went into the bathroom and told her mother who was taking a bath about the incident with defendant. She admitted that her mother told her to make sure to tell the counselors about defendant, but said her mother "didn't tell [her] anything else besides that."

¶ 13 Nicole testified that E.H. was confused about the pills she was taking and that the pills were actually Prozac prescribed by the doctor for depression after the doctor examined E.H. for signs of sexual abuse. Nicole testified, "[E.H.'s doctor] put her on them when we went in there because of her—she didn't take it well with her being messed with and she started crying a lot and so we went to the doctor." Nicole explained that the doctor prescribed the pills in January or February 2010 after E.H. disclosed the sexual abuse. Nicole also explained that after the abuse was disclosed she did not talk with E.H. about it very often because the police told her not to so as not to "hurt the investigation." The police told her to let E.H. talk about it with her counselor.

¶ 14 Rebecca Bakke testified that she is a mental health therapist who has treated E.H.

"multiple times." Bakke first talked to E.H. on January 13, 2010, after the CAC referred E.H. to her and Nicole called to request an initial appointment. E.H. told her that defendant touched her one time in the middle of the night by sticking his hand down her pants. Bakke met with both Nicole and E.H. during the first session, but after that met individually with E.H.

¶ 15 Defendant testified in his own defense that he met Nicole in a bar, had sex with her, and stayed with her for a month and a half until Nicole returned to Illinois. He remained in contact with Nicole and ultimately went to live with her and her three daughters in an apartment in Waterloo, Illinois. Nicole later gave birth to his daughter. He testified he got along well with the children, but the couple started having trouble cause Nicole "tried to control" him. He and Nicole had an off-again, on-again relationship, but he moved out for good in January of 2009.

¶ 16 Defendant testified that he had a few conversations with Nicole after he moved out and she ultimately accused him of cheating on her and called him "a sorry SOB." Defendant finally got fed up with all the arguing and "told her [he] was done with her." Defendant testified that Nicole threatened him after that, telling him that if she could not have him, no one would. After defendant found out Nicole was dating his cousin, he repeatedly tried to call her, but Nicole would not talk to him.

¶ 17 Defendant first learned about the allegations made against him in June 2010 when he was contacted by detectives in Ohio. Defendant denied the allegations and said he did not go into E.H.'s room and molest her. He said he never noticed any changes in E.H.

while he was living with her.

¶ 18 On cross-examination, defendant admitted that he would drink 8 to 10 beers every other night. He later changed that and said he got a job so he only drank that much on the weekends. Defendant denied that it was possible that he touched E.H., but did not remember it due to alcohol consumption.

¶ 19 Defendant's cousin, James, testified that he met Nicole at a party around Thanksgiving in 2007 and he had contact with her through social media and the telephone. He initially dated one of Nicole's friends, but then started a relationship with Nicole after Nicole and defendant broke up. James moved in with Nicole and became the father figure to her children. James was in a relationship with Nicole until his brother Jack moved in with them and replaced him as the father figure and started his own relationship with Nicole.

¶ 20 James testified that while he was in a relationship with Nicole she would talk badly about defendant and become angry whenever defendant's name was mentioned. Nicole was angry that defendant cheated on her. According to James, Nicole called defendant a "no good SOB" and said he was not a good dad. Nicole told James she did not want anything to do with defendant and if it was up to her he would not be a father to his daughter with her. James was upset with Nicole talking badly about defendant because defendant is his cousin.

¶ 21 After hearing all the evidence, the jury convicted defendant of aggravated sexual abuse. Defendant was sentenced to three years in the Department of Corrections.

Defendant filed a timely notice of appeal.

¶ 22

## ISSUES

¶ 23 The first issue raised on appeal is whether the trial court erred in finding E.H. competent to testify at trial. Defendant argues the trial court erred in finding E.H. competent to testify because she was confused about her age, admitted to being frequently confused, and could not remember events, including whether she was interviewed by a forensic interviewer regarding the allegations against defendant and whether her mother had given her "memory pills". Defendant also complains that the trial court never determined whether E.H. knew the difference between the truth and a lie. The State replies that the trial court's ruling that E.H. was competent to testify was not an abuse of discretion. We agree with the State.

¶ 24 Section 115-14 of the Code of Criminal Procedure of 1963 provides that, irrespective of age, every person is qualified to testify as a witness unless he or she is incapable of expressing himself or herself as to be understood concerning the matter or incapable of understanding the duty of a witness to tell the truth. 725 ILCS 5/115-14 (West 2010). In determining the competency of a witness, a trial court considers the following four criteria: (1) ability of the witness to receive correct impressions from his or her senses; (2) ability to recollect those impressions; (3) ability to understand questions and express answers; and (4) ability to appreciate the moral duty to tell the truth. *People v. DeWeese*, 298 Ill. App. 3d 4, 12, 698 N.E.2d 554, 559 (1998). It is not necessary that a child witness give perfect answers during the competency determination or at trial, and an

imperfect response to a question is not sufficient to invalidate a finding of competency. *People v. Williams*, 383 Ill. App. 3d 596, 632, 891 N.E.2d 904, 932 (2008). The reality is that there is an extremely broad standard of competency which permits even very young children to testify. *People v. Mack*, 216 Ill. App. 3d 239, 245, 576 N.E.2d 1023, 1027 (1991).

¶ 25 The burden of proving incompetency devolves on the party challenging the witness's ability to testify. 725 ILCS 5/115-14(c) (West 2010). A reviewing court will not disturb a trial court's ruling regarding competency of a witness unless the ruling constitutes an abuse of discretion. *Williams*, 383 Ill. App. 3d at 632, 891 N.E.2d at 931. "This deference is given because the trial court, unlike the reviewing court, has the opportunity to observe the demeanor, appearance, and conduct of the witness." *People v. Harris*, 389 Ill. App. 3d 107, 125, 904 N.E.2d 1077, 1092 (2009).

¶ 26 In the instant case, defendant recognized it was his burden to show E.H. was incompetent to testify. The trial court refused to exclude witnesses at the hearing, noting that the facts were not in issue at the hearing, the only issue was E.H.'s and S.H.'s competency. The clerk specifically asked E.H. during the swearing in: "Do you swear to tell the truth, the whole, truth, and nothing but the truth, so help you God? You're gonna tell the truth, correct?" E.H. replied, "Uh-huh." The trial court then asked that E.H. be sworn in again after it was evident that E.H. raised her left hand rather than her right hand as she was told. E.H. then raised her right hand, and the clerk then asked, "Do you solemnly swear the testimony you're about to give is the truth, the whole truth, and nothing but the truth, so help you God." E.H. replied, "Yes."

¶ 27 E.H. gave her name and spelled her last name. She initially said she was "Ten," but corrected herself and said she was "11." She gave her date of birth. Defense counsel then noted that E.H. seemed unsure whether she was 10 or 11, and E.H. said, "I kind of get it confused." She also admitted that she only "[k]ind of" knows her right hand from her left hand. Defense counsel asked whether she is often confused, and E.H. replied, "Sometimes, yeah." E.H. testified that she is in fifth grade and is not in special education classes. She identified the classes she takes. Asked how old she was in 2008, E.H. correctly replied, "Eight years old." She said she could not remember what she did on her birthday, but she could remember that in November 2008, "Joker ended up touching [her]." She did not remember talking about memory pills or talking to "Mrs. Lewinsky [phonetic]." She could not remember drawing pictures or talking to her. At this point the State objected, noting: "I'm going to leave this up to the Court, but I don't know that these questions go to her ability to express herself or to know or do—to tell the truth. I think this is more of a discovery deposition as to the case in question. I don't think it's relevant to the statute." The trial court overruled the objection, "for the time being," but warned the defense attorney not to "turn it into a deposition." The following colloquy then ensued between defense counsel and E.H.:

"Q. [Defense counsel:] What causes you to—to you stated that [defendant] touched you?

A. [E.H.:] Um, I was in—I was—

Q. I didn't ask you about that. Just, do you remember that?

A. Yes.

Q. Okay. And why do you remember that?

[Prosecutor:] Judge, now we're right on the facts of the case.

The Court: Sustained.

[Defense counsel:] Pardon?

The Court: Sustained.

[Defense counsel:] I didn't hear you.

The Court: As far as a deposition, going into the facts—

[Defense counsel:] Okay.

The Court:—of the case. If you're going to—to show her ability to relate the story, that's one thing, but—but to cross examine her on the particulars is another.

Q. [Defense counsel:] Do you—I'll ask you, do you remember those facts?

A. [E.H.:] I don't think so.

Q. I have no further questions."

The prosecutor said he had no questions for E.H., and she was allowed to step down.

¶ 28 While the record reflects that E.H. was confused about which was her right hand and which was her left hand, initially said she was 10, even though she was actually 11, and admitted that she is sometimes confused, none of these is enough, either separately or together, to make her incompetent to testify. E.H. gave her date of birth, identified herself as being in fifth grade, and discussed the classes she was taking. She also correctly identified that she was eight years old when the alleged abuse occurred. While we are somewhat concerned about the trial court's lack of discussion about whether E.H.

understood the difference between telling the truth and not telling the truth, the record here shows that the trial court made the clerk swear E.H. in twice in order to ensure that she raised her right hand while being sworn in and answered yes when asked if she would tell the truth.

¶ 29 Defense counsel makes much ado about E.H. not being able to remember the CAC interview or the "memory pills" which E.H. said she was taking when she was interviewed at the CAC, but could not recall during the competency hearing. However, as the State points out, the competency hearing was held on October 6, 2011, long after the CAC interview and long after E.H. had come to understand that the pills were not for memory. Nicole testified at trial that the pills were actually Prozac which were prescribed after the alleged abuse. The deficiencies in E.H.'s testimony as pointed out by defendant are not sufficient for us to substitute our judgment for that of the trial judge, who was in a better position to observe E.H.'s demeanor, appearance, and conduct. After careful consideration, we cannot say the trial court abused its discretion in finding E.H. competent to testify.

¶ 30 The second issue raised on appeal is whether the defense counsel was ineffective for failing to impeach E.H. with testimony from her competency hearing. Defendant again complains that at the competency hearing, E.H. could not remember having an interview at the CAC with Ms. Liszewski in which she reported she was taking memory pills nor could E.H. remember the details of the underlying complaint. Defendant contends that E.H.'s inability to recall these matters only three months before trial directly impacted her credibility and should have been addressed by defense counsel to bolster the

defendant's theory that E.H. was being coached. Defendant insists that his trial counsel was ineffective for failing to impeach E.H. with this information and for this reason he is entitled to a new trial. We disagree.

¶ 31 Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), under which a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697. In evaluating the prejudice prong, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Given the variety of circumstances faced by defense counsel and the range of decisions regarding how to best represent a defendant, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. A defendant claiming ineffective assistance must overcome a strong presumption that the challenged action of defense counsel constituted sound trial strategy, not incompetence. *People v. Harris*, 129 Ill. 2d 123, 156, 544 N.E.2d 357, 371 (1989).

¶ 32 Defendant asserts that at trial, E.H. remembered her interview at the CAC, but could not recall it at the competency hearing, and, therefore, defense counsel should have impeached her on this issue. However, the purpose of the competency hearing was only to determine whether or not E.H. was competent to testify. The trial court made it

abundantly clear that it was not going to allow defense counsel to cross-examine E.H. about the allegations of abuse. E.H. succinctly stated at the competency hearing that defendant touched her; however, when she tried to elaborate, she was cut off. Moreover, the interview at the CAC with Ms. Liszewski was recorded, played for the jury, and introduced into evidence. Thus, the jury was aware that E.H. said her mother gave her memory pills. During trial, E.H. also remembered that she said she took memory pills dispensed by her mother, but then explained that they were not actually memory pills, but were given to her to help with her attitude. As previously discussed, Nicole explained that the pills were actually Prozac. Thus, we fail to see how defendant was prejudiced by defense counsel's failure to impeach E.H. about the memory pills, as the pills were adequately explained.

¶ 33 E.H. turned 11 years old only a few weeks prior to the trial. Badgering her might have effectively turned the jury against defendant, as it is questionable whether there is any merit in cross-examining minors regarding discrepancies in their testimony. See *People v. Oats*, 2013 IL App (5th) 110556, ¶ 35, 993 N.E.2d 600. We believe defense counsel's decision not to impeach E.H. with testimony from her competency hearing is an example of trial strategy which deserves judicial deference.

¶ 34 The final issue raised in this appeal is whether defendant is entitled to additional credit for time served in pretrial custody. Defendant was arrested by police in Ohio on October 5, 2010, and arrived in Illinois on October 12, 2010. He was released on bond in Illinois on October 26, 2010. The trial court only awarded defendant credit for 14 days of pretrial custody for the time spent in prison in Illinois prior to posting bond. The State

agrees that defendant is entitled to credit for the time he was detained in Ohio prior to being sent to Illinois. Thus, defendant is entitled to 22 days credit for time served in pretrial custody in both Ohio and Illinois from October 5, 2010, until October 26, 2010. Pursuant to our authority under Supreme Court Rule 615 (eff. Jan. 1, 1967), we order the correction of the mittimus to reflect 22 days credit for time served prior to sentencing rather than the 14 days ordered by the trial court.

¶ 35 Affirmed with correction to the mittimus.