2016 IL App (2d) 140587-U
No. 2-14-0587
Order filed October 14, 2016



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>JASON R. MILLER,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Kane County.<br><br><br><br>No. 12-CF-154<br><br>Honorable James C. Hallock, Judge, Presiding. |

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

**ORDER**

¶ 1 *Held*: (1) Defense counsel was not ineffective for failing to use a peremptory challenge: his failure was part of a reasonable strategy to obtain more peremptory challenges, and, in any event, defendant was not prejudiced, as the juror at issue had shown no bias or prejudice; (2) defense counsel was not ineffective for failing to object to the State's closing argument: the State did not rely substantively on evidence limited to impeachment, and, in any event, defendant was not prejudiced, as the jury was instructed on the proper use of the evidence, the State's reliance on that evidence was limited, and the evidence of guilt was substantial.

¶ 2 Defendant, Jason R. Miller, appeals from his conviction of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)), asserting that his trial counsel was ineffective

for failing to use a peremptory challenge against a particular juror and for failing to object to the State's use, during closing argument, of impeachment evidence as substantive evidence. Because counsel's decision regarding the peremptory challenge was a matter of trial strategy, the State did not use the impeachment evidence substantively, and, in either event, defendant was not prejudiced, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on four counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)) against a female under 13 years old. Defendant opted for a jury trial.

¶ 5 At the start of jury selection, the trial court informed the attorneys that it did not allow back-striking.[1] During *voir dire* of the first panel, defense counsel exercised three of his seven peremptory challenges to remove potential jurors who either had been, or had friends or relatives who were victims of sexual abuse.

¶ 6 The final juror questioned on the first panel was Juror No. 8. He stated that his wife had revealed about five years earlier that when she was young she had been sexually abused by a family member. After Juror No. 8 stated that he would be able to sign a not-guilty verdict if the State failed to prove defendant guilty beyond a reasonable doubt, defense counsel asked him if he would have any qualms about doing so. He responded that that was a "hard question to answer. I mean qualms, no. I've seen the emotional damage that has been done through my lifetime, and I mean I can't just block that out." When counsel asked if Juror No. 8 could reach a verdict independent of what happened to his wife, he answered, not "[o]ne hundred percent

[1] Back-striking refers to the exercise of a peremptory challenge against a member of a panel already accepted by counsel. *People v. Dixon*, 382 Ill. App. 3d 233, 241 (2008).

independent," because that was "part of [his] life." Recognizing that what happened to his wife was part of his life, counsel asked him if he could be fair. He answered that "[he] believe[d] [he could] be fair." Counsel accepted Juror No. 8.

¶ 7 During a recess, defense counsel, who had four peremptory challenges remaining, requested that the trial court allow him three additional peremptory challenges, contending that, because of the unusual number of potential jurors who were, or knew, victims of sexual abuse, he felt forced to accept jurors whom he would not otherwise accept. Referring to Juror No. 8, he commented that he took a juror "that nobody in their right mind would take." He added, for the record, that he did so only because he was "running out of [peremptory challenges] already." Counsel told the court that if he were granted additional peremptory challenges he would use one to exclude Juror No. 8.

¶ 8 The trial court denied the request for additional peremptory challenges. Defense counsel, in turn, asked that Juror No. 8 be excused, because it was "impossible for him to be fair."[2] Observing that Juror No. 8 had said that he could be fair, the court denied the request to excuse him. Defense counsel never used any of his remaining peremptory challenges.

¶ 9 The following evidence was established at the jury trial. For several years, defendant lived with the victim (M.D.), her parents, and her older brother (I.P.). Defendant had his own bedroom, which was located near the kitchen and M.D.'s parents' bedroom. Defendant had his own computer in his bedroom.

[2] Counsel did not specify whether he was seeking to challenge Juror No. 8 for cause or peremptorily.

¶ 10 On January 19, 2012, M.D. was sent to the principal's office because she had hit a classroom assistant. The principal, Twila Garza, was with a high school senior, Miguel Hernandez, who was "shadowing" Garza for the day.

¶ 11 When Garza asked M.D. if it was okay to hit someone, M.D. responded that it was not, but that she hit defendant, whom she referred to as her uncle, all the time because he touched her inappropriately. M.D. pointed to her vagina and buttocks as the places where defendant touched her. Garza immediately reported the incident to the Department of Children and Family Services (DCFS).

¶ 12 According to Hernandez, M.D. went "on and on" about defendant touching her, including that she told her mother and that her mother did not do anything about it. M.D. said that she would hit defendant when he touched her and that her mother would get mad at her for hitting him. M.D. added that her mother did tell defendant to stop one time. Hernandez described M.D.'s demeanor as going from playful to "like wanting to cry" as she talked about defendant's conduct. Hernandez could not recall Garza talking about herself being abused as a child or having flashbacks. Garza denied discussing her own background with M.D.

¶ 13 The next day, when Garza saw M.D. in the hallway, M.D. told her that the "bad man" had been taken away in handcuffs. She also told Garza that defendant had touched her brother. Garza did not remember M.D. saying that her mother knew about the abuse. According to Garza, after M.D.'s disclosure, M.D. quit kicking Garza, hitting others, hiding under her desk, and sucking her thumb. The frequency of M.D's being sent to Garza's office for discipline drastically dropped.

¶ 14 Orlando Arroyo, a DCFS investigator, went to M.D's home later on the same day that M.D. spoke to Garza. After explaining to her parents why he was there, Arroyo met alone with

M.D. He did so because M.D.'s father appeared volatile and stated that he wanted to hurt defendant. Arroyo audio-recorded the meeting, and a transcript of that recording was admitted.

¶ 15 According to the transcript, M.D. told Arroyo that her mother, father, and brother kissed her. When Arroyo asked if anyone else touched her body, M.D. said that defendant touched her "private area." When Arroyo asked what her private area was, she said her "va-jay-jay and [her] butt." M.D. told Arroyo that when defendant touched her he did so by placing his hand underneath her pants. When he touched her "va-jay-jay" he would tell her that she was beautiful. She added that defendant would touch her brother's private parts. M.D. said that the last time defendant touched her was a few weeks earlier when the snow was high and they had been sledding. M.D. told Arroyo that defendant would take his hand out of her pants and do "his computer stuff." He showed her photographs of naked "[g]irls" on his computer. M.D. added that she knew that defendant was a molester.

¶ 16 When asked if the bedroom door was open or shut when defendant touched her, M.D. told Arroyo that it was "[o]pen and closed." She added that her "mom notice[d]" defendant touching her, because the door was open. When Arroyo asked M.D. what her mother said to defendant, M.D. answered that her mother told him that she would kick him out. Her mother also told defendant that she would break his stuff and kill him if she saw him do it one more time. M.D. told Arroyo that defendant never did it again. M.D. denied that she ever told anyone at school about defendant touching her.

¶ 17 M.D. testified that, because she had told a lie, defendant stopped living with her and her family. She could not remember him ever showing her anything on his computer, although she and her brother were allowed to use defendant's computer. She denied talking with her parents about defendant or that they told her how to testify. She denied that anyone had touched her

inappropriately. She could not recall talking to Garza about anyone touching her private areas. Nor could she remember telling anyone that defendant showed her photos of naked girls or that he touched her private areas. She did not recall telling her father that defendant touched her. She did not remember her mother seeing defendant touch her. M.D. denied that defendant ever touched her inappropriately. Although her parents told her to tell the truth, they did not tell her what the truth was. They also told her to never lie again.

¶ 18 According to M.D.'s mother, Susy P., defendant was a close family friend who lived with them for several years. She admitted that she had sex with defendant one time in 2005 and had photos of him naked on her cellphone. Susy did not tell M.D.'s father, James D.,[3] about the affair with defendant until after the investigation began.

¶ 19 Susy knew that defendant had adult pornography on his computer. She, M.D., and I.P. would tease defendant about the pornography. After defendant's arrest, Susy found a CD containing photos of naked women in defendant's room and gave it to the police. When Arroyo told Susy that M.D. had alleged that defendant had touched her, Susy denied that it occurred.

¶ 20 After meeting with the prosecutor, Susy became concerned that she might be prosecuted. Susy subsequently hired her own attorney.

¶ 21 According to Susy, on September 29, 2012, James called her at work to tell her that M.D. had recanted. She left work and went home to talk with M.D. M.D. told her that she had lied about defendant and that he had never touched her.

¶ 22 Julie Pohlman, a case manager for the Children's Advocacy Center (CAC), testified that, during the second day of trial, she overheard a conversation between Susy, James, and I.P. in a conference room adjacent to the courtroom. According to Pohlman, she heard Susy tell I.P. that

[3] James was engaged to Susy.

he needed to tell the truth because the police would enjoy taking him and M.D. away from the family. M.D. was present for that conversation.

¶ 23 In explaining that incident, Susy testified that she told I.P. to shut up because he had been acting up and disrespectful. James testified that he told I.P. that if I.P. misbehaved in court I.P. would be arrested. James denied that either he or Susy told I.P. how to testify.

¶ 24 Laurie Riehm, a licensed clinical social worker, testified for the State as an expert on the dynamics of child sex abuse. Riehm opined that a victim could delay disclosing sex abuse because she told a parent and the parent failed to take immediate action. If a child disclosed the abuse to a person who she thinks did not believe her, that child is more likely to recant. A child also might recant if she believes that a family member could get in trouble because of her disclosure. Recantation is not uncommon in child sex abuse cases, but recantation does not mean that the abuse never occurred. Riehm admitted that she never had met with, or interviewed, M.D.

¶ 25 According to James, he and Susy spoke to M.D. and I.P. several times before the incident about being touched inappropriately. Before January 19, 2012, M.D. had never complained about being touched inappropriately.

¶ 26 James and Susy spoke to M.D. within a day after January 19, 2012. During that conversation, M.D. said that defendant had touched her inappropriately five times and that he had done so over her clothing. She also said that she tried to hit defendant when he was touching her. According to James, M.D. stated that, when she talked to Garza, Garza told her that Garza's uncle had abused her and that she had suffered flashbacks.

¶ 27 On September 29, 2012, James was at home when M.D. asked him if he liked the stuffed animals that Susy had purchased. When M.D. said that she had accompanied Susy to the store to

purchase the animals, James knew that she was lying, because M.D. had been at home with him when Susy went to the store. When James asked M.D. why she had lied, M.D. smirked and ran to her bedroom. James then told M.D. that he was not surprised that she would lie because she had been lying a lot during the past year. James then told M.D. that he did not believe her accusations about defendant. According to James, M.D. smirked again and said that she "lied about everything." James immediately called Susy at work and told her about M.D.'s recantation. James denied telling M.D. that she would get a good birthday or Christmas present if she told the truth that defendant never touched her. James admitted that Susy was concerned about going to jail because of M.D.'s accusations that she knew that defendant had touched M.D. Thus, she felt the need to hire an attorney.

¶ 28 Defendant denied having ever touched M.D. or her brother inappropriately. He admitted having been alone with M.D. but never in his bedroom. According to defendant, he cooperated with the investigation, including speaking to the police and consenting to a search of his computer. When an investigator asked him if M.D. was lying, defendant said that he could not answer that question, because he "didn't want to call [M.D.] a liar." When asked why not, defendant testified that he did not call people he cared about liars. Defendant admitted having had sex with Susy once in September 2005. The affair had remained a secret between him and Susy. Defendant was told that his parents came and removed his computer the day after Arroyo was at the house, although they did not get the rest of his belongings until later. He could not remember telling his parents to remove the computer.

¶ 29 On October 2, 2012, Pam Ely, an investigator with the CAC, spoke with M.D. at her school. M.D. was carrying a pink stuffed unicorn. When Ely asked M.D. if she had any problems at home, M.D. said that her "mother was worried about going to somewhere." M.D.

told Ely that the police were mad at her for lying. M.D. stated that her father had told her that she would get a really good birthday or Christmas present for telling the truth. M.D. said that the present would be a unicorn or something ending with the word dog. According to Ely, M.D. said that she did not feel safe with, and was afraid of, defendant because "he like[d] to ride bikes and [M.D. didn't] like to do that." Ely admitted that M.D. never said that her mother was worried about going to jail or being prosecuted.

¶ 30 After the close of evidence, defendant asserted that Ely's testimony should be limited to impeachment only and that neither party could rely on it as substantive evidence. The State responded that, although it would rely on Ely's testimony, it was not going to argue as to what type of evidence it was. The trial court ruled that the evidence was "impeachment and [the parties] can't argue that it's substantive evidence." The court instructed the jury that the "believability of a witness could be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case," and that such evidence could "ordinarily be considered by you for the limited purpose of deciding the weight to be given the testimony you heard from the witness in the courtroom."

¶ 31 During closing argument, the State referred to Ely's testimony. In doing so, the State noted that Ely testified about M.D.'s statements for the purpose of "impeach[ing] [M.D.]." In rebuttal, the State again referred to Ely's testimony that M.D. told her she was promised a really good present if she told the truth. Defendant did not object to either reference to Ely's testimony.

¶ 32 The jury found defendant guilty of all four counts. Defendant filed a motion and amended motion for a new trial, contending, in part, that the trial court erred when it refused to allow defense counsel to back-strike Juror No. 8. Neither motion raised any issue as to the

State's references to Ely's testimony during closing argument and rebuttal. The court denied both motions and sentenced defendant to 24 months' probation. Defendant filed a timely notice of appeal.

¶ 33 II. ANALYSIS

¶ 34 On appeal, defendant contends that his trial counsel was ineffective for: (1) failing to timely use a peremptory challenge to remove Juror No. 8; and (2) failing to object to the State's use, during closing argument, of Ely's testimony as substantive evidence.

¶ 35 Claims of ineffective assistance of counsel are assessed under the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Lopez*, 371 Ill. App. 3d 920, 928 (2007). To prevail on such a claim, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's deficient performance so prejudiced the defendant as to deny him a fair trial. *Lopez*, 371 Ill. App. 3d at 928. The failure to show either prong defeats the claim. *Lopez*, 371 Ill. App. 3d at 928-29.

¶ 36 As for the first prong, a defendant must overcome a strong presumption that, under the circumstances, the challenged action or inaction was sound trial strategy. *Lopez*, 371 Ill. App. 3d at 929. Matters of trial strategy are generally immune from claims of ineffective assistance of counsel. *Lopez*, 371 Ill. App. 3d at 929 (citing *People v. West*, 187 Ill. 2d 418, 432 (1999)).

¶ 37 In regard to the second prong, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Lopez*, 371 Ill. App. 3d at 929 (citing *People v. Johnson*, 206 Ill. 2d 348, 362 (2002)). A lack of prejudice will defeat a claim of ineffectiveness. *Lopez*, 371 Ill. App. 3d at 929.

¶ 38 We first address defendant's claim that his trial counsel was ineffective for failing to timely use a peremptory challenge to remove Juror No. 8. A defense counsel's conduct during

jury *voir dire* is a matter of trial strategy that generally is not subject to scrutiny under *Strickland*. *People v. Metcalfe*, 202 Ill. 2d 544, 562 (2002). The decision as to whether to exercise an available peremptory challenge is a strategic one. *People v. Bowman*, 325 Ill. App. 3d 411, 428 (2001).

¶ 39 In this case, defense counsel's decision not to initially use a peremptory challenge against Juror No. 8 was purely strategic. Indeed, counsel told the trial court that he did not use a peremptory challenge against Juror No. 8 only because, given the unusual number of potential jurors who had either been or known a victim of sexual abuse, it appeared that he would need additional peremptory challenges. As it turned out, counsel never used all of his original peremptory challenges. Nonetheless, his failure to use one on Juror No. 8, as part of an effort to obtain more, was reasonable trial strategy under the circumstances, and thus does not support a claim of ineffectiveness.

¶ 40 Even if the decision not to peremptorily challenge Juror No. 8 was deficient, defendant suffered no prejudice. Although Juror No. 8's wife had been the victim of sexual abuse, when asked he unequivocally stated that he would be fair and that he could sign a not-guilty verdict if the State failed to prove defendant guilty beyond a reasonable doubt. Even though he acknowledged that he could not block out the fact that his wife had been sexually abused, that alone did not evince that he was biased or prejudiced, particularly in light of his statement that he would be fair. By failing to identify any bias or prejudice of Juror No. 8, defendant has not shown that the verdict would probably have been different had Juror No. 8 not been on the jury. See *Bowman*, 325 Ill. App. 3d at 428-29.

¶ 41 We next address whether defendant's counsel was ineffective for failing to object to the State's use of Ely's testimony during closing argument. He was not.

¶ 42 Any witness may be impeached by a prior inconsistent statement when the witness's testimony damages the impeaching party. *People v. Bradford*, 106 Ill. 2d 492, 500 (1985). The State may choose to have the impeaching statements admitted into evidence. *Bradford*, 106 Ill. 2d at 500. The purpose of impeachment is to adversely affect witness credibility and not to establish the truth of the impeaching evidence. *People v. Acklin*, 208 Ill. App. 3d 616, 624 (1990) (citing *Bradford*, 106 Ill. 2d at 499). If a prior inconsistent statement is introduced into evidence only for the limited purpose of impeachment, and not as substantive evidence, a limiting instruction must be given, and the State may not use that testimony as substantive evidence during closing argument. *People v. Lambert*, 288 Ill. App. 3d 450, 461 (1997) (citing *Bradford*, 106 Ill. 2d at 501-02). The applicable limiting instruction in that regard is Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000) (I.P.I. No. 3.11). See *Bradford*, 106 Ill. 2d at 501-02.

¶ 43 In recanting in court, M.D. denied that her parents persuaded her to do so or told her how to testify. During closing argument, the State, consistent with the trial court's ruling, told the jury that it was relying on Ely's testimony to impeach M.D's testimony. In its relatively brief reference to Ely's testimony, the State never indicated that it was using Ely's testimony for anything other than impeachment. The same is true for the terse reference during rebuttal to Ely's testimony that M.D. told her that she was promised a good present if she told the truth. In mentioning that part of Ely's testimony, the State argued that it showed, consistent with Riehm's expert testimony, that a child could be influenced to recant. Again, that argument was that Ely's testimony impeached M.D's testimony that she was not persuaded to recant. Because the State used Ely's testimony for the limited purpose of impeaching M.D's testimony that she was not told how to testify, counsel was not ineffective for failing to object during closing argument.

¶ 44 Even if trial counsel was deficient in that regard, such deficiency was not prejudicial. First, the trial court instructed the jury, pursuant to I.P.I. No. 3.11, that it was to consider evidence such as Ely's for the limited purpose of weighing a witness's testimony. That instruction significantly reduced the likelihood that the jury considered Ely's testimony as substantive evidence. Second, the State's reliance on Ely's testimony was limited. That further reduced its impact. Finally, there was substantial evidence of defendant's guilt. Significantly, Garza, Hernandez, and Arroyo all testified that M.D. told them that defendant had sexually abused her. James admitted that M.D. told him and Susy that defendant had touched her inappropriately several times. The evidence further showed that it was not until after Susy became concerned that she might be held responsible for the abuse that M.D. suddenly changed her story. Because of the limiting instruction, the minimal use of Ely's testimony, and the ample evidence against defendant, the verdict probably would not have been different had counsel objected to the use of Ely's testimony. Thus, defendant has not established ineffective assistance of counsel in that regard.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the judgment of the circuit court of Kane County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 47 Affirmed.