2016 IL App (5th) 140083-U

NO. 5-14-0083

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Bond County.
	)	
v.	)	No. 13-CF-67
	)	
JOHNNY R. BROWN,	)	Honorable
	)	John Knight,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Chapman and Stewart[*] concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in not giving Illinois Pattern Jury Instruction, Criminal 4th No. 11.66 in connection with the use of the minor victim's hearsay statements during trial. Defendant was properly proven guilty of aggravated battery of a child, and he was not denied effective assistance of trial counsel. Additionally, the prosecutor's cross-examination of defendant was not improper.

¶ 2 Defendant, Johnny R. Brown, was convicted after a jury trial of aggravated battery of a child and was sentenced by the circuit court of Bond County to 11 years' imprisonment

[*]Judge Stewart fully participated in the decision prior to his retirement. See *Cirro Wrecking Co. v. Roppolo*, 153 Ill. 2d 6, 605 N.E.2d 544 (1992).

with 3 years' mandatory supervised release. Defendant appeals his conviction contending he was denied effective assistance of trial counsel, the prosecutor's cross-examination of him was improper, and the trial court erred in not giving a certain jury instruction pertaining to the minor victim's hearsay statements. We affirm.

¶ 3 On August 4, 2013, the 2½-year-old victim was home alone with his stepfather. The victim's mother claimed she left the victim in defendant's care, for the first time, for about 20 minutes while she checked on the health of a nearby friend. The victim's mother and defendant had only been married some three weeks. Originally, defendant was going to go with the victim's mother to the friend's house, but according to the mother, defendant was upset with the victim because he could not dress himself properly. Defendant announced that he would be staying home with the victim instead. When the mother returned from the friend's house, she found the victim holding a piece of frozen meat to his head. When she asked what had happened, defendant claimed he was watching television in another room while the victim was in his room jumping on the bed. After hearing a thump coming from the victim's room, defendant went to check on him. He found the victim getting up off the floor. According to defendant, the victim apparently fell off the bed, hit his head on a rocking chair or the side of the bed or both before hitting the floor. He noticed that one side of the victim's head felt soft. He did not have any ice, so he retrieved a frozen piece of meat to apply to the victim's head. While mother claimed defendant told her that the victim did not need to go to the hospital, defendant stated he wanted to take the victim to the hospital but she was afraid to go. The mother took the victim to see a neighbor, and it was determined that the child needed to see someone as soon as possible. Mother took the child

to the nearest hospital. She told hospital personnel the story defendant related as to how the victim was injured. Out of fear of getting in trouble herself, she also told hospital personnel that she was home when the victim was injured. Once she learned that the boy's injuries were very severe, and were not consistent with a fall, she told the truth that the victim had been left alone with defendant. The mother also testified that defendant started abusing the victim shortly after they got married. According to her, defendant routinely came home from work in a bad mood which he took out on the victim.

¶ 4 Because of the severity of his injuries, the victim was transferred by ambulance to a children's hospital in St. Louis, Missouri. This time defendant went to the hospital with the victim's mother. Defendant denied inflicting any of the injuries to the victim, and continued telling the victim's mother that the child had fallen off his bed. The victim stayed in the hospital for three days, and was taken into protective custody by the Division of Children and Family Services.

¶ 5 The pediatric intensive care unit nurse for the children's hospital was one of the first to assess the victim after his arrival. Even though she had been treating children for some 34 years, she testified that she was shocked at the severity of the swelling on the left side of the victim's head, as well as the massive amount of bruising to his whole head. She believed the massive, soft tissue swelling to the victim's head, along with the amount of bruising about his face, neck, and behind his ear, were consistent with blunt force trauma, or being hit, punched or slammed against something multiple times, as opposed to an accidental fall. She also noted a loop mark on the victim's cheek, typical from being hit with something with a loop or finger or a hand, consistent with being slapped. When she questioned the victim as

to how he had been injured, the victim responded "daddy did it." Both the victim's mother and defendant were present in the room at that time. Defendant made no comment. The victim later repeated the same statement to others as well, when asked about the source of his injuries. On their way home from the hospital, defendant again told the victim's mother that he did not hurt the child, and that he did not know what happened, other than he had heard a thump, went into the boy's room, and helped him up off the floor.

¶ 6 Dr. Linda Shaw, a child abuse pediatrician since 2009, testified that the victim had extensive bruising and swelling to both sides of his head, forehead, ears, and buttocks, along with other scattered bruises, all consistent with abuse and not from an accidental fall. She noted that one rarely sees bruising to a child's ears in any kind of accidental injury, and that most children who have suffered an accidental fall from a bed usually exhibit a knot on the head with little swelling. She further noted that the swelling to the left side of the victim's face was so significant that there was concern for underlying injury. She concluded, to a reasonable degree of medical certainty, that the victim's injuries were consistent with child abuse. She believed the victim had been struck repeatedly with an object or a body part or slammed into something.

¶ 7 At trial, defendant denied any responsibility for the injuries to the victim. He pointed out that he had been married before, and helped his first wife raise her five children from a previous relationship. He never mistreated or harmed any of the children, or acted violently. Even after the couple's divorce, defendant maintained close relationships with his former stepchildren with the two youngest living with him at various times. Defendant claimed he got along well with the victim, and regularly engaged in "father and son" activities. He

further claimed that the victim's mother often left the victim alone with him before and after the marriage, and that his form of discipline was light spanking.

¶ 8 The jury chose not to believe defendant's version of the incident and found him guilty of aggravated battery of a child. Defendant argues on appeal that he was denied a fair trial by having the victim's hearsay statements repeatedly elicited from the State's witnesses without proper instruction for considering such statements, as required by statute. He also contends he was denied his right to a fair trial when the State improperly impeached him during cross-examination and failed to present any supporting evidence after defendant denied the State's accusations. Defendant also asserts his constitutional right to effective assistance of counsel was violated when trial counsel failed to provide an effective opening statement. We find little merit to defendant's contentions on appeal, and therefore affirm his conviction.

¶ 9 Defendant first argues on appeal that the trial court erred in not giving Illinois Pattern Jury Instruction, Criminal 4th No. 11.66, as mandated by statute, when the victim's hearsay statements were relied upon heavily to prove defendant guilty of aggravated battery of a child. Section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2012)) allows introduction of a minor complainant's hearsay statements regarding acts of physical or sexual abuse against him to counteract the difficulties of minors testifying inadequately. See 725 ILCS 5/115-10(a)(2) (West 2012); *People v. Mitchell*, 155 Ill. 2d 344, 351-52, 614 N.E.2d 1213, 1216 (1993). The statute also recognizes the potential for such hearsay statements to unfairly prejudice a defendant accused of abuse, and therefore also provides for safeguards, specifically that the jury be instructed on how to weigh such hearsay

statements admitted under section 115-10(c). See 725 ILCS 5/115-10(c) (West 2012). Defendant believes he was denied his right to a fair trial because of the court's failure to properly instruct the jury as to how to consider the minor complainant's hearsay statements. Given that the error is clear and obvious, defendant further contends it was plain error not to give the instruction as required by section 115-10. See *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 59, 995 N.E.2d 446. Defendant argues that the evidence was closely balanced, and that the jury's verdict rested upon a credibility determination between defendant and the minor victim, who did not testify. He further contends his trial counsel was ineffective for failing to request that the jury be instructed in accordance with section 115-10, given that the failure to tender an instruction relevant to the credibility of essential state evidence clearly prejudices a defendant. See *People v. Wheeler*, 401 Ill. App. 3d 304, 314, 929 N.E.2d 99, 108 (2010).

¶ 10 As the State points out, to keep the victim from having to testify, defendant agreed to stipulate to the admissibility of the victim's four consistent hearsay statements identifying defendant as the source of his injuries. Parties may stipulate to the admissibility of hearsay statements, including hearsay that would otherwise be inadmissible. See *People v. Sclafani*, 166 Ill. App. 3d 605, 610, 520 N.E.2d 409, 413 (1988). When hearsay statements are admitted pursuant to the parties' stipulation, the State need not show any other basis for the statements' admissibility. *Sclafani*, 166 Ill. App. 3d at 610-11, 520 N.E.2d at 413. By agreeing to a general stipulation to the statements' admissibility as substantive evidence, the defendant relieved the State of the need to establish the admissibility of the victim's statements under section 115-10, or any other statutory or common law basis. The

stipulation also relieved the State of the necessity of submitting proof on the issue. *People v. Woods*, 214 Ill. 2d 455, 468-69, 828 N.E.2d 247, 256 (2005). In this instance, the statements were admitted as substantive evidence pursuant to the stipulation of the parties, not pursuant to any statutory exception, specifically section 115-10. 725 ILCS 5/115-10 (West 2012). Illinois Pattern Jury Instruction, Criminal 4th No. 11.66 is required to be given only when hearsay statements are admitted pursuant to section 115-10. Because the statements here were not admitted pursuant to section 115-10, the instruction was inapplicable, and the trial court did not err in not giving the instruction. Moreover, omitting IPI Criminal 4th No. 11.66 is not error where the minor's hearsay statements are admitted pursuant to another basis in addition to section 115-10. *People v. Caffey*, 205 Ill. 2d 52, 109, 792 N.E.2d 1163, 1199 (2001). Lastly, because the jury instruction did not apply, trial counsel was not ineffective for not requesting it. When a defendant is not entitled to a specific jury instruction, defendant's counsel cannot be ineffective for failing to request it. See *People v. Salas*, 2011 IL App (1st) 091880, ¶ 93, 961 N.E.2d 831.

¶ 11 Even if the victim's hearsay statements had been admitted pursuant to statutory exception, the omission of IPI Criminal 4th No. 11.66 would not be error under the circumstances presented here. First, defendant never tendered the instruction to the trial court or objected to its omission, and he failed to raise the issue in his posttrial motion, thereby invoking plain error review. Before invoking the plain error doctrine, we must first determine whether any error occurred at all. See *People v. Herron*, 215 Ill. 2d 167, 184, 830 N.E.2d 467, 478 (2005). Here, any possible error was harmless at best. IPI Criminal 4th No. 1.02 instructs juries to consider a minor's age and circumstances under which his or her

hearsay statements were made. When IPI Criminal 4th No. 1.02 is given, the omission of IPI Criminal 4th No. 11.66 is harmless error. See *People v. Sargent*, 239 Ill. 2d 166, 192-94, 940 N.E.2d 1045, 1060-61 (2010); *People v. Richmond*, 341 Ill. App. 3d 39, 50, 791 N.E.2d 1132, 1141 (2003). Here IPI Criminal 4th No. 1.02 was given.

¶ 12 We must also point out, based on our review of the record before us, that there was more than ample evidence to convict defendant of abuse, even without the victim's hearsay statements. Besides the fact that the 2½-year-old victim had no motive to fabricate any statements against defendant, defendant linked himself to the crime by claiming the victim was injured accidently while alone with defendant. The medical evidence showed that the victim had been abused, and that defendant was lying about the source of victim's injuries. The victim had a massive amount of swelling on the left side of his face and head, to the point where his head was deformed, his left ear was tilted out of place, and he had difficulty seeing out of his left eye. He had severe bruising to his face, ears, and forehead, to the sides and back of his head, and to the back of his neck, torso, upper thighs, and buttocks. The multiple sites of injury were consistent with the victim having been struck multiple times. Moreover, injuries to both sides of his head were inconsistent with falling off a bed and hitting something on the way down. The bruising within and behind his ears was not consistent with the accident, as described by defendant, nor was the handprint bruise mark on his right cheek. Both experts gave opinions within a reasonable degree of medical certainty that the victim was not injured in an accidental fall, but rather his injuries were consistent with somebody having struck, punched, slammed or slapped him multiple times on his face, neck, head, torso and buttocks. Defendant had no reasonable explanation for the medical

evidence that belied his story. Even if the victim's hearsay statements had not been admitted into evidence, the medical evidence against defendant was overwhelming.

¶ 13 Defendant next argues on appeal that he was denied the right to a fair trial when the State improperly impeached him during cross-examination and failed to present any supporting evidence after defendant denied the State's accusations. Specifically, defendant contends the State repeatedly insinuated that one of the friends of the victim's mother had personal knowledge that defendant was abusing the victim, and that she wanted to keep the victim away from defendant. The friend was never called as a witness after defendant denied the State's accusations. Defendant believes the State's line of questioning had the effect of allowing her to testify against defendant at trial, without her ever having stepped into the courtroom, and being subjected to cross-examination. According to defendant, the incomplete impeachment misled the jury, thereby depriving him of his right to a fair trial.

¶ 14 We initially note that defendant forfeited the issue because he failed to object to the cross-examination, move for a mistrial at the close of the State's rebuttal case, or include the issue in his posttrial motion. *People v. Williams*, 165 Ill. 2d 51, 60, 649 N.E.2d 397, 402 (1995). Assuming the issue was not forfeited, we acknowledge that the State may not impeach a defense witness by asking a leading question that insinuates a fact not in evidence, unless the State has the good-faith intent and ability to complete the impeachment by introducing admissible evidence to prove the insinuation. *People v. Williams*, 204 Ill. 2d 191, 211-12, 788 N.E.2d 1126, 1139 (2003). Here, there were no insinuations unsupported by the evidence. Rather, the cross-examination of defendant was based on reasonable inferences from the evidence, including defendant's own testimony. Defendant's abuse of

the victim was already in evidence through the mother's testimony. More importantly, defendant explained that the friend's motive for getting the victim away from him was, in fact, her belief that defendant's house was unfit for the victim. Defendant did not merely deny the State's inference. He, in fact, gave a reasonable explanation which reduced any damage the State's inference could have done. We also note that incomplete impeachment is only reversible error when the State engages in a pattern of "substantial numbers" of prejudicial and unsupported insinuations. When the error is not repeated, it is not reversible. See *People v. Amos*, 204 Ill. App. 3d 75, 82, 561 N.E.2d 1107, 1113 (1990). Here the error was not repeated. In fact, the friend's name was not brought up again during the rest of the trial, nor was she mentioned in closing argument.

¶ 15 For his final point on appeal, defendant contends he was denied effective assistance of counsel when defense counsel gave a short opening statement at the close of the State's case. Defendant believes counsel's opening statement was not effective, presented no theory of his case, and allowed the jury to form an opinion of the case based on the State's evidence. He further asserts counsel's closing argument was ineffective given that he argued reasonable doubt because it was his "job" to do so.

¶ 16 We agree with the State that defendant's trial counsel did not provide ineffective assistance by deferring his opening statement to the close of the State's case, and keeping it very short. Even delivering a perfunctory opening statement is a matter of trial strategy, and is not ineffective. *People v. Leeper*, 317 Ill. App. 3d 475, 484, 740 N.E.2d 32, 40 (2000). A defendant claiming ineffective assistance of counsel must first show that counsel's representation fell below an objective standard of reasonableness. Counsel's performance

must be so deficient that he did not function as the counsel guaranteed by the sixth amendment. *People v. Perry*, 224 Ill. 2d 312, 342, 864 N.E.2d 196, 214 (2007). Moreover, the totality of counsel's performance is to be evaluated, not just isolated acts. *People v. Mitchell*, 105 Ill. 2d 1, 15, 473 N.E.2d 1270, 1277 (1984). Here counsel asked the jury to give equal attention and consideration to defendant's side of the story, reminding them, in essence, that defendant's testimony was equal in worth to the State's evidence. Additionally, the jury is supposed to decide guilt or innocence based on the evidence, not on what the attorneys say the evidence will be. We conclude that defendant failed to meet his burden of demonstrating prejudice resulting from the brevity of trial counsel's opening statement.

¶ 17 A defendant is entitled to competent, not perfect, counsel. *People v. Palmer*, 162 Ill. 2d 465, 476, 643 N.E.2d 797, 801 (1994). As the State points out, trial counsel's overall performance was effective. He filed pretrial motions and got some evidence excluded, investigated possible defense witnesses, actively conducted *voir dire*, made trial objections, and cross-examined all but one of the State's witnesses. Through his examinations of the witnesses and his closing argument, he presented the defense theory of the case, namely that the victim injured himself accidently, and overzealous hospital and state officials wrongfully blamed defendant. He summarized the flaws in the State's case, and forcefully argued for a verdict of not guilty. We also note that the content of defense counsel's closing argument is a matter of trial strategy and professional judgment, and should not be second-guessed in hindsight. *People v. Franklin*, 135 Ill. 2d 78, 119, 552 N.E.2d 743, 762 (1990). Trial counsel's strategic decisions did not prejudice defendant in this instance. Expert medical

testimony proved the victim was injured intentionally and that defendant's story was incredible.

¶ 18 For the foregoing reasons, we affirm the judgment of the circuit court of Bond County finding defendant guilty of aggravated battery of a child.

¶ 19 Affirmed.