2017 IL App (1st) 153221-U

No. 1-15-3221

Third Division
March 15, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 13899
	)	
RICHARD LARCO,	)	Honorable
	)	William H. Hooks,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Trial counsel was not ineffective in failing to request interpreter for defendant at trial where record indicates defendant admitted he spoke English and conversed in English during questioning by police and in giving inculpatory statement. Moreover, counsel was not deficient for presenting theory that defendant did not touch 11-year-old child's chest for the purpose of sexual gratification.

¶ 2 Following a bench trial, defendant Richard Larco was convicted of the aggravated criminal sexual abuse of a victim under 13 years of age by a person age 17 years old or older (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)). The State alleged that defendant knowingly touched

the breast of A.M., his girlfriend's daughter, while she slept, for the purpose of sexual arousal or gratification. On appeal, defendant contends his trial counsel's performance fell below an objective standard of reasonableness because, due to counsel's oversight, he lacked the benefit of a Spanish interpreter before and during trial, and he asserts he did not fully understand the court proceedings and could not aid in his own defense. Defendant also argues the theory of defense set out by his counsel, namely that the State failed to prove an element of the offense, lacked factual and legal support.

¶ 3 Defendant's bench trial was held on July 17, 2014. Before defendant's trial began, the court admonished defendant regarding his right to a jury trial. Defendant answered "yes" to the trial court's questions, including whether defendant had signed a jury waiver. When defendant was asked if he wanted a "bench or jury trial," defendant responded, "Bench."

¶ 4 A.M. testified that on June 27, 2013, she was 11 years old and lived in a two-bedroom apartment with her mother, Carmela Araujo-M., defendant and her siblings. A.M. slept in a bedroom with her brothers and sister, and her mother and defendant slept in the other bedroom. That night, A.M. wore a gray shirt that buttoned halfway down the front, a T-shirt under the gray shirt and a bra. The gray shirt was buttoned when A.M. went to bed; however, she awoke to find police present and her mother buttoning the gray shirt.

¶ 5 Carmela Araujo-M. testified with the aid of a Spanish interpreter. Defendant was her boyfriend when this incident occurred at their apartment at 4329 South Wood in Chicago. Carmela and defendant had a baby who was about a month old at the time of these events and who slept with them in their bedroom. Defendant was not the father of her other children.

¶ 6 Carmela woke up at 11 p.m. and got up to find defendant because he was not in bed. While standing in the kitchen, she saw defendant, who was standing about five feet away, at the

door of the children's bedroom. Both the kitchen light and bedroom light were on. She testified defendant "was unfastening [A.M.'s] blouse with one hand and with the other, he was touching her breasts." A.M. was asleep while defendant touched her for between 10 and 15 seconds. Defendant stopped when Carmela gasped but did not speak. Carmela called the police, who arrived shortly thereafter. Defendant left the apartment. On cross-examination, she stated defendant's hand was under A.M.'s T-shirt and he removed it when he noticed her nearby. Defendant wore "basketball shorts and a T-shirt" and did not say anything to Carmela when he realized she was standing nearby.

¶ 7 Chicago Police Sergeant Marietta testified that she arrived at 4329 South Wood in response to the call and spoke to defendant in English after being apprised of the situation. Sergeant Marietta asked defendant "if he knew that touching her inappropriately would be considered wrong" and if "he knew it was wrong prior to doing so" and defendant responded "yes" to both questions. A.M.'s mother communicated with the police in Spanish.

¶ 8 Chicago Police Detective Jose Castaneda testified he interviewed defendant at the 16th District police station on June 29, 2013, after defendant was arrested at his workplace and transported to the station. Detective Castaneda testified defendant admitted to touching A.M.'s breast when he saw her sleeping. Defendant said only one button of her shirt was buttoned and, according to the detective's testimony, he "had placed his hand on her shirt and fondled her breast out of sexual curiosity." It is not clear from the detective's testimony what language was used in interviewing defendant. The detective testified he is fluent in Spanish and he interviewed A.M.'s mother in Spanish after defendant had been placed into custody.

¶ 9 Defendant also was interviewed by assistant Cook County State's Attorney (ASA) Andrea Kersten in the presence of Detective Castaneda. Defense counsel stipulated that

defendant was advised of his *Miranda* rights in Spanish and in English. Detective Castaneda testified that during the interview by ASA Kersten, defendant did not indicate that he failed to understand what was being said.

¶ 10 ASA Kersten interviewed defendant in English and typed a written statement in English. Defendant signed each page of the statement. Defendant's statement was entered into evidence and read into the record. In the statement, defendant said he arose from bed at about 11:20 p.m. to use the bathroom, which was next to the bedroom where the older children slept. The children's bedroom was illuminated by an overhead light and several children were sleeping in one bed, with A.M. closest to the door.

¶ 11 Defendant's statement continued:

> "[Defendant] states that as he stood in the doorway of the room, he noticed that [A.M.'s] shirt was unbuttoned and her white bra was showing. [Defendant] states that this made him curious, and it was a sexual curiosity.
>
> [Defendant] states that he was curious to see how [A.M.'s] body had matured, since he has known her since she was 8 or 9 years old. ***
>
> [Defendant] states that he reached out and touched [A.M.'s] breast with his hand. [Defendant] states that he knew what he was doing was bad, so he stopped and tried to button her shirt back up."

¶ 12 Defendant acknowledged in his statement that he "admitted to several police officers, both male and female, that he touched [A.M.'s] breast." He further stated that "he can read and write English, and demonstrated this by reading the first paragraph of his statements aloud, and then followed along as the rest of the statement was read aloud" by ASA Kersten. The statement concludes that "everything contained in this statement is true and correct."

¶ 13 After the State rested, defense counsel indicated it would not call witnesses. The trial court then addressed defendant:

"THE COURT: Okay. Mr. Larco, your attorney has rested and has indicated that he's not calling any witnesses.

Have you had ample time to discuss any possible defenses with your attorney?

DEFENDANT: Yes.

THE COURT: Are you satisfied with the representation given to you by your attorney?

DEFENDANT: Yes."

¶ 14 The court advised defendant of his right to remain silent and his right to testify if he chose to do so. Defendant responded that he would "not testify."

¶ 15 In closing argument, defense counsel argued that the State was required to prove each element of the offense beyond a reasonable doubt, including that defendant touched A.M.'s breast for the purpose of sexual arousal or gratification. Counsel argued defendant would not have acted in the illuminated kitchen area if he sought sexual gratification and noted that defendant was fully dressed, was not breathing heavily and did not appear to be sexually aroused. Counsel referred to defendant's act as "inappropriate" and "unusual" but asserted that, according to defendant's statement, he acted on mere curiosity about A.M.'s body and "the stage of her development."

¶ 16 Counsel further argued:

> "I don't know if, in [defendant's] mind, he's worried about what's coming next: Dating and clothes and other stuff that fathers have to do, but once again, where is the proof beyond a reasonable doubt that he did this for sexual gratification or arousal?
>
> The proof is lacking, it wasn't proved beyond a reasonable doubt[.]"

¶ 17 After the State's closing argument, the trial court found the evidence sufficient to convict defendant of the charged offense. The court found "ludicrous" defendant's explanation that he acted to determine A.M.'s development. The court found that defendant admitted to the act of touching A.M.'s breast and his intent could be inferred from the surrounding circumstances.

¶ 18 Defendant was represented in posttrial matters by the attorney who is his counsel in this appeal. Counsel filed a motion for a new trial, claiming, *inter alia*, that trial counsel was ineffective in failing to challenge the accuracy of defendant's oral and written statements as given to Detective Castaneda and ASA Kersten and failing to use a Spanish interpreter to translate the trial proceedings for defendant. The motion asserted that although "the Defendant, in general, understands English, it was necessary that he understood every single word at trial" and without an interpreter, he was denied the right to understand the proceedings against him and assist in his defense. Among the documents attached to the motion were a handwritten affidavit of defendant in Spanish and a separate translation of defendant's affidavit into English.

¶ 19 In its response, the State asserted that defendant did not request an interpreter at any time during the proceedings or indicate he did not understand what was being said by the court, his counsel or the prosecution. The State noted defendant answered questions asked in English by responding in English.

¶ 20 Prior to the hearing on defendant's motion for a new trial, defense counsel told the court that he was "not claiming that [defendant] doesn't speak English," noting that defendant

graduated from high school. Counsel said he was instead asserting that defendant did not understand English well enough to comprehend the proceedings. Counsel stated: "[W]e're not claiming there should have been a motion to suppress filed because I don't think we could have met a burden" that defendant's statement was not voluntary. Counsel stated that defendant "simply didn't fully understand everything he was signing in English."

¶ 21 At the hearing on defendant's motion, defendant presented testimony from three of his former high school teachers, Lourdes Guerrero, Victor Herrera and Efrain Gonzalez. In summary, those witnesses testified that in school, defendant would answer questions affirmatively even if he did not understand the question and would only fully comprehend something if it was explained to him in Spanish. They testified that even though defendant understood some words in English, he could not converse in English and seemed more comfortable speaking Spanish. Counsel presented affidavits from those individuals stating they were available to testify at trial.

¶ 22 Defendant testified at the hearing with the aid of a Spanish interpreter. Defendant was born in Ecuador and came to the United States in 2002 at age 14. He was 24 years old at the time of this offense. Defendant said he can speak English but is more comfortable speaking Spanish.

¶ 23 After high school, defendant attended Morton College. Defendant took remedial English courses in college and got an F in his public speaking course. Defendant used a translation application on his cell phone to assist with his college coursework; however, he did not use that application when he was questioned by police.

¶ 24 Regarding the night in question, defendant testified that when he walked past the children's bedroom, his attention was drawn to A.M.'s unbuttoned shirt. Defendant said he approached her and his hand touched her breast as he tried to button her shirt. Defendant

acknowledged that his statement included the term "sexual curiosity" but testified that when he signed his statement, he simply meant that A.M.'s unbuttoned shirt caught his attention.

¶ 25 Defendant testified that when police arrived and began to question him, he did not understand what he was being asked and felt "nervous" and "under pressure." When defendant was questioned by Detective Castaneda, the detective initially addressed him in English and defendant asked to speak to him in Spanish, and he and the detective then conversed in Spanish from that point on. Defendant was advised of his *Miranda* rights in Spanish. Defendant testified he gave Detective Castaneda the account that was memorialized in his written statement.

¶ 26 Defendant said ASA Kersten questioned him in English and that she used the term "sexual curiosity." He said he thought that term was "nothing bad." He was not given the option of making his statement in Spanish.

¶ 27 Defendant testified that trial counsel arranged for him to meet with Dr. Ostrov, a psychiatrist with whom he conversed in Spanish. Defendant said counsel did not tell him he had the right to have an interpreter present during the court proceedings. Defendant said that on the day of his trial, counsel told him "if they asked me if an interpreter to say no because otherwise the court will take longer." Counsel also advised defendant not to testify at trial, telling defendant his statement would work to the benefit of his defense. Defendant acknowledged, however, that the trial court informed him that whether to testify was his decision.

¶ 28 On cross-examination, defendant stated he was in his third year of study at Morton College majoring in science and computers at the time of his arrest. Those courses were taught in English, as were the majority of his college and high school classes. Defendant did not use a translation application when taking his exams.

¶ 29 Defendant said he knew that when Carmela saw him touching A.M.'s chest, it looked bad but he maintained his act was "not intentional[]." When he spoke to police on the night of the incident, the officers spoke to him in English and he responded in English. Defendant said he never told Detective Castaneda that he did not understand what ASA Kersten was saying to him, and he acknowledged reading a paragraph of the statement aloud in English. Defendant signed the bottom of a page of the statement that said he could read and write English.

¶ 30 Defendant acknowledged he did not request a Spanish interpreter at his bond hearing or at any pretrial court date. Defendant did not ask his counsel for an interpreter because they "never offered it, and I never knew that I could have one." Defendant did not ask the judge for an interpreter "because the attorney would always talk." Defendant acknowledged the judge admonished him in English as to his jury waiver and his right to testify and asked if he was satisfied with his representation and that he responded in English.

¶ 31 Defendant stated that when his trial counsel asked him why he touched A.M.'s breast, he responded he did not know and then said he was going to button her shirt, and counsel told him that was "not a valid reason." Defendant conversed with counsel in English and never told counsel he did not understand the court proceedings. Defendant said that counsel "never asked." Defendant acknowledged that Carmela used a Spanish interpreter during trial but said counsel told him before trial not to request an interpreter. After seeing the interpreter during Carmela's testimony, defendant did not request an interpreter "because I thought it was too late" and further stated "I don't speak English good to ask for one."

¶ 32 On redirect examination, defendant said he did not ask for his written statement to be translated because, at that time, he believed he understood it. Defendant said he did not truly understand the statement's contents until it was translated at trial. Defendant comprehended

generally what was happening at trial. He did not understand "everything that was said" but added "if you ask me what I didn't -- what I did not understand, I could not tell you."

¶ 33 The State presented the testimony of Dennis Doherty, who was defendant's trial counsel, along with ASA Kersten and Eric Bell, an attorney who worked with Doherty on defendant's case. Doherty testified he met with defendant between 12 and 15 times outside of court in preparation for trial and spoke with defendant by phone between 75 and 100 times. Doherty said that defendant's situation was "not a complicated case" because defendant admitted to touching A.M. and also because Carmela witnessed that act.

¶ 34 Doherty testified he always conversed with defendant and defendant's family in English and that no one requested an interpreter for the court proceedings. Doherty stated that based on his interactions with and representation of defendant, defendant was able to understand what was happening and what he was being told in English. Defendant never said he could not understand English or that he did not understand the statement.

¶ 35 When discussing the incident with defendant, Doherty did not believe a translation issue existed. Doherty said he asked defendant "on numerous occasions" what he told the police about touching A.M. Defendant repeatedly responded, "I don't know." Doherty said later in his testimony that defendant explained he decided to button A.M.'s shirt as he walked by. Based on defendant's explanation, Doherty said it would not be a "very good defense strategy" to have defendant testify he did not know why he touched the child. He added that if a defendant is "not pleading guilty, I have to defend him. And there was no other plausible defense."

¶ 36 Doherty arranged for Dr. Ostrov to assess defendant because "there might be some other psychological explanation other than 'I don't know.' " Doherty added that he "never told [defendant] to give me some other explanation." Doherty had Dr. Ostrov assess defendant

because defendant said he touched A.M. because he was curious. Doherty said he "wanted to see if there was any -- I could get any professional or scientific or medical support for a legal argument that he may have been touching a breast for curiosity."

¶ 37 Doherty further stated:

> "He's known the child since age eight. He's now touching her breast at [age] 11, and she just began puberty. I was trying to determine, in my mind, whether or not he's in the role of a surrogate father. All of a sudden, the young girl is sprouting breasts, he goes in while she's asleep, and he wants to see if he's seeing what he's seeing. Inexperienced father, his first child is a [] baby. At any rate, that was a pipe dream on my part based on what Dr. Ostrov concluded."

¶ 38 When asked why he did not call Dr. Ostrov to testify at trial, Doherty responded Dr. Ostrov told Bell that defendant was "full of s*** and he was a fruit cake, or a freak, or something like that." Doherty did not request a written report from Dr. Ostrov because it would not have aided the defense, would have been an additional expense for defendant's family and would have allowed the State to "possibly call" Dr. Ostrov as a witness. Doherty said he did not call defendant to testify at trial because defendant said he did not want to testify.

¶ 39 On cross-examination, Doherty said he never had defendant's statement translated into Spanish and that he reviewed the statement with defendant "a lot" prior to trial. Defendant's repeated explanation for his actions was "I don't know." Doherty was aware of cases in which doctors were accused of touching patients where it must be shown beyond a reasonable doubt that the contact was for the doctor's sexual gratification; however, he said he knew before trial that defense was not possible in this case.

¶ 40 Doherty testified that he also attempted plea bargaining with the State on this case but those efforts were rejected. He also unsuccessfully tried to persuade Carmela not to testify for the State by offering to initiate a paternity action and establish a child support agreement as to their infant.

¶ 41 Doherty did not consider defendant's language ability to be a viable defense. He noted it was "a possible defense" and he had used the theory in other cases; however, that defense "wouldn't fly here because he was interviewed by an experienced prosecutor" and "furthermore, it wasn't true. He never said he didn't understand what they were saying to him."

¶ 42 Doherty testified he "did not want to dispute the statement" at trial, explaining that "[t]he theory of the defense was -- the defense was in the statement. I wanted to promote it. I wanted to project the image that the statement was favorable." Doherty stated that an argument that defendant touched A.M. for reasons other than sexual gratification was "the only defense that I can think of."

¶ 43 ASA Kersten testified she was called to the 16th District police station to interview defendant and spoke with Detective Castaneda before meeting defendant. She testified her ability to speak Spanish is "very very limited" and she knows "probably less than 20 words" of Spanish. She communicated with defendant in English, reciting defendant's *Miranda* rights to him in English and discussing the incident. Defendant answered in English and "was able to express himself very clearly." On cross-examination, ASA Kersten said the purpose of felony review was to memorialize statements by suspects. She knew English was not defendant's native language. Defendant did not write anything by himself in English.

¶ 44 Bell testified he is a criminal defense attorney who worked with Doherty on this case. Bell does not speak Spanish. Bell appeared as defendant's counsel at his bond hearing and conversed with defendant in English.

¶ 45 Before the hearing, Bell tried to obtain biographical information from defendant, and defendant told Bell he did not want to talk to him. Bell testified that when he asked defendant if he understood English, defendant "responded in an affirmative manner." Bell did not tell defendant he could have an interpreter or ask defendant if he wanted to use an interpreter because he knew defendant had made a statement in English and he "was under the impression [defendant] knew what I was saying."

¶ 46 Bell referred Doherty to Dr. Ostrov, who is fluent in Spanish, and Doherty sought the doctor's opinion as to whether he could present a theory that defendant did not touch A.M.'s breast for sexual gratification. Bell testified Doherty chose a different defense centering on defendant's statement that he acted out of curiosity.

¶ 47 In a 10-page written order, the court denied defendant's motion for a new trial, rejecting defendant's claims of ineffective assistance of counsel. Specifically, the court found that defendant understood English and that "[d]efendant's allegation that trial counsel was ineffective due to a language barrier is entirely conclusory." After a sentencing hearing, the court imposed a term of three years in prison, followed by two years of mandatory supervised release (MSR).

¶ 48 On appeal, defendant contends that his conviction should be reversed because his trial counsel was ineffective for several of the reasons set out in his posttrial motion and, accordingly, the trial court erred in denying the motion. Defendant argues that Doherty was deficient in failing to determine his ability to understand English and for not requesting an interpreter at trial, and he asserts he did not understand the contents of his confession or comprehend the court

proceedings. Additionally, defendant contends that a defense based on those theories would have been more plausible than counsel's strategy that defendant was curious about A.M.'s physical development. He maintains that theory was unreasonable and was not supported at trial by expert testimony or relevant legal precedent.

¶ 49 We review a trial court's ruling on a posttrial motion for a new trial under an abuse of discretion standard, which involves consideration of whether the trial's outcome was "supported by the evidence and whether the losing party was denied a fair trial." (Internal citations omitted.) *People v. Abdullah*, 336 Ill. App. 3d 940, 949-50 (2002) (quoting *People v. Dixon*, 256 Ill. App. 3d 771, 778 (1993) and *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill. 2d 545, 548-49 (1981)). In contrast, a determination of whether a defendant's constitutional rights have been violated is made *de novo*. *People v. Hale*, 2013 IL 113140, ¶ 15.

¶ 50 A defendant's claims of ineffectiveness of trial counsel are considered under the familiar two-prong test of *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). First, the defendant must show that counsel's performance was deficient, *i.e.*, that it fell below an objective standard of reasonableness. *Id.* Second, the defendant must show that counsel's deficient performance resulted in prejudice to his case, *i.e.*, that but for counsel's deficient performance, the result of the proceedings would have been different. *Id.*

¶ 51 In reviewing an ineffective assistance claim, this court considers the actions of counsel under the totality of the circumstances of the individual case. *People v. Salgado*, 2016 IL App (1st) 133102, ¶ 35. Counsel's trial strategy is given a strong presumption of reasonable professional assistance and, therefore, judicial scrutiny of counsel's performance is highly deferential. *Id.*, citing *Strickland*, 466 U.S. at 689. As the Supreme Court has stated, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting

effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. To establish counsel's deficient performance, the defendant must identify counsel's acts or omissions that allegedly were not the result of reasonable professional judgment, and the defendant must overcome the strong presumption that the action or inaction of counsel was the result of sound trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007).

¶ 52 In addition to the right to the effective assistance of counsel, a criminal defendant has the constitutional right to be informed of the "nature and cause" of the accusations against him, to confront all witnesses against him, and to testify on his own behalf or to refuse to testify. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8; *People v. Argueta*, 2015 IL App (1st) 123393, ¶ 32 (and cases cited therein). Even when a defendant is physically present in the courtroom, a defendant who speaks only a foreign language or has limited English proficiency "lacks a mental presence by his or her inability to understand or participate meaningfully in the proceedings." *Id*.; see also *People v. Raczowski*, 359 Ill. App. 3d 494, 498 (2005).

¶ 53 The Criminal Proceeding Interpreter Act states, in pertinent part:

> "Whenever any person accused of committing a felony or misdemeanor is to be tried in any court of this State, the court shall upon its own motion or that of defense or prosecution determine whether the accused is capable of understanding the English language and is capable of expressing himself in the English language so as to be understood directly by counsel, court or jury." 725 ILCS 140/1 (West 2012).

¶ 54 Here, defendant asserted in his motion for a new trial that trial counsel was deficient for not requesting a Spanish interpreter to translate the proceedings. This court has held a defendant was not denied a fair trial by a lack of an interpreter where the record lacked any indication that

the defendant was "either not personally understandable, comprehensible or intelligible *** or was forced to answer questions which he did not understand." *People v. Castro*, 109 Ill. App. 561, 565 (1982). Additionally, the failure of defense counsel to request an interpreter for a witness did not constitute ineffective assistance of counsel where the substance of the Korean victim's testimony, though "choppy and grammatically incorrect," could be understood. *People v. McGinnis*, 51 Ill. App. 3d 273, 276 (1977).

¶ 55 Defendant's arguments on this point were presented to the trial court in the hearing on the motion for a new trial and were rejected by the court as "entirely conclusory." Even applying the more stringent *de novo* standard of review here to defendant's claim of ineffectiveness of his trial counsel, the records of both the trial proceedings and the hearing on defendant's motion for a new trial are replete with evidence that defendant comprehended the nature and content of the proceedings as well as the content of his written statement. Moreover, the record lacks any indication that defendant expressed to the court or to counsel his lack of understanding of the legal proceedings.

¶ 56 At the hearing on his motion for a new trial, defendant testified, through an interpreter, that although he is "more comfortable" speaking Spanish, he can speak English. Defendant completed high school and college coursework in English. Defendant was interviewed by ASA Kersten in English and read a paragraph of his written statement aloud in English. During the court proceedings, he conversed with counsel in English, listened to the court's inquiries made in English and gave appropriate oral responses in English. Although defendant claimed at the motion hearing that he "never knew that he could have" an interpreter, the record indicates that at trial, a Spanish interpreter was used for Carmela's testimony. Accordingly, defendant was aware that a Spanish interpreter was available. In light of the ample evidence that defendant

could communicate adequately in English, we cannot conclude defense counsel's performance fell below professional norms when he failed to request an interpreter. See *McGinnis*, 51 Ill. App. 3d at 276. Therefore, we conclude that defense counsel was not ineffective for failing to request an interpreter.

¶ 57 Based on this record, we also reject defendant's contention that had his counsel presented a defense based on his purported inability to understand English, that defense strategy would have been any more successful than the theory that was pursued by counsel. The decision of trial counsel to rely on one theory of defense to the exclusion of others is a matter of trial strategy that is largely immune from a claim of ineffective assistance of counsel. *People v. Falco*, 2014 IL App (1st) 111797, ¶ 16, citing *People v. Enis*, 194 Ill. 2d 361, 378 (2000). Here, counsel presented the defense that the State did not prove each element of the charged offense. Counsel asserted that even though defendant admitted to touching A.M.'s breast, the State did not establish that defendant did so for the purpose of sexual gratification.

¶ 58 Defendant contends his counsel would have succeeded under a different theory, namely that defendant did not know his comment about being "curious" had a sexual connotation and only meant that A.M.'s unbuttoned shirt caught his attention. However, the testimony of Doherty and Bell at the motion hearing indicates that counsel considered different defense theories and determined that the strategy of challenging an element of the offense was the strongest alternative in this case. Doherty testified that defendant told him he "did not know" why he touched A.M., and Doherty testified he believed defendant's remark could not be the valid foundation of a criminal defense. Doherty presented the argument that the State did not prove defendant acted for his own sexual gratification, which constituted a reasonable legal strategy where, as Doherty noted, defendant had "no other plausible defense." The fact that a strategy

proved unsuccessful does not mean that counsel's arguments rested upon an unsound legal theory. *People v. Woods*, 2011 IL App (1st) 092908, ¶ 35; see also *People v. Ganus*, 148 Ill. 2d 466, 473-74 (1992) ("[a] weak or insufficient defense does not indicate ineffectiveness of counsel in a case where a defendant has no defense").

¶ 59 Furthermore, the defense that was offered here met with the considerable strength of the prosecution's case. The State presented the testimony of an eyewitness who saw defendant commit the act in question here, *i.e.*, touching A.M's breast, and defendant made a statement to Detective Castaneda and ASA Kersten admitting that he acted "out of sexual curiosity."

¶ 60 The effective assistance of counsel refers to "competent, not perfect representation." *People v. Evans*, 209 Ill. 2d 194, 220 (2004) (quoting *People v. Stewart*, 104 Ill. 2d 463, 491-92 (1984)). All that appellate counsel's proposed alternative strategy has shown is that reasonable attorneys could disagree about the best strategy to be employed in this case. Counsel on appeal has not established that trial counsel's chosen defense was so clearly incorrect that it fell below a reasonable level of assistance.

¶ 61 Given our determination that defense counsel provided reasonable representation under *Strickland* and that defendant's conviction should be affirmed, we need not reach defendant's contention that this court should order the trial judge's recusal on remand of this case, nor is it necessary to consider the supplemental authority defendant has provided in support of that argument.

¶ 62 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 63 Affirmed.