2017 IL App (2d) 150726-U
No. 2-15-0726
Order filed November 14, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 15-CF-180
ERASMO DOMINGUEZ,	)	Honorable George D. Strickland,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Hudson and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* Defense counsel was not ineffective for failing to raise an alleged violation of an order *in limine*, as raising the issue would not have changed the result; there was no violation, the testimony at issue was cumulative of other evidence, and the testimony was not crucial to defendant's conviction.

¶ 2 After a bench trial, defendant, Erasmo Dominguez, was convicted of two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)) and sentenced to concurrent four-year prison terms. On appeal, he argues that his trial counsel was ineffective for failing to argue in his posttrial motion that the trial court erred in allowing the State to violate a ruling barring the complaining witness's prior consistent statements to her therapist. We affirm.

¶ 3 The indictment charged that, between January 1, 2009, and December 31, 2011, defendant committed aggravated criminal sexual abuse against his stepdaughter, J.S., who was under 13 years of age at the times of the offenses, by (1) knowingly touching her about the breast for his sexual gratification; and (2) knowingly touching her about the vagina for his sexual gratification. Defendant moved *in limine* to exclude any testimony by therapist Jennifer Dirzo disclosing statements that J.S. had made to her. He contended that these statements were hearsay and were not admissible under section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2014)), because J.S. was over 13 when she made them. At the hearing on defendant's motion, the State conceded that the statements were inadmissible. The court granted defendant's motion but did not bar Dirzo from testifying.

¶ 4 At trial, Dirzo testified on direct examination as follows. On January 19, 2015, she met with J.S. and her mother, Ricarda Navarette, at a public library. Dirzo had spoken with J.S. several times before, beginning the previous October. That day, J.S. was tearful and told Dirzo that she wanted to tell her something. Navarette left, and Dirzo and J.S. spoke.

¶ 5 Dirzo testified that, based on the conversation, she felt compelled to notify the Department of Children and Family Services (DCFS). The prosecutor asked her why. Defendant objected on the ground of relevance. The prosecutor responded that the question was relevant but that he would rephrase it to avoid violating the order *in limine*. The judge stated, "I'll *** allow you to do that. What would cause the investigation to begin is almost always relevant as long as we don't violate the court's ruling." The examination continued:

> "Q. Now as a therapist, are there certain things if you're told that you by law must notify [DCFS]?
>
> A. Absolutely.

Q. What are those things include [*sic*]?

A. Any type of abuse, any type of abuse to themselves, they try to kill themselves or try to hurt somebody else. Those are the three things we absolutely must report immediately.

Q. As a result of your conversation with [J.S.] on January 19, 2015, you felt compelled by the law to notify DCFS?

A. Absolutely."

¶ 6 Defendant did not cross-examine Dirzo.

¶ 7 The State next called J.S. She testified on direct examination as follows. She was born May 7, 2001. She lived in Mundelein with her mother, her two brothers, and her sister. All her siblings were younger. Before January 2015, defendant, J.S.'s stepfather, had also lived with the family. Only in fifth grade had J.S. learned that defendant was not her biological father. As of mid-2015, she had lived in Mundelein for three years. The previous two years, the family lived in defendant's sister's house in North Chicago. Earlier, they had lived in Mundelein.

¶ 8 J.S. testified that, on January 19, 2015, she and Navarette met with Dirzo at the public library. Navarette made a statement that upset J.S. and caused her to cry. At that point, J.S. knew that she had to tell Dirzo about something that had happened to her. After Navarette left, J.S. told Dirzo what had happened to her. She did not want Dirzo to tell anybody else; defendant was the only one in the family working and J.S. knew that, if he had to leave the others, he could not provide for them and the family "was going to be falling apart after that. And it did."

¶ 9 J.S. testified that, before she learned that defendant was her stepfather, their relationship had been all right. It changed when she was eight, shortly before Christmas 2009. Defendant and J.S. were at the dining room table. He was sitting down. She was standing up. Her brother

was watching television in the living room, facing away from them. Nobody else was in the area. As defendant was wrapping a present, he told J.S. to get in the way of her brother so that he could not see it. He then put his right arm around her and reached down, touching her vagina over her clothing and making a patting motion. J.S. knew that this act was wrong, so she grabbed his hand and pushed it away.

¶ 10 J.S. testified that she did not tell anybody about what defendant had just done. Her sister had just been born and she did not want her to grow up without a father. Further, she knew that her mother would be mad and her brother would be upset.

¶ 11 J.S. testified that defendant had touched her on the vagina at other times. Once was when the family still lived in Mundelein. She and defendant were alone in a bedroom with the door closed. He was standing in back of her and put his arms over her, then put one hand under her underwear on the outer part of her vagina. His fingers made a circular motion.

¶ 12 J.S. testified that, besides the foregoing two incidents, defendant had touched her on the vagina more than five times. On these occasions, he said nothing unless she said that she would tell her mother; then, he told her not to tell, because she was going to get a bike or some other gift. J.S. knew that he was not telling the truth, but she did not want to tell anybody, because she knew that nobody would believe her.

¶ 13 J.S. testified that defendant touched her on the breast more than five times, usually when she was lying down. The first time was when she was in fourth or fifth grade. Usually, he touched her over her clothes, but at least twice he reached under her clothes.

¶ 14 J.S. testified that, once while she was living in North Chicago, she was taking a shower. The bathroom door was locked but defendant, who was drunk, opened it with the edge of a spoon and walked in on her. She turned off the shower, covered herself with a towel, and yelled

at him to leave. Eventually, he did. Another time, the family was preparing for a car trip. While the others were inside, defendant, who was in the driver's seat, ordered J.S. into the car. He told her to sit on his lap. She obeyed. He then pulled down her shirt and looked at her breasts.

¶ 15 J.S. testified that, until recently, she had not told anyone about defendant's misconduct, because she had known that nobody would believe her. He would deny it and the others would probably believe him. Since January 2015, her relationship with her family had deteriorated. One brother now hated her; her two other siblings kept wondering why their father was no longer home, and Navarette did not want to explain it to them. Defendant's mother moved in two days after J.S. talked to Dirzo, and J.S. sensed that she did not like her. Life was easier in that defendant was not around; he had been drinking heavily, got into arguments with Navarette and J.S. every day, and did not appear to care about his family.

¶ 16 J.S. testified on cross-examination as follows. Between October 2014 and January 2015, she saw Dirzo once a week. J.S.'s biological father lived in Orlando, Florida. The last time she talked with him was the day before the trial. She had never seen him. J.S. did not want to live with him and she had never asked Navarette to let her move to Florida to be with him. J.S. disliked her biological father because he had left her long ago. J.S. did not want to be with defendant—not because he was her stepfather, but because of what he had done to her.

¶ 17 J.S. testified that, in December 2009, defendant touched her over her vagina. She could not remember how long he touched her. He did not say anything to her and she did not say anything to him. During the incident in the bathroom, defendant never touched her or the towel. He never exposed his private parts to her. After the move back to Mundelein, he did not touch her vagina or breasts.

¶ 18 Micjel Bush, an investigator for the Mundelein police department, testified as follows. With the assistance of a translator, he questioned defendant on January 20, 2015. Marc Hergott, a detective, spoke to defendant afterward. All their conversations with defendant were recorded. Bush had not seen or spoken to defendant before the day of the interview.

¶ 19 The lengthy interview was played in court. We shall note the following.[1] About seven minutes into the interview, Bush asked defendant the name of his stepdaughter. Defendant paused and said that he could not recall, then gave her name but said that he could not spell it. He explained that, because J.S. was his wife's child, he did not get involved that much with her. Defendant said that J.S. did not play with the other children or the rest of the family.

¶ 20 Defendant told Bush that, about three years ago, his family moved from North Chicago to Mundelein. Recently, there had been problems with J.S. She fought with her mother and was going through a rebellious phase with mood swings. J.S. had attacked his older son. Sometimes she called defendant "Dad" and sometimes she did not. When she was very young, she had been spoiled by his wife's brother and grew up thinking that she could have whatever she wanted.

¶ 21 After a lunch break, Bush resumed by telling defendant that J.S. had said that at times he had touched her inappropriately. Defendant denied it, then said that he might have done so while playing with her when she was much younger. Defendant did not know why J.S. would say such a thing, but he said that she had always been envious of the other children and had said that she did not love them. Asked about her father, defendant said that he lived in Florida and that they had argued and said nasty things to each other.

[1] The statement of facts in defendant's brief includes no questions or statements from either interview, and the argument cites the interviews only briefly and selectively. Nonetheless, the interviews played a crucial role in the trial court's judgment and are extremely pertinent here.

¶ 22 Bush turned to specific accusations. He told defendant that J.S. had said that defendant had touched her breasts when she was younger. Defendant denied this. Then he said "maybe" but that he did not remember and that, had he done it, he would have remembered. Bush told him that J.S. had accused him of touching her vagina; defendant denied it. He did not know why she would say such a thing. He denied it again, but added that he might have touched her while they were playing around. Asked several times about the alleged shower incident, defendant denied it. He said that the whole family would have learned about it and kicked him out. He denied ever having been alone with J.S. at home in the past decade. Defendant admitted drinking regularly but denied that his drinking caused him to do anything improper to J.S. After further questioning, he conceded that he might have done something once or twice but could not remember. Defendant then denied ever touching J.S. inappropriately but then said that maybe he had touched her with his hands.

¶ 23 Bush told defendant that J.S. had said clearly that he had touched her inappropriately and then told her not to tell her mother. Defendant denied this flatly. Bush asked him whether he might have touched J.S. because he had been drinking and made a mistake. Defendant said, "it could be." Asked how many times it happened, he said maybe 10. He did not know when it started or why. It could have begun in North Chicago.

¶ 24 Defendant said that he might have touched J.S. over the clothes but never under. He denied ever having touched her vagina. He did not know how often he had touched J.S. inappropriately over her clothes. He again admitted having touched her breasts but denied having touched her vagina or touching her breasts under her clothes. He added that he had done this in North Chicago but never in Mundelein. Asked whether he had touched J.S. on the breasts, he said "could be," but not 10 or more times.

¶ 25 Bush returned to J.S.'s claim that defendant had touched her vagina. Defendant first said no but then said, "maybe once [over the clothes], I don't think so" and "could be." He said that her pants had "maybe [been] on" and that it "could be" that he had just been curious. Asked when it first happened, defendant said that he did not know but that it was while the family lived in North Chicago. Defendant admitted that he had touched J.S.'s breasts in Mundelein; he then denied it. He again denied the allegation about the shower incident. After some further questioning, Bush asked defendant whether he had touched J.S. lightly on the vagina while they were living in North Chicago. Defendant nodded and said yes.

¶ 26 After another intermission, Bush told defendant that he did not think that he was telling the whole truth. Defendant denied any wrongdoing, then admitted that something had happened once or twice in Mundelein. He next said that he could not remember whether this was so. A short time later, he denied having touched J.S. inappropriately while they lived in Mundelein. He admitted that he might have touched her breast once in North Chicago, perhaps out of curiosity, to see how she would react. He again denied ever having touched her vagina.

¶ 27 Hergott testified as follows. On January 20, 2015, after an investigator with the State's Attorney's office interviewed J.S., Hergott met with J.S. Bush then told Hergott about his interview of defendant. Hergott spoke further to defendant. The conversation was recorded and played in court.

¶ 28 We summarize the interview. Asked how old J.S. was when he first touched her, defendant said that he did not remember; asked again, he suggested age eight but he was not sure. Asked what had happened then, he said that he did not remember; "it just happened." Asked what had "just happened," he said that he did not remember. He admitted that he had touched J.S. while they were living in North Chicago, but he said that it was over her clothes, not

under. Asked where on her body he had touched her, he said, "I think down there; I don't remember."

¶ 29 Asked how many times he had touched J.S. on her private parts, defendant said once. Asked how many times he had touched her breasts, he said maybe one or two, then suggested three. Hergott reminded defendant that J.S. had said that he touched her in a sexual way. Defendant said that he might have been drinking when the alleged touching happened; when he drank very heavily, he did not know what he was doing. Hergott asked whether, if J.S. said that it happened, he would say that she was telling the truth. Defendant answered, "possibly, yes."

¶ 30 Hergott then told defendant that J.S.'s claim that defendant had abused her came out in her counseling the day before. In court, defendant did not object to the admission of this part of the recording. In the interview, defendant responded that J.S. had been very envious of his children. Hergott repeated that the accusation had come out in J.S.'s counseling session the day before. In court, defendant did not object to the admission of this part of the interview.

¶ 31 Defendant told Hergott that the incident in the car never happened. He said that the shower incident did happen; he did not remember it, but he might have been drunk that day. Defendant denied ever having put his hand on J.S.'s vagina under her clothes. Asked how he could be sure that he had not done it while he was drunk, he responded that he did not remember doing it and that he was almost 100% sure that it did not happen. He admitted that he might have touched J.S.'s breasts several times, but he denied a sexual motivation.

¶ 32 The State rested. Defendant called Navarette, who testified as follows. She had known defendant for 10 years. During that time, he had been the sole provider. She did not drive and had never worked until a week before trial. J.S. was three years old when Navarette met defendant, and he had always acted as her father. J.S.'s biological father lived in Florida, and

J.S. had never met him. About a year and a half before trial, J.S. started contact with him by phone. At times since then, she told Navarette that she wanted to go live with him in Florida.

¶ 33 Navarette testified that she and J.S. had gotten into arguments from time to time. About 10 times, J.S. said that she would hurt herself or Navarette if she could not live with her father. Navarette told J.S.'s teachers about these threats, but they ignored her. J.S. had been receiving therapy at school since October 2014.

¶ 34 Navarette testified that the relationship between defendant and J.S. had been good until the family moved back to Mundelein. At that point, J.S. became very rebellious. After that, Navarette never saw any contact between defendant and J.S. and never saw him alone with the child. She never saw him put his hands on J.S. or put his arms around her. He never tried to kiss her or hold her hand and usually did not get near her.

¶ 35 After hearing arguments, the judge stated as follows. J.S.'s demeanor while testifying had been "consistent with truth telling." She had forgone opportunities to embellish the facts and had made potentially damaging admissions. Moreover, she had no motive to fabricate; "[m]uch the opposite." She had been aware that "this disclosure if made public could uproot her family, could cause her family to dislike her, to blame her, to take the only bread earner out of the family." She had known that, by going forward, she could make her mother and her siblings resent her and this had indeed happened. The judge also noted that J.S. made the initial disclosure to Dirzo, who she surely did not know was obligated to report the matter. The judge found that "[J.S.] admitted this to the counselor because she was upset about it."

¶ 36 The judge continued as follows. There was no evidence that J.S. accused defendant in order to obtain permission to live with her biological father in Florida. She was angry at her father; she had never met him and hardly knew him. Moreover, "[e]verything in her life [was]

here and not in Orlando." Since the accusations came to light, there had been no evidence that J.S. had tried to take advantage of the situation in order to move to Florida.

¶ 37 The judge noted that J.S. had testified that defendant fondled her breasts and vagina both over and under her clothing. There were several reasons that she had not disclosed it earlier, such as promises of gifts for her silence and that her mother was defendant's paramour. In general, the judge found that J.S.'s testimony was "believable and credible."

¶ 38 Turning to defendant's statements to the police, the judge noted that defendant said many times that he did not commit the alleged offenses, but that defendant said at many other points that he did. Defendant initially denied that any touching had taken place but later admitted that some did and sought to avoid the inference of sexual motives by blaming his conduct on drinking or curiosity. Although his statements were "all over the place," he admitted the physical acts but denied the sexual motive. However, the circumstances, including that he and J.S. were alone during the acts, proved that he had acted for sexual arousal. Thus, he was guilty of both charges.

¶ 39 Defendant filed a posttrial motion. The motion did not contend that the State had violated the order *in limine* or that the court had erred in allowing Dirzo to testify that J.S. reported some type of abuse. The court denied the motion, sentenced defendant as noted, and denied his motion to reconsider his sentences. Defendant timely appealed.

¶ 40 On appeal, defendant contends that his trial attorney was ineffective for failing to argue in his posttrial motion that the trial court erred in considering J.S.'s prior consistent statements to Dirzo. Defendant argues that counsel's failure had no strategic justification and forfeited a meritorious claim of error. He reasons that allowing this part of Dirzo's testimony was tantamount to admitting barred hearsay statements by J.S. and that the violation was not harmless, in that the trial judge cited the testimony as supporting the finding of guilt.

¶ 41 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that (1) trial counsel's performance was objectively unreasonable; and (2) it is reasonably probable that, but for trial counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984).

¶ 42 Defendant notes that, because trial counsel failed to raise the claim of error in the posttrial motion, it was forfeited then and also on appeal. See *People v. Denson*, 2014 IL 116231, ¶ 18. He asserts that the claim had merit, because the order *in limine* was correctly based on the rule that, with exceptions not pertinent here (including the exception in section 115-10), the hearsay rule bars a party from bolstering a witness's testimony with prior consistent statements. See Ill. R. Evid. 613(c) (eff. Jan. 1, 2011); *People v. Stull*, 2014 IL App (4th) 120704, ¶ 99. Defendant adds that the failure to preserve the claim was prejudicial, because the case came down to credibility and, in finding J.S. credible, the trial judge specifically referred to Dirzo's testimony that J.S. had stated that she had been abused. However, defendant has not satisfied *Strickland*'s prejudice prong. Even if counsel's failure to preserve the issue was unreasonable, it was not reasonably probable that including the claim in the posttrial motion would have changed the result.

¶ 43 First, it does not appear that the State violated the order *in limine*. No actual statements by J.S. came out in Dirzo's testimony. J.S. had disclosed abuse of some sort that had to be reported to DCFS, and the subsequent evidence implied that defendant had committed the abuse. However, Dirzo repeated none of J.S.'s words, and no specifics were disclosed by her testimony. Also, as the trial judge observed, the testimony was admissible to explain how the investigation started, as that purpose did not trigger the hearsay rule. Because the testimony was relevant to a

purpose that did not implicate the hearsay rule, we cannot say that the trial court would have (or should have) found merit in defendant's claim of error had he raised it in his posttrial motion.

¶ 44 Second, Dirzo's testimony was at most cumulative of other evidence that was admitted without objection and as to which defendant raises no claim of ineffective assistance. During his interview of defendant, Hergott twice stated that, the day before, January 19, 2015, J.S. told her therapist that defendant had abused her. This evidence established the same thing that Dirzo's allegedly improper testimony did (indeed, it went further in explicitly referring to defendant).

¶ 45 Third, and most important, even had the claim been meritorious, the erroneous admission of Dirzo's testimony would not have affected the result of the trial. We have set out the judge's explanation in some detail in order to put Dirzo's testimony into its proper context. Defendant is correct that the judge did note this testimony and attached at least a modicum of weight to it. However, reading the explanation as a whole refutes any contention that Dirzo's testimony was even arguably crucial. Even without it, the credibility contest would have gone in favor of J.S. and against the defense. The judge placed the greatest weight on J.S.'s testimonial demeanor; the absence of any motivation for her to fabricate and the extreme unlikelihood that she would subject herself to the consequences of wrongly accusing defendant; and defendant's own equivocal and sometimes inculpatory statements to the police. The judge found that *both* J.S. and defendant provided strong evidence of defendant's guilt. The credibility contest was one-sided, regardless of Dirzo's testimony. Therefore, even had defendant preserved the claim of error, and even had the claim been meritorious, it is not reasonably probable that the result of the trial would have been different. Defendant's claim of ineffective assistance must fail.

¶ 46 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed. 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 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 47 Affirmed.