2017 IL App (4th) 160695-U

NO. 4-16-0695

FILED
March 3, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: LOGAN F., a Minor,	)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
Plaintiff-Appellee,	)	McLean County
v.	)	No. 15JD38
LOGAN F.,	)	
Respondent-Appellant.	)	Honorable
	)	John Brian Goldrick,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed, concluding (1) respondent was provided ineffective assistance by his trial counsel and (2) the State provided insufficient evidence to sustain respondent's adjudications.

¶ 2 In February 2015, the State filed a petition for an adjudication of wardship, alleging respondent, Logan F. (born in 1999), was a delinquent minor because he committed one count of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(2)(i) (West 2014)) and one count of criminal sexual abuse (720 ILCS 5/11-1.50(a)(2) (West 2014)). After an adjudicatory hearing ending in August 2016, the McLean County circuit court found respondent guilty of the aforementioned charges and adjudicated him a delinquent minor. At the September 2016 dispositional hearing, the court made respondent a ward of the court and sentenced him to 24 months' probation. Respondent appeals and argues (1) trial counsel provided ineffective

assistance when he failed to move to suppress respondent's statements and (2) the State presented insufficient evidence to support his adjudications. For the following reasons, we reverse.

¶ 3 I. BACKGROUND

¶ 4 In February 2015, the State filed a petition alleging respondent committed the offenses of aggravated criminal sexual abuse and criminal sexual abuse against four-year-old D.R., who is the daughter of his mother's live-in boyfriend, Darrel Steidinger. These charges arose from an allegation by Kelli Reynolds, D.R.'s biological mother, when she reported to the Department of Children and Family Services (DCFS) respondent inappropriately touched D.R. At the time this incident was reported, respondent lived with his mother, Shannon Getty, and Steidinger and D.R. would visit every other weekend.

¶ 5 A. Police Interview

¶ 6 On July 30, 2014, respondent was 14 years old and was interviewed by Detective Sara Bernabei based on the allegation respondent inappropriately touched D.R. Bernabei began the interview with Getty in the interview room and told respondent he was not in trouble and he was not going to jail. Bernabei asked respondent if he ever watched the television show "Cops," to which respondent answered in the affirmative. Bernabei stated, "Okay, so you know when they say all this stuff?" He again responded in the affirmative. She then proceeded to read respondent his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)) and confirmed he understood his rights. Bernabei asked respondent if she could speak with him alone, and he agreed. Bernabei then escorted respondent's mother from the interview room.

¶ 7 When Bernabei returned to the room, she acknowledged she knew respondent from a previous incident and asked him if he remembered why they previously met. Respondent could not recall. Barnabei explained they met a couple of years ago, when previous accusations

arose that he inappropriately touched D.R. Respondent responded, "[Reynolds] thinks I touched her, I'm not a pervert." When asked why he thought this came about again, his response was he did not know, does not think about it, and thinks it is stupid. Respondent stated he often helped D.R. with putting her clothes on (except he would not help her put on her underwear) and eating, but not "inappropriate stuff."

¶ 8 Respondent stated it had been a long time since he and D.R. were left alone together, likely since the last accusation arose. He also stated he does not help D.R. when she goes to the bathroom. If D.R. needed assistance in the bathroom, respondent would get Steidinger to help her. Respondent sarcastically explained he did this because he did not want to risk getting in trouble for touching her "again." Respondent explained he understood "good" versus "bad" touching because his mother talked to him about it a few years ago. Defendant admitted he kissed girls of his same age but denied inappropriately touching them.

¶ 9 Bernabei then recounted D.R.'s description of events from a few days prior. D.R. stated she went into the bathroom and respondent went into the bathroom to help her. Respondent asked D.R. to lie on the floor and he helped her clean up "white stuff" from her vaginal area. Respondent denied this happened. Respondent stated D.R. went to the bathroom and she went to wipe and there was "white crap down there" that looked like a yeast infection. Respondent had D.R. lie down on the floor and he told Steidinger to take care of D.R. Bernabei asked respondent how he saw the "white stuff" and why he was in the bathroom. Respondent explained he walked into the bathroom to check on D.R. and saw her getting off the toilet with "white stuff" hanging around her vagina. Respondent denied touching D.R. or thinking about touching D.R.

¶ 10 Bernabei told respondent sometimes people make mistakes. She elaborated on D.R.'s accusation and explained D.R. felt like she was being tickled when respondent touched her. She asked defendant if he tried to wipe the "white stuff" out and he denied the accusation. When asked why D.R. would say that respondent touched her, he claimed he "doesn't touch little girls like that." When Bernabei pressed further, respondent, in a sarcastic tone, stated, "It was an accident or whatever it was, I guess I touched her, I don't know." Bernabei acknowledged respondent's sarcastic tone and pressed him to be honest with her. When Barnabei suggested this was an incident of curiosity or a onetime occurrence, he continued to adamantly deny the accusations. Respondent expressed his frustration with Reynolds and explained, "She has been pulling this crap for the whole four or five years." Bernabei left the room to get respondent's mother.

¶ 11 Respondent's mother asked him what happened and he recounted the same story as he told Bernabei. D.R. was using the bathroom and he saw "white stuff down there," so he laid her down on the carpet to get Steidinger. Respondent believed Steidinger was in the kitchen when he told him about D.R. Respondent could not recall whether Steidinger went to take care of her. Respondent became frustrated and said he did not touch D.R. and thinks it is sick to touch a three-year-old baby. Respondent recalled this incident occurred the previous weekend but could not identify the day. Bernabei said they need to discuss this with Steidinger to determine if he can corroborate respondent's story. Bernabei and respondent's mother left the room. While in the room alone, respondent said to himself, "Touching a three-year-old baby. Yeah right."

¶ 12 Respondent's mother returned and questioned respondent to determine the day the incident occurred. They reached an impasse and waited for Bernabei to return. After 15 minutes

passed, Bernabei returned and brought respondent's mother out of the room to discuss something. Ten minutes later, respondent's mother and Bernabei returned. Bernabei pressed for respondent to remember the day and who was home. Respondent believed it occurred on Friday and only he, D.R., and Steidinger were home. Prior to finding D.R. in the bathroom, respondent recalled they were getting ready to watch a movie and he was making popcorn when D.R. left to use the bathroom. When respondent was waiting for the popcorn to cook, he walked around the house, but he could not explain why he walked into the bathroom. Respondent gave the same story he previously recounted. He continued to deny any allegations he touched D.R., and Bernabei continued to press, suggesting it was a onetime thing, and respondent exclaimed in a sarcastic tone, "It was a onetime thing. Let's get over it." Respondent further stated to tell Reynolds he did it so everyone could be on his or her way. Respondent's mother intervened and told defendant if he did it, to say he did; otherwise, he should say he did not. Respondent became frustrated with the accusations, continued to deny the allegations, and stated they were sick.

¶ 13 B. D.R.'s Child Advocacy Center Interview

¶ 14 That same day, D.R. was interviewed by Mary Whitaker, a forensic interviewer at the Child Advocacy Center (Advocacy Center) in McLean County. D.R. explained respondent laid her down in the bathroom, pulled down her pants and underwear, and scratched her "pee pee" with his fingers to get the "white stuff" out. She said his fingers were sharp and it tickled. D.R. also stated respondent was fully clothed. Afterward, they made popcorn and watched a movie. D.R. said she was home alone with respondent and she told her mother about the incident when she returned to her mother's house.

¶ 15 C. Adjudicatory Hearing

¶ 16 On July 26, 2016, the trial court held a bench trial. The State called six witnesses: D.R., Reynolds, Steidinger, Getty, Bernabei, and Maureen Hoffmann. Respondent called one witness, Charnette Griffin.

¶ 17 1. *D.R.*

¶ 18 At the time of trial, D.R. was six years old. D.R. recalled she went into the bathroom while she and respondent were watching a movie and eating popcorn. She went to the bathroom by herself. Respondent came into the bathroom and helped her lie down on the floor without her pants or underwear. Respondent touched her vagina with his finger. D.R. explained it did not hurt when respondent touched her but it felt funny. She did not ask respondent to go into the bathroom.

¶ 19 2. *Kelli Reynolds*

¶ 20 Reynolds testified she is the mother of D.R., and in July 2014, D.R. lived with her. D.R. would visit Steidinger every other weekend and on Wednesday nights. Reynolds testified when she picked up D.R. from her father's house on Sunday July 27, 2015, D.R. complained of a stomachache. During the night, D.R. kept waking up with nightmares, so Reynolds took D.R. to bed with her. D.R. woke up and said her vagina hurt. Reynolds took her into the bathroom and D.R. told Reynolds respondent was playing a tickle game and used his finger to get the "white stuff" out. Reynolds asked D.R. where Steidinger was and was told she was home alone with respondent.

¶ 21 Reynolds explained D.R. had occasional discharge and she needed help wiping herself after using the bathroom. If D.R. was standing unclothed, any discharge would be unapparent. Reynolds said in order to see the discharge D.R.'s labia would need to be spread open. Reynolds cleaned the discharge from D.R.'s vagina with a wet wipe or a washrag.

¶ 22 After D.R. told Reynolds about the incident, Reynolds was hesitant to report it because of her prior experience and the way she was treated. Reynolds stated when D.R. was about 2 1/2 years old, D.R.'s pediatrician made a similar report concerning respondent and inappropriate touching. She was upset with how her report was handled because she felt it was not taken seriously because there were visitation issues concerning D.R. at the time. She explained no real investigation occurred and DCFS simply concluded she was jealous D.R.'s father had a girlfriend. Reynolds was also hesitant to report D.R's statement because she thought it reflected poorly on her because she and Steidinger had an ongoing custody case. However, Reynolds decided to contact her lawyer, who advised her to take D.R. to the emergency room.

¶ 23 3. *Darrel Steidinger*

¶ 24 Steidinger testified he is D.R.'s father. Steidinger recalled on Friday July 27, 2015, he and Getty left the house to get Getty's oldest son from football practice and respondent and D.R. stayed home. He estimated they were gone for 15 or 20 minutes. When they were leaving the house, respondent and D.R. were popping popcorn and watching a movie in the living room. When they returned, D.R. did not tell him about the incident. Steidinger could not recall whether respondent told him about helping D.R. in the bathroom. He explained sometimes he would need to help clean D.R. due to her medical condition. He tried to clean her every time she used the bathroom because she would want medicine applied. He used a washcloth to clean D.R. and it was painful for her, as he described it was hard to clean out. When asked if he could see the "white stuff" if D.R. was standing, he said he could, because at times, her condition was bad and the discharge would spread to her buttocks.

¶ 25 4. *Shannon Getty*

¶ 26 Getty testified she was respondent's mother. She and Steidinger picked up her oldest son from football practice and left D.R. and respondent home alone for about 15 to 20 minutes. She recalled getting a movie and popcorn ready for respondent and D.R. before she left. When she returned, neither respondent nor D.R. told her about the incident. Getty stated she would help D.R. clean her vagina with a wet wipe or washcloth and it was painful for D.R. as her skin was "raw." She often noticed D.R. needed cleaned when she would be scratching or digging at her vagina. If it was not bath time, Getty would lay D.R. down and use a wet wipe to clean her. Getty said the discharge was visible when D.R. was not clothed and, at times, it would be in her underwear.

¶ 27 5. *Sara Bernabei*

¶ 28 Bernabei testified she was the detective assigned to investigate the reported incident. Bernabei recalled interviewing respondent for an incident reported in 2012, which was ultimately indicated as unfounded by DCFS. Bernabei noted when she interviewed respondent, he told her three different variations of what occurred with D.R. on the night in question. Bernabei reviewed the recording of the interview and believed it was accurate. The State moved to admit the recording of the interview into evidence without objection from respondent.

¶ 29 6. *Maureen Hoffman*

¶ 30 The parties stipulated Maureen Hoffman was an expert in pediatric and child sex abuse cases. Hoffman testified she performed an exam on D.R. after these allegations arose. Initially, Reynolds was in the room in order for Hoffman to gather D.R.'s medical history, but then Reynolds was asked to leave the room. Hoffman asked D.R. why she had to come in and D.R. replied, "[respondent] touched my pee-pee." D.R. elaborated and said, "He used his claws to scratch the stuff out like little drops of glue." D.R. claimed it tickled. Hoffman performed a

physical exam on D.R. and observed what she described as "smegma" between the folds of D.R.'s labia. She said smegma is often white and is an accumulation of dirt, debris, oil, and urine often seen with young female patients. Hoffman said the labia have to be spread to see the smegma. She opined the smegma remained in the genital area but it may sometimes be found in underwear. Based on the exam she performed on D.R., she did not observe any indication of trauma or abuse. The State moved to admit D.R.'s Advocacy Center interview and the trial court granted it without objection.

¶ 31 7. *Charnette Griffin*

¶ 32 Charnette Griffin testified she has been a child protection investigator with DCFS since 2006. Griffin recalled two incidents she investigated concerning respondent occurring in November 2012 and July 2014. The November 2012 incident concerned an allegation of sexual molestation when D.R. was two years old. Griffin said the investigation was unfounded for a number of reasons. First, D.R. was nonverbal at two years of age and she was not able to get a forensic interview for her. Second, she interviewed respondent and he denied the allegations. Third, Griffin believed there were no corroborating factors. Reynolds made the disclosure to a nurse that respondent touched D.R.'s buttocks, but D.R. pointed to her vaginal area, and the nurse felt due to D.R.'s age, her statements were unreliable. The same nurse said there was a visitation issue and Reynolds was bringing D.R. in frequently after she visited Steidinger. Last, Griffin said there were credibility issues with Reynolds because she was dishonest about two particular things. First, Reynolds told Griffin the previously mentioned nurse thought there was a tear in D.R.'s vagina when there was no such finding. Second, Reynolds withheld visitation from Steidinger and claimed Griffin suggested that she not take D.R. for visitation. However, Griffin stated the July 2014 incident was indicated for sexual penetration.

¶ 33 D. The Trial Court's Findings

¶ 34 The trial court believed the case turned on two issues: (1) whether there was touching and (2) whether the touching was for the purpose of sexual gratification or arousal by either the accused or the victim. As to the first issue, the court relied on the testimony and interviews, and the court specifically mentioned D.R.'s disclosures during the Advocacy Center interview and to Hoffman during her emergency room visit. The court found the statements to be consistent and clear that D.R. knew who touched her. Additionally, D.R. was clear about the circumstances surrounding the touching, such as her description that it occurred at her father's home, what clothes she was wearing, her pants and underwear were eventually taken off, she laid down, she was touched, and she was touched "in her pee pee with *** [respondent's] finger," and her response was that it tickled. Therefore, the court believed D.R. was touched and believed respondent touched her with his finger as she described.

¶ 35 As to whether the touching was for the purpose of sexual gratification or arousal by either the accused or the victim, the trial court considered the totality of the evidence, which included respondent's age, his level of maturity, his knowledge about sexuality or about sexual issues, respondent's personal experiences, respondent's statements, and the surrounding circumstances. The court reiterated the testimony was consistent until there was an allegation of touching. Respondent was 14 years old at the time of the incident. During his interview with Bernabei, he stated he had an understanding of things of a sexual nature and he understood what was appropriate and not appropriate in terms of touching a female. He believed kissing was okay but other touching was not appropriate. The court believed respondent had an understanding of sexuality, described his personal experience, and understood what was appropriate touching and what was not.

¶ 36 In making this determination, the trial court also looked to D.R.'s statements as to how she described the incident. Although D.R. said respondent was trying to get the "white stuff" out, she described the sensation as tickling and it did not hurt. All of the other testimony regarding D.R.'s medical condition showed the cleaning was painful for D.R. D.R.'s statements also lined up with respondent's, up until the touching. Although respondent stated in his interview with Bernabei he was not going to put himself in a situation of being accused of touching D.R. again—he would help D.R. put her pants on after a shower but would not touch her underwear, and he would get his mother or Steidinger if D.R. needed assistance—the court believed this showed respondent understood he should not put himself in those circumstances. The court believed these statements were demonstrative of respondent's consciousness of guilt. Respondent was willing to acknowledge the events up to a certain point, but he was not willing to acknowledge the ultimate act. The court also was concerned with why respondent was in the bathroom with D.R. to begin with. The court believed the touching was for purposes of sexual gratification or arousal of respondent. The court found respondent guilty beyond a reasonable doubt of both counts against him.

¶ 37 E. Dispositional Hearing

¶ 38 The trial court adjudicated respondent a delinquent minor and made him a ward of the court. The court sentenced him to 24 months' probation.

¶ 39 This appeal followed.

¶ 40 II. ANALYSIS

¶ 41 On appeal, respondent argues (1) trial counsel provided ineffective assistance because he failed to file a motion to suppress respondent's custodial statements and (2) the State presented insufficient evidence to support his adjudication.

¶ 42 A. Effective Assistance of Counsel

¶ 43 The sixth amendment guarantees criminal defendants effective assistance of counsel. U.S. Const., amend. VI. To establish a claim of ineffective assistance of counsel, respondent has the burden to show his claim satisfies the two-pronged *Strickland* test: (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance resulted in prejudice to respondent such that, but for counsel's errors, a different result would have been reached. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 44 Recently, this court has categorized ineffective-assistance-of-counsel claims on direct appeal into three categories. *People v. Veach*, 2016 IL App (4th) 130888, ¶ 72, 50 N.E.3d 87. Category A cases are those cases where the record on appeal is insufficient to resolve the defendant's ineffective-assistance-of-counsel claims. *Id.* ¶ 74. Category B cases are those which include groundless ineffective-assistance-of-counsel claims. *Id.* ¶ 82. Finally, category C cases are cases where the record contains sufficient evidence for the court to resolve the defendant's ineffective-assistance-of-counsel claims because the alleged error was egregious or obvious. *Id.* ¶ 85. Based on the record before us, we categorize this case as a category C case, and we address respondent's claim.

¶ 45 1. *Objective Standard of Reasonableness*

¶ 46 Respondent claims trial counsel's performance fell below an objective standard of reasonableness when he failed to file a motion to suppress his custodial statements due to a *Miranda* violation. Respondent contends allowing his statements to be used against him is not a reasonable trial strategy, and as a result, counsel's representation was deficient. In response, the State argues trial counsel's decision not to file a motion to suppress was proper because it constituted sound trial strategy, and alternatively, no *Miranda* violation occurred.

¶ 47 To prevail under the first prong of *Strickland*, respondent "must prove that counsel's performance, as judged by an objective standard of competence under prevailing professional norms, was so deficient that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment." *People v. Bew*, 228 Ill. 2d 122, 127-28, 886 N.E.2d 1002, 1006 (2008). Respondent must overcome the strong presumption that the challenged action or inaction may have been a result of sound trial strategy. *People v. Manning*, 241 Ill. 2d 319, 327, 948 N.E.2d 542, 547 (2011). However, counsel's decision whether to file a motion to suppress is generally considered a matter of trial strategy and is entitled to great deference. *Bew*, 228 Ill. 2d at 128, 886 N.E.2d at 1006. Our supreme court has "made it clear that a reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344, 864 N.E.2d 196, 216 (2007).

¶ 48 Under *Miranda*, a defendant's custodial statements are inadmissible unless the statements were preceded by (1) the defendant's voluntary, knowing, and intelligent waiver of his right to not be compelled to testify against himself or incriminate himself; and (2) his waiver to have an attorney present during the interrogation. *Miranda*, 384 U.S. at 444. "Accordingly, an officer who intends to subject a person to custodial interrogation toward obtaining an admissible confession must first warn that individual 'that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed,' and obtain his waiver of those rights before questioning him." *People v. Jordan*, 2011 IL App (4th) 100629, ¶ 16, 960 N.E.2d 1253 (citing *Miranda*, 384 U.S. at 444). When determining whether a waiver was voluntary and knowing, we look to the particular facts and circumstances of the case, including the background, experience, and

conduct of the accused. *People v. Braggs*, 209 Ill. 2d 492, 515, 810 N.E.2d 472, 487 (2003). "It is well-settled that special care must be taken to ensure that a juvenile's *Miranda* waiver is knowing and intelligent." *In re S.W.N.*, 2016 IL App (3d) 160080, ¶ 72, 58 N.E.3d 877; see also *In re D.L.H*, 2015 IL 117341, ¶ 60, 32 N.E.3d 1075 ("[T]he greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." (Internal quotation marks omitted.)).

¶ 49 In this case, respondent was 14 years old when he met with Bernabei. (The interview was both audio and video recorded, which is part of the record on appeal.) During the first part of the interview, respondent's mother was present. When Bernabei first entered the interview room, she told him she was going to read him his rights and then told him he was "not going to jail" and "not in any trouble." Bernabei asked respondent if he ever watched the television show "Cops" and if he heard "when they say all this stuff." Respondent replied in the affirmative. Bernabei then proceeded to read respondent the *Miranda* warnings. Respondent stated he understood. Bernabei did not have respondent sign a written waiver. Respondent agreed to speak with Bernabei alone and his mother was escorted from the interview room.

¶ 50 Respondent argues the totality of the circumstances surrounding his *Miranda* waiver establishes his waiver was not voluntary, knowing, or intelligent. Respondent contends Bernabei's assurances that he was "not in any trouble" and "not going to jail," coupled with her comments about the television show "Cops," rendered her reading of the *Miranda* warnings a meaningless procedural formality. Respondent further suggests these comments obscured the very purpose of the warnings, which are intended to impart "a full awareness of both the nature of the right being abandoned and the consequence of the decision to abandon it" (citing *Moran v.*

Burbine, 475 U.S. 412, 421 (1986)). The State disagrees because (1) Bernabei's comments that he was "not in trouble" and "not going to jail" occurred prior to the reading of the *Miranda* warnings and (2) the mention of the television show "Cops" provided respondent with a better understanding and familiarity with the warnings. Further, the State argues Bernabei's reading of the warnings was not a ritualistic recitation because they were intelligently read, word for word, and were provided at a normal speaking pace which allowed respondent to understand and comprehend the warnings.

¶ 51 Considering respondent's background, experience, and conduct, we find respondent's *Miranda* waiver was not voluntary and knowing. Although Bernabei's comments stating respondent was "not in any trouble" and he "was not going to jail" were made before the *Miranda* warnings, they likely influenced his decision to waive his *Miranda* rights. Additionally, when Bernabei related her act of reading respondent the *Miranda* warnings to the television show "Cops," it depreciated the seriousness and gravity of respondent's decision to waive his rights. Bernabei's tone and attitude during this portion of the interview also suggests the reading of the *Miranda* warnings was a mere formality and something she just had to get out of the way. The State suggests Bernabei's comment about "Cops" provided respondent with a greater understanding of the rights he was waiving. We find this argument unpersuasive. Based on respondent's age, it cannot be said with certainty respondent knew what he was doing when he agreed to waive his rights, even based on his previous knowledge of the television show "Cops."

¶ 52 It is also important to consider respondent's background. This was not his first interview with Bernabei. In 2012, D.R. made a similar allegation against him, which DCFS later determined to be unfounded. As a result, no charges were brought against respondent based on

those allegations. Based on this experience, respondent may not have understood his statements could actually be used against him, because in a similar situation two years prior, nothing came of the allegation. It is clear based on these circumstances the purpose of *Miranda* was not effectuated. Therefore, Bernabei's comments, along with her comparison to "Cops," coupled with respondent's background and experience, demonstrate his waiver was not knowing and voluntary. Next, we consider trial counsel's decision not to file a motion to suppress respondent's custodial statements.

¶ 53 Respondent argues no reasonable trial strategy exists in allowing respondent's statements to be used against him, as a defendant's incriminating statements are the most "powerful piece of evidence the State can offer," and their effect on the trier of fact is "incalculable" (quoting *People v. R.C.*, 108 Ill. 2d 349, 356, 483 N.E.2d 1241, 1245 (1985)). The State suggests counsel decided not to file this motion because it was part of his strategy. The State notes the only witness the defense called was Griffin, the DCFS investigator. Griffin testified regarding the previous unfounded report and how she reached her determination. The State suggests it was sound trial strategy for defense counsel to relate the current allegations to the previous allegations to suggest the victim's mother created the allegations to regain custody or because of jealously. The State says respondent made many remarks during his interview with Bernabei to support this theory, which would explain why counsel would not want to suppress it. For example, respondent said Reynolds had "been doing this crap for the whole four or five years." Further, respondent never admitted touching D.R.'s vagina.

¶ 54 Although respondent never admitted touching D.R.'s vagina, he made a number of incriminating statements the trial court used when it made its determination. Perhaps one of the factors that weighed most heavily with the court was how respondent could not explain to

Bernabei why he was in the bathroom in the first place. The court noted respondent's story aligned with D.R.'s allegation up to the ultimate act. Additionally, respondent stated he notified Steidinger D.R. needed assistance—but Steidinger testified he was never notified and actually left D.R. and respondent home alone for 15 or 20 minutes. Last, respondent discussed his sexual knowledge and experiences, which the court also used in making its determination that respondent touched D.R's vagina for the purpose of sexual gratification. For these reasons, we disagree with the State that this demonstrates sound trial strategy. Although trial counsel's decision whether to file a motion to suppress is given great deference, considering the facts and circumstances of this case, counsel's failure to file a motion to suppress constituted deficient performance. Since we find respondent satisfied the first prong of *Strickland*, we now consider whether he was prejudiced by trial counsel's failure to file a motion to suppress.

¶ 55 2. *Prejudice*

¶ 56 Respondent argues he was prejudiced by trial counsel's failure to file a motion to suppress his custodial statement because the court heavily relied on the statement when it determined he touched D.R. for the purpose of sexual gratification or arousal. "Our supreme court has noted that when an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the outcome would have been different had the evidence been suppressed." (Internal quotation marks omitted.) *People v. Fellers*, 2016 IL App (4th) 140486, ¶ 33, ___ N.E.3d ___ . For the reasons stated above, respondent had a valid basis for a motion to suppress his custodial statement, and this court concludes that motion would have been meritorious.

¶ 57 Respondent argues he was prejudiced because, but for counsel's failure to file a motion to suppress his statements to Bernabei, the trial court would not have found the touching was for sexual gratification. He notes the court stated it used his age, level of maturity, knowledge of sexual issues, statements to Bernabei, and surrounding circumstances of the offense to make this determination. However, since he did not testify, the majority of this information was gathered from his statements to Bernabei. For example, his knowledge of sexuality, personal experiences, surrounding circumstances of the incident, and what he believed was appropriate touching. Respondent also relies on the court's statements regarding inconsistencies between his and D.R.'s statements and how he could not explain why he was in the bathroom.

¶ 58 We also agree with respondent that he was prejudiced by counsel's deficient performance. As previously discussed, respondent's statement contained a number of inconsistencies and the trial court construed those against respondent when it issued its ruling. Additionally, when the court made its finding of sexual gratification, it heavily relied on respondent's custodial statement. Without respondent's custodial statement, the main piece of evidence against respondent would have been D.R's allegation and the testimony that showed D.R. was consistent with her statement. A reasonable probability exists, had respondent's custodial statement not been admitted, the court would not have found the element of sexual gratification.

¶ 59 In this case, the failure of respondent's trial counsel to file a motion to suppress his custodial statement constituted deficient performance that prejudiced respondent because (1) the motion would have been granted and (2) a reasonable probability exists that the outcome of the trial would have been different had respondent's statement been suppressed. See *People v.*

Tayborn, 2016 IL App (3d) 130594, ¶ 21, 49 N.E.3d 983 ("We can see no reasonable trial strategy for trial counsel's failure to file a motion to suppress defendant's statement to police that he was transporting cocaine where the statement was the State's strongest evidence against defendant."); see also *People v. Little*, 322 Ill. App. 3d 607, 613, 750 N.E.2d 745, 752 (2001) (concluding counsel was ineffective for failing to file a motion to suppress when the motion "would have been defense counsel's strongest, and most likely wisest, course of action"). Accordingly, we conclude respondent was provided ineffective assistance by his trial counsel.

¶ 60 B. Sufficiency of the Evidence

¶ 61 When a respondent challenges the sufficiency of the State's evidence used to convict him, the reviewing court determines whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime when considering all of the evidence in the light most favorable to the prosecution. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 47, 958 N.E.2d 227. This standard of review gives the trier of fact the responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the facts. *People Siguenza-Brito*, 235 Ill. 2d 213, 228, 920 N.E.2d 233, 243 (2009). An adjudication will be reversed when the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the respondent's guilt. *In re M.W.*, 2013 IL App (1st) 103334, ¶ 13, 986 N.E.2d 737.

¶ 62 The trial court found respondent guilty of criminal sexual abuse and aggravated criminal sexual abuse. Under section11-1.50(a)(2) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/11-1.50(a)(2) (West 2014)), "[a] person commits criminal sexual abuse if that person *** commits an act of sexual conduct and knows that the victim is unable to understand the nature of the act or is unable to give knowing consent." Under section 11-

1.60(c)(2)(i) of the Criminal Code (720 ILCS 5/11-1.60(c)(2)(i) (West 2014)), "[a] person commits aggravated criminal sexual abuse if *** that person is under 17 years of age and *** commits an act of sexual conduct with a victim who is under 9 years of age." Section 11-0.1 of the Criminal Code (720 ILCS 5/11-0.1 (West 2014)) defines "sexual conduct," in relevant part, as follows:

> "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused."

¶ 63 Respondent argues the State presented insufficient evidence because it failed to prove beyond a reasonable doubt he touched D.R. for the purpose of sexual gratification or arousal. While a fact finder can infer an accused adult intended sexual gratification, the same intent cannot be imputed into a child's action. *In re Matthew K.*, 355 Ill. App. 3d 652, 655, 823 N.E.2d 252, 255 (2005). "However, it is not a bright-line test; the issue of a minor's intent of sexual gratification or arousal must be determined on a case-by-case basis, and the fact finder must consider all of the evidence, including the minor's age and maturity, before deciding whether such intent can be inferred." *In re Davontay A.*, 2013 IL App (2d) 120347, ¶ 19, 3 N.E.3d 871.

¶ 64 In this case, respondent was 14 years old and D.R. was 4 years old. D.R. testified she was using the bathroom when respondent walked in without her requesting his assistance.

Respondent laid her down on the floor and pulled down her underwear and pants. D.R. testified respondent used his finger to clean out the "white stuff," and it felt like scratching and it tickled. Respondent cites *Matthew K.* to support his argument the case presents no overt evidence to prove the touching of D.R. was sexual in nature because his clothes were always on, he never asked D.R. to touch him, he did not show D.R. parts of his body, and no evidence was presented suggesting he had an erection, was breathing heavily, or exhibited other signs of arousal. Respondent's counsel on appeal suggests, "[i]t seems quite likely that [respondent] was simply curious about D.R.'s condition, but then became embarrassed and defensive when he learned his actions may carry legal consequences."

¶ 65 Viewing the evidence in the light most favorable to the prosecution, we conclude a rational trier of fact could not have found respondent guilty criminal of criminal sexual abuse and aggravated criminal sexual abuse because the State presented insufficient evidence to show respondent touched D.R.'s vagina for sexual gratification or arousal. Although it is appropriate to consider circumstantial evidence for sexual gratification, we do not find such supporting evidence in the case. The trial court relied on respondent's sexual knowledge, experiences, age, and D.R.'s description of the touching when it found respondent touched D.R.'s vagina for the purpose of sexual gratification. However, none of these factors demonstrates respondent touched D.R. for the purpose of sexual gratification. These factors merely illustrate respondent knew or should have known it was inappropriate to touch D.R.'s vagina, but they in no way suggest, beyond a reasonable doubt, respondent touched D.R.'s vagina for the purpose of sexual gratification. See *Matthew K.*, 355 Ill. App. 3d at 655, 823 N.E.2d at 255.

¶ 66 In this case, the State failed to prove an essential element of the offense, and therefore, it failed to prove respondent guilty beyond a reasonable doubt of both of criminal sexual abuse and aggravated criminal sexual abuse.

¶ 67 Because we find respondent received ineffective assistance of counsel and the State presented insufficient evidence to sustain his adjudication, we reverse. See *Burks v. U.S.*, 437 U.S. 1, 11 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.").

¶ 68 III. CONCLUSION

¶ 69 We reverse the trial court's judgment.

¶ 70 Reversed.