2018 IL App (5th) 140488-U

NO. 5-14-0488

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 14-CF-84
	)	
HERBERT W. DE WITT,	)	Honorable
	)	Wm. Robin Todd,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Barberis and Justice Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's aggravated criminal sexual abuse conviction is affirmed where his counsel was not ineffective for failing to challenge a potential juror who expressed concern about her ability to be objective where counsel could have concluded that she was not unequivocally biased and the defendant failed to prove that a reasonable probability exists that, but for any alleged error, the result of the proceeding would have been different. Also, the defendant was not entitled to $5-per-day credit against his eligible fines because he was convicted of aggravated criminal sexual abuse.

¶ 2 After a jury trial, the defendant, Herbert De Witt, was found guilty of aggravated criminal sexual abuse and sentenced to four years' probation. He appeals, arguing that he was denied his right to a fair trial by an impartial jury where his trial counsel failed to challenge a potential juror for cause or use a peremptory challenge to remove her from

the jury where she stated that she "probably" could not be objective if defense counsel asked the 14-year-old alleged victim sensitive questions. For the reasons that follow, we affirm.

¶ 3 In March 2014, the defendant was charged in Marion County with aggravated criminal sexual abuse (720 ILCS 5/11-1.60(d) (West 2012)). The allegations indicated that he had committed an act of sexual conduct with S.S. in that he had placed his hand on her vagina (over her clothing) and that, when the contact occurred, she was at least 13 years of age but under 17 years of age.

¶ 4 During *voir dire*, defense counsel asked the first panel of prospective jurors the following question:

> "As you may have figured out, one of the witnesses in this case obviously is going to be the victim and it's a young girl. Now, I think it's natural for all of us when you see a young person to have some sympathetic feelings come up, that's natural. Anybody here think they could not put those sympathetic feelings aside and be objective about that person's testimony? If you think that you could not, please raise your hand."

No one raised their hand. The following exchange then occurred between defense counsel and the prospective jurors:

> "[THE DEFENDANT'S COUNSEL (COUNSEL)]: Now, when this young woman takes the stand, the State's going to ask her some questions and then I am allowed to ask her questions.

As [the defendant's] attorney, it's my obligation to ask her some questions. [Mistie U.], do you have any problem with that process where this young woman is going to have to testify and I ask her questions[?]

MISTIE U.: It probably depends on how she keeps herself composed.

[COUNSEL]: It might become necessary for me to ask her some tough questions. Part of my job as [the defendant's] attorney, if I have to do that, is that going to affect your ability to be [an] objective, fair, and impartial juror?

MISTIE U.: I don't think. It's just hard if you see a young person—

[COUNSEL]: Exactly, that's why I'm asking the question.

MISTIE U.: I don't know. I've never been in this situation. I'd like to think I could be fair. I am softhearted.

* * *

[COUNSEL]: I may have to ask her questions you wouldn't ask in polite society.

MISTIE U.: My daughters and granddaughters.

[COUNSEL]: You think that might affect your ability to be fair and impartial?

MISTIE U.: I don't know. I'll try not to be.

[COUNSEL]: If I ask her a sensitive question that causes her to tear up or cry, is that going to affect your ability to be fair and impartial?

MISTIE U.: I don't think it would make me be unfair, but I'd feel really bad for her.

[COUNSEL]: All right. [Michael S.], how about you, do you have any daughters or granddaughters?

MICHAEL S.: No.

[COUNSEL]: This young woman takes the stand and I have to ask some sensitive questions, you understand that's part of my obligation to [the defendant], you understand that?

MICHAEL S.: Yes.

* * *

[COUNSEL]: If this young lady tears up or starts to cry, a natural reaction for all of us is to feel some sympathy, right?

MICHAEL S.: Yes.

[COUNSEL]: Can you put that aside and listen objectively?

MICHAEL S.: Yes.

[COUNSEL]: [Kathy N.], how about you?

KATHY N.: I have a young teenage daughter, 16.

[COUNSEL]: So you are telling me that that's going to cause you to maybe identify with this young witness?

KATHY N.: It might.

[COUNSEL]: And you would not be able to be fair and impartial in that situation?

KATHY N.: Well, I'd try to be.

[COUNSEL]: I know you'd try to be, but [the defendant] needs to be certain that you can be fair and impartial.

* * *

KATHY N.: I can be fair.

* * *

[COUNSEL]: How about you, [Nathanael M.]?

NATHANAEL M.: I grew up with four sisters and I have six nieces. So I don't know. I probably wouldn't be very fair.

[COUNSEL]: Okay. [Marc P.]?

MARC P.: I think I could be fair.

[COUNSEL]: So any emotion that might arise you could put that aside and decide this case objectively?

MARC P.: I believe so.

[COUNSEL]: [Elizabeth K.], how about you?

ELIZABETH K.: I think it would be hard. I have a lot of nieces so I really don't know for sure.

[COUNSEL]: Okay. Well, I recognize that it would be hard, you've been called in, all of you have been called in for a difficult job here. [The defendant] though, he has a right to expect that whoever sits on this jury will be fair, be objective. And only you know whether you can do that or not, okay? So the only right answer here is the truth, whatever it may be. So I have to ask you

whether you think in that situation you can put any emotion aside and be objective.

ELIZABETH K.: Probably not honestly.

[COUNSEL]: Okay. All right. Thank you. ***

* * *

[COUNSEL]: And Dennis T., correct?

DENNIS T.: Yes.

[COUNSEL]: Do you have any daughters or granddaughters?

DENNIS T.: I have several nieces and great nieces. I think I could be fair.

[COUNSEL]: Think you could be fair if I have to ask some sensitive questions?

DENNIS T.: Yes.

[COUNSEL]: So a question that might offend you if we were in public somewhere and I asked a question, you understand here it's an appropriate question?

DENNIS T.: Right.

* * *

[COUNSEL]: [Elizabeth S.]?

ELIZABETH S.: I do have a nine and 13 year old. I'd like to think my mental capability could outweigh my heart strings, but I've never been in that situation at all. So, I'd like to think I could."

¶ 5 The court and counsel then questioned a second juror panel. Bonnie F., a prospective juror on this panel, indicated that she knew the State's Attorney because his sons went to "our school." She also indicated that she had daughters and granddaughters, and defense counsel asked her the following question: "The State's going to be putting on a witness who is—I think she's about 14. She's going to say that [the defendant] did some things. The fact that you have daughters going to affect your ability to be fair and impartial?" Bonnie F. answered, "I hope not." Defense counsel then asked Bonnie F. whether she could put aside the natural tendency to identify and sympathize with the witness. Bonnie F. responded, "I think I can."

¶ 6 After both panels were questioned, jury selection from the two panels began. During selection, defense counsel used peremptory challenges to strike Mistie U., Elizabeth S., Kathy N., and Bonnie F. but did not use a peremptory challenge to strike Elizabeth K. from the jury. He also did not challenge Elizabeth K. for cause.

¶ 7 Because there were not enough jurors for a full panel, the court and counsel questioned a third panel of prospective jurors. The court asked the third panel the following question: "Any of you know of any reason why you could not be a fair and impartial juror in this case[?]" Daniel D. responded, "I've got two sisters that are around the ages of 13 and 15." The court then asked whether that relationship would affect his ability to be fair and impartial. Daniel D. answered, "I don't know if I could be fair." Defense counsel then asked the panel whether anyone with daughters and granddaughters would be "unable to put aside any sympathy that you might feel." Sandra M. responded that she has an 11-year-old granddaughter and would "[p]robably get pretty emotional."

She indicated that she did not know if she could be objective because she is an "emotional person." Defense counsel then asked the panel the following: "Now, I might have to ask some sensitive questions, the young woman questions that normal situations would be offensive, but it's my obligation maybe to ask those questions here. *** [W]ill you still be able to maintain that objectivity?" Steven S. indicated that he did not "think [he] could." Jerry H. responded, "I'm up in the air on that. I'd say no." Sandra M. answered that she "probably wouldn't be able to handle it very good." Daniel D. indicated that he did not think that he could be fair and impartial because he has a close relationship with his two sisters.

¶ 8 Defense counsel challenged Jerry H., Sandra M., Daniel D., and Steven S. for cause because they indicated that they could not be fair. The State conceded the challenge for cause against Jerry H. and Sandra M. but objected to the challenge against Steven S. because his answer that he did not think he could be fair if the victim was asked tough questions was based on the victim's demeanor while testifying, not on any sympathy that he felt for the victim. The court granted the cause challenges for Jerry H., Sandra M., and Daniel D. because they indicated that they could not be fair. The court, however, denied the defendant's challenge for cause on Steven S., stating that it was a "close call" but that "it didn't come about with him" until there was a question about asking the alleged victim tough questions. The court concluded that he had answered appropriately that he would follow the instructions and that the jury would be instructed that "sympathy and other things [could not] be used."

¶ 9 At trial, S.S., who was 14 years old, testified as follows. In spring 2013, the defendant, S.S.'s grandfather, began touching her vagina over her clothes, which happened "more than once." In December 2013 or January 2014, the defendant moved in with S.S.'s family.

¶ 10 S.S. explained that the defendant would typically come up behind her when other family members were not in the room, reach around her as though he was hugging her, and then "rub [her] stomach and move his hand down and start rubbing [her] vagina." On some occasions, she was able to push him away before he touched her. Another incident occurred at the defendant's house when she was on the couch watching a movie. He came over to kiss her goodnight and began rubbing her vagina. She did not initially tell her mother about these incidents because she was afraid that her mother would hurt him.

¶ 11 In mid-March 2014, S.S. disclosed the abuse to her parents after they confronted her about accessing an adult website on a neighbor's computer while babysitting. During the conversation, S.S.'s mother began to suspect that S.S. had been touched inappropriately, and she asked S.S. if anyone had touched her. S.S. initially denied it but then her mother asked about specific people touching her, and when her mother named the defendant, she "froze for a couple of minutes" and eventually "said yes." Her mother then called the police. On cross-examination, S.S. acknowledged that it was her mother who had first suggested that she had been looking at pornography because she had been abused and that she initially denied that her grandfather had touched her.

¶ 12 Anthony Decker, a detective with the Marion County sheriff's office, testified that he had some training on how to interview a child witness. He acknowledged that when

questioning a possible sexual abuse victim, the interviewer should not suggest to the victim that they were abused.

¶ 13 Melinda S., S.S.'s mother, gave the following testimony. In March 2014, her neighbor called about S.S. looking at pornography on the neighbor's computer while she was babysitting. When Melinda questioned S.S., she "dropped her head in her lap and starting crying" and "just kept crying and crying and crying." Melinda asked S.S. what was wrong, but S.S. would not even look at her. She knew something was wrong, and she asked S.S. if S.S.'s father had done something while she was working the evening shift, which S.S. immediately denied. Melinda then stated that she "left it alone for a while," and that, once S.S. had calmed down and quit crying, she asked S.S. if she was ready to talk. S.S. responded that she did not want her mother "to kill anybody," which made Melinda think that someone had hurt her. After further questioning, S.S. admitted that the defendant had touched her. On cross-examination, Melinda acknowledged that she had assumed that someone had inappropriately touched S.S. and that she had told S.S. that S.S. would not be in trouble for looking at pornography. On redirect, Melinda clarified that she assumed that someone had inappropriately touched S.S. based on S.S.'s reaction during their conversation.

¶ 14 Robert S., S.S.'s father, testified that, around January 2014, he walked into the house and observed S.S. sitting on the defendant's lap. When the defendant noticed him, the defendant pushed S.S. off his lap and S.S. "[b]olted right to her room." Robert later told Melinda that they needed to talk to S.S. and tell her that she was too old to be sitting on her grandfather's lap.

¶ 15 Jennifer B., the defendant's daughter, testified as follows. She was approximately 11 years old when her father began sexually touching her. He would approach her from behind, wrap his arms around her like he was hugging her, and then touch her breasts and her vaginal area over her clothing. This happened multiple times over an approximately five-year period. Jennifer also testified that she had a habit of chewing on her fingernails, and that, whenever he caught her doing this, he would take her into a room and make her "suck on his penis." She did not tell anyone about this until she was an adult because she was scared; she then told both her mother and Melinda but did not give them any details. She acknowledged that Melinda had told her that the defendant had inappropriately touched S.S., but Melinda had not given any details about the touching.

¶ 16 The defendant testified and denied both S.S.'s and Jennifer's allegations of inappropriate touching.

¶ 17 Following deliberations, the jury found the defendant guilty of aggravated criminal sexual abuse. Thereafter, the defendant was sentenced to 180 days' jail time with credit for time served and 4 years' probation. As part of the probation, the trial court mandated that the defendant participate in and complete a specialized sexual offender treatment program. The defendant appeals.

¶ 18 On appeal, the defendant argues that he was denied his right to a fair trial by an impartial jury where his trial counsel failed to challenge for cause or use a peremptory challenge to remove Elizabeth K. from the jury.

¶ 19 Our review of ineffective assistance of counsel claims is guided by the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme

court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To succeed on a claim of ineffective assistance of counsel under the *Strickland* standard, one must both show that (1) counsel's representation fell below an objective standard of reasonableness (deficient performance prong); and (2) a reasonable probability exists that, but for the error, the result would have been different (prejudice prong). *People v. Richardson*, 189 Ill. 2d 401, 410-11 (2000). A defendant must satisfy both prongs of the *Strickland* test in order to succeed on a claim of ineffective assistance of counsel. *Id.* at 411. Thus, the defendant's failure to establish either deficient performance or prejudice will be fatal to the claim. *Id.*

¶ 20 To establish deficiency under the first prong of the *Strickland* test, one must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *Id.* The reviewing court must 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 (2007). An evaluation of counsel's conduct cannot extend into matters involving the exercise of judgment, trial tactics, or strategy. *People v. Penrod*, 316 Ill. App. 3d 713, 722 (2000). Counsel's actions during jury selection are generally considered a matter of trial strategy and such strategic choices are "virtually unchallengeable." *People v. Manning*, 241 Ill. 2d 319, 333 (2011). "Reviewing courts should hesitate to second-guess counsel's strategic decisions, even where those decisions seem questionable." *Id.* at 335.

¶ 21 Here, the defendant argues that his counsel's failure to excuse Elizabeth K. was not a deliberate strategic decision and was instead an oversight. We disagree. Our supreme court has found defense counsel's failure to remove a juror to be a matter of trial strategy

even when the juror made stronger statements about his potential inability to be impartial than Elizabeth K. made here. In *Manning*, the defendant, a registered sex offender, was on trial for drug-related offenses. 241 Ill. 2d at 321-22. During *voir dire*, defense counsel questioned the potential jurors about what impact, if any, the defendant's sex-offender status would have on their ability to be fair and impartial. *Id.* at 322. Juror A.C. stated that he believed that sex offenders should be "locked up for life." *Id.* When asked by defense counsel as to whether he could render a judgment on a case that is separate and distinct from the sex-offense case, he indicated that he could and that he did not think that the sex-offender background would influence his decision. *Id.* at 323. However, when defense counsel pressed the issue, he stated, "I cannot be fair with the case." *Id.* He then repeated that statement two more times. *Id.* Defense counsel did not move to strike him for cause or use a peremptory challenge to remove him from the jury. *Id.*

¶ 22 The defendant appealed his conviction, arguing that his counsel was ineffective for failing to challenge A.C. based on bias. *Id.* at 333-34. The court rejected this argument, stating that the defendant had focused only on A.C.'s last few answers and had failed to consider the entire *voir dire*. *Id.* at 334. The court noted that, even after saying that sex offenders should be locked up for life, A.C. stated that he would be able to listen to the evidence and render a decision apart from the sex-offender issue and that it was not until defense counsel pressed A.C. to state unequivocally that such a background would not influence his decision that he stated that he could not be fair. *Id.* Thus, the court concluded that, considering the entire *voir dire*, it was possible that the defendant's trial counsel decided that A.C. was not unequivocally biased. *Id.* at 335.

¶ 23 Here, Elizabeth K. affirmed, during group questioning, that she could put her sympathetic feelings aside and be objective about the victim's testimony. It was not until she was individually questioned about her ability to remain objective if S.S. was asked sensitive questions that she stated she "probably" could not be impartial. Further, Elizabeth K. also affirmed that she understood that the defendant was presumed innocent, that the State must prove the defendant guilty beyond a reasonable doubt, that the defendant did not have to offer evidence, and that the defendant's failure to testify cannot be held against him. Thus, defense counsel could have decided that Elizabeth K. was not unequivocally biased, and we cannot second-guess counsel's strategic decisions, even where those decisions seem questionable.

¶ 24 Even assuming that defense counsel's failure to challenge Elizabeth K. was objectively unreasonable, we conclude that the defendant has failed to overcome his burden of showing a reasonable probability that Elizabeth K.'s alleged bias altered the outcome of the trial.

¶ 25 Regarding the prejudice prong of the *Strickland* test, a defendant must prove that a reasonable probability exists that, but for the error, the result of the proceeding would have been different. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). A reasonable probability is one that is sufficient to undermine confidence in the trial's outcome. *Id.* at 410-13. This prong entails more than an "outcome-determinative" test. *Id.* Rather, the defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Id.*

¶ 26 Here, the evidence is more than sufficient to prove the defendant guilty beyond a reasonable doubt. S.S. testified that the defendant began touching her vagina through her clothing when she visited his home in spring 2013. The defendant moved in with her family in December 2013 or January 2014 and the touching continued. S.S. explained that the defendant would approach her from behind, reach around her as though he was hugging her, and rub her stomach and move his hand down to her vagina. She also described other incidents where the defendant would approach her with the pretext of showing concern or giving affection and then he would attempt to touch her vagina. She first revealed the abuse to her mother, who immediately contacted the police, and then she reported the abuse to the responding officer.

¶ 27 Jennifer B., the defendant's daughter, described similar conduct from the defendant. Jennifer testified that the defendant started sexually abusing her when she was 11 years old. She also testified that the defendant would approach her from behind, wrap his arms around her as though he was hugging her, and then touch her breasts or vagina. Although she acknowledged that she disclosed the abuse to Melinda, S.S.'s mother, she did not disclose the details of the abuse. Also, Jennifer did not know the details surrounding S.S.'s abuse allegations. Given the similarity in the testimony concerning the defendant's pattern of abuse, we conclude that the defendant has not shown that a reasonable probability exists that, but for the error, the result of the proceeding would have been different. Therefore, the defendant has not met the prejudice prong of the *Strickland* standard.

¶ 28 The defendant last argues that he is entitled to $5-per-day credit against imposed fines under section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2014)). The States concedes that the defendant is entitled to credit for 184 days in custody but disagrees with the defendant's argument that he was never awarded this credit. On the fines, fees, and costs order, the trial court entered "184" where the incarceration credit is calculated. However, the line for the total amount of credit is blank and the total fines imposed show no reduction in the fines that were eligible for offset. Also, a fines, fees, and costs printout from the circuit court, which was generated after sentencing, does not reflect that the credit was applied to the eligible fines. Based on our review of the record, we conclude that the court did not award the defendant any $5-per-day credit against his imposed fines. Thus, we must now determine whether the defendant was entitled to that credit.

¶ 29 A defendant is entitled to a credit of $5 per day for each day spent in presentence custody credited against fines assessed. 725 ILCS 5/110-14(a) (West 2014). However, subsection (b) of section 110-14 provides that subsection (a) does not apply to a person incarcerated for sexual assault as defined in section 5-9-1.7(a)(1) of the Unified Code of Corrections (Code) (730 ILCS 5/5-9-1.7(a)(1) (West 2014)). 725 ILCS 5/110-14(b) (West 2014). The definition of "sexual assault" in section 5-9-1.7(a)(1) of the Code includes aggravated criminal sexual abuse. 730 ILCS 5/5-9-1.7(a)(1) (West 2014). Because the defendant was convicted of aggravated criminal sexual abuse, he is not entitled to the $5-per-day credit against his imposed fines.

¶ 30 For the foregoing reasons, we affirm the judgment of the circuit court of Marion County.

¶ 31 Affirmed.