2019 IL App (2d) 160485-U
No. 2-16-0485
Order filed March 4, 2019.

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 14-CF-1119
ARMANDO ROMERO-GUTIERREZ,	)	Honorable Donald M. Tegeler Jr.,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was not ineffective for failing to object to the admission of a prior inconsistent statement containing his admissions: defendant was not prejudiced, as his admissions were vague, the victim's accusations were essentially clear and consistent, and defendant's conduct showed his consciousness of guilt.

¶ 2 Following a jury trial, defendant, Armando Romero-Gutierrez, was convicted of two counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)) and eight counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(b), (c)(1)(i) (West 2014)). Defendant appeals, contending that his attorney was ineffective for failing to object to

the admission as substantive evidence of his wife's prior inconsistent statement that defendant admitted committing the offenses. Although the statement was improperly admitted, defendant was not prejudiced. Therefore, we affirm.

¶ 3 Defendant was charged with 5 counts of predatory criminal sexual assault and 20 counts of aggravated criminal sexual abuse of A.D., who at the relevant times was younger than 13. At trial, A.D.'s mother, Irma Martinez, testified that her family sometimes visited defendant at his home. At other times, defendant would pick up her children from school and would watch them with his wife Estela Martinez, who was Irma's sister.

¶ 4 In 2014, Irma and her family were at defendant's house for Father's Day when Estela told Irma that A.D. was upset. Irma spoke with A.D. later that evening. A.D. said that defendant had touched her "butt." When Irma asked A.D. why she had not said anything previously, A.D. began to cry.

¶ 5 Irma spoke with A.D. again the following day. In response to questions, A.D. cried and said that defendant had touched her. The touching sometimes happened when she was at defendant's house and defendant was cooking. It began before A.D. went to the hospital for cutting her legs. A.D. said that "she had cut herself because she felt better that way, because she couldn't tell anybody." Irma recalled that she had taken A.D. to the hospital approximately eight months earlier.

¶ 6 A.D. related that defendant had touched her chest and her butt. She also pointed to her vaginal area. On at least two occasions, defendant touched her under her clothes. Defendant touched her butt with his penis. Defendant told A.D. to keep the touching a secret because Estela and her parents would be upset.

¶ 7 Estela testified that in June 2014 her sister told her that something had happened between defendant and A.D. Sometime after—she could not remember when—she went to his workplace to speak to him about it but she could not remember what they discussed. She did not remember telling Tim Martin of the Children's Advocacy Center that she told defendant that she knew what he had done to A.D. She did not recall telling Martin that defendant told her that he had done something stupid. She did tell defendant that she wanted him out of the house.

¶ 8 Defendant later picked up his clothes from the house. Sometime after that, she had a telephone conversation with him. She told defendant to bring her truck back. However, she did not recall telling Martin that defendant told her that he was going to call Irma and her husband and ask for forgiveness.

¶ 9 Martin testified that he interviewed Estela on June 23, 2014, but did not record the interview. Afterward, he summarized with Estela what she said and this summary was audio-recorded. The conversation was in Spanish, but an English transcript was admitted into evidence.

¶ 10 Martin testified that during the summarization Estela agreed that she had said that defendant stayed quiet when she confronted him about what he had done. She said that she told him that she knew he had touched A.D.'s breast and butt, and he admitted that he had done something stupid.

¶ 11 Estela also said that defendant told her that he wanted to ask A.D.'s parents for forgiveness for having touched their daughter. She said that it was not the right time to apologize. During the instructions conference, the parties agreed that Martin's testimony about his interview with Estela could be used as substantive evidence.

¶ 12 Pamela Ely, an investigator with the Children's Advocacy Center, testified that she interviewed A.D. on June 23, 2014. A video recording of the interview was played for the jury. In it, A.D. said that defendant began touching her when she was 9 or 10 years old. He sometimes picked A.D. and her siblings up after school. She would go to her cousins' room to watch movies. Defendant would pretend to go to the bathroom but would instead go into the room and try to touch her.

¶ 13 He sometimes touched her chest with his hands, both over and underneath her clothes. He tried three times to put his penis in her butt and actually did so twice. On one such occasion, defendant took off her underwear. He also touched her "part where [you] go pee" with his hand while her clothes were on. This happened five or six times.

¶ 14 She became angry when defendant touched her. As a result, she began cutting herself.

¶ 15 A.D. testified that she was born June 12, 2002. At some point, defendant began touching her. She could not recall what age she was when this began. He would touch her with his hands, both under and over her clothing.

¶ 16 The touching occurred in her cousins' room. When staying at defendant's house, she would often go there to watch television. Defendant would then pretend to use the bathroom but instead enter the bedroom, where he would touch her chest.

¶ 17 A.D. could not recall how old she was when defendant first touched her vagina, but he did so more than once. This occurred in the spring or summer when she was in the fifth, sixth, or seventh grade. Defendant touched her vagina with his hands both under and over her clothes. He said that, if she told anyone what he had done, he would hurt A.D. or her family.

¶ 18 The prosecutor then asked whether she was in bed both times defendant touched her vagina with his hands, and she replied "yes." The prosecutor showed A.D. a diagram of a boy's

body, and the State asked her to circle on the diagram the body part with which defendant had touched her. She circled the boy's hands and penis area. Defendant would stand up and remove her pants and underwear. He first touched her butt with his hand, then later with his penis. That part went inside her butt. When asked how many times his penis went inside her butt, she twice replied, "One or two times."

¶ 19 The prosecutor asked if "both times" happened the same way and inside her cousins' room. She responded, "The first would be with my clothes like off, and second time would be with my clothes on." When asked if "it" ever happened in defendant's bedroom, she said that it did and that "[t]hat time" her clothes were off.

¶ 20 A.D. testified that she sometimes cut herself. She did so when she was angry, as when her mother would yell at her. She was also mad at defendant. She eventually told her parents what had occurred.

¶ 21 The parties stipulated that a physician examined A.D. on June 17, 2014. There was no physical evidence of a sexual assault.

¶ 22 Defendant denied abusing A.D. He denied telling Estela that he had done something stupid or that he wanted to apologize to A.D.'s parents. He quit work and went to live with his brother in Milwaukee because he had no place to live after his wife kicked him out of the house and took her truck back.

¶ 23 In closing, the prosecutor argued that the jury could consider Estela's prior inconsistent statement as substantive evidence. During deliberations, the jury asked for a copy of Martin's interview summary and for a transcript of Martin's trial testimony. The court did not give the jury a copy of the interview summary but allowed it to review a transcript of Martin's testimony.

¶ 24 The jury found defendant guilty of 2 counts of predatory criminal sexual assault of a child and 16 counts of aggravated criminal sexual abuse. The court sentenced defendant to seven years' imprisonment on each predatory-criminal-sexual-assault-count, with those sentences to be consecutive to each other. The court sentenced him to six years on each of eight aggravated-criminal-sexual-abuse-counts, the sentences to be concurrent with each other but consecutive to the sentences for predatory criminal sexual assault. Defendant timely appeals.

¶ 25 Defendant argues that his attorney was ineffective for failing to object to the use of Estela's statement to Martin both as impeachment and as substantive evidence. He contends that the evidence was inadmissible substantively because Estela did not personally witness the acts that were the subject of the statement. Further, defendant argues, the evidence was not admissible even for impeachment because Estela's testimony that she could not remember what defendant told her did not affirmatively damage the State's case. Defendant contends that he was prejudiced because there were no other eyewitnesses and no physical evidence. Thus, the State's case hinged entirely on A.D.'s testimony, which was fraught with inconsistencies.

¶ 26 In response, the State does not dispute that the evidence was inadmissible. It contends only that defendant was not prejudiced, because A.D.'s testimony and her consistent statements to Ely and Irma were overwhelming. Moreover, Estela's statement to Martin, while relaying an "admission," was vague and contained no damaging details of the offenses.

¶ 27 A defendant is entitled to the effective assistance of counsel. Where a defendant claims that his counsel was ineffective, we apply the test in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24. "To prevail under that test, a defendant must show both that his counsel was deficient and that this deficiency prejudiced the defendant." *People v. Givens*, 237 Ill. 2d 311, 331 (2010) (citing *Strickland*, 466 U.S. at 687).

"If it is easier to dispose of an ineffective assistance claim on the ground that it lacks sufficient prejudice, then a court may proceed directly to the second prong and need not determine whether counsel's performance was deficient." *Id.* (citing *Strickland*, 466 U.S. at 697). Where, as here, the claim of ineffective assistance was not raised in the trial court, our review is *de novo*. *Lofton*, 2015 IL App (2d) 130135, ¶ 24.

¶ 28 The general rule is that hearsay, defined as an out-of-court statement offered for its truth, is inadmissible. *People v. Brooks*, 297 Ill. App. 3d 581, 583 (1998). However, an exception exists for a witness's prior inconsistent statements. *People v. McCarter*, 385 Ill. App. 3d 919, 929-30 (2008). Under section 115-10.1 of the Code of Criminal Procedure of 1963, a witness's prior inconsistent statement may be admitted as substantive evidence if it "narrates, describes, or explains an event or condition of which the witness had personal knowledge." 725 ILCS 5/115-10.1(c)(2) (West 2014). For the "personal knowledge" requirement to be satisfied, the witness must actually have seen the events that are the subject of that statement. *McCarter*, 385 Ill. App. 3d at 930. Hence, "[e]xcluded from this definition are statements made to the witness by a third party, where the witness has no firsthand knowledge of the event" that is the subject of the third party's statements. *People v. Morgason*, 311 Ill. App. 3d 1005, 1011 (2000). That is, the witness must have observed the events being spoken of, rather than simply hearing about them afterward. *McCarter*, 385 Ill. App. 3d at 930.

¶ 29 In *People v. Simpson*, 2015 IL 116512, the court found that defense counsel was deficient for failing to object to the admission of a witness's prior statement. The witness repeated the defendant's admissions that he struck the victim repeatedly with a baseball bat, but the witness did not personally see the attack. *Id.* ¶¶ 34-36. The court rejected the State's argument that the conversation with the defendant qualified as an "event" about which the witness had personal

knowledge. *Id.* ¶ 32. The present case is indistinguishable from *Simpson*, in that Martinez's earlier statement merely repeated her conversation with defendant; she never claimed to have witnessed any of the events.

¶ 30 Defendant further contends that the statement should not have been admitted even for impeachment, because Martinez's testimony that she could not remember the conversation did not affirmatively damage the State's case. A party may impeach its own witness through a prior inconsistent statement only when the witness's testimony affirmatively damages that party's case. *People v. Cruz,* 162 Ill. 2d 314, 361-62 (1994); *McCarter*, 385 Ill. App. 3d at 933. For testimony to be affirmatively damaging, it must do more than fail to support the State's position; it must give "positive aid" to the defendant's case, for instance by being inconsistent with the defendant's guilt under the State's theory of the case. *Cruz,* 162 Ill. 2d at 362.. It is not enough that a witness merely disappoints the State by failing to incriminate the defendant. *Id.* at 362-63. This limitation is necessary because the purpose of impeachment is to cancel out damaging testimony; if no such damage has been done, the only purpose of introducing the prior statement is to get it before the jury as substantive evidence. *Id.* at 364. Defendant asserts that Martinez's testimony that she could not remember much of her conversation with defendant might have disappointed the State but did not affirmatively damage its case.

¶ 31 As noted, the State does not contend that the statement was properly admitted, but contends that defendant was not prejudiced by its admission. We agree.

¶ 32 To establish prejudice under *Strickland*, a defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). A reasonable probability is one sufficient to undermine confidence in the proceeding's outcome: the defendant must show

that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Id.*

¶ 33 Defendant contends that he was prejudiced because the improperly admitted statement amounted to defendant's confession, the "most powerful piece of evidence the State can offer" (*People v. R.C.*, 108 Ill. 2d 349, 356 (1985)), and because, without this statement, the State's case hinged entirely on A.D.'s credibility. Defendant notes that there was no physical evidence and no other corroboration save A.D.'s statements to Ely and Irma.

¶ 34 The State responds that the statement was not a confession as defendant did not actually admit to committing any offense. Further, the State asserts, the statement did not contain any details of any offense whereas A.D.'s testimony and subsequent statements were clear and consistent.

¶ 35 In *Simpson*, the court noted that the confession "was a powerful piece of evidence that indicated defendant's chief role in the victim's death and the State used it to full effect." *Simpson*, 2015 IL 116512, ¶ 39. Moreover, the only eyewitness failed to identify the defendant at trial and most of the other evidence came from accomplices, whose testimony could have been viewed with "some skepticism given that they all received lighter treatment from the justice system." *Id.* Thus, the court found that the admission of the statement prejudiced the defendant.

¶ 36 Similarly, in *Lofton*, this court found prejudice where the improper evidence included the defendant's confession "complete with the motive for the shooting and the street upon which the murder was committed." *Lofton*, 2015 IL App (2d) 130135, ¶ 33. We compared the power of the detailed admissions with the "scarcity of other concrete evidence" tying the defendant to the crime. *Id.* ¶¶ 36-37.

¶ 37 By contrast, in *McCarter*, the court held that the defendant failed to establish the requisite prejudice, noting that considerable properly admitted evidence supported the verdict. This included evidence that the State had recovered a loaded gun from the defendant's mother's house, with one spent round consistent with the single bullet removed from the victim's body; the witness's in-court testimony establishing a possible motive for the crime; and other circumstantial evidence linking the defendant to the crime. *McCarter*, 385 Ill. App. 3d at 936.

¶ 38 Here, the statement did not contain the type of detail that the courts found significant in *Simpson* and *Lofton*. Defendant merely said that he had done something stupid and that he wanted to ask for forgiveness.

¶ 39 Moreover, the properly admitted evidence was strong. A.D. testified that defendant touched her chest both over and under her clothes "more than one" time. This was consistent with her earlier statements to Ely and her mother.

¶ 40 Similarly, A.D. consistently reported defendant's touching her sex organ with his hand, which made up the five convictions of aggravated criminal sexual abuse. A.D. reported to her mother that defendant touched her in her vaginal area. A.D. also told Ely that defendant touched her "at least *** five or six times" where she would "go pee." At trial, A.D. testified that defendant touched her vagina with his hand more than once and that it happened both under and over her clothing.

¶ 41 Irma testified that A.D. told her that defendant touched her butt with "the intimate part of men." A.D. reported to Ely that defendant put his private part in her butt twice. She explained that defendant would be standing behind her during this conduct. She further testified that defendant placed his private part in her butt "one or two times" and that it felt "[u]ncomfortable." In both her interview with Ely and at trial, A.D. stated that defendant told her not to tell anybody.

¶ 42 Moreover, as the State points out, defendant's subsequent conduct was evidence of his consciousness of guilt. After the meeting with Estela, he left his longtime employment without informing his supervisor or picking up his last paycheck. Defendant testified that his wife threw him out of the house. He then stayed in a truck for three nights before his brother picked him up and took him to Milwaukee. See *People v. Olla*, 2018 IL App (2d) 160118, ¶ 36 (that defendant left home without protest after being confronted with complainant's allegations corroborated the victim's testimony).

¶ 43 Defendant points out several inconsistencies in A.D.'s various versions of these events. He notes, for example, that A.D. told Ely that defendant twice placed his penis in her butt in her cousins' bedroom, but she testified at trial that the first time occurred in defendant's bedroom. The discrepancies defendant cites involve collateral details and do not detract from the overall consistency of her accounts.

¶ 44 Defendant cites *People v. Rush*, 250 Ill. App. 3d 530 (1993), for the proposition that, where the evidence of guilt hinges on the credibility of a single witness, the evidence is automatically "closely balanced." In *Rush*, the issue was whether the judge's remarks vouching for the victim's credibility were reversible error. The 10-year-old victim was far more equivocal than the victim in this case, prompting the court to hold that the "uncertainty" of the victim's testimony rendered the evidence closely balanced. *Id.* at 538; see also *Olla*, 2018 IL App (2d) 160118, ¶¶ 32-36 (evidence is not necessarily closely balanced where witnesses present differing accounts; court must " 'conduct a qualitative, commonsense assessment' " of the evidence (quoting *People v. Sebby*, 2017 IL 119445, ¶ 53)). *Rush* is thus distinguishable.

¶ 45 The judgment of the circuit court of Kane 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).

¶ 46 Affirmed.