2019 IL App (2d) 170479-U
No. 2-17-0479
Order filed September 10, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RODNEY P. RUBIO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kendall County. No. 16-CM-950 Honorable Timothy J. McCann, Judge, Presiding.

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was not ineffective for failing to introduce as substantive evidence the State's witnesses' prior statements: having established through cross-examination that their prior statements were inconsistent, counsel reasonably declined to introduce the statements themselves, which presumably contained damaging evidence.

¶ 2 Following a bench trial, defendant, Rodney P. Rubio, was convicted of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2016)) and two counts of criminal damage to property (*id.* § 21-1(a)). The trial court sentenced him to 12 months' probation. He appeals, contending that his

counsel was ineffective for failing to introduce as substantive the prior inconsistent statements of two witnesses. We affirm.

¶ 3 I. BACKGROUND

¶ 4 At trial, Jennifer Plum testified that she had been defendant's fiancée. On November 30, 2016, she lived with defendant and her four children. That morning, she and defendant began arguing. They both had to go different places, but they continued the dispute through calls and text messages throughout the day.

¶ 5 In the early morning of December 1, Plum was in a bathroom connected to her bedroom. She was not feeling well. She had been drinking since about 8:30 the previous night and had three or four beers. Defendant came in and stood in the doorway, yelling. He tried to pull her out of the bathroom, but she resisted by grabbing the toilet. Defendant was able to drag her out of the bathroom, pulling out some of her hair in the process. He struck her six or more times on her legs and face.

¶ 6 Plum screamed, "please don't kill me." Her daughter, Faith, woke up and came to the doorway. When she showed up a second time, yelling for defendant to stop, he left the room and went to the kitchen. Plum then heard two or three loud "crashes" from the driveway.

¶ 7 Plum called 911 and reported that someone had pushed her car through the garage door. She did not report a domestic battery at that time, because she was "scared and upset."

¶ 8 On cross-examination, she acknowledged giving the police a written statement. Defense counsel Dan Transier referred to the statement as "Defense Exhibit Number 2." Plum acknowledged that the statement was "fairly vague." It did not state that she and defendant had previously argued, or where the battery occurred. It did not indicate how many times she had

been struck, or whether she suffered any injuries. On redirect, she stated that she was "in shock" and just wanted to write something brief.

¶ 9 Faith Plum testified that she went to her mother's room after she heard her scream, "please don't kill me." She saw defendant kneeling in the bathroom doorway with her mother on the floor by the toilet. Jennifer told her to leave and she went back downstairs. When her mother screamed again, she went back upstairs. Defendant put his gun in his pocket. Defendant spat on Jennifer, but Faith did not see him strike her. Defendant went to the kitchen, yelling that Jennifer was a "whore" and that she had cheated on him. He threw some things around. Blood in his moustache made it look as if his nose were bleeding. Faith heard three loud bangs from outside.

¶ 10 On cross-examination, Faith said that she gave police a written statement the morning after the incident. The statement, which Transier referred to as "Defense Exhibit Number 3," did not mention that defendant spat on Jennifer or called her derogatory names. Faith said that she could not recall many of the details when she was writing the statement, because she was scared.

¶ 11 Officer Sean Barks responded to defendant's and Jennifer's house to investigate a "possible domestic." He encountered defendant leaving the house. Defendant said that the whole thing was a misunderstanding, that he did not want to talk, and that he wanted a lawyer.

¶ 12 Barks noticed that the garage door and two cars in the driveway were damaged. Defendant admitted causing the damage but said that it was an accident. With Jennifer's consent, Barks searched the house, where he found blood on the toilet, wall, and floor of the master bathroom. A towel was smeared with blood. Jennifer had a scratch on her neck and bruises on various parts of her body.

¶ 13 Defendant testified that he entered the bedroom and saw Jennifer kneeling by the toilet. She screamed at him and called him a jerk. Defendant's nose began bleeding due to a sinus infection. He started to go into the bathroom to get some tissue, but Jennifer slammed the door on him, striking his foot. As he opened the door to free his foot, which was caught underneath, the door struck Jennifer. She began pulling out her own hair and screaming. Defendant grabbed her wrists to prevent her from pulling her hair out. She kicked him, causing him to fall on top of her. She screamed at him not to kill her. She continued beating and kicking him. As defendant crawled away, he grabbed her pants leg to prevent her from kicking him. He did not strike her with his hand at any point.

¶ 14 After he left the bathroom, he was looking for his keys in the dark and might have knocked some things over. He got in his truck, which was parked behind Jennifer's van. He accidentally put the truck into drive instead of reverse, causing it to strike Jennifer's car.

¶ 15 In arguing for a directed finding, Transier claimed that the State's witnesses were not credible, because their statements given shortly after the incident were not specific. Only later, after having time to reflect, did they embellish their statements with additional details. Again in closing, Transier argued that the State's witnesses originally provided statements that were "truncated, very basic, very non-specific" versions of the events.

¶ 16 The court found the State's witnesses credible. Referring to Transier's argument that the witnesses' earlier statements were inconsistent and lacked detail, the court said that "[t]hose statements were not offered into evidence," so that it was "unable to make any findings based upon any alleged inconsistencies." The court found that defendant's testimony was not credible. Accordingly, the court found defendant guilty of one count of domestic battery and two counts of

criminal damage to property. It sentenced him to 12 months' probation. Defendant timely appeals.

¶ 17 II. ANALYSIS

¶ 18 Defendant contends that Transier was ineffective for failing to introduce Jennifer's and Faith's statements into evidence. Defendant argues that Transier made the inconsistencies between these statements and the witnesses' trial testimony the centerpiece of his defense, then failed to introduce the actual statements, causing the court to decline to consider them at all. The State responds that we must presume that Transier's actions were the result of trial strategy and that, because the statements are not in the record, we cannot meaningfully evaluate Transier's strategic decision.

¶ 19 A claim of ineffective assistance of counsel requires a defendant to establish that (1) his attorney's performance was objectively unreasonable and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Courts indulge a strong presumption that counsel's conduct is the result of strategic choices rather than incompetence. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007); *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Generally, decisions concerning whether and how to impeach witnesses and what evidence to present are strategic decisions that are virtually immune from ineffective-assistance claims. *People v. Madej*, 177 Ill. 2d 116, 148-49 (1997); *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). The only exception is where counsel's strategy is so unsound that counsel entirely fails to conduct any meaningful adversarial testing. *Perry*, 224 Ill. 2d at 355-56.

¶ 20 "A witness may be impeached by proof that she made a statement outside of court contradicting her in-court testimony or failed to speak under circumstances where it would have

been natural to relate the matters testified to in court if true." (Internal quotation marks and citation omitted.) *People v. Long*, 316 Ill. App. 3d 919, 930 (2000). A prior statement is considered inconsistent where it "omits a significant matter that would reasonably be expected to be mentioned if true." *People v. Zurita*, 295 Ill. App. 3d 1072, 1077 (1998). If the witness is subject to cross-examination about the statement and acknowledges making it, and the statement is within the witness's personal knowledge, the statement is admissible as substantive evidence. 725 ILCS 5/115-10.1 (West 2016).

¶ 21 Defendant argues, and the State does not dispute, that Jennifer's and Faith's statements were inconsistent with their trial testimony in that they omitted "significant matter[s]" that would reasonably have been expected to be included. Zurita, 295 Ill. App. 3d at 1077. These "matters" included the number of times Jennifer was struck and where the alleged beating took place. The State concedes that the statements would have been generally admissible. See Ill. Rs. Evid. 801(d)(1)(A) (eff. Oct. 15, 2015), 806 (eff. Jan. 1, 2011).

¶ 22 Defendant concludes that Transier should have followed up by seeking to admit the statements as substantive evidence, allowing the trial court to fully consider the extent of the inconsistencies in deciding on the witnesses' credibility. We disagree.

¶ 23 We must assume that Transier made a strategic decision not to introduce the statements and, without knowing what exactly was in them, we cannot evaluate the soundness of that decision. On cross-examination, both witnesses acknowledged making the statements and that they lacked many of the details of their trial testimony. Transier did not need to introduce the statements in order to question the witnesses about them. Ill. R. Evid. 613(a) (eff. Oct. 15, 2015). Thus, he achieved the only purpose for which defendant claims the statements were relevant without introducing them into evidence. Admitting the statements substantively might

have placed before the court evidence harmful to the defense. See *People v. Fillyaw*, 409 Ill. App. 3d 302, 314-15 (2011) (defense counsel has duty to prevent admission of prejudicial facts).

¶ 24 To the extent we can surmise from the record what the statements contained, it is likely that they did contain information prejudicial to the defense. For example, Transier asked Jennifer whether her statement failed to state how many times she had been struck. He never asked her whether she had claimed that her injuries were accidental or were inflicted by an unknown intruder. Thus, the clear inference is that Jennifer's original statement alleged that defendant struck her. Transier could reasonably have concluded that, having accomplished his objective by getting Jennifer to admit that her original statement lacked important details, no further purpose would be served by introducing a written statement made shortly after the event that, consistent with the trial testimony, accused defendant of hitting her.

¶ 25 Our conclusion is not altered by considering the trial court's statement that it "could not consider" any alleged inconsistencies because the statements were not introduced. We evaluate counsel's decisions not in hindsight, but from his perspective at the time. *Perry*, 224 Ill. 2d at 344. As noted, counsel could reasonably have believed that he had achieved his purpose by getting Jennifer and Faith to admit that their earlier statements lacked detail. As far as we can tell, there was nothing of substance for the court to consider.

¶ 26 III. CONCLUSION

¶ 27 The judgment of the circuit court of Kendall County is affirmed.

¶ 28 Affirmed.