2019 IL App (2d) 180117-U
No. 2-18-0117
Order filed April 12, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SUNNY T. MATTAHIL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 16-CM-2394 Honorable James D. Orel, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant forfeited his ineffective-assistance claim by failing to develop and support it; in any event, none of his various contentions had merit.

¶ 2 Defendant, Sunny T. Mattathil, appeals from his conviction of battery (contact of an insulting or provoking nature) (720 ILCS 5/12-3(a)(2) (West 2014)), asserting, based on multiple asserted failures, that trial counsel was ineffective. We hold that defendant has forfeited his claim by failing to develop it adequately. Further, forfeiture aside, we hold that the record fails to support defendant's claim. We thus affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 2, 2016, the State charged defendant by information with a single count of battery (contact of an insulting or provoking nature). The information, as corrected, alleged that, "on or about the 13th day of July, 2014," "defendant placed his hands upon the chest of Maria [R.]" It further alleged that "the applicable statute of limitations [was] tolled from July 13, 2014, to June 2, 2016, during the pendency of [case No.] 14 CM 2334, and [that the] applicable statute of limitations [was] extended pursuant to 720 ILCS 5/3-7(c)." Maria R. was an employee of defendant's at the Howard Johnson motel that he owned in Addison; the contact at issue was defendant's hugging Maria from behind and touching her breasts.

¶ 5 The State filed a motion *in limine* in which it sought to introduce evidence of three incidents in which defendant touched two other female employees in an offensive manner. Defendant opposed the motion on the basis that the evidence was irrelevant and that its unfair prejudice would outweigh its probative value. The court denied the motion without prejudice. At the same time, defendant moved to sever the trial in this case from the one in case No. 16-CM-2394, which involved a similar, but later, incident with a different victim.

¶ 6 Defendant had a jury trial but waived his right to a 12-person jury. The parties stipulated that the charge was not barred by the statute of limitations:

> "The parties stipulate that the State has 18 months to bring charges against the defendant, and that that the statute of limitations ran for 72 days out of the 18 months.
>
> The parties hereby stipulate that from 07/14/2014 (the date that charges were initially filed under 14CM2334) through 06/02/2016 (the date that the State's motion to continue trial date was denied, and the case was dismissed) the statute of limitations did not run as the case was pending.

> Additionally, the parties stipulate that the statute of limitations has not been running from 08/02/2016 (the date that charges were refiled) to today's date of 05//18/2017 as the case has been pending.
>
> The parties stipulate that an exception permitting this prosecution applies under 720 ILCS 5/3-7(c)."

¶ 7 In this appeal, defendant asserts that defense counsel acted ineffectively when she failed to excuse a regular juror, Douglas Schoof, and the alternate juror, Casey Tome. Schoof told the State that he ran a family contracting business and had previously served on a jury in a criminal case. The State asked Schoof—as it had asked some other venire members—about what sort of bumper sticker he would pick for his car. He responded, "It would probably say: Three Jews walk into a bar. No." Neither the State nor defense counsel asked questions that followed up on his response. The alternate juror did not deliberate, so, as no prejudice could have resulted from her selection, we do not detail her *voir dire*.

¶ 8 In her opening statement, defense counsel emphasized that, although the "inappropriate[] touching" took place at about 6 p.m. on July 3, 2014, Maria did not contact the police until the next morning. Counsel argued that Maria "was illegal," that she needed money and filed a wrongful termination suit with "more egregious" allegations than those in her police report, and that she received compensation in that suit.

¶ 9 Maria was the State's primary witness. At the time of the trial, she had been working as an Uber driver for a little over a year and was the single parent of a five-year-old daughter. On July 3, 2014, she had been working at the Howard Johnson in Addison for about a month. She found the job based on a sign posted in front of the motel. She had recently quit a job at a Subway because the hours were not compatible with her childcare. The hours were similar at the

motel, but Maria by then needed any job she could get to pay her rent. She started working as a maid, but then her responsibilities changed to include working at the front desk and doing laundry.

¶ 10 During the afternoon and evening of July 3, 2014, Maria was working at the front desk. Defendant, who was her immediate supervisor, was also in the building. At around 6 p.m., defendant came over to the front desk area and told her that he needed to show her something. He told her to go to the laundry area—she explained that "as soon as you open the door to the back there is the laundry area"—and had her walk in front of him. The laundry room was badly lit, with some lights not functioning, and the light switches were at the back of the space. As she walked into the room, he reached around her from the back, hugged her over her arms, and grabbed her breasts. She "pushed him back" and said, "[W]hat are you doing?" He said, "[O]kay, okay," and then grabbed his keys and left the motel. Maria felt "disgusted." Maria stayed at the front desk because no one else was there. When her replacement arrived, she left without completing her last task, which was to check the rooms: "I was scared [defendant] was going to be in the room. I just couldn't stay there." At that point in Maria's testimony, the court cleared the room for a few minutes to allow her to "collect herself."

¶ 11 Maria left work at the end of her shift, picked up her daughter from the babysitter, went home, and contacted her boyfriend to ask him to go with her to the police to report defendant's behavior. He agreed to accompany her at about 7 a.m. the next morning—as soon as he got off work. They went to the Addison Police Department, and Maria made her report. She did not go to work that day. She falsely told defendant that she could not come to work because she did not have a babysitter, but she never worked another shift at the Howard Johnson. She went with a police officer to pick up her last paycheck.

¶ 12 Maria sought legal advice, resulting in her filing what she characterized as a "wrongful termination lawsuit" against defendant. However, because her lawyer wanted money that she did not have, she did not pursue the suit and did not receive any compensation from defendant.

¶ 13 On cross-examination, Maria said that she was born in Mexico but she became a legal United States resident when she was three months old. Her green card came up for renewal in 2013; she had applied for the renewal late in 2012, and she got a sticker for the back of her card extending its validity while she waited for the new card to arrive. She had been an authorized resident at all times. She denied that defendant ever suggested to her that her work performance was inadequate. Defense counsel showed Maria the complaint in her civil suit, which was for employment discrimination, not wrongful termination. Counsel suggested to Maria that the complaint was inconsistent with the police report in that it included an allegation that defendant had ground his body up against hers. Maria said that both the police report and the complaint were correct: when defendant hugged her from behind, the front of his body ground up against her back. She agreed that, in one job application she filled out at the same time she applied for the Howard Johnson job, she said that she left her job at Subway because she was "uncomfortable," never mentioning the hours.

¶ 14 Officer Thomas Hostetler of the Addison police met with Maria and her boyfriend on July 4, 2014. Maria was upset and angry as she made her report. After taking Maria's statement, Hostetler went to the Howard Johnson. Defendant was not there at the time, but Hostetler reached him by phone and asked him to come to the motel to talk. They met later in the morning; defendant arrived an hour and 45 minutes after he said he would. Defendant said that he had been training Maria the previous afternoon. The State asked whether defendant said what happened while he was training her:

"[HOSTETLER]: He said that he had a conversation—I asked him if he had a conversation with [Maria] and he said that he had a conversation with her in the laundry room and that he touched her on both shoulders and advised her that he was leaving.

[THE STATE]: Did he say anything else to you?

[HOSTETLER]: Yeah, he said that she made a statement back to him stating don't touch me. I found it very unusual."

When defendant spoke to Hostetler, he appeared to be "upset" and "nervous."

¶ 15 The State rested after the stipulation was read, and defense counsel moved for a directed verdict, asserting that the State's substantive evidence was insufficient and not challenging the information's timeliness. The court denied the motion. It admonished defendant of his right to decide whether to testify. Defendant said that it was his choice to decline to testify, and the defense rested without putting on evidence.

¶ 16 The State made certain statements in its closing argument that are relevant to his claims on appeal. He asserts that defense counsel failed to respond to the State's exaggeration of the laundry room's isolation. The State argued as follows:

"The defendant was her boss and he approached her on that date and he came up to her and he said that he had something to show her and it was in the laundry room, in a back room away from the front of the hotel."

¶ 17 Defendant next argues that defense counsel failed to object to the State's misuse of Hostetler's testimony about his conversation with defendant. On that point, the State argued as follows:

"First, Officer Hostetler said that when he went to talk to the defendant at the Howard Johnson Hotel the defendant was very nervous during questioning. And, second, without

any question from Officer Hostetler the defendant said as soon as he knew that Officer Hostetler was there to talk to him about a conversation with [Maria] the defendant said I touched her on both of her shoulders, and that was in response to no question about any physical contact. Ladies and gentlemen, that shows a guilty state of mind of this defendant."

¶ 18 Defense counsel argued that Maria made up the incident because she was desperate for money:

"[Maria] was on the stand and she was crying. She was crying about how she couldn't afford to provide for her kids, about how she felt insulted when the defendant—when my client allegedly touched her breasts. This crying coming three years later? Three years later. Where was the crying? Where was the calling of the police back on July 3rd, 2014?"

¶ 19 In rebuttal, the State again discussed the laundry room's isolation:

"In fact, what she wrote on that piece of paper [(the civil complaint)] is exactly what she told us in court today that on July 3rd of 2014 this defendant directed her to a dark room away from people, away from anyone else and that's when he placed his hand on her breasts."

¶ 20 The jury found defendant guilty.

¶ 21 Defendant then replaced his counsel and new counsel filed a posttrial motion that counsel later amended. The amended motion is not part of the record on appeal. Based on the State's response, it is apparent that defendant asserted that trial counsel was ineffective for failing to challenge the timeliness of the charge and for failing to object to Hostetler's testimony that defendant appeared to be "nervous." Further, defendant apparently asserted a violation of the

principles of *Brady v. Maryland*, 373 U.S. 83 (1963), in that the State failed to disclose interviews with other female employees of defendant's. On September 14, 2017, the court sentenced defendant to 24 months' reporting supervision. The court denied the amended posttrial motion on January 22, 2018. Defendant filed a notice of appeal on February 15, 2018.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant argues that trial counsel was ineffective. He lists what he asserts are 12 unprofessional errors of trial counsel's. However, some of the 12 duplicate others. Moreover, the discussion portion of defendant's argument raises different points. We find 10 points in defendant's claim of counsel's ineffectiveness:

(1) Trial counsel had "no trial strategy of any kind and gave Defendant no professional assistance at all."

(2) Counsel should have obtained and used "exculpatory" evidence that some of defendant's female employees had not experienced physical harassment from him.

(3) Counsel should have objected to the State's arguments that implied that the laundry room was a secluded place.

(4) Counsel should have challenged the seating of Schoof—"whose idea of a bumper sticker was 'three Jews went into a bar' and whose prejudice was obvious"—and of the alternate juror.

(5) Counsel should have moved to bar Hostetler's testimony that defendant appeared to be nervous and should have objected to the State's arguments based on that testimony.

(6) Counsel should have objected to the "State [*sic*] stating 'you have before you evidence that the defendant made statements relating to the offense charge[d] in the information.' "

(7) Counsel should have objected to the jury receiving a circumstantial-evidence instruction when none of the evidence was circumstantial.

(8) Counsel should have objected to sending the exhibits to the jury.

(9) Counsel should have challenged the State's change of the information between the two cases; the first information alleged that defendant touched Maria's "shoulders," whereas the second alleged that he touched her "chest."

(10) Counsel should have explained to the jury "as many times as possible," and particularly at *voir dire*, defendant's right not to testify.

¶ 24 We hold that defendant has waived his claim by failing to develop any part of it properly, with cogent argument and citation to appropriate authority. To succeed on a claim of ineffective assistance of counsel, a defendant must present evidence to satisfy both prongs of the standard set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984): a defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. Defendant has failed to explicitly address *either* prong of *Strickland* for *any* of the claimed unreasonable acts of counsel. For instance, defendant has not explained why—in a trial where the State introduced no evidence of a pattern of assaultive behavior by defendant—evidence that defendant *did not* assault or batter some of his female employees would be admissible exculpatory evidence. Moreover, he has not explained how the failure to introduce such evidence prejudiced him, when introducing it would likely have opened the door to evidence that he assaulted or battered others. It is not our function to provide the argument and

citations to authority that defendant should have provided. " ' "[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." ' " *People v. Ramirez*, 2013 IL App (4th) 121153, ¶ 74 (quoting *In re Marriage of Baumgartner*, 237 Ill. 2d 468, 474-75 (2010), quoting *Pecora v. Szabo*, 109 Ill. App. 3d 824, 825-26 (1982)).

¶ 25 Forfeiture aside, the record does not show that trial counsel was ineffective. We first reject the suggestion that trial counsel had "no trial strategy of any kind, and gave Defendant no professional assistance at all." Counsel's strategy was to paint Maria as a desperate woman who was prepared to frame her employer to get money to support her child. Although this strategy appears to have been unlikely to succeed, no better alternative presents itself. Further, trial counsel actively advocated for defendant, objecting to the State's motion *in limine*, vigorously cross-examining the State's witnesses, and successfully raising multiple objections to the testimony.

¶ 26 Second, evidence that defendant *did not* batter or harass certain of his employees would not have been relevant exculpatory evidence; although patterns of physical harassment are common, there is no reason to expect them to extend to *every* potential victim. Testimony of employees whom defendant did not victimize would arguably have been relevant to counter evidence that defendant had a pattern of victimizing employees. But the State did not put on such evidence, so trial counsel had no basis to introduce countering evidence.

¶ 27 Third, the evidence does not contradict the State's assertion that the battery took place "in a back room away from the front of the hotel." Maria testified, "[A]s soon as you open the door to the back there is the laundry area." Thus, the laundry area was not part of the public area in

the front of the motel. Thus, no evident basis existed for trial counsel to object to the State's argument.

¶ 28 Fourth, nothing in the record suggests that trial counsel's choice to allow the seating of Schoof—"whose idea of a bumper sticker was 'three Jews went into a bar' and whose prejudice was obvious"—was unreasonable. In part, we are not sure what exactly to make of Schoof's response, especially given that he seemed to try to take it back as soon as he made it. In any event, even if Schoof's answer reflected bias, it is not clear why that bias hurt defendant. Defendant implies that he, as an Indian American, would have been a natural target of Schoof's ethnic biases. That is not an obvious inference. Trial counsel must have been seeking jurors who would be receptive to her argument that Maria fabricated her claim for money. Schoof's comments were not a basis to conclude that he would be unreceptive to counsel's theory of the case. Further, as noted, allowing the alternate to be seated cannot be a basis for an ineffective-assistance claim: the alternate did not deliberate, and so his seating cannot have prejudiced defendant.

¶ 29 Fifth, the record does not show any basis on which trial counsel could have objected to Hostetler's testimony about defendant's demeanor. Nothing in the Illinois Rules of Evidence or our case law prohibits a witness who had the opportunity to observe the demeanor of another from testifying about the demeanor.

¶ 30 Sixth, contrary to what defendant asserts, the State did not "stat[e that] 'you have before you evidence that the defendant made statements relating to the offense charge[d] in the information.' " In fact, that statement was a part of the court's instructions to the jury. Moreover, the record does not suggest that trial counsel had a basis to object *to that* instruction.

Defendant did make one statement relating to the offense: he stated that he had touched Maria's shoulders.

¶ 31 Seventh, defendant asserts that trial counsel should have objected to the instruction on circumstantial evidence on the basis that no circumstantial evidence was presented. The record does not support that contention. "Circumstantial evidence" is evidence tending to prove facts or circumstances from which the trier of fact may, by use of reason and experience, infer other relevant facts. *E.g.*, *People v. White*, 2016 IL App (2d) 140479, ¶ 37. Thus, evidence that defendant appeared nervous when Hostetler came to speak to him and that he volunteered a defensive answer was potentially circumstantial evidence that he had a guilty conscience. Thus, the circumstantial-evidence instruction was proper.

¶ 32 Eighth, defendant asserts that counsel should have objected to the exhibits being sent to the jury room. We do not understand the basis for that claim. The exhibits were all court documents relating to the issue of whether the charge at issue was within the statute of limitations. Whether to send exhibits to the jury room is a matter for the discretion of the trial court. *E.g.*, *People v. Arze*, 2016 IL App (1st) 131959, ¶ 109. A court can properly decline to send an exhibit to the jury room for several reasons, the only one of which that seems remotely applicable is that the jury might give undue weight to it (*People v. Mims*, 204 Ill. App. 3d 87, 94 (1990)). In any event, we cannot see how the jury could have given too much weight to authentic documents relating to the history of the charge.

¶ 33 Ninth, we cannot determine the basis for defendant's claim that counsel should have challenged the State's modification of its statement of the offense between the two cases, either from defendant's argument or from the record on appeal.

¶ 34 Tenth, we do not agree that professional standards required that counsel explain defendant's right not to testify to the jury "as many times as possible." Of course, when a defendant exercises the right not to testify, the jury needs to know that it cannot weigh that against him or her. However, that does not mean that incessant emphasis will benefit a defendant. Indeed, excessive emphasis on a defendant's right to decline to testify can become counterproductive by increasing the salience of the defendant's silence.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm defendant's conviction. 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).

¶ 37 Affirmed.