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No. 3--09--0753

Order filed April 14, 2011

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	No. 07--CF--620
)	
DONALD FLETTER,)	Honorable
)	Robert P. Livas,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

Held: Where available witnesses supported victim's story and would have been subject to impeachment if they had testified, trial counsel was not ineffective for failing to introduce their testimony to attack the victim's credibility.

Defendant Donald Fletter was convicted of two counts of criminal sexual assault (720 ILCS 5/12--13(a)(4) (West 2006)) and three counts of aggravated criminal sexual abuse (720 ILCS 5/12--16(d) (West 2006)), and sentenced to 21 years in prison. He

appeals, claiming that trial counsel was ineffective for failing to introduce evidence that would have demonstrated the victim's lack of credibility. We affirm.

Defendant was charged with sexually abusing and assaulting, E.A., a minor between the ages of thirteen and eighteen. The five-count indictment alleged that defendant, who was in a position of supervision and trust, placed his finger in E.A.'s vagina, placed his penis in E.A.'s mouth, and instructed E.A. to fondle his penis with her hand.

E.A. was the only witness at trial. She testified that between June 1, 2006, and March of 2007, she was fifteen years old. Her mother, Mary, was dating defendant. E.A. lived with her mother, her sister, Danielle, and defendant.

In the summer of 2006, E.A. had problems with abnormal vaginal discharge. Her mother examined her vagina and helped her treat the infected area by applying cream. Defendant also examined E.A. During his examination, defendant put his finger in E.A.'s vagina.

Sometime that summer, defendant and E.A. were sitting on the couch in the living room, and defendant asked E.A. if he could touch her breasts. Defendant touched E.A.'s breasts over her clothing and under her bra. Later, he showed E.A. how to perform a "hand job." E.A. rubbed her hand against his penis until he ejaculated. On one occasion, defendant asked E.A. to perform oral sex on him and she did. On another occasion, defendant performed

oral sex on E.A. and placed his penis between her breasts. He also used E.A.'s breasts to demonstrate the proper method of a breast examination.

E.A. testified that she and defendant had numerous sexual encounters between June 2006 and May 2007. Mary often left E.A. alone with defendant while she and Danielle went shopping. When defendant and E.A. were alone, they engaged in sexual activities. She testified that defendant drove her to places on two separate occasions. Both times, E.A. performed oral sex on defendant or rubbed his penis.

E.A. also recalled that, on one occasion, Mary told her to watch while Mary and defendant performed oral sex on each other as a teaching experience. During the demonstration, Mary stopped and let E.A. rub defendant's penis.

E.A. did not tell anyone about her sexual encounters with defendant initially because he was the only person in the household who had a job. E.A. was afraid of what would happen to her family if they lost defendant's income. However, when defendant told E.A. that they would have sexual intercourse when she was ready, E.A. became frightened and decided to tell her friends. She later told authorities about defendant's conduct.

Defendant's attorney, Timothy McGrath, cross-examined E.A. and questioned her veracity. McGrath attempted to highlight E.A.'s motive to invent the allegations against defendant. During

questioning, E.A. admitted that she consistently disobeyed her mother's rules by wearing inappropriate clothing and dating boys her mother did not like. E.A. testified that she did not have a good relationship with her mother and that Mary often grounded her for breaking household rules.

The parties stipulated that defendant was born in 1961. The State rested, and defendant did not present any witnesses. The jury found defendant guilty on all five counts.

Prior to sentencing, defendant filed a motion for a judgment notwithstanding the verdict or for a new trial, alleging among other things, that defense counsel was ineffective for failing to challenge the victim's credibility. Defendant alleged that counsel should have confronted E.A. with her Child Advocacy Center (CAC) interview, in which she admitted to lying and falsely accused Danielle of sexually abusing her. He also claimed that counsel should have called Mary and Danielle as witnesses to contradict E.A.'s claims that defendant committed sexual acts with E.A. in their presence.

Defendant attached several exhibits to his motion, including a police report summarizing E.A.'s CAC interview. In that interview, E.A. stated that defendant had been living in her mother's house for approximately 2½ years. She described an incident in which Mary instructed her to take off her clothes and engage in sexual acts with Mary and defendant; Mary told her that

masturbation would help with her vaginal discharge. E.A. stated that Mary did not touch her again but that defendant asked her to perform "hand jobs and blow jobs" on him. E.A. also stated that, on more than one occasion, she woke up in the night and found Danielle rubbing her breasts and kissing her on the mouth.

The trial court conducted an evidentiary hearing on defendant's motion. Mary testified that defendant lived with her for more than a year and that she never noticed any inappropriate behavior between defendant and E.A. She denied that she ever rubbed E.A., or that she ever performed oral sex on defendant or had him perform oral sex on her in front of E.A. She also stated that defendant was unable to drive between June 2006 and March 2007 due to an injury at work. She informed McGrath of these facts but was not called to testify.

On cross-examination, Mary acknowledged that she gave a videotaped statement to police in which she stated that defendant participated in E.A.'s vaginal examination. On redirect, she explained that she gave the statement to police, after several hours of questioning, because she felt threatened that the officers were going to charge her with an offense.

Danielle stated that she never saw defendant act inappropriately around E.A. She denied telling a police officer that defendant used E.A.'s breasts to demonstrate a breast examination. Danielle claimed that, like Mary, she gave this

information to McGrath.

Defendant testified that he met with McGrath three times before trial. At the third meeting, McGrath told defendant that Mary was a "rotten witness" and that he was not going to call her to the stand. McGrath encouraged defendant to accept a plea. He did not discuss the case any further. At trial, McGrath told defendant not to testify.

McGrath described all three meetings as substantive in nature. At one meeting, defendant gave McGrath the names of two of E.A.'s friends. McGrath had an investigator interview both and decided not to call them because their statements expressly denied that E.A. made false accusations against defendant. As to Danielle and Mary, McGrath decided not to call Danielle as a witness because she made a statement to police in which she recalled defendant using E.A. to demonstrate a breast examination. Mary was also a questionable witness because she had given a videotaped statement to police stating that defendant had performed a vaginal examination on E.A. Although both Danielle and Mary later changed their statements, McGrath worried that, if they testified, their prior statements would be used against them for impeachment purposes. He was also concerned that their earlier statements supported E.A.'s testimony. Consequently, McGrath decided not to call either witness. The trial court then denied defendant's posttrial motion.

ANALYSIS

To establish a claim of ineffective assistance, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that counsel's deficient performance prejudiced the defendant. *People v. Albanese*, 104 Ill. 2d 504 (1984). The defendant's failure to demonstrate either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *People v. Palmer*, 162 Ill. 2d 465 (1994). The court must judge counsel's conduct on the facts of the particular case, viewed at the time of his or her performance. *People v. Shatner*, 174 Ill. 2d 133 (1996).

Trial counsel's decision whether to present a particular witness is within the realm of strategic choices that are generally not subject to attack on grounds of ineffectiveness. *People v. Tate*, 305 Ill. App. 3d 607 (1999). Errors in strategy do not constitute ineffective assistance of counsel. *People v. Krankel*, 131 Ill. App. 3d 887 (1985). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984).

In the present case, defendant has failed to establish his claim of ineffective assistance of counsel. The record demonstrates that the decisions of defense counsel, not to confront

E.A. with her CAC statement or call Mary and Danielle as witnesses, were strategic ones.

First, defendant argues counsel was ineffective for failing to admit E.A.'s false accusations against Danielle in the CAC interview to impeach E.A.'s credibility. The CAC interview, which was conducted shortly after the alleged offenses, essentially supported E.A.'s trial testimony. Minor discrepancies in the details of events could not overcome the correlation between the sexual acts E.A. described in the interview and the sexual conduct E.A. spoke about at trial. E.A.'s allegedly false statement against her sister would not have changed the otherwise probative nature of the interview in defendant's case. Moreover, defense counsel's introduction of the interview would have opened the doors and allowed the State to use E.A.'s earlier statement defendant to bolster her trial testimony in the eyes of the jury. Accordingly, trial counsel's performance was not incompetent nor was defendant prejudiced by counsel's failure to introduce the CAC interview.

Second, defendant contends that counsel was ineffective for failing to call Mary and Danielle as witnesses. At the evidentiary hearing, Mary and Danielle both testified that they never saw any inappropriate sexual conduct between defendant and E.A. On cross-examination, Mary admitted that she gave a statement to police in which she told investigators that defendant participated in a vaginal examination of E.A. Danielle was confronted with an

earlier statement in which she said that defendant used E.A. to demonstrate a breast examination. Attorney McGrath acknowledged that before trial both witnesses recanted their testimony but noted the State's ability to use their earlier statements for impeachment purposes. He testified that he decided not to call Mary and Danielle as witnesses because he was afraid that their earlier statement would be used to corroborate E.A.'s testimony or, worse, to impeach them. As such, McGrath felt that the best defense was to focus on the weakness of the State's case and to avoid offering unreliable witnesses. Because the record demonstrates that McGrath's decisions were matters of reasonable trial strategy, the defendant's claim of ineffective assistance necessarily fails. See *Tate*, 305 Ill. App. 3d at 612.

CONCLUSION

The judgment of the circuit court of Will County is affirmed.
Affirmed.