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No. 3--09--0451

Order filed May 25, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF	)	Appeal from the Circuit Court
ILLINOIS,	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08--CF--798
	)	
STEVEN R. GRANT,	)	
	)	Honorable Kathy Elliott,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Presiding Justice Carter and Justice O'Brien concurred in  
the judgment.

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**ORDER**

*Held:* Trial counsel was not constitutionally ineffective for recalling defendant to the stand so the State could perfect its impeachment of him. This was a permissible trial strategy under the facts of this case.

Following a trial in the circuit court of Kankakee County, a

jury convicted defendant, Steven Grant, of criminal sexual assault. 720 ILCS 5/12-13(a)(2) (West 2008). This is defendant's direct appeal in which he claims he was denied effective assistance of counsel where his counsel recalled him to the stand to allow the State to perfect its impeachment of him. We affirm.

#### FACTS

At trial, the victim J.B. testified that on February 24, 2007, she saw defendant, Aaron Walker and a man named Kamron at Gala Lanes and agreed to meet them later in the evening. Defendant later drove her to "Mike's house" where she drank gin while others in the apartment played dominos and cards. She was drunk and began kissing Aaron Walker while the two of them were in the living room. The next thing she remembered was "being upstairs."

J.B. stated that she recalled having sex with Aaron Walker on the night in question. At one point, she woke up to find defendant having sex with her. She pushed him back, found her clothes and left. She testified that she did not agree to have sex with Steven Grant that evening.

Officer Nicholas Crowley testified that at approximately 4:30 a.m. on February 25, 2007, he saw the victim walking along

University Avenue. She told him she had been at a party at Mike's house and woke up to find someone trying to have sex with her. She indicated that she pushed the individual off of her and grabbed her clothes. She directed him to Mike's house, which the police later searched. Steven Grant was present at the residence. J.B. did not name the individual she pushed off of her that night and, while she appeared drunk, Officer Crowley noted she was able to walk and converse with him.

Romy Mietzner, an emergency room nurse, testified that she administered a rape kit for the victim on the night in question. J.B. told nurse Mietzner that when she woke up, a man was having sex with her. Nurse Mietzner reported that the victim mentioned Aaron Walker and someone named Steve who "was tall, muscular, and had a gap between his teeth." The victim reported to nurse Mietzner that Steve had sex with her that night.

David Turngren, a forensic scientist, identified a DNA sample obtained from Steven Grant. He testified that he could not match defendant's DNA to any of the forensic evidence collected by the police.

Sergeant Glenn Nixon testified that when he saw J.B. the morning of February 25, she was crying, upset and stated that she had been raped, but did not know the person who raped her. She

described the man as a tall, thin black male with a large gap between his teeth.

Lieutenant Gregory Kunce testified that at the hospital, the victim told him that the man who assaulted her was named Steve. He reported that defendant was present at Mike's house when the police executed a search warrant. He interrogated defendant at the police station. The trial court published to the jury a statement signed by defendant. The State then rested.

Steven Grant took the stand in his own defense. He stated he arrived at Michael Wesby's house around midnight on February 24, 2007. He played cards and dominos most of the night. While playing dominos, the victim entered the room "half dressed" and sat on Aaron Walker's lap. Later in the evening, Aaron and the victim went upstairs.

Defendant continued his testimony by noting that he played cards for approximately an hour and then went into the living room to watch a movie where he fell asleep. He was awoken by police officers knocking at the door. He denied giving a statement to Lieutenant Kunce, but admitted signing a statement for Lieutenant Kunce as the lieutenant told defendant that he could go home if he signed the statement. He denied ever having sex with J.B.

During cross-examination, the prosecutor questioned defendant about a previous hearing in which he testified. The following exchange took place:

"Q. There was a previous time in which you testified, sat on the stand, were placed under oath and answered some questions; is that correct? In regards to this case.

A. No, I don't recall.

Q. You don't recall a hearing March 31 of 2008 in which you testified, Detective Kunce testified, and some other officers testified?

A. You said March 31?

Q. I'm sorry. October 31 of 2008.

A. Uh, I don't recall.

Q. All right.

A. Uh - -

Q. You don't recall sitting in that chair?

A. You say October?

Q. October 31 of 2008. Halloween.

A. No - -

Q. All right.

A. - - I don't.

Q. You don't recall sitting in that chair?

A. Unh-unh.

Q. You don't recall being placed under oath?

A. No, ma'am.

Q. You don't recall Mr. Ridge asking you questions?

A. No, Ma'am.

Q. You don't recall - -

A. Other than this office.

Q. - - me asking you questions?

A. Unh-unh."

When asked about specific testimony that defendant allegedly gave at a hearing on October 31, 2008, defendant continually answered, "No, I don't recall." After the prosecution concluded its cross-examination, the defense rested.

During the jury instruction conference, the prosecutor discovered that while the hearing referenced during defendant's cross-examination began on October 31, 2008, defendant did not testify until November 12, 2008, due to many continuances. The prosecution asked whether defendant wanted the "opportunity to say that he may or may not recall testifying on a different day."

The trial judge told defense counsel, "It's up to you, \*\*\* [defendant] would simply be called to - - so [the prosecution] can say basically the date wasn't October 31, it was November 12." Defense counsel asked to see the State's impeachment before making a decision on the State's request to reopen cross-examination. The trial court granted defendant's request.

After reviewing the State's impeachment evidence, defense counsel recalled defendant to the stand for the specific purpose of being asked two questions. The trial court limited the State to asking two questions solely for the purpose of correcting the erroneous date earlier referenced and to allow defendant to confirm or deny making the statements previously referenced. Defendant testified that he did recall making all of the statements.

Ultimately, the jury found defendant guilty of criminal sexual assault and not guilty of aggravated criminal sexual abuse. Defendant filed a motion for a new trial, which the trial court denied. Following a sentencing hearing, the trial court sentenced defendant to five years' incarceration. This appeal followed.

#### ANALYSIS

Defendant claims he was "denied the effective assistance of

counsel where, after the prosecutor failed to lay a proper foundation for the impeachment of Mr. Grant, defense counsel did not object to the impeachment and recalled Mr. Grant to allow the prosecutor to perfect the foundation." We disagree and affirm defendant's conviction.

The right to effective assistance of counsel is guaranteed by both the United States and Illinois Constitutions. U.S. Const., amends, VI, XIV; Ill. Const. 1970, art. I, §8; *Glasser v. United States*, 315 U.S. 60 (1942). The two-prong test for evaluating claims of ineffective assistance of trial is set out in *Strickland v. Washington*, 466 U.S. 668 (1984).

To establish a valid claim of ineffective assistance of counsel, a defendant must show that: (1) his attorney's conduct fell below an objective standard of reasonableness; and (2) he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). The defendant bears the burden of overcoming a strong presumption in favor of finding that counsel's advocacy was effective. *Albanese*, 104 Ill. 2d 504. To establish that counsel was ineffective, defendant must overcome the strong presumption that the challenged inaction may have been the product of competent trial strategy. *People v. Richardson*, 189

Ill. 2d 401, 411 (2000). Inquiries of counsel's effectiveness may not extend into areas of trial strategy or tactics. *People v. Gapski*, 283 Ill. App. 3d 937 (1996).

Defense counsel's decision to recall defendant to the stand was undoubtedly a matter of trial strategy and tactics. Defendant has not overcome the strong presumption that the decision was the product of competent trial strategy.

As noted above, during cross-examination, the prosecution referenced a hearing in which defendant previously testified. The prosecution mentioned the date of October 31, 2008, and asked defendant if he remembered testifying to certain matters. The prosecutor asked general questions about defendant's previous testimony and specific questions about the testimony that included the October 31, 2008, date in them. At every turn, defendant claimed not to recall testifying at such a hearing or even "sitting in that chair."

After defendant's testimony, the defense rested. The trial judge asked the State if it intended to call any rebuttal witnesses. The State indicated it most definitely intended to offer witnesses in rebuttal. A jury instruction conference took place after which the parties engaged in a discussion about how the State would perfect its impeachment of defendant. The

discussion included the fact that the hearing in which defendant testified began on October 31, 2008, but was continued a number of times resulting in defendant actually testifying on November 12, 2008.

The prosecutor informed the court and defense counsel that she had ordered a certified copy of the transcript of defendant's previous testimony and that the court reporter who took and transcribed the statement was "prepared to testify this afternoon." The prosecutor then discussed an option of giving defendant "an opportunity to say if he recalls testifying on November 12, or not?"

Defense counsel noted that he could not make an informed decision about recalling his client to the stand until he saw the certified transcript. The court agreed to allow defense counsel an opportunity to see the transcript and then decide whether he wanted to recall his client for the sole purpose of being asked two questions.

After a break and receipt of the transcript, the prosecution noted, "We've gone through each question that we asked and how it was impeaching with [defense counsel] and where in the transcript it was." The prosecution noted it intended to call the court reporter from the suppression hearing to the stand to perfect its

impeachment of defendant. The State indicated it would ask the court reporter to verify that defendant made each of the 13 statements at the suppression hearing, which he indicated during his cross-examination he could not recall making.

Instead of allowing the jury to hear all 13 statements again, defense counsel agreed to recall defendant to the stand for the sole purpose of being asked, "Mr. Grant, I previously had asked you a series of questions from a hearing, and I asked you if you remembered that hearing taking place on October 31. You said, 'No.' You testified, in fact, on November 12 of 2008. Do you recall testifying on November 12 of 2008?" It was also agreed that, "If he says yes, he recalls testifying, [the State] would say, 'Those questions that I asked you this morning from the hearing, do you recall making those statements?' "

Defense counsel recalled defendant back to the stand, and he answered both questions in the affirmative. Defense counsel's conduct did not evince deficient performance but, instead, was undoubtedly sound trial strategy. The record makes clear that the prosecution was in a position to perfect its impeachment of defendant without ever recalling him to the stand. It informed the trial judge of its intention to call rebuttal witnesses after defense rested, specifically the court reporter who took and

prepared the transcript of defendant's testimony at the suppression hearing. Allowing his client to retake the stand allowed his client to, at least somewhat, explain away how he did not recall previously testifying and also prevented the jury from hearing the 13 statements again. We find counsel's performance did not fall below an objective standard of reasonableness and was, unquestionably, a matter of trial strategy.

As such, we hold defendant was not denied effective assistance of counsel.

#### CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

Affirmed.