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2012 IL App (3d) 100312-U

Order filed February 9, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE
OF ILLINOIS,

Plaintiff-Appellee,

v.

CARL O. JACKSON,

Defendant-Appellant.

) Appeal from the Circuit Court
) of the 14th Judicial Circuit,
) Henry County, Illinois,
)
) Appeal No. 3-10-0312
) Circuit No. 09-CF-386
)
) Honorable
) Ted J. Hamer,
) Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's conviction for the predatory criminal sexual assault of a five-year old girl was upheld on appeal because defendant could not prevail on his claim of ineffective assistance of counsel. The victim's out-of-court statement was sufficiently reliable, and admissible, so the defendant was not prejudiced by defense counsel's failure to object to the statement's admissibility. Also, the defendant could not show plain error in the prosecutor's closing arguments or in the defendant's 30-year prison sentence.

¶ 2 The defendant, Carl Jackson, was convicted of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)) and sentenced to 30 years in prison. The

defendant appealed, arguing that his trial counsel provided ineffective assistance of counsel, that the prosecutor made improper remarks during closing argument, and that his sentence was excessive. We affirm.

¶ 3

FACTS

¶ 4 On October 8, 2009, the defendant took his son and his son's cousin, S.W., to a park near S.W.'s home. S.W.'s father and the mother of the defendant's son were siblings. Both children were 5 years old; the defendant was 37 years old. After returning from the park, S.W. told her mother that the defendant had touched her "jay-jay", which the mother understood to be S.W.'s vagina. The defendant was later arrested and charged with predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)).

¶ 5 Prior to trial, the trial court held a hearing pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/115-10 (West 2008)) to determine whether S.W.'s out-of-court statements would be admitted as an exception to the hearsay rule. At the hearing, defense counsel stipulated that S.W.'s statement to Sally Adams at the Braveheart Children's Advocacy Center (CAC) was admissible. However, the trial court noted that the interview of S.W. at CAC was conducted appropriately, the contents of the interview were reliable, and the statements were admissible as long as S.W. testified. Testimony was heard to determine whether statements made by S.W. to her mother were also admissible. After the hearing, the trial court determined that S.W.'s statements to her mother were also admissible.

¶ 6 At trial, S.W. testified that she was in kindergarten. She used the words "pee-pee" for vagina and "wee-wee" for penis, and she identified them on anatomical drawings. S.W. testified that she, the defendant, and her cousin had went to the woods near her home, and that the

defendant touched her “pee-pee” with his “wee-wee” and it hurt. S.W. testified that she told her mother soon after she got home that same day. Defense counsel did not cross-examine S.W.

¶ 7 S.W.’s mother, J.W., testified that sometime in early October 2009, the defendant took his son and S.W. to a park near S.W.’s home. When they got home, J.W. asked S.W. if she had fun at the park, and S.W. reported that the defendant had touched her “jay-jay”, which was S.W.’s word for vagina. J.W. did not contact the police, but she did take S.W. to the health department a few days later for a school physical. During the physical, a nurse tried to undo S.W.’s pants, and S.W. starting screaming and crying. S.W. reported that the defendant had touched her. The nurse contacted the Department of Children and Family Services (DCFS).

¶ 8 Adams, the executive director of the CAC, testified that she interviewed S.W. on October 27, 2009. S.W. said that the defendant had touched her “jay-jay” with his “wee-wee.” The interview was videotaped, and a portion of the videotape was played for the jury. During the interview, S.W. stated that she was in kindergarten, but she did not remember her age. She lived with her mother and father, two brothers, and several pets. She stated that her mother’s name was Rose, and her father’s name was “dad” (there is no explanation in the record or the briefs why she said Rose, when that is not her mother’s name). In response to open-ended questions, S.W. stated that a couple of weeks earlier she had gone to a park near her home with her cousin and the defendant. They were collecting caterpillars. She had to go to the bathroom, and the defendant helped her with her pants. S.W. said that the defendant touched her “jay-jay” with his “wee-wee” and that it hurt.

¶ 9 Robert VanSeveren, a child abuse investigator for DCFS, testified that DCFS received a complaint against the defendant on October 22, 2009. VanSeveren testified that he sat in the

interview of the defendant by Suzanne Bogart, the police chief of the City of Colona, after the defendant was asked to come in for questioning. VanSeveren testified that Bogart read the defendant his *Miranda* rights, and Bogart never yelled at the defendant. The questioning was relaxed and informal. VanSeveren testified that Bogart told the defendant that she wanted to help him, and that the defendant needed to tell what happened so they could help him.

¶ 10 Bogart testified that she telephoned the defendant and asked him to come to the police station to talk about the complaint that had been made against him. The defendant drove himself to the police station. Bogart testified that she informed the defendant that he was not under arrest and read the defendant all of his *Miranda* rights. Bogart testified that she advised the defendant that he had the right to have an attorney appointed before questioning. Bogart said that she told the defendant that it would be better if he told the truth. After about a half hour of questioning, Bogart recorded the defendant's statement, which was played for the jury. In the statement, the defendant acknowledged that he was read his rights. The defendant stated that, a few weeks earlier, he took his son and S.W. to a park near where S.W. lived. They were in a wooded area, and S.W. had to go to the bathroom. The defendant said that he helped her pull her pants down. He then went a little further away and pulled his own pants down to urinate. The defendant stated that S.W. had pulled her own pants back on, but when she came over near him, he told her to pull her pants down. The defendant then laid down on the ground and told S.W. to come over. The defendant stated that S.W. came over and, without prompting, straddled him, grabbed his penis, and put it into her vagina. He said they stayed like that for about a minute, but he denied having an orgasm. During this time, the defendant's son was about six feet away, holding a cup for the caterpillars.

¶ 11 The defendant was the only defense witness. The defendant acknowledged going to the park on the day in question with his son and S.W., but he denied doing anything to S.W. The defendant claimed that his admissions to Bogart were not true; he was just repeating S.W.'s allegations so that he would be allowed to go home. The defendant also testified that Bogart read him some of his rights, but he did not remember her reading anything about his right to a lawyer. He signed the rights waiver form, but he claimed that he did not read it.

¶ 12 During closing arguments, the prosecutor said:

“[S.W.] told you the truth here today. She’s only six years old, but she knows the difference between a truth and a lie. She demonstrated that to you.

* * *

She has no motive to lie or to make his up. Nothing happened between she and the defendant that day that would make her angry at him and want her to get back at him, and how a six-year-old would have the maturity to come up with a story like this to try and get back at somebody anyway just isn’t going to happen. She wouldn’t say it if it wasn’t true.”

¶ 13 During the defense closing arguments, trial counsel said:

“[S.W.]’s mother must not have believed her because she didn’t call the police.

*** She didn’t believe her daughter.

* * *

[T]he State will probably tell you that little girls – that children don’t lie about this, but kids lie about everything, anything. I don’t know if she’s telling the truth here or not.***[H]er mother knows her best, and if her mother didn’t believe her,

why should you[?]"

¶ 14 In rebuttal, the State re-addressed the issue of whether S.W. was telling the truth or a lie:

“And do kids lie? Yeah. You know, kids make up lies. Everybody, whether they’re kids or adults, everybody lies. But six-year-olds kids don’t make up a lie like this. [A] six-year-old kid isn’t going to have the knowledge to come up with a lie that ‘he,’ this adult male, ‘put his wee-wee on my jay-jay, and it hurt, and it looked big.” No motive for her to do that. There’s no evidence that she lied.”

¶ 15 The jury found the defendant guilty. At the sentencing hearing, the trial court found that four statutory aggravating factors were present: the crime threatened serious harm, the defendant had a history of committing the same type of offense, deterrence was necessary, and the defendant was in a position of trust. The trial court found no statutory mitigating factors. The trial court considered, as a nonstatutory mitigating factor, that the defendant cooperated with police, although he later denied what he told them. The defendant also had some special education needs. The trial court noted that the defendant had blamed the victim. The trial court sentenced the defendant to 30 years in prison. The defendant appealed.

¶ 16

ANALYSIS

¶ 17

I. Assistance of Counsel

¶ 18 The defendant argues that his trial counsel was ineffective for: (1) failing to object to the out-of-court statements of S.W. to Adams, or alternatively, failing to use S.W.’s out-of-court statements to impeach S.W.’s trial testimony; (2) failing to request a limiting instruction under section 115-10(c) of the Criminal Code (725 ILCS 5/15-10(c) (West 2008)); and, (3) failing to file a pretrial motion to suppress the defendant’s statements to Bogart. To establish a claim for

ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish a deficiency, the defendant must prove that his counsel's performance, judged by an objective standard, was so inadequate so as not to be counsel under the sixth amendment. *People v. Bew*, 228 Ill. 2d 122, 128 (2008). The defendant must overcome a strong presumption that his counsel's action or inaction was the result of sound trial strategy. *People v. Houston*, 226 Ill. 2d 135 (2007). To show prejudice, the defendant must show that, but for counsel's deficient representation, there is a reasonable probability that the outcome of the trial would have been different. *Houston*, 226 Ill. 2d 135. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Houston*, 226 Ill. 2d 135. A claim of ineffective assistance of counsel on direct appeal is subject to *de novo* review. *People v. Bew*, 228 Ill. 2d 122 (2008).

¶ 19 The defendant argues that S.W.'s statement to Adams was not sufficiently reliable, so defense counsel was ineffective for failing to object to the admission of the statement, or at least use the out-of-court statement to impeach S.W. at trial. The State counters that the statement was admissible, and the defendant cannot demonstrate deficiency nor prejudice in defense counsel's failure to object or impeach.

¶ 20 An out-of-court statement, offered for the truth of the matter asserted, generally constitutes inadmissible hearsay, unless it falls within an exception to the hearsay rule. *People v. Tenney*, 205 Ill. 2d 411 (2002). Section 115-10 of the Criminal Code creates an exception to the hearsay rule that allows testimony of an out-of-court statement by a child victim of sexual assault to be admitted if the trial court conducts a hearing outside the presence of the jury and finds that

the statement provided sufficient safeguards of reliability and if the victim then testifies at the proceeding. 725 ILCS 5/115-10 (West 2008). The State, as the party seeking to present the out-of-court statement, bears the burden of proving that the time, content, and circumstances of the statement provided those sufficient safeguards. *People v. Cookson*, 215 Ill. 2d 194 (2005). The admissibility of evidence is within the trial court's discretion. *People v. Zwart*, 151 Ill. 2d 37 (1992).

¶ 21 In this case, the trial court conducted a hearing and determined that, even if defense counsel had objected, the interview was conducted appropriately, the contents of the interview were reliable, and the statements were admissible as long as S.W. testified. A review of the record indicates that enough specific information regarding the time, content, and circumstances of the videotaped statement was presented so that the trial court was well within its discretion in admitting the statement. Since the statement was admissible, the defendant cannot show prejudice by his counsel's failure to object to the statement's admissibility.

¶ 22 The defendant also argues that his counsel should have attempted to impeach S.W.'s trial testimony with her out-of-court statement. The defendant contends that his counsel should have brought up some of the inconsistent information that was on the portion of the videotape that was not played for the jury. In order to establish deficient performance under *Strickland*, the defendant must overcome the strong presumption that his counsel's actions were the result of sound trial strategy. *People v. Perry*, 224 Ill. 2d 312. After a review of the record, we find that the defendant has not overcome that presumption. The confusion in the details of S.W.'s statement seems to suggest another incident of abuse. If defense counsel had cross-examined the young victim with those details from the statement, it very likely would have revealed the other

incident. S.W. was entirely consistent in her assertion that the defendant's penis touched her vagina in the woods on the day they went looking for caterpillars.

¶ 23 The defendant also argues that section 115-10(c) of the Criminal Code directs that the jury be given a limiting instruction when a victim's statement is admitted under the section. 725 ILCS 5/115-10(c) (West 2008). Illinois Pattern Jury Instructions, Criminal, No. 11.66 (Instruction No. 11.66), is the jury instruction that tracks the statutory language of section 115-10(c) of the Criminal Code. *People v. Williams*, 193 Ill. 2d 306, 356 (2000); Illinois Pattern Jury Instructions, Criminal, No. 11.66 (4th ed. 2000). That instruction informs the jury that it should determine the weight to be given to statements, considering the age and maturity of the victim and the circumstances of the statements. Illinois Pattern Jury Instructions, Criminal, No. 11.66 (4th ed. 2000). In this case, there is no dispute that the jury did not receive Instruction No. 11.66. The State argues that the failure to tender that instruction did not amount to a deficient performance because the jury was given Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000) (Instruction No. 1.02).

¶ 24 Instruction No. 1.02 is the standard instruction given to juries instructing them as to their function in assessing the weight to be given to the testimony of witnesses. *People v. Booker*, 224 Ill. App. 3d 542, 555 (1992). That instruction informs the jury that it must judge the believability of the witnesses, taking into account such things as the witness's ability and opportunity to observe, memory, manner while testifying, and bias. Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000). The standard instruction advised the jurors to consider the witness' ability and opportunity to observe, which, by implication, includes consideration of the witness' age. *Booker*, 224 Ill. App. 3d at 556. Thus, the jury was adequately advised regarding the relevant

considerations it should include in making its decision. The defendant has not prejudiced, and his claim of ineffective assistance fails.

¶ 24 Finally, the defendant argues that his statement to the chief of police was unknowing and coerced, and his trial counsel was ineffective for failing to file a motion to suppress. The State argues that the defendant was never in custody, so *Miranda* did not apply. In any event, the State argues, the defendant's statement was voluntarily and intelligently made, and admissible, so defense counsel was not required to file an unsuccessful motion.

¶ 25 Generally, defense counsel's decision not to file a motion to suppress evidence is a matter of trial strategy and does not constitute ineffective assistance. *People v. Hernandez*, 362 Ill. App. 3d 779, 787 (2005). However, the failure to file a motion to suppress will constitute ineffective assistance if there is a reasonable probability that the motion would have been granted and the outcome of the trial would have been different. *Hernandez*, 362 Ill. App. 3d at 787. Whether or not a defendant's interrogation is custodial, a confession must still be voluntary. *People v. Slater*, 228 Ill. 2d 137 (2008). If defense counsel had filed a motion to suppress, the burden would have been on the prosecution to prove that the defendant's admissions were voluntary by a preponderance of the evidence. *Slater*, 228 Ill. 2d at 149. Considering the totality of the circumstances, the test for voluntariness is whether the defendant made the statement freely and without compulsion or inducement. *Slater*, 228 Ill. 2d at 160. Circumstances to consider include: (1) the defendant's age, intelligence, education, experience, and physical condition; (2) the duration of the interrogation; (3) the presence of *Miranda* warnings; (4) the presence of any physical or mental abuse; and (5) the legality and duration of the detention. *Slater*, 228 Ill. 2d at 160.

¶ 26 The defendant testified at trial that Bogart grabbed things and shouted at him. He claimed that Bogart showed him the rights waiver form and read some of the rights, but he did not remember the part about appointing a lawyer if he could not afford one. The defendant claimed that he was simply repeating S.W.'s allegations during the interview so that he could go home. Based on the defendant's claims, arguably, defense counsel should have filed a motion to suppress. However, the defendant cannot prevail on his claim of ineffective assistance of counsel because he cannot show a reasonable probability that the motion would have been granted, and, thus, no prejudice. Although the defendant had lower than average intelligence and some learning disabilities, there was no indication that the defendant could not understand questions or conversations. Also, the defendant drove himself to the police station to be questioned and he was not under arrest. The interrogation lasted approximately one hour, and the second half hour was audiotaped. The audiotape recording belies the defendant's claims, indicating a conversational interview with the defendant wherein the defendant makes admissions, but denies some allegations. Bogart and VanSeveren both testified that Bogart read the defendant his *Miranda* rights, and the defendant acknowledges at the beginning of the audiotape that he was advised of his *Miranda* rights. The defendant admitted that he was advised of some of his *Miranda* rights, and the fact that he did not remember being advised that he had a right to an attorney did not mean that he was not so advised. The defendant's allegation that Bogart grabbed things and shouted at him, during the first half of the interview with VanSeveren present, even if true, was not sufficient mental abuse so as to render the defendant's statement involuntary. Since the defendant has not shown a reasonable probability that the suppression motion would have been granted, he cannot prevail on this claim.

¶ 27

II. Closing arguments

¶ 28 The defendant argues that he was denied a fair trial because the prosecutor "vouched" for the credibility of S.W. during closing arguments. The defendant acknowledges that the statements were not objected to at trial, so the review is for plain error. Alternatively, the defendant argues that his counsel was ineffective for failing to preserve the issue for review. The State argues that, when considered in context, the prosecutor's comments were based on the evidence and reasonable inferences.

¶ 29 Generally, a prosecutor is given wide latitude in the content of her opening and closing arguments. *People v. Wheeler*, 226 Ill. 2d 92 (2007). The State is permitted to make arguments based on the evidence and any reasonable inferences that may be drawn from it, even if the inferences are unfavorable to the defendant. *People v. Dixon*, 378 Ill. App. 3d 535 (2007). For a remark to constitute reversible error, it must have resulted in substantial prejudice to the accused, such that the verdict would have been different had it not been made. *People v. Evans*, 209 Ill. 2d 194 (2004). Although it is improper for a prosecutor to vouch for the credibility of a witness or express a personal opinion about the case, it is not improper to make comments regarding the credibility of a witness if such comments are based on the evidence. *People v. Hickey*, 178 Ill. 2d 256 (1997).

¶ 30 This case centered on the credibility of both S.W. and the defendant. The prosecutor's arguments, when read as a whole, were based on the evidence and addressed the young victim's credibility and ability to tell the truth or a lie. Finding no clear and obvious error, this court need not review the issue for plain error nor consider the defendant's argument that his counsel was ineffective for failing to preserve this as error. See *People v. McLaurin*, 235 Ill. 2d 478 (2009).

¶ 31

III. Defendant's sentence

¶ 32 The defendant contends that his 30 year prison sentence was excessive and an abuse of discretion. The defendant notes that his counsel waived the challenge by failing to file a post-sentencing motion, but he argues that it should be reviewed as plain error. Alternately, the defendant argues that his counsel's failure to file the post-sentencing motion was ineffective assistance.

¶ 33 A trial court has broad discretion when imposing a sentence, and its sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203 (2000). The trial court is granted such deference because it is generally in a better position than a reviewing court to weigh factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Stacey*, 193 Ill. 2d 203. A trial court's sentencing decision will not be reversed on appeal absent an abuse of discretion. *People v. Jackson*, 375 Ill. App. 3d 796 (2007). "A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense." *Jackson*, 375 Ill. App. 3d at 800. Although a reviewing court may reduce a sentence where an abuse of discretion has occurred, the reviewing court must not substitute its judgment for that of the trial court just because it would have weighed the factors differently. *Jackson*, 375 Ill. App. 3d 796.

¶ 34 In this case, the defendant was found guilty of predatory criminal sexual assault of a child, for which the applicable prison term was 6 to 60 years. (720 ILCS 5/12-14.1(a)(1), (b)(1) (West 2008). The trial court considered and weighed the aggravating and mitigating factors, and imposed a sentence in the middle of the range: 30 years. The defendant argues that the sentence should have been closer to the statutory minimum of six years because of the mitigation in the

case. The mitigation evidence was that the defendant had a difficult childhood, which included being beat by his father and being sexually abused by an older brother. The defendant was placed in special education classes due to a learning disability and lower intellectual functioning. The defendant also argued that his criminal background was not extensive. He acknowledged his prior conviction in 1993 for aggravated criminal sexual abuse of his niece, but pointed out that he had completed his sentence and completed all of his required treatment. He was helping to raise his six year old son.

¶ 35 A review of the record reveals that the trial court considered all of the mitigating factors cited by the defendant. The trial court noted the defendant's special education needs and lower intelligence. The trial court gave more weight to the prior offense, though, even though it was 17 years earlier, because it was similar to the current offense. The trial court found that the defendant was a danger to the community, so a more lengthy prison sentence was necessary. In sum, the trial court's sentence in the middle of the sentencing range was not an abuse of discretion. Since there was no error, there was no plain error and no ineffective assistance of counsel.

¶ 36

CONCLUSION

¶ 37 The judgment of the circuit court of Henry County is affirmed.

¶ 38 Affirmed.