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2012 IL App (4th) 110268-U
NO. 4-11-0268
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
November 30, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
ROBERT W. BILLINGS,)	No. 10CF336
Defendant-Appellant.)	
)	Honorable
)	Claudia S. Anderson,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justice Appleton concurred in the judgment.
Justice Cook dissented.

ORDER

- ¶ 1 *Held:* The appellate court affirmed, concluding that (1) the record was insufficient to determine whether (a) the trial court abused its discretion by restricting a witness's testimony or (b) defense counsel's performance was ineffective because the record failed to show what the witness's testimony would have been and (2) defense counsel's representation during posttrial proceedings as to what a witness's testimony would have been was insufficient to show error.
- ¶ 2 In February 2011, a jury found defendant, Robert W. Billings, guilty of failing to report a change of address as a sex offender (730 ILCS 150/6 (West 2008)). The trial court later sentenced him to five years in prison.
- ¶ 3 Defendant appeals, arguing that (1) the trial court erred by limiting his direct examination of a defense witness, (2) defense counsel provided ineffective assistance by failing to make an offer of proof regarding excluded witness testimony, and (3) defense counsel

provided ineffective assistance by failing to argue in defendant's posttrial motion that the court improperly limited defense counsel's cross-examination of one of the State's witnesses. We disagree and affirm.

¶ 4

I. BACKGROUND

¶ 5

A. The State's Charges

¶ 6

In November 2010, the State charged defendant with failure to report a change of address as a sex offender, alleging that between April and June 2010, defendant knowingly failed to personally report his change of address as required by section 6 of the Sex Offender Registration Act (730 ILCS 150/6 (West 2008)). (In January 2010, defendant reported that he was living at an apartment located on Harmon Street in Danville, Illinois.)

¶ 7

B. Defendant's February 2011 Jury Trial

¶ 8

1. *The State's Evidence*

¶ 9

At defendant's February 2011 jury trial, the State presented evidence that defendant had a 2003 conviction for aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2002)).

¶ 10

Police officer James Smutz, who managed registered sex offenders within Danville's city limits, testified that defendant was required to register annually and, upon any permanent or temporary change of address, to register his new address within three days. In February 2010, Smutz verified that defendant was residing in an apartment with Debra Fox, which was located on Harmon Street. Smutz recounted that in June 2010, he returned to the Harmon residence and spoke with Fox, who informed him that defendant had moved out two months earlier. Based on information provided by Fox, Smutz went to an address where

defendant's aunt resided and subsequently located defendant. According to Smutz, defendant admitted that, "due to drug activity in the area," he moved from the Harmon residence to his aunt's home, admitting that he had failed to register his new address. Smutz then placed defendant under arrest.

¶ 11 On direct examination, Fox's testimony was consistent with Smutz's account. On cross-examination by defense counsel, Fox denied experiencing any problems with illegal activity at the Harmon Street residence or noticing any illegal activities going on in her apartment building. Fox also denied having any dispute with defendant regarding rent. During cross-examination of Smutz, defense counsel inquired whether Smutz had concerns about defendant living in the Harmon residence. After the State objected on relevancy grounds, the following colloquy occurred outside of the jury's presence:

"THE COURT: What's the relevance?

[DEFENSE COUNSEL]: Your Honor, I think this does go to the bias, interest, and motive of the other person who testified.

* * *

THE COURT: You're going to have to give me an explanation, and you're going to have to explain to me what is relevant about what type of house it was. Is there some sort of a defense that says if you're a sex offender and you're living in a, pardon the language, cruddy house, that that gives you an excuse not to register?

[DEFENSE COUNSEL]: No, your Honor.

THE COURT: So what's the relevance?

[DEFENSE COUNSEL]: If the person who is maintaining your home is maintaining a home in which illegal activities are going on, and if she doesn't want anyone in the house to have regular contact with the police, that speaks to the witness's bias.

THE COURT: How does that go to any relevancy of the defense here? What defense does that provide?

[DEFENSE COUNSEL]: The defense that it provides, your Honor, is that [defendant] has maintained that he maintained his residence at that address, that he actually did reside there.

* * *

[DEFENSE COUNSEL]: The point is the only individual who says he wasn't actually residing there and had, in fact, blown his three-day grace period is the previous witness.

THE COURT: Well, you'll have a chance to argue that to the jury then, won't you? But at this point this questioning is not relevant to this witness.

[DEFENSE COUNSEL]: I think it goes to impeachment of the other witness.

THE COURT: And how would that be? What's the impeachment?

[DEFENSE COUNSEL]: I'm going to ask whether he

noted whether or not the building was dilapidated whether or not there seemed to be illegal activities going on, what—what condition Miss Fox appeared to be in at the time of the interview.

THE COURT: Let's just assume for a minute all that is true. Your only purpose is, just to make sure I'm getting this clear—

[DEFENSE COUNSEL]: As to impeach Miss Fox. Correct.

THE COURT: Because she said what that you think is going to be impeached by this statement?

[DEFENSE COUNSEL]: Because she stated that he was no longer living there during the time period from April all the way through June."

The court thereafter sustained the State's objection.

¶ 12 *2. Defendant's Evidence*

¶ 13 Marilyn Huerta, Fox's neighbor on Harmon Street, testified that she was familiar with defendant and knew he lived with Fox. Huerta testified that she recalled seeing defendant at the Harmon residence in June and July 2010, but she was not sure about the precise dates defendant resided with Fox and did not know whether defendant lived with Fox during April or May 2010.

¶ 14 Defense counsel inquired whether Huerta noticed any problems with Fox's Harmon Street residence or if she noticed anything special about the neighborhood. The State

*** Fox wanted [defendant] to leave the apartment because she believed the police, in the course of routinely contacting [defendant] because he was a registered sex offender, would discover the criminal activity taking place in or around the residence. Furthermore, *** Fox wanted [defendant] to leave because he complained about the building's condition."

Defendant contends that such evidence was contradictory of Fox's trial testimony and would have established Fox's bias and motive to testify falsely, thereby impeaching her credibility.

¶ 22 Alternatively, defendant posits that defense counsel was ineffective for failing to make an offer of proof as to Huerta's testimony. Defendant further complains that defense counsel's performance was deficient because counsel failed to (1) make an offer of proof as to Smutz's testimony and (2) preserve issues related to the limiting of Smutz's testimony for appellate review. We address defendant's contentions in turn.

¶ 23 A. Defendant's Evidence Claim

¶ 24 "When a defendant claims that he has not been given the opportunity to prove his case because the trial court improperly barred evidence, he 'must provide [the] reviewing court with an adequate offer of proof as to what the excluded evidence would have been.'" *People v. Pello*, 404 Ill. App. 3d 839, 875, 942 N.E.2d 463, 493-94 (2010) (quoting *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 773, 771 N.E.2d 966, 970 (2002)). A "defendant's failure to make an adequate offer of proof deprives this court of the record required to determine whether the [trial] court abused its discretion." *Id* at 877, 942 N.E.2d at 495. On review, the appellate court will not speculate as to what a witness's testimony would have been. *People v. Bauer*, 393

Ill. App. 3d 414, 424, 913 N.E.2d 1132, 1142 (2009). Further, we cannot find defense counsel ineffective on the basis that he failed to present an offer of proof when the record fails to reflect what the offer of proof would have been. *People v. Atherton*, 406 Ill. App. 3d 598, 619, 940 N.E.2d 775, 794 (2010); see *People v. Neylon*, 327 Ill. App. 3d 300, 312, 762 N.E.2d 1127, 1138 (2002) (finding a defendant's ineffective-assistance claims were better served in the context of a postconviction petition where the defendant alleged counsel's ineffectiveness for failing to present an offer of proof but the record failed to show what the offer of proof would have been).

¶ 25 At trial, defense counsel failed to make an offer of proof as to either Huerta's or Smutz's testimony. This court will not speculate as to what either witness would have testified. As a result, the record is insufficient for this court to address the merits of defendant's claims regarding either error by the trial court or defense counsel's performance.

¶ 26 To the extent defendant argues that defense counsel's posttrial representations showed what Huerta's testimony would have been, we find no error. *People v. Becker*, 239 Ill. 2d 215, 234, 940 N.E.2d 1131, 1142 (2010) ("The admission of evidence is within the sound discretion of a trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion"). The record shows that defense counsel attached an affidavit to defendant's posttrial motion wherein she asserted Huerta would have testified (1) there were a large number of people coming and going from Fox's residence, (2) those people appeared to be engaging in drug transactions in the front yard of the residence, and (3) Huerta believed that Fox was aware of those activities. Such testimony was neither relevant to the allegations against defendant nor sufficient to show Fox's bias and motive to testify falsely.

¶ 27 Further, evidence that is relevant is generally admissible. *People v. Abernathy*,

402 Ill. App. 3d 736, 749, 931 N.E.2d 345, 355 (2010). Relevant evidence is that which "(1) renders a matter of consequence more or less probable or (2) tends to prove a fact in controversy." *Pelo*, 404 Ill. App. 3d at 864, 942 N.E.2d at 485. "A trial court may reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty, or possibly unfair prejudicial nature." *People v. Harvey*, 211 Ill. 2d 368, 392, 813 N.E.2d 181, 196 (2004). Moreover, although a defendant has "the right to inquire into a witness' bias, interest, or motive to testify falsely," the evidence used to impeach must not be remote or uncertain and, instead, "must give rise to an inference that the witness has something to gain or lose by his testimony." *People v. Coleman*, 206 Ill. 2d 261, 278, 794 N.E.2d 275, 286-87 (2002); see also *People v. Rendak*, 2011 IL App (1st) 082093, ¶ 23, 957 N.E.2d 543, 551 ("evidence used to impeach a witness must be timely, unequivocal and directly related, and may not be remote or uncertain"). Accordingly, we reject defendant's claims related to Fox's potential bias and motive to lie, and turn to his contention that counsel failed to provide effective assistance.

¶ 28 B. Defendant's Ineffective Assistance of Trial Counsel Claims

¶ 29 Ineffective-assistance-of-counsel claims are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Cathey*, 2012 IL 111746, ¶ 23, 965 N.E.2d 1109, 1115. "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *Id.*

¶ 30 As previously stated, the State's charge against defendant concerned his alleged failure to register a change of address as a sex offender between April 21, 2010, and June 21, 2010. Neither evidence of illegal drug activity around Fox's residence or her knowledge of such

activity was relevant to a determination of that charge. Additionally, although defendant argues that Huerta's excluded testimony went to Fox's bias against defendant and showed her motive to testify falsely against him, the alleged subject matter of that testimony was too remote and uncertain to establish Fox's bias. Defense counsel's assertions as to Huerta's testimony provided no time frame in which Huerta observed the alleged drug activities and showed only a tenuous connection between those activities and Fox. Huerta's proposed testimony does not give rise to the inference that Fox had anything to gain or lose by her testimony that defendant was not living in her home from April to June 2010.

¶ 31 Accordingly, we conclude that defendant was not prejudiced by counsel's performance.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 34 Affirmed.

¶ 35 JUSTICE COOK, dissenting.

¶ 36 I respectfully dissent. The evidence here was relevant. Why did Fox tell Officer Smutz that defendant had moved out two months earlier? Was it because illegal activities were going on in the house, and Fox did not want police officers looking around the home because defendant was living there? There was an adequate offer of proof; defense counsel would ask Officer Smutz whether there seemed to be illegal activities going on. Of course, Officer Smutz was not a witness under the control of defense counsel; cross-examination may have been counsel's first opportunity to obtain clear information from the officer.

¶ 37 A showing of bias or motive to testify falsely is an accepted method of impeaching a witness. "A court should allow a criminal defendant wide latitude to make such a showing by direct and positive evidence; this latitude is particularly important where the State's case rests almost entirely on the credibility of its witnesses." *People v. Ward*, 153 Ill. App. 3d 413, 416, 505 N.E.2d 1251, 1252 (1987); see also *People v. Howard*, 113 Ill. App. 3d 380, 385, 447 N.E.2d 473, 476-77 (1983). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *United States v. Abel*, 469 U.S. 45, 52 (1984).

¶ 38 I would reverse and remand for a new trial.