

2013 IL App (2d) 111008-U  
No. 2-11-1008  
Order filed February 27, 2013

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08-CF-2278
	)	
JAY SIMON,	)	Honorable
	)	Theodore S. Potkonjak,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Justices Hutchinson and Birkett concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defense counsel was not ineffective for failing to introduce certain documents into evidence: the offense occurred on one of two weekends; if it occurred on one, as defendant theorized, the documents would have been cumulative of other evidence that already supported his alibi, and, if it occurred on the other, as the jury likely found in light of the evidence of his presence, the documents would not have supported an alibi at all.
- ¶ 2 Defendant, Jay Simon, appeals from his conviction of two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2006)). He contends that his trial counsel was

ineffective for failing to introduce documents into evidence to support his alibi defense that he was at work at the time of the alleged offense. We affirm.

¶ 3

### I. BACKGROUND

¶ 4 Defendant was initially indicted on multiple charges related to allegations that he touched the victim, A.P., on her buttocks and vagina during a birthday party at his home for his daughter, T.S. Defendant was also indicted on multiple counts involving an unrelated incident, but those counts were later severed, and the State proceeded only on the counts related to A.P. The State alleged that the incident occurred during the weekend of either November 10-13, 2006, or November 16-19, 2006.

¶ 5 At trial, A.P. testified that, in 2006, she and T.S. were best friends and that she and another girl, J.B., attended a sleepover party at defendant's home to celebrate T.S.'s 11th birthday. A.P. was also 11 at the time. A.P. did not remember the specific date of the party, but she thought that it was on a Saturday. Her mother drove her to the party, it was light outside when she arrived, and that T.S.'s mother and defendant were both present when she arrived. She could not remember what defendant was wearing, but thought that it was his normal clothes rather than his police uniform. She also remembered that defendant was present during the party while the girls played a game, but he did not participate, and he was in the basement at about 11 p.m. when T.S.'s mother told the girls that it was time for bed.

¶ 6 A.P. testified that, between 11 p.m. and midnight, the girls went to bed in the living room. A.P. was on the floor next to the couch. A.P. denied that she ever told her mother that she had slept on the couch. As she was lying awake, she saw defendant sitting downstairs shining a flashlight. A.P. said that defendant came upstairs, sat on the couch, and rubbed her back. A.P. said "ouch" and

T.S. sat up to see what was wrong. Defendant told T.S. to roll back over and then he resumed rubbing A.P. She testified that he later moved his hand under her shirt and that he touched her buttocks under her clothes and rubbed her vagina. He asked if she wanted to go downstairs with him, and she said no. Defendant then left the room. When A.P. awoke the next morning, defendant was in the kitchen.

¶ 7 The next morning, A.P. told T.S. about the incident. They agreed not to tell anyone because they did not want to become separated from each other. A.P. told her mother that she had fun at the party. The incident was not discussed again until May 2008, when T.S. told her mother about it. T.S.'s mother then spoke to A.P. about it, and A.P.'s mother was told about it.

¶ 8 T.S. testified and could not remember the date of the party, but she thought that it began about 5 p.m. on a Friday. She did not think defendant was there because he was working, although she also stated that she did not know for sure. T.S. did not recall him being there when they played games or watched movies, but she remembered seeing him there at some point during the night and said he might have been present when the girls got ready for bed. She remembered seeing him downstairs watching television, but was unsure of the time, and she recalled that he came home late. T.S. thought that the girls went to bed between midnight and 1 a.m., and that she went to sleep a little after 1 a.m., but could not be certain because she was not watching the clock. T.S. said that defendant came upstairs to the couch and she heard "ouch." She turned over and defendant told her to turn back over, and that was all that she heard. T.S. could not see defendant's hands and did not know where he went after the incident. The next day A.P. told T.S. what happened, and A.P. wanted to tell T.S.'s mother, but T.S. disagreed because she thought they might get in trouble. T.S. did not think that defendant was there when she got out of the shower in the morning.

¶ 9 J.B. testified that she did not remember the date of the party. However, she was certain the party was on a Friday, because she took the school bus there with T.S., which she normally did not do. She initially said that they arrived at about 3 p.m., and that defendant was present. The girls played a game and watched movies. Later J.B. testified that she did not recall seeing defendant at the home when she arrived. However, she recalled that, when they ate cake and sang happy birthday, defendant was downstairs, but she could not remember if that was earlier or later in the evening.

¶ 10 T.S.'s mother, Debra, testified that she was married to defendant on the date of the incident. She could not remember the specific date of the party, but knew that it was either the weekend before or the weekend after T.S.'s November 13, 2006, birthday. She said that J.B. rode the school bus home with T.S. on the day of the party. She went to bed before the girls went to sleep and did not see their sleeping arrangements. Debra said that most of T.S.'s sleepovers occurred when defendant was at work. She did not remember if he was present the night of the party. She did not recall seeing him when they cut the cake or when she went to bed.

¶ 11 Debra testified that, in May 2008, T.S. told her what had happened. She then called A.P.'s mother and listened in on a phone call where T.S. talked to A.P. and verified what had happened. On cross-examination, Debra acknowledged that defendant moved out of the home about two months after the party and that one week before the abuse was reported defendant told her that he was going to seek custody of the kids.

¶ 12 A.P.'s mother, Holly, testified that A.P. told her details that were generally consistent with A.P.'s testimony. However, she said that A.P. indicated that she had been on the couch during the incident instead of the floor. She could not remember the date of the party, but thought that she remembered seeing defendant when she took A.P. there. When she picked A.P. up the next day, she

saw only Debra. Holly was certain the party was on a Saturday, because she remembered picking A.P. up on Sunday, and A.P. had school the next day. Holly said that A.P. did not suffer any behavioral or emotional issues, and Holly did not seek counseling for her. Holly did not call a doctor or the police immediately after learning of the incident, because it had occurred two years prior and she wanted to let A.P. calm down. A couple of days later the police contacted her about the incident.

¶ 13 The defense called Officer Daniel Wielgat, who testified that he served as an officer with defendant. Generally officers worked the same 6 p.m. to 6 a.m. shift, with the exception of a traffic shift that went from 5 p.m. to 3 a.m. Wielgat did not know for sure which shift defendant worked. Wielgat had no independent recollection of the date of the incident. Using Computer Aided Dispatch (CAD) records, Wielgat testified that he was defendant's backup officer for calls at 12:31 a.m. and 1:33 to 1:50 a.m. on Saturday, November 18, 2006, and for calls at 12:42 a.m. to 12:44 a.m. and at 2:09 a.m. on Sunday, November 19, 2006. The actual CAD records were not offered into evidence.

¶ 14 Defendant testified that the family had a habit of scheduling parties on weekends that he worked. He was certain that the party began on Saturday, November 18, 2006. He worked each night that weekend on the 5:30 p.m. to 3:30 a.m. shift, but did not log off of his computer until 4 a.m. on Saturday and 6:15 a.m. on Sunday. He said that, on November 18, he left the house to go to work around 4:30 p.m. and returned the next day at about 7 a.m. He did not see the girls when he arrived home, but he knew there was a party. On or about May 10, 2008, defendant had an argument with Debra and told her that he was filing for custody of the children. He was arrested on June 4, 2008.

¶ 15 During deliberations, the jury requested to see a video of A.P.'s interview with an investigating officer and asked for a transcript. They were allowed to see the video. The jury later sent a note indicating that they were split 10 to 2. The court told them to keep deliberating, and they found defendant guilty.

¶ 16 Defendant obtained new counsel and moved for a new trial, arguing that his trial counsel, Torrie Newsome, was ineffective for failing to introduce the CAD records into evidence. A hearing was held, and defendant testified that he thought Newsome would use the records. Newsome testified that his strategy was to argue that the party began on November 18 and that defendant was at work at the time of the alleged crime. He did not want defendant to testify, because he was concerned that defendant would place himself in the home with the girls after returning from work. He said that he did not introduce the CAD records at trial because he had Wielgat's testimony and because, when defendant decided to testify, he wanted to keep things short and simple to avoid opening the door to the prosecution to explore other things. The CAD records showed that defendant answered calls on November 18 and 19, 2006, at additional times than what Wieglat testified to.

¶ 17 The motion for a new trial was denied, and defendant was sentenced to six years' incarceration. He appeals.

¶ 18 II. ANALYSIS

¶ 19 Defendant contends that the trial court erred when it denied his motion for a new trial. He argues that Newsome was ineffective because he did not introduce the CAD records into evidence at trial.

¶ 20 A claim of ineffective assistance of counsel requires a defendant to establish that (1) his attorney's performance fell below an objective standard of reasonableness and (2) there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). "Effective assistance of counsel means competent, not perfect, representation." *People v. Rodriguez*, 364 Ill. App. 3d 304, 312 (2006). To succeed on a claim of ineffective assistance, a defendant must overcome a strong presumption that counsel's conduct was the result of strategic choices rather than incompetence. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). If a trial court has reached a determination on the merits of a defendant's ineffective- assistance claim, we will reverse only if the trial court's action was manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008). "Manifest error" is error that is clearly plain, evident, and indisputable. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

¶ 21 Decisions concerning what evidence to present on a defendant's behalf have long been viewed as matters of trial strategy that ultimately rest with defense counsel and are generally immune from claims of ineffective assistance. *People v. West*, 187 Ill. 2d 418, 432 (1999). The fact that a trial strategy was ultimately unsuccessful is not a sufficient reason to deem counsel's representation ineffective. *People v. Skillom*, 361 Ill. App. 3d 901, 913-14 (2005). "This general rule is predicated upon our recognition that the right to effective assistance of counsel refers to 'competent, not perfect representation.'" *West*, 187 Ill. 2d at 432 (quoting *People v. Stewart*, 104 Ill. 2d 463, 492 (1984)). Thus, mistakes in trial strategy, tactics, or judgment do not of themselves render the representation incompetent. *Id.* "The only exception to this rule is when counsel's chosen trial strategy is so unsound that 'counsel entirely fails to conduct any meaningful adversarial testing.'" *Id.* at 432-33 (quoting *People v. Guest*, 166 Ill.2d 381, 394 (1995)).

¶ 22 Further, “in order to succeed on a sixth amendment claim of ineffective assistance of counsel, the defendant must not only show that counsel’s performance was deficient, he must also establish that he was prejudiced by the deficient performance.” *People v. Rosemond*, 339 Ill. App. 3d 51, 66 (2003). As noted, “[i]n order to satisfy this second prong of the *Strickland* test, defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* Because a defendant must satisfy both prongs of the test, we may dispose of an ineffective-assistance argument by rejecting the claim of prejudice without inquiring into whether counsel’s performance was unreasonable. *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 23 Here, the trial court’s determination that the decision to not introduce the CAD records was trial strategy was not manifest error. Newsome testified that he called Wielgat to testify that defendant was at work on November 18, 2006, and that, once defendant chose to testify, he wanted to keep things simple to avoid opening the door for the State to bring in more details. That strategy was reasonable, given that the weekend of November 18 was not the only weekend in question and that the CAD records did not place defendant at work the previous weekend.

¶ 24 Further, defendant has not shown any prejudice by Newsome’s decision not to seek the admission of the records into evidence. Defendant’s position was that the party began on November 18, 2006, and that he was at work. Wielgat’s testimony established that he was indeed at work that day on a shift that would have covered the time when the incident allegedly occurred. The records thus would have been cumulative. (Defendant also contends that the records further showed that he answered calls earlier in the evening, but that information was not critical to his defense.) See *People v. Hayes*, 2011 IL App (1st) 100127, ¶ 42. Moreover, the possibility existed that the party

was on the previous weekend. The records did not provide an alibi for that weekend. Testimony from the girls at the party was that defendant was there at some point during the night, with several providing testimony indicating that he was in the house throughout the evening and not dressed in his uniform. Thus, there was ample evidence that the party began on a day other than November 18 and that defendant was present for at least part of the time. Accordingly, even if error could be found, there was not a reasonable probability that, but for the error, the result of the proceeding would have been different.

¶ 25

### III. CONCLUSION

¶ 26 The trial court's determination was not manifestly erroneous. Accordingly, the judgment of the circuit court of Lake County is affirmed.

¶ 27 Affirmed.