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2013 IL App (3d) 110472-U

Order filed April 10, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

RUSSELL AMOS, JR.,

Defendant-Appellant.

) Appeal from the Circuit Court
) of the 12th Judicial Circuit,
) Will County, Illinois,
)
) Appeal No. 3-11-0472
) Circuit No. 09-CF-880
)
) Honorable
) Carla Alessio-Policandriotes,
) Judge, Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court. Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 **Held:** The trial court did not err when it (1) denied defendant's request for a continuance to call additional witnesses; (2) limited defendant's cross-examination of the victim; and (3) conducted an inquiry into defendant's *pro se* posttrial claims of ineffective assistance of counsel. We remand the case to the trial court to vacate one of defendant's convictions under the one-act, one-crime doctrine.

¶ 2 Following a jury trial, defendant Russell Amos, Jr., was convicted of two counts of aggravated criminal sexual assault (720 ILCS 5/12-14 (West 2008)) and one count of home invasion (720 ILCS 5/12-11(a)(6) (West 2008)). The trial court sentenced defendant to three

consecutive terms of 30 years of imprisonment. On appeal, defendant argues: (1) the trial court erred in refusing to grant a brief continuance to allow him to call additional witnesses; (2) violated his right to present a defense by limiting the scope of cross-examination of the victim; (3) conducted an inadequate inquiry into posttrial claims of ineffective assistance of counsel; and (4) one aggravated criminal sexual assault conviction should be vacated according to the one-act, one-crime doctrine. We affirm in part and remand in part.

¶ 3

FACTS

¶ 4 On April 30, 2009, defendant was charged by indictment with two counts of home invasion and three counts of aggravated criminal sexual assault. The third count, charging aggravated criminal sexual assault, alleged that defendant placed his penis in the victim's vagina and acted in such a manner as to endanger the victim's life by choking her "about the neck with his hands making it difficult for [the victim] to breath." The fourth count, also charging aggravated criminal sexual assault, alleged that defendant placed his penis inside the victim's vagina and caused bodily harm to the victim by choking her "about the neck with his hands."

¶ 5 On January 27, 2011, the State filed a motion *in limine* to prohibit the introduction of evidence concerning the victim's prior sexual activity or reputation. The trial court granted the State's motion.

¶ 6 Thereafter, on February 25, 2011, defendant filed a notice of his intent to pursue an affirmative defense of consent. Due to the nature of the affirmative defense, defendant requested the trial court reconsider its ruling on the State's motion *in limine*. During the hearing on defendant's motion, defendant denied choking, striking, or forcing himself on the victim on the date in question. Defendant described his relationship with the victim as based solely on sex.

Defendant testified that this relationship with the victim lasted for nearly 18 months and they lived together for two months, while they were dating. Defendant estimated he had sex with the victim over 100 times, at various locations, including her bedroom, a car, the Plaza Hotel, Motel 6, and a third hotel in Joliet. However, he could not remember the specific dates of their sexual encounters.

¶ 7 Defendant stated the victim would call his telephone number to arrange their meetings. Defendant believed his telephone records would clarify when the victim called. Additionally, defense counsel represented that a private investigator tried to obtain hotel records documenting defendant's stays at the Plaza Hotel, but the records had been destroyed.

¶ 8 The trial court found that defendant's testimony was inconsistent, incredible, and lacked specificity. Nonetheless, the court indicated defendant could present a defense based on the victim's consent but would not readdress the motion *in limine* unless the victim agreed to previous consensual sexual activity with defendant.

¶ 9 On March 21, 2011, defendant filed a motion to reconsider this ruling. At the subsequent hearing, Homer Williams testified that he remembered seeing defendant and the victim together when they were dating, but he never witnessed them having sex. Defense counsel also introduced a written interview with Norma Jean Simpson. Simpson indicated that she saw the victim and defendant together, and stated that they dated in early 2009. The trial court granted defendant's motion to reconsider, in part, stating "defense counsel is allowed to present to the jury that the defendant and victim had a prior dating relationship that included a prior sexual relationship, but there will be no indication where, how, when, type or anything like that."

¶ 10 At trial, the State called the victim to testify. The victim testified that she met defendant

through an associate, but denied dating defendant. According to the victim, between 9 and 9:30 p.m. on April 15, 2009, she was smoking a marijuana cigarette on her porch when defendant approached from the back of the house, handed her a beer, and joined her on her porch.

¶ 11 After the victim finished her beer, she opened the door to her home, and defendant pushed his way into her home without permission, causing her to go to her bedroom to find her phone to call the police. After discovering her phone was not in the bedroom, she grabbed her baseball bat, and entered the kitchen to find her phone. Once in the kitchen, defendant choked the victim until she blacked out. Before she lost consciousness, defendant removed her pants, inserted the baseball bat into her vagina and rectum, and he inserted his penis into her vagina.

¶ 12 The victim regained consciousness around 9 a.m. At that time, she noticed that there was blood and fecal matter on the rug where she was sitting. She observed defendant staring at her while sitting on the couch. When the victim's son arrived, defendant ran out of the house. The victim called the police and was subsequently transported to Silver Cross hospital for treatment.

¶ 13 Before defense counsel began cross-examination of the victim, the court conducted a sidebar hearing on the admissibility of evidence of the victim's prior sexual activity with defendant. During cross-examination, the victim denied defendant kept a bag of clothes at her house. She explained her prior contact with defendant involved seeing him at an acquaintance's house and at the bar a few times. She indicated defendant attempted to break into her house in September 2008, and she noticed defendant on her porch and peeking through her windows but did not remember speaking with Detective Alan Vertin about this incident. The victim also indicated that she knew Williams, but she did not know Simpson.

¶ 14 Following the victim's testimony, the court read its earlier sidebar ruling into the record.

This ruling provided defendant must first ask the victim if she had a prior dating relationship with defendant. If the victim denied the existence of a dating relationship, the court's pre-trial ruling prohibited defendant from further inquiries regarding any previous sexual activity between the victim and defendant.

¶ 15 Jagdish Muzumdar testified that he was an emergency room physician at Silver Cross hospital, and he treated the victim on April 16, 2009. Muzumdar noted that the victim had tenderness to her cervix, rectum, and left temple. After his examination, Muzumdar transferred the victim to Loyola University hospital for further treatment.

¶ 16 Aaron Guajardo testified that he was a radiologist at Silver Cross hospital. Guajardo reviewed the victim's computerized tomography scans and noted that she had air in her rectum. Guajardo opined that the air could have been caused when something was inserted into the victim's rectum.

¶ 17 Carlos Matlock testified that he was a detective for the Joliet police department. Matlock met with the victim at the hospital, where she identified defendant as the offender from a photographic line-up.

¶ 18 Kevin Sepulveda, a detective for the Joliet police department, testified that during his interview with defendant on April 20, 2009, defendant stated he had sex with the victim once in the fall of 2008 but did not have further contact with the victim after that date. Defendant told the officer that on April 15, 2009, defendant was present at Williams' home from 10:30 a.m. until they went to Manny's Bar, between 7 and 8 p.m. Defendant left the bar at approximately 11 p.m.

¶ 19 Katherine Sullivan testified that she performed the deoxyribonucleic acid (DNA) analysis on the physical evidence in the case. Sullivan stated that defendant's DNA could not be excluded

from the semen taken from the victim's vaginal swab. The victim's DNA also could not be excluded from the blood found on the bat at the scene.

¶ 20 Tony Marshall testified that he was a bartender and part owner of Manny's Bar. Marshall indicated that he spoke with defendant on a regular basis. On the night of April 15, 2009, the bar was busy, and defendant came in and out many times before the bar closed around 1 a.m. Marshall was unsure if defendant was present at closing time. Marshall testified that he knew the victim because she lived in the community, but he had not observed defendant and the victim together, and had not heard that they were dating.

¶ 21 Defendant called Simpson to testify. Simpson grew up with the victim and met defendant through her friend, Williams. Simpson stated that the victim and defendant had a dating relationship but could not provide specific details other than to say defendant and the victim were friendly with each other.

¶ 22 On cross-examination, Simpson testified that she had prior felony convictions for theft, driving under the influence, and possession of a controlled substance. Simpson stated that she was not friends with the victim, but they were "acquaintances[.]" One night, Simpson and Williams stayed at the victim's house and Simpson noted that defendant slept in the same room as the victim. However, she did not witness them having sex.

¶ 23 Williams testified that he had a prior conviction for possession of cocaine. Williams stated that he had known defendant for 30 to 40 years, and that he was related to the victim. Williams saw defendant and the victim together 10 or more times. On these occasions, he saw defendant and the victim hug and talk to each other. Williams confirmed that he and Simpson spent the night at the victim's house while defendant lived with the victim.

¶ 24 Defendant declined to testify, but before presenting closing arguments, defense counsel requested a continuance to call three additional witnesses. First, defendant indicated Nurse Stephanie Eutsey would testify regarding a questionnaire she conducted with the victim pertaining to her sexual assault examination. Second, Officer Vertin would testify the victim told him, during an investigation of a 2008 incident between defendant and the victim, that defendant kept a bag of clothes at her house. Third, Barbara Ward would testify that she knew the victim for 25 years, observed defendant and the victim together on numerous occasions, and knew they had a dating and sexual relationship. Defense counsel indicated defendant did not tell him about Ward until defendant saw her in the courtroom gallery during the morning trial proceedings. The trial court denied defendant's request.

¶ 25 The jury found defendant guilty of home invasion and two counts of aggravated criminal sexual assault based on penis to vagina contact.

¶ 26 After the trial, defendant filed *pro se* posttrial motions alleging "indifferences of assigned counsel" and requesting judgment notwithstanding the verdict. During a hearing on these *pro se* posttrial motions on June 3, 2011, defendant argued his attorney failed to procure telephone records, did not call witnesses Bonnie Ray Jordan, Genetta Montgomery, and an unnamed maintenance man from a laundromat to testify, failed to file motions on defendant's behalf, and failed to consult with him. The court allowed the State to respond, and the State argued that the court could question both defendant and his lawyer or rely on its own knowledge to make an ineffective assistance determination. The State argued defendant had not met his burden of showing that he was prejudiced by counsel's performance.

¶ 27 The trial court noted that it had presided over the case for more than two years and during

that time, the court was able to observe the relationship between defense counsel and defendant. The court noted that counsel conferred with defendant before taking any position in the case and consistently consulted with defendant on scheduling issues. The court stated that counsel was always prepared and diligently represented defendant's interests. The court observed the decision regarding the filing of motions was a matter of trial strategy. Therefore, the court found defendant failed to establish ineffective assistance of counsel and denied defendant's motions.

¶ 28 On June 29, 2011, the court sentenced defendant to three consecutive terms of 30 years of imprisonment. Defendant filed a notice of appeal.

¶ 29 ANALYSIS

¶ 30 I. Continuance

¶ 31 Defendant argues that the trial court erroneously refused to grant defendant a continuance to allow him to call Vertin and Ward to testify. The State argues defendant waived this issue by failing to raise the issue in his posttrial motion. However, the record shows defendant sought a continuance during trial to call these witnesses and preserved the issue in his motion for a new trial by asserting the court should have allowed his request to call Ward to testify in his defense.

¶ 32 Generally, "[a]fter trial has begun a reasonably brief continuance may be granted to either side in the interests of justice." 725 ILCS 5/114-4(f) (West 2008). The grant or denial of a continuance is a matter within the sound discretion of the trial court. *People v. Walker*, 232 Ill. 2d 113 (2009). The determination of whether a trial court abused its discretion depends on the facts and circumstances of each case. *Walker*, 232 Ill. 2d 113. In making this determination, a trial court may consider the following: the history of the case, the seriousness of the charges, docket management, judicial economy, and inconvenience of the parties and witnesses, the

movant's diligence, the defendant's right to a speedy, fair, and impartial trial, and the interest of justice. *Id.*

¶ 33 We will not interfere with the trial court's decision absent a clear abuse of discretion. *People v. Chapman*, 194 Ill. 2d 186 (2000). However, we will reverse a defendant's conviction "[w]here it appears that the refusal of additional time in some manner embarrassed the accused in the preparation of his defense and thereby prejudiced his rights[.]" *People v. Lewis*, 165 Ill. 2d 305, 327 (1995).

¶ 34 In the present case, we note that defendant's case was pending for over two years. During this period, defendant did not previously disclose Ward as a potential witness and defense counsel admitted that he had not met Ward or discussed her possible testimony until the day he requested the continuance. Similarly, defendant had the same amount of time to prepare and call Vertin to testify regarding the 2008 incident. Thus, defendant has not shown the necessary diligence to warrant a continuance.

¶ 35 Secondly, the absence of Vertin and Ward's testimony did not affect defendant's right to a fair and impartial trial. Vertin's testimony was relevant only to impeach the victim's testimony regarding the September 2008 incident. This matter was collateral to defendant's consent defense, and defense counsel acknowledged that Vertin's testimony did not "have any direct effect on the consent issue." See *People v. Santos*, 211 Ill. 2d 395 (2004) (a matter is collateral if it cannot be introduced for any purpose other than to contradict).

¶ 36 In addition, Ward's proposed testimony would have duplicated Simpson and Williams' testimony suggesting that defendant had a prior dating relationship with the victim. Ward's testimony would not have shed light on the issue of the victim's consent on April 15, 2009.

Consequently, we conclude the trial court did not abuse its discretion when it denied defendant's request for a continuance.

¶ 37

II. Cross-examination

¶ 38 Next, defendant argues he was denied his right to present a defense by restricting the scope of cross-examination of the victim during trial. In this case, the State filed a pre-trial motion *in limine* seeking to prohibit defendant from introducing evidence of the victim's previous sexual history pursuant to section 115-7 of the Code of Criminal Procedure of 1963 (Code). 725 ILCS 5/115-7 (West 2008). The court allowed this motion. Thereafter, defendant filed a motion disclosing an affirmative defense of consent and requested the court to reconsider the previous ruling *in limine*.

¶ 39 During the hearing to reconsider the court's ruling on the motion *in limine*, defendant testified that he had sexual relations with the victim on nearly 100 occasions, at various locations, dated her for nearly 18 months, and lived with her for a short period of time in her household. However, defendant did not offer any corroborative evidence to support his testimony, such as phone records or hotel receipts.

¶ 40 Following the first hearing, the court found defendant's testimony regarding his previous sexual relationship with the victim was inconsistent, incredible, and lacked specificity. However, the court ruled that *if* the victim agreed there had been a previous sexual history with defendant during her testimony at trial, the court would readdress the issue raised in the State's motion *in limine* at that time.

¶ 41 Later, following a second pre-trial hearing due to defendant's motion to reconsider the court's ruling *in limine*, defendant introduced the testimony of Williams and Simpson to

corroborate his claim that he had a previous dating relationship with the victim, involving an active and consensual sexual relationship. Following the second hearing, the court determined "defense counsel is allowed to present to the jury that the defendant and victim had a prior dating relationship that included a prior sexual relationship, but there will be no indication where, how, when, type or anything like that."

¶ 42 By statute, the defense may introduce evidence of a victim's prior sexual activity or reputation only in two limited situations. 725 ILCS 5/115-7 (West 2008). First, evidence concerning the victim's prior sexual conduct is admissible when it is offered to establish the victim consented to the sexual conduct at issue. 725 ILCS 5/115-7(a)(1) (West 2008). Second, evidence of the victim's prior sexual activity or reputation is admissible when it is constitutionally required. 725 ILCS 5/115-7(a)(2) (West 2008). A criminal defendant has a "fundamental constitutional right to confront the witnesses against him, which includes the right to cross-examination." *People v. Kliner*, 185 Ill. 2d 81, 130 (1998).

¶ 43 In this case, just before defendant cross-examined the victim during trial, the court reminded counsel that defendant must first ask the victim if she had a prior dating relationship with defendant and cautioned defense counsel that if the victim denied the existence of a dating relationship, the court's pre-trial ruling prohibited defendant from further inquiries regarding any previous sexual activity between the victim and defendant. Defense counsel did not object to the court's directions on the record.

¶ 44 After carefully reviewing this record, we conclude the court's guidance during the side bar preceding the cross-examination of the victim during trial was proper and consistent with the pre-trial ruling *in limine*. Had the victim acknowledged a previous dating history with defendant, the

court stated it would readdress the restrictions on cross-examination regarding previous physical or consensual sexual encounters between defendant and the victim. However, once the victim denied the existence of a previous dating relationship with defendant, defense counsel was precluded from cross-examining the victim regarding any other sexual activities.

¶ 45 This ruling was not in error and did not impede defendant's constitutional right to confront the victim or present a defense. Defendant was allowed to present testimony from Simpson and Williams that contradicted the victim's denial of a dating relationship for the jury's consideration regarding the victim's truthfulness. Defendant was allowed to cross-examine the victim on the other issues raised in her direct testimony including the victim's prior interactions with defendant, his attempt to break into her house on September 2008, Vertin's investigation of this incident, and her relationship with Williams and Simpson.

¶ 46 Here, the court properly balanced the protections afforded by section 115-7 of the Code against defendant's constitutional right to confront the victim and present a consent based defense. Defendant was allowed to cross-examine the victim on other issues relevant to his defense and to impeach the victim's testimony with his own witnesses. Therefore, the trial court did not abuse its discretion.

¶ 47 III. Ineffective Assistance of Counsel

¶ 48 Defendant argues that the trial court conducted an inadequate inquiry into his *pro se* posttrial claims of ineffective assistance of counsel. When a defendant makes a *pro se* posttrial claim of ineffective assistance of counsel, the trial court must conduct an inquiry into its factual basis. *People v. Moore*, 207 Ill. 2d 68 (2003).

¶ 49 The adequacy of the trial court's inquiry into defendant's *pro se* posttrial motion of

ineffective assistance of counsel raises a question of law that we review *de novo*. *People v. Strickland*, 363 Ill. App. 3d 598 (2006). However, we will reverse the trial court's ruling on the merits of defendant's claim only if the court's action was manifestly erroneous. *People v. McLaurin*, 2012 IL App (1st) 102943.

¶ 50 A trial court may make this inquiry by: (1) questioning trial counsel about the facts and circumstances surrounding defendant's allegations; (2) requesting more specific information from defendant; or (3) relying on its own knowledge of defense counsel's performance at trial and considering the insufficiency of defendant's allegations on their face. *Id.* If defendant's claim lacks merit or pertains only to trial strategy, the court need not appoint new counsel and may deny the motion. *Id.* However, if the allegations show possible neglect of the case, the trial court should appoint new counsel to argue defendant's ineffective assistance claims. *Id.*

¶ 51 In the instant case, the trial court allowed defendant to argue his motion and relied on its own knowledge of defense counsel's performance to make its ruling. Matters of trial strategy are generally immune from claims of ineffective assistance of counsel unless counsel's chosen strategy is so unsound that counsel fails to conduct any meaningful adversarial testing. *People v. West*, 187 Ill. 2d 418 (1999). The trial court correctly noted that decisions to file motions and call witnesses are matters of trial strategy. See *People v. Wilson*, 164 Ill. 2d 436 (1994) (generally, trial counsel's failure to file a motion does not establish ineffective assistance of counsel); see also *People v. Ward*, 371 Ill. App. 3d 382 (2007) (decision of what witnesses to call and what evidence to present are matters of trial strategy that cannot form the basis of a claim of ineffective assistance of counsel).

¶ 52 Next, we address defendant's argument that the trial court applied an incorrect standard of

review when it found that defendant did not establish ineffective assistance of counsel.

Defendant is correct in arguing that when a defendant files a *pro se* posttrial claim of ineffective assistance of counsel, the standard the court must apply is whether defendant has shown possible neglect of his case. *Moore*, 207 Ill. 2d 68. If defendant has shown possible neglect, new counsel should be appointed to represent defendant at a hearing on his *pro se* claim of ineffective assistance. *Id.*

¶ 53 Although the trial court did not refer to the neglect standard, we presume that the trial court understood and properly applied the law. See *People v. Daniels*, 237 Ill. App. 3d 986 (1992). The court stated that counsel was diligent in his representation of defendant and this comment carries an implicit finding that defendant had not shown possible neglect. Thus, as noted above, new counsel need not be appointed because defendant's claims were not meritorious. See *Moore*, 207 Ill. 2d 68. Therefore, we affirm the denial of defendant's *pro se* posttrial motion for ineffective assistance of counsel.

¶ 54 IV. One-Act, One-Crime Doctrine

¶ 55 Defendant argues that one of his convictions for aggravated criminal sexual assault should be vacated under the one-act, one-crime doctrine. The State concedes the issue, and we agree. Where a defendant stands convicted of multiple charges of aggravated criminal sexual assault based upon the same physical act, only one conviction can stand. *People v. Artis*, 232 Ill. 2d 156 (2009). Here, defendant was convicted of two counts of aggravated criminal sexual assault based on the single act of defendant placing his penis in the victim's vagina. Thus, we remand the cause to the trial court with instructions to vacate the less serious offense. *Id.* (where it is difficult to tell from the record which conviction is more serious, cause should be remanded

to the trial court to make that determination).

¶ 56

CONCLUSION

¶ 57 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed in part and remanded in part.

¶ 58 Affirmed in part and remanded in part.