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2013 IL App (3d) 120406-U

Order filed May 10, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS, ) Appeal from the Circuit Court  
 ) of the 9th Judicial Circuit,  
Plaintiff-Appellee, ) McDonough County, Illinois,  
 )  
v. ) Appeal No. 3-12-0406  
 ) Circuit No. 06-CF-163  
DARRELL RIPPATOE, )  
 ) Honorable  
Defendant-Appellant. ) Raymond A. Cavanaugh,  
 ) Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Holdridge and Schmidt concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Trial counsel's decision not to call a witness was trial strategy and did not constitute ineffective assistance of counsel.

¶ 2 Defendant, Darrell Rippatoe, was found guilty of home invasion (720 ILCS 5/12-11(a)(6) (West 2006)), criminal sexual abuse (720 ILCS 5/12-15(a)(1) (West 2006)), criminal trespass to a residence (720 ILCS 5/19-4(a)(2) (West 2006)), and resisting or obstructing a peace officer (720 ILCS 5/31-1(a) (West 2006)). The court sentenced defendant to concurrent prison terms of 6½ years

for home invasion and 364 days for resisting or obstructing a peace officer. Thereafter, defendant filed a *pro se* motion for a new trial alleging ineffective assistance of counsel. The trial court denied the motion; however, on appeal we remanded the cause for the court to conduct an inquiry into the factual basis of defendant's claims and determine whether new counsel should be appointed. *People v. Rippatoe*, No. 3-07-0646 (2009) (unpublished order under Supreme Court Rule 23). On remand, the trial court concluded that new counsel need not be appointed. Defendant appealed, arguing that the court erred by failing to determine whether it was necessary for him to be shackled during the hearing. We remanded the cause for a determination of whether defendant should have been shackled and, if not, to conduct a new hearing. *People v. Rippatoe*, 408 Ill. App. 3d 1061 (2011). On remand, the trial court, without addressing the shackling issue, appointed new counsel and held a new evidentiary hearing. At the conclusion of the hearing, the court denied defendant's motion. Defendant appeals, arguing that he was denied the effective assistance of counsel when his trial attorney failed to call a witness to testify that the witness was with defendant's son on the day of the alleged offenses. We affirm.

¶ 3

#### FACTS

¶ 4 At defendant's jury trial, the State presented the testimony of the victim, M.J. She stated that on August 1, 2006, she was lying on a bed in her living room watching television with her son, Justin Mack, when defendant entered her home unannounced and uninvited. Defendant, who was dating M.J.'s niece, was accompanied by his two-year-old son. Upon entering the living room, defendant immediately jumped on the bed and grabbed M.J.'s breasts. He told her to pretend that he was her husband and that they should engage in intercourse. M.J., who described defendant as being drunk, said that she struggled to get defendant off her. During the struggle, defendant's son threw a ball at

him. After several minutes, defendant left the house.

¶ 5 Mack testified that on August 1, 2006, he was with his mother in the living room of their home when defendant and his son entered unannounced. Defendant immediately jumped on M.J.'s bed and put his hands on her breasts. Mack testified that he was too scared to do anything because defendant was bigger than he was. M.J. struggled with defendant and attempted to push him off her, but she was unable to do so. Defendant's son attempted to get him off of M.J. by throwing a ball at him. After approximately five minutes, defendant got off M.J., but he continued to try and remove the blanket that covered her. Eventually defendant left with his son.

¶ 6 The jury found defendant guilty of home invasion, criminal sexual abuse, criminal trespass to a residence, and resisting or obstructing a peace officer. Thereafter, defendant filed a *pro se* motion for a new trial alleging ineffective assistance of counsel. The trial court denied the motion after a review of the transcripts; however, we remanded the cause with directions for the trial court to conduct a proper inquiry into the factual basis of defendant's claims and determine whether new counsel should be appointed to represent defendant. *Rippatoe*, No. 3-07-0646. Upon remand, the trial court held a hearing and found that the claims did not entitle defendant to the appointment of new counsel. However, during the hearing, defendant remained shackled. Upon review, we again remanded the cause with directions to determine if defendant should have remained shackled, and if not, to conduct a new hearing. *Rippatoe*, 408 Ill App. 3d 1061.

¶ 7 Upon remand, the trial court, without addressing the shackling issue, appointed new counsel to represent defendant on his claims of ineffective assistance of counsel and conducted a new evidentiary hearing. At the hearing, trial counsel, Douglas Miller, testified that he was aware before trial that M.J. and Mack would testify that defendant's son was with defendant during the alleged

offenses. He further knew that defendant claimed that Floyd Robertson would testify that he was watching defendant's son at the time of the alleged offenses. Still, counsel decided not to call Robertson as a witness. Counsel declined to use Robertson because when he interviewed him prior to trial, Robertson spontaneously told him that although defendant's child was with him for approximately one hour on the day of the offenses, he could not say whether or not that one hour was before, during, or after the time defendant went to M.J.'s house. Therefore, Miller did not feel that the testimony would sufficiently support defendant's claim that the child was not at the victim's house when defendant was there. Further, counsel declined to use Robertson because he thought that it might be helpful to defendant if the jury believed that his son was at M.J.'s house. Specifically, counsel noted that he had argued during trial that it was less likely defendant would have committed the offenses in front of his own son.

¶ 8 At the end of the hearing, the court denied defendant's motion for a new trial. It found that Miller's failure to call Robertson as a witness was based on trial strategy and thus did not rise to the level of ineffective assistance of counsel. Defendant appeals.

¶ 9 ANALYSIS

¶ 10 Defendant claims that he was denied the effective assistance of counsel when trial counsel failed to call Robertson to testify that defendant's son was with him on the day of the alleged offenses. To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's representation 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. *People v. Albanese*, 104 Ill. 2d 504 (1984). Defendant must satisfy both prongs in order to prevail on a claim of ineffective assistance of counsel. *Id.*

¶ 11 In order to establish the first prong, a defendant must show that counsel's performance was so inadequate that counsel was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 241 Ill. 2d 319 (2011). In doing so, the defendant must overcome a strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *Id.* The decision to present certain evidence is a matter of trial strategy. *People v. Winchel*, 159 Ill. App. 3d 892 (1987). Likewise, a decision to present a particular witness is a strategic choice and generally considered trial strategy. *People v. Richardson*, 189 Ill. 2d 401 (2000). Matters of trial strategy are generally immune from claims of ineffective assistance of counsel. *Manning*, 241 Ill. 2d 319.

¶ 12 Here, we find that counsel's decision not to call Robertson was a product of trial strategy and did not amount to ineffective assistance of counsel. Counsel noted that Robertson volunteered that he would be unable to testify that he was watching the child when defendant was at the victim's house. Counsel stated that he therefore did not use Robertson's testimony because: (1) he did not feel that the testimony would sufficiently support defendant's claim that the child was not at the victim's house when defendant was there; and (2) he intended to argue that it would be unlikely that defendant would engage in a sexual act in front of his son. Based on our review of the record, we believe that counsel's decision not to use Robertson's testimony was objectively reasonable and, even if a different strategy might have proved more beneficial, it would be inappropriate to second-guess counsel's strategic decision here. See *Strickland v. Washington*, 466 U.S. 668 (1984). Therefore, we conclude that counsel was not ineffective.

¶ 13 CONCLUSION

¶ 14 The judgment of the circuit court of McDonough County is affirmed.

¶ 15 Affirmed.