NOTICE
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2013 IL App (4th) 120222-U

NO. 4-12-0222

FILED
August 14, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Douglas County
DAVID M. HARSHBARGER,	)	No. 11CF30
Defendant-Appellant.	)	
	)	Honorable
	)	Michael G. Carroll,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Steigmann and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial counsel was not ineffective for failing to argue legally cognizable grounds for the admission of impeachment evidence that the child victim had falsely accused a third party of sexual abuse, where there was no reliable evidence of the same.

(2) The trial court abused its discretion by imposing the sentences on defendant's three convictions for aggravated criminal sexual abuse upon an erroneous belief the sentences were required to run consecutively.

¶ 2 Defendant, David M. Harshbarger, appeals from his convictions and sentencing on two counts of predatory criminal sexual assault of a child and three counts of aggravated criminal sexual abuse. Defendant contends (1) his trial counsel was ineffective for failing to argue the admissibility of impeachment evidence, and (2) the trial court erred in believing the sentences on the aggravated-criminal-sexual-abuse counts had to be served consecutively. We affirm defendant's convictions and modify the sentences imposed on the aggravated-criminal-sexual-abuse counts.

¶ 3 I. BACKGROUND

¶ 4 On May 9, 2011, the State charged defendant with two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)): one count for the sexual penetration of E.M., age 9, and one count for the sexual penetration of A.W., age 8. The State also charged defendant with four counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)): three counts related to defendant's conduct with E.M. and one count related to A.W.

¶ 5 In January 2012, the State filed several motions *in limine,* one of which was a motion to bar evidence that A.W., or someone acting on her behalf, may have reported a prior incident of sexual abuse, not involving defendant, in June 2010. According to the State, defendant would attempt to argue at trial that this prior incident may have provided the victim with the sexual detail contained in her anticipated testimony. At the hearing, the State argued that defendant may present the testimony of a Douglas County sheriff's deputy, who would testify that, in May 2010, defendant's sister, Amber Harshbarger and/or Nicole Maulding, A.W.'s sister and E.M.'s stepmother, informed the deputy that A.W. had complained to them that A.W.'s mother's boyfriend had sexually abused her. The deputy advised Harshbarger and Maulding to report the incident to the Villa Grove police department. Harshbarger would then testify that Maulding decided not to "incur the ire of her mother" and refused to proceed with reporting the incident further. According to the State, defendant may attempt to admit this evidence to prove A.W. was sexually abused by someone other than defendant. The State argued such evidence was prohibited under the Rape Shield Act (725 ILCS 5/115-7(a) (West 2010)), with no applicable exceptions. The trial court asked defendant's counsel to respond to the rape-shield argument. Counsel explained: "Yes, it is an allegation of prior sexual activity, but it also goes, I believe to the—I think it goes to credibility issues in this case." As the

discussion continued, counsel stated:

> "And the court may further recall that each of them [(Harshbarger and Maulding)] did testify that this subject has never been discussed with either of these girls before this allegation was raised or since. Now, if the testimony I proffered through the defendant's sister, [Harshbarger,] is true, then that's a contradiction. This would have been discussed by these two parents with these girls earlier, and that does go, I believe, to their credibility as witnesses."

After the hearing, the trial court issued a letter opinion, finding as follows:

> "Defendant is barred from introducing evidence of previous sex crime complaints involving another alleged defendant, except for impeachment purposes only, of the person who is alleged to have made a prior inconsistent statement, if the situation presents itself."

¶ 6 Defendant's case proceeded to trial in January 2012. The jury trial continued over the course of four days with a total of 13 witnesses testifying, including defendant. Because defendant does not contest the sufficiency of the evidence, we will summarize only that which is either pertinent to the issues discussed below or necessary to an understanding of the circumstances surrounding the incident.

¶ 7 Both victims testified they had spent the night at defendant's residence because they were friends with defendant's daughter. While there, defendant would blindfold the victims and play both the "taste game" and the "touch game." The victims would either touch or taste something and have to guess what they were tasting or touching. The touch game involved the victims touching

defendant's penis, while the taste game involved defendant placing food items on his penis and having the victims taste it. After considering all of the evidence, the jury found defendant guilty of two counts of predatory criminal sexual assault of a child and three counts of aggravated criminal sexual abuse.

¶ 8 In February 2012, defendant filed a posttrial motion, raising the trial error he raises in this appeal. The trial court denied defendant's motion and proceeded to sentencing. The court sentenced defendant to two terms of natural life in prison on the two counts of predatory criminal sexual assault of a child, and five years in prison on each of the three counts of aggravated criminal sexual abuse, "mandatory consecutive sentences per statute." This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 A. Ineffective Assistance of Counsel

¶ 11 Defendant first claims his trial counsel rendered substandard performance when he failed to argue, during the hearing on the State's motion *in limine*, legally cognizable grounds for the admission of impeachment evidence against A.W., one of the victims. In this appeal, defendant claims that, during the parties' discussion regarding the application of the rape shield statute, his attorney should have argued the anticipated testimony about A.W.'s prior accusations of sexual abuse by another individual, should have been admitted and explored as possible grounds for impeachment, not as an exception to the statute, but as a means of showing A.W.'s corrupt state of mind or a motive to lie, her bias, or improper interest.

¶ 12 To demonstrate an attorney's ineffective assistance, one must prove both prongs of the two-part standard set forth in *Strickland v. Washington*, 466 U.S. 668, 685, 687 (1984), which provides that (1) counsel's performance was deficient, and (2) the deficient performance caused

prejudice. Under the first prong, the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. That is, the defendant must demonstrate that his claim has merit and his attorney, in fact, erred. *Strickland,* 466 U.S. at 687.

¶ 13 The State anticipated that defendant would present evidence in the form of testimony from either defendant's sister, Amber Harshbarger, or the deputy who took Harshbarger's complaint that A.W. had reportedly accused an individual, not defendant, of a sex crime against her approximately one year before defendant was charged with the current offenses. Thus, the State filed a motion *in limine* attempting to prohibit such evidence, citing the "rape shield" statute. That statute provides that the prior sexual activity or the reputation of the alleged victim is absolutely barred from admission except (1) when offered as evidence of past consensual sexual conduct between the alleged victim and the defendant, or (2) when constitutionally required to be admitted. 725 ILCS 5/115-7(a) (West 2010). Defendant claims the evidence of A.W.'s prior allegations of sexual abuse would have been admitted had counsel made the proper argument.

¶ 14 The proper argument, defendant contends, is not centered on the "rape shield" statute, but rather, on the admissibility of evidence that the victim had made prior false allegations against someone else. He insists such evidence was admissible for impeachment purposes or to demonstrate the victim's (or those of the witnesses' reporting for her) improper interest, bias, or motive to lie. He contends the admission of prior false allegations made by the victim would demonstrate her habit or general scheme of making false charges or claims.

¶ 15 To support his position, defendant relies on *People v. Grano*, 286 Ill. App. 3d 278 (1996). There, the Second District held the trial court had erred in determining that the rape shield statute precluded the defendant from introducing evidence that the victim had previously falsely

accused three other men of sexual assault. *Grano*, 286 Ill. App. 3d at 288-89. The court determined that the rape shield statute was not designed to preclude the admission of *all* evidence related to sex. Instead, the court found, the legislative intent was to exclude evidence of actual sexual history or reputation of the victim, not evidence of *prior accusations* of the victim offered for the purpose of impeachment, even if that evidence related to sex. *Grano*, 286 Ill. App. 3d at 288. The court's finding meant that the rape shield statute had no bearing on that case. See *People v. Santos*, 211 Ill. 2d 395, 402 (2004).

¶ 16 Our supreme court provided guidance on when evidence that the complainant had made other "unfounded" allegations of sexual assault against third parties should be allowed. See *People v. Cookson*, 215 Ill. 2d 194, 214 (2005). The court held that such evidence would be admissible as a means for the defendant to impeach the complainant's credibility if he could demonstrate the witness's interest, bias, or motive to lie. *Cookson*, 215 Ill. 2d at 214. The court found the defendant in *Cookson* was unable to demonstrate that the complainant had any interest, bias, or motive to lie about the defendant. *Cookson*, 215 Ill. 2d at 218. We reach the same result here.

¶ 17 At the hearing on the State's motion *in limine*, defendant's attorney made a proffer that in May 2010, defendant's sister, Amber Harshbarger, notified a Douglas County sheriff's deputy that A.W. had accused her mother's boyfriend of sexual abuse. The deputy referred Harshbarger to the Villa Grove police department because that is where the alleged abuse occurred. However, according to Harshbarger's anticipated testimony, the parties dropped the allegations and did not pursue it further.

¶ 18 We agree with the State's assessment that there was no evidence that A.W. had made

such allegation, except the testimony of defendant's sister. As the State notes, the testimony from defendant's sister would not be sufficiently reliable to prove the fact that A.W. had made prior sexual abuse allegations. Indeed, the deputy was expected to testify that defendant's sister came to him and made the accusation on an unidentified child victim's behalf. There was no evidence, other than that which came from defendant's sister, that A.W. accused any third party of sexual abuse.

¶ 19 Given the lack of evidence related to prior false accusations, we conclude that counsel's performance was not substandard. Counsel could not have made any reasonable argument that the evidence tending to demonstrate that A.W. had accused another individual of sexual abuse approximately one year prior to the abuse committed by defendant showed she had an improper interest, bias, or motive to lie against defendant. We find no relationship between the alleged prior accusations and A.W.'s motive to be untruthful regarding the accusations against defendant. As such, any evidence related to A.W.'s sexual abuse accusation against her mother's boyfriend was irrelevant, improper impeachment evidence, and was properly excluded by the trial court. Accordingly, trial counsel's performance was not deficient and thus, defendant suffered no prejudice therefrom.

¶ 20 B. Sentencing

¶ 21 Defendant next contends the trial court erred in imposing consecutive sentences for the three counts of aggravated criminal sexual abuse. The court mistakenly believed that consecutive sentences were mandatory. The State concedes error and we accept the State's concession.

¶ 22 Aggravated criminal sexual abuse is a Class 2 felony. 720 ILCS 5/12-16(g) (West 2010). When imposing a sentence upon a conviction for aggravated criminal sexual abuse, the trial court *may* impose consecutive prison terms if it finds, based on "the nature and circumstances of the

offense and the history and character of the defendant," that consecutive terms are required to protect the public. 730 ILCS 5/5-8-4(c)(1) (West 2010). However, consecutive terms are not mandatory. Consecutive terms *are* mandatory for aggravated criminal sexual assault (720 ILCS 5/11-1.30 (West 2010)). See 730 ILCS 5/8-4(d)(2) (West 2010). Perhaps it was this provision the trial court referred to when it imposed "mandatory consecutive sentences per statute."

¶ 23 The State recommends, in the interest of judicial economy, this court exercise its authority pursuant to Illinois Supreme Court Rule 615 (eff. Jan. 1, 1967) and modify defendant's sentences to run concurrent with each other and consecutive to the sentences imposed on defendant's two convictions for predatory criminal sexual abuse of a child, rather than remand for a new sentencing hearing. Our supreme court has instructed that "[i]n light of the jurisprudence of [the supreme] court and the plain language of Rules 615(b)(1) and (b)(4), [it] conclude[d] a court of review has the power to reduce a defendant's sentence on appeal once it has been determined that the trial court's sentencing decision was unlawful or an abuse of discretion." *People v. Jones*, 168 Ill. 2d 367, 378 (1995). In light of the State's recommendation and the imposition of the two consecutive natural life terms defendant must serve on his other convictions in this case, we find it appropriate to utilize our stated authority and modify defendant's sentence accordingly rather than "exhaust additional judicial resources, as well as the resources of counsel for the State and the defense, that would be expended by ordering a new sentencing hearing." *Jones*, 168 Ill. 2d at 378.

¶ 24 III. CONCLUSION

¶ 25 For the foregoing reasons, we affirm the trial court's judgment of conviction. We modify the sentences imposed on defendant's three convictions for aggravated criminal sexual abuse to run concurrently, rather than consecutively, with each other and consecutive to the sentences

imposed on defendant's two convictions for predatory criminal sexual assault of a child. Because the State has in part successfully defended a portion of the criminal judgment, we grant the State its statutory assessment of $50 against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978)).

¶ 26 Affirmed as modified.