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2014 IL App (3d) 130636-U

Order filed August 28, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0636
JESUS C. MARTINEZ,)	Circuit No. 12-CF-102
Defendant-Appellant.)	Honorable Sarah-Marie F. Jones, Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Lytton and Justice Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial counsel did not provide ineffective assistance for failing to assert an entrapment defense.
- ¶ 2 Following a jury trial, defendant, Jesus C. Martinez, was found guilty of traveling to meet a minor (720 ILCS 5/11-26(a) (West 2012)), indecent solicitation of a child (720 ILCS 5/11-6(a)-5) (West 2012)), and unlawful grooming (720 ILCS 5/11-25(a) (West 2012)). He was sentenced to 30 months of sex offender probation and 96 days in jail with credit for time served. Defendant appeals, arguing trial counsel was ineffective for failing to raise the affirmative defense of

entrapment. We affirm.

¶ 3

FACTS

¶ 4

On January 26, 2012, defendant was charged by indictment with traveling to meet a minor (720 ILCS 5/11-26(a) (West 2012)), indecent solicitation of a child (720 ILCS 5/11-6(a-5) (West 2012)), and unlawful grooming (720 ILCS 5/11-25(a) (West 2012)). The charges related to communications defendant had with an undercover police officer, Paul Howey, who met defendant on an online chat room.

¶ 5

At defendant's jury trial, Howey testified about his online investigation. On December 29, 2011, Howey was conducting an investigation on Yahoo chat, using a fictitious profile of a teenage girl with the screen name "kayla_girl2015." Howey was in a chat room called "Romance," when he received an instant message from defendant, who used the screen name "just8inchesofpleasure." Defendant asked kayla_girl2015's age and location. Kayla_girl2015 responded that she was a 14-year-old female from Illinois. Defendant responded that he was a 39-year-old male from Chicago. Defendant then asked kayla_girl2015 what she was looking for and if she would like to have sex. Kayla_girl2015 said she had never had sex before, and defendant asked if she would like an older man to teach her.

¶ 6

Pursuant to defendant's request, kayla_girl2015 sent defendant pictures of a teenage girl. During the conversation, defendant repeatedly asked if she really wanted to learn about sex and asked if she wanted to meet him in person. Defendant expressed his concern about meeting her because of her age. Defendant then told kayla_girl2015 that he was married, but separated, and had three children that were close in age to kayla_girl2015. Eventually, defendant's web camera depicted live video feed of him masturbating. Defendant stated multiple times that he wished to meet kayla_girl2015 to engage in sexual intercourse. Kayla_girl2015 stated that she would like

to meet somewhere in public and then signed off, stating they could talk another night because her mother was coming home.

¶ 7 On January 2, 2012, Howey signed onto Yahoo chat, and defendant sent him an instant message. Defendant asked kayla_girl2015 when she would like to see him. Defendant later asked kayla_girl2015 if she was a police officer, but was assured by kayla_girl2015 she was not. Kayla_girl2015 said they could meet in public and then go to her house while her mother was working on Friday. Defendant reiterated that he wanted to meet and have sex. Defendant then said he had to go and ended the chat.

¶ 8 On January 3, 2012, Howey signed onto Yahoo chat, and defendant sent an instant message. Defendant asked if they were going to meet Friday, January 6, 2012. Kayla_girl2015 said she could not meet Friday, but she could meet on Saturday. Defendant then asked kayla_girl2015 to wear something sexy when they meet in person and asked if she would like to see him more than one time. Defendant then sent kayla_girl2015 a web camera invitation, which depicted himself masturbating. Kayla_girl2015 then said she had to go, and defendant confirmed he would talk with her Friday and meet on Saturday. Howey explained that due to his schedule, he was unavailable Friday and Saturday and did not meet or chat with defendant on those days.

¶ 9 On January 11, 2012, Howey signed onto Yahoo chat and sent an instant message to defendant, apologizing for being unavailable. Defendant asked for more pictures, which kayla_girl2015 sent to defendant. Defendant then asked if kayla_girl2015 still wanted to meet. Kayla_girl2015 suggested the following day at McDonald's in Crete, Illinois. Defendant said he would meet kayla_girl2015 at 4:45 p.m. in the rear dining area, but asked whether she had any friends that might see her there. Kayla_girl2015 said no and suggested that defendant bring a

flower so she would know it was him. Defendant said he was not sure what people would think of an older man giving flowers to a young girl. However, defendant said he would be wearing a green jacket, a black hat, and jeans. Defendant raised another concern regarding police involvement, but then confirmed kayla_girl2015 would want to have sexual intercourse if they met.

¶ 10 At 4:40 p.m. on January 12, 2012, the police saw defendant arrive at the McDonald's. After circling the location, defendant eventually entered the building and was wearing a green jacket and black hat. Defendant went to the rear dining area and appeared to be looking for someone. After quickly entering and exiting the bathroom, defendant ordered food. He returned to his vehicle and waited. The police approached defendant and informed him that they believed he was attempting to meet an underage girl. Defendant admitted meeting kayla_girl2015 in a chat room and was sorry for coming to the location. Defendant stated that he had never done anything like that before and admitted it was a mistake to meet her.

¶ 11 At the police station, defendant admitted chatting with kayla_girl2015, but said he thought she was 15 or 16 years old. When Howey stated kayla_girl2015 was 14 years old, defendant admitted she said she was 14 in their chats. Defendant said he used the computer at his wife's flower shop in Chicago, Illinois. Defendant admitted going to the location to meet kayla_girl2015, but stated he would not have forced himself on her. Howey told defendant that the minor's mother was concerned and asked defendant to write an apology letter. Defendant wrote a letter, stating that he regretted what he had done. Defendant explained that it was easy to say things when using a computer, but claimed he would not have actually done what he said he was going to do.

¶ 12 During trial, defendant testified that he was married and had three children between the

ages of 15 and 16. Defendant admitted chatting with kayla_girl2015 under the screen name just8inchesofpleasure. Defendant said he chatted with her in a romance chat room that he believed was exclusively for adults. Defendant explained that to enter the chat room, you must verify that you were 18 years old. Defendant testified that he used the chat room to escape from his problems. When he began chatting with kayla_girl2015 and she informed him she was 14 years old, he was under the impression she was really an adult. Defendant testified that he went to McDonald's to see if kayla_girl2015 was an adult.

¶ 13 The jury ultimately found defendant guilty of traveling to meet a minor (720 ILCS 5/11-26(a) (West 2012)), indecent solicitation of a child (720 ILCS 5/11-6(a-5) (West 2012)), and unlawful grooming (720 ILCS 5/11-25(a) (West 2012)). He was sentenced to 30 months of sex offender probation and 96 days in jail with credit for time served. Defendant appeals.

¶ 14 ANALYSIS

¶ 15 Defendant argues trial counsel was ineffective for failing to raise the affirmative defense of entrapment because had the defense been raised, it was likely he would not have been found guilty.

¶ 16 To prevail on a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance was so deficient that it 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. Manning*, 241 Ill. 2d 319 (2011); *Strickland v. Washington*, 466 U.S. 668 (1984). Defendant's failure to satisfy either prong defeats a claim of ineffective assistance. *People v. Graham*, 206 Ill. 2d 465 (2003).

¶ 17 In establishing deficient performance, defendant must overcome a strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not

of incompetence. *Manning*, 241 Ill. 2d 319. Generally, counsel's choice of an appropriate defense is a matter of trial strategy or tactics not reviewable under the *Strickland* test. *People v. Garmon*, 394 Ill. App. 3d 977 (2009).

¶ 18 Based on our review of the record, we find that counsel's failure to raise an entrapment defense was a product of trial strategy. In order to rely on the defense of entrapment, a defendant must admit to committing all the elements of the charged offense, including the requisite mental state. *People v. Arndt*, 351 Ill. App. 3d 505 (2004). Here, defendant admitted to all the elements of the offenses, except he denied any belief that kayla_girl2015 was under the age of 17. As such, by denying the requisite mental state for the offenses, he was precluded from claiming entrapment. *Id.*

¶ 19 Defendant argues counsel should have argued entrapment instead of refuting the mental state, noting that a similar defense was unsuccessful in *Arndt*, 351 Ill. App. 3d 505. However, this alone does not render counsel's performance deficient. See *People v. Cundiff*, 322 Ill. App. 3d 426 (2001) (finding that simply because a trial strategy is unsuccessful is not evidence that counsel was ineffective). Given the amount of evidence supporting defendant's guilt, it appears that disproving defendant's mental state was a sound trial strategy for counsel to pursue, and we cannot say counsel's decision to refrain from arguing an entrapment defense was objectively unreasonable.

¶ 20 Nevertheless, even if counsel raised an entrapment defense, defendant cannot show a reasonable probability that the outcome of his trial would have been different. An entrapment defense requires that a defendant show both that the State improperly induced him to commit a crime and that he was not otherwise predisposed to commit the offense. 720 ILCS 5/7-12 (West 2012); *People v. Bonner*, 385 Ill. App. 3d 141 (2008). An entrapment defense is unavailable

where the State merely provided defendant an opportunity to commit the crime. *Arndt*, 351 Ill. App. 3d 505. Here, defendant was not induced to commit the crime where he initiated sexual conversations on multiple occasions with someone he was told was 14 years old. Defendant claimed the chats with kayla_girl2015 were mere fantasy; however, defendant continuously asked to meet kayla_girl2015 in person and confirmed that she would be willing to have sexual intercourse when they met. Even after the first planned meeting with kayla_girl2015 did not work out, defendant again agreed to meet her and arrived at the designated location wearing the clothing he had described. As such, even if counsel argued an entrapment defense, defendant is unable to show he was prejudiced by counsel's alleged deficient performance. Therefore, we conclude that trial counsel was not ineffective.

¶ 21

CONCLUSION

¶ 22

The judgment of the circuit court of Will County is affirmed.

¶ 23

Affirmed.