2015 IL App (1st) 121580-U

FIRST DIVISION
March 9, 2015

No. 1-12-1580

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 20136
	)	
BRIAN ROCUANT,	)	Honorable
	)	Garritt Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

Held: We hold defendant's failure to show he was prejudiced by alleged trial counsel errors is fatal to his ineffective assistance of counsel claim. Additionally, we agree with the parties that the $5 court system fee (55 ILCS 5/5-1101 (a) (West 2008)) and the $5 electronic citation fee (705 ILCS 105/27.3e (West 2010)) must be vacated.

¶ 1 The circuit court convicted defendant, Brian Rocuant, after a bench trial, of four counts of aggravated criminal sexual abuse for committing various acts of sexual conduct with a

14-year-old when he was at least five years older. The circuit court found defendant not guilty of eight counts of criminal sexual assault. The circuit court sentenced defendant to six months of incarceration and 30 months of felony probation.

¶ 2 Before this court, defendant raises an ineffective assistance claim arguing that his counsel failed to object to the complaining witness's leading testimony and hearsay statements. Defendant also argues his counsel was ineffective for failing to secure an expert witness to explain his theory of the case; that the complaining witness's allegations were based on a learned behavior from her mother. We hold defendant's failure to show he was prejudiced by the alleged errors is fatal to his ineffective assistance of counsel claim. Additionally, we agree with the parties that the $5 court system fee (55 ILCS 5/5-1101 (a) (West 2008)) and the $5 electronic citation fee (705 ILCS 105/27.3e (West 2010)) must be vacated.

¶ 3 JURISDICTION

¶ 4 The circuit court sentenced defendant on February 16, 2012. Defendant timely filed his notice of appeal on February 23, 2012. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); R. 606 (eff. Feb. 6, 2013).

¶ 5 BACKGROUND

¶ 6 Defendant was charged by indictment with eight counts of criminal sexual assault and four counts of aggravated criminal sexual abuse for acts defendant allegedly committed in December of 2009 against C.F., his niece. Relevant here, counts I through IV alleged defendant committed acts constituting sexual assault by the use or threat of force. Counts V through VIII alleged defendant committed acts constituting sexual assault in that the victim was between 13

and 18 years of age and defendant was over 17 years of age and held a position of trust, authority or supervision in relation to the victim. Counts IV through XII, upon which defendant was found guilty, alleged defendant committed acts constituting aggravated criminal sexual abuse where the victim was between 13 and 17 years of age and defendant was at least five years older than the victim. Specifically, count IV alleged defendant committed an act of sexual penetration by his hand contacting C.F.'s vagina. Count X alleged defendant committed an act of sexual penetration by defendant's mouth contacting C.F.'s vagina. Count XI alleged defendant committed an act of sexual penetration by his penis contacting C.F.'s mouth. Count XII alleged defendant committed an act of sexual penetration by his penis contacting C.F.'s anus.

¶ 7 At trial, C.F., testified that in December of 2009 her father lived in Chicago while her mother lived in Skokie at her grandparent's, Anilda and Ignacio Rocuant's, house. Her uncle, defendant, was also staying at the house. She primarily stayed with her father as it was closer to her school but would stay with her mother on the weekends. At the end of December 2009, however, during her winter break, she stayed with her mother at her grandparent's house. She described her grandparent's house as a split level house with a front door alarm. The alarm could be heard throughout the house when the front door opened.

¶ 8 On December 28, 2009, after midnight, C.F. was watching television alone in the living room when defendant sat beside her on the couch and started to rub her leg. This did not alarm C.F. because defendant was studying to be a masseur and frequently gave massages. As defendant rubbed C.F.'s leg, he moved slowly up her leg toward her vaginal area. Defendant then inserted his fingers into C.F.'s vagina. Defendant moved his fingers in and out of C.F.'s vagina for "a few minutes." While defendant was doing this, C.F. cried and did not know what to do as she was in "shock." She later testified she was "vulnerable." Eventually, defendant

stopped touching C.F.'s vagina and began comforting her because he saw her crying. Defendant apologized to her.

¶ 9 C.F. testified that the next afternoon, December 29, 2009, she went into the kitchen and defendant was there. Defendant lifted her up and kissed her on the lips. C.F. wrapped her legs around defendant. C.F. testified defendant told her "[y]ou know this is just between you and me, right. Don't tell your mom." She did not tell her mother because she was scared.

¶ 10 The next day, in the early morning hours of Wednesday, December 30, 2009, C.F. was again watching television alone on the couch. Defendant eventually sat next to her on the couch and again went "towards [C.F.'s] vaginal area again." C.F. testified that defendant "ended up opening [her] legs and*** used his mouth." She testified further that "[h]e started using his lips and tongue around" her vaginal area. He moved his tongue around for a few minutes while C.F. cried and tried "to figure out *** what to do." Defendant then stopped and sat on the couch. C.F. testified that defendant then grabbed her neck and the back of her head with his hands and made her perform oral sex on him. C.F. testified that she was still crying and her eyes were closed. C.F. testified that defendant finished and then "apologized once again like he always did, and that was basically it." When asked whether defendant ejaculated, C.F. answered "I believe so."

¶ 11 That same day, in the early afternoon, C.F. watched television in her mother's room. She laid on her stomach in her mother's bed while holding her head up with her arms. Defendant was at home, but her grandparents, mother, and sister were not home. Defendant eventually came in the room, pulled down C.F.'s pants, and got on top of her. C.F. testified that defendant "started putting pressure to my, you know, area and like with his penis." She stated defendant pulled down her pants so that her buttocks were showing. Defendant straddled over

her with his legs over her. She felt defendant's penis "pressing" her anus. After a couple of minutes, defendant stopped because he heard the front door alarm and her grandfather entered the house. Defendant pulled up his pants and walked out of the bedroom. She did not tell her grandfather because she was scared.

¶ 12 In late March, C.F. told her boyfriend what had happened. A few weeks later, she told her best friend what happened. A few weeks after that she told a new boyfriend who encouraged her to write a letter to express herself. After several attempts to write a letter, drafts of which she discarded, C.F. eventually completed a letter to defendant on August 1, 2010. She gave it to her sister who in turn gave it to her brother. Her brother called her mother and the next day she went to the police with her mother on the evening of August 2, 2010.

¶ 13 C.F.'s mother, Maria Angelica Rocuant, known as Angie, testified that her son called her on August 1, 2010, around lunch time, and told her that defendant "tried to rape" her daughter. She returned home and called her sister, Diana Rocuant, and told her to meet her at her parent's house. She eventually read C.F.'s letter to defendant. At that time, she did not discuss the allegations with her parents but she did tell her sister. She was very upset and crying. When her parents asked her what happened, she told her sister Diana to tell them. She then went to her room and started packing her things. She did not hear her sister Diana tell her parents of the allegations against defendant, but it was her understanding that Diana told them. Her mother Anilda, called defendant.

¶ 14 At around 3:10 p.m., Angie received the following text message from defendant: "Id never ever hurt her. Ever. I am so fucking sorry anything happened at all." Angie did not look for defendant that day and testified that "I said [defendant] needs to stay out of my sight for now because if I see him I will kill him."

¶ 15 The next day, August 2, 2010, she took C.F. to the Skokie police station where C.F. told a police officer what happened. C.F. also spoke to the Children's Advocacy Center and the Department of Children and Family Services about what happened.

¶ 16 On August 3, 2010, defendant sent Angie and her two sisters, Diana and Jeanette Rocuant, the following text message:

> "There are more than a few times in my life where i wish that my smarter and ethically aware half were more prominent in the situations i was placed in. Were there a way to measure the weight of the im sorry's I'd say whisper wish think everyday til i died, even that scale would break under the weight of my apology. There is nothing to do with the past thats done. Only to learn and move on. I let the unthinkable happen when i myself know that feeling have been there myself and swore i would never let it happen to someone else. and I failed utterly. Its my face i have to look at everyday and see the monster that was inside me. I do not expect your trust, your forgiveness, or our blood to be considered remotely related or comparable. Everything ive done since that horrid mistake has been a step moving myself away from the family i never deserved, and could have done better without me. I am vehemently sorry. i will stay away move away respect a restraining order. please don't make it worse. everything i can do i will. please please please."

In response, Angie told defendant via text message to turn himself in, that he was dead to her, and that C.F. adored him.

¶ 17 On August 3, 2010, at 10:09 a.m., defendant responded to Angie with the following text message:

"Yea… i guess that'll help her huh? there is no way to confront you. Every time i tried i knew how ud react or hear it. im sorry. mom doesn't need to know yet. and dad needs to be watched over. take care of them."

¶ 18 On August 16, 2010, defendant turned himself in to the police.

¶ 19 At the close of the State's case, the circuit court granted defendant's motion for a directed verdict as to counts I, II, and IV, because the State failed to prove use of force or threat of force.

¶ 20 Gloria Medic, defendant's godmother, testified on his behalf. Gloria Medic testified that on December 30, 2009, defendant and his father, Ignacio, arrived at her house between 9 and 10 in the morning to install a bathroom in her basement. She left between 10 and 11 a.m. to go to work. When she returned home at "[m]aybe 6 o'clock" in the evening, defendant and Ignacio were gone.

¶ 21 Christian Medic, testified he lives with his mother, Gloria Medic. On December 30, 2009, he returned home and saw defendant and Ignacio working in the basement at approximately 2:15 in the afternoon. He then made lunch and took a nap. When he awoke at "about 5 that afternoon," defendant and Ignacio were gone.

¶ 22 Diana Rocuant, defendant's sister, testified that she observed defendant and C.F. interacting normally in the time period after the incident. She described the day that her sister Angie found out about C.F.'s letter, and testified that Angie was angry and saying she wanted to kill defendant. Angie's son also stated he wanted to kill defendant. Later Diana recounted in August of 2009 that Angie had told her parents that she had been raped at age 12. C.F. was present when Angie told her parents that she had been raped.

¶ 23 Ignacio Rocuant, defendant's father, testified that he was in Chile for vacation in December of 2009 for three weeks until December 29, 2009, "about midday." He testified that on December 30, 2009, he worked with his son at Gloria Medic's house. They arrived at "[m]ore or less 9, 9:15, 9:30" in the morning. He worked with defendant until after 4 in the afternoon. Defendant was with him that entire time. Ignacio testified that he was in his family room at approximately 8 p.m. on December 29, 2009. Defendant left the house at approximately 10:30 p.m. on that date and went to a friend's house. Ignacio testified that he went to bed at "11, 11:30, or 12" that night and returned at 2:30 on the morning of December 30. Defendant woke him up with the door alarm at 2:30. He testified that he never heard crying on December 29, or 30. During this time period, he observed C.F. and defendant interacting normally.

¶ 24 Anilda Rocuant, defendant's mother, testified she returned with her husband from Chile on December 29, 2009 "around noon." On that day, she recalled that defendant left the house at around 10:30 p.m. to go to a friend's house. She went to bed at between 10 and 11 p.m. that night. She testified that at approximately 8:00 a.m. on December 30, 2009, her husband and defendant left the house to go to work at around 9 or 9:30 in the morning. They returned at around 5 in the afternoon.

¶ 25 Anilda also described the events of August 1, 2010. She testified Angie was crying and that C.F. had written a letter to defendant. She "scanned through" C.F.'s letter. She testified that Angie and her son were threatening to kill defendant. Defendant was at work, but Anilda called him at around 3 in the afternoon and told him what Angie was saying about him and to warn him to stay away from the house. After 5 p.m. she went to defendant's work and brought him clothes and told him to not stay at the house because she feared Angie or Angie's son would

kill him. She told him to write a letter of apology to Angie because Angie "is crazy and vindictive. She always wants revenge. And she's out of control" and lost "her temper." Defendant stayed with a friend that night and Anilda left for Puerto Rico on August 2, 2010. Anilda also testified that Angie claimed to have been raped at age 12 and that C.F. was present when she told her. Anilda testified that defendant did not want to apologize because he did not do anything. She testified she wanted defendant to send Angie a letter to appease her.

¶ 26 Defendant denied C.F.'s allegations and testified as follows. On December 28, 2009, he went to a friend's house after 11 in the evening. He thought he returned home "probably *** around 3" in the morning. No one was awake when he returned home. The next morning, December 29, 2009, at around 11:30 a.m., he awoke to his parents arriving home from Chile. Later that day, at around 10:30 p.m., he again went to his friend's house to play video games. When he returned home at around 2:30 in the morning, no one was awake. After checking the fridge for snacks, he went to his bedroom. He unhooked his video game player, then hooked it back up to his television, changed clothes, got into bed, and watched television. He also made some phone calls because he could not sleep. He fell asleep around 5 in the morning.

¶ 27 On December 30, 2009, he woke up at 8 a.m. and then left the house at around 9:30 a.m. to work with his father at Gloria Medic's house. He saw Christian Medic around 2 or 2:30 in the afternoon. Defendant left the Medic's house at around 4:30 in the afternoon and returned home.

¶ 28 Defendant testified that around midnight on December 31, 2009, C.F. tried to kiss him when he was going to bed, but he stopped her. He told C.F. she should date someone her own age. He admitted that he called 1-800-Therapist at 2:37 a.m. on December 30, 2009.

¶ 29 Defendant testified that on August 1, 2010, he received a call from Anilda sometime after 3 p.m. while he was working. Anilda told him that there were serious allegations against him that he had attacked C.F. Anilda told him further that Angie and her son were threatening to kill him and that Anilda and his father would meet him after work. Defendant admitted to sending the first text message to Angie, but said that he did not know what he was apologizing for and he just wanted to calm Angie down. Regarding the second text message, sent on August 3, 2010, he explained that he feared Angie's retaliation and knew that she was violent. He sent the message to all three of his sisters at the same time because he wanted feedback. He still did not know what the allegations were and testified that he thought C.F.'s allegations were regarding an incident where he swore at C.F. when she disconnected the internet while he was playing a video game in March or April 2010. Angie had confronted him at that time and threatened to kill him. Defendant characterized the apology as insincere and an attempt to calm Angie down. He took Angie's threat to kill him seriously and worried about his safety. He explained that his final text message to Angie was done as a "sarcastic" response to her suggestion to turn himself into the police.

¶ 30 After closing arguments, the court found defendant not guilty of count III, criminal sexual assault, because the State did not prove that defendant used the threat of force. The court also found defendant not guilty of counts V through VIII, which all alleged criminal sexual assault, because the State failed to show defendant was in a position of trust, authority, or supervision.

¶ 31 The court did, however, find defendant guilty of counts IX through XII for criminal sexual abuse. The court noted its confidence in its credibility determinations and stated that it found C.F.'s testimony to be credible. The court found C.F.'s testimony to be detailed and

noted that she did not embellish. The court found C.F.'s demeanor to be "low key and appropriate" emotionally, and noted her testimony was "genuine" and her tears "sincere." Regarding C.F.'s delay in reporting the crime, the court found C.F.'s testimony to be credible in that she feared no one would believe her.

¶ 32 The court found defendant's testimony, however, to be incredible. Regarding defendant's explanation of his text messages, *i.e.*, that he yelled at C.F. after she unplugged the internet four months earlier, the court stated defendant's explanation "defied logic." The court further pointed out that defendant's text messages show that he feared jail and the consequences of his actions. The court pointed out that defendant contradicted himself when he said in the text message that his mother did not need to know when, according to his version of events, his mother was the one who first told him about the allegations and told him to apologize. The court further found defendant's witnesses to be incredible and evasive and noted that at times, they contradicted each other.

¶ 33 ANALYSIS

¶ 34 Defendant contends that his trial counsel was ineffective for failing to object to leading questions and hearsay evidence. Defendant further argues that his counsel was ineffective for failing to call an expert witness to support his psychological theory of defense, *i.e.*, that C.F.'s allegations were false because it was a learned behavior from her mother who had made false rape allegations in the past. According to defendant, the cumulative effect of those alleged errors resulted in substantial prejudice to him.

¶ 35 Defendant provides the following examples of testimony from C.F. that he alleges contain improper leading questions. First, defendant argues that the below testimony created a prejudicial inference that defendant sought out C.F. with a premeditated plan to abuse her.

"Q. Was there a period of time where your grandmother was out of the country?

A. Yes.

Q. So you're not sure exactly when she came back into the country, is that what your saying?

A. Yes.

Q. But your grandfather, he would have been sleeping; is that correct?

A. Yes."

***

Q. And if your grandmother was there, she would have been sleeping, but she might have been out of the country; is that what your trying to say?

A. Yes.

***

Q. And as you were watching TV, were you watching TV by yourself?

A. No.

Q. Initially, first, were you watching TV by yourself?

A. Yes.

Q. And at some point did somebody join you?

A. Yes.

Q. Who was that person?

A. [Defendant]."

¶ 36 Defendant argues that the following testimony improperly created a prejudicial inference that defendant used force to commit the assault.

"Q. Now, you said he started going towards your vaginal area. What was he doing as he got closer to your vaginal area?

A. He kept going and he inserted his fingers into my vagina.

Q. Before he did that, did your legs have to be moved in any way for him to do that?

A. Yes."

C.F. then explained that defendant "spread them like slightly and giving him enough room" so that he could insert his fingers.

¶ 37 Defendant argues that the State essentially testified for C.F. regarding the timing of the incident in the following colloquy:

"Q. The following morning, Wednesday morning in the early morning, did something else happen with [defendant]?

A. Yes.

Q. Do you remember approximately when it was approximately?

A. It was like really early, like probably around the same time as Monday.

Q. Could it have been even later, like 2:00 or 2:30?

A. Yeah.

Q. Do you really know the exact time that these incidents happened?

A. No.

Q. Do you remember what you were doing that early morning?

A. I was watching TV again on the couch.

***

Q. Do you remember where your mother and sister were?

A. They were sleeping.

Q. And your grandparents, or at least the ones that would have been in the country, were they also sleeping?

A. Yes.

Q. Initially you were watching TV by yourself, is that correct?

A. Yes.

Q. And at some point did someone come in the area that you were?

A. Yes.

Q. Who was that?

A. [Defendant.]

Q. And once he came to that area, where did he sit?

A. Next to me on the couch."

Defendant next argues that the State suggested to C.F. that defendant ejaculated in the following exchange:

"Q. Did something happen[] then when he was done? Did you notice anything?

A. He apologized once again like he always did, and that was basically it.

Q. Do you know what the term ejaculated means?

A. Yes.

Q. Did he ejaculate?

A. I believe so."

¶ 38 According to defendant, the following exchange demonstrated the State's leading C.F. into clarifying vague testimony that directly influenced counts IV, VIII, and XII; which were based on contact between defendant's penis and C.F.'s anus.

"Q. What happened?

A. [Defendant] came into my room, and he ended up pulling down my pants. And he got on top of me and he like started putting pressure to my, you know, area and like with his penis.

Q. When you say that he pulled down your pants, what do you mean by that. Where did they go?

A. Like he just pulled them down enough so my butt was showing.

Q. When you say that he got on top of you, how was it that he got on top of you?

A. Like with his legs over me.

Q. Like he straddled over you?

A. Yeah.

Q. Did you think you had the ability to move out of that position?

A. No.

Q. Is [defendant] bigger than you?

A. Yes.

Q. Is he stronger than you?

A. Yes

***

Q. You had said that you were able to feel something in your anal area; is that correct?

A. Yes."

¶ 39 Defendant's final example of a leading question was when C.F. testified that she was crying even though she stated earlier that she only "stuffed [her] face like into the bed and just hid." Despite C.F.'s testimony, the State later asked her in regard to the incident that "Now, you said that you were also crying during this correct" to which she responded "[y]es."

¶ 40 Defendant's hearsay argument is based on C.F.'s testimony of how she wrote the letter that eventually led to defendant's arrest. Defendant points out that an inadmissible hearsay outcry statement is only admissible if the victim was under 13 years of age. 725 ILCS 5/115-10(a) (West 2008). C.F., however, was older than 13 years of age. Defendant argues that the circuit court improperly relied on the following testimony:

"Q. When was the first time that you told anybody about these things that happened with you and [Defendant]?

A. The first person I told was my boyfriend at the time ***.

***

Q. Did you end up telling someone else about what happened?

A. Yes.

Q. Who was that?

A. My best friend ***.

***

Q. Did you end up telling an additional person what happened?

A. Yes.

Q. Who was that?

A. [S.B.]

***

Q. Who was [S.B.] to you?

A. He was my new boyfriend."

¶ 41 In response to all of the above claims of error made by defendant, the State argues that defense counsel competently represented defendant and defendant suffered no prejudice from the alleged deficiencies. The State further argues that defendant's arguments should all be considered matters of trial strategy, not incompetence.

¶ 42 A criminal defendant's right to the effective assistance of counsel is a constitutional right which we review pursuant to the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), as adopted by our supreme court in *People v. Albanese*, 104 Ill 2d 504 (1984). *People v. Domagala*, 2013 IL 113688, ¶ 36. To demonstrate ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that he was prejudiced by the deficient performance of his counsel. *Id.*; *People v. Easley*, 192 Ill. 2d 307, 317 (2000) ("The test is composed of two prongs: deficiency and prejudice.").

¶ 43 In order to establish deficient performance, a defendant "must prove that counsel's performance, as judged by an objective standard of competence under prevailing professional norms, was so deficient that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment." *People v. Bew*, 228 Ill. 2d 122, 127-28 (2008). In doing so, the "defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *People v. Clendenin*, 238 Ill. 2d 302, 317 (2010). Failed strategic decisions do not establish the ineffectiveness of counsel and our

supreme court has cautioned that "strategic choices are virtually unchallengeable." *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). The failure to object to testimony does not necessarily establish deficient trial performance because generally such decisions are considered trial strategy. *People v. Evans*, 209 Ill. 2d 194, 221 (2004); *People v. Pecoraro*, 144 Ill. 2d 1, 13 (1991).

¶ 44 To establish prejudice, a "defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Easley*, 192 Ill. 2d 307, 317 (2000). Therefore,"[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* As such, the results of the proceedings must be shown to be fundamentally unfair or unreliable. *Id.* at 317. Actual prejudice must be shown, speculation that defendant may have been prejudiced is insufficient to satisfy the prejudice prong of the *Strickland* test. *People v. Patterson*, 2014 IL 115102, ¶ 81. If prejudice is not shown, a court can dispose of an ineffective assistance of counsel claim without first determining whether counsel's performance was deficient. *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 45 After reviewing the above claims of error alleged by defendant, in addition to our review of the record and the circuit court's findings, we hold that defendant cannot show ineffective assistance of counsel because he cannot show that he was prejudiced by the leading questions, alleged hearsay evidence, or his counsel's failure to secure an expert witness to testify that C.F.'s allegations were based on a learned behavior. Specifically, defendant cannot show that " there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Easley*, 192 Ill. 2d at 317. Defendant argues we should remand the matter for a new trial because the outcome of this case hinges on a credibility

determination between C.F. and defendant. Defendant, however, fails to account for strength of the incriminating apologetic text messages he sent to C.F.'s mother and his other sisters after the crime had been discovered. We acknowledge the importance of C.F.'s testimony but find that it was corroborated and strengthened by the text messages defendant sent. Those text messages provide further evidence, in addition to C.F.'s testimony, incriminating defendant. Notably, defendant fails to show this court how C.F.'s testimony or the presence of an expert witness on learned behavior would in any way discredit the evidence of the incriminating text messages.

¶ 46 Furthermore, the court found defendant's alibi defense to be incredible and discounted both his and his witnesses' testimony. Even if defendant's trial counsel would have performed as defendant now argues before this court, we cannot say that the circuit court would have ruled any differently in light of the incriminating text messages and the circuit court's findings that defendant's alibi defense, in addition to his testimony and the testimony of his witnesses, were not credible. We need not determine whether defendant's counsel in this matter was deficient because defendant cannot show that he was prejudiced. *Givens*, 237 Ill. 2d at 331. Therefore, we hold defendant's failure to show prejudice is fatal to his claim of ineffective assistance of counsel.

¶ 47 We agree with the parties that the $5 court system fee (55 ILCS 5/5-1101 (a) (West 2008)) and the $5 electronic citation fee (705 ILCS 105/27.3e (West 2010)) must be vacated. Accordingly, we vacate the $5 court system fee (55 ILCS 5/5-1101 (a) (West 2008)) and the $5 electronic citation fee (705 ILCS 105/27.3e (West 2008)).

¶ 48 CONCLUSION

¶ 49 The judgment of the circuit court of Cook County is affirmed in part, vacated in part.

¶ 50 Affirmed in part, vacated in part.