2015 IL App (2d) 130733-U
No. 2-13-0733
Order filed March 5, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARK TATE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 10-CF-579 Honorable Robbin J. Stuckert, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: We granted counsel's motion to withdraw and affirmed the judgment of the circuit court because the record did not present any arguable issue of merit for appeal.

¶ 2 Defendant, Mark Tate, was found guilty after a jury trial of six counts of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2010)), seven counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2010)), and one count of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2010)).

¶ 3 Defendant was charged by indictment in connection with allegations that he repeatedly sexually assaulted and sexually abused K.R., who was under 18 years of age, between September 2009 and May 2010, when she became pregnant. Defendant was K.R.'s stepfather.

¶ 4 At trial, K.R. testified that the incidents took place two or three times per week while she was living with defendant and her mother. K.R. also spent two to three days each week at her grandmother's home. She testified that defendant assaulted her there as well. The family lived in three different locations during the relevant time period. K.R. had her own bedroom at each location, and defendant always assaulted her in her bedroom. K.R.'s mother, Cynthia, generally testified consistently with K.R.'s testimony and stated that defendant was unemployed and was home alone with K.R. while Cynthia was at work.

¶ 5 After K.R. gave birth, DNA evidence was collected from the child. Extensive evidence was provided about the chain of custody of the DNA sample and the testing that was done. An expert testified that he could not determine paternity with 100% certainty, but that there was a 99.999% probability that defendant was the father of the child.

¶ 6 Defendant testified that he was employed during some of the time period at issue and did not remember many times when K.R. was present and Cynthia was not. He said that there was one incident in which K.R. took a pair of her mother's panties that had semen on them, put them on, and did a dance like a stripper in them. He said that Cynthia then scolded K.R. for it. Cynthia testified that she did not recall such an incident and that it would be hard for K.R. to wear her panties since K.R. was much larger than Cynthia. During closing remarks, the State, in arguing that defendant's story was not credible, insinuated that his sperm would have to be magic to impregnate K.R. from a pair of panties.

¶ 7 The jury found defendant guilty on multiple counts. Defendant then filed a *pro se* posttrial motion alleging ineffective assistance of counsel on the basis that trial counsel failed to file motions, failed to call witnesses, failed to object to exhibits, and was inattentive at trial by chewing on a pen. Defendant also alleged that Cynthia perjured herself and that trial counsel should have sought additional DNA testing. A hearing was held, and defendant presented his concerns to the court and also expressed concerns about the chain of custody of the DNA sample. Trial counsel responded and fully refuted defendant's assertions. There also was a discussion involving the DNA testing and how the chain of custody of the DNA sample was established. The court found that there was no issue with the chain of custody and that there was no viable issue of ineffective assistance of counsel. Defendant was sentenced to terms totaling 30 years of incarceration. There was no motion to reconsider the sentence, and defendant appealed. The Office of the State Appellate Defender was appointed to represent him.

¶ 8 Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *People v. Jones*, 38 Ill. 2d 384 (1967), the appellate defender moved to withdraw as counsel. Defendant responded, and we directed counsel to brief any issues of arguable merit therein or to file a new motion to withdraw if there were not any.

¶ 9 Counsel has filed a new motion to withdraw. In his motion, counsel states that he read the record and found no issue of arguable merit. Counsel further states that he advised defendant of his opinion. Counsel supports his motion with a memorandum of law providing a statement of facts and an argument why the appeal presents no issue of arguable merit. Defendant has filed a response.

¶ 10 Counsel raises four primary issues: sufficiency of the evidence, ineffective assistance of counsel, remarks made by the State at closing arguments, and excessive sentence.

¶ 11 Counsel correctly notes that the evidence is sufficient to sustain a conviction if, viewing it in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Perez*, 189 Ill. 2d 254, 265-66 (2000). In assessing the sufficiency of the evidence, we do not retry the case. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, we defer to the fact finder's assessment of witness credibility, the weight it gave the evidence, and the reasonable inferences it drew from the evidence. *People v. Steidl*, 142 Ill. 2d 204, 226 (1991).

¶ 12 As counsel notes, defendant essentially claimed that he did not have the opportunity to commit the crimes, as K.R. often stayed with her grandmother and, on the days she was present in his household, Cynthia was also there. But Cynthia testified that K.R. had a bedroom at every residence that they occupied, and K.R. herself testified that the abuse occurred in her bedroom two to three times per week and that she was also assaulted at her grandmother's house. The jury was free to credit that testimony. Further, the testimony was sufficient to support multiple convictions. The exact dates of the crimes were not essential elements, and K.R.'s inability to remember exact dates and times merely affected the weight to be given to the testimony. See *People v. Letcher*, 386 Ill. App. 3d 327, 331-32 (2008). Defendant contended that K.R. was impregnated by putting on her mother's panties. But K.R.'s mother testified that she did not recall such an incident, and the jury was free to find such a defense unreasonable. Counsel has also convincingly explained how defendant, as a step-parent, was a family member for purposes of the charges.

¶ 13 Counsel next correctly notes that the trial court properly addressed defendant's *pro se* posttrial motion alleging ineffective assistance of counsel. When a defendant brings a *pro se* posttrial claim that trial counsel was ineffective, the trial court must inquire adequately into the

claim and, under certain circumstances, must appoint new counsel to argue the claim. *People v. Krankel*, 102 Ill. 2d 181, 187-89 (1984); *People v. Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9. New counsel is not automatically required merely because the defendant presents a *pro se* posttrial claim that his counsel was ineffective. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Instead, the trial court must first examine the factual basis of the claim. *Id*. at 77-78. "The ultimate purpose of a trial court's initial inquiry into a defendant's ineffective assistance claim is to determine whether new counsel should be appointed." *People v. Cunningham*, 376 Ill. App. 3d 298, 304 (2007). If, after a preliminary investigation into the allegations, the court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the claim. *Moore*, 207 Ill. 2d at 78. The court may base its decision on personal knowledge of counsel's performance. *Id*. at 77-79. Reversal is required only when the decision was manifestly erroneous. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 14 Here, the trial court conducted a thorough inquiry. Trial counsel addressed defendant's concerns and explained his reasoning and strategy for not calling various witnesses. He also addressed his investigation into defendant's concerns that Cynthia perjured herself, stating that she told him a completely different story than what defendant claimed. As to allegations that counsel was inattentive in court, the trial court could rely on its own personal observations to determine that counsel paid appropriate attention to the case.

¶ 15 In his motion to withdraw, counsel sets forth two possible issues concerning the admission of DNA evidence and the chain of custody of the DNA sample. He then explains how testing of the DNA was consistent and the chain of custody sufficient. Most important, those

matters would be irrelevant, as defendant essentially admitted that he was the father of K.R.'s child through his defense that K.R. was impregnated by wearing contaminated panties.

¶ 16 Counsel also notes that the sentence was not an abuse of discretion. The trial court imposed a sentence that was just above the minimum, and defendant did not file a motion to reconsider the sentence. It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required. *People v. Bannister*, 232 Ill. 2d 52, 76 (2008).

¶ 17 In his response to the first motion to withdraw, defendant asserted that counsel should have raised a large number of entirely different issues. In some instances, defendant posed the matter in the form of a question. In most cases, little to no cogent legal argument was provided. In his second motion to withdraw, counsel provides a lengthy and full explanation of how defendant's assertions are unsupported by or contrary to the record. Counsel notes that, in many cases, defendant misrepresented the facts and, in other cases, defendant alleged items that cannot be raised on appeal because they are matters outside of the record.

¶ 18 Counsel found one potential issue in the response. Defendant argued that he was denied a fair trial by the State's argument that defendant's sperm would have to be magical to impregnate K.R. from being on a pair of panties. However, counsel correctly notes that this did not result in an unfair trial.

¶ 19 "Prosecutors are afforded wide latitude in closing argument, and a prosecutor's comments in closing argument will result in reversible error only when they engender substantial prejudice against a defendant to the extent that it is impossible to determine whether the jury's verdict was caused by the comments or the evidence." *People v. Caffey*, 205 Ill. 2d 52, 131 (2001). Here, counsel admits that the comment was sarcastic, but correctly notes that it drew a

fair inference that K.R. did not become pregnant in the manner suggested by defendant. That was also consistent with the evidence that she never wore Cynthia's panties. Thus, substantial prejudice from the comment cannot be shown.

¶ 20 In his response to the second motion to withdraw, defendant raises essentially the same matters that he previously addressed in his first response. Counsel has adequately explained why no matters of merit can be found. Accordingly, after examining the record, the motion to withdraw, and the memorandum of law, we agree with counsel that this appeal presents no issue of arguable merit. Thus, we grant the motion to withdraw, and we affirm the judgment of the circuit court of De Kalb County.

¶ 21 Affirmed.