2015 IL App (2d) 150022-U
No. 2-15-0022
Order filed December 23, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RAMIRO FONSECA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 13-CF-2233 Honorable Susan Clancy Boles, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Schostok and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions of criminal sexual assault and aggravated criminal sexual abuse were affirmed where the evidence was sufficient to prove all elements beyond a reasonable doubt; the trial court erred in denying defendant's motion *in limine* in which he sought to impeach a witness with a juvenile adjudication, but the error was harmless beyond a reasonable doubt; and defendant was not prejudiced by his trial counsel's failure to properly impeach a witness and call another witness to testify.

¶ 2 Following a bench trial, defendant, Ramiro Fonseca, was convicted of two counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(3) (West 2012)) and three counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(b) (West 2012)). On appeal, defendant raises three

contentions of error: (1) the State failed to prove his guilt beyond a reasonable doubt as to all counts; (2) the trial court erred in denying his motion *in limine* in which he sought to impeach the victim's credibility with a juvenile adjudication; and (3) he received ineffective assistance of counsel when trial counsel failed to properly impeach a witness and failed to call another witness to testify. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On May 28, 2014, a grand jury returned an eight-count indictment charging defendant with committing offenses against J.F., his natural daughter, between January 1, 2009, and June 10, 2013, when J.F. was 13 years old. Relevant to this appeal, counts III and IV charged defendant with criminal sexual assault of a minor in that he knowingly "placed his finger in the sex organ of J.F." Count V charged defendant with aggravated criminal sexual abuse of a minor in that he "placed his hand on the sex organ of J.F. for the purpose of the sexual arousal or gratification of the defendant or the victim." Counts VII and VIII also charged defendant with aggravated criminal sexual abuse of a minor in that he "placed his hand on the breast of J.F. for the purpose of the sexual arousal or gratification of the defendant or the victim."

¶ 5 A bench trial began on September 22, 2014. Marivel Leal testified that she was J.F.'s mother and defendant's girlfriend for over twenty years. Between June 2009 and March 2011, Leal, defendant, and two of their three children lived in St. Charles, Illinois. Leal testified that defendant and J.F. would often lie together on one of their couches and watch television, but she did not suspect that any improper behavior was occurring. Leal did not learn of the behavior until a Department of Child and Family Services (DCFS) investigator called her after J.F. made an outcry nearly three-and-a-half years subsequent to the alleged conduct. Leal also testified that defendant favored J.F., had control over her, and would keep her home from school. After

defendant left the family to move to Texas in February 2011, J.F.'s behavior changed "rapidly" and she "spun out of control." Leal further testified that defendant was abusive toward her, had threatened to kill her, used drugs, and had cheated on her. Nevertheless, Leal did not hate defendant, and she did not instruct J.F. to accuse defendant of sexual assault.

¶ 6 J.F., who was 17 years old at the time of trial, testified that she was in seventh and eighth grade when defendant sexually assaulted her. She described two specific instances where defendant had assaulted her, although she claimed that this conduct occurred every day for about a year. On both occasions that J.F. specifically recalled, defendant and J.F. were lying together on the couch watching television. Both lay on their sides facing the television, but defendant was behind J.F. Defendant lifted J.F.'s leg above his, and then digitally penetrated J.F.'s vagina. One such instance occurred in the living room while Leal and J.F.'s sister were sleeping in her sister's bedroom. The other instance occurred when J.F. and defendant were in the basement of the house, and Leal called J.F.'s name from the top of the stairs while defendant's fingers were inside her vagina. J.F. testified that defendant's behavior made her feel uncomfortable and "emotionally confused." In response to defendant's questioning, however, J.F. was unable to remember what she was wearing on either occasion or the time of the year.

¶ 7 J.F. also testified that defendant touched her breasts multiple times "when [she] was on [her] period[.]" On one such occasion, J.F. and defendant were in the basement, and J.F. was lying on her back between defendant's legs. Defendant placed his hands on J.F.'s breasts by moving his hands through her "shirt, above the neck hole." On another occasion, while J.F. was sick, defendant rubbed "Vicks" on her chest and told her that she "had a pretty chest." On a third occasion, defendant told J.F. "never to let [her] boyfriend or any boy touch [her] in [her] private areas[,]" while simultaneously grabbing her breasts and vagina to demonstrate where boys

should not touch her. Defendant's actions never escalated to anything beyond touching and digital penetration, and J.F. did not recall defendant ever becoming erect or asking J.F. to touch him. J.F. did not tell anyone about defendant's actions because "[h]e told [her] that if [she] loved him, [she] would keep it a secret."

¶ 8 J.F. further testified that, after defendant moved to Texas in 2011, she began using drugs and alcohol daily to the point of "blackouts." J.F.'s use of alcohol and marijuana coincided with defendant leaving, but she occasionally drank and smoked marijuana while he still lived with the family. J.F. testified that she was mad at her father for leaving, and she questioned if he still loved her. After he left, J.F. maintained phone communication with defendant, but that stopped after about a year. Eventually, J.F. entered rehabilitation treatment for her drug and alcohol problem. While in treatment, J.F. told her counselor about defendant's behavior, because she wanted to get it "off her chest" and move forward with her treatment.[1] J.F. testified that she did not fabricate the accusations against defendant because she was mad at her father for leaving the family and hurting Leal.

¶ 9 The State rested its case, and defendant moved for a directed finding. After argument, the court denied defendant's motion.

¶ 10 In his case-in-chief, defendant called officer Chris Tunney. Tunney was a police officer in Aurora, Illinois, and she was assigned as an investigator for the Child Advocacy Center in Geneva, Illinois. She investigated J.F.'s case after DCFS referred it to the Child Advocacy Center. Tunney testified that the only evidence she discovered was what J.F. told her. But she

[1] J.F. also testified that she first told a boyfriend about defendant's behavior when she was 16, but he was never contacted by police or investigators. The boyfriend was not a witness at trial.

did obtain "corroborating evidence" by taking photographs of the home where defendant and J.F. lived during the relevant time periods. Tunney also retrieved J.F.'s school records and Leal's time cards from her places of employment. Tunney testified that she conducted an "overhear," in which J.F. called defendant in Tunney's presence. Tunney obtained no evidence from the overhear, and defendant did not make any statements against his interest during the conversation. Tunney also testified that it is typical for a defendant accused of sexual assault not to escalate the alleged activity beyond digital penetration.

¶ 11 Keighliegh Fonseca, another of defendant's daughters, also testified. Keighliegh is J.F.'s older sister, and she has a close relationship with J.F. J.F. often asked Keighliegh for advice, but never told her about defendant's actions. Keighliegh testified that J.F. was not shy and did not act "differently or strange" during the time that defendant lived with them. Keighliegh never saw defendant touch J.F. inappropriately, nor did she suspect that anything "weird" was occurring between J.F. and defendant. She was usually home while defendant and J.F. were watching TV, and she generally watched TV with them or was in the same room. She also explained that the basement, where most of the alleged assaults occurred, was a "high traffic area for all of the *** people who lived in the house." Keighliegh testified that J.F. "was a very troubled kid[]" at the time she made the accusations against defendant. According to Keighliegh, Leal stated that she hated defendant and disapproved of Keighliegh's relationship with defendant's family. Keighliegh testified that she was concerned for her own well-being due to her testimony, because her mother, Leal, "can get angry and she says some hurtful things." Keighliegh also worried that Leal would "kick her out of the house" because of her trial testimony.

¶ 12 Defendant did not testify, and the defense rested.

¶ 13 The trial court found defendant guilty of counts III, IV, V, VII, and VIII. The court specifically found Keighliegh to be the most credible witness. The court found Leal to be the least credible witness, saying that it "relied little on her testimony." As to J.F., the court found her testimony credible because she still had feelings for her father and she did not "embellish" her testimony. Although J.F. did not show much emotion, the court found her "lack of emotion not surprising based on what [J.F.] has experienced in her short life[.]" The court also noted that the timing of J.F.'s outcry, which occurred while she was in substance abuse treatment, "made sense with what she was attempting to deal with in her life at that time." The court considered J.F.'s "possible motivation to get back at her father for leaving in 2011[,]" but explained: "the fact that the disclosure came out during treatment makes it that much more reliable." The court also noted that it "heard argument but no evidence that [J.F.'s] testimony was as [*sic*] a result of a conspiracy with her mother or controlled by her mother."

¶ 14 The court found that the State proved beyond a reasonable doubt the elements of counts III and IV, criminal sexual assault. The court explained that J.F. testified that penetration occurred multiple times, but that she specifically testified about two instances of assault when (1) Leal and Keighliegh were sleeping in an adjacent room and (2) when J.F. and defendant were in the basement and Leal called to her from the top of the stairs. As to count V, aggravated criminal sexual abuse, the court found that the State proved all of the elements beyond a reasonable doubt, because J.F. testified to an instance where defendant grabbed her breasts and vagina "while instructing her not to let boys touch her in those areas." On counts VII and VIII, also alleging aggravated criminal sexual abuse, the court explained that J.F. testified about multiple instances of abuse where defendant touched her breasts. The court noted, however, that

J.F. testified about two specific instances of defendant touching her breasts: (1) "when she was having her period," and (2) when defendant "rubbed ointment on her chest when she was sick."

¶ 15 Defendant filed a "Motion to Reconsider Convictions" as well as a "Motion for a New Trial." Defendant argued that the evidence was insufficient to find him guilty and that the court erred in its evidentiary rulings. He also argued that newly discovered evidence warranted either a new trial or a judgment notwithstanding the verdict. The new evidence was a letter written by J.F. after the trial, in which she claimed that she fabricated her accusations against defendant as an attempt to excuse her substance abuse and return home from rehabilitation.[2] At an evidentiary hearing on the posttrial motions, J.F. testified that the letter was "a lie" and that she had testified truthfully at trial. She also testified that she wrote the letter after family members had told her that defendant was "very sick," was trying to commit suicide, and was "being raped" in prison. J.F. testified that defendant's girlfriend, aunt, and niece helped her write the letter. According to J.F.'s therapist, who testified at the hearing, defendant's family pressured J.F. to recant her testimony so that defendant "could go free" and J.F. "would be welcomed back into the family[.]"

¶ 16 The court denied defendant's posttrial motions. The court sentenced defendant to a total of 15 years' imprisonment. Specifically, it sentenced defendant to consecutive six-year sentences on counts III and IV. It also sentenced defendant to concurrent three-year sentences for counts V, VII, and VIII, to run consecutively with counts III and IV. Defendant timely appealed.

¶ 17 II. ANALYSIS

[2] The letter does not appear in the record.

¶ 18 On appeal, defendant argues (1) that the State failed to prove each element of the offenses for which he was convicted; (2) that the court erred in denying his motion *in limine* in which he sought to impeach J.F. with her juvenile adjudication for aggravated battery; and (3) that he received ineffective assistance of counsel when his attorney failed to properly impeach Leal and failed to call another material witness to testify.

¶ 19 A. Sufficiency of the Evidence

¶ 20 Defendant contends that the evidence presented at trial was insufficient to convict him on all counts. Specifically, he argues that he was convicted "almost entirely" on J.F.'s testimony, which was "so unsatisfactory that the allegations should not be believed and the conviction[s] should not stand." The State acknowledges that the convictions rest "almost totally on the credibility of J.F." It argues, however, that J.F.'s testimony is sufficient to sustain defendant's conviction.

¶ 21 When considering a challenge to the sufficiency of the evidence, a reviewing court does not retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). "The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (emphasis in original) *Collins*, 106 Ill. 2d at 261. The trier of fact is responsible for weighing the evidence, assessing the credibility of witnesses, resolving conflicts in the evidence, and drawing reasonable inferences and conclusions from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court will not substitute its judgment for that of the trier of fact. *Sutherland*, 223 Ill. 2d at 242. Ultimately, we will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 22 The testimony of even one witness, if positive and credible, is sufficient to convict a criminal defendant. *People v. Novotny*, 41 Ill. 2d 401, 411 (1968). In criminal sexual assault cases, other than the perpetrator the victim is typically the only witness to the crimes. *People v. Booker*, 224 Ill. App. 3d 542, 550 (1992). The testimony of the victim need not be corroborated by physical or medical evidence to sustain defendant's convictions. *People v. Le*, 346 Ill. App. 3d 41, 50 (2004). A fact finder's determination of witness credibility is entitled to deferential review. *Booker*, 224 Ill. App. 3d at 550.

¶ 23 Counts III and IV charged defendant with criminal sexual assault under section 11-1.20(a)(3) of the Criminal Code of 1961 (Code) (720 ILCS 5/11-1.20(a)(3) (West 2012)). Under section 11-1.20(a)(3) of the Code, the State was required to prove that defendant committed an act of sexual penetration on a family member under 18 years of age. Sexual penetration means "any intrusion, however slight, of any part of the body of one person *** into the sex organ or anus of another person ***." 720 ILCS 5/11-0.1 (West 2012).

¶ 24 Counts V, VII, and VIII charged defendant with aggravated criminal sexual abuse under section 11-1.60(b) of the Code (720 ILCS 5/11-1.60(b) (West 2012)). To support those counts, the State was required to prove that defendant committed an act of sexual conduct on a family member under 18 years of age. 720 ILCS 5/11-1.60(b) (West 2012). Sexual conduct means "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused *** for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1 (West 2012).

¶ 25 Here, it is undisputed that J.F. is defendant's natural daughter and that she was under 18 years of age at the time of the alleged conduct. Also, the evidence relevant to counts III and IV, which alleged sexual penetration of J.F.'s vagina with defendant's fingers on two occasions,

included the following. J.F. testified that, while Keighliegh and Leal were sleeping in Keighliegh's bedroom, defendant lifted her leg over his, touched a "nerve that [J.F.] [has] on the top of [her] thigh on the inside *** [a]nd then slowly made his way into [her] underwear and touched [her] vagina." J.F. further testified that defendant digitally penetrated her vagina, and, on this occasion, defendant asked her "if [she] had the chills." As to the second occasion, J.F. testified that while she and defendant were watching TV in the basement, defendant again lifted her leg over his, touched her nerve, and then digitally penetrated her vagina. During the second occasion, Leal called J.F. from the top of the stairs, and defendant then ceased penetrating her vagina with his fingers. On both occasions, J.F. remembered that she was clothed, but she did not recall what she was wearing or what television shows she was watching.

¶ 26 As to count V, which alleged that defendant placed his hands on J.F.'s sex organ, J.F. testified that defendant grabbed her vagina and breasts while instructing her not to allow boys to touch her there. As to counts VII and VIII, which alleged that defendant placed his hands on J.F.'s breasts on two separate occasions for sexual arousal or gratification, J.F. testified that defendant once rubbed Vicks on her chest while she was sick and told her that she "had a pretty chest." J.F. also testified that on another occasion, while she was lying on her back between defendant's legs, defendant placed his hands through the "neck hole" in her shirt and touched her breasts. J.F. testified that, on all occasions, she never recalled defendant becoming erect, defendant never touched himself or asked J.F. to touch him, and defendant's conduct "never escalated to something more than touching."

¶ 27 Nevertheless, defendant takes issue with J.F.'s testimony, because "she can give no real specifics." Defendant argues that J.F.'s testimony lacks "context," as she cannot recall "seasons, times of day, clothing anyone was wearing or television programs that were on when it

happened." Any shortcomings in a victim's testimony, however, do not destroy her credibility; they merely affect the weight to be afforded to the testimony by the trier of fact. *Booker*, 224 Ill. App. 3d at 550. Here, the trial court had the opportunity to observe J.F., and it found her testimony to be credible, explaining that it was "direct, somewhat matter-of-fact, and forthright." The court also noted that J.F. was especially credible because she "did not embellish in her testimony[.]" Such a determination is entitled to great weight, and we will not substitute our judgment for that of the trier of fact. *People v. Calusinksi*, 314 Ill. App. 3d 955, 960 (2000). We also note that it is not surprising that J.F. did not recall the "specifics" that defendant demands, as she reported defendant's conduct almost three-and-a-half years after it occurred and testified at trial over four years after the conduct occurred.

¶ 28 Defendant contends that "[m]ost damning to the State's case" is the lack of evidence that defendant was sexually gratified or aroused. Without citing any authority, defendant argues that because J.F. testified that defendant never became erect, touched himself, or had J.F. touch him, the evidence is inconsistent with sexual gratification. Defendant's sexual gratification or arousal**,** however, may be inferred from the evidence. *Calusinksi*, 314 Ill. App. 3d at 960; see also *In re A.P.*, 283 Ill. App. 3d 395, 398 (1996) ("[I]t is not necessary for anyone to testify that the father had an erection, that the father was fondling himself, or that the father was leering, drooling, or moving in a sexually suggestive way. *** [I]t is not necessary for the State to present any direct evidence of 'for the purpose of sexual arousal[.]' ").

¶ 29 Here, defendant's acts themselves clearly allow the inference that they were done for his sexual arousal or gratification. Defendant was J.F.'s father, and J.F. testified that he placed his hands on her breasts multiple times when she was 13 years old. She testified that he touched her breasts not outside, but under her clothes, while they were lying prone and watching TV.

Defendant also told J.F. that she "had a pretty chest" while he was rubbing Vicks on her breasts. On another occasion, he grabbed J.F.'s breasts and vagina while instructing her not to let boys touch her in those areas. The fact that defendant told J.F. that "if [she] loved him, [she] would keep it a secret[]" underscores that defendant's actions were for the purpose of his own sexual gratification and arousal. If defendant's actions were arguably benign, his instructions to J.F. not tell anyone would not have been necessary.

¶ 30 Thus, viewing the evidence in the light most favorable to the prosecution, we hold that the evidence was sufficient to convict defendant on all counts.

¶ 31 B. Evidentiary Ruling

¶ 32 Defendant next argues that the court erred in denying his motion *in limine* in which he sought to use J.F.'s 2014 juvenile adjudication for aggravated battery to impeach her credibility. He also contends that the trial court erred in granting the State's motion *in limine* that sought to bar defendant's use of J.F.'s adjudication. The State responds that the trial court did not err, but even if it did, any error was harmless beyond a reasonable doubt.

¶ 33 The Illinois Rules of Evidence provide that evidence of a juvenile adjudication is generally not admissible to attack the credibility of a witness, unless "conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." Ill. R. Evid. R. 609(d) (eff. Jan. 1, 2011). Thus, to be admissible, a juvenile adjudication, like an adult conviction, must involve either a felony or a crime of untruthfulness or false statement, and the danger of unfair prejudice must not substantially outweigh the probative value of the conviction. Ill. R. Evid. R. 609(a). The adjudication must also have occurred within 10 years of the date of trial. Ill. R. Evid. R. 609(b). In balancing the probative value and prejudicial effect, the trial

court should consider certain factors, including the nature of the crime, the length of the witness' criminal record, the age and circumstances of the witness, and whether the crime was similar to the one charged. See *People v. Montgomery*, 47 Ill. 2d 510, 518 (1971). A trial court has discretion in applying the balancing test and in determining whether a witness' conviction is admissible. *People v. Cox*, 195 Ill. 2d 378, 383 (2001).

¶ 34 Here, in ruling on the motions *in limine*, the court stated:

> "Okay, what makes this different than your typical felony is that this is a juvenile adjudication as opposed to a conviction. An adjudication is different than a felony conviction in that sense, and the case law is very clear and pursuant to [Illinois Rule of Evidence] 609, this is not admissible for impeachment purposes. So, that State's motion as it relates to that is going to be granted. *** So understand that [defendant's motion] will be denied as it relates to that."

The State argues that the court did not rule that juvenile adjudications were *per se* inadmissible, but was merely "stating the strong preference to exclude them." We disagree. The court's plain language suggests that it barred the use of J.F.'s juvenile adjudication based on a mistaken belief that such evidence was not admissible as a matter of law. The court's error is further demonstrated by the fact that it explicitly conducted balancing tests for other witnesses' convictions throughout the hearing on the parties' motions *in limine*. The court apparently failed to exercise its discretion in this instance, and thus it erred. See *People v. Newborn*, 379 Ill. App. 3d 240, 248 (2008) ("When a court is required by law to exercise discretion, the failure to do so may itself constitute an abuse of discretion"); see also *People v. Georgakapoulos*, 303 Ill. App. 3d 1001, 1019 (1999) ("If the record shows that the trial court did not conduct a meaningful [balancing] test, error is committed.").

¶ 35 Although the court erred in denying defendant's motion *in limine*, as we explain below, we hold that the error was harmless. An error is harmless where the reviewing court is satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *People v. Bond*, 405 Ill. App. 3d 499, 512 (2010).

¶ 36 Here, defendant impeached J.F. with her drug and alcohol abuse. Also, during the bench trial, the trier of fact became aware of any bias, interest, or motive that J.F. may have harbored to testify falsely. Indeed, defense counsel expounded during closing arguments on some of the attacks that he made on J.F.'s credibility: "And then there is credibility. [J.F.] is a drug addict. She was in rehab when she said it. She was troubled. She is angry. She holds a grudge against her father. [Leal and J.F.] were inconsistent with their statements and they were both caught in untruths, lies." Defendant impeached J.F. with purported inconsistencies in the statements that she made to investigators and officers concerning when she began using drugs and alcohol and whether or not defendant gave her alcohol after he touched her. Defendant also impeached J.F. with inconsistencies in her prior statements about when she alleged that defendant began touching her. Furthermore, defendant repeatedly challenged J.F.'s motives for making her allegations against defendant. Defendant elicited testimony that J.F. was angry at defendant for leaving in 2011 and blamed him for starting fights with Leal and cheating on Leal. Defendant also introduced testimony that J.F. was "mad" at him, and that she felt that defendant had abandoned her. The trial court also heard J.F. question whether defendant loved her and admit that she ran away from home multiple times. Under these circumstances, impeachment with a juvenile adjudication for aggravated battery would not have added to the trial judge's "store of knowledge" concerning J.F.'s credibility. See *People v. Lindgren*, 111 Ill. App. 3d 112, 120 (1982) ("The evidence of [the witness'] neglect adjudication would not have added significantly

to their store of knowledge and no error occurred"); see also M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 609.3 (8th ed. 2004) ("[C]rimes of violence have little or no direct bearing on honesty and veracity.").

¶ 37 C. Ineffective Assistance of Counsel

¶ 38 Defendant next argues that he received ineffective assistance of counsel when his trial counsel (1) failed to properly impeach Leal and (2) failed to call a material witness.

¶ 39 To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Makiel*, 358 Ill. App. 3d 102, 108 (2005). The prejudice prong is satisfied if the defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Makiel*, 358 Ill. App. 3d at 108-09. The failure to satisfy either the deficiency prong or the prejudice prong precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

¶ 40 Defendant claims that counsel was ineffective because he failed to properly impeach Leal with a prior conviction. Specifically, defendant contends that Leal was convicted of aggravated battery in Texas in 2005, for which she was "sentenced to the penitentiary." No certified copies or other proof of Leal's conviction for aggravated battery appear in the record, and the record is unclear as to whether she was, in fact, convicted. Instead, the only reference in the record to Leal's conviction for this offense occurred during arguments on the parties' motions *in limine* before trial. Defense counsel apparently sought to impeach Leal with letters she allegedly wrote

while "she was sitting in jail for" aggravated battery. Defense counsel contended that the letters were admissible if Leal denied her criminal history. We need not address whether counsel's efforts fell below an objective standard of reasonableness, because defendant cannot establish prejudice under *Strickland*. Moreover, he does not even attempt to argue that he was prejudiced. Even if counsel were to have properly impeached Leal with her prior conviction, defendant cannot show that the results of the proceeding would have been different. Indeed, the court specifically found Leal not to be credible.

¶ 41 Defendant also argues that counsel was ineffective for failing to call "a witness material to the defense." Defendant claims that his mother, Belen Perez, would have testified to statements that Leal had made regarding her hatred for defendant, thereby impeaching Leal and lending credence to defendant's theory that Leal "had put J.F. up to making up the allegations."

¶ 42 To support a claim of ineffective assistance for failure to call a witness, a defendant must provide an affidavit from the individual who would have testified. *People v. Johnson*, 183 Ill. 2d 176, 192 (1998). Without an affidavit, we cannot determine whether the proposed witness could have provided information or testimony favorable to defendant. *Johnson*, 183 Ill. 2d at 192. Defendant has failed to provide an affidavit from Perez, which generally renders further consideration of her purported testimony unnecessary. *Johnson*, 183 Ill. 2d at 192; see also *People v. Guest*, 166 Ill. 2d 381, 402 (1995) ("because defendant has failed to submit affidavits from these proposed witnesses, we will not consider them further.").

¶ 43 Even assuming that defendant's allegation had been supported with Perez's affidavit, defendant cannot establish prejudice under *Strickland*, because the trial court found that Leal was not credible. Further, defense counsel impeached Leal with statements that she made to the police in which she stated that she hated defendant. Keighliegh similarly testified that Leal had

stated that she hated defendant. Accordingly, Perez's testimony about Leal's hatred for defendant would have been cumulative. *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009) ("Evidence is considered cumulative when it adds nothing to what was already before the jury."). Finally, J.F. denied that Leal forced her to fabricate her accusations against defendant. Thus, Perez's testimony, even if it were admissible, would not have changed the outcome.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 46 Affirmed.