2016 IL App (1st) 133209-U

SECOND DIVISION
March 29, 2016

Nos. 1-13-3209 & 1-13-3210 (Consolidated)

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 11 CR 13626
	)	No. 11 CR 13627
	)	
CIRILO OSORIO,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's counsel was not ineffective for failing to challenge the indictment for being overbroad.

¶ 2 Following a bench trial, defendant Cirilo Osorio was convicted of multiple counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(4) (West 2010)) and criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2010)). On appeal, defendant argues that trial counsel was ineffective for failing to challenge the indictment because the indictment alleged crimes that spanned over an eight year period and therefore was overbroad. For the following reasons, we

affirm.

¶ 3 BACKGROUND

¶ 4 On August 3, 2011, defendant was arrested and charged in two separate cases for sexually abusing his nieces, two minors who are sisters and whom we will refer to as R.O. and J.R. The indictment included multiple counts of criminal sexual assault, aggravated criminal sexual assault, aggravated criminal sexual abuse, sexual relations within families, and unlawful restraint. The counts that concerned R.O. indicated that defendant was being charged with crimes that covered a time span from "on or about December 20, 1998, and continuing on through December 20, 2006." The counts concerning J.R. covered a time span from "on or about January 2, 2007, and continuing on through December 31, 2008." Some of these counts were alleged to have occurred on specified dates.

¶ 5 At trial, R.O. testified she had lived in an apartment on St. Louis Avenue with her family, including defendant, her uncle. In 2000, when R.O. was five years old, defendant first sexually assaulted her in her bedroom. Defendant kissed her chest, reached down her pants, and put his finger inside her vagina. R.O. further testified defendant engaged in similar acts about once a week, touching her vagina with his fingers. R.O. and her family, along with defendant, then moved to an apartment on Lawndale Avenue. R.O. testified defendant's last sex act toward her occurred there, when she was about 10 to 12 years old. Defendant entered R.O.'s room, touched her vagina with his finger, and put his hand or fingers in her anus. On May 24, 2011, R.O. told her parents what defendant had done and spoke to the police about the incidents.

¶ 6 J.R. testified that she had lived with her family, including defendant, in an apartment on Lawndale Avenue. According to J.R., defendant first sexually assaulted J.R. after a New Year's

Eve party on January 1, 2007 when she was 15. Defendant took J.R. into the bathroom and closed the door on her while he remained outside for five minutes. He then entered the bathroom, pulled down J.R.'s pants and his own pants, and put his penis inside her vagina. J.R. also testified that defendant had vaginal intercourse with her two or three more times that year. J.R. could not remember the date of the last time defendant committed a sex act on her but did state that she was about 15 years old. Defendant entered her bedroom, pulled down his pants and her shorts, got on top of J.R., and put his penis in her vagina.

¶ 7 In addition, J.R. testified that she saw defendant pick up R.O. and kiss her using his tongue when R.O. was five years old. On another occasion, she saw defendant and R.O. lying in defendant's bed together covered in a blanket. In May 2011, J.R. told her husband and parents about the incidents. She spoke to police on May 24, 2011.

¶ 8 After R.O. and J.R. gave their accounts to the police, defendant was arrested on August 3, 2011. On the evening of his arrest, defendant was interviewed by Assistant State's Attorney Daryl Jones. Detective Manuel De La Torre, who was present for the interview, translated from Spanish to English and English to Spanish. That night, defendant provided two separate statements that were typed regarding his sexual relations with R.O. and J.R. These statements were admitted into evidence.

¶ 9 Detective De La Torre testified that when defendant gave these statements he was not under the influence of alcohol or drugs. Detective De La Torre testified that defendant exhibited no signs that he was under the influence of alcohol or drugs. Further, within the statements, defendant affirmed that his statements to State's Attorney Jones were true and correct.

¶ 10 In his statement regarding J.R., defendant stated he began having sexual contact with J.R.

while living in an apartment on Lawndale Avenue. The first encounter took place on January 1, 2007, when J.R. was only 15 years old. He admitted he had inserted his penis into J.R.'s vagina on or about five different occasions and had also performed oral sex on J.R.'s vagina on or about three different occasions. His sexual contact with J.R. ended on December 25, 2008.

¶ 11 In the statement regarding R.O., defendant stated he had had ongoing sexual contact with R.O. between the summers of 2001 and 2005. Defendant had been living with R.O. at this time at the apartment on Lawndale Avenue. Defendant stated his first sexual encounter had occurred when R.O. was about six or seven years old. Defendant and R.O. went into defendant's bedroom, and defendant licked R.O.'s vagina with his tongue. Defendant also inserted his fingers inside R.O.'s vagina. There were other times when defendant performed oral sex on R.O. and inserted his finger into R.O.'s vagina. Defendant had similarly had oral sex with R.O. on three other occasions. According to defendant, his sexual contact with R.O. ended the summer of 2005.

¶ 12 Defendant testified in his own defense that he did not remember giving the statements to Assistant State's Attorney Jones and Detective De La Torre regarding J.R. and R.O. Defendant claimed he had consumed beer and cocaine the night before and the day of his arrest. Therefore, defendant stated that he could not remember anything that had occurred after his actual arrest on August 3, 2011.

¶ 13 Defendant further testified that he had never lived with or had sexual contact with J.R. or R.O. Rather, defendant stated that he had been living with friends on 61st Street and Francisco Avenue. Defendant testified that he had been living at this location during his entire time in Chicago, until he began living with his brother, Eugenio Osorio.

¶ 14 Eugenio Osorio testified that defendant had never lived with R.O. and J.R., and that

defendant was living with friends before he moved in with Eugenio.

¶ 15 In rebuttal, Officer Saul Basurto testified that he was the lockup keeper when defendant was arrested. Upon a visual check of defendant, Officer Basurto saw no indication that defendant was under the influence of alcohol. Officer Basurto stated that he based his conclusion on the fact that defendant had good balance, and his eyes and speech were clear.

¶ 16 The trial court found defendant guilty and entered judgment on two counts as to each of the victims. The remaining counts were merged. The court found that defendant had admitted to specific incidents that J.R. and R.O. had also testified to. In fact, defendant had admitted to a larger number of sex acts than J.R. and R.O. had described. The court further found it did not see any motive for the two victims to lie. The court sentenced defendant to 10 years in prison on each count, all served consecutively for an aggregate of 40 years' imprisonment. Defendant timely filed a direct appeal.

¶ 17 ANALYSIS

¶ 18 Defendant argues that his trial counsel was ineffective for failing to move to dismiss the indictment or to move for a bill of particulars where the prosecution charged that his sex crimes occurred over an unreasonably broad eight-year period.

¶ 19 A criminal defendant has a fundamental right under both the United States Constitution (U.S. Const., amend.VI) and the Illinois Constitution of 1970 (Ill. Const.1970, art. I, § 8) to be apprised of the " 'nature and cause' of criminal accusations made against him." *People v. DiLorenzo*, 169 Ill.2d 318, 321 (1996). In furtherance of this right, Illinois law provides that an indictment must be in writing and allege the commission of an offense by: (1) stating the name of the offense; (2) citing the statutory provision that is alleged to have been violated; (3) setting

forth the nature and the elements of the offense charged; (4) stating the date and county of the offense as definitely as can be done; and (5) stating the name of the accused, if known. 725 ILCS 5/111–3(a) (West 2010).

¶ 20 Normally, when a defendant is challenging the sufficiency of an indictment on appeal, we must first determine whether the defendant initially challenged the indictment in the lower court.

> "When an indictment or information is attacked for the first time on appeal, it is sufficient that the indictment or information 'apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct.' [Citations.] In other words, the appellate court should consider whether the defect in the information or indictment prejudiced the defendant in preparing his defense. If, however, the information or indictment is attacked before trial, * * * the information must strictly comply with the pleading requirements of [section 111–3(a) of] the Code of Criminal Procedure of 1963. [Citations]." *People v. Thingvold*, 145 Ill. 2d 441, 448 (1991) (quoting *People v. Gilmore*, 63 Ill. 2d 23, 29 (1976)).

¶ 21 Defendant did not challenge the indictment in the trial court. We note that defendant is not challenging the indictment outright but instead chooses to couch the issue as an ineffective assistance claim, essentially bypassing waiver and raising the claim of a deficient indictment for the first time on appeal. Therefore in considering the underlying merit of defendant's ineffective assistance of counsel claim, we must determine whether the alleged deficiency in the indictment prejudiced defendant in preparing his defense. *Thingvold*, 145 Ill. 2d at 448 (quoting *Gilmore*, 63 Ill. 2d at 29.)

¶ 22 To succeed on a claim of ineffective assistance of trial counsel, a defendant must satisfy the two-pronged *Strickland* test by establishing the following: (1) the facts show counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the trial's outcome would have been different. *People v. Enis*, 194 Ill. 2d 361, 376 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Defendant must demonstrate both deficient performance by counsel and resulting prejudice *Strickland*, 466 U.S. at 687. If the underlying claim has no merit, no prejudice resulted, and defendant's claims of ineffective assistance of counsel at trial must fail. See *People v. Coleman*, 168 Ill.2d 509, 523 (1995); *People v. Pitsonbarger*, 205 Ill. 2d 444, 465 (2002).

¶ 23 Defendant contends that the prosecution charged an unconstitutionally broad eight-year period in which the alleged acts of sexual assault occurred and because the time frame of his indictment was so broad, he could not have adequately defended himself against the charges.

¶ 24 Illinois courts recognize "it is often difficult in the prosecution of sexual abuse cases to pin down the times, dates, and places of sexual assaults, particularly when the defendant has engaged in a number of acts over a prolonged period of time." *People v. Bishop*, 218 Ill. 2d 232, 247 (2006). Thus, the date of the offense is not an essential factor in child sex offense cases, and the State is afforded flexibility regarding the date requirement under the Code of Criminal Procedure. *People v. Guerrero*, 356 Ill. App. 3d 22, 27 (2005); 725 ILCS 5/111-3 (West 2014).

¶ 25 Here, the State has brought allegations of several criminal sex acts committed against minors, all occurring over a prolonged period of time. *Bishop*, 218 Ill. 2d at 247. R.O. could only allege that her first sexual assault occurred when she was about five, and her final assault occurred somewhere between the ages of 10 and 12. J.R. was able to remember that her first

sexual assault occurred when she was 15-years-old on January 1, 2007, due to its proximity to a holiday. Although, she could not determine an exact date of her final sexual assault, she testified that she was still 15 years old at that time. In the statements given on the date of his arrest, defendant admitted his sexual assaults of R.O. occurred between the summer of 2001 and the summer of 2005. He further admitted his sexual assaults of J.R. occurred from January 1, 2007, to December 25, 2008.

¶ 26 Because this case involves multiple acts of child sexual assault over several years, the prosecution could not have narrowed most of its indictment down to specific dates, especially when defendant himself was one of the persons who provided the time frame. *Id.* at 28-29. Nor does the defendant contend that the State was required to allege a more precise date of the offense than it did in charging these offenses. Ultimately, the State narrowed its indictment down to a period of time as definitely as could be done based on the information provided by R.O and J.R. and from the statements given by defendant. The counts concerning R.O. were alleged to have taken place from "on or about December 20, 1998, and continuing on through December 20, 2006." The counts concerning J.R. were alleged to have taken place from "on or about January 2, 2007, and continuing on through December 31, 2008." We cannot conclude, nor has defendant argued any basis from which to conclude, that the indictment was unconstitutionally overbroad or not in accord with the requirements of section 113-3(a).

¶ 27 Defendant argues that, had the State been forced through a bill of particulars to comply with section 111-3(a) before trial he would have been able to advance a "meaningful defense." We are not persuaded. Based on the evidence, the charges would have been restated to conform to the time period testified to by R.O. and J.R. and encompassing the period of time reflected in

the statement given by defendant. This would have sufficiently complied with the requirements of section 111-3(a) ("stating the date and county of the offense as definitely as can be done"). Defendant's bald assertion that alleging a more narrow time period would have "afford[ed] him the opportunity to advance a meaningful defense" rings hollow. Given the statements defendant made after his arrest (which he does not challenge), the testimony of the complaining witnesses, his assertion that he was under the influence of alcohol and drugs at the time of his arrest, coupled with the testimony of his brothers, we view his defense at trial was as meaningful as he could advance. Thus, this back-door attempt of challenging the charging instrument to establish an ineffective assistance of counsel claim fails.

¶ 28 Although the indictment did allege a broad time frame, defendant was not prejudiced in preparing a defense. *People v. Cuadrado*, 341 Ill. App. 3d 703, 709 (2003). Indeed, defendant presented a defense denying all of the allegations. Defendant testified that he never lived with R.O. or J.R. and that he was intoxicated and under the influence of drugs and alcohol when he gave his damaging statements to the police. He also testified that he never had any sexual contact with either girl. In addition, defendant called his brother Eugenio as a witness who testified that defendant did not live with R.O. and J.R. and that defendant lived with him since 2005.

¶ 29 Because the indictment was not overbroad a pretrial challenge on that basis would have failed, and because defendant was not prevented from presenting the defense he intended to present, defendant cannot establish that he was prejudiced by trial counsel's decision not to challenge the indictment. Where the underlying claim of defendant's ineffective assistance of counsel argument is without merit, defendant suffers no prejudice. Therefore his ineffective assistance of counsel argument must fail. See *Coleman*, 168 Ill. 2d at 523; *Pitsonbarger*, 205 Ill.

2d at 465.

¶ 30 For the foregoing reasons, we affirm defendant's conviction and sentence.

¶ 31 Affirmed.