2016 IL App (5th) 120501-U

NO. 5-12-0501

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 11-CF-240
	)	
JAMAL JONES,	)	Honorable
	)	William G. Schwartz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Presiding Justice Schwarm and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not denied effective assistance of trial counsel; accordingly, his convictions for aggravated criminal sexual assault are affirmed.

¶ 2 Defendant was found guilty, after a jury trial in the circuit court of Jackson County, of two counts of aggravated criminal sexual assault, and was sentenced to 30 years' imprisonment on each count, to be served concurrently. Defendant argues on appeal that his defense attorney committed numerous errors that were independently and cumulatively prejudicial. Defendant also complains that the court failed to substantially comply with Supreme Court Rule 401(a) in allowing his retained attorney to withdraw,

and therefore believes his cause should be remanded for new postsentencing proceedings. We affirm.

¶ 3 On the evening of May 7, 2011, the victim, a 19-year-old student at Southern Illinois University (SIU), attended a party that her roommate's boyfriend was having at his apartment just east of campus. At 2:45 a.m., the victim decided she should go home and began to walk to her residence on the west side of campus. The victim cut across campus, passing by several residence halls and university buildings along the way. As she was walking, she was on her cell phone talking to a friend from back home. Unfortunately, the victim was also being followed as she walked across campus. Fortunately, she was being photographed or videotaped by security cameras as she passed various school buildings. These same cameras also caught the individual following her.

¶ 4 As she approached another campus building along her walk home, the victim heard footsteps as if someone was running behind her. She turned around and, in front of her, encountered a black man wearing a light-colored, long-sleeved shirt. The man grabbed her, tossed her phone and keys into the bushes, and pushed her up against a wall. He then forced her to kneel on the ground and compelled her to perform oral sex on him. He next forced her down onto her hands and knees and pulled her leggings down from behind and attempted to penetrate her. While forcibly continuing to restrain her on the ground, he spat on his hands to lubricate her and then continued to engage in intercourse with her until he ejaculated. The attacker pushed the victim's face into the dirt and told her to keep her face down and count to 15 while he ran off. When she felt safe enough to get up, the victim started running westbound across the campus until she encountered an

SIU police vehicle occupied by Officer Street. Officer Street testified that the victim was an emotional wreck, crying, screaming and shaking. She was covered in leaves and grass and shrubbery. From her knees down she was completely covered with mud and dirt, and her face and forearms were dirty. Tear marks streaked the dirt on her face. The back of her hair looked muffled like someone had grabbed it from behind and ruffled it. The officer first took the victim back to the area where the attack had occurred. The officer testified it appeared as if a struggle had taken place in the bushes, with several limbs broken off the bushes and dirt knocked up and leaves pushed aside. The officer then took the victim to the hospital to be treated and examined. The victim's legs and knees contained several abrasions and scratches, and her knees were badly bruised. The swabs from the sexual assault kit, after being processed, revealed the DNA profile of defendant.

¶ 5 Using a still photograph taken from one of the surveillance videos, the police distributed information to the media about the victim's attacker. On the morning of May 9, Morgan Cannon saw the news and contacted the SIU police. She related that at approximately 3:30 a.m. on May 8, 2011, she encountered a black man wearing cream-colored clothing at the apartment where she was visiting. The man was very excited and ran up and sat on the landing of the stairs. He took off his shirt and started talking to one of the people in the apartment. Later, the man told her and others in the apartment that he had hooked up with some girl and that they had had sex. After they finished, however, the girl said that she was going to tell the police that he had raped her. Ms. Cannon identified the person depicted in the photograph from the news as the same man who ran into the apartment on May 8. She further identified that man as defendant.

She also knew that defendant and the friend whose apartment she was visiting played basketball together at Rend Lake College.

¶ 6 The basketball coach from Rend Lake testified that defendant visited him in the afternoon hours of May 9, 2011, and told him that he was the individual in the photos being circulated in the news. The coach further stated that defendant related to him the story of a consensual sexual encounter with the victim who later reported that she had been raped. The coach told him that if he really did nothing wrong, then he needed to turn himself in and clear his name. Defendant chose to go back home to Pennsylvania.

¶ 7 Several video surveillance tapes taken by SIU security cameras were introduced into evidence and shown to the jury. Officer Beights, then a detective with the SIU police department, viewed the tapes from buildings near the path that the victim stated she had taken that night to walk home from the party. After reviewing the tapes, he captured the videos onto a DVD. According to Officer Beights, the videos depict the victim walking alone with defendant following her some 20 feet behind at approximately 3 a.m. on May 8, 2011.

¶ 8 The jury chose to believe the victim's version of the sexual encounter that early morning of May 8, 2011, and found defendant guilty of two counts of aggravated criminal sexual assault. Defendant was sentenced by the circuit court to 30 years' imprisonment on each count to be served concurrently. Defendant now appeals his convictions.

¶ 9 Defendant first argues on appeal that his trial counsel was ineffective. He believes trial counsel failed to admit beneficial defense evidence and did not object to

inadmissible evidence. He points out that counsel's performance was so poor that even the judge, in the presence of the jury during closing argument, had to admonish counsel to properly practice law. Defendant points out that criminal defendants are entitled to the effective assistance of counsel. Counsel is not effective if his performance falls below an objective standard of reasonableness and prejudices the defendant to the extent that he is denied a fair trial. Defendant believes he was denied a fair trial in this instance.

¶ 10 To succeed on a claim of ineffective assistance of counsel, a defendant must show that, absent the objectively unreasonable errors, there is a reasonable probability that his trial would have had a different result. *People v. Albanese*, 104 Ill. 2d 504, 526-27, 473 N.E.2d 1246, 1254 (1984). Review of an attorney's actions gives deference to the attorney's decisions, however. The fact that another attorney might have handled things differently does not constitute ineffective assistance of counsel. In other words, mistakes in strategy or tactics do not alone constitute ineffective assistance of counsel. Effective assistance of counsel refers to competent, not perfect, representation. *People v. Palmer*, 162 Ill. 2d 465, 476, 643 N.E.2d 797, 801-02 (1994).

¶ 11 Defendant first takes issue with counsel's failure to object to portions of the State's foundation for the admission of the surveillance video recordings. Defendant believes Officer Beights' testimony, particularly his identifications of the victim and defendant in the videos, amounted to inadmissible lay opinion testimony that invaded the province of the jury. Defendant asserts the videos are not clear and are so pixilated that it is difficult to tell who was recorded in them. And, as defendant points out, the State used the surveillance videos to depict defendant as a predator who stalked the victim across

campus in order to prove that the sexual contact between defendant and the victim was not consensual. Defendant believes the introduction of the videos, as narrated by Officer Beights, was more than enough to undermine confidence in the outcome of defendant's trial. As the State correctly argues, however, the officer's testimony did not invade the province of the jury in this instance. The officer was not required to identify who was following the victim, for the victim identified defendant as the person depicted in the photos following her. More importantly, defendant admitted that he was the individual depicted in the photos taken from the videos. Defendant also admitted that he was wearing a white long-sleeved pullover shirt with hoodie and khaki pants that night. Officer Beights was the one who created the exhibits by transferring the surveillance recordings from the security cameras and computers to the DVD shown to the jury. Officer Beights was also the one who could best identify the locales and objects depicted in the videos. Given that Officer Beights' testimony was not introduced to identify defendant, we find that this testimony was not lay opinion testimony (see Ill. R. Evid. 701 (eff. Jan. 1, 2011); *People v. Thompson*, 2016 IL 118667, ¶ 50). Officer Beights merely laid the foundation for admission of the video evidence, and his testimony was not used as the basis for identifying defendant as the individual in the recordings.

¶ 12 The admission of evidence is usually a matter within the sound discretion of the trial court, and the dispositive issue in every case is the accuracy and reliability of the process that produced the recordings. There simply was no defect in the foundation established here, and there was no error in allowing Officer Beights' testimony under the circumstances. See *People v. Taylor*, 2011 IL 110067, ¶ 35, 956 N.E.2d 431; *People v.*

Dennis, 2011 IL App (5th) 090346, ¶ 23, 956 N.E.2d 998 (court can admit recording as primary, substantive evidence under the silent witness theory based on foundation that establishes recording's authenticity). With no error in the admission of the videos, defense counsel could not have been ineffective for failing to object to the officer's testimony explaining them, particularly when his explanations did not invade the province of the jury. Again, there simply was no issue at trial as to the identity of the individual following the victim the night of the sexual assault. Defense counsel could not credibly attack that fact when defendant admitted he was the person depicted in the photos taken from the videos.

¶ 13 Defendant next asserts on appeal that counsel was ineffective because he did not seek admission of certain surveillance videos that would have shown that the campus was well lit and that there were others on campus around the time of the crimes to contradict the victim's testimony. During closing argument, defense counsel attempted to play portions of the videos for the jury depicting the victim walking in a well-lit area of the campus, as well as other people walking and driving by who allegedly should have heard the victim screaming during the time of the attack. The court did not allow counsel to play the selected videos, however, because it was closing argument and counsel had failed to play these portions of the videos during the evidentiary portion of trial. The court's ruling was proper given that counsel cannot supply new evidence to the jury during closing argument (see *Flynn v. Cusentino*, 59 Ill. App. 3d 262, 267, 375 N.E.2d 433, 437 (1978)). Counsel then explained to the jury about the videos, and asked the jury to watch all of the video recordings and to notice all the people walking on the path that

the victim took. During deliberations, the jury asked to view all of the videos again in chronological order. The jury was shown the requested videos. Defendant therefore suffered no prejudice from counsel's performance because the jury viewed all of the video evidence admitted at trial, and specifically viewed those portions defense counsel mentioned during closing argument. Moreover, both the victim and defendant agreed that there was no one around at the time of the sexual encounter, regardless of whether it was an assault or a consensual sexual encounter.

¶ 14 Defendant next complains that counsel was ineffective because he did not seek admission of evidence that one of the sexual assaults could not have taken place in the manner described by the victim, but instead tried to demonstrate its impossibility during closing argument. Counsel's attempt, while ill-advised, did not prejudice defendant when defendant himself admitted he had pulled down the victim's leggings and penetrated her from the rear as she bent over, and that he had completed the act after she had fallen to the ground.

¶ 15 For his last complaint pertaining to defense counsel's performance, defendant argues that counsel was ineffective for failing to object to the video of defendant's statement to the police, which showed him shackled and in a jail jumpsuit. He believes counsel should have requested that the jury only listen to the audio portion of the interrogation and, at a minimum, should have requested that the jury be instructed not to consider the fact that he was shackled. The video was highly probative in that defendant admitted during the interview that he had followed the victim, had sexual relations with her in the same place as the victim described, and gave several other details that matched

the victim's testimony. Throughout the interview, defendant appears to be highly cooperative and forthcoming. The jury knew that defendant had been arrested and that his interview was taking place while he was in custody. Not offering a limiting instruction amounted to sound strategy when such an instruction would only have called attention to the handcuffs and jail clothes. Under the circumstances, we agree that the video did not strip defendant of the presumption of innocence merely because he was shown in jail clothes and shackles. Defendant suffered no prejudice from counsel's performance in this instance. Moreover, the jury was instructed on the presumption of innocence, and the jury is presumed to have followed those instructions. See *People v. Schaefer*, 217 Ill. App. 3d 666, 671, 577 N.E.2d 855, 859 (1991). And, given that there was either no defective performance and/or prejudice shown by defendant overall, we cannot find any cumulative effect of errors that prejudiced his defense in this instance. Defendant's claim of ineffective assistance of counsel therefore fails.

¶ 16 For his next point on appeal, defendant contends the trial court failed to substantially comply with the terms of Supreme Court Rule 401(a) before permitting his retained attorney to withdraw. Defendant believes his cause should be remanded for new postsentencing proceedings, and the appointment of an attorney who can file a motion to reconsider sentence on his behalf. Defendant points out that the trial court failed to admonish him that he had a right to have counsel appointed to represent him during postsentencing proceedings. See *People v. Williams*, 358 Ill. App. 3d 1098, 1104-05, 833 N.E.2d 10, 16 (2005) (litigation of posttrial motions are critical stages of proceedings to which right to counsel applies).

¶ 17 Defendant was first represented by a public defender and then private counsel. Defendant was sentenced on October 11, 2012. On October 26, 2012, private counsel filed a motion to withdraw indicating that defendant no longer wanted him to take any further steps in the case. Defendant consented to his attorney's withdrawal as evidenced by his notarized signed consent to withdraw appended to the motion. Counsel also relayed in the motion defendant's request for appointment of an appellate public defender. On October 31, 2012, defendant filed his *pro se* notice of appeal. That same day, the court granted counsel's motion to withdraw and appointed defendant an appellate public defender. At no point did defendant attempt to waive counsel or express a desire to waive counsel. More importantly, defendant was never without privately retained or appointed counsel. Defendant's complaint about the lack of a hearing and lack of substantial compliance with Rule 401(a), therefore, is without merit.

¶ 18 The State also requests on appeal modification of defendant's sentences. Defendant was convicted of two counts of aggravated criminal sexual assault and sentenced on each count to 30 years, to be served concurrently. According to the State, defendant's sentences were required to be served consecutively (see 730 ILCS 5/5-8-4(d)(2) (West 2010)). Relying on *People v. Arna*, 168 Ill. 2d 107, 113, 658 N.E.2d 445, 448 (1995) (a sentence which does not conform to a statutory requirement is void), the State argues defendant's concurrent sentences are void and asks us to correct defendant's void sentence to make the two sentences consecutive. This we cannot do. Our Illinois Supreme Court recently abolished the *Arna* void sentencing rule in *People v. Castleberry*, 2015 IL 116916, ¶ 19, 43 N.E.3d 932. As *Castleberry* recognizes, Supreme Court Rule

604(a), which sets forth with specificity those instances when the State may appeal in a criminal case, does not permit the State to appeal a sentencing order. *Castleberry*, 2015 IL 116916, ¶ 21, 43 N.E.3d 932. Following the reasoning of *Castleberry*, the State's argument here was not brought to sustain the judgment of the circuit court, but rather was a new and different issue brought with a view to "lessening the rights" of defendant. The State's argument is, therefore, a *de facto* cross-appeal challenging defendant's sentence and, as such, is impermissible. *Castleberry*, 2015 IL 116916, ¶ 23, 43 N.E.3d 932. Accordingly, we cannot modify defendant's sentences as requested in this manner.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court of Jackson County.

¶ 20 Affirmed.