2018 IL App (3d) 160443-U

Order filed June 14, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0443
v.	)	Circuit No. 14-CF-441
	)	
DENNIS L. MARTIN JR.,	)	Honorable
	)	Kathy S. Bradshaw-Elliott,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The evidence was sufficient to prove the defendant's guilt of predatory criminal sexual assault of a child beyond a reasonable doubt. (2) The defendant's ineffective assistance claim is better suited for a postconviction proceeding. (3) The court did not abuse its discretion in sentencing the defendant to 11 years' imprisonment.

¶ 2 The defendant, Dennis L. Martin Jr., appeals from his conviction for predatory criminal sexual assault of a child. The defendant raises three issues: (1) the evidence was insufficient to prove his guilt beyond a reasonable doubt, (2) he received ineffective assistance of trial counsel,

and (3) the court failed to give adequate weight to the mitigating factors in sentencing the defendant to 11 years' imprisonment.

¶ 3 FACTS

¶ 4 On October 17, 2014, the State charged the defendant with predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)). The indictment alleged that the defendant had "committed an act of sexual penetration with [the victim], a person who was under 13 years of age when the act was committed, in that said defendant placed his finger in the vagina of [the victim]."

¶ 5 Before trial, the State filed a notice of intent to use hearsay statements. The statements were made by the victim to T.F., C.V., and a Children's Advocacy Center (CAC) interviewer. 725 ILCS 5/115-10 (West 2014). Some of the statements were contained in the video recording of the CAC interviews.

¶ 6 At the subsequent hearing, the State called C.V. to testify. C.V. said that she was currently 11 years old, and the victim was her sister. In September 2014, C.V. spoke with a CAC interviewer. Approximately one month before the interview, C.V. and the victim were cleaning their shared bedroom when C.V. noticed the victim was crying. The victim explained that the defendant had touched her. C.V. made an in-court identification of the defendant as the individual that the victim had said touched her. The touching occurred when the victim spent the night at the home of Elizabeth Schoon (Liz), whom C.V. called "Liz." While the victim lay on an air mattress on the floor, the defendant touched the victim's "pee pee" with his hand. Initially, C.V. could not understand the victim's statement because the victim was crying. After the victim repeated her recollection of the incident, the victim asked C.V. not to tell their mother, T.F., because the victim feared that she would get in trouble. Nevertheless, C.V. relayed the victim's

allegations to T.F. On cross-examination, C.V. said that before the victim told C.V. of the incident, C.V. noticed that the victim's demeanor had recently changed, she did not play with her friends anymore and kept to herself.

¶ 7 T.F. testified that she was the mother of C.V. and the victim. On September 17, 2014, T.F. contacted the Kankakee County Sheriff regarding the victim's report of inappropriate sexual contact. C.V. had previously informed T.F. of the incident. From C.V.'s report, T.F. understood that the victim said the defendant had inappropriately touched her "private area." T.F. then spoke with the victim who was hysterical and repeatedly said "it's really bad" and "I don't want to tell you." The victim was unable to tell T.F., in her own words, about the incident. T.F. reassured the victim that she had done nothing wrong. T.F. then called her friends Liz, and William Mook (Billy). Liz and Billy owned the home where the incident allegedly occurred. T.F. also asked her children's babysitter, Brittany, to come over with Brittany's mother, Tracy. The victim permitted T.F. to speak to these individuals about the incident. The victim spoke directly with Brittany and Tracy about the incident. T.F. did not call the police that night because she was in a state of shock and considered taking matters into her own hands.

¶ 8 On cross-examination, T.F. said the incident occurred on August 16, 2014, and C.V. did not report the incident until approximately one month later.

¶ 9 During the State's argument for the introduction of the CAC interview recording, the court interjected that, at three different points in the victim's interview, the victim laughed and jumped up and down. The court found the victim's behavior to be unusual. Defense counsel acknowledged that the victim exhibited some unusual characteristics, to which the court replied "I'd say the tape is better for the defense than it is for the State quite frankly."

¶ 10 The court ruled that C.V. and T.F.'s oral statements could be admitted at trial. As to the victim's CAC interview recording, the court again noted it's a "better tape for the defense than it is for the State *** but that's not the reason why I'm considering not letting it in." The court noted the victim had been inconsistent in her word choices as she referred to her genitals at various points as "pee pee" and at other times as "vagina." The court wondered aloud if someone had spoken with the victim during a break in the interview that caused the change in word choice. The court also observed that the victim's speech rambled at several points, she attempted to distract the interviewer, she jumped up and down on the chair, she asked to leave the room at least three times, and she laughed inappropriately. The court concluded that the victim's interview lacked sufficient safeguards of reliability and denied the State's motion to use the recording at trial. Because the court denied the State's motion, the CAC interview recording was not made a part of the record.

¶ 11 The case proceeded to a bench trial. The State called the victim as its first witness. The victim testified that she was eight years old. The victim was in court because an individual that she called "DJ," and identified as the defendant, had done "a bad thing." In August 2014, the victim and her mother, T.F., stayed overnight at Liz's house. Liz was a friend of T.F. Early in the evening, T.F., Liz, Billy, and the defendant conversed and drank alcohol. T.F. arranged for the victim and her to stay overnight at Liz's home. Liz set up an air mattress in the living room for T.F. and the victim to sleep on. The defendant, who also had arranged to stay overnight, slept on a couch near the air mattress. Liz and Billy slept in their bedroom. The victim remembered that she wore a Tinker Bell nightgown and underwear to bed.

¶ 12 Sometime after the victim lay down on the air mattress, the defendant "did something bad." The State asked the victim to explain what the defendant had done, and the victim asked

for "a minute," and noted that she needed "to take this step by step." The victim explained that the defendant squatted next to her, pulled down his pants, pushed down her underwear, and touched her "private part"[1] with his finger. Using a drawing, the victim indicated that the defendant had touched her vagina. The victim clarified that the defendant's finger went inside her vagina. The victim said that the defendant's contact "felt weird," but she did not scream or cry. When the victim moved, the defendant removed his finger and went to the bathroom. The defendant then left the house.

¶ 13 After the defendant left, the victim tried to wake T.F., but was unsuccessful. In the morning, the victim went to church with Liz's daughter, and T.F. went home. The victim did not feel comfortable talking to T.F. about the incident. A few weeks later, while the victim was in her bedroom with her older sister, C.V., she told C.V. that the defendant had done "something bad." The victim told C.V. about the incident, but she did not feel comfortable talking about the specific details of her conversation with C.V. The victim also told C.V. that she did not want to speak with T.F. about the incident and suggested that C.V. tell T.F.

¶ 14 On cross-examination, trial counsel asked:

> "Q. Okay. Now, when you saw Billy, what was—what was he wearing?
>
> A. I think a white tank top and jeans.
>
> Q. Mm-hmm. Okay. What was his hair like?
>
> A. Brown.
>
> Q. Was it short? Was it long?
>
> A. Short.

[1]During the direct examination, the victim also referred to the area that the defendant touched with his finger as her "pee pee."

Q. Did he have any beard or mustache?

A. Not that I know of.

Q. Okay. Now, when you started to get ready to go to bed, was Billy already on the couch laying [*sic*] down?

A. No. He was in Liz's room.

Q. Okay. So then he came out of Liz's room after you guys put up the air mattress?

I'm sorry. I said 'Billy.' I made a mistake. That's my fault. I meant DJ.

Where was DJ at when you went to bed?

A. He was on the brown couch."

Shortly thereafter, trial counsel again referred to the defendant as "Billy" and acknowledged that he had "mixed up" the individuals again.

¶ 15 On redirect examination, the victim said that she did not remember the clothing that the defendant wore at the time of the incident, but she thought that he was wearing blue jeans. The victim also thought that the defendant had shorter hair at the time of the incident.

¶ 16 On recross-examination, the victim indicated that, although she was not sure what clothing the defendant wore at the time of the incident, she knew that he did not wear sweatpants.

¶ 17 The State next called Liz to testify. Billy was Liz's fiancé, Billy, and Liz and T.F. were close friends. On the evening of August 16, 2014, Liz had arranged for T.F. and the victim to stay overnight at her home. Liz set up an air mattress on the living room floor for T.F. and the victim to sleep on. T.F. slept on the side nearest to the couch and the victim slept on the side by the door. The defendant, who had also arranged to stay overnight, slept on a couch near the air

mattress. Liz recalled the defendant wore khaki cargo shorts, a white t-shirt, and a cross necklace.

¶ 18 Billy testified the defendant was his cousin. On an evening in August 2014, T.F. and the victim stayed overnight at Liz and Billy's home. T.F. and the victim slept on an air mattress in the living room. Billy thought that T.F. slept on the outside of the air mattress and the victim slept on the side nearest to the couch. That night, the defendant slept on a couch near the air mattress. Billy recalled that the defendant wore a white shirt and cross necklace. Billy thought that the defendant was also wearing sweatpants.

¶ 19 T.F. testified that the victim and C.V. were her daughters, and she was friends with Liz. On August 16, 2014, T.F. and the victim went to Liz and Billy's home. There, T.F., Liz, and Billy watched television and drank beer. During the visit, the defendant stopped in to socialize. The defendant also brought marijuana with him, which T.F., Liz, and Billy smoked. The defendant then left the home for approximately 45 minutes to an hour.

¶ 20 T.F. and the victim planned to stay overnight at Liz and Billy's home, and the victim asked to sleep with T.F. on the air mattress in the living room. At bedtime, the victim changed into her Tinker Bell nightgown and lay on the air mattress near the door. T.F. slept on the side of the air mattress closest to the couch. T.F. fell asleep fairly quickly and did not remember anything happening during the night.

¶ 21 Earlier in the evening, the defendant indicated that he was also spending the night at Liz and Billy's home. The defendant slept on a couch that was located in front of the air mattress. T.F. recalled that the defendant wore a white t-shirt and a cross necklace. T.F. did not remember the type of pants that the defendant wore.

¶ 22 When T.F. awoke in the morning, the defendant had already left the home. The victim told T.F. that she had urinated in the bed. T.F. thought that this was odd, but assumed that the victim did not want to go through Liz's bedroom to get to the only working bathroom. Later that morning, the victim and Liz's daughters went to church and T.F. went home.

¶ 23 On September 17, 2014, C.V. told T.F. that the victim needed to speak with her. Shortly thereafter, the victim came to T.F. crying and repeatedly said "[i]t's really bad[.]" T.F. had never seen the victim so upset and indicated that the defendant had inappropriately touched her. T.F. did not recall the victim's "exact words, but [the victim] was definitely referring to [the defendant] molesting her, touching her in places that he should not have." T.F. acknowledged that she previously testified that C.V. told her about the incident. After listening to the victim's recollection of the incident, T.F. was in a state of shock and asked Liz and Billy to come over for emotional support. A few days later, T.F. called the police. T.F. explained that she did not notify the police sooner because she was concerned that the victim's allegations were unprovable and contemplated taking matters into her own hands.

¶ 24 C.V. testified that the victim was her younger sister. In September 2014, C.V. and the victim were in their shared bedroom when the victim began crying. C.V. asked the victim what was wrong. The victim replied that when she spent the night at Liz's home, "DJ" touched her "pee pee place." Initially, C.V. was unable to understand the victim's reply as she thought the victim said that she wanted to be a disc jockey. C.V. then determined that the victim had said that the defendant, who went by "DJ," had inappropriately touched the victim. The victim asked C.V. not to tell T.F., but C.V. disregarded the request and told T.F. that the defendant had touched the victim in her "pee pee place." T.F. then spoke with the victim in the bedroom.

¶ 25 On cross-examination, C.V. said that she did not remember the date of her conversation with the victim, but she thought that it happened a few days after the incident occurred. Trial counsel also asked:

> "Q. Okay. And [the victim] told you that Billy had touched her in her pee pee place; correct?
>
> A. Yes.
>
> Q. Did she say what he used to touch her?
>
> A .She said—well, she told Tracy this, because I was in the room when they were talking about this. She said that he touched her with his fingers."

¶ 26 Before ruling on the defendant's guilt, the court provided a lengthy recitation of the facts that included its review of each of the witnesses' testimonies. During this recapitulation, the court noted that trial counsel had mistakenly referred to the defendant as "Billy" while cross-examining the victim. Trial counsel then corrected his misstatement. Overall, the court found the victim to be "very credible." The court noted that the testimonies of the victim and C.V. were especially consistent, and concluded that the State had proved the defendant's guilt of predatory criminal sexual assault of a child beyond a reasonable doubt.

¶ 27 The defendant filed a posttrial motion for judgment notwithstanding the verdict or a new trial. The defendant argued the State failed to prove his guilt beyond a reasonable doubt. The court denied the defendant's motion and the cause proceeded to a sentencing hearing.

¶ 28 During the sentencing hearing, the court considered evidence of the defendant's criminal history as presented in his presentence investigation (PSI) report. The PSI report documented that the defendant had one prior theft and four prior burglary convictions. The defendant also had one juvenile delinquency adjudication for residential burglary. As a result of these prior

convictions, the defendant had served two separate prison sentences. The PSI report also indicated that the defendant had participated in drug abuse treatment programs eight times and completed the program in six of the eight times.

¶ 29 In mitigation, the PSI report noted that the defendant's father was a "drug addict" and he had physically abused the defendant. At six years of age, the defendant was sexually assaulted by his babysitter. At the age of 15, on the day that the defendant was discharged from juvenile probation, the defendant's father offered him marijuana. The defendant dropped out of school in the twelfth grade, but earned his general education diploma (GED) in 2011. In 2013, the defendant attended business classes at Olivet Nazarene University.

¶ 30 As further evidence in mitigation, trial counsel called the defendant's fiancée, Olivia Almanza, to testify. Olivia had known the defendant for three years. Olivia and the defendant met while the defendant was a student at Olivet Nazarene University. Olivia said the defendant was a good, caring, and loving man, and he interacted well with her young nephew and niece. Olivia felt that the defendant was still able to be a productive member of society.

¶ 31 Kathy Almanza, Olivia's mother, testified that the defendant had lived at her house for three years. Kathy said the defendant was very helpful and got along well with her grandchildren. Kathy saw no concerning behavior of defendant while he lived with her.

¶ 32 James Riordan testified that he had known the defendant for 14 years. Riordan said the defendant had a troubled youth. Riordan served as a mentor for the defendant, and the defendant lived with Riordan at times. As the defendant's mentor, Riordan helped the defendant plan life strategies. After the defendant received his GED, Riordan encouraged the defendant to attend college. Riordan said the defendant suffered from associating with the wrong individuals and

struggled with marijuana addiction. Riordan noticed that the defendant became more responsible after he met Olivia.

¶ 33 The State argued that the factors in aggravation and nature of the crime warranted a sentence of 15 years' imprisonment. Trial counsel argued that the defendant's history of physical abuse as a child, incidence of childhood sexual abuse, and parental encouragement to take drugs warranted a lower sentence. Trial counsel asked the court to impose the minimum sentence of six years' imprisonment.

¶ 34 The court found in aggravation that the defendant had an extensive criminal record and had previously served two prison sentences. The court also noted, in mitigation, that the defendant had a "lousy childhood" that included incidents of drug use and sexual abuse. The court sentenced the defendant to 11 years' imprisonment. The defendant appeals.

¶ 35 ANALYSIS

¶ 36 I. Sufficiency of the Evidence

¶ 37 The defendant argues the evidence was insufficient to prove his guilt beyond a reasonable doubt. Specifically, no physical evidence was presented; the defendant's alleged acts were improbable given the victim's proximity to T.F. at the time of the incident; no independent witness observed the incident; C.V. testified, on cross-examination, that the victim told her that Billy had touched her; C.V. overheard the victim tell her babysitter, Brittany, that Billy had touched her; the victim uncharacteristically wet her pants, potentially to avoid passing through Billy's bedroom to get to the bathroom; Billy testified, in contrast to the other witnesses, that the victim slept on the side of the air mattress nearest to the defendant; the victim did not immediately report the incident; and C.V.'s description of the incident evolved from the

defendant placing his finger "on" the victim's vagina to the defendant placing his finger "in" the victim's vagina.

¶ 38 In a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Instead, " '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.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under this standard, we will not substitute our judgment for that of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We afford great deference to the determinations of the trier of fact, and we draw all reasonable inferences from the record in favor of the State. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). "[I]n a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). The testimony of a single witness is sufficient to sustain a conviction if it is positive and credible. *People v. Gray*, 2017 IL 120958, ¶ 36. We "will not reverse a conviction simply because the evidence is contradictory [citation] or because the defendant claims that a witness was not credible." *Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 39 The State charged the defendant with predatory criminal sexual assault of a child. 720 ILCS 5/11-1.40(a)(1) (West 2014). To secure a conviction for this offense, the State needed to prove beyond a reasonable doubt that: (1) the defendant was 17 years of age or older, (2) he committed an act of sexual penetration, and (3) the victim was under 13 years of age. *Id.* The parties do not dispute the sufficiency of the evidence that the defendant was greater than 17 years

of age and the victim was under 13 years of age. Instead, the defendant argues that the State failed to prove that he committed an act of sexual penetration with the victim.

¶ 40 Evidence of the defendant's act of sexual penetration with the victim was established by the victim's testimony, C.V.'s testimony of the victim's initial report, and T.F.'s testimony of the victim's allegations. This evidence was largely consistent.

¶ 41 The victim testified that in August 2014, she was falling asleep on an air mattress next to T.F. when the defendant approached her. The defendant lowered the victim's underwear, and placed his finger in the victim's vagina. When the victim moved, the defendant removed his finger. Consistent with the victim's testimony, C.V. testified that the victim reported to her that the defendant had touched her "pee pee" on the night that the victim slept at Liz's home. The testimony of the victim's mother, T.F., also indicated that the victim reported that the defendant had inappropriately touched her. The circuit court, which observed these witnesses' demeanor in person, found their testimonies to be credible. After reviewing the record in a light most favorable to the State, we find that this credible evidence established the sexual penetration element beyond a reasonable doubt.

¶ 42 In reaching our decision, we reject the defendant's arguments that claim the above testimony was discredited by minor inconsistencies in the record. In doing so, we reaffirm that questions of witness credibility are best left to the trier of fact who determined that these witnesses were credible. *Siguenza-Brito*, 235 Ill. 2d at 228. After reviewing the record, we find no grounds to reverse the trier of fact's credibility determination.

¶ 43 We also note that part of the defendant's argument is based on trial counsel's repeated cross-examination references to the perpetrator as "Billy." Contrary to the defendant's assertion that these references indicate that Billy committed the offense, the record establishes that trial

counsel's references were merely misstatements. In fact, at times, trial counsel recognized and corrected his misstatements, a fact that was noted by the circuit court after closing arguments. The few uncorrected references to "Billy," which occurred during trial counsel's cross-examination of C.V. were also clearly due to a misstatement as C.V. clearly indicated on direct examination that the victim told her that the defendant had committed the offense.

¶ 44 Altogether, these misstatements and minor inconsistencies in the witnesses' testimonies do not undermine the court's credibility findings and ultimate determination of guilt. Viewed in the light most favorable to the State, the evidence proved the defendant's guilt of predatory criminal sexual assault of a child beyond a reasonable doubt.

¶ 45 II. Ineffective Assistance of Counsel

¶ 46 The defendant argues that he received ineffective assistance of counsel where trial counsel did not attempt to use the CAC interview recording at trial. In making this argument, the defendant notes that the court found the recording to be more helpful for the defense than the State and would serve to impeach the victim's testimony. The *Strickland* ineffective assistance of counsel standard, requires that the defendant establish that "counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Specifically, the "defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* (quoting *Strickland*, 466 U.S. at 694).

¶ 47 Where, as in this case, the defendant's allegations are based on trial counsel's decision not to admit or use video-recorded evidence, we must be able to review the disputed evidence to

determine if its exclusion was based on trial strategy or the result of deficient performance. See *People v. Madej*, 177 Ill. 2d 116, 148-49 (1997) (decisions concerning which witnesses to call and what evidence to present rest with trial counsel and are virtually unchallengeable unless that strategy is so unsound that counsel fails to conduct any meaningful adversarial testing). Moreover, the contents of the recording are crucial to determining whether the omitted evidence would have altered the outcome of the proceeding, *i.e.*, caused the defendant prejudice. The CAC interview recording that is the center of the defendant's ineffective assistance of counsel claim is not part of the record on appeal. As a result, we are unable to determine whether trial counsel's decision not to use the recording was based on trial strategy or deficient performance and if the video might have altered the outcome of the proceedings. Therefore, we find that this ineffective assistance of counsel claim is better suited for a collateral proceeding. See *People v. Veach*, 2017 IL 120649, ¶ 46. In such a proceeding, the defendant is able to supplement the record with the CAC interview recording that is at the core of his ineffective assistance claim. We take no position on the defendant's claim of ineffective assistance of trial counsel.

¶ 48 III. Sentence

¶ 49 The defendant argues the circuit court erred in sentencing him to 11 years' imprisonment because it failed to give adequate consideration to the mitigating evidence including the PSI report that detailed that the defendant had been subjected to significant abuse as a child.

¶ 50 The circuit court has broad discretion in imposing a sentence, and its sentencing decision is entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). As a result, we will not substitute our judgment for that of the circuit court merely because we would weigh the sentencing factors differently. *Id.* at 213. We further presume "the circuit court considered any

mitigating evidence before it, absent some indication to the contrary other than the sentence itself." *People v. Thompson*, 222 Ill. 2d 1, 37 (2006).

¶ 51 At the outset, we note that the defendant's sentence of 11 years' imprisonment is at the low end of the sentencing range of 6 to 60 years' imprisonment. 720 ILCS 5/11-1.40(b)(1) (West 2014). Therefore, the sentence is presumptively valid. See *People v. McGuire*, 2016 IL App (1st) 133410, ¶ 12.

¶ 52 The defendant has pointed to nothing in the record that rebuts the presumption that the circuit court considered the mitigating evidence of the defendant's childhood abuse in imposing the sentence. To the contrary, the record expressly establishes that the court considered the relevant factors in mitigation. Before pronouncing the defendant's sentence, the court noted that the defendant had a "lousy childhood" that included incidents of drug use and sexual abuse. Therefore, the record establishes that the court did not abuse its discretion when it imposed the defendant's 11-year prison sentence.

¶ 53 CONCLUSION

¶ 54 The judgment of the circuit court of Kankakee County is affirmed.

¶ 55 Affirmed.