

No. 1-12-0662

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 2281
	)	
JAMES PHILLIPS,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LIU delivered the judgment of the court.  
Presiding Justice Harris and Justice Simon concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Trial counsel was not ineffective for not filing a motion to suppress defendant's post-arrest statement, where it was reasonable to conclude that defendant's confession was voluntary and where there was other evidence sufficient to convict.

¶ 2 Following a bench trial, defendant James Phillips was convicted of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse and sentenced to consecutive prison terms of 8, 8, and 3 years respectively. On appeal,

defendant contends that trial counsel rendered ineffective assistance by not filing a motion to suppress his post-arrest statement as involuntary.

¶ 3 Defendant was charged with multiple counts of predatory criminal sexual assault of a child and of aggravated criminal sexual abuse, all allegedly committed against D.H. between July 1, 2008, and September 30, 2009, while he was 17 years old or older and she was under 13 years old.

¶ 4 At the 2011 trial, D.H. testified that she was born in 1997 and lives with her mother and younger siblings, a brother and two sisters. Around 2008, she and her siblings went nearly every day to the home of her aunt Sheila Hall, often spending the night there, because their mother was at work. Sheila lived with Eric Hall, her son and D.H.'s cousin, and defendant, Sheila's ex-boyfriend. Defendant was at the Hall home every time D.H. was there.

¶ 5 D.H. stopped going to the Hall home "because of" defendant, specifically because "I was being touched by" defendant. He would do so while D.H. was in bed, sometimes during the night and sometimes the day. D.H.'s siblings would be sleeping in the same room, and sometimes in the same bed. In four separate incidents, defendant touched her vagina with his hand, touched her vagina with his penis, touched her vagina with his mouth, and had D.H. hold his penis in her hand. During these incidents, D.H. said nothing to defendant and her siblings slept undisturbed in the same room. D.H. explained that she made no outcry because she was afraid of defendant and did not want to frighten her siblings. However, in 2010, D.H.'s cousin Tanisha Townsend found her crying so D.H. told her what defendant had done. By that point, defendant had "done this" more than 20 times. D.H. did not then tell her mother but later described defendant's actions to the police.

¶ 6 On cross-examination, D.H. testified that the bedroom where the incidents occurred did not have a door, and other people including Sheila and Eric Hall were sleeping in the home at the same time. While she struggled with defendant to stop him, and her siblings were sometimes sleeping in the same bed, they never woke up during one of the incidents. Defendant never threatened D.H. and never told her that he would hurt her if she "told anyone." When D.H. was interviewed by Cynthia Pettis of the Department of Children and Family Services (DCFS) in July 2010, she said that she had "hollered" for defendant to stop before penetrating her, and that he then stopped. D.H. explained that this occurred in one of the later incidents, "after multiple times." When Pettis interviewed D.H. again in September 2010, D.H. described only the first incident and did not mention the later incidents. D.H. testified that there were at least 30 but probably not as many as 40 incidents, but then also testified that defendant entered her bedroom every other night for about two years so that there were hundreds of incidents, then denied that there were hundreds of incidents. When D.H. was interviewed by police detective Ronald Schmuck in July 2010, she mentioned about 20 incidents, not hundreds, and mentioned defendant touching her vagina and making her touch his penis but did not mention him touching her vagina with his penis.

¶ 7 On redirect examination, D.H. testified that her "holler" for defendant to stop was actually a whisper so she would not wake her siblings. While D.H.'s bedroom had no door, Sheila's bedroom did and it was closed while she slept. While D.H. testified that defendant said nothing to threaten her, he "sometimes" covered her mouth to quiet her, and his hand sometimes partially covered her nose. On recross examination, D.H. admitted that she did not mention to either Pettis or Detective Schmuck that defendant had covered her mouth.

¶ 8 D.H.'s cousin Tanisha Townsend testified that, in July 2010, she found D.H. crying. D.H. explained why she was crying: defendant had inappropriately touched her an unspecified number of times between July 2008 and September 2009. Townsend then called D.H.'s mother and relayed D.H.'s account.

¶ 9 Nurse Monica Almeda testified that she saw D.H. in a hospital emergency room in July 2010, at which time D.H. reported "a sexual assault" as D.H. put it. She "had been touched inappropriately by a person" who tried to penetrate her and made her hold his penis in her hand.

¶ 10 Detective Ronald Schmuck testified that, after he interviewed D.H. in July 2010, he sought defendant as a suspect. In October 2010, defendant phoned Detective Schmuck, stating that he was in Mississippi and was aware that Detective Schmuck was seeking him regarding D.H.'s allegations. Defendant assured Detective Schmuck that he would contact him immediately upon returning to Chicago though he did not know when he would do so. However, defendant did not call again and was arrested in Chicago on January 17, 2011.

¶ 11 Detective Schmuck interviewed defendant the next day, the 18<sup>th</sup>. Between his arrest and the interview, defendant was kept in the lockup of another police station, which has "a very set feeding schedule." During the interview over several hours, Detective Schmuck asked defendant several times if he wanted food, drink, or to use the washroom and then "provided him with whatever he asked for;" that is, defendant was provided both food and drink and allowed to use the washroom "several" times. During the interview, defendant initially denied the allegations but then changed his account. After the interview, Detective Schmuck called Assistant State's Attorney (ASA) Lisa Morrison, who interviewed D.H. at her home before interviewing defendant. Defendant gave a statement, which ASA Morrison wrote out and defendant signed,

in Detective Schmuck's presence at about 5 a.m. on the 19<sup>th</sup>. The written statement was consistent with defendant's inculpatory account from Detective Schmuck's interview of the 18<sup>th</sup>.

¶ 12 On cross-examination, Detective Schmuck clarified that he did not provide defendant a full meal but two bottles of water and two bags of chips. While defendant was arrested before 10 p.m. on the 17<sup>th</sup>, Detective Schmuck denied that defendant ate only chips between the arrest and written statement because he did not see defendant until after 5 p.m. on the 18<sup>th</sup> and he would have been fed on the lockup feeding schedule at the arresting station. Detective Schmuck admitted that he did not know if defendant actually ate the lockup food and that he gave defendant the first bottle of water at the beginning of the interview and the second several hours later. During the interview, defendant used the washroom three or four times.

¶ 13 After defendant initially denied the allegations, Detective Schmuck spoke very briefly with a distraught D.H. In his later interviews of D.H., he "did not get the same information" as that initial account. When asked if D.H.'s account "got worse and worse" with each interview, Detective Schmuck replied that "I learned more information with each additional interview." After speaking with D.H. and her sisters, he returned to interviewing defendant at about 8 p.m. Defendant again initially denied the allegations but then admitted to four incidents: licking D.H.'s vagina in the bathroom of the Hall home in the summer of 2008, touching the area of her vagina while she was clothed, that his penis touched her vagina as they embraced wearing "short shorts," and about a year after the licking incident touching her vagina with his penis but not penetrating her as he "realized it was wrong." Though the first three incidents did not correspond with D.H.'s account, Detective Schmuck did not confront her about these incidents when he again interviewed her before 1a.m. on the 19<sup>th</sup>. During the subsequent interview with ASA

Morrison, defendant described three incidents and admitted that there may have been more but his recollection was affected by heavy drinking of alcohol at the time of the incidents. These three incidents did not correspond with D.H.'s accounts; in particular, defendant claimed that D.H. initiated each incident.

¶ 14 On redirect examination, Detective Schmuck testified that he confronted defendant with D.H.'s account insofar as she alleged penis-vagina and mouth-vagina contact so that defendant's descriptions of incidents were his own. Detective Schmuck denied that he denied defendant food, drink, or use of the washroom, that defendant requested food or drink but he did not provide it, or that he otherwise mistreated defendant.

¶ 15 ASA Lisa Morrison testified that she began her involvement with D.H.'s case by interviewing her at home shortly before 1 a.m. on the 19<sup>th</sup>, then interviewing defendant at the police station, accompanied at both interviews by Detective Schmuck. She informed defendant of his *Miranda* rights and that she was a prosecutor rather than his counsel; he indicated that he understood. He was not handcuffed, did not indicate that he was hungry or thirsty, was taken to the washroom the one time he asked, and at some point during the interview was given a bag of chips and bottle of water. After defendant gave his account, ASA Morrison confirmed with Detective Schmuck absent that defendant "had been treated fine" -- he had not been denied any request for food, water, or the washroom -- and no threats or promises were made to induce his statement. At about 5 a.m., she wrote out defendant's account, which he corrected and then signed. The corrections were initialed by defendant, ASA Morrison, and Detective Schmuck.

¶ 16 ASA Morrison read the statement, in which defendant admitted to three incidents initiated by D.H., into the record.

¶ 17 On cross-examination, ASA Morrison testified that the interview room where defendant was held had a bed but no blanket or pillow. During the interview with D.H., she told ASA Morrison that "there were several incidents in the bathroom, but the majority were in the back room where she slept." While D.H. did not describe the incidents that defendant alleged were initiated by D.H., ASA Morrison opined that defendant was admitting to actual incidents but "was putting his own spin on all of them" and "minimizing \*\*\* by trying to blame the victim." However, when ASA Morrison confronted defendant with unrealistic aspects of his account, he maintained his account.

¶ 18 The parties stipulated to D.H.'s birth certificate and to defendant's arrest in Chicago before 10 p.m. on January 17, 2011.

¶ 19 Cynthia Pettis of DCFS testified for the defense that, when she interviewed D.H. in July 2010, D.H. said that she had hollered for defendant to stop before penetrating her, which he did, and that he molested her more than 20 times. While D.H. had not explained what she meant by "hollered," Pettis explained that "hollering" is often used colloquially rather than literally. In August 2010, defendant phoned Pettis, stating that he was in Mississippi because D.H.'s mother had broken the windows of his car and had threatened to kill him. When Pettis concluded her DCFS investigation, she informed defendant in October 2010 of her recommended finding that the allegations were unfounded.

¶ 20 D.H.'s sisters Je'mya and J'nae Williams each testified that they never saw defendant in the bedroom they shared with D.H. and her siblings while staying at the Hall home on weekends. Je'mya never saw defendant "do bad things" to J'nae. Sheila's son, Eric Hall, testified that he had

seen defendant in the bedroom used by D.H. and siblings in the Hall home a "couple of times," but not while they were sleeping.

¶ 21 D.H.'s aunt Sheila Doyle, also called Hall, testified that D.H. and her siblings stayed in her home on weekends, and occasionally during the week in summertime. There was no door on the bedroom they slept in, and while Sheila saw defendant in that bedroom "uncountable" times, she never saw him "do anything inappropriate with anybody." In July 2010, after learning of D.H.'s allegations, D.H.'s mother threatened to kill defendant, then came to the Hall home and broke at least one window of his car. Sheila then asked defendant to vacate the Hall home, which he did. He had been living there "on and off" during the same time that D.H. and siblings stayed; he was not her boyfriend but she "let him back in because I was afraid of him."

¶ 22 Following closing argument, the court found defendant guilty on all counts, merging redundant counts into two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse, each based on different physical acts. The court found D.H.'s testimony credible and explained "the lack of immediate outcry" by her age. The court gave no weight to defendant's move to Mississippi in light of the actions of D.H.'s mother the court found. Defendant's statement was "highly corroborative of the victim's testimony" and "a classic case of someone attempting to minimize his role in the [matter] and put himself in a better light while admitting passively that they occurred."

¶ 23 In his post-trial motion, defendant argued insufficiency of the evidence in that D.H.'s testimony was inconsistent and impeached, defendant's statement was the unreliable result of a lack of sleep, food, and water, and no witness corroborated the incidents from D.H.'s testimony or defendant's statement. Defendant noted that he "is not now and has not previously argued that

Detective Schmuck intentionally deprived him of sleep, food, or water. [Defendant] just did not ask for much food or water." He stated in the motion that detainees in the lockup where he was held between arrest and questioning "are not provided Sealy mattresses, down comforters, and fluffy pillows." The court denied the motion after a hearing, finding that the discrepancies in D.H.'s testimony were explained by her age and "her repeated sexual abuse over time" and that her testimony was corroborated by defendant's statement. Following argument in aggravation and mitigation, the court sentenced defendant as stated above, and this appeal timely followed.

¶ 24 On appeal, defendant contends that trial counsel rendered ineffective assistance by not filing a motion to suppress his post-arrest statement as involuntary because he went "without adequate food or sleep and after multiple interrogations."

¶ 25 To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that the deficient performance prejudiced him; that is, by showing a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different.

*People v. Domagala*, 2013 IL 113688, ¶ 36.

¶ 26 Here, defendant raised the issue of the voluntariness of his statement -- that it resulted from being "without adequate food or sleep [] after multiple interrogations" -- in his unsuccessful post-trial motion. The record supports a conclusion to the contrary. Firstly, while there were indeed multiple periods of questioning, none were particularly long and defendant had opportunities to rest: Detective Schmuck first interviewed him at about 5 p.m. on the 18<sup>th</sup>, but then went to interview D.H. and her sisters, returning to interviewing defendant at about 8 p.m. Before Detective Schmuck left again around midnight to confer with ASA Morrison and

interview D.H. again, defendant had already given an inculpatory account, so that the fact that his confession was recounted to ASA Morrison and reduced to a written statement in the early hours of the 19<sup>th</sup> is of little weight. Secondly, defendant asks us to infer from the absence of affirmative evidence that he slept or ate in the police lockup from his arrest at about 10 p.m. on the 17<sup>th</sup> until meeting Detective Schmuck after 5 p.m. on the 18<sup>th</sup>. Especially in light of Detective Schmuck's testimony that there is a regular feeding schedule in the lockup, it was reasonable for the trial court, and is reasonable for us, to infer otherwise. Thirdly, as there was a bed in the interview room, we shall not infer from the mere absence of a blanket or pillow on that bed that defendant could not avail himself of the opportunity to sleep during the periods when Detective Schmuck was not interviewing him, including in the middle of the night of the 18<sup>th</sup>-19<sup>th</sup> when Detective Schmuck and ASA Morrison went to interview D.H. Lastly, while it is essentially undisputed that defendant had no more than two bags of chips and two bottles of water during his interviews, the testimony of Detective Schmuck and ASA Morrison establish that he was not denied any request for food or drink; notably, defendant did not contend such deprivation in his post-trial motion. Under such circumstances, it was reasonable for trial counsel to conclude that a motion to suppress defendant's statement would have little chance of success and instead pursue trial and post-trial challenges to its weight, for which he laid the framework in his cross-examination of Detective Schmuck and ASA Morrison.

¶ 27 Moreover, while defendant argues at length that his statement was "the only evidence against him other than D.H.'s own testimony," that testimony was sufficient to convict him absent his statement so that there is no prejudice from the absence of a motion to suppress.

While defendant notes discrepancies and contradictions in D.H.'s testimony, the trial court twice

1-12-0662

acknowledged them and found her a credible witness nonetheless. While defendant argues that D.H.'s account was uncorroborated, there was some corroboration in that she reported defendant's actions only when prompted by cousin Townsend finding her crying – circumstances that tend to weigh against the prospect that she was "framing" defendant. Lastly, while no witness from the Hall home corroborated the incidents described by D.H., she clearly testified that they occurred when everyone else was asleep, that she made nearly no noise during the incidents, and that defendant had put his hand on her mouth to ensure so.

¶ 28 Accordingly, the judgment of the circuit court is affirmed.

¶ 29 Affirmed.