2012 IL App (1st) 100256-U

FIFTH DIVISION
May 25, 2012

No. 1-10-0256

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 5934
	)	
MAURY BROWN,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Where counsel provided defendant effective assistance at trial and on appeal, we affirm the circuit court's dismissal of his post-conviction petition without an evidentiary hearing.

¶ 2 Defendant Maury Brown appeals from the circuit court order granting the State's motion to dismiss his petition filed under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2008). On appeal, defendant contends that his petition substantially showed that he was denied effective assistance of trial and appellate counsel where his counsel failed to object to prejudicial hearsay testimony. We affirm.

¶ 3 On September 7, 2004, following a jury trial, defendant was convicted of aggravated criminal sexual assault and attempted aggravated robbery where defendant pointed a gun at the victim's back, demanded money, forced her into a car, and sexually assaulted her during the early morning hours of February 7, 2001. Defendant was sentenced to 25 and 14 years' imprisonment, respectively, with the sentences to be served consecutively.

¶ 4 At trial, the victim, C.L., who was seven months pregnant, testified that at 3:30 a.m. on February 7, 2001, she walked to a pay phone near her apartment to arrange a babysitter for her children so that she could attend a doctor's appointment at 9:45 a.m. C.L. did not own a phone and did not ask her neighbor to use a phone because her neighbor was asleep. While C.L. was at the pay phone, defendant pointed a gun at her back and demanded money. After C.L. informed defendant that she did not have any money, he told her to get into a nearby car. C.L. stated that defendant held the gun to her back as she entered the vehicle on the passenger side and that defendant entered the car with her. She also stated that defendant entered the vehicle through the passenger side first and she followed. Defendant drove to a nearby street, parked the car, and sexually assaulted C.L. During the assault, C.L. was seated, defendant was facing her, and C.L. noticed that she was bleeding. After the assault, defendant dropped off C.L. in an alley near her apartment, and she spoke to a neighbor who called the police. An ambulance and police arrived, and, when C.L. was in the ambulance, defendant was brought to the scene and C.L. identified him. C.L. was taken to the hospital and a rape kit was performed.

¶ 5 Yolanda Olivas, the nurse who treated C.L. on February 7, testified that when C.L. arrived at the hospital, she was crying. C.L. told Olivas that when she was making a call at a pay phone an unknown man came up to her, pointed a gun at her, and asked if she had any money. When she answered negatively, the man told her to get into a car, drove her to a different location, and raped her. Because C.L. was worried about her and her unborn baby's safety, she

did not fight her attacker. Following C.L's statements to Olivas, a rape kit was performed on C.L. Olivas did not observe any physical injuries on C.L. Prior to going to the hospital, C.L. changed her clothes, except for her underwear. No clothing containing blood stains was collected from C.L., and DNA testing revealed that seminal fluid recovered from C.L.'s vaginal swab came from defendant.

¶ 6 Officer Beth Svec testified that at about 4 a.m. on February 7, she observed a vehicle matching the description of the one used in a sexual assault. As defendant exited the vehicle, Svec signaled for defendant to approach her. The zipper of defendant's pants was open, and Svec observed a red discoloration on his pants. When Svec exited her car, defendant fled. A short chase ensued, and Svec and her partner momentarily lost sight of defendant before apprehending him. A toy gun was found under the back porch of a house in the area where Svec lost sight of defendant. Defendant was then taken to C.L., who identified him as the person who sexually assaulted her.

¶ 7 During closing argument, the State relied, in part, on Olivas' testimony regarding the events in question, and defense counsel argued that the sexual intercourse between defendant and C.L. was consensual. At the conclusion of trial, the jury found defendant guilty of aggravated criminal sexual assault and attempted aggravated robbery, and we affirmed that judgment on appeal. *People v. Brown*, No. 1-04-2990 (2006) (unpublished order under Supreme Court Rule 23).

¶ 8 On April 2, 2007, defendant filed a *pro se* post-conviction petition. The circuit court appointed defendant counsel who filed an amended petition on defendant's behalf on June 30, 2009. The amended petition alleged, in pertinent part, that defendant's trial counsel was ineffective for failing to object to Olivas' testimony regarding the statements C.L. made to her detailing the alleged sexual assault. The amended petition further alleged that appellate counsel

was ineffective for failing to raise trial counsel's ineffectiveness on that basis. The State filed a motion to dismiss defendant's petition, which was granted by the circuit court. In doing so, the circuit court found that the statements made to Olivas by C.L. were admissible under the hearsay exception for statements made to medical providers.

¶ 9 On appeal, defendant asserts that trial counsel was ineffective because he failed to object to the prejudicial hearsay testimony of Olivas, which bolstered C.L.'s version of the events and undermined defendant's consent defense. He also contends that his appellate counsel was ineffective for failing to raise this claim on direct appeal.

¶ 10 The State initially responds that because defendant failed to raise his ineffective assistance claim on direct appeal, he forfeited this argument. Where defendant has previously taken a direct appeal from a judgment of conviction, the judgment of the reviewing court is *res judicata* as to all issues decided by the court, and any other claims that could have been raised on direct appeal, but were not, are waived. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). These procedural bars are relaxed, however, where the alleged waiver stems from the incompetence of appellate counsel. *People v. Harris*, 206 Ill. 2d 1, 33 (2002). Here, defendant alleges that both his trial and appellate counsel were ineffective. Therefore, we address the merits of defendant's claim. *Harris*, 206 Ill. 2d at 33-34.

¶ 11 The dismissal of a post-conviction petition is warranted at the second stage of proceedings only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). We review the court's dismissal of a post-conviction petition without an evidentiary hearing *de novo*. *Coleman*, 183 Ill. 2d at 389.

¶ 12 To prevail on a claim of ineffective assistance of counsel, defendant must establish that counsel's representation fell below an objective standard of reasonableness and that there is a

reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Enis*, 194 Ill. 2d at 376. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant must overcome the presumption that the challenged action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. The benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 696.

¶ 13 An attorney's decisions such as what matters to object to and when to object are matters of trial strategy (*People v. Pecoraro*, 175 Ill. 2d 294, 327 (1997)), and such strategic decisions will not typically support a claim of ineffective assistance of counsel (*People v. Graham*, 206 Ill. 2d 465, 477-79 (2003)). The decisions that counsel makes regarding matters of trial strategy are "'virtually unchallengeable.'" *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007), quoting *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). In fact, even mistakes in trial strategy or tactics will not, of themselves, establish that counsel was ineffective. *Palmer*, 162 Ill. 2d at 476. The issue of counsel's competency is determined by examining the totality of counsel's conduct, and not isolated incidents. *People v. Ayala*, 142 Ill. App. 3d 93, 99-100 (1986).

¶ 14 In this case, defendant's claim of ineffective assistance centers on statements made by nurse Olivas during trial that, according to defendant, were inadmissible hearsay statements. The State maintains that Olivas' statements were admissible under section 115-13 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-13 (West 2000)), as a hearsay exception for statements made by a sexual assault victim to medical personnel for purposes of diagnosis and treatment. Defendant maintains that Olivas' testimony did not fall within the hearsay exception set forth in section 115-13 of the Code because her testimony was "totally unrelated to medical

diagnosis or treatment." We agree with the State.

¶ 15 Section 115-13 of the Code provides that in a prosecution for criminal sexual assault:

> "statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule." 720 ILCS 5/115-13 (West 2000).

This court has held that, "the plain language of section 115-13 evinces a legislative intent to apply this provision broadly, encompassing testimony from nurses, treating doctors, or any other medical professional that is reasonably pertinent to diagnosis or treatment where it provides details of the sexual act committed, including how, when, and where the act occurred." *People v. Freeman*, 404 Ill. App. 3d 978, 987 (2010). Moreover, when the victim's statements are primarily concerned with what happened as opposed to the identity of the offender, courts have favored the admission of the statements under the medical treatment exception. *People v. Jackson*, 203 Ill. App. 3d 1, 12-13 (1990).

¶ 16 Here, the application of section 115-13 of the Code shows that the challenged testimony falls within its scope. Nurse Olivas specifically testified that C.L. told her that:

> "[C.L.] was by a pay phone, making a call when an unknown African American male came up to her and pointed a gun to her belly and asked her if she had any money. And she told him she didn't, so he told her to get in the car and he pulled her into the car and I guess he took her, I don't know if he took her, where he took her, but he, at that point, vaginally raped her."

As found by the circuit court when it granted the State's motion to dismiss defendant's petition, nurse Olivas' testimony was admissible as an exception to the hearsay rule for purposes of medical treatment under section 115-13 of the Code. See *People v. Cassell*, 283 Ill. App. 3d 112, 125 (1996) (admitting nurse's testimony that the victim was dragged from her apartment under section 115-13 of the Code, but not allowing the admission of the identity of the alleged offender). As we find no error in the admission of Olivas' testimony, we conclude that counsel was not deficient for failing to object to its admission. *People v. Evans*, 209 Ill. 2d 194, 222 (2004).

¶ 17 In reaching this decision, we find *People v. Oehrke*, 369 Ill. App. 3d 63 (2006), *People v. Davis*, 337 Ill. App. 3d 977 (2003), and *People v. Mitchell*, 200 Ill. App. 3d 969 (1990), relied on by defendant, distinguishable from the case at bar. In these cases, this court refused to extend section 115-13 to include medical staff's testimony regarding the identity of the victim's attacker (*Oehrke*, 369 Ill. App. 3d at 70; *Davis*, 337 Ill. App. 3d at 990), and a doctor's testimony regarding statements made by the assailant before and after the attack (*Mitchell*, 200 Ill. App. 3d at 976). Here, however, the admitted statements made by C.L. to nurse Olivas did not identify defendant as the offender, and were related to the attack itself.

¶ 18 We further find that even if defense counsel should have objected to Olivas' testimony, defendant cannot show he was prejudiced by the alleged error. The evidence against defendant was substantial. C.L. identified defendant as the offender who sexually assaulted her, and the DNA evidence matched defendant. Moreover, Officer Svec observed defendant exit a vehicle that matched the description of the one used in a sexual assault. Defendant had his zipper open, and, when Svec exited the police car, defendant fled and was apprehended after a short chase. Police recovered a toy gun under the back porch of a house in the area where Svec had lost sight of defendant, corroborating C.L.'s testimony that defendant pointed a gun at her.

¶ 19 Despite this evidence, defendant maintains that he was prejudiced by Olivas' statements because they bolstered C.L.'s trial testimony, which, by itself, was unbelievable. This court previously rejected defendant's assertions that C.L. was incredible on direct appeal. We specifically held that, "C.L.'s testimony was not incredible, nor did it contain serious inconsistencies." *Brown*, No. 1-04-2990, order at 7. Because this court has already considered and rejected defendant's arguments challenging C.L.'s credibility, such arguments are barred by *res judicata*. See *People v. Simms*, 192 Ill. 2d 348, 360 (2000) (holding that a post-conviction petitioner may not avoid the bar of *res judicata* by rephrasing issues addressed on direct appeal). Moreover, the fact that the State relied on Olivas' testimony in its closing argument does not show that defendant was prejudiced. Her testimony was properly admitted at trial, and, even assuming that it was not, this case was not closely balanced. We therefore conclude that defendant's ineffective assistance of trial counsel claim fails.

¶ 20 Defendant finally alleges that appellate counsel was ineffective on direct appeal. Because we have determined that defendant's underlying claim is without merit, appellate counsel cannot be found to be ineffective for failing to raise a nonmeritorious issue. *People v. Johnson*, 183 Ill. 2d 176, 187 (1998).

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 22 Affirmed.