2014 IL App (1st) 101630-U

THIRD DIVISION
February 11, 2014

No. 1-10-1630

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. 08 CR 10049
	)	
ANTHONY NERI,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment affirmed over defendant's claims that trial counsel provided ineffective assistance, and that the evidence was insufficient to sustain his conviction.

¶ 2 Following a jury trial, the defendant, Anthony Neri, was found guilty of three counts of indecent solicitation of a child (720 ILCS 1/11-9.1(a)(1) (West 2010)) and six counts of sexual exploitation of a child (720 ILCS 1/11-6(A) (West 2010)), and sentenced to a single term of six years' imprisonment. On appeal, defendant contends that his convictions should be reversed and

his cause remanded for a new trial based on the insufficiency of the evidence, and the ineffective assistance of trial counsel.

¶ 3 The evidence adduced by the State at trial showed that about 11:30 a.m. on May 13, 2008, the fifth grade class at the Chicago Academy in Chicago was outside at recess. Some students were participating in a fitness program and walking or running around the track, while others were playing soccer on the field inside the track. A fence separated the track from the street.

¶ 4 Two fifth grade girls, K.H. and K.A., were walking on the track at that time, and observed a man standing by the fence touching his penis. K.H. identified defendant as that man, and testified that she saw his hands moving "in a circle" and "rubbing" his penis. K.A. observed that the man's hand was "rubbing *** his private part up and down[.]" K.H. felt uncomfortable, and she and K.A. wrote a note to the principal regarding what they had observed. Both girls signed the note and delivered it to the principal after class.

¶ 5 R.W., born in 1997, testified that she was walking the track with her friend, D.P. At one point, D.P. ran ahead, and R.W. saw an adult man with gray hair by the fence unzipping his pants. The man said, "I want to fuck you[,]" to her, and R.W. ran to tell her teacher.

¶ 6 D.P., who was also born in 1997, testified that he was walking laps on the track with R.W. when he saw a man standing at the fence. He identified defendant as that man, and testified that he heard him say, "Do you want to go to my house?" and "I want to fuck you" to R.W. While defendant was talking to R.W., D.P. saw him "touching himself" on "his private parts."

¶ 7 W.B. testified that he was born in 1997, and identified defendant as the offender. He observed defendant by the fence, and heard him say, "I would like to fuck all of you" and "I'm getting horny up in here[,]" to him. He also heard defendant repeat those comments a second time to S.L., and, on a third occasion, he heard defendant tell J.M. that he was getting "horny[.]" W.B. observed that defendant was wearing sweatpants, and had his hand down his pants touching his penis. Defendant then began "kind of like humping the fence[,]" rubbing his penis against the fence while thrusting his hips back and forth. W.B. called his father and reported the incident to the principal.

¶ 8 G.V., born in 1997, testified that she was walking on the track with a friend when she saw defendant standing by the fence. He heard defendant say "hi" to her, and saw that he was touching his penis. G.V. reported the incident to the principal, and later picked defendant out of a lineup at the police station.

¶ 9 D.V. testified that he was born in 1996, and was running and walking on the track with his friends, K.A., K.H., and J.M. at the time in question, when he noticed a gray-haired man with his pants below his waist and around his upper thigh area. D.V. "ignored" him and kept running.

¶ 10 S.L., born in 1997, testified that he was outside playing soccer when the ball went towards the fence that borders the field. When S.L. went to retrieve the ball, he saw a man with gray hair shaking the fence to get his attention. The man then started pulling his pants down and rubbing his "private part" against the fence, thrusting his hips back and forth. Once recess was over, S.L. asked permission to "go tell the office" what he saw.

¶ 11 J.M., testified that he was born in 1997, and was walking the track at school when he saw an older white male with white hair by the fence. He saw the man unzip his pants and move his hand as he touched his penis. J.M. stopped walking laps and told a teacher what he had observed.

¶ 12 Victor Iturralde testified that he is the principal of Chicago Academy Elementary School. On May 13, 2008, he was approached by a large number of fifth grade students, and, after speaking with them, he contacted the school's off-duty police officer and police arrived shortly thereafter.

¶ 13 Chicago police officer Magdalena Garrison testified that, about noon on May 13, 2008, she responded to a report of a sex offense involving students at Chicago Academy. She and her partner, Officer Sanchez, met Officer Jorge Gutierrez, who directed them to a home at 6042 West Cornelia on the northern border of the Chicago Academy. The officers located the residence and found defendant in the backyard. After confirming his name, address and learning that he had been at Chicago Academy, the officers brought defendant to the school and conducted a "show up" with the children who witnessed the offense. The officer subsequently brought defendant to the police station.

¶ 14 Chicago police detective Gina Rodriguez testified that she interviewed defendant at the police station. After admonishing the defendant and explaining his *Miranda* rights, he stated that about 11 or 11:30 a.m., he was standing by the fence and watching the children play soccer. A young female neighbor approached him and told him that her grandmother said "hello[.]" He

indicated that he "might have been scratching himself by his penis" and "might have said something like 'I want to screw you,'" to the children, but "he didn't recall and was sorry."

¶ 15 The State rested, and defendant called Chicago police officer Gutierrez, who testified that he is employed part-time as a security guard at the Chicago Academy. About 11:15 a.m., on the day in question, Officer Gutierrez initially observed a man, who he identified as defendant, sitting on his front porch across the street from the school, rubbing his outer garment near his genital area. Defendant then crossed the street and stood near the north side of the fence. About 11:30 a.m., Officer Gutierrez observed defendant rubbing the outside of his genital area in an up and down and back and forth motion, as students were playing outside. He saw that defendant's lips were moving, but he could not make out what he was saying. The officer continued his observations as students stopped and looked in defendant's direction. Officer Gutierrez watched defendant for approximately 10 minutes, until defendant saw him and left. The officer called 911 and reported the incident to the principal. He indicated that he did not personally arrest defendant because he was "on surveillance" and did not want to rush to judgment.

¶ 16 Defendant, who was almost 70-years-old at the time of the incident, testified that, on May, 13, 2008, he was working in his yard and sitting on the front porch of his home. He crossed the street to watch the "kids playing soccer[,]" and, while watching, he saw a young female neighbor, D.M., who approached him and told him that her grandmother said "hi[.]" Defendant was unsure of her identity, but after she explained who she was related to, defendant told her to, "Say hi to your grandmother." He did not talk to anyone else while at the fence. He returned home and police arrived about 10 minutes later.

¶ 17 Defendant stated that he was interrogated at the police station for at least three hours. During the interrogation, he told police that he may have touched himself "around" his genital area, but he meant that he may have scratched himself, and not that he was "playing with" himself. He was unsure if he had touched his genital area, and testified "I don't remember. I might have." Defendant also stated that he might have told police that he said something like "'I'd like to screw you' to the kids, but I'm sorry and I didn't mean it[.]" He could not remember, but "might have said it just because they had me in there so long[.]"

¶ 18 The jury found defendant guilty as charged. Defendant retained new counsel, and filed a written motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial. In it, defendant alleged that he was deprived of the effective assistance of trial counsel for, *inter alia*, failing to file a motion to quash arrest and suppress evidence, and failing to interview or call three occurrence witnesses and 26 character witnesses. The trial court denied defendant's motion and sentenced him to six years' imprisonment.

¶ 19 In this appeal, defendant contends that his conviction should be reversed based on the insufficiency of the evidence and the ineffective assistance of his trial counsel. We address defendant's arguments in turn.

¶ 20 In order to prove that defendant committed sexual exploitation of a child, the State was required to prove that, while in the presence of a child and with knowledge that the child would view his acts, he engaged in masturbation. 720 ILCS 1/11-6(A) (West 2010). To prove that defendant committed indecent solicitation of a child, the State was required to prove that

defendant knowingly solicited a child to perform an act of sexual penetration or sexual conduct. 720 ILCS 1/11-9.1(a)(1) (West 2010).

¶ 21 As set forth above, the State presented testimony from nine student witnesses, under the age of 13, who observed defendant standing at the fence surrounding the track and field of their school. Those witnesses described defendant's behavior there, including their observations of him rubbing his genital area and unzipping his pants. The witnesses also testified that defendant made lewd comments to them, including statements directed at R.W., that he wanted to "fuck" her, and asking her to come to his house, and statements to W.B. and S.L., that he wanted to "fuck" them, and that he was "getting horny[.]" This testimony was corroborated by Officer Gutierrez, who observed defendant walk to the fence, and begin rubbing his genital area. The officer could see the defendant's "lips were moving" as he faced the track and soccer field, but he could not hear what the defendant was saying. The State also presented evidence that defendant admitted telling police that he "might" have touched himself around his genital area, and he "might" have said something like "'I'd like to screw you'" to the children, but that he was sorry and did not mean it. Defendant admitted being at the scene of the incident, and acknowledged that he may have said the things reported to the police, but alleged that the statements resulted from the long interrogation. We find the evidence, when viewed in the light most favorable to the prosecution, was more than sufficient to establish defendant's guilt of the charged offenses.

¶ 22 Defendant disagrees, and contends that the evidence was insufficient because "there is conflicting testimony about what the man was wearing and a lack of identification by the witnesses." In so arguing, defendant points to testimony that some witnesses described

defendant as wearing jeans and unzipping his pants, whereas one witness testified that he was wearing sweatpants, which defendant points out "do not have a zipper[.]" This discrepancy, however, is minor and, as such, only affects the weight of the witnesses' testimony. *People v. Garmon*, 394 Ill. App. 3d 977, 981 (2009). Whether defendant was wearing jeans or sweatpants does not detract from the witnesses' consistent testimony regarding defendant's conduct, which established the offenses (*People v. Berland*, 74 Ill. 2d 286, 306 (1978)), and does not create a reasonable doubt of his guilt. *Garmon*, 394 Ill. App. 3d at 981.

¶ 23 As to the "lack of identification," defendant notes that R.W. and K.A. did not specifically identify him during their direct examinations at trial. The record shows, however, that defendant's identity was not at issue during the trial. Defendant was identified in court by five witnesses as the offender, and it is well established that a positive identification by even a single witness who had a sufficient opportunity to observe defendant is sufficient to support a conviction. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). Moreover, in defendant's own testimony, he acknowledged his presence during the incident, and did not claim that he was misidentified, but merely that he did not do anything inappropriate. Thus, the failure of these two witnesses to make in-court identifications does not raise a reasonable doubt of defendant's guilt. Accordingly, defendant's contrary argument fails.

¶ 24 Defendant next claims that trial counsel provided ineffective assistance. We initially note, as pointed out by the State, that defendant failed to include a copy of the report of proceedings for the hearing on his post-trial motion in which he challenged the effectiveness of trial counsel. The State argues that defendant has therefore given this court an inadequate record

to review, and, without a record of what arguments and rulings were made at the hearing on the motion, this court must presume that the court's ruling was in conformity with law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 25 Despite the incompleteness of the record on appeal, defendant did include his written post-trial motion in the record, and we also have the benefit of the record on which the claims are based. Under these circumstances, we find that defendant's failure to include the report of proceedings on the post-trial motion will not preclude our review of this case. See e.g., *Walker v. Iowa Marine Repair Corp.*, 132 Ill. App. 3d 621, 625-26 (1985).

¶ 26 Ineffective assistance of counsel claims are evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that defendant's trial counsel provided ineffective assistance, he must show that counsel's performance was so deficient that his representation fell below an objective standard of reasonableness, and that absent this deficient performance, there was a reasonable probability that the outcome of the proceeding would have been different. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). "A defendant's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim." *Palmer*, 162 Ill. 2d at 475.

¶ 27 Defendant alleges a number of ways in which trial counsel provided ineffective assistance. He first claims that counsel failed to make proper objections and file proper motions, including motions to quash arrest and suppress his statements, the show-up or the lineup. In doing so, he makes conclusory statements that the show-up was "conducted without legal authority" and that that the lineup was conducted "after an illegal arrest[,]" but does not explain

why such conclusions are appropriate. Similarly, defendant does not identify what objections counsel should have made, why such objections would have been successful, or why the failure to make them caused him prejudice. These generalities fail to meet the requirements of Supreme Court Rule 341 for presenting claims on appeal (Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008)), and thus provide no basis to sustain his assertion that trial counsel provided ineffective assistance.

¶ 28 Defendant also contends that counsel was ineffective for failing to investigate and call D.M. and two of her friends, who, he claims, were present while she was talking to him at the scene. He maintains that these witnesses would have corroborated his testimony that he was merely conversing with D.M. about her grandmother, and provided evidence that defendant "was saying nothing inappropriate and doing nothing inappropriate at the time of the alleged offense[.]" Defendant additionally asserts that counsel was ineffective for failing to call 26 character witnesses who would have testified to his reputation for being honest and law abiding.

¶ 29 We note that decisions regarding which witnesses to call and evidence to present are matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418, 432 (1999). We see no need to deviate from that rule. There is no indication in the record that D.M. and the two other named witnesses were with defendant for the entire time that he was standing at the fence, and thus, even if they were to testify as anticipated, such testimony would be insufficient to overcome the strong evidence of defendant's guilt provided by the other witnesses. Moreover, it is clearly not ineffective assistance for counsel to choose not to present the testimony of 26 witnesses who would testify to defendant's reputation, who were not witnesses to the actual incident at issue, and whose

testimony would likely carry little weight due to their close relationships with defendant. *People v. Kubat*, 114 Ill. 2d 424, 433 (1986).

¶ 30 Defendant further claims that counsel provided ineffective assistance when, after R.W. and K.A did not specifically identify him during their direct examinations, counsel referred to defendant during cross-examination as the man they saw. Relatedly, he argues that defense counsel was ineffective for failing to call R.W. in the defense case to elicit testimony that she could not identify him when viewing the photo lineup. However, as previously found, defendant placed himself at the scene of the incident, and thus, it is reasonable to assume that counsel decided not to challenge defendant's guilt as a case of misidentification, but instead, attempted to challenge the student's testimony as fabricated and exaggerated. Since identification was not at issue, counsel's strategic decisions not to call a witness to testify that she was unable to identify defendant in a line up, or to refer to defendant during cross-examination as the person the witnesses saw, does not establish ineffective assistance. This is particularly true where, as here, the witness's testimony would have had no probative value on the determination of defendant's guilt or innocence. *People v. Ashford*, 121 Ill. 2d 55, 74-75 (1988).

¶ 31 Finally, defendant contends that counsel "did not properly question" the State's witnesses for later impeachment, by "fail[ing] to exploit" discrepancies in the testimony. The only discrepancy that defendant specifically alleges should have been "exploit[ed]" was the testimony showing that one witness thought defendant was wearing sweatpants, while the others thought he was wearing jeans. "[T]he decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel."

People v. Pecoraro, 175 Ill. 2d 294, 326 (1997). As noted previously, this discrepancy is minor and does not detract from the witnesses' testimony or create doubt as to defendant's guilt of the charged offenses. Therefore, it was not ineffective for trial counsel to choose not to "exploit" that minor discrepancy.

¶ 32 In sum, defendant has failed to show that counsel's strategic decisions amount to ineffective assistance, or that his guilt was not proved beyond a reasonable doubt. Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.