

THIRD DIVISION
May 28, 2014

No. 1-11-3290

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. 09 CR 12421
)	
JAVIER CONTRERAS,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm defendant's conviction of aggravated criminal sexual abuse over his contention that his trial counsel was ineffective for failing to elicit testimony from his wife that he spoke only limited English.

¶ 2 Following the second jury trial of defendant Javier Contreras, he was convicted of aggravated criminal sexual abuse and sentenced to 180 days in jail, 36 months of probation, and, upon release, 18 months of home confinement. On appeal, defendant contends that he was denied effective assistance of trial counsel where counsel failed to elicit testimony from his wife that he spoke only limited English, which would have supported his argument that he could not

have understood the written statement he purportedly provided to police. We affirm.

¶ 3 Defendant was charged with criminal sexual abuse and aggravated criminal sexual abuse, stemming from an incident where he allegedly touched the minor E.M.'s vagina over her clothing on or about June 14, 2009. Defendant's first jury trial resulted in a mistrial when the jury was unable to reach a unanimous verdict.

¶ 4 During the opening arguments of defendant's second jury trial, defense counsel stated that this case was about vengeance and that E.M.'s father, Bayron Najera, had gotten angry at defendant regarding an earlier incident and attacked him. Counsel noted that this attack was the reason the police were called, and not child molestation. Counsel further argued that the State would attempt to "trick" the jury into believing that defendant spoke English.

¶ 5 At trial, E.M. testified that on June 13, 2009, she went to her grandmother's house at 3419 North Neva Avenue in Chicago between 3 and 4 p.m. to celebrate her cousin's birthday. E.M.'s grandmother, Laura Contreras, was married to defendant. Later in the evening, E.M. went to sleep on the couch in her grandmother's living room. She was woken by defendant's hand, which was touching her vagina over her clothing for about 30 seconds. E.M. went outside to find her mother and started to cry, telling her mother in Spanish that defendant had touched her "bad stuff." E.M. explained that, similarly to her father and defendant, she spoke English and Spanish. She spoke Spanish to her mother and English to defendant. E.M.'s mother then told Bayron what had happened, and he punched defendant. The police arrived later and asked E.M. what defendant did to her and she told them. E.M. was taken to the hospital where a doctor examined her. The parties subsequently stipulated that on a prior occasion E.M. saw defendant arguing with her grandmother.

¶ 6 E.M.'s mother, Karla Najera, testified substantially similar to E.M. She further testified that about an hour before E.M. returned outside and stated that defendant had touched her, she saw her mother, Laura Contreras, and defendant arguing in the dining room. Karla could not hear what they were saying, but she saw defendant raise his hand as if to hit Laura.

¶ 7 Detective Tannia Franchini testified that she interviewed defendant on June 15, 2009, and, although she informed him that she spoke Spanish, defendant indicated that he preferred to speak in English. Defendant told her that he had been drinking on the day of the party, went to sleep at 10 p.m., and when he awoke he saw E.M. sleeping on the living room sofa. Defendant admitted to touching E.M.'s leg and "panocha," a Spanish term for vagina. Defendant elaborated that he touched E.M.'s vagina with his hands over her clothes and when she got up to tell her mother, he touched her "nalgas," a Spanish term for "butt cheeks." Defendant stated that he was sorry and knew it was not right to touch children. Other than the Spanish slang terms defendant used, the rest of the statement was made in English. After defendant indicated he was willing to talk to an assistant State's Attorney (ASA), Franchini notified felony review and ASA Kari Mason arrived and spoke with defendant in Franchini's presence. Franchini explained that had defendant wanted to speak to ASA Mason in Spanish, she could have served as an interpreter. However, there was no need to do so because defendant spoke English.

¶ 8 ASA Mason testified that she introduced herself to defendant and initially wanted to ascertain if he spoke English well enough to talk to her, or whether she needed Detective Franchini to translate. Defendant, however, understood what she was saying in English, and when Mason advised him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), he indicated that he understood. Defendant spoke to her in English and never indicated any hesitation in his ability to understand her questions. Following their conversation, defendant

indicated that he wanted his statement written down, and Mason typed a summary of what defendant told her. Defendant's statement, which was substantially similar to the oral statement he gave Franchini, was admitted into evidence and read to the jury. The written statement indicated that defendant understood and spoke English, and that he preferred to give his statement in English. After defendant completed his statement, Mason read it out loud to him, allowing him to make any necessary corrections. Defendant signed each page and then Mason typed out an addendum stating,

"[Defendant] states that he could speak and moderately read English, but write very little English, and did not have his reading glasses with him to read the statement. [Defendant] states that he listened as [ASA] Keri Mason read the statement out loud to him. [Defendant] states that he listened to [ASA] Mason read the statement, he stopped her if he said anything that was not correct. [Defendant] states that any time he had to stop [ASA] Mason, he told her what was not correct and watched her make the correction he pointed out. [Defendant] states that each time a correction was made he put his initials by the change if he wanted and that he signed the bottom of each page to show that it is accurate. [Defendant] states that everything contained in this statement is true and correct."

¶ 9 Barry Cohen, the director of human resources for the company at which defendant worked as a machine operator, testified that he spoke to defendant on two occasions in the months preceding the trial. One of the conversations was face-to-face and the other was over the phone, and both were in English. Because defendant missed a lot of work in June of 2011, he and his manager entered Cohen's office, and, during the 15-minute conversation, they spoke entirely in English. Cohen had no trouble understanding defendant, and defendant never requested an interpreter.

¶ 10 Officer Cvetkovic testified on behalf of defendant that he was called to the scene around midnight on June 13, 2009, in response to a battery in progress. Cvetkovic spoke to E.M. who

told him that defendant had touched her inappropriately. E.M.'s parents also told him that defendant touched E.M.'s buttocks and vagina, and that she had been touched down the front of her pants. Bayron also mentioned an earlier confrontation between him and defendant.

¶ 11 Laura Contreras, defendant's wife, testified through an interpreter that she lived at the subject address with defendant, to whom she had been married for six years, and that on June 13, 2009, they were celebrating her grandson's birthday at her house. Her daughter Karla Najera, and granddaughter, E.M., arrived around 4 p.m, and Bayron Najera, Karla's husband, arrived around 6 p.m. Defendant had been drinking since 8 a.m. that day and went to bed by 7 p.m. E.M. came into the house between 9:30 p.m. and 10 p.m. because she was tired, and Laura took her to the sofa in the living room.

¶ 12 Around 11:30 p.m., Laura testified that she told Karla to take E.M. home after E.M. came out to the porch and indicated she was tired. Laura went inside and laid down with defendant. She then got up to go to the bathroom when Bayron came into the bathroom and said he needed to use it. At that time, defendant got up and asked Bayron what he was doing, and Laura opened the basement door so Bayron could use the bathroom in the basement. Bayron responded to defendant that he could go wherever he wanted. Laura and defendant went into the kitchen where defendant said something to her regarding her being in the bathroom with Bayron. Defendant raised his hand as if to hit Laura, which Karla observed. Defendant then went outside and told everyone to leave because it was late. As they were all cleaning up, Bayron came outside and hit defendant. Laura testified that defendant was not alone with E.M. on the night in question.

¶ 13 During closing argument, defense counsel argued that defendant's English was not sufficient for him to have made the incriminating statement, and that E.M. and Karla had lied

about defendant touching E.M. to ensure that Bayron avoided any trouble for attacking defendant. In rebuttal, the State argued that no one, including Laura, had testified during the trial that defendant had a limited understanding of English. Following closing arguments, the jury found defendant guilty of aggravated criminal sexual abuse.

¶ 14 Defendant filed a motion for a new trial, arguing that the evidence was insufficient to convict him. Defense counsel specifically argued that the statement containing defendant's confession was not made by defendant because he had only a limited ability to speak and understand English. The court denied defendant's motion, and sentenced him to 180 days in prison, 36 months of probation, and 18 months of home confinement following his release.

¶ 15 On appeal, defendant contends that he was denied effective assistance of counsel because his trial counsel failed to elicit testimony from his wife, Laura Contreras, regarding his limited command of the English language. In so arguing, defendant maintains that had counsel done so, the jury would have concluded that he could not have understood the inculpatory statement he made and would have acquitted him.

¶ 16 In order to establish ineffective assistance of counsel, defendant must allege facts which demonstrate that counsel's representation fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *People v. Enis*, 194 Ill. 2d 361, 376 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Enis*, 194 Ill. 2d at 377, citing *Strickland*, 466 U.S. at 697. "If it is easier, a court may proceed directly to the second prong of *Strickland* and dismiss an ineffective assistance claim on the ground that it lacks sufficient prejudice, without first determining whether counsel's performance was deficient." *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 70. Prejudice is demonstrated where the

defendant shows a reasonable probability that, absent counsel's alleged error, the trial's outcome would have been different. *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 17 Here, defense counsel's decision not to elicit testimony from Laura Contreras that defendant had a limited command of the English language was not so prejudicial to defendant's case that it could have changed the outcome of the trial. This is particularly true in light of the overwhelming evidence adduced at trial demonstrating that defendant understood and spoke English. E.M. testified that although she spoke both Spanish and English, she spoke English to defendant. Detective Franchini testified that she interviewed defendant on June 15, 2009, and, although she informed him that she spoke Spanish, defendant indicated that he preferred to speak in English. Defendant then proceeded to make an oral confession to Franchini entirely in English, except for the couple of Spanish slang terms that he used describing E.M.'s vagina and buttocks. When defendant agreed to speak to ASA Mason, Franchini explained that had defendant wanted to speak to Mason in Spanish, she could have served as an interpreter. However, there was no need to do so because defendant spoke English. Moreover, Barry Cohen, defendant's employer testified that defendant spoke and understood English. The above witness testimony shows that defendant spoke and understood English, thus corroborating the State's argument that defendant understood the subject written statement.

¶ 18 Additionally, the circumstances surrounding the statement itself further reveal that defendant understood what was written. After acknowledging that he understood his *Miranda* rights, defendant proceeded to provide a statement in English to ASA Mason, who summarized it in writing. Defendant spoke to Mason in English and never indicated any hesitation in his ability to understand her questions. In fact, the written statement indicated that he preferred to give his statement in English. After defendant completed his statement, Mason read it out loud to him,

allowing him to make any necessary corrections. Defendant signed each page of the statement and then Mason typed out an addendum reiterating that defendant could speak and moderately read English. Therefore, there is no reasonable probability that the result at trial would have been different had defendant's wife testified that he spoke only limited English, and, in turn, defendant's claim that he could not have understood the written statement fails to satisfy *Strickland's* prejudice requirement.

¶ 19 In reaching this conclusion, we find unpersuasive defendant's argument that his wife's testimony that he spoke limited English would have changed the result at trial because, at his first trial, she did so testify, and the result was a hung jury. Contrary to defendant's assertions, the fact that the first trial resulted in a hung jury does not establish that Laura's testimony was the reason why the first jury was unable to reach a verdict. As the State points out, any speculation as to why the first jury was hung would be pure conjecture. See *People v. Jones*, 323 Ill. App. 3d 451, 458 (2001) (rejecting the defendant's argument that it was unreasonable for counsel not to call a witness at his second jury trial who testified at his first trial, which resulted in a hung jury, where it was speculative that the witness' testimony alone caused the hung jury).

Moreover, the fact that the prior trial ended in a hung jury necessarily means that although some jurors found reasonable doubt, other jurors believed defendant had been proven guilty at trial.

¶ 20 We also find that *People v. Sutherland*, 194 Ill. 2d 289 (2000), relied on by defendant, is distinguishable from the case at bar. In *Sutherland*, the defendant was found guilty of aggravated kidnapping, aggravated criminal sexual assault, and murder, based in part on physical evidence showing that tire prints discovered near the victim's body corresponded with the tread of a tire found on the defendant's car and that a shoe impression found on the victim's back matched the boots found in the defendant's possession. *Id.* at 291-92. Subsequently, at a post-

conviction evidentiary hearing, testimony established that trial counsel was aware that the defendant had put the matching tire on his car after the offense occurred, and that he purchased boots with the matching tread two months after the crime occurred. *Id.* at 293-94. Trial counsel acknowledged that he was aware of this evidence, but never investigated or presented it at trial. *Id.* at 296. The supreme court reversed the defendant's conviction, holding that trial counsel was ineffective for failing to investigate and present evidence concerning the boots and tires, and that such deficient performance caused him substantial prejudice. *Id.* at 298-99. Unlike *Sutherland*, however, defendant in this case was not prejudiced by counsel's decision not to present evidence from Laura that he spoke limited English. As stated above, the evidence overwhelmingly showed that defendant spoke and understood English, and there is no reasonable probability that any testimony presented by his wife to the contrary would have changed the result at trial.

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

¶ 22 Affirmed.