2019 IL App (1st) 180472-U

No. 1-18-0472

Order filed on September 3, 2019.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 20890
	)	
CHRISTOPHER LINDERMAN,	)	The Honorable
	)	Pamela M. Leeming,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Coghlan concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for criminal sexual assault of a family member is affirmed over his contentions that evidence was insufficient and that he was denied the effective assistance of counsel.

¶ 2 Following a bench trial, defendant Christopher Linderman was found guilty of criminal sexual assault of a family member and sentenced to four years in prison. On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt because the victim's testimony

was incredible and there was no physical evidence to corroborate her testimony. He further contends that he was denied the effective assistance of counsel when counsel failed to present a defense theory at trial and to subject the State's case to meaningful adversarial testing. We affirm.

¶ 3 Following his arrest, defendant was charged with two counts of criminal sexual assault of a family member (720 ILCS 5/11-1.20(a)(3) (West 2014)), and six counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(b), (d) (West 2014)).

¶ 4 Prior to trial, the defense filed a motion in *limine* seeking, *inter alia*, to bar evidence of "any other bad acts or crimes alleged committed by the Defendant that do not form the basis of the charges pending." The trial court granted the motion.

¶ 5 S.L., who was 17 years old at the time of trial, testified that on November 25, 2015, she was at her "dad's house." The parties stipulated to an in-court identification of defendant as her "dad." It was the day before Thanksgiving. S.L., her brother J.L., and defendant were present in the home. After they had dinner and watched television, S.L. went to her bedroom and began to watch television there. J.L. was in the living room playing the "Xbox." She was wearing a long-sleeved shirt and underwear. At one point, defendant entered the room, sat down next to her and started to rub her back "because that was like a normal thing." S.L. turned over so that she was facing the wall, and defendant lifted up her shirt to rub her back with his hand. This was a "ritual" between them.

¶ 6 That night, defendant "started" with S.L.'s back, and then touched her "stomach area" and breast in a "circular motion." She was not wearing a bra. After two or three more "times," defendant went below S.L.'s "waist area" and his hand touched her vagina. First, "it was over the underwear, and then it graduated to under the underwear, and then all the way, and then

penetration." Defendant put one and then two fingers inside S.L.'s vagina. Defendant then went "back up" S.L.'s stomach, then "back down" and moved his hand to her "butt" under her underwear. Defendant next "came back up" to her stomach. When he went back down under her underwear, he "pulled them down a little bit." Defendant then "went back to putting his fingers back in [S.L.] again." When her underwear was back up, defendant pressed his body up against her. He was not wearing a shirt. S.L. felt his "hard" penis and heard him "breathing heavy." Defendant had a hand on S.L.'s waist and was "like holding [her] vagina to keep [her] up against his body." There was a noise and defendant left the room. S.L. texted her best friend and told her what had happened.

¶ 7 S.L. then received a text from her mother. She told her mother what happened and they "came up with a plan" to get S.L. out of the house. Ten minutes later, defendant entered S.L.'s bedroom, asked if she was "okay" and told her "not to tell mom and to keep it between us." S.L got "frustrated" and did not want to talk to defendant, so she told him to leave her room. When defendant did not leave, she "ended up kicking him a couple times" and he eventually left. S.L. got dressed and left with her mother. She did not discuss what happened because she was crying "too much" and hugging her mother. S.L. and her mother then went home and called the police. She later went to a police station and told officers what happened, and then went to a hospital. On the way to the hospital, S.L. and her mother picked J.L. up from defendant's home. At the hospital, a "rape kit" was administered. S.L. had not showered, gone to the bathroom or changed her clothes.

¶ 8 During cross-examination, S.L. testified that she was 15 years old on November 25, 2015, and her brother was 11 years old. She had sprained her right ankle the day before playing basketball. When she asked defendant whether she could attend her team's basketball game on

the evening of the incident, he said no. Defense counsel asked whether she was upset and S.L. answered, "No, I was injured." Defense counsel then asked whether she remembered testifying in April 2015 at a civil order of protection hearing and whether she remembered being asked if she was upset with defendant regarding not being able to play in the basketball game. She remembered, and testified that she was not upset with defendant; rather, she was "a little upset" that she could not go to the game and support her team.

¶ 9 Her bedroom at defendant's home was off the living room. The door was open that evening. In November 2015, defendant was planning to move closer to S.L. and she was happy about that. S.L. testified that defendant had scratched or rubbed her back more than a "thousand" times and that it helped her to fall asleep. Defense counsel then asked whether, during these previous "thousands of times," defendant ever touched her inappropriately. The State objected and the trial court overruled the objection. S.L. answered "one other time." She testified that this prior incident took place "at the Dells in the summer," and that she did not talk to her mother about it because "we were all tired ***, and he did it once." She thought defendant touching her upper body was an accident. She did not tell the police about this incident, which occurred a year prior, because she did not think it was relevant.

¶ 10 On November 25, 2015, defendant rubbed her back for around 25 minutes before the touching became "inappropriate," and defendant touched her inappropriately for 10 to 15 minutes. She estimated that defendant touched her breasts for five minutes. He inserted his fingers into her vagina two separate times. Defendant was in her room for 1½ hours total. Her brother was in the living room playing video games and did not come into her bedroom. The first time defendant entered her bedroom he was wearing clothes. The second time that defendant

entered her room, after leaving to check on J.L., defendant "just had underwear on." S.L. described the underwear as briefs and agreed that the underwear looked like short pants.

¶ 11 During re-direct, S.L. clarified that the first time defendant entered her room, it was a "shorter period of time," and it was during the second time defendant entered her room that he touched her inappropriately. The second time defendant entered her room, defendant was shirtless and wearing underwear that she described as "loose" but "not really tight."

¶ 12 J.L., S.L.'s brother and defendant's son, testified that he played video games in the living room while S.L. and defendant went to their rooms. Later, defendant went to S.L.'s room and "gave her a back scratch like usual." Defendant was in her room for "[p]robably half an hour to an hour." J.L. was "pretty sure" that defendant as wearing a t-shirt and shorts but was not "a hundred percent sure." J.L. was in defendant's room watching television when he observed defendant exit S.L.'s room. Defendant entered the room and went to sleep. However, 20 minutes later, defendant woke up and started pacing in the hallway. This was unusual. Defendant walked for 5 to 10 minutes and then came back into the room. Around half an hour later, their mother came to pick S.L. up.

¶ 13 At one point, while defendant was scratching S.L.'s back, J.L. went into her room. Defendant was "like laying next" to S.L. and was "kind of asleep, kind of not, still scratching her back." He also went into her room when their mother arrived. S.L. was holding her stomach because she was unwell and wanted to go home with their mother.

¶ 14 The parties stipulated that Dr. Conor Schaye would testify that he examined S.L. on November 26, 2015, that a criminal sexual assault kit was collected, and that there were no visible signs of traumatic injury anywhere on S.L.'s body. A nurse collected swabs from S.L.'s vagina, anus, and "abdomen and trunk area." Dr. Schaye would further testify that S.L. stated

that while she was at her father's house, her father came into her room in his underwear and began rubbing her back and that at one point, he pulled down her underwear and inserted one, and possibly multiple fingers, into her vagina. He would also testify that S.L. stated that her father left the room when her brother made a noise, that she immediately texted a friend, and that this friend texted S.L.'s mother, resulting in her mother picking her up from her father's house.

¶ 15 The parties further stipulated that a buccal swab was taken from defendant. The parties next stipulated that forensic scientists would testify that no semen was identified in S.L.'s criminal sexual assault kit and that a "mixture" of DNA was identified in the swab from S.L.'s abdomen and trunk area. This DNA sample was "profiled at 24 distinct loci"; it contained S.L.'s DNA and "[a] minor DNA type was identified from this mixture at one of the 24 loci examined from which [defendant] cannot be excluded." Specifically, "one in two black, one in five white, or one in four Hispanic unrelated individuals cannot be excluded from having contributed to this DNA type." The State rested and the defense moved for a directed finding. The trial court denied the motion.

¶ 16 Defendant then testified that he was divorced and shared custody of S.L. and J.L. On November 25, 2015, when he picked up the children from his ex-wife's home, S.L. was on crutches and wearing a soft boot. As they drove, S.L. stated that she had a basketball game. Defendant told her she could not go because she was injured and because he had to pack in order to move to a new house. S.L. was "very upset" and yelled at him. Later, after dinner, S.L. told defendant that her stomach hurt and went to her bedroom. Twenty to thirty minutes later, S.L. asked defendant to scratch her back. When he entered S.L.'s room, defendant was wearing a t-shirt and gym shorts. S.L. was on the bed facing the television, so defendant sat down at the foot of her bed and started scratching her back. Defendant scratched S.L. under her shirt, as he

usually did. He explained that if he scratched her over her shirt, she complained that she could not feel it.

¶ 17 That evening, S.L. was wearing a long-sleeved shirt and had the bedcovers up to her waist. Defendant did not get under the covers and did not lie down next to her. He was in S.L.'s bedroom for 40 to 45 minutes. He did not touch S.L.'s breasts, buttocks, or vagina, and J.L. did not enter the room. After 45 minutes, he told S.L. he was tired, kissed her on the head and went to bed. When he left S.L.'s room, J.L. was still playing a video game. However, when defendant said he was going to bed, J.L. turned off the game and went with him. He explained that J.L. slept in his bed because J.L.'s bed was covered in toys. Defendant then fell asleep.

¶ 18 Defendant woke up when he received a text message from his ex-wife stating that she was coming to pick up S.L. Defendant then went to check on S.L. When he asked whether she was okay, S.L. stated that her stomach hurt. Defendant said he would tell S.L. when her mother arrived and then went back to sleep. Around 20 minutes later, he woke up to another text from his ex-wife and went to tell S.L. that her mother had arrived. When he told S.L., she did not say anything, did not look upset, and did not kick him. After S.L left, defendant went back to sleep. He was woken up a third time by a text from his ex-wife that she was coming to get J.L. J.L. had been asleep the whole time and defendant did not wake J.L. up until he received a text that his ex-wife was outside. He walked out with J.L. and asked his ex-wife whether something was wrong. She answered no, and that she just needed to pick up J.L. Defendant "le[ft] it at that" and went back to bed. He realized something was wrong when the police came to his place of work Monday morning. He accompanied officers to a police station and was eventually arrested. Defendant denied ever touching either S.L. or J.L. inappropriately.

¶ 19 During cross-examination, defendant agreed that the discussion regarding the basketball game "didn't go beyond the car." Defendant testified that to his knowledge, J.L. never woke up. J.L. did not come into the room while defendant was rubbing S.L.'s back. Defendant did not question the fact that S.L. was sick because she stated that she had a "stomachache," which was a "code word for her having her period." S.L. did not like to stay with him when she had her period. Other than "[n]ormal teenage daughter stuff," defendant "would say" S.L. was a good daughter.

¶ 20 The trial court found defendant guilty of both counts of criminal sexual assault of a family member and two counts of aggravated criminal sexual abuse. The court found defendant not guilty of the remaining four counts of aggravated criminal sexual abuse. When making its guilty finding, the court stated that S.L. was a credible witness. Defendant then filed a motion for reconsideration or a new trial. After hearing argument on the motion, the trial court vacated its guilty findings as to one count of criminal sexual assault and all of its guilty findings as to aggravated criminal sexual abuse.[1] The trial court then sentenced defendant to four years in prison for criminal sexual assault. Defendant filed a motion to reconsider sentence, which the trial court denied.

¶ 21 On appeal, defendant first contends that he was not proven guilty beyond a reasonable doubt when S.L.'s testimony was incredible and unsupported by any DNA evidence. Defendant further argues that the trial court relied on "inaccurate" DNA evidence in finding him guilty.

[1]The report of proceedings from defendant's posttrial motion reveals that when the trial court asked whether it found defendant guilty of count III (aggravated criminal sexual abuse), the State responded in the negative, and the court then stated that it had found defendant guilty of criminal sexual assault (counts I and II), and not guilty as to all other counts. The half-sheet, however, states that the court's guilty findings as to "Ct 2" and "Ct 3 & 4" were vacated.

¶ 22 When a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. All reasonable inferences from the record must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. It is the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Brown*, 2013 IL 114196, ¶ 48. A reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. *Id*. A defendant's conviction will not be overturned unless the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of his guilt. *Id.*

¶ 23 In this case, to sustain a conviction for criminal sexual assault of a family member, the State needed to prove beyond reasonable doubt that defendant committed an act of sexual penetration against a family member under age 18. See 720 ILCS 5/11-1.20(a)(3) (West 2014). Defendant only contests whether the act of sexual penetration was proven beyond a reasonable doubt.

¶ 24 In the case at bar, defendant was found guilty of digitally penetrating S.L.'s vagina. At trial, S.L. testified that defendant penetrated her vagina with his fingers. She further testified that defendant pressed his body against her, she felt his "hard" penis, and she heard his heavy breathing. S.L. also testified that she immediately texted her best friend and told her what happened. She also told her mother and made plans to leave defendant's house. Once S.L. and her mother were home, they called the police. Although defendant testified that he sat at the foot of the bed to rub S.L.'s back, J.L. testified that when he went into S.L.'s room, defendant was

"laying" next to S.L. The parties also stipulated that Dr. Schaye would testify that S.L. stated that her father inserted one, possibly multiple, fingers into her vagina. Although defendant denied touching S.L.'s vagina, the trial court expressly found S.L. to be credible, and, as evidenced by its guilty finding, defendant to be incredible. We will not substitute our judgment for that of the trial court on the issue of witness credibility. See *Brown*, 2013 IL 114196, ¶ 48.

¶ 25 Defendant, however, argues that S.L.'s testimony was incredible as there was no physical evidence to support her testimony. He notes that were no signs of "traumatic injury" to S.L.'s body, and that neither semen nor a "definitive DNA profile" were recovered. However, it is well established that the lack of an injury does not disprove sexual assault. See, *e.g.*, *People v. Davis*, 260 Ill. App. 3d 176, 189 (1994); *People v. Fryer*, 247 Ill. App. 3d 1051, 1058 (1993). Moreover, there was no testimony that defendant ejaculated during the incident. Finally, although defendant could not be excluded from having contributed to the DNA mixture recovered from S.L.'s stomach and trunk area, it was undisputed in this case that defendant rubbed and scratched S.L.'s back.

¶ 26 To the extent defendant argues that S.L. was not credible because she admitted she was upset with defendant because he did not permit her to go to a basketball game, and it was not "credible" that defendant would touch S.L. when J.L. was "steps away" playing a video game, we disagree. Although defendant testified that S.L. was "very upset" that she could not go to the basketball game, S.L. testified that she was not upset with defendant; rather she was upset at the situation, that is, she was injured. Moreover, defendant's conclusion that it was fantastical that this incident would occur while J.L. was nearby ignores the facts that J.L. testified that it was "usual" for defendant to go into S.L.'s room and scratch her back, and that J.L. was an 11-year-

old boy playing a video game. S.L. also testified that defendant left her room immediately upon hearing J.L. make a noise.

¶ 27 Defendant further contends that the evidence was insufficient to sustain his conviction because the State presented "incomplete and inaccurate" DNA evidence at trial. In particular, defendant argues that because he "could not be excluded" as a match for a minor DNA type identified at just one of the 24 loci, "the failure of the minor DNA type to be identified at any of the remaining 23 loci" effectively excluded him as the source of the DNA. Furthermore, because the stipulation did not reference "any database population" or "provide a statistical analysis" to explain what it means, defendant submits that the stipulation "does not make sense." He posits that because of the incomplete nature of the facts, the conclusions reached by the forensic scientists, namely that defendant could not be excluded as the source of the DNA, are unreliable and that the trial court therefore erred when it relied on this evidence to find him guilty.

¶ 28 Defendant did not object to the DNA evidence at trial, and consequently, has forfeited this argument on appeal. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve alleged error for review, the defendant must both object at trial and include the alleged error in a posttrial motion). Moreover, defendant does not argue for plain error review such that this court may reach the merits of his claim on appeal. See *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010) (a defendant's failure to argue for plain error review forfeits such review). As defendant neither preserved this claim for review, nor argued plain error on appeal to save it, it is therefore waived.

¶ 29 Notwithstanding defendant's waiver, the record reveals that all DNA evidence was entered through the stipulated testimony of the State's witnesses. " 'A stipulation is conclusive as to all matters necessarily included in it,' [citation] and '[n]o proof of stipulated facts is necessary, since the stipulation is substituted for proof and dispenses with the need for evidence' [citation]."

People v. Woods, 214 Ill. 2d 455, 469 (2005) (quoting 34 Ill. L. & Prac. *Stipulations* §§ 8, 9 (2001)). "Generally speaking, a defendant is precluded from attacking or otherwise contradicting any facts to which he or she stipulated." *Id.* Although the trial court properly considered the DNA evidence as admitted through the stipulations of the State's scientific witnesses, we cannot agree with defendant's assertion that the outcome of the case rested upon that evidence. Moreover, as discussed above, this case did not rest upon physical evidence, as it was undisputed that defendant was present in S.L.'s room and that he rubbed her bare back.

¶ 30 Essentially, defendant asks this court to reweigh the evidence presented at trial in his favor and substitute our judgment for that of the trier of fact. This we cannot do. See *People v. Abdullah*, 220 Ill. App. 3d 687, 693 (1991) ("A reviewing court has neither the duty nor the privilege to substitute its judgment for that of the trier of fact."). It is the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh evidence, and to draw reasonable inferences therefrom. *Brown*, 2013 IL 114196, ¶ 48. In doing so, the trier of fact is not required to disregard the inferences that flow from the evidence or search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *People v. Newton*, 2018 IL 122958, ¶ 24. In the case at bar, the trial court found S.L. to be credible; we will not reverse a conviction simply because a defendant claims that a witness was not credible. *People v. Evans*, 209 Ill. 2d 194, 211-12 (2004). A defendant's conviction will be overturned only if the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of his guilt (*Brown*, 2013 IL 114196, ¶ 48); this is not one of those cases. We therefore affirm defendant's conviction.

¶ 31 Defendant next contends that he was denied the effective assistance of counsel when trial counsel elicited "extremely prejudicial other crimes evidence," and failed to have defendant deny

this other crimes evidence. He further argues that trial counsel stipulated to the State's DNA reports, failed to challenge those reports or cross-examine the State's witnesses, failed to investigate the accuracy of the reports, and failed to present an expert who would rebut the State's DNA evidence. Defendant finally contends that counsel failed to present a theory of the defense and to put the State's case to meaningful adversarial testing.

¶ 32 Ineffective assistance of counsel claims are governed by the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant raising a *Strickland* claim "must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Id*. at 687. This court is highly deferential of trial counsel's performance. *People v. McGath*, 2017 IL App (4th) 150608, ¶ 38. We use this deferential standard because "[t]here are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689.

¶ 33 Defendant first contends that counsel erred when, during cross-examination of S.L., counsel elicited "other crimes evidence" and then failed to mitigate that evidence.

¶ 34 "The decision of whether and how to conduct a cross-examination is generally a matter of trial strategy, which cannot support a claim of ineffective assistance of counsel." *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 34. The manner in which to cross-examine a particular witness involves the exercise of professional judgment, entitled to substantial deference from a reviewing court. *People v. Pecoraro*, 175 Ill. 2d 294, 326-27 (1997). A defendant can only prevail on a claim of ineffective assistance of counsel by showing that counsel's approach to cross-examination was objectively unreasonable. *Id*. at 327.

¶ 35 In the case at bar, the defense theory was that no inappropriate touching took place and, therefore, S.L. was not credible. In cross-examining S.L., trial counsel asked whether she was upset with defendant because he did not allow her to attend a basketball game. When S.L.

answered that she was injured, counsel then attempted to impeach her by asking whether she remembered previously being asked whether she was upset with defendant. S.L. answered that she remembered, but that she was not upset with defendant; rather, she was upset that she could not attend the game and support her team. Counsel then asked whether, during the "thousands" of previous times that defendant scratched her back, defendant had ever touched her inappropriately. She answered "one other time," and then explained that a year prior defendant had touched her upper body. Upon further questioning, S.L. testified that she believed the prior touch was an accident and that she did not tell either her mother or the police.

¶ 36 Clearly, trial counsel was attempting to emphasize the fact that the November 2015 incident was singular in the context of defendant and S.L.'s relationship. The mere fact that counsel's strategy was unsuccessful, however, does not mean that counsel was deficient. A strategy must be more than unsuccessful to support a *Strickland* claim, it "must appear irrational and unreasonable in light of the circumstances that defense counsel confronted at the time." *People v. Faulkner*, 292 Ill. App. 3d 391, 394 (1997). Here, it was not irrational for counsel to attempt to attack S.L.'s credibility by establishing that no similar incident had occurred. Moreover, it is not clear that this cross-examination prejudiced defendant, as S.L.'s testimony revealed that she had not told anyone about the prior incident because she thought it was an accident and did not think it was "relevant." Also contrary to defendant's argument on appeal, counsel did elicit a denial from defendant, as defendant denied touching S.L.'s vagina on November 25, 2015, or ever touching either S.L. or J.L. inappropriately.

¶ 37 Defendant further contends that he was denied the effective assistance of counsel because counsel agreed to stipulate to the testimony of the State's witnesses regarding the DNA tests. He

argues that counsel "blindly stipulated" when counsel should have challenged the accuracy of the State's witnesses' conclusions and called defense experts to rebut the State's witnesses.

¶ 38 However, defendant has not overcome the presumption that counsel's decision to stipulate to the testimony of the State's scientific witnesses was sound trial strategy. Here, there was no dispute that defendant and S.L. were in her bedroom together, that defendant scratched her back, or that back scratching was a "ritual" between them. In other words, identity was not an issue and defendant's testimony was largely consistent with that of S.L. up to the point of the "inappropriate" touching. As discussed above, the defense's theory of the case was that S.L. was not a credible witness and that the alleged vaginal penetration never took place. Counsel could have believed that because the case rested on the credibility of S.L. and defendant rather than physical evidence, it would be more expedient to stipulate to the State's scientific witnesses. This is especially true when the stipulations, taken as a whole, established that S.L. had no injuries to her body or vagina, no semen was recovered, and the only DNA recovered was from S.L.'s stomach and trunk area. In other words, no physical evidence directly corroborated S.L.'s testimony regarding penetration. Even if this strategy appears in retrospect to be erroneous, this would not render counsel's representation constitutionally deficient. *People v. Palme*r, 162 Ill. 2d 465, 479-80 (1994) (an error in trial strategy does not establish incompetence, and trial performance should not be "judged by a hindsight perspective").

¶ 39 Finally, we are unpersuaded by defendant's argument that counsel failed to present a theory of the defense or to subject the State's case to meaningful adversarial testing merely because counsel agreed to stipulate to the testimony of certain State's witnesses.

¶ 40 Counsel cross-examined S.L. and J.L., and presented the testimony of defendant. While defendant argues on appeal that counsel could have presented additional witnesses to rebut "the

type of person that S.L. depicted him to be," the record reveals that during cross-examination counsel elicited that S.L. was happy that defendant was planning to move closer to her in 2015, and that S.L. and defendant had a close relationship, *i.e.*, evidence regarding their bedtime "ritual." Counsel also questioned S.L. about whether she was upset with defendant about the basketball game, and on direct examination of defendant elicited that S.L. was "very upset" about the basketball game. Counsel's questioning of defendant elicited a denial regarding the November 2015 vaginal touching and an assertion that he had never touched the children inappropriately. Counsel further elicited that defendant thought S.L. left because she was menstruating, and that he had no idea that anything was wrong until police visited him at work. Thus, the record reveals that defense counsel presented a defense theory that the inappropriate touching never occurred. Accordingly, we reject defendant's argument that he was denied the effective assistance of counsel.

¶ 41 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 42 Affirmed.