2014 IL App (2d) 121106-U
No. 2-12-1106
Order filed March 28, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-366
ADRIAN RAMIREZ-ALCANTAR,	)	Honorable David R. Akemann,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was not ineffective for eliciting evidence that tended to inculpate defendant on a lesser charge: counsel's decision was reasonably strategic, as the evidence tended to exculpate him on the more serious charges.

¶ 2 Defendant, Adrian Ramirez-Alcantar, appeals after his convictions of two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2000)) and one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2000)), asking us to reverse his conviction of aggravated criminal sexual abuse only. He asserts that defense counsel was ineffective in that counsel elicited evidence necessary to his conviction of the count at issue.

We hold that counsel's decision falls within the presumption that such choices are reasonable trial strategy. Although the evidence was inculpatory as to the charge of aggravated criminal sexual abuse, it was exculpatory as to the more serious charges of predatory criminal sexual assault of a child. This placed counsel in a dilemma so that either path was reasonable. We therefore affirm defendant's conviction of aggravated criminal sexual abuse.

¶ 3 I. BACKGROUND

¶ 4 On June 11, 2011, a grand jury indicted defendant on two counts of predatory criminal sexual assault of a child (penis penetrating sex organ of victim) and two counts of aggravated criminal sexual abuse (defendant's hand on victim's sex organ, defendant placed victim's hand on defendant's penis). The victim in all counts was M.R., who was approximately five years old at the time of the offenses; the indictment stated that the offenses occurred at some time between May 12, 2000, and May 12, 2002.

¶ 5 M.R. was 16 years old at the time of defendant's bench trial. She was then the oldest of three children and was five years older than the next child, her sister Miriam. During the summer after she turned five, she was living in North Aurora in a one-story house. Two of her father's adult cousins, known as Eduardo and "Fernando" (her name for defendant, for whom her family usually used the nickname "Nandito") lived with them. Eduardo and defendant were brothers. M.R.'s father worked third shift and her mother worked second shift. Her father spent part of the day caring for her sister, then an infant. He slept in the afternoon. The house had a converted garage that served as a bedroom for M.R.'s immediate family.

¶ 6 One day during that summer, M.R. was alone in the living room; her mother was at work and her father was in his bedroom. Defendant called her into his bedroom. He had her sit on the floor facing the television. He pulled her pants down to her knees and pulled his pants off. He

then rubbed her breast area with his hand. He put his penis into her vagina and started moving. When she started crying out in pain, he covered her mouth with a piece of cloth. He pulled away, and she saw something come out of his penis that she later understood must have been ejaculate. The only contact she had with him during this encounter other than that already described was that he wiped her with the cloth he had used to cover her mouth.

¶ 7 Defendant had sexual contact with M.R. a second time that summer. She was in a bedroom that was being used as a playroom and a laundry room. Her mother was again at work and her father in his bedroom. Defendant came into the room, grabbed her by the shoulders, and laid her on her back on the floor. He pulled her pants off and penetrated her vaginally with his penis. She did not recall whether he touched her anywhere else in that encounter and she did not touch him anywhere else.

¶ 8 The final instance of sexual contact between M.R. and defendant occurred the same summer; defendant called her in from outside. He picked her up, put her on his mattress, and pulled her pants down. He again penetrated her vaginally with his penis. She did not recall him touching her any other way, and she did not touch him.

¶ 9 Eduardo also abused M.R. The incidents were separate.

¶ 10 Not long after these incidents, defendant moved out of the house; Eduardo left at about the same time. M.R. believed that defendant had moved to Mexico.

¶ 11 M.R. did not tell anyone about defendant's assaults until she was 15 years old. She saw a television program about a girl who had been raped. When she watched the program, she "started remembering what had happened to [her], and that's when [she] started crying." Her mother came into the room, and they spoke. Because she thought that it had been too long, she did not speak to the police On cross-examination, she explained that she had not forgotten the

incidents, but said, "[I]t's something I couldn't forget for a long time and that I have always kept to myself."

¶ 12 When M.R. was 16 years old, she and her mother were at a festival in West Chicago when her mother pointed out someone she believed was defendant in the crowd. M.R. went up to a police officer and asked whether, despite the passage of years, the police could do anything about the assaults. A search for defendant ensued, but the participating officers did not find him.

¶ 13 On cross-examination, defense counsel asked M.R. about the details of her conversation with an investigator at the Kane County Children's Advocacy Center, Tim Martin. Counsel asked, "[D]o you recall telling Investigator Martin that Fernando had you place your hand on his penis?" M.R. responded, "No. I recall that I told him that I put it on—that Eduardo had made me put my hands on his penis."

¶ 14 On redirect, M.R. explained that she had spoken to Martin about both Eduardo and defendant at her first meeting with Martin. She was feeling nervous and awkward and had possibly made a mistake about which man she had seen ejaculate.

¶ 15 West Chicago police officer Robyn Nielsen testified concerning M.R.'s approaching her at the festival. Maria de Lourdes Gonzalez Garcia, M.R.'s mother, testified about the time frame in which M.R. and defendant were living in the same house and about M.R.'s disclosure of the assaults.

¶ 16 Martin testified that he was a State's Attorney's Office investigator. As part of his investigation of M.R.'s report of abuse, he and a Department of Child and Family Services investigator, Orlando Arroyo, interviewed defendant. They advised defendant of his *Miranda* rights and defendant agreed to speak to them. Defendant confirmed that he had lived with M.R. and her family for six months in 1999. Martin asked defendant whether he had had any

"inappropriate contact" with M.R., and defendant told him that M.R. "always looked for him" and that, on one occasion, she got on his knee and "moved back and forth like a woman having sex." He said that something of the sort had happened three times. He also said that, once, he was half-asleep in his bedroom when M.R. came in, put her hand on his penis, and started rubbing it. His reaction was to remove M.R.'s hand and to tell her to leave the room. He denied that he had ever penetrated M.R. with his penis. He said that on four occasions M.R. had tried to unzip his pants or touch his penis. Defendant agreed to make a taped statement; that statement was consistent with what he said earlier.

¶ 17 Defense counsel moved for a directed finding on all charges; the court denied the motion. The State *nolle-prossed* count III (defendant's hand on victim's sex organ).

¶ 18 Juan Manuel Ramirez testified for defendant. His testimony was confusing, but may have contradicted M.R.'s and defendant's mother's as to who was living in the house at the time of the incidents.

¶ 19 Defendant also called Martin. Counsel questioned Martin about his initial interview of M.R. In particular, counsel asked, "[D]uring this interview *** did you ask her if Fernando had made her touch him?" Martin responded, "Yes." Counsel also asked, "[D]id she tell you that Fernando touched his penis with her hand?" Martin responded, "She said that he took her hand and put it on his penis and moved it up and down." Counsel also asked Martin what M.R. had said about Eduardo, and specifically whether Eduardo had penetrated her. She told him that Eduardo had put his penis in her vagina and that she had seen "sperm" come out on one occasion. She did not describe any such incident with defendant.

¶ 20 The State called a single rebuttal witness, Cecelia Alvarez, defendant's wife. She testified that, although defendant's legal given name was "Adrian," she called him "Nando."

¶ 21 The State argued that defendant's statement that M.R. had come into his bedroom and rubbed his penis was such that, in light of the other evidence of defendant's conduct with M.R., it could be "inferred circumstantially that the defendant provoked [M.R.] into touching his penis in order to make it erect or to cause arousal."

¶ 22 The court found defendant guilty on the three remaining counts. Defendant filed a motion for a new trial. He did not raise any issues specifically relating to the conviction of aggravated criminal sexual abuse; the motion did contain a general assertion that the State failed to prove defendant's guilt beyond a reasonable doubt. The court denied the motion. It sentenced defendant to consecutive terms of 10 years' imprisonment on each of the predatory-criminal-sexual-assault-of-a-child convictions and a further consecutive term of 4 years' imprisonment on the aggravated-criminal-sexual-abuse conviction. Defendant moved for reconsideration of the sentence and the court denied the motion. Defendant timely appealed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, defendant asserts that defense counsel was ineffective in that counsel caused Martin to testify that M.R. had told him that defendant had caused her to touch his penis, when that evidence was critical to the conviction on count IV, aggravated criminal sexual abuse. He notes that M.R. was clear in her testimony that defendant had never caused her to touch his penis, so that the only evidence the State put on in support of that conviction was defendant's statement that M.R. had touched it while he was half-asleep.

¶ 25 Defendant relies on several decisions that held that defense counsel's eliciting of critical evidence of guilt constituted ineffective assistance of counsel. In *People v. Orta*, 361 Ill. App. 3d 342, 350 (2005), a First District panel held that counsel's "repeated and misguided efforts to elicit damaging testimony not introduced by the State, and the trial judge's partial reliance on

this evidence in his finding, resulted in an unfair trial for the defendant." In *People v. Bailey*, 374 Ill. App. 3d 608, 614-15 (2007), the court held that no strategic purpose could exist for defense counsel's introduction of highly damaging evidence.

¶ 26 Defendant further argues that, before Martin's testimony for defendant, the only evidence of defendant's guilt of count IV was defendant's statement about M.R.'s touching his penis when he was half asleep. He states that, under the rule in *People v. Sargent*, 239 Ill. 2d 166 (2010), a defendant's uncorroborated inculpatory statement is insufficient to establish the *corpus delicti* of an offense. He therefore argues that, but for defense counsel's questioning of Martin, the State would have failed to establish the *corpus delicti* of the offense.

¶ 27 The State responds that the testimony that defense counsel elicited from Martin was not critical to the conviction. It points to defendant's statement to Martin about M.R.'s touching of defendant's penis. Further, it asserts that the court did not rely on the testimony that defense counsel elicited. In support of this, it points out that the court, in rendering its judgment, did not mention the testimony that defense counsel elicited from Martin. It points out that the court did find that M.R.'s testimony was credible whereas defendant's statement describing M.R.'s sexualized conduct was not. It also argues that the recall questioning of Martin was sound trial strategy in that it served to cast doubt on the reliability of M.R.'s memories.

¶ 28 To state a claim for ineffective assistance of counsel, a defendant must satisfy both prongs of the standard stated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Specifically, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced him or her in that, but for counsel's deficient performance, a reasonable probability exists that the proceeding would have had a different result. *Strickland*, 466 U.S. at 687, 694. "In demonstrating, under the first *Strickland* prong, that his counsel's

performance was deficient, a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct might be considered sound trial strategy." *People v. Houston*, 226 Ill. 2d 135, 144 (2007).

¶ 29 Here, defendant can satisfy only the second prong of the *Strickland* standard. His claim thus fails. Contrary to what the State argues, the evidence relating to count IV was extremely closely balanced. Although defendant's would-be exculpatory statement to Martin was, in reality, obviously very damaging to him, it is hard to see it as proof beyond a reasonable doubt of conduct that he did not describe. This is all the more the case given that M.R. also denied that the conduct had occurred. On the other hand, as we further discuss, defendant cannot overcome the presumption that counsel's recall questioning of Martin was sound trial strategy. This is true regardless of whether one considers simply sufficiency of the evidence or whether one considers specific rules about how the *corpus delicti* must be established.

¶ 30 Defense counsel's questioning of Martin is consistent with sound trial strategy; counsel could reasonably have been willing to risk admission of evidence supportive of conviction on one of the lesser charges in order to increase the likelihood of an acquittal on all charges. M.R.'s ability to remember a decade later what happened to her when she was five was the central source of doubt in this case. Thus, any evidence tending to undermine the reliability of M.R.'s recollections was good evidence for the defense.

¶ 31 Defense counsel accepted a trade-off by eliciting Martin's testimony of M.R.'s statement: damage to M.R.'s credibility in exchange for evidence in support of count IV. Such a trade-off was reasonable in light of the charges that defendant was facing. As charged here, predatory criminal sexual assault of a child is a Class X felony with a standard Class X sentencing range (720 ILCS 5/12-14.1(b)(1) (West 2000)), but aggravated criminal sexual abuse is a Class 2

felony (720 ILCS 5/12-16(g) (West 2000)). Further, at the start of defendant's evidence, two predatory-criminal-sexual-assault-of-a-child counts were before the court, with defendant's eligibility for consecutive sentences unchallenged. A defense focus on evidence that might defeat the predatory-criminal-sexual-assault-of-a-child counts was reasonable, even if risk on the lesser count was associated with that evidence.

¶ 32 Neither *Orta*'s nor *Bailey*'s facts presented defense counsel with the kind of dilemma at issue here. Both opinions mention only a single charge.

¶ 33 In retrospect, it might appear that defense counsel would have better served defendant by eliciting Martin's testimony of M.R.'s statements contradicting her testimony only to the extent that those statements did not support a conviction on count IV. However, given that M.R. was quite firm in her testimony that defendant never made her touch his penis, Martin's testimony that she had told him otherwise was valuable impeachment evidence. Suggesting that counsel was unprofessional to use it is precisely the sort of hindsight that the presumption that a choice is sound trial strategy guards against.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the judgment of the Circuit Court of Kane County.

¶ 36 Affirmed.