2022 IL App (3d) 200016-U

Order filed December 2, 2022

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2022

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of the 21st Judicial Circuit, Iroquois County, Illinois, |
| Plaintiff-Appellee, | ) | |
| | ) | Appeal No. 3-20-0016 |
| v. | ) | Circuit No. 15-CF-132 |
| | ) | |
| ROMER GILLESPIE, | ) | Honorable James B. Kinzer, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justice Peterson concurred in the judgment.
Justice McDade dissented.

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**ORDER**

¶ 1 *Held*: (1) The record does not establish that defendant's trial attorneys provided ineffective assistance due to their failure to discuss lesser included offenses with defendant. (2) The record is insufficient to determine whether the trial attorneys were ineffective due to their failure to move to suppress defendant's unrecorded statement based upon his purported invocation of the right to counsel. (3) The trial attorneys were not ineffective due to their failure to move to suppress defendant's unrecorded statement based upon section 103-2.1 of the Code of Criminal Procedure of 1963. (4) The State's closing argument did not deprive defendant of his right to a fair trial, and this alleged error plus defendant's ineffective assistance claims were not cumulative error. (5) The victim's mother properly invoked her right against self-incrimination.

¶ 2 Defendant, Romer Gillespie, appeals his two predatory criminal sexual assault of a child convictions. Defendant argues that his trial attorneys provided ineffective assistance by: (1) failing to discuss lesser included offenses with him; and (2) failing to file a motion to suppress his unrecorded statement. He further argues that the cumulative effect of this ineffective assistance and the State's improper closing argument deprived him of his right to a fair trial. Additionally, he argues the Iroquois County circuit court erred in allowing the victim's mother to invoke the victim's right against self-incrimination. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant with two counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)). The charge alleged that defendant was 17 years of age or older, the victim, E.D., was under the age of 13, and that defendant placed his penis and finger in E.D.'s vagina.

¶ 5 Prior to trial, counsel moved to suppress defendant's recorded statement. At the suppression hearing, it was established that, after speaking with E.D., Officer Jeremy Douglas contacted defendant and arranged to have him come to the police station. Douglas and defendant were familiar with each other from the community, and Douglas was considered a friend of defendant's family. Defendant drove himself to the police station. The interview began between 7 and 8 a.m.

¶ 6 Defendant testified that when he arrived at the police station, Douglas waved for him to come in. As they were walking in the door, defendant asked if they could reschedule so he could "bring a lawyer or something." Douglas told him "[Y]ou don't need an attorney. It's all right. We got this bud." After entering the police station, they entered a room with no windows. Officer Josh King was in the room. Douglas was in uniform and had his gun on his hip. King was not in uniform

but had his gun on his hip. Douglas asked if defendant knew why they were there, and defendant said he did not. The officers asked defendant about E.D., and defendant confirmed that he knew her. They advised defendant that E.D. told them that she and defendant had sexual intercourse. Defendant denied E.D.'s allegation. Sometime after the initial conversation, Douglas read defendant the *Miranda* warning, and defendant initialed and signed the *Miranda* form, indicating he understood those rights. Defendant claimed he did not really consider those rights or understand them, but he told Douglas that he understood them. Defendant never told Douglas or King that he did not understand. Neither officer threatened defendant with a gun or any kind of physical restrictions. Defendant continued to deny any sexual contact with E.D. The officers told defendant they were going to need a recorded confession. When the officers started recording, defendant invoked his right to counsel. Defendant explained his thoughts stating that "why do I need to make—why do I need to make a confession and they let me go whereas if I don't give a confession then I go to jail, you know. So I was confused and everything so I just, you know, so I asked all right, I want to wait for a lawyer." Thereafter, the recording was stopped, and Douglas handcuffed defendant and walked him out of the police station toward a squad car. Defendant stated Douglas told him that he thought it was a bad idea not to give a recorded statement and if defendant gave a recorded confession he could go home. The State clarified that "And this is after you've been on camera and you denied having intercourse with [E.D.]? And so after that and you asked for a lawyer then [Douglas] basically told you, well, you have to give a confession or else you are not going to leave? Is that what he said?" And defendant replied "Yes." The State then asked where they were when Douglas told him that and he replied they were outside the police station. Defendant then made a recorded confession and was arrested.

¶ 7 Douglas testified that when defendant arrived at the police station, he "probably greeted him, thanked him for coming in, something along those lines." Douglas was asked if he talked to defendant "about any issues of him needing a lawyer or anything," and he responded "Not at that time, no." Douglas would not have suggested to defendant that he did not need a lawyer. They would have had idle conversation and then entered the interview room. The officers told defendant they needed to talk to him about allegations that were made, and then Douglas read defendant his *Miranda* rights. Defendant admitted he stuck his finger in E.D.'s vagina and placed his penis inside her vagina. Defendant explained it happened in a detached garage behind his house. Defendant provided details about the sexual encounters. Defendant indicated that E.D. came over to socialize, and during the course of watching movies, the sexual acts happened. After defendant provided this information, Douglas and King decided to interview defendant on camera. Defendant then invoked his right to counsel, but eventually made a recorded statement.

¶ 8 King testified that Douglas read defendant his *Miranda* rights. Defendant "claimed that he did have intercourse with [E.D.] and he kind of described the details of the night."

¶ 9 The court granted defendant's motion to suppress his recorded statement. It then stated that the statement by defendant prior to being recorded was admissible. The matter proceeded to a jury trial.

¶ 10 At trial, E.D. testified that her birthdate was May 23, 2003. When she was 12 years old, she would socialize with her cousin L.M. L.M. had a cell phone and they used the phone to talk with defendant through the Internet. They arranged to meet defendant at a factory, but ultimately only E.D. went. Defendant took E.D. to his house, and they went in the garage. E.D. told defendant she was 12 years old. Defendant put his arm around her and tried to remove her brassiere. E.D.

told defendant not to touch her, and he backed away. E.D. requested to leave, and defendant walked her back to the factory. E.D. arranged to meet defendant again the next night.

¶ 11 The next night, E.D. met defendant at the same factory, and they walked to defendant's garage. Defendant asked if they could kiss, and E.D. told him no and that he was "way older" than her. Defendant had told E.D. he was 21 years old. Defendant then asked if E.D. knew what oral sex was and if she wanted to do that, and E.D. told him no. "[T]hen he tumbled over [E.D.] and" asked if she wanted to have sexual intercourse, and she told him no because he would get in trouble. Defendant told E.D. that he would give her anything and that he would give her a cell phone. E.D. "always wanted a phone back then and that's when [she] gave in and it's when [they] started taking off [their] clothes." Defendant inserted his fingers into her vagina and then they had sexual intercourse, which E.D. stated was when a penis goes into a vagina. Defendant walked E.D. back to the factory. Approximately one month later, E.D. told L.M. what happened with defendant.

¶ 12 On cross-examination, E.D. stated that prior to testifying she spoke with the State about her testimony and there were five people present. When E.D. originally spoke with the police, she told them that defendant "touched [her] around [her] bottom part and the front." She clarified that when she used those terms, she meant her buttocks and vagina.

¶ 13 King testified that when he and Douglas interviewed defendant, King had told defendant E.D.'s allegations and asked if it was true. Defendant said it was. King then asked defendant if he placed his penis in E.D.'s vagina, if he placed a finger in E.D.'s vagina, and if he had oral sex with E.D. Defendant stated that he did place his penis and finger in E.D.'s vagina and that he asked for oral sex, but E.D. refused. E.D.'s statement to King and Douglas was consistent with defendant's statement.

¶ 14 Douglas testified that when he and King interviewed defendant, he read defendant his *Miranda* rights. Defendant initialed and signed the *Miranda* rights form. Defendant also listed his birthdate as April 27, 1994. Douglas confronted defendant with the allegations that he had sexual intercourse with E.D. Defendant admitted to the allegations. Douglas asked if it was planned, and defendant said it was not. Douglas then asked defendant to explain what happened. Defendant explained that E.D. had come to his house the night before the sexual acts. E.D. and defendant socialized and then "she hit him up again" and wanted to come over. They proceeded to watch Netflix and then they had sexual intercourse. There were no differences between E.D.'s statement and defendant's statement. Their accounts matched "for the most part." Douglas noted that they did not go into as many details with defendant as they had with E.D. There were no promises made to defendant that if he confessed he would be permitted to leave.

¶ 15 Defendant testified that L.M. reached out to him on Facebook. L.M. told him that she had a cousin that wanted to meet him. L.M. and E.D. made many attempts to associate with defendant, but he would stop replying or make excuses as to why he could not meet with the girls. He eventually met E.D. and L.M. at a factory, and L.M. and E.D. watched Netflix at his house. Defendant met E.D. at his shed. They were talking and the conversation "just kept getting heated." E.D. moved closer to defendant, and defendant put his arm around her. There was an awkward silence, and defendant assumed E.D. wanted him to kiss her. He leaned in and they started "serious making out." After approximately three minutes, he backed away and told E.D. they should not have done that. Defendant did not have any sexual contact with E.D.

¶ 16 Defendant admitted giving a confession to Douglas and King but stated it was not true. He said that they told him they "need a confession if [he] want[ed] to get out of [t]here." Defendant did not have a lawyer at that time. He had asked to do the interview at another time so he could

obtain a lawyer and Douglas told him that he did not need a lawyer. Defendant admitted "there was nothing overbearing about [Douglas's] conversation with [him] at the police station." Defendant was not handcuffed during the conversation. Defendant was a high school graduate. Neither King nor Douglas drew their weapons. The interview with Douglas and King lasted approximately one hour. Defendant initially denied that he had sexual contact with E.D. but then agreed to what Douglas and King told him E.D. said happened.

¶ 17 During closing arguments, defense counsel inquired why there needed to be five people in the room to interview E.D. prior to her testimony. Defense counsel further pointed out that E.D. met with the State several times. In rebuttal, the State responded

> "5 people in the interview room somehow when [E.D.] before she took the stand. Well, that's true. You will see a jury instruction that talks about lawyers having the opportunity, taking the opportunity to interview witnesses. Folks, the State's not going to bring you a case where we haven't interviewed the victim, where we haven't interviewed witnesses. I mean, it's just professionalism to know what people are going to say when they testify otherwise you are just committing stupidity by not knowing what people are going to say ahead of time. So, I mean, if [E.D.] had said, well, you know, none of this happened in the interview room with me or anybody else associated with the State then guess what, we wouldn't be here for trial."

¶ 18 The jury found defendant guilty. Defendant retained new counsel who filed a motion for new trial. Among other things, the motion argued that trial counsel provided ineffective assistance by failing to: (1) discuss lesser included offenses with defendant and allow defendant to decide whether to request jury instructions on lesser included offenses; (2) move to suppress his

unrecorded statement; and (3) properly investigate the "U Visa" statute and respond to the State's motion *in limine* concerning E.D.'s potential unlawful immigration status.

¶ 19 An evidentiary hearing was held wherein E.D.'s mother was called as a witness and asked questions concerning her and E.D.'s immigration status. E.D.'s mother revealed that both she and E.D. were born in Mexico and that she came to the United States in 2005. E.D. and her mother lived in Illinois. She was asked: (1) "[D]id your daughter come into this country with a passport?"; (2) "is she a citizen?"; (3) "has she been naturalized?"; and (4) "does she have a green card?" E.D.'s mother responded to each of those questions with "I assert the 5th Amendment." Posttrial counsel objected to E.D.'s mother invoking the fifth amendment in response to those questions, and the court overruled the objection. It found "that the mother can invoke 5th Amendment rights with respect to her daughter."

¶ 20 A separate hearing was held regarding the motion for new trial. At that hearing, one trial attorney testified that he did not believe he told defendant about his option to request jury instructions on a lesser included offense. Another trial attorney testified that she did not present any lesser included offense options to defendant. Defendant testified that before trial, neither of his trial attorneys explained the concept of a lesser included offense or gave him the option to ask the jury to consider finding him guilty on a lesser included offense.

¶ 21 During argument on the motion, when posttrial counsel was talking about the importance for trial counsel to prepare defendant for his testimony in light of the confession, he stated how defendant just agreed with what the officers said, and the court interjected:

> "So then he has enough sense though when they say we want to record this, I know you confessed once, but we want to tape this thing, is that okay with you, at that point he said no. He had enough wherewithal to refuse to allow them to video

> tape his confession, but somehow his willpower was overcome by these leading questions."

In providing its decision, the court stated the following about defendant's credibility:

> "[Defendant] came across as smug and entitled during the trial while he testified, that's based on my observation of his demeanor and my assessments of his testimony. *** He had to rebut it somehow and so the jury found him to be a liar because they rejected that testimony and I concur with the jury in their assessment. He's a proven liar. So much of what he has to say here in testimony and by way of affidavit has to be discounted by me on that basis."

The court denied the motion for new trial.

¶ 22 The court sentenced defendant to consecutive terms of six and seven years' imprisonment. Defendant appeals.

¶ 23 II. ANALYSIS

¶ 24 A. Ineffective Assistance of Counsel

¶ 25 Defendant raises two claims of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[I]f [an] ineffective-assistance claim can be disposed of on the ground that the defendant did not suffer prejudice, a court need not decide whether counsel's performance was constitutionally deficient." *People v. Griffin*, 178 Ill. 2d 65, 74 (1997). "To show actual prejudice, defendant must establish that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome.' " *People v. Horton*, 143 Ill. 2d 11, 23 (1991) (quoting *Strickland*, 466 U.S. at 694).

¶ 26 1. Lesser Included Offenses

¶ 27 Defendant argues that trial counsel provided ineffective assistance by failing to explain lesser included offenses and allow defendant to decide whether to request instructions on lesser included offenses at trial.

¶ 28 Our supreme court has held that defendants have "the exclusive right to decide whether to submit an instruction on a lesser-included offense at the conclusion of the evidence." *People v. Medina*, 221 Ill. 2d 394, 403-04 (2006). Here, the undisputed evidence shows that trial counsel did not discuss lesser included offenses with defendant or allow him to decide whether to request an instruction on a lesser included offense. However, the record fails to show that defendant was prejudiced by these failures. Specifically, although defendant testified at the hearing on his motion for new trial, he failed to testify, or even allege in his motion, that had he been given the opportunity to request a jury instruction on a lesser included offense, he would have actually done so. Without evidence that defendant would have requested a lesser included offense instruction, we cannot say that the failure to discuss the same and provide him the opportunity to do so prejudiced him. In other words, if defendant was not going to request a lesser included offense instruction, he cannot be harmed by the failure to be given the opportunity to do so. Based on the foregoing, we conclude that defendant has failed to establish ineffective assistance of counsel regarding lesser included offenses.

¶ 29 2. Failure to Move to Suppress Defendant's Unrecorded Statement

¶ 30 Defendant argues that trial counsel was ineffective for failing to move to suppress his unrecorded statement because (1) the officers violated his *Miranda* rights due to their failure to

honor his right to counsel which he invoked by asking Douglas if they could do the interview another time so he could "bring a lawyer or something"; and (2) per section 103-2.1 of the Code of Criminal Procedure of 1963, the statement was presumably inadmissible because it was not recorded. See 725 ILCS 5/103-2.1(b-5)(1) (West 2014) (providing that in criminal proceedings for predatory criminal sexual assault of a child, an accused's statement made as a result of custodial interrogation, occurring on or after June 1, 2014, conducted at a police station is presumed to be inadmissible unless an electronic recording is made of the custodial interrogation). The State responds that there was no *Miranda* violation because defendant was not in custody when he allegedly requested counsel. Further, the State argues that the record shows that the presumption of inadmissibility is overcome because the totality of the circumstances show that the statement was voluntary and reliable. See *id.* § 103-2.1(f) (stating the presumption of inadmissibility "may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances").

¶ 31 As to the *Miranda* issue, we note that posttrial counsel raised this issue in the motion for new trial. However, the court did not explicitly address the claim in its ruling and therefore, it is unclear on what basis the court denied it. Although the court noted it generally had concerns with defendant's credibility, it made no explicit findings on whether defendant made the statement that he wanted to bring a lawyer, as he asserted, or whether no such statement was made as Douglas testified. If we accept defendant's version of events, then his *Miranda* rights may have been violated and a motion to suppress could have been granted, such that counsel could have been ineffective for failing to file one because had the confession been suppressed there is a reasonable probability the outcome of trial would have been different. See *People v. Williams*, 2021 IL App (3d) 180282, ¶ 38 (providing that when custodial interrogation is imminent, an unequivocal

request for an attorney triggers *Miranda*); *People v. Tayborn*, 2016 IL App (3d) 130594, ¶ 17 ("To establish defendant's prejudice resulting from counsel's failure to file a motion to suppress evidence, a defendant must show that: (1) the unargued suppression motion is meritorious (*i.e.*, would have succeeded); and (2) there is a reasonable probability that the outcome of the trial would have been different had the evidence been suppressed."). However, if we accept Douglas's version of events, a motion to suppress would have been futile because defendant did not invoke his right to counsel and defendant would be unable to establish ineffective assistance of trial counsel. Due to this unresolved factual question, this claim is better suited for collateral proceedings. See *People v. Bew*, 228 Ill. 2d 122, 134-35 (2008).

¶ 32 Turning to defendant's section 103-2.1 claim, we agree with the State that the record establishes that the presumption of inadmissibility is overcome because the totality of the circumstances show that defendant's statement was both reliable and voluntary. Specifically, both King and Douglas testified that defendant's statement was consistent with E.D.'s statement such that it was reliable. Further, it was voluntary because, as the circuit court implied, defendant's will was not overborne. See *People v. Gilliam*, 172 Ill. 2d 484, 500 (1996) ("[T]he test of voluntariness is whether the defendant made the statement freely, voluntarily, and without compulsion or inducement of any sort, or whether the defendant's will was overcome at the time he or she confessed."). Notably, defendant drove himself to the station, he had a familiar relationship with Douglas, defendant testified that there was nothing overbearing about his conversation with Douglas, defendant was 21 years old, he was a high school graduate, the interrogation began between 7 and 8 a.m. and lasted approximately one hour, defendant was not handcuffed, and defendant was not threatened. See *id.* at 500-01 ("Factors to consider when determining voluntariness include: the defendant's age, intelligence, background, experience, mental capacity,

education, and physical condition at the time of questioning; the legality and duration of the detention; the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises."). We note that defendant alleged that the officers told him he could leave if he confessed, such that, if believed, a promise had been made to defendant. However, that is only one factor to consider in the totality of the circumstances. Further, Douglas testified that defendant was not promised that he could leave if he confessed. Notably, while not directly in response to defendant's testimony about the purported promise, the circuit court noted that defendant was a liar and that it discounted much of what he had to say. Additionally, it is highly improbable that a 21-year-old high school graduate would believe that if he confessed to having sexual intercourse with a 12-year-old, that he would simply be allowed to go free. Thus, the purported promise does not alter our conclusion that the record establishes that defendant's statement was voluntary. Thus, a motion based upon section 103-2.1's presumption of inadmissibility would have been futile and trial counsel was not ineffective for failing to pursue such motion.

¶ 33 B. Cumulative Error

¶ 34 Defendant argues that the combination of the purported ineffective assistance of trial counsel, as discussed above, in conjunction with prosecutorial misconduct in closing argument, cumulatively denied him a fair trial. Because we have already analyzed the ineffective assistance claims above, we now address the prosecutorial misconduct claim.

¶ 35 Defendant argues that during closing argument the State improperly vouched for E.D.'s credibility when it stated

> "Folks, the State's not going to bring you a case where we haven't interviewed the victim, where we haven't interviewed witnesses. *** So, I mean, if [E.D.] had said,

well, you know, none of this happened in the interview room with me or anybody else associated with the State then guess what, we wouldn't be here for trial."

The State argues that defendant forfeited this issue by not raising it at trial and in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant argues the purported forfeiture is of no consequence because the test for cumulative error and second prong plain error are the same, seemingly requesting plain error review. See *People v. Blue*, 189 Ill. 2d 99, 138 (2000). We begin by determining whether the court erred. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (providing that the first step in applying the plain error doctrine is to determine if an error occurred).

¶ 36 "Generally, it is improper to vouch for the credibility of a witness or to express a personal opinion on a case." *People v. Emerson*, 122 Ill. 2d 411, 434 (1987). "In order for a prosecutor's comments regarding a witness's credibility to be improper, 'he must *explicitly* state that he is asserting his personal views.' " (Emphasis in original.) *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 51 (quoting *People v. Pope*, 284 Ill. App. 3d 695, 707 (1996)).

¶ 37 Here, the complained of comments did not explicitly assert a personal view or address E.D.'s credibility. Further, the comments did not necessarily implicate E.D.'s credibility. The State appeared to be explaining that it was good practice to interview witnesses such that if the complaining witness told them nothing happened, they would not proceed with the charges. Therefore, we find the comments were not error. Because we have not determined that any of defendant's issues were errors, we cannot find that there was cumulative error denying him a fair trial.

¶ 38 C. Right Against Self-Incrimination

¶ 39 Defendant argues that the circuit court improperly allowed E.D.'s mother to invoke E.D.'s fifth amendment right against self-incrimination regarding her immigration status. Defendant argues that it is a personal right such that only E.D. could invoke it. The State argues that the responses could incriminate E.D.'s mother and cites to section 1324 of the United States Code (see 8 U.S.C. § 1324(a)(1)(A)(i), (ii) (2012)). Subsection (i) provides for criminal penalties for anyone that "knowing that a person is an alien, brings *** to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner." *Id.* § 1324(a)(1)(A)(i). Subsection (ii) provides for criminal penalties for anyone that "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law." *Id.* § 1324(a)(1)(A)(ii). Defendant responds that answers to the questions E.D.'s mother invoked her fifth amendment right for would not directly incriminate E.D.'s mother under section 1324.

¶ 40 The fifth amendment can be invoked to "refuse to answer questions which tend to incriminate" the witness. *People v. Redd*, 135 Ill. 2d 252, 304 (1990). The protection is for "those instances where the witness has reasonable cause to believe he might subject himself to prosecution if he answers." *Id.* Further, " 'it is for the circuit court to determine if under the particular facts there is a real danger of incrimination.' " *Id.* (quoting *People v. Baker*, 123 Ill. 2d 233, 244 (1988).

¶ 41 Here, E.D.'s mother's testimony revealed that both she and E.D. were born in Mexico but were residing in Illinois. Further, E.D.'s mother testified she came to the United States in 2005. She invoked the fifth amendment in response to the following questions about E.D.: whether she

came into the country with a passport, whether she was a citizen, if she had been naturalized, and whether she had a green card. While answers to these questions would not appear to directly incriminate E.D.'s mother under section 1324, it does appear that responses to those questions paired with the information that E.D.'s mother and E.D. were born in Mexico, and E.D.'s mother came to the United States in 2005 (which would be after E.D. was born), could provide circumstantial evidence that E.D.'s mother brought E.D., knowing she was alien, into the United States at a place other than a designated port of entry and that she moved E.D. within the United States, which would tend to incriminate her. See 8 U.S.C. § 1324(a)(1)(A)(i), (ii); see also *Rajah v. Mukasey*, 544 F.3d 427, 441 (2d Cir. 2008) ("The Fifth Amendment protects not only statements that are themselves evidence of criminal violations, but also 'those [statements] which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.' ") (quoting *United States v. Hubbell*, 530 U.S. 27, 38 (2000)). Thus, it was proper for E.D.'s mother to invoke her fifth amendment right. While the circuit court appeared to allow E.D.'s mother to invoke the fifth amendment right on behalf of E.D., E.D.'s mother's response to each question was "I assert the 5th Amendment" which indicates she was invoking her own right despite the questions seeking information about E.D., and regardless of the circuit court's reasoning, this court can affirm on any basis supported by the record. See *People v. Johnson*, 208 Ill. 2d 118, 129 (2003) ("The rule that a lower court decision may be sustained on any ground of record is both universally recognized and long established.")

¶ 42 III. CONCLUSION

¶ 43 The judgment of the circuit court of Iroquois County is affirmed.

¶ 44 Affirmed.

¶ 45 JUSTICE McDADE, dissenting:

¶ 45 The majority affirms the convictions of defendant, Romer Gillespie, finding that none of the issues which he has raised in this appeal warrants reversal. I agree with that conclusion of the majority on four of the five claims raised. I would find, however, that defendant's convictions should be reversed and the case remanded for a new trial because of the combined ineffectiveness of both of his trial counsel related to their handling of lesser-included offenses.

¶ 46 The rights of which defendant was deprived were (1) *the right to be advised* of the existence of lesser-included offenses and the possible ramifications of presenting those options to the jury, and (2) *the exclusive right to decide* whether to seek an instruction on any or all of them. To find he has only been prejudiced if he alleges he would have asked for the instruction both ignores and demeans the intrinsic value of the rights themselves. Such a finding also removes any professional incentive for trial counsel to be diligent in safeguarding those rights. A decision such as the one reached by the majority in this case essentially holds that denial of the process—the procedural right itself—is not prejudicial and is not deserving of redress.

¶ 47 To the more immediate point, however, in this case, a posttrial motion was filed by new trial counsel objecting to the claimed error (and thereby avoiding forfeiture) but failing to make the requisite allegation that defendant would actually have asked that the jury be instructed on one or more of the lesser-included offenses had he known that such crimes and such an option existed. Because of this omission, the majority concludes that defendant has failed to establish the type of prejudice required by reviewing courts to prove ineffective assistance of counsel. This conclusion ensured the affirmance of the convictions without defendant or the jury ever knowing of or being able to consider any lesser-included offenses. Defendant, who has counsel because he recognizes he does not know enough to represent himself, was whip-sawed by the flawed representation of

not one but both trial attorneys, and we neither acknowledge his injury nor offer him a remedy. I respectfully dissent from that result.