2023 IL App (4th) 190592-U

NO. 4-19-0592

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 1, 2023
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
RICHARD COFFEY,	)	No. 19CF30
Defendant-Appellant.	)	
	)	Honorable
	)	James R. Glenn,
	)	Judge Presiding.

PRESIDING JUSTICE DeARMOND delivered the judgment of the court.
Justices Cavanagh and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed in part, reversed in part, and remanded for a new sentencing hearing, holding (1) defendant's trial counsel was not ineffective for failing to object to claimed inadmissible prior consistent statements of the victim, request a modified Illinois Pattern Jury Instruction, and seek redaction of video evidence; and (2) the trial court erred in considering defendant's now-vacated, invalid, prior aggravated-unlawful-use-of-a-weapon conviction at sentencing.

¶ 2 After a four-day trial, a jury found defendant guilty of unlawful restraint, criminal sexual assault, aggravated criminal sexual assault with a dangerous weapon, and aggravated criminal sexual assault with bodily harm. The trial court sentenced defendant to 36 years' imprisonment for aggravated criminal sexual assault with a dangerous weapon, merging all other counts for conviction and sentence purposes.

¶ 3 Defendant appeals, arguing (1) he was denied the effective assistance of trial counsel and (2) the trial court erred when it "expressly considered [defendant's] invalid prior conviction for aggravated unlawful use of a weapon in aggravation at sentencing." For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 A. The State's Charges

¶ 6 In January 2019, by way of information, the State charged defendant with multiple counts, including: aggravated criminal sexual assault with a dangerous weapon, a Class X felony punishable by 6 to 30 years in the Illinois Department of Corrections with a mandatory 10-year enhancement (count I) (720 ILCS 5/11-1.30(a)(1), (d)(1); 730 ILCS 5/5-4.5-25(a) (West 2018)); unlawful restraint, a Class 4 felony punishable by 1 to 6 years' incarceration due to extended term sentencing based on a prior Class 2 aggravated-unlawful-use-of-weapon (AUUW) conviction (720 ILCS 5/10-3(a); 730 ILCS 5/5-4.5-45(a) (West 2018)); and criminal sexual assault, a Class 1 felony punishable by 4 to 15 years' incarceration (count III) (720 ILCS 5/11-1.20(a)(1); 730 ILCS 5/5-4.5-30(a) (West 2018)). Six months later, the State charged defendant with an additional count of aggravated criminal sexual assault with bodily harm, also a Class X felony, punishable by 6 to 30 years' incarceration (count IV) (720 ILCS 5/11-1.30(a)(2); 730 ILCS 5/5-4.5-25(a) (West 2018)).

¶ 7 B. Jury Trial

¶ 8 The State's charges against defendant arose from a series of contacts between defendant and the victim, T.G., over several days in January 2019, as T.G. tried to obtain methamphetamine for her drug habit. In June 2019, defendant's jury trial commenced. The following facts were established at trial through witness testimony and physical evidence.

¶ 9 1. *The Setup*

¶ 10 Brooke Rieck, T.G.'s friend and fellow drug user, told T.G. about someone called "J" from whom they could buy drugs. At Rieck's direction, T.G. accompanied two friends of Rieck, who drove her to purchase drugs. Instead, after taking her money, the two left T.G. at a local pharmacy, stranding her with no way to get home. A man, whom T.G. later identified as defendant, approached her, and she informed him of her situation. He identified himself as "J" and agreed to give her a ride. They exchanged cellphone numbers and discussed her possible purchase of drugs from him later. Driving what T.G. later described as a "maroon Buick grandma car," defendant took her first to where she met Rieck earlier. T.G. introduced defendant as "J" to Rieck and identified him as a possible new drug "connection." Defendant then took T.G. to where she was staying.

¶ 11 From January 14, 2019, to January 16, 2019, defendant and T.G. traded text messages, consisting of a series of conversations involving T.G.'s attempts to obtain methamphetamine and defendant's attempts to get her to "come and party" with him. The series of texts between defendant and T.G. were read into the record by T.G., who described the conversations as "[r]eally just me trying to get some drugs and one-sided flirting from him." Defendant referred to T.G. as "Luv" and asked if they could "smoke a blunt" together, or if he could come over. In one instance, defendant told T.G., "[w]ish I could hold you and cuddle." T.G. asked defendant how much methamphetamine she could purchase from him, when she could obtain it, and what it would cost. The last time T.G. used methamphetamine before those three days was the evening of January 13. She also admitted using methamphetamine for "a little over a year" before her most recent 44-day period of sobriety by the time of trial.

¶ 12 Apparently not having any methamphetamine at the time, defendant first provided T.G. with $25 worth of cannabis on January 14. According to T.G., she began using cannabis around the ages of "12 or 13," and she admitted she smoked cannabis with defendant during the three-day period between their meeting and defendant's assault of her. Eventually, T.G. purchased what she thought was methamphetamine for $50, but she suspected it to be carpet freshener after injecting it. On January 16, after texting defendant to complain, T.G. agreed to go with him to get her money back from the source. When defendant arrived to pick her up, he was again driving the same maroon vehicle she observed earlier.

¶ 13 2. *The Attack*

¶ 14 Defendant drove T.G. around the northwest side of Mattoon, Illinois for "[m]aybe 15, 20 minutes" and eventually backed into a driveway where he told T.G. they would be "waiting on his guy." T.G. could tell the house they were parked next to was vacant because it was empty inside and there were no blinds on the windows. T.G. said defendant then began hitting her "in the side of [her] head and [her] face, [her] eye[ ]" approximately "six to eight times." While hitting her, defendant told her to stop screaming, eventually putting his hand over her mouth. T.G. said she bit his gloved hand when he put it over her mouth, but she stopped screaming because she feared what might happen if she did not. Defendant then held her head down in the seat while he drove away from the vacant house. When she confronted defendant, asking why he was doing this, defendant gave several responses, including that her ex-boyfriend paid him to do it.

¶ 15 According to T.G., after defendant drove for "probably around five to ten minutes" and made "a lot of turns," defendant eventually stopped the car and told T.G. "he heard [she] was working with the police, so he was going to check [her] for wires." Defendant then

removed her coat and sweater, putting the sweater over her head and telling her to put her hands behind her back. T.G. could partially see through the sweater's large weave. T.G. said defendant secured her hands with duct tape and then put duct tape over her mouth by wrapping it around her head. Defendant proceeded to sexually assault T.G. from behind, penetrating her vagina with his penis. T.G. testified the assault lasted anywhere from 45 to 90 seconds. Before the assault, T.G. believed she felt the blade of the knife from her purse being held against her back by defendant. T.G. feared being killed because defendant told her, "You'll be lucky if I let you go" when he beat her earlier. Although she initially resisted, T.G. eventually "figured if [she] just complied with what he was saying, then maybe he would let [her] go."

¶ 16 T.G. described how defendant put her clothes back together after the sexual assault, leaving the sweater over her head. He then drove again for approximately five minutes before letting her out of the car. He made her promise not to tell anyone, saying she needed to leave town and that someone would be watching her house. Defendant returned T.G.'s phone, kept her purse and its contents, and cut the duct tape binding her wrists at her request. He then told her to wait 15 seconds before removing the sweater from her head and drove off. When asked to estimate, T.G. believed she was in defendant's car for a total of "maybe two hours."

¶ 17 3. *Immediate Aftermath*

¶ 18 Once she was able to see, T.G. recognized where she was and knew she was within several blocks of a former boyfriend's parents' house. She ran to the house, knocked on the door, and rang the doorbell while yelling, "[I]t's me, [T.G.] let me in, please let me in." The parents, Russell and Allethia Shoot, let her in because they could see she was visibly injured and not wearing a coat. Specifically, the Shoots testified they found T.G. at their door on the night of January 16, 2019, "freezing cold" with "blood on her face and in her hair, her shirt." They could

see she had duct tape "around both her wrists and around her neck" and her face was "really swollen." They tried to give her aid and called the police, who arrived within "maybe five minutes, if that." During her trial testimony, T.G. identified photos taken of her by the police before the ambulance transported her to the hospital, which revealed the pieces of duct tape still attached to her wrists and around her neck. Allethia Shoot likewise identified People's Group Exhibits 6-A through 6-F as the photographs of T.G. taken by the police at her residence that night. Captain Raymond Hall Jr., a Mattoon police officer, testified he responded to the Shoot residence and took the photos previously identified by T.G. Hall further testified, when he first saw T.G., she was "crying" and "had tape wrapped around her wrists. Her face was all bloody." T.G. described her assailant as a black male, "shorter, stocky, a round face, and scruffy beard face," wearing "a black jacket, a t-shirt and jeans, and *** gloves." T.G. testified the gloves were "black with green around the wrist." She also said defendant was driving a "maroon Buick grandma car."

¶ 19 4. *At the Hospital*

¶ 20 After T.G. was transported to the hospital, her clothing was taken as evidence, and she submitted to a computed tomography scan and a rape kit. T.G. described her injuries as her "right eye was almost swollen shut." She had cuts between her knuckles with blood "all over [her] face running down [her] neck some and all in [her] hands running down [her] fingers." The State presented the uncontested testimony of the registered nurse, Hannah Foltz, who treated T.G. Foltz collected samples and clothing from T.G. as part of the Illinois sexual assault kit and turned them all over to the police. Foltz observed "multiple abrasions and lacerations to [T.G.'s] face. Her right eye had swelling;" "She had abrasions to the right ear. Multiple scalp abrasions. She had a cut to the left hand. Swelling to the right hand. And then a bruise to the left thigh."

Foltz said T.G. had blood on her face, in her hair, and on her clothes. Foltz also observed "a lot of facial swelling, mainly to the right side, and to her hands as well."

¶ 21 5. *Stopping and Identifying Defendant*

¶ 22 On January 17, 2019, Mattoon police officers Chase Kull and Travis Easton initiated a traffic stop of defendant's vehicle, containing defendant and his wife. They described defendant's vehicle as a "maroon Mercury sedan" or "maroon or reddish-color Mercury Grand Marquis," and Kull testified defendant "fit the exact description *** the way [T.G.] ha[d] described the suspect." The officers identified defendant by his out-of-state driver's license. An initial search of the vehicle revealed a knife in the driver's door panel and a "rubber style glove that fit the exact description of what [T.G.] had given in her statement" in a center arm rest. The officers also found "a pair of brass knuckles" in the same area. Kull described defendant's demeanor throughout the stop as "[v]ery calm, very collected," and "cooperative". While inventorying the vehicle before it was towed, Easton observed "what appeared to be a reddish substance" which "resembled blood" in two locations—one near the arm rest and on the front passenger seat.

¶ 23 When T.G. provided her statement to the police on January 17, she rode with another Mattoon police officer, Sergeant Ryan Hurst, to locate the place defendant had taken her before the sexual assault. While doing so, Hurst learned Kull and Easton had stopped defendant driving a maroon vehicle, so Hurst drove T.G. to their location for a "show up." As they passed defendant, who was standing outside his car, T.G. told Hurst "that was him." After identifying defendant as her assailant, T.G. was asked to describe the interior of the maroon vehicle, which she did, along with identifying photos of the interior of the vehicle taken by the police. T.G. testified she then told Hurst she needed to get away from the area because "[she] was going to

vomit"—and she did. At trial, T.G. positively identified defendant as the person who sexually assaulted her.

¶ 24 6. *Police Interviews*

¶ 25 a. T.G.

¶ 26 Police, and later the Coles County state's attorney, spoke with T.G. multiple times during the investigation. In her initial interviews, T.G. denied having other sexual partners around the time of the alleged assault. Specifically, in her January 17, 2019, interview with Hurst, she said she had not engaged in sexual activity since November 28, 2018. When describing the conclusion of the sexual assault, she told Hurst it "felt like [defendant] came in me," and "it felt like he was leaking out." After receiving the results from the rape kit, which revealed male DNA which was not defendant's on T.G.'s vaginal swab, Hurst talked with T.G. again. In her May 8, 2019, interview with Hurst, T.G. acknowledged she had sex with two different men during the week of January 16, 2019. Then, in her June 4, 2019, interview at the state's attorney's office, she said she also had sex with a third man within the week of January 16. T.G. told investigators she had a pack of condoms in her purse on the day of the attack, which was never found. In her later interviews, as well as her trial testimony, T.G. was unsure whether defendant wore a condom, at one time saying she thought he did not but later saying she was not able to tell. T.G. also testified she had consensual sex in the week prior to the assault with three other men and admitted she failed to disclose all of this because she was "embarrassed" and "didn't see the relevance" at the time.

¶ 27 Just as she had on direct examination, T.G. acknowledged on cross-examination she previously had consensual sexual relations with three other men in the week prior to the attack. On redirect examination, T.G. admitted she was originally somewhat confused about

exactly how many men she had sexual relations with prior to the incidents occurring between January 14 and January 16 and when she last had sex. When confronted with her discrepancies, she acknowledged being embarrassed and did not think it was particularly relevant when she was first questioned about it.

¶ 28 b. Defendant

¶ 29 Police interviewed defendant twice at the station. The interviews were video-recorded and played for the jury. The video from the first interview was edited, but video of the second interview was not. The State used testimony from Mattoon police officer Alex Hesse to authenticate the videos. In the first statement, defendant said he was with a woman named Salissa during the relevant timeframe and he loaned his vehicle to someone he knew as "J".

¶ 30 When defendant was interviewed the second time, he initially maintained his prior claims, but as the interview continued, the versions he provided continued to change. He eventually acknowledged having a "white girl" in his car that night because she had contacted him about buying drugs. Defendant said he did not mention it before because he did not want to get her in trouble for the crime of purchasing drugs. He said they had consensual sex and she had asked to be tied up and hit. Defendant gave another version where he said he let her out and arranged for other people to beat her up, and those people had asked him to tape her up. According to defendant, he complied and then threw her out of the car. During the same statement, he told police they would not find his DNA, but he then said he had not been wearing a condom when they had sex.

¶ 31 Defendant likewise gave conflicting statements about his cellphone. Although defendant said his phone number had been the same for years, he eventually admitted to

changing his phone number on January 16, the same date T.G. testified the sexual assault occurred.

¶ 32 For the second interview, Hesse said the tactics changed and questioning became more direct. Defendant admitted to having sexual intercourse with T.G., taping her hands, and "slapping her in the face approximately ten times." Defendant acknowledged he consented to both the DNA sample and search of his vehicle. While defendant initially denied having duct tape in his car, he eventually said he threw the duct tape from the car window after he let T.G. go. Towards the end of defendant's second interview and after police directly accused defendant of raping T.G., defendant mentioned getting a lawyer. Alone in the room, he said, "[G]et me a *** lawyer in here." Once an officer reentered the room and asked a question, defendant began talking but then said, "I'm ready to see my lawyer. *** Give me my lawyer." As he continued talking to officers, defendant again said, "I'll let my lawyer handle it."

¶ 33 c. Salissa Vanscycoc

¶ 34 Deputy Chief Sam Gaines of the Mattoon Police Department said he was present during a portion of defendant's statement at the police station and learned defendant told officers he had been with Salissa Vanscycoc at the date and time of the offense. When Gaines went to Vanscycoc's residence to speak with her about this several hours later, he met defendant leaving her residence at the same time. When asked why he was there, defendant replied "he was just waking Miss Vanscycoc up so she wouldn't be late for work." As the investigation progressed, Gaines returned to Vanscycoc's apartment looking for a roll of duct tape since defendant said he had been with her some time before the assault. During questioning, Vanscycoc acknowledged having a roll of duct tape at her residence, but when she went to find it for the police, she discovered it was missing. She noted defendant came to her apartment on January 17 and told

her to tell police he had been with her the previous evening. When initially questioned by police, Vanscycoc told them defendant had been with her on January 16 until 10:00 p.m., although she later admitted he had only been there between 6:00 p.m. and 7:00 p.m.

¶ 35 7. *Physical Evidence*

¶ 36 Police gathered several pieces of physical evidence from T.G. and from searches of defendant's home and car. A crime scene technician identified a series of photographs documenting the search of the interior of defendant's vehicle and the location where any item of evidence was found. The search of defendant's vehicle produced a cellphone on the floorboard between the seats later identified as belonging to T.G.; a folding pocketknife and a set of brass knuckles in the driver's side front seat area; a "gray and black glove" with a green band around the wrist with what looked to be "similar to a blood-like substance" on it laying on the seat near the seat belt latch; and various red stains found on the passenger seat and arm rest in several locations as well as the driver's seat. The technician used alternate light sources to look for bodily fluids inside the vehicle as well as evidence of the use of cleaning fluids or chemicals on the car but was unable to find any. Blood found on the pocketknife, glove, and from swabs of the front seat of defendant's car was identified as belonging to T.G. Police also searched defendant's home and found T.G.'s knife and a roll of duct tape. T.G.'s blood was found on the duct tape and her DNA was found on the knife. Finally, male DNA was found on T.G.'s vaginal swab from the sexual assault kit, but it did not come from defendant.

¶ 37 Police also gathered information from T.G.'s and defendant's cellphones. Before testifying about the forensic examination he conducted on defendant's phone, as well as T.G.'s phone found in defendant's vehicle, Detective Michael Johnson of the Mattoon Police Department discussed the "general information about the case" he had before he began his

investigation. Specifically, he noted he had learned "[T.G.] had been sexually assaulted the night before," and "[t]he sexual assault had taken place inside the vehicle." Johnson testified "[T.G.] had been bound by duct tape. Dropped off around 21st and Lafayette to which she ran to a location she knew and made contact with someone she knew there who then reported to police."

¶ 38 Additional chain of custody witnesses were called and stipulations were read into the record regarding all physical evidence taken from defendant and his vehicle. The State also called additional witnesses to describe other aspects of the investigation, including looking for someone else known as "J" and checking out defendant's alibi for where he was the night of the offense.

¶ 39 8. *Jury Instructions, Verdict, and Sentencing*

¶ 40 Defendant elected not to testify on his own behalf. During the jury instruction conference preceding closing arguments, there was little discussion or disagreement on the Illinois Pattern Jury Instructions (IPI) tendered by the State. Defendant submitted no proposed instructions of his own. After a four-day trial with 19 witnesses, the jury deliberated for 32 minutes before returning verdicts of guilty on all counts.

¶ 41 At the outset of the August 2019 sentencing hearing, the parties, as well as the trial court, agreed the court could enter convictions on all counts. However, defendant would be sentenced only on count I, aggravated criminal sexual assault, subject to a mandatory 10-year enhancement for displaying a dangerous weapon per section 11-1.30(a)(1) of the Criminal Code of 2012 (720 ILCS 5/11-1.30(a)(1) (West 2018)). After evidence in aggravation, including a victim impact statement read by T.G. and a statement in allocution by defendant, the court sentenced defendant to 26 years' imprisonment with 10 additional years based on the statutory

enhancement. Thereafter, defendant filed a motion to reconsider sentence which the court ultimately denied.

¶ 42 This appeal followed.

¶ 43 II. ANALYSIS

¶ 44 On appeal, defendant first contends he was denied the effective assistance of trial counsel. Specifically, defendant asserts counsel failed to (1) object to what defendant contends were "inadmissible prior consistent statements" by T.G., admitted to improperly bolster her testimony, (2) request a non-IPI jury instruction regarding testimony of drug addicts, and (3) adequately redact defendant's comments about counsel from his video-recorded statement. He next argues the trial court erred when it "expressly considered [defendant's] invalid prior conviction for aggravated unlawful use of a weapon in aggravation at sentencing." We address each of defendant's arguments in turn.

¶ 45 A. Ineffective Assistance of Counsel

¶ 46 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Veach*, 2017 IL 120649, ¶ 29, 89 N.E.3d 366. To prevail on this type of claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show "counsel's performance 'fell below an objective standard of reasonableness.' " *People v. Valdez*, 2016 IL 119860, ¶ 14, 67 N.E.3d 233 (quoting *Strickland*, 466 U.S. at 688). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466

U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010). Falling short on either showing is fatal to the claim. *People v. Coleman*, 183 Ill. 2d 366, 397, 701 N.E.2d 1063, 1079 (1998).

¶ 47 At the same time, reviewing courts are to pay great deference to trial counsel's decisions, refraining from using the lens of hindsight or second-guessing. See *People v. McGath*, 2017 IL App (4th) 150608, ¶ 38, 83 N.E.3d 671. "Accordingly, when 'considering whether counsel's performance was deficient, [we] must indulge a strong presumption that the challenged action, or inaction, was the result of sound trial strategy.' " *People v. Bruemmer*, 2021 IL App (4th) 190877, ¶ 40, 192 N.E.3d 823 (quoting *People v. Poole*, 2012 IL App (4th) 101017, ¶ 10, 972 N.E.2d 340). Generally, trial strategy encompasses such decisions as what to object to and when. See *People v. Perry*, 224 Ill. 2d 312, 344, 864 N.E.2d 196, 216 (2007). Furthermore, "matters of trial strategy will not support a claim of ineffective assistance of counsel unless counsel failed to conduct any meaningful adversarial testing." *People v. Patterson*, 217 Ill. 2d 407, 441, 841 N.E.2d 889, 909 (2005).

¶ 48 Claims of ineffective assistance of counsel call for a hybrid standard of review. "Whether counsel provided ineffective assistance is a mixed question of fact and law. [Citation.] Therefore, we defer to the trial court's findings of fact, but we make an independent judgment about the ultimate legal issue. [Citation.] We review *de novo* whether counsel's omission supports an ineffective assistance claim. [Citation.]" *People v. Coleman*, 2015 IL App (4th) 131045, ¶ 66, 25 N.E.3d 82 (quoting *People v. Davis*, 353 Ill. App. 3d 790, 794, 819 N.E.2d 1195, 1200 (2004)).

¶ 49 1. *Prior Consistent Statements*

¶ 50 a. T.G.'s Statements

¶ 51 Defendant claims counsel was ineffective for failing to object to what he characterizes as "T.G.'s prior consistent statements." As a threshold matter, we must first determine whether defendant's characterization of the statements is accurate before ascertaining their effect.

¶ 52 Generally, prior consistent statements are inadmissible hearsay, meaning "a witness may not be rehabilitated by admitting former statements consistent with [her] trial testimony." *People v. Heard*, 187 Ill. 2d 36, 70, 718 N.E.2d 58, 77 (1999). In practical terms, counsel may not rehabilitate a witness whose credibility has been questioned during cross-examination by introducing the witness's prior consistent statements during redirect examination. The one narrow exception to this general rule applies when "it is charged that the testimony is recently fabricated or that the witness has some motive for testifying falsely." *People v. Harris*, 123 Ill. 2d 113, 139, 526 N.E.2d 335, 346 (1988). As this court noted in *People v. Stull*, 2014 IL App (4th) 120704, 5 N.E.3d 328, as a term of art, " 'prior consistent statement' *** usually refers to a *rehabilitative* prior consistent statement admitted" under this exception. (Emphasis in original.) *Stull*, 2014 IL App (4th) 120704, ¶ 99. Practically, it is admitted to show the witness told the same story " 'before the motive came into existence or before the time of the alleged fabrication.' " *Stull*, 2014 IL App (4th) 120704, ¶ 99 (quoting *People v. Williams*, 147 Ill. 2d 173, 227, 588 N.E.2d 983, 1003 (1991)).

¶ 53 In *Stull*, we also noted how "[u]nder the standard of review applicable to purely evidentiary errors, the erroneous admission of prior consistent statements would seldom warrant reversal" because a jury is likely to place little significance on the fact a witness said the same thing twice unless there is a claim of recent fabrication or motive to lie. *Stull*, 2014 IL App (4th)

120704, ¶ 105. “In other words, the erroneous admission of such statements should rarely result in any meaningful prejudice to a defendant.” *Stull*, 2014 IL App (4th) 120704, ¶ 105. Citing *Stull*, the Second District held, “[t]he improper admission of a prior consistent statement will warrant reversal of a defendant’s conviction only when a reasonable probability exists that the defendant would have been acquitted in the absence of the improperly admitted prior consistent statement.” *People v. Rainey*, 2022 IL App (2d) 200475-U, ¶ 45 (citing *Stull*, 2014 IL App (4th) 120704, ¶ 106). In *People v. Doehring*, 2021 IL App (1st) 190420, 195 N.E.3d 260, the First District accepted the same “reasonable probability” analysis. See *Doehring*, 2021 IL App (1st) 190420, ¶ 119 (“Reversal based on such an error is only warranted when a reasonable probability exists that but for the improperly admitted prior consistent statement, the jury would have acquitted the defendant.”).

¶ 54 Here, defendant does not identify any particular prior consistent statements the State improperly elicited from T.G. Rather, defendant first complains about the State’s questions on redirect examination after defendant’s counsel sought to discredit T.G.’s testimony about the number of men she had sex with before the date of the offense as well as her recollection of whether defendant wore a condom. Even if the State’s redirect examination had produced prior consistent statements from T.G., they would have fallen into the rehabilitative prior consistent statement exception and were unobjectionable. See *Harris*, 123 Ill. 2d at 139.

¶ 55 Defendant’s counsel began his cross-examination by asking T.G. about discrepancies between her earlier testimony and previous statements to the police regarding who she had sex with and when before the assault. He also questioned her about a more recent disclosure to the state’s attorney’s office as the case was being prepared for trial and after DNA results were obtained. The context of the questions was clearly intended to imply she changed

her statements after speaking with the State in preparation of trial and after learning defendant's DNA was not discovered in the results from the rape kit. In fact, after noting she testified on direct examination that she was not sure whether defendant wore a condom on the night of the assault, defense counsel confronted T.G. with a previous statement to Hurst which seemed to imply defendant had not worn a condom during the assault. She had told Hurst it "felt like [defendant] came in me," and "it felt like he was leaking out." Counsel then asked, "[I]n preparation for your testimony today, did the State's Attorney's office explain to you why this [whether defendant wore a condom or not] was an important point?", getting her to acknowledge its importance in light of defendant's absence of DNA found from the rape kit.

¶ 56 Contrary to defendant's claim, this is classic cross-examination intended to show the witness is motivated to testify falsely or that his or her testimony is of recent fabrication, and therefore the proper subject of *rehabilitative* prior consistent statements. See Ill. R. Evid. 613(c) (eff. Sept. 17, 2019); *Harris*, 123 Ill. 2d at 139. Defendant omits the context within which the statements were made. His counsel sought to create the inference T.G. lied about her consensual sexual partners and whether defendant wore a condom during the attack until later questioned by police and the state's attorney's office in preparation for trial. Utilizing a reasonable trial strategy, counsel attempted to discredit T.G.'s veracity.

¶ 57 On redirect examination, the State highlighted T.G.'s prior statements, asking her to explain the apparent inconsistency, to rehabilitate the implication raised by defense counsel's questions. She acknowledged having previously told Hurst she last had sex in November but explained, "I maybe was a little embarrassed; and I also, I didn't see the relevance, I guess." Defendant himself obtained an acknowledgment of what T.G. told Hurst. Such evidence came in substantively. T.G. was permitted to provide an explanation once counsel implied she was either

lying or had recently fabricated her testimony for trial. This was the rehabilitative prior consistent statement admissible under Rule 613(c). See Ill. R. Evid. 613(c) (eff. Sept. 17, 2019).

¶ 58 T.G. further testified on redirect examination she had consensual sex with the three people she named, but she knew none of the incidents occurred between January 14 and January 16. She had already testified to that fact on both direct and cross-examination. The State's inquiry, in direct response to defendant's questions on cross-examination, was "you would also agree that prior—you got a little mixed up on who you had intercourse or sex with prior to January 14, right?" T.G. did not repeat previous testimony or statements. There was no prior consistent statement made. She testified substantively about her confusion regarding the issue defendant raised on cross-examination as rehabilitation from the inference defendant sought to create.

¶ 59 Within this category of alleged prior consistent statements from T.G., the only arguable claim is based on the State's question at the close of redirect examination when the prosecutor asked, "[W]ould you agree with me that aside from a few things, you tell multiple people the same story; is that correct?" This question, however, does not elicit a prior consistent statement, as claimed by defendant, but instead asks T.G. to characterize what she "tell[s] multiple people" as "the same story." In other words, she was asked to comment on the consistency of what she told others, not what she, in fact, told others. Admittedly, this could amount to asking the witness to bolster her own testimony and perhaps should not have been allowed. Finding it to be inadmissible, however, would not necessarily require reversal. In assessing an ineffective assistance of counsel claim, we must determine whether trial counsel made a conscious choice to refrain from objecting to the otherwise inadmissible evidence since

"defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy." *Perry*, 224 Ill. 2d at 342.

¶ 60 Then, even if we find counsel's actions indefensible as trial strategy, we must conclude it was so prejudicial "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Dupree*, 2018 IL 122307, ¶ 44, 124 N.E.3d 908 (citing *Strickland*, 466 U.S. at 694). Frequently, experienced trial counsel will forego objecting to otherwise inadmissible evidence to avoid highlighting the witness's response as a matter of trial strategy. T.G. had already been candid about her drug usage, had related the intimate details of a brutal encounter—as evidenced by the significant injuries seen by multiple witnesses, and had been made to confess her personal sexual history before the assault. Counsel was faced with a sympathetic victim whose emotions were apparent on the record. He had already made his points on cross-examination and an objection would have had little effect unless he intended to highlight what T.G. said by inquiring further himself.

¶ 61 More importantly, given the overwhelming evidence of defendant's guilt, could we conclude a failure to object to T.G.'s response alone created a "reasonable probability" of a different outcome? The answer is simple; no. Defendant admitted he taped T.G.'s hands, "slapp[ed] her in the face approximately ten times," and had sexual intercourse with her. The day after his assault of T.G., defendant instructed Vanscycoc to tell the police he had been with her the previous evening. However, Vanscycoc testified defendant had only been at her residence for approximately one hour that day. T.G.'s cellphone was also found on the floorboard between the seats of defendant's vehicle along with a folding pocketknife and a set of brass knuckles in the driver's side front seat area. A "gray and black glove" with a green band around the wrist,

"fit[ting] the exact description of what [T.G.] had given in her statement," was found with what looked to be "similar to like a blood-like substance" on it laying on the seat near the seat belt latch. Various red stains were found in several locations as well, including the driver's seat, passenger seat, and arm rest. The blood found on the pocketknife, glove, and from swabs of the front seat of defendant's car was identified as belonging to T.G. Police also searched defendant's home and found T.G.'s knife and a roll of duct tape. T.G.'s blood was found on the duct tape and her DNA was found on the knife. See *Clendenin*, 238 Ill. 2d at 317-18 (stating the failure to satisfy either prong precludes a finding of ineffective assistance of counsel).

¶ 62 b. Sergeant Hurst's Statements

¶ 63 Defendant next claims the State improperly elicited testimony from Sergeant Hurst, which defendant characterizes as T.G.'s prior consistent statements. He also claims Hurst vouched for her credibility as well. Once again, defendant confuses testimony *about* prior statements with testimony *containing* prior consistent statements. Here, Hurst described a technique he used during his "thousands" of interviews of suspects or victims where he might "sometimes lie" to them "to make sure that victim is telling us the truth." He acknowledged lying to T.G. and, when the State asked what lie he told her, the trial court sustained defense counsel's objection. Hurst was then asked, "And when you lied to her, did that cause her to change her story in any way?" Defense counsel interposed a hearsay objection to Hurst's response that it did not, which was overruled by the trial court. Hurst never disclosed the substance of her statements, either before or after he lied to her, merely acknowledging his technique did not "cause her to change her story in any way."

¶ 64 This is very similar to *People v. Williams*, 264 Ill. App. 3d 278, 636 N.E.2d 630 (1993) (*Laval Williams*), where no plain or reversible error was found when witnesses were

asked whether they told the police or grand jury "the same story they had told in court." The First District relied, in part, on another First District case, *People v. Williams*, 228 Ill. App. 3d 981, 593 N.E.2d 968 (1992) (*Angelo Williams*), where the court found reversal was not required where the evidence was not closely balanced, the witness testified only that his prior statement was consistent with his trial testimony and did not testify to the substance of the prior statement. The court noted, that for purposes of a plain error analysis, it was significant the testimony of the challenged witness was corroborated by other witnesses and by physical evidence. See *Angelo Williams*, 228 Ill. App. 3d at 992-93.

¶ 65 Even though the *Williams* cases operated within a plain-error analysis, and we are considering ineffective-assistance of counsel, we find the emphasis on corroborating evidence apt for our purposes of evaluating possible prejudice to a defendant. Here too, there was substantial corroborating evidence, such as: (1) multiple witness' testimony about T.G.'s physical and emotional condition after the assault; (2) the fact T.G. had been seen with "J", later identified as defendant; (3) T.G.'s accurate description of defendant and his car; (4) a trail of defendant's text messages trying to get T.G. to meet with him and expressing his desire for intimate contact; (5) the physical evidence found in defendant's car, including T.G.'s blood, her items found at his home and in his car, along with the duct tape with her blood on it; and ultimately, (6) defendant's own statements—first denying and then admitting—that he beat and had sex with T.G., albeit consensually, according to him. Considering the amount of corroborating evidence present here, we find there was no reasonable probability of a different outcome (*i.e.*, acquittal) had defendant's counsel objected to (and the trial court excluded) Hurst's statement that the victim's story did not change when confronted with a lie. *Doehring*, 2021 IL App (1st) 190420, ¶ 119; see also *Laval Williams*, 264 Ill. App. 3d at 289. Moreover,

our confidence in the fairness of the proceedings and the outcome is unmoved. Without prejudice, there can be no ineffective assistance. See *Coleman*, 183 Ill. 2d at 397-98 (stating a "lack of prejudice renders irrelevant the issue of counsel's performance").

¶ 66 Defendant likewise argues Hurst's response improperly vouched for T.G.'s credibility. However, Hurst did not comment on T.G.'s credibility. He merely stated her story did not change when confronted with a lie as part of his interviewing technique. Defendant nevertheless contends "the unmistakable purpose of this questioning was to tell the jury that Lt. Hurst believed what T.G. told him was the truth." As support, he cites *People v. Boling*, 2014 IL App (4th) 120634, 8 N.E.3d 65, which is substantially dissimilar to the case before us.

¶ 67 In *Boling*, the State's evidence consisted almost entirely of statements of an eight-year-old child victim and the denials of the defendant. The State elicited testimony from a sexual assault nurse examiner (SANE), testifying as an expert witness, that the victim gave her a "credible history." The impropriety of such a direct comment was clear. "[I]t is generally improper to ask one witness to comment directly on the credibility of another witness." *People v. Stevens*, 2018 IL App (4th) 160138, ¶ 42, 115 N.E.3d 1207. In its closing argument, the State then continued to vouch for the victim's credibility, saying "[y]ou heard [the SANE nurse], who does this for a living, state[] that it was [a] very credible statement. [The nurse] certainly seemed to believe it." *Boling*, 2014 IL App (4th) 120634, ¶ 120. The State went further, stating, "So, I do think [the victim's] statements are credible. They are believable. They are honest." *Boling*, 2014 IL App (4th) 120634, ¶ 125. This court found it was plain error to permit the SANE nurse to testify expressly about the victim's credibility and for the prosecutor to then express his personal opinion of the victim's credibility to the jury. See *Boling*, 2014 IL App (4th) 120634, ¶¶ 119-127.

¶ 68 We have none of that here. Hurst neither commented on T.G.'s believability nor conveyed the content of her statements. All he said was that when confronted with a lie, her story did not change. The jury was still left to determine for themselves whether the story they heard from the victim at trial was believable or not. This does not violate the general rule vesting decisions of credibility to the exclusive province of the jury. See *Stevens*, 2018 IL App (4th) 160138, ¶ 42; *People v. Nitz*, 143 Ill. 2d 82, 95, 572 N.E.2d 895, 900-01 (1991). Further, the comments by Hurst were not a prosecutor's expression of "personal beliefs or opinions or invok[ing] the integrity of the State's Attorney's office, to vouch for the credibility of a prosecution witness." See *Boling*, 2014 IL App (4th) 120634, ¶ 126 (quoting *Lee*, 229 Ill. App. 3d at 260). And lastly, considering the overwhelming evidence against defendant, as stated *supra*, any error in admitting the statement was not reasonably likely to affect the outcome or create a "reasonable probability" of a different outcome had counsel objected. See *Dupree*, 2018 IL 122307, ¶ 44; see also *Clendenin*, 238 Ill. 2d at 317-18.

¶ 69 c. Statements of Brooke Rieck and Detective Johnson

¶ 70 Defendant next contends portions of the testimony from Rieck and Johnson constituted additional prejudicial prior consistent statements. Defendant is wrong on both counts. Rieck's testimony merely recited events which occurred earlier on January 14, when T.G. first sought to purchase drugs. She neither referenced nor repeated any statements made by T.G. Rieck could obviously testify to the plan and identify the persons involved since she was directly involved in setting up the purchase of drugs both for herself and T.G., all of which she admitted to on the stand. The record does not reveal the source of Rieck's information that the three people who took T.G. to purchase drugs "ended up robbing us, and leaving T.G. *** where they took her." Yet defendant surmises the jury would somehow conclude the information must have

come from T.G. This assumption strains credulity. More importantly, it ignores the fact trial counsel's strategy from the outset of the case was to argue T.G. was not credible by highlighting T.G.'s drug usage. Counsel's failure to object to Rieck's testimony about what occurred, apparently outside her presence (even that is not clear from the record), on the morning of January 14 was much more likely a matter of trial strategy to highlight T.G.'s habits as a drug user and addict. Defendant admitted this incident led to their meeting in the first place. Counsel even emphasized the incident in closing argument. See *People v. Graham*, 206 Ill. 2d 465, 478-79, 795 N.E.2d 231, 240 (2003) ("Defense counsel's failure to object to trial testimony may be a matter of strategy and does not necessarily establish substandard performance."). Again, even if we found it to be deficient performance, it would not have created a "reasonable probability" of a different outcome. *Dupree*, 2018 IL 122307, ¶ 44; *Doehring*, 2021 IL App (1st) 190420, ¶ 119.

¶ 71 Next, the statements of Johnson, the detective who conducted a forensic download of T.G.'s cellphone, were elicited by the State to explain what "general information about the case" he had before he initiated his investigation. Following counsel's hearsay objection, the State advised the statements were being offered as "course of conduct." The trial court immediately informed the jury,

> "I will let the jury know that some of the questions are going to be geared toward the course of conduct of police officer [*sic*] as to why the police officer progressed from one step to another step. It's not offered for the truth of the matter asserted. It's simply offered for the course of conduct."

Johnson then testified to the information relayed to him, saying,

> "[T.G.] had been sexually assaulted the night before. She had been picked up by someone she knew in the vehicle. The sexual assault had taken place inside the vehicle. She had been bound by duct tape. Dropped off around 21st and Lafayette to which she ran to a location she knew and made contact with someone she knew there who then reported to police."

In response to further questioning, Johnson said the victim indicated she had cellphone conversations with her assailant, and Johnson eventually obtained possession of her phone.

¶ 72 As an exception to the rule against hearsay, "[a] police officer may testify as to the steps taken in an investigation of a crime 'where such testimony is necessary and important to fully explain the State's case to the trier of fact.' " *Boling*, 2014 IL App (4th) 120634, ¶ 107 (quoting *People v. Simms*, 143 Ill. 2d 154, 174, 572 N.E.2d 947, 954-55 (1991)). Consistent with our admonishments in *Boling*, Johnson's testimony about the steps taken in his investigation did "not include the *substance* of a conversation with a nontestifying witness." (Emphasis in original.) *Boling*, 2014 IL App (4th) 120634, ¶ 107. Instead, T.G. and others had already testified and been subject to substantial cross-examination on the same information Johnson conveyed in general terms to explain the basis for his examination of her phone. " 'The fundamental reason for excluding hearsay is the lack of an opportunity to cross-examine the declarant.' " *People v. Dawson*, 2022 IL App (1st) 190422, ¶ 54 (quoting *People v. Jura*, 352 Ill. App. 3d 1080, 1085, 817 N.E.2d 968, 973-74 (2004)).

¶ 73 Again, defendant characterizes general facts of the investigation, obtained from T.G. and other witnesses as well as information obtained from the substantial amount of physical evidence and defendant's own statements to police, as prior consistent statements. None of the

information identified defendant as the perpetrator or related specific statements of the victim or any other person, whether testifying or not. Defendant admitted he texted with T.G., they had sex, it took place in his car, duct tape was used, he hit her repeatedly (at her request), and he dropped her off afterward. He gave Johnson consent to search his phone. By the time Johnson testified about being apprised of the particulars of the investigation, the observations of other witnesses and evidence from the medical examination revealing evidence of a sexual assault was already before the jury. There was nothing in Johnson's description of the information provided to him that was not already in evidence, which lessened any prejudice to defendant.

¶ 74 Defendant's reliance on *Jura*, 352 Ill. App. 3d 1080 is misplaced. We first note *Jura* has the unenviable distinction of being distinguished almost a third of the time it is cited. In *Jura*, the First District narrowly interpreted the course of conduct or "police investigative procedure" exception to the hearsay rule. *Jura*, 352 Ill. App. 3d at 1084-89. The court found allowing three police witnesses to testify about the radio call describing the "type of crime reported and the description of the suspect" was inadmissible hearsay and not included within the exception. *Jura*, 352 Ill. App. 3d at 1086-89. But they did so when the other evidence in the case, or lack of such evidence, made it clear the hearsay statements were offered for their truth. *Jura*, 352 Ill. App. 3d at 1088-89. In fact, the State relied upon them in both its opening and closing statements. *Jura*, 352 Ill. App. 3d at 1088-89. As our supreme court noted when also distinguishing *Jura* from the case before it in *People v. Banks*, 237 Ill. 2d 154, 934 N.E.2d 435 (2010), "[i]n *Jura*, the appellate court held that the testimony admitted had the effect of proving the matter asserted, that the defendant was the individual who committed the offense, and that it failed to satisfy any other relevant, nonhearsay purpose." *Banks*, 237 Ill. 2d at 182. Such is not the case here. Johnson's statements were to generally explain why obtaining T.G.'s phone was

relevant to the investigation, and what evidence may be obtained therefrom. Further, the trial court immediately provided a limiting instruction to the jury, and nothing in the record suggests the jury ignored the law pursuant to that instruction. See *People v. Phillips*, 392 Ill. App. 3d 243, 270, 911 N.E.2d 462, 488 (2009) ("The jury is presumed to follow instructions."). This too had no likelihood of affecting the outcome of the trial. See *Doehring*, 2021 IL App (1st) 190420, ¶ 119.

¶ 75 Finally, we note how this situation could have been easily avoided had the trial court utilized the *Cameron* hearing procedure our colleague Justice Steigmann discussed in *Boling*. Although we have distinguished it factually, much of *Boling*'s legal analysis is relevant here. When an objection is first raised (or, if not, by the trial court *sua sponte*) a hearing should be conducted outside the presence of the jury " 'to determine both the *scope* of these third-party out-of-court statements and the *need* for the jury to hear them.' " (Emphases in original.) *Boling*, 2014 IL App (4th) 120634, ¶ 114 (quoting *People v. Cameron*, 189 Ill. App. 3d 998, 1005, 546 N.E.2d 259, 264 (1989)). This procedure allows the trial court to determine what, if anything, should be presented, " 'thereby permitting the State to provide its legitimate explanations for police conduct, while protecting the defendant against prejudicial hearsay statements.' " (Emphasis in original.) *Boling*, 2014 IL App (4th) 120634, ¶ 114 (quoting *Cameron*, 189 Ill. App. 3d at 1005). We commend Justice Steigmann's thoughtful analysis of this issue to trial judges and prosecutors alike.

¶ 76 2. *Failure to Request a Non-IPI Instruction*

¶ 77 Defendant next claims his trial counsel was ineffective for failing to request a non-IPI jury instruction—namely, a "modified version of IPI 1.02, cautioning the jury about the believability of a drug addict." Defendant relies on the committee note's reference to *People v.*

Franz, 54 Ill. App. 3d 550, 368 N.E.2d 1091 (1977), as support for his claim "[a]n instruction informing the jury that it could consider the evidence that a witness was addicted to drugs at the time of the crime in judging that witness' credibility would have been proper." *Franz*, 54 Ill. App. 3d at 555. We note both the committee note and *Franz* predate *People v. Steidl*, 142 Ill. 2d 204, 568 N.E.2d 837 (1991), where the supreme court specifically held it to be a proper exercise of discretion for a trial court to deny a tendered addict instruction where evidence of addiction is already before the jury. *Steidl*, 142 Ill. 2d at 237-39. Although a defendant is allowed to cross-examine witnesses regarding drug use, a trial court is not required to instruct the jury on the unreliability of drug addict testimony. *People v. Armstrong*, 183 Ill. 2d 130, 146, 700 N.E.2d 960, 967 (1998).

¶ 78 Ultimately, the decision on giving a non-IPI instruction is within the sound discretion of the trial court. *People v. Simms*, 192 Ill. 2d 348, 412, 736 N.E.2d 1092, 1133 (2000). "[A] trial court does not abuse its discretion by refusing to give a non-IPI instruction if there is an applicable IPI instruction or the essence of the refused instruction is covered by other given instructions." *Simms*, 192 Ill. 2d at 412-13. The holding in *Steidl* continues to be good law. "[I]t is not reversible error to deny an offered addict instruction where evidence of the addiction is before the jury so it can make its own determination of the credibility of the witness." *People v. Foster*, 322 Ill. App. 3d 780, 789, 757 N.E.2d 894, 903 (2000) (citing *Steidl*, 142 Ill. 2d at 238); see *People v. Reed*, 405 Ill. App. 3d 279, 288, 938 N.E.2d 199, 206-07 (2010).

¶ 79 This is (and was) the state of the law, and we presume trial counsel knew the law. "[C]ounsel's choice of jury instructions *** is a matter of trial strategy" that we defer to on appeal. *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 97, 58 N.E.3d 1242. "Accordingly, counsel's decision as to which jury instruction to tender can support a claim of ineffective

assistance of counsel only if that choice is objectively unreasonable." *Mister*, 2016 IL App (4th) 130180-B, ¶ 97.

¶ 80 Here, without objection from defense counsel, the jury was given the standard IPI 1.02 instruction discussing the jury's duty to assess the credibility of witnesses. T.G.'s drug addiction, and by extension her credibility, played a major role in this case. Within the first minutes of the State's opening statement (less than a full page of transcript) the prosecutor informed the jury of T.G.'s drug habit and how the case begins with her search for drugs. Defense counsel did the same thing from the beginning of his opening statement as well. Throughout the trial, T.G. and others talked about her addiction and the various drugs she used at the time of the offense. She was cross-examined on the subject extensively and both sides referenced her addiction in closing arguments. Defendant acknowledges as much in his brief.

¶ 81 The evidence of T.G.'s addiction was before the jury throughout the trial. " 'Jurors do not leave their common sense behind when they enter court, and even in the absence of cautionary instructions they will ordinarily be aware of the factors which make some witnesses unreliable.' " *Steidl*, 142 Ill. 2d at 238 (quoting *People v. Rollins*, 108 Ill. App. 3d 480, 488, 438 N.E.2d 1322, 1328 (1982)). We cannot say it was objectively unreasonable for trial counsel to decide to go with IPI 1.02 rather than asking for a non-pattern instruction like the one from *Franz*. *Mister*, 2016 IL App (4th) 130180-B, ¶ 97. Counsel may have made the strategic decision to not tender an instruction he believed would likely be denied or was unnecessary because the substance was already covered in another instruction or because it even further highlighted T.G.'s addiction. See *Reed*, 405 Ill. App. 3d at 288 ("Additionally, courts are reluctant to give a non-IPI drug addiction instruction because it places undue emphasis on particular evidence in a case."). Similarly, counsel may have made the strategic decision to focus

the jury's attention on T.G.'s drug use and undermine her credibility throughout the trial rather than rely on the trial court to give the non-IPI instruction from *Franz*. Accordingly, we do not find counsel's decision amounts to deficient performance. The failure of defendant to show error defeats any claim of ineffective assistance. *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 47, 22 N.E.3d 1175.

¶ 82 3. *Failure to Seek Redaction of Video Evidence*

¶ 83 Defendant's final claim of ineffective assistance relates to his contention trial counsel was ineffective because he "failed to ensure [defendant's] requests for counsel were redacted from his video-recorded statement that was played for the jury." He does not elaborate on exactly how counsel was to "ensure" that. Interestingly, he does not claim trial counsel was ineffective for failing to address it in his suppression motion, by seeking redaction, or by way of objection. In effect, defendant blames trial counsel for the outcome as opposed to any particular action or inaction on his part.

¶ 84 Defendant's claim of error fails to mention his request for counsel was raised before trial in a motion to suppress. During the motion hearing, arguments were heard, and defense counsel confirmed the trial court previously viewed the recorded statements. The court found, in addition to several ambiguous comments about counsel, defendant eventually said, "Give me my lawyer, man," at one point in the interview. However, the court also found defendant "immediately initiated further communications with the deputy chief" after the chief acknowledged his request for counsel, thereby "knowingly and intelligently waiv[ing] the right he was attempting to invoke." The court further found the "deputy chief did not initiate further police interrogation. He was done. But defendant wasn't. He continued to talk, and I don't find there to be a violation." The matter was also addressed at trial by way of counsel's continuing

objection to the admission of the video-recorded statements and was raised as a claim of error in defendant's posttrial motion.

¶ 85 Defendant now claims the violation here was not one of *Miranda*—continuing to question him after an assertion of his right to counsel—but a violation for permitting the jury to hear his request for counsel as set forth in *Doyle v. Ohio*, 426 U.S. 610 (1976). Under *Doyle* and its progeny, a party may not introduce evidence of a "defendant's post-*Miranda*-warning request for an attorney" because such evidence undermines the promised right-to-counsel and violates due process. *People v. Dameron*, 196 Ill. 2d 156, 163-64, 751 N.E.2d 1111, 1115 (2001) (citing *Wainwright v. Greenfield*, 474 U.S. 284, 295 n.13 (1986); *People v. Lucas*, 132 Ill. 2d 399, 432, 548 N.E.2d 1003 (1989)). Defendant contends counsel should have challenged the video-statement on *Doyle* grounds or, at least, had it redacted to remove his request for counsel, and further, these omissions amounted to ineffective assistance from counsel.

¶ 86 Seemingly looking for a similar outcome, defendant directs our attention to *People v. Bunning*, 298 Ill. App. 3d 725, 700 N.E.2d 716 (1998), where defense counsel unintentionally elicited an answer on cross-examination that violated *Doyle* and we remanded for a new trial. There, counsel asked a police detective how long he interviewed the defendant, and the detective answered by saying, "[A]fter a short time, [the] defendant terminated the interview by refusing to continue and requesting counsel." *Bunning*, 298 Ill. App. 3d at 731. No one objected to, or otherwise moved to strike, the answer; no one referenced the answer during the remainder of the trial; and defense counsel did not raise the issue in a posttrial motion. *Bunning*, 298 Ill. App. 3d at 731-32.

¶ 87 On appeal, the defendant raised the curious argument the State errantly introduced this evidence and his counsel was ineffective for "failing 'to object' " to the answer from a question he posed. *Bunning*, 298 Ill. App. 3d at 731. This court observed,

> "Although defense counsel may have decided not to make a motion to strike and to ask the jury to be instructed to disregard the testimony so as not to call undue attention to the statement by [the detective], that does not explain the absence of a motion for mistrial outside the jury's presence or the failure to include the issue in the posttrial motion." *Bunning*, 298 Ill. App. 3d at 731-32.

Without a prejudice-prong analysis, we concluded, "It was ineffective assistance of counsel not to raise this [*Doyle*] issue in some fashion." *Bunning*, 298 Ill. App. 3d at 732. We remanded for a new trial based on multiple errors, saying, "Although these errors may not have required reversal individually, the cumulative impact entitles [the] defendant to a new trial." *Bunning*, 298 Ill. App. 3d at 732.

¶ 88 Defendant likewise cites *People v. Moore*, 279 Ill. App. 3d 152, 663 N.E.2d 490 (1996), where the Fifth District reversed and remanded based, in part, upon counsel's failure to object to a *Doyle* violation. There, as in *Bunning*, multiple constitutional violations occurred, and the defendant's trial counsel challenged none of them in what the Fifth District labeled "egregious lawyering." *Moore*, 279 Ill. App. 3d at 157. Briefly addressing the *Doyle* argument, the court noted, "When [Officer] Faith told this jury that he read the defendant his rights and the defendant subsequently refused to answer questions about his activities that night, a reasonably effective lawyer would have objected and requested a mistrial." *Moore*, 279 Ill. App. 3d at 157. The Fifth District deemed counsel's omission deficient performance, finding, "We cannot

construe the unobjected-to admission of this testimony as strategy rather than mistake." *Moore*, 279 Ill. App. 3d at 157. But, like the *Bunning* court, the Fifth District did not conduct a prejudice analysis on this particular error. The court instead considered all of counsel's errors together when it reversed and remanded on ineffective-assistance grounds, holding, "From our review of the proceedings as a whole, we find that the adversarial process designed to produce fair and just results broke down, and as a result of the errors of counsel, the verdict cannot be relied upon with confidence." *Moore*, 279 Ill. App. 3d at 162.

¶ 89 We acknowledge, on the surface, *Bunning*'s and *Moore*'s facts appear comparable to those before us—counsel's failure to challenge evidence based on a *Doyle* violation. But, in our view, the similarities end there. In those cases, counsel committed many errors and the courts' prejudice analyses centered upon cumulative error. Indeed, *Bunning* indicated that counsel's single failure of not objecting to *Doyle* evidence may not require reversal for ineffective assistance of counsel. *Bunning*, 298 Ill. App. 3d at 732; *People v. Edwards*, 309 Ill. App. 3d 447, 455, 722 N.E.2d 258, 264 (1999) (distinguishing *Bunning* and ultimately finding no prejudice and no ineffective assistance when counsel failed to object to a *Doyle* violation because such an error was harmless).

¶ 90 Assuming, *arguendo*, we found counsel rendered deficient performance here by trying to exclude the interview-video evidence based only on a *Miranda* violation and not also on *Doyle* grounds, we would find defendant suffered no prejudice from the error. Defendant's references to a lawyer came in quick succession while he kept talking with officers in the video. We are not assuming defendant's comments went unnoticed by the jury, but merely observe their brevity and isolation. Once the video played, no one commented on defendant's request for an attorney. The State did not use it to argue defendant's consciousness of guilt or non-cooperation.

Defense counsel did not use it to argue defendant was being railroaded by police, like defendant claimed during the interview as he asked for a lawyer. Considering all that happened during the trial, as well as the substantial evidence presented against defendant, we ultimately cannot say counsel's failure to ensure the jury did not hear defendant's request for an attorney undermines confidence in the jury's guilty verdict. See *Moore*, 279 Ill. App. 3d at 162 (elaborating on the prejudice prong for ineffective-assistance-of-counsel analysis). To be sure, a "review of the fundamental fairness of the proceeding as a whole," confirms defendant received a fair trial and "the result [i]s worthy of confidence." *Moore*, 279 Ill. App. 3d at 162. Consequently, there is no prejudice and no ineffective assistance of counsel. See *Coleman*, 183 Ill. 2d at 397-398 ("Courts, however, may resolve ineffectiveness claims under the two-part *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance.").

¶ 91 4. *Cumulative Effect of Errors*

¶ 92 As a catch-all, defendant contends the cumulative effect of the alleged errors created a reasonable probability of a different outcome. For two claims we have addressed, defendant has failed to establish that error occurred. "[T]he absence of error nullifies any ineffective assistance of counsel argument because counsel's performance is not deficient for failing to raise a meritless issue." *People v. Stone*, 2018 IL App (3d) 160171, ¶ 20, 100 N.E.3d 672. And as we explained above, even if we found counsel's failure to ensure the jury did not hear defendant's request for an attorney amounted to deficient performance, defendant suffered no prejudice.

¶ 93 B. Need for Remand for Sentencing

¶ 94 Finally, defendant contends his case should be remanded for a new sentencing hearing because the trial court improperly considered, in aggravation, his prior conviction for AUUW of the type held unconstitutionally invalid by *People v. Aguilar*, 2013 IL 112116, 2 N.E.3d 321, and *People v. Burns*, 2015 IL 117387, 79 N.E.3d 159. The State concedes the void nature of the prior conviction, the resultant error in considering it, and the need for resentencing. Therefore, having established defendant's prior AUUW conviction to be voided by the above authority, we accept the State's concession and agree it was error for the court to consider it at sentencing. See *In re N.G.*, 2018 IL 121939, ¶ 36, 115 N.E.3d 102.

¶ 95 III. CONCLUSION

¶ 96 For the reasons set forth above, we affirm in part, reverse in part, and remand for a new sentencing hearing.

¶ 97 Affirmed in part and reversed in part; cause remanded.