2013 IL App (1st) 113794-U

FIFTH DIVISION
NOVEMBER 8, 2013

No. 1-11-3794

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 20277
	)	
EDWARD KELLER,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

O R D E R

¶ 1 *Held*: The second-stage dismissal of defendant's postconviction petition is affirmed where defendant failed to make a substantial showing of ineffective assistance of trial counsel.

¶ 2 Defendant Edward Keller appeals the trial court's dismissal, on motion of the State, of his petition for postconviction relief. On appeal, defendant contends that his petition should not have been dismissed because it made a substantial showing of two constitutional violations. First, he asserts that his trial counsel was ineffective for failing to secure "vital admissible testimony" from a particular witness, Chaplain William Brewer. Second, he argues that counsel

was ineffective for failing to move to suppress his statements on grounds that they were obtained in violation of his right against self-incrimination, as he was not given adequate notice of his *Miranda* rights.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the events of July 31, 2000. On that date, his girlfriend's 15-month-old son suffered a severe and permanent head injury. The State's theory of the case was that defendant caused the injury. The defense's theory of the case was that the boy was already injured when his mother left him with defendant. Following a bench trial, defendant was convicted of aggravated battery of a child and sentenced to 20 years in prison. On direct appeal, we affirmed defendant's conviction, but corrected an error in the mittimus and remanded for proper post-sentencing admonishments and to allow defendant to file a motion to reconsider his sentence. *People v. Keller*, No. 1-03-2435 (2004) (unpublished order under Supreme Court Rule 23). Following remand, defendant appealed the trial court's order denying his motion to reconsider the sentence. We affirmed defendant's sentence. *People v. Keller*, No. 1-05-1593 (2004) (unpublished order under Supreme Court Rule 23).

¶ 5 The underlying facts of the case are set forth in our second order on direct appeal, but will be repeated here at length due to the nature of defendant's postconviction claims.

¶ 6 At trial, Alexis Tomacek testified that on the date in question, she asked defendant to watch her son, Nicholas, while she went to an appointment at the welfare office. About 3 p.m., she brought Nicholas to the house where defendant lived in a basement apartment. At that time, Nicholas was "fine" and "normal." After placing Nicholas on the couch next to defendant, Alexis left for her appointment. About 10 minutes into her drive, she received several emergency pages from defendant. Alexis called defendant's number and spoke with his landlady's son, who told her Nicholas was not breathing right and had been rushed to MacNeal

Hospital. The hospital then paged her, and she went straight there. Shortly thereafter, Nicholas was transferred to Loyola University Medical Center.

¶ 7 Alexis acknowledged talking to her mother-in-law, Angela Konieczny, about Nicholas' injuries a few days after they occurred. However, she denied telling Angela that Nicholas was unresponsive before she brought him to defendant's apartment, that defendant had nothing to do with Nicholas' injuries, or that when she brought Nicholas down the stairs and placed him on the couch, his head was bobbing up and down and from side to side. Alexis also acknowledged receiving a collect telephone call four days after the incident from her husband, Ronald Tomacek, who was incarcerated in Texas. Alexis stated that Angela was present when she received the call and that she told Ronald what happened to Nicholas. Alexis testified, "I believe I told him that I don't believe [defendant] did it." According to Alexis, she did not tell Ronald that Nicholas' head was bobbing up and down and from side to side when she brought him to defendant's apartment.

¶ 8 Alexis' mother, Donna Navarro, testified that she observed Alexis and Nicholas around 2 p.m. on the day in question. She fed Nicholas a cracker and asked him to point to his nose, eyes, and ears, which he did. About 2:40 p.m., she walked Alexis and Nicholas to the car and placed Nicholas in his car seat. According to Donna, Nicholas was "his usual self."

¶ 9 Stickney police officer Kevin McGuire testified that at 3:22 p.m. on the day in question, he responded to a 9-1-1 hangup call made from defendant's address. When Officer McGuire arrived, defendant was standing by the front door. Defendant told Officer McGuire that there was a baby inside having problems breathing. Officer McGuire called for an ambulance and entered the house. Nicholas was lying on the floor, face up. Officer McGuire testified that when he picked Nicholas up, he was limp and gasping for air. In response to the officer's questions, defendant reported that Nicholas had been in that condition for just a few minutes. Officer

McGuire heard the ambulance approaching and carried Nicholas outside, performing mouth-to-mouth resuscitation as he did so. He then placed Nicholas in the ambulance.

¶ 10 The chief of detectives for the Stickney Police Department, Commander Ritchie Hare, investigated Nicholas' injuries. On July 31, 2000, he interviewed defendant, Alexis, Donna, and defendant's landlady, Joyce Casares, all of whom came to the police station, in an attempt to determine what had happened to Nicholas. Commander Hare interviewed defendant first. Defendant related to Commander Hare that he was watching television with Nicholas, went to another room to make a telephone call, heard a thud, and discovered that Nicholas had fallen off the couch and hit his head on the concrete floor. Commander Hare then interviewed Alexis, Donna, and Joyce. According to Commander Hare, "we re-interviewed everybody a couple of times trying to get the time frames down on when the actual injuries had taken place, and the chain of events."

¶ 11 Commander Hare stated that he spoke with defendant for the second time around 11 p.m. During this conversation, defendant told Commander Hare that Nicholas was antsy and whining, and he picked him up and forcibly put him on the couch. Defendant went into another room to make a telephone call and heard Nicholas fall. Defendant related he was scared because he was afraid he had injured Nicholas.

¶ 12 Commander Hare interviewed defendant for a third time around 8 a.m. the next morning. Commander Hare memorialized the statement in writing. In the written statement, defendant related that he had been advised of his rights and was making his statement voluntarily. Defendant recounted that after Alexis left Nicholas with him, he put Nicholas on the floor to play. Nicholas stood there, pouting and doing nothing. Defendant grabbed him hard and sat him down on the couch. He then went into another room to use the telephone. Within 30 seconds, he heard a thud. He went back into the room and discovered that Nicholas had collapsed and "just

plopped right off the couch and fell face first." When defendant picked Nicholas up, his body was limp. Nicholas' head fell backward and his right eye "went sideways towards his ear." Holding Nicholas, defendant ran upstairs to his landlady, Joyce, because she was a registered nurse. Joyce took Nicholas, put him on the couch, and tried to revive him. Defendant paged Alexis and then dialed 9-1-1 at Joyce's direction. However, defendant hung up. He explained, "I didn't want to call 9-1-1 and have the police come there because Alexis was already having trouble with DCFS over the baby's broken leg. I just wanted Alexis to call and get there first so we could take the baby to the hospital." Defendant paged Alexis again. The police dispatcher called, and defendant, thinking it was Alexis, answered. Defendant related that he was just "standing there" watching Nicholas and Joyce when the police arrived.

¶ 13 Commander Hare went to Loyola University Medical Center and spoke with a Dr. Weller about Nicholas' injuries. Commander Hare asked the doctor how long it would take after an injury for Nicholas' symptoms to manifest. According to Commander Hare's testimony, Dr. Weller told him, "A very short period of time, almost immediately." However, Commander Hare wrote in his police report that Dr. Weller stated it would take "plus or minus, she would estimate, approximately forty minutes" for a child to collapse from such injuries.

¶ 14 Assistant State's Attorney (ASA) Mohammad Ghouse testified that about 2:30 p.m. on August 1, 2000, he interviewed defendant, who was in custody at the Stickney Police Department. After defendant was advised of his *Miranda* rights, he told ASA Ghouse that after Alexis dropped Nicholas off, he put Nicholas on the ground so he could play. But then he grabbed Nicholas hard and put him back on the couch. As he was doing so, his hands slipped up from Nicholas' shoulder or arm to his neck and jaw. Defendant told ASA Ghouse that he "plopped" Nicholas down on the couch very hard, causing Nicholas to shake up and down. Defendant then went into another room to make a telephone call, and after about 30 seconds, he

heard a thud. He found Nicholas on the floor face-down. Nicholas was limp and one of his eyes was looking toward his ear. Defendant related to ASA Ghouse that he brought Nicholas upstairs to Joyce Casares. At Joyce's direction, defendant called 9-1-1, but then he hung up because he did not want the police to get involved. Defendant paged Alexis. When the telephone rang, he answered, thinking it was Alexis. However, it was Stickney police dispatch. Defendant told the dispatcher that everything was okay. Shortly thereafter, the police and an ambulance arrived at the scene.

¶ 15 ASA Ghouse testified that he asked defendant whether he wanted to memorialize his statement in writing, and defendant indicated he did. ASA Ghouse advised defendant of his *Miranda* rights and then hand-wrote defendant's statement. The written statement was published to the trial court. In the statement, defendant related that he put Nicholas on the floor to play, but then grabbed him hard with both hands near his upper arms or shoulders and tried to lift him up. Defendant stated that he lost his balance and shook Nicholas with a "hard jolt." According to defendant, he lost his grip and his hands slid to the side of Nicholas' neck and jaw. He swung Nicholas onto the couch and "plopped" him down, causing him to bounce up and down. Defendant related that he got up off the couch to check on the telephone. After about 30 seconds, he heard a thud. He found Nicholas lying on his stomach on the floor. Defendant picked Nicholas up and noticed that his head was "going backward and limp," his right eye was looking toward his right ear, and he was not breathing. Defendant took Nicholas upstairs to Joyce Casares because she was a nurse. After laying Nicholas on the couch, defendant paged Alexis. He then called 9-1-1 at Joyce's direction, but hung up because he was scared. Defendant paged Alexis again, and then received a call from the Stickney police dispatcher. Defendant told the dispatcher there was no problem. Defendant paged Alexis a third time, and then the police arrived.

¶ 16 Dr. Russ P. Nockels, an expert in neurological surgery specializing in children's head trauma, testified that he operated on Nicholas at Loyola University Medical Center on July 31, 2000. Nicholas arrived at Loyola in a coma, with a large subdural hematoma and associated brain swelling. According to Dr. Nockels, Nicholas was in such serious condition neurologically that they performed an emergency craniotomy. Later, Nicholas needed several additional surgeries for removal of parts of his frontal and temporal lobes.

¶ 17 Dr. Nockels characterized Nicholas' injury as "very severe" and involving "a tremendous amount of damage" to more than half of the brain. When asked how soon after an injury a child would display symptoms such as going limp and having an eye go off to the side, Dr. Nockels answered, "Very shortly, within minutes at the most." Dr. Nockels testified that Nicholas would not have been able to stand for more than a minute after sustaining his injuries. When asked about the likelihood that Nicholas' injury had occurred from falling off a couch, Dr. Nockels stated, "I've never seen an injury of this nature result from anything but a very very serious trauma and nowhere near that amount of force would cause this kind of injury. In other words, falling that short of a distance could not cause this kind of injury." Dr. Nockels added that it would take a fall of at least 20 feet for a child to develop the kind of head injury Nicholas sustained. In the alternative, it was possible that an injury such as Nicholas' could have been caused by an adult shaking the child "very, very severely." In Dr. Nockels' opinion, Nicolas' injuries could have been caused by a blow to the head, a fall, a motor vehicle accident, or a severe shaking.

¶ 18 Joyce Casares, defendant's landlady and a registered nurse, testified on his behalf. Joyce stated that on the day in question, she observed Alexis take Nicholas down the stairs to her basement. From the room where she was sitting on the main level, she could sometimes hear conversation downstairs, and would hear if Nicholas was crying. She did not hear Nicholas cry

that day. The first indication she determined that something was wrong was when defendant brought Nicholas upstairs. Joyce took Nicholas from him, laid him on the couch, and told defendant to call 9-1-1. After defendant made the call, she moved Nicholas to the floor. Nicholas was making a moaning, sort of "keening" cry. Joyce stayed with Nicholas until the paramedics took him away.

¶ 19 Angela Konieczny, the mother of Nicholas' father, also testified for the defense. Angela testified that after she learned Nicholas had been injured, she called Alexis at the hospital and asked her what had happened. Alexis reported that defendant "did it." Angela flew to Illinois the next morning. At the hospital, Alexis told her she did not know how Nicholas' injuries had occurred, but that defendant had been arrested. Alexis told Angela that on the day in question, prior to her dropping Nicholas off with defendant, Nicholas did not recognize Donna Navarro and his eyes rolled back in his head. When Angela asked Alexis why she did not take Nicholas to the hospital, Alexis said she had a welfare appointment she could not miss. Angela testified, "Well, she said that something was wrong with him on the Sunday prior, and that he had fallen out of a playpen on to his head, and could this have caused this. Well, I told her I didn't know, but I didn't know much about shaken baby syndrome, so I didn't know."

¶ 20 Angela testified that a few days later, Alexis asked her to set up a telephone call with Ronald Tomacek, Nicholas' father, who was in prison in Texas. Angela arranged to call Ronald through the prison chaplain on August 7, 2000. Before they made the call, Alexis again told Angela that defendant did not injure Nicholas, that there was "something wrong" with Nicholas prior to her dropping him off with defendant, that Nicholas had fallen out of a playpen, and that before she dropped him off, Nicholas did not recognize Donna and his eyes were rolling in the back of his head. Angela urged Alexis to tell the police, but Alexis said she was scared, was under investigation due to an earlier injury to Nicholas, and did not want to go to jail.

¶ 21 Angela testified that she told Alexis the telephone call would be made through the prison chaplain and would be monitored. Angela called the chaplain, and once Ronald was on the line, she handed the telephone to Alexis. Angela was present in the room throughout the call. During the call, Alexis told Ronald that defendant "did not do this," that there was something wrong with Nicholas before she dropped him off, and that she was scared and did not want to go to jail.

¶ 22 Defendant called Dr. Steven Berry Abern, a pediatric neurologist, who reviewed Nicholas' medical records from Loyola University Medical Center. He noted that Nicholas underwent an emergency evacuation of a subdural hematoma involving the right temporal lobe, and that a few days later, had a temporal lobectomy on that same side. Based on the symptoms reported in the medical records, it was Dr. Abern's opinion that Nicholas suffered from shaken baby syndrome. He testified that it would take a minimum of an hour after a shaking for symptoms such as Nicholas' to manifest. Dr. Abern stated that if there was "a preexisting open space," a fall of 18 to 20 inches could cause injuries such as Nicholas', but if there was no preexisting condition, such injuries would be "less likely."

¶ 23 Defendant called as a witness William Brewer, who was the senior chaplain of the prison where Ronald Tomacek was incarcerated. Chaplain Brewer explained that prison policy required that all telephone calls made by prisoners be monitored by a chaplain and recorded in a log. He testified that he recalled monitoring a telephone call with Ronald in early August 2000. At this point in Chaplain Brewer's testimony, the prosecutor objected and asked for a sidebar. During the sidebar, the prosecutor informed the trial court he had not received a copy of any kind of telephone log. When the trial court asked defense counsel whether a log existed, counsel answered, "The only thing he has is some notes he made as the conversation went on which I just saw for the first time this morning." The trial court held a recess to allow the State to "look at" the notes. After the recess, defense counsel withdrew Chaplain Brewer as a witness. No

explanation was recorded for the withdrawal, and the trial court indicated his testimony was stricken.

¶ 24 Following closing statements, the trial court convicted defendant of aggravated battery of a child. Defendant was subsequently sentenced to 20 years in prison. As noted above, on direct appeal, we affirmed defendant's conviction, but corrected an error in the mittimus and remanded for proper post-sentencing admonishments and to allow defendant to file a motion to reconsider his sentence. *People v. Keller*, No. 1-03-2435 (2004) (unpublished order under Supreme Court Rule 23). Defendant filed such a motion, which the trial court denied. We affirmed the trial court's decision. *People v. Keller*, No. 1-05-1593 (2004) (unpublished order under Supreme Court Rule 23).

¶ 25 In May 2005, defendant filed a *pro se* postconviction petition, and in July 2005, he filed a second *pro se* petition. In December 2010, defendant's appointed postconviction counsel filed a "superceding" petition, arguing, as relevant to the instant appeal, that trial counsel was ineffective for failing to present a motion to quash arrest and suppress statements and for failing to call Chaplain Brewer as a witness to impeach Alexis with her prior inconsistent statements. In support of the petition, defendant attached a self-executed affidavit averring that the only time he was advised of his *Miranda* rights was after he signed a written statement prepared by the ASA. He also attached an affidavit from Chaplain Brewer, in which Brewer averred that during the telephone call he monitored, Alexis told her husband, " 'When I took the baby out of the car seat, to give him to my friend, he seemed limp and lifeless.' 'When I left, I remember seeing his little head bouncing up and down as he ran up the stairs.' 'I don't know maybe this is what caused the injury.' "

¶ 26 The State filed a motion to dismiss the petition, which was granted by the trial court.

¶ 27 On appeal, defendant contends that his petition should not have been dismissed because it made a substantial showing of two claims of ineffective assistance of trial counsel.

¶ 28 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2010)) provides a three-stage process by which defendants may assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). The instant case involves the second stage of the post-conviction process. At this stage, dismissal is warranted when the petition's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 382. A defendant is entitled to proceed to a third-stage evidentiary hearing on his petition only if the allegations in the petition, supported by the trial record and affidavits, make a substantial showing of a violation of constitutional rights. *Coleman*, 183 Ill. 2d at 381; *Franklin*, 167 Ill. 2d at 9. At second-stage proceedings, all factual allegations not positively rebutted by the record are considered to be true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Our review at the second stage is *de novo*. *Coleman*, 183 Ill. 2d at 388, 389.

¶ 29 Claims of ineffective assistance of counsel are judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. In order to establish this prong, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Second, a defendant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

¶ 30 On appeal, defendant's first contention is that he was denied the effective assistance of counsel where his attorney failed to secure "vital admissible testimony" from Chaplain Brewer, *i.e*, that Alexis told her husband that Nicholas "seemed limp and lifeless" when she took him out of his car seat, and that when she left, she remembered "seeing his little head bouncing up and down as he ran up the stairs." Defendant argues that this testimony from Chaplain Brewer was "game-changing" as it would have rebutted Alexis' trial testimony and corroborated Angela's testimony that Alexis had admitted Nicholas was already injured before she left him with defendant. Defendant asserts that this lack of corroboration was particularly devastating because the trial court assumed Angela suffered from emotional deficiencies or personal interests, and Chaplain Brewer was a disinterested witness. According to defendant's argument, the weight of Chaplain Brewer's testimony would have tipped the scales in defendant's favor in an otherwise closely balanced case. Finally, defendant asserts that Chaplain Brewer's testimony would not have been cumulative to Angela's both because Chaplain Brewer was disinterested, and because he added the detail that Alexis reported over the telephone that Nicholas was already "limp and lifeless" when she took him out of his car seat.

¶ 31 Generally, an attorney's decision regarding whether to present a particular witness is considered a matter of trial strategy, and there is a strong presumption that the decision is a product of sound trial strategy, rather than incompetence. *People v. English*, 403 Ill. App. 3d 121, 138 (2010). A decision regarding whether to call a witness cannot form the basis for a claim of ineffectiveness unless counsel's chosen strategy is so unsound that he can be said to have entirely failed to conduct any meaningful adversarial testing. *People v. Harris*, 389 Ill. App. 3d 107, 133 (2009).

¶ 32 Here, trial counsel planned to present Chaplain Brewer as a witness. Brewer took the stand, and after he mentioned that he kept a log of telephone calls he monitored, the State

objected because it had not been tendered a copy of the log. When the trial court asked whether a log existed, defense counsel responded that the only thing Brewer had was "some notes" of the conversation. The trial court took a recess so that the State could examine the notes. After the recess, defense counsel withdrew Chaplain Brewer as a witness.

¶ 33 The circumstances surrounding counsel's withdrawal of Brewer as a witness indicate that counsel's decision was strategic, and not the result of incompetence. See *People v. Moleterno*, 254 Ill. App. 3d 615, 622 (1993) (a reviewing court presumes trial strategy and will not disturb counsel's decision not to call a witness whom he had interviewed). Counsel had learned of Brewer's existence, apparently interviewed him, flown him in from Texas, secured his presence in court, and called him to the stand. It was only after the recess that counsel withdrew Chaplain Brewer as a witness. These circumstances support the presumption that during the recess, counsel made a tactical decision to alter his trial strategy. The failure to present Chaplain Brewer's testimony cannot be viewed as a mere oversight; rather, the record strongly suggests that it was the result of a conscious decision. See *Moleterno*, 254 Ill. App. 3d at 622. Thus, defendant has not demonstrated that counsel's representation fell below an objective standard of reasonableness. See *Strickland*, 466 U.S. at 688.

¶ 34 With regard to the second prong of the *Strickland* analysis, defendant is unable to show that he was prejudiced by the absence of Chaplain Brewer's testimony. Even if Brewer had testified that Alexis told her husband that Nicholas "seemed limp and lifeless" before she took him downstairs to defendant, the outcome of the trial would have been the same. Defendant gave detailed statements to the police and the ASA in which he admitted that he grabbed Nicholas hard, that his hands slid to Nicholas' neck and jaw area, and that he "plopped" Nicholas down hard on the couch, causing him to bounce up and down. Dr. Nockels testified that a child would display symptoms such as going limp and having an eye go off to the side within minutes, "at the

most," after being injured. This evidence strongly supports the conclusion that defendant was the person who injured Nicholas, and that Nicholas could not have been severely injured before Alexis left him in defendant's care.

¶ 35 Moreover, Angela had already testified at trial that Alexis told her husband over the telephone that there was "something wrong" with Nicholas prior to her dropping him off with defendant. Therefore, Chaplain Brewer's testimony would have been largely cumulative. Although his testimony may have added some detail as to what exactly was said on the telephone and would have offered some corroboration, its value would have been limited. Brewer's testimony would not have been completely exculpatory, as it would not have identified an alternate perpetrator or provided an alibi for defendant for the time period when Nicholas was injured. Thus, we cannot agree with defendant that Chaplain Brewer's testimony would have been "game-changing." Defendant has not established that there is a reasonable probability Chaplain Brewer's testimony would have been sufficient to overcome the State's competent evidence against him and change the outcome of the proceeding.

¶ 36 The cases relied on by defendant to compel an opposite result are unpersuasive.

¶ 37 First, defendant analogizes his case to *People v. King*, 316 Ill. App. 3d 901 (2000), because, he argues, both cases involved "exculpatory statements in the witness' affidavit." In *King*, the defendant was convicted of aggravated criminal sexual assault and aggravated kidnaping for the abduction and rape of a teenaged girl on his school bus route. *King*, 316 Ill. App. 3d at 903-04. At trial, counsel's defense strategy was to attack the credibility of one of the State's three occurrence witnesses. *King*, 316 Ill. App. 3d at 916.

¶ 38 In his postconviction petition, the defendant maintained that he did not rape the girl and was never alone with her on the bus. *King*, 316 Ill. App. 3d at 904. He attached to his petition an affidavit executed by a bus attendant, stating that she was on the bus the entire time the

students were riding home on the day in question and that the alleged victim was never on the bus alone with the defendant. *King*, 316 Ill. App. 3d at 904. At an evidentiary hearing on the petition, defense counsel testified that he subpoenaed and interviewed the bus attendant, and although he could not recall his specific reasoning, he chose not to call her as a witness as a matter of strategy. *King*, 316 Ill. App. 3d at 906. The postconviction court found that counsel was not ineffective. *King*, 316 Ill. App. 3d at 911. On appeal, we held that because we could not conceive of any sound trial strategy that would justify counsel's failure to call an available alibi witness who would have bolstered an otherwise uncorroborated defense, counsel's failure to call the bus attendant as a witness was the result of incompetence. *King*, 316 Ill. App. 3d at 916.

¶ 39 The instant case is distinguishable from *King*. Unlike the testimony of the witness in *King*, Chaplain Brewer's testimony would not have been unequivocally exculpatory. In *King*, the witness' testimony, taken as true, would have established that the rape could not have occurred. In contrast, in the instant case, Chaplain Brewer was not an alibi. Even taking his statements as true, they would only establish that Alexis told her husband Nicholas was limp and lifeless before she left him in defendant's care. Chaplain Brewer's testimony would have served to impeach Alexis' testimony that Nicholas was "fine" and "normal" when she dropped him off, but would not have served as an alibi.

¶ 40 Defendant also analogizes his case to *People v. Butcher*, 240 Ill. App. 3d 507 (1992). He argues that in both *Butcher* and his case, defense counsel was ineffective for failing to "corroborate and buttress" a testifying witness' account. In *Butcher*, the defendant was convicted of armed robbery; the defense theory had been mistaken identity. *Butcher*, 240 Ill. App. 3d at 508. At trial, a defense witness testified that the defendant was not one of the two robbers. *Butcher*, 240 Ill. App. 3d at 510. On appeal, we determined that because the State's case hinged entirely on the identification of the defendant as one of the robbers, defense counsel's failure to

call two additional witnesses who could "corroborate and buttress" the testimony of the defense witness who did testify could not be attributed to a professionally reasonable tactical decision. *Butcher*, 240 Ill. App. 3d at 510.

¶ 41 *Butcher* is distinguishable from the instant case. First, the cases are distinguishable because here, identification is not at issue. In *Butcher*, the reliability of the testimony of all of the witnesses – those called by the State and by the defense – depended on the witnesses' ability to perceive and accurately describe an individual they did not know and may have seen only briefly. Thus, corroboration of the defense witness' testimony might have led the jury to conclude that her description of the robber was more accurate than the descriptions provided by the State's witnesses. In contrast, in the instant case, there was no question as to defendant's identity.

¶ 42 Second, *Butcher* involved conflicting testimonies. Here, there was no true conflict between Alexis' description of the telephone conversation and Angela's. At trial, Alexis admitted that during the telephone call, she told her husband that she did not believe defendant "did it." According to Angela's testimony, Alexis told her husband that defendant that "did not do this," that there was something wrong with Nicholas before she dropped him off, and that she was scared and did not want to go to jail. Because these two reports of the telephone conversation do not conflict, Chaplain Brewer's proposed testimony would not have had the effect of tipping the scales in favor of one witness' version of events over the other.

¶ 43 Defendant next contends that his postconviction petition made a substantial showing of a claim that his trial counsel was ineffective for failing to move to suppress his statements on grounds that they were obtained in violation of his right against self-incrimination. In an affidavit attached to his petition, defendant alleged that although he was interrogated several times on both July 31, 2000, and August 1, 2000, the only time he was advised of his *Miranda*

rights was "after I signed a statement after my last interrogation with the ASA." Citing *Missouri v. Siebert*, 542 U.S. 600 (2004), defendant argues that Commander Hare's "ask first, *Mirandize* second" tactics in this case should not be sanctioned. He asserts that because a motion to suppress his statements would have enjoyed a reasonable probability of success and because the finding of guilt relied upon the statements, trial counsel was ineffective for failing to move to suppress the statements.

¶ 44 Generally, the decision whether to file a motion to suppress evidence is considered a matter of trial strategy that is immune from ineffective assistance claims. *People v. Deloney*, 359 Ill. App. 3d 458, 466 (2005). To succeed on a claim of ineffectiveness based on the failure to file a motion to quash and suppress, a defendant must demonstrate a reasonable probability both that the motion would have been granted and that the outcome of the trial would have been different if the evidence had been suppressed. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000).

¶ 45 At trial in the instant case, Commander Hare testified that he interviewed defendant the morning after the incident. At that time, defendant made a statement that was memorialized in writing. The written statement, which was published to the trial court, began by relating that defendant had been advised of his right not to make any statement, of his right to the advice of counsel, and that any statement he made could be used against him. In addition, ASA Ghouse testified that he interviewed defendant that afternoon. ASA Ghouse testified that when he met defendant, he introduced himself and advised defendant of his *Miranda* rights. Defendant indicated that he understood, and then gave a statement. ASA Ghouse testified that he asked defendant whether he wanted to memorialize his statement in writing. After defendant agreed, ASA Ghouse read him his *Miranda* rights again. Defendant signed a form indicating that he understood those rights. ASA Ghouse then took a written statement, which was published to the trial court. The published statement began by reciting that defendant understood he had the right

to remain silent and that anything he said could be used against him in a court of law, that he understood he had the right to talk to a lawyer and have him present during questioning, and that if he could not afford to hire a lawyer, one would be appointed for him. Defendant signed that portion of the statement.

¶ 46 As explained above, at second-stage postconviction proceedings, all factual allegations not positively rebutted by the record are considered to be true. *Hall*, 217 Ill. 2d at 334. Here, the record positively rebuts defendant's claim that he did not receive *Miranda* warnings until after he signed a statement taken by the ASA. Given this record, defendant has not demonstrated a reasonable probability that a motion to quash arrest and suppress evidence based on failure to give *Miranda* warnings would have been granted. In light of defendant's failure to make this showing, we need not consider whether the trial's outcome would have been different had motion been granted. Defense counsel was not ineffective for failing to pursue what would have been a futile motion. See *People v. Rucker*, 346 Ill. App. 3d 873, 889 (2004); *Rodriguez*, 312 Ill. App. 3d at 926. The claim of ineffective assistance of counsel fails.

¶ 47 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 48 Affirmed.