

No. 1-13-0221

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 98 CR 7519
)	
KASPER ROBINSON,)	Honorable
)	Brian K. Flaherty,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant did not make a substantial showing of prejudice to warrant an evidentiary hearing on his postconviction petition alleging ineffective assistance of trial and appellate counsel for failure to provide a sufficient record on direct appeal.

¶ 2 Following a jury trial, Kasper Robinson, the defendant, was convicted of home invasion and residential burglary and sentenced to a term of natural life in prison as a habitual criminal (720 ILCS 5/33B-1 (West 1996)). His conviction was affirmed on direct appeal. *People v. Robinson*, No. 1-02-2993 (2006) (unpublished order under Supreme Court Rule 23). Defendant

filed a postconviction petition alleging ineffective assistance of trial and appellate counsel. In response, the State filed a motion to dismiss, which was granted by the trial court after a hearing at the second stage of postconviction proceedings. Defendant appeals from this ruling, alleging that the trial court erred because his petition made a substantial showing of ineffective assistance of trial and appellate counsel based on counsels' failure to provide a sufficient record to allow the appellate court to properly address defendant's claim of prosecutorial misconduct on direct appeal. We find that defendant failed to establish that he was prejudiced by the alleged deficient performance of trial and appellate counsel. Accordingly, we affirm the trial court's dismissal of defendant's petition.

¶ 3

BACKGROUND

¶ 4 The evidence presented at trial is set forth in our previous decision. In short, defendant was charged with home invasion and residential burglary for an incident that occurred on February 23, 1998, during which defendant unlawfully entered the victim, Elizabeth Vasche's apartment. Vasche testified that defendant was wearing surgical gloves. During a struggle between defendant and Vasche, defendant hit her in the mouth causing her mouth to bleed. Defendant also threatened Vasche and told her, if she moved, he would kill her and her daughter. Eventually, defendant exited the apartment and Vasche chased him outside. Two maintenance workers observed defendant exit the building and drive away in a vehicle. One of the workers observed defendant remove surgical gloves and throw them into his vehicle before driving away. The police were called and defendant was eventually apprehended and arrested. Vasche identified defendant as her attacker to police at the scene of his arrest. A search of defendant's vehicle resulted in the discovery of evidence that linked defendant to the crime and corroborated

the victim's version of events, including *inter alia*, two surgical gloves underneath the driver's seat.

¶ 5 Defendant testified and presented two witnesses to support his assertion that he was merely at the apartment building to pass out fliers for a play he was directing and that Vasche unreasonably accused him of wrongdoing as he was simply attempting to invite her to the play.

¶ 6 During the State's closing rebuttal argument, the prosecutor requested a sidebar on defendant's objection. At the conclusion of the side bar, the trial court stated: "I don't know if the loud comments as [the State's Attorney (ASA)] was exiting the room were of record, but I hope they were of record. They were totally inappropriate and totally uncalled for." The prosecutor's comment, however, does not appear in the trial transcript.

¶ 7 The jury found defendant guilty of home invasion and residential burglary and defendant filed a motion for new trial. In his motion for new trial, defendant alleged, *inter alia*, several instances of prosecutorial misconduct including the ASA's alleged comment in the presence of the jury that "the defense was allowed to have a fair trial, but not the State." During the hearing on the motion, the State argued the comment did not warrant a new trial as it was not of record and, thus, to assume the jury heard the comment and was affected by it was speculation. The court responded: "Counsel, you were sitting at that table and he [the ASA] was in front of the jury and I was up here on the bench. If I could hear it, you must have heard it. And the jury had to hear it." Defense counsel, attempting to make a record of the statement, engaged in this exchange with the court:

"[DEFENSE COUNSEL]: *** the comment that the State very loudly made that the court had allowed the defense to have a fair trial but not the State. Is that how this court understood the comment as I heard it ***

THE COURT: I think everybody heard it."

The court concluded, however, that the comment did not deprive defendant of a fair trial and denied defendant's motion for new trial on this, and all other grounds.

¶ 8

DIRECT APPEAL

¶ 9 On direct appeal, defendant argued, *inter alia*, several instances of prosecutorial misconduct, including that the ASA misstated the law of home invasion during closing and that he improperly accused the trial court of bias against the State as he was exiting the court room for the side bar. Defendant argued the improper comment was prejudicial because it denied him the right to a fair trial as the ASA's comment was made in front of the jury and thus undermined the court's authority. He also argued that this comment enhanced the prejudice resulting from the other instances of alleged prosecutorial misconduct. This court affirmed defendant's convictions and sentence. *People v. Robinson*, No. 1-02-2993 (2006) (unpublished order under Supreme Court Rule 23).

¶ 10 We concluded, in relevant part, that, as the ASA's comment was not reflected in the record, we would be speculating if we presumed the jury heard the comment. *Id.*, order at 23. Therefore, due to the incomplete record, defendant had not demonstrated that the comment "whatever that comment may have been, actually prejudiced him." *Id.*, order at 23-24. In the context of plain error, this court denied review of defendant's claim that the ASA misstated the law of home invasion as the evidence in the case was not closely balanced. We explained: "The

State presented a strong case which consisted of [the victim's] eye-witness identification testimony, two witnesses who observed [defendant] fleeing from the crime scene, [and] three police officers that recovered evidence at the scene of the crime and in [defendant's] car which implicated him in the crime." *Id.* at 20.

¶ 11

PRO-SE POSTCONVICTION PETITION

¶ 12 Defendant subsequently filed the instant *pro se* postconviction petition alleging, in relevant part, ineffective assistance of trial and appellate counsel for their failure to make the prosecutor's improper comment that the trial court was biased against the State part of the record. He argued that both trial and appellate counsel were aware that the comment was not included in the record and, therefore, should have supplemented the record with a bystanders report or some other method to reflect the comment in order to allow the appellate court to properly review the issue. Defendant argued, had it not been for trial and appellate counsels' "unprofessional performance," it is likely that the outcome of the appellate proceedings would have been different.

¶ 13 Attached to his petition, defendant submitted an affidavit from appellate counsel who represented him on direct appeal. In the affidavit, counsel states that "as I thought I understood the law, the prosecutor's comment *** was preserved in the record." However, after having reviewed the reasoning of this court's order on direct appeal, counsel stated that he "misunderstood the law" and should have "either filed a motion to clarify the record in the trial court under Illinois Supreme Court Rule 329 (eff. July 1, 2982) or attempted to submit a

stipulated statement of facts or bystander's report under Illinois Supreme Court Rule 323 (eff. Sept. 23, 1996).¹

¶ 14 The court appointed counsel and the petition proceeded to second stage review. The State filed a motion to dismiss. After a hearing, the trial court granted the State's motion, finding defendant's petition failed to make a substantial showing that he suffered prejudice due to the prosecutor's alleged improper comment. The trial court reasoned that "all we have is speculation as to whether or not there was any prejudice made by [the ASA] or whether or not the jury even heard this."

¶ 15 On appeal, defendant contends he made a substantial showing of ineffective assistance based upon trial and appellate counsels' failure to supplement the record to include the improper comment made by the ASA so that it could be preserved on direct appeal and reviewed by this court. He argues he was prejudiced by the comment as it undermined the authority of the trial court and enhanced the prejudice resulting from the other alleged instances of prosecutorial misconduct as it made the jury less likely to follow the trial court's instructions, the only means available to mitigate the ASA's many improper comments. Defendant claims a reasonable probability exists that he would have received a new trial on direct appeal had counsel provided this court with a complete record. He requests we reverse the denial of his postconviction petition and remand the cause for an evidentiary hearing so he can obtain a complete record in order to "finally have his meritorious issue heard by this court."

¹ Rule 329 allows corrections to the record on appeal if it is inaccurate. Material omissions, or improper authentication may be corrected by stipulation of the parties or by the trial court. Ill. S. Ct. R. 329. Rule 323 allows parties to supplement the record on appeal with an agreed statement of facts or with a bystander's report if no verbatim transcript is available. Ill. S. Ct. R. 323.

¶ 16

ANALYSIS

¶ 17 There are three stages of the postconviction process. *People v. Pendleton*, 223 Ill. 2d 458, 472-73 (2006). Relevant here is the second stage. The purpose of the second stage is to determine whether a defendant is entitled to an evidentiary hearing based upon the plain language in his petition. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the State responds by filing a motion to dismiss at this stage, the trial court may only rule on the legal sufficiency of defendant's claim as stated in the petition. *People v. Ward*, 187 Ill. 2d 249, 255 (1999). Dismissal is not warranted if defendant makes a substantial showing that his constitutional rights were violated and that showing would necessitate an evidentiary hearing under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 (West 2012); *Coleman*, 183 Ill. 2d at 381; see also *People v. Domagala*, 2013 IL 113688, ¶ 35. At this stage of the proceedings, the trial court must not engage in any fact-finding or credibility determinations; all well-pleaded facts are to be taken as true. *People v. Domagala*, 2013 IL 113688, ¶ 35; *Caballero*, 126 Ill. 2d 248, 259 (1989). The trial court's dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

¶ 18 Claims alleging ineffective assistance of counsel are judged against the standards set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 397. This standard also applies in postconviction proceedings. See *People v. Hall*, 217 Ill. 2d 324 (2005) (applying Strickland standard to ineffective assistance claim under Post-Conviction Hearing Act). Under *Strickland*, a defendant must establish that defense counsel rendered performance that fell below an objective standard of reasonableness, and that defendant was prejudiced because of this deficient performance. *Strickland*, 466 U.S. at 688, 694; *People v. Morgan*, 187

Ill. 2d 500, 529-30 (1999). Prejudice means a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). Ineffective assistance of appellate counsel is determined under the same standard as ineffective assistance of trial counsel. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). If the claim may be disposed of on grounds that defendant suffered no prejudice, a court need not determine whether counsel's performance was deficient. *People v. Griffin*, 178 Ill. 2d 65, 74 (1997).

¶ 19 Defendant's claims of counsels' ineffectiveness fail as he has not demonstrated he was prejudiced by counsels' alleged error. *Griffin*, 178 Ill. 2d at 74 (if the claim may be disposed of on grounds that defendant suffered no prejudice, a court need not determine whether counsel's performance was deficient).

¶ 20 To establish prejudice here, defendant must demonstrate a reasonable probability that the outcome on appeal would have been different had his trial and/or appellate counsel properly preserved the prosecutor's comment in the record. *People v. Petrenko*, 237 Ill. 2d 490, 496-97 (2010). Defendant has not met this burden as he has not shown that he was prejudiced by counsels' failure to preserve the ASA's improper remark.

¶ 21 In the direct appeal, because the defendant failed to raise the issue in his post trial motion, we invoked the plain error rule when we reviewed defendant's arguments regarding the ASA's misstatement of the law and failure to follow the court's instructions, but we found that the evidence of defendant's guilt was "overwhelming." *Robinson*, No. 1-02-2993, 23-24. The State presented a strong case that consisted of eyewitness identification testimony from the victim, corroborated with testimony from two witnesses who observed defendant flee the premises, and

culminated with testimony from three police officers who discovered incriminating evidence in defendant's vehicle. Although defendant testified on his own behalf and presented witnesses to establish an alternate version of events, the jury found the State's evidence more credible and returned a guilty verdict. We cannot substitute our judgment on credibility matters for that of the jury. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002).

¶ 22 Having considered the overwhelming evidence of defendant's guilt and defendant's new claim of ineffective assistance of counsel, we find that defendant has not suffered prejudice from defense counsels' failure to preserve the prosecutor's comment in the record. Therefore, even had the ASA's comment been preserved for our review on direct appeal and had we been able to address the merits of defendant's claim, with the overwhelming evidence of defendant's guilt, the outcome of the appeal would have been no different. Accordingly, defendant's postconviction petition, liberally construed, does not make a substantial showing that he was prejudiced as a result of trial and/or appellate counsels' alleged deficient performance, and therefore, we hold the trial court did not err in dismissing the petition.

¶ 23 For these reasons, the judgment of circuit court of Cook County is affirmed.

¶ 24 Affirmed.