

No. 1-14-3465

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 5981
	)	
LARRY CHRISTOPHER,	)	Honorable
	)	Sharon Sullivan,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE ELLIS delivered the judgment of the court.  
Justices McBride and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held:* Dismissal of postconviction petition at second stage affirmed. Defendant could not make substantial showing of ineffective assistance of appellate counsel where issue he claimed appellate counsel should have raised—admissibility of rebuttal witness’s testimony—lacked merit.

¶ 2 Defendant Larry Christopher was convicted of armed robbery, aggravated kidnapping, and unlawful use of a weapon by a felon (UUWF) at a bench trial. This court affirmed defendant’s conviction on direct appeal. Defendant’s appellate counsel on direct appeal did not argue that the court erred in admitting the testimony of codefendant Darnesha Simmons during the State’s rebuttal case, even though trial counsel had objected to its admission.

¶ 3 Defendant filed a postconviction petition alleging that his appellate counsel was ineffective for failing to raise the admissibility of Simmons's testimony. The trial court granted the State's motion to dismiss the petition at the second stage of postconviction proceedings.

¶ 4 In this appeal, defendant claims that the trial court erred in dismissing his petition because he made a substantial showing that his appellate counsel was ineffective on direct appeal. We disagree. Defendant could not show that his attorney acted unreasonably in failing to raise the admissibility of the rebuttal witness's testimony where the State properly impeached that rebuttal witness with her prior inconsistent statement, and that prior inconsistent statement conflicted with defendant's evidence.

¶ 5 I. BACKGROUND

¶ 6 We recounted the evidence presented at trial in our resolution of defendant's direct appeal, *People v. Christopher*, No. 1-09-1588 (2011) (unpublished order under Supreme Court Rule 23). Thus, we will restate that evidence only to the extent necessary to understand his claims in this appeal.

¶ 7 The State's evidence at trial showed that defendant robbed Sheldon Watson in the back of Simmons's car. According to Watson, Simmons had offered to give him and his friend, Steve Jamerson, a ride home from a bar. After letting Jamerson out of the car, Simmons drove Watson to an alley where defendant got into the car, threatened Watson with a gun, and hit Watson in the face. Watson said that defendant had short hair.

¶ 8 Defendant's girlfriend, Bridget King, testified on his behalf. She said that she worked 12-hour shifts, from 7 p.m. to 7 a.m., three days a week. When she worked, defendant stayed home and watched their children. King testified that she worked on the evening of the offense and that

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defendant was at home when she left for work and when she got back. She could not say whether defendant was at home while she was at work.

¶ 9 Defendant's two sisters also testified that, at the time of the robbery, defendant had long hair that he wore in an "afro" style.

¶ 10 In rebuttal, the State called Simmons. Simmons denied that defendant was the man who robbed and beat Watson in the back of her car. Instead, she said that she picked up a "crackhead" and paid him to get Watson out of her car after Watson refused to leave. This unknown person robbed Watson and hit him. Simmons acknowledged that, after the offense, the police arrested her at a Target store with Watson's credit cards. She denied telling the police that defendant was the robber.

¶ 11 The State confronted Simmons with a written statement she had given to the police that identified defendant as the robber. She acknowledged making the statement but said that it was "bogus" because the police told her they would let her go if she said that defendant was the robber.

¶ 12 Defense counsel moved to strike Simmons's testimony on the basis that it did not rebut any of the testimony presented by the defense. The court denied the motion.

¶ 13 The State admitted Simmons's handwritten statement as substantive evidence. The State also called the detective who took Simmons's statement, who said that he did not promise Simmons anything or threaten her in order to obtain the statement.

¶ 14 The trial court found defendant guilty, citing Simmons's statement as evidence corroborating Watson's identification.

¶ 15 On direct appeal, defendant argued that the State failed to present sufficient evidence to prove that he was armed with a firearm and that the trial court improperly assessed him certain

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finer and fees. This court affirmed his conviction and vacated some of his fines and fees. *Christopher*, No. 1-09-1588 (2011) (unpublished order under Supreme Court Rule 23).

¶ 16 Defendant filed a *pro se* petition for postconviction relief, arguing, among other things, that his attorney on direct appeal was ineffective for failing to raise the admissibility of Simmons's testimony. Defendant attached a letter he had written to his appellate counsel, which included several proposed arguments to raise on appeal, including the State's admission of Simmons's prior inconsistent statement.

¶ 17 The trial court advanced defendant's petition to the second stage and appointed counsel for defendant. Postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), stating that she did not supplement defendant's *pro se* petition because it "adequately represent[ed]" his claims as it was written.

¶ 18 The State moved to dismiss defendant's petition, alleging that his claims were barred by *res judicata* and "waiver" and that he could not make a substantial showing of a constitutional violation. The trial court granted the State's motion, finding that "defendant ha[d] not given a substantial violation of his constitutional rights."

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 A. *Res Judicata*

¶ 22 Before reaching the merits of defendant's appeal, we must address the State's claim that defendant's ineffective-assistance-of-appellate-counsel claim is barred by *res judicata*. The State claims that defendant previously raised his claim in a petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)).

¶ 23 In a postconviction proceeding, the doctrines of *res judicata* and forfeiture prohibit a defendant from raising claims that were or could have been adjudicated on direct appeal. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). Specifically, *res judicata* deals with issues that were actually raised and decided, whereas forfeiture deals with those issues that could have been raised but were not. *Id.* at 443-44.

¶ 24 The State acknowledges that defendant did not raise his appellate counsel's ineffectiveness in the section 2-1401 petition he filed in 2011. But, the State notes, at the hearing on defendant's postconviction petition, the assistant State's Attorney (ASA) pointed out that the admissibility of Simmons's testimony had come up during the section 2-1401 proceedings.

¶ 25 We reject the State's claim. The ASA's reference to the section 2-1401 proceedings is refuted by defendant's section 2-1401 petition, which is available in the record and makes no reference to the admissibility of Simmons's testimony. We do not credit the ASA's oblique reference to the section 2-1401 proceedings over the substance of defendant's actual petition.

¶ 26 More importantly, defendant could not have raised appellate counsel's ineffectiveness in his section 2-1401 petition even had he tried. See *People v. Pinkonsly*, 207 Ill. 2d 555, 567 (2003) ("We have long held that section 2-1401 proceedings are not an appropriate forum for ineffective-assistance claims because such claims do not challenge the factual basis for the judgment."). So the application of forfeiture or *res judicata* would not be appropriate. We now turn to the merits of defendant's petition.

¶ 27 B. Ineffectiveness of Appellate Counsel

¶ 28 Defendant's postconviction petition comes to us having been dismissed at the second stage of postconviction proceedings. The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) establishes a three-stage process for the litigation of postconviction claims. At the

first stage, the court examines the petition and determines whether it states the gist of a constitutional claim (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)); the court may dismiss the petition if it is frivolous and patently without merit (*People v. Domagala*, 2013 IL 113688, ¶ 32).

¶ 29 If the court does not dismiss the petition, it advances to the second stage, where the defendant must make a substantial showing of a constitutional violation. *Id.* ¶ 33. The issue at the second stage is the legal sufficiency of the petition. *Id.* ¶ 35. Thus, at this stage, we take the defendant's well-pleaded allegations as true and refrain from making credibility determinations or performing any fact-finding. *Id.*

¶ 30 Defendant argues that his appellate counsel was ineffective for failing to challenge the admissibility of Simmons's rebuttal testimony on direct appeal. In analyzing a claim of ineffective assistance of appellate counsel, we apply the analysis of *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Simms*, 192 Ill. 2d 348, 362 (2000). The *Strickland* analysis requires that a defendant establish two prongs: (1) that his attorney's performance fell below an objective standard of reasonableness, *i.e.*, that it was deficient, and (2) that his attorney's deficient performance prejudiced him such that there is a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88, 694.

¶ 31 Appellate counsel is not required to brief every conceivable issue on appeal. *Simms*, 192 Ill. 2d at 362. Counsel is not ineffective when he or she refrains from raising issues that, in his or her judgment, lack merit, unless counsel's assessment of the merits is "patently wrong." *Id.* Consequently, an analysis of prejudice requires a reviewing court to examine the merits of the underlying issue that counsel did not raise. *Id.*

¶ 32 The court may admit rebuttal evidence that tends to “ ‘explain, repel, contradict or disprove the evidence of the defendant,’ ” even if the State could have admitted that evidence during its case-in-chief. *People v. Waller*, 67 Ill. 2d 381, 387 (1977) (quoting *People v. Daugherty*, 43 Ill. 2d 251, 255 (1969)). Where evidence does not in some way explain, repel, contradict, or disprove the defendant’s evidence, it should not be admitted during rebuttal. See, e.g., *Henderson v. Hudson*, 121 Ill. App. 3d 780, 783-84 (1984). Because the admission of rebuttal evidence falls within a trial court’s discretion, we will not reverse that decision absent an abuse of discretion. *Chapman v. Hubbard Woods Motors, Inc.*, 351 Ill. App. 3d 99, 106 (2004).

¶ 33 Defendant claims that Simmons’s testimony was inadmissible because it did not actually rebut any of defendant’s evidence, as she testified that defendant was not involved in the robbery. The State responds that, while Simmons’s live testimony did not contradict defendant’s evidence, her written statement to the police did. And, according to the State, it had to call Simmons as a live witness in order to admit her written statement.

¶ 34 Defendant does not quarrel with the notion that Simmons’s prior statement to the police contradicted his trial evidence or that her prior statement was admissible as substantive evidence. See 725 ILCS 5/115-10.1 (West 2008) (prior inconsistent statement admissible as substantive evidence where witness subject to cross-examination and witness acknowledged making statement at trial). Defendant’s theory of the case was that he did not commit the robbery; that he was at home with his children and that Watson’s description of his attacker conflicted with defendant’s physical appearance at the time. Simmons’s statement directly contradicted that evidence by identifying defendant as the man who robbed Watson in the back of Simmons’s car.

¶ 35 And in order to admit Simmons’s prior inconsistent statement, the State *had* to call her as a witness. Before admitting a prior inconsistent statement, a party must first ask the witness if he

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or she made the statement. *People v. Halbeck*, 227 Ill. App. 3d 59, 62 (1992). The party must direct the witness's attention to the time, place, circumstances, and substance of the inconsistent statement and give the witness a chance to explain the inconsistency. *People v. Bradford*, 106 Ill. 2d 492, 500-01 (1985). Here, the State did precisely that, and Simmons attempted to explain the inconsistency by saying that the police had promised to let her go if she inculcated defendant. Thus, we see nothing improper in the State presenting Simmons's live testimony as a means to admit her prior statement as substantive rebuttal evidence.

¶ 36 More importantly, defendant has not pointed to any authority to support the notion that the State may not present rebuttal evidence through a witness in order to lay the foundation for the admission of the witness's prior inconsistent statement. And in the absence of any authority to support this claim, we fail to see how appellate counsel could be faulted for not raising it. Appellate counsel's performance, including his assessments of a possible issue's merit, depends on the state of the law at the time of the direct appeal. *People v. English*, 2013 IL 112890, ¶ 34. Because defendant cannot point to any law that would clearly support his argument in this case, we cannot say that counsel acted unreasonably in failing to raise that argument. Compare *id.* ¶ 35 (appellate counsel not ineffective where argument "was not supported by precedent at the time of \*\*\* direct appeal") with *People v. Moore*, 177 Ill. 2d 421, 437 (1997) (appellate counsel ineffective for failing to raise meritorious issue where, at the time of appeal, "the same issue was addressed in \*\*\* earlier cases").

¶ 37 We hold that defendant has failed to make a substantial showing of a constitutional violation. We affirm the trial court's dismissal of defendant's postconviction petition.

¶ 38 **III. CONCLUSION**

¶ 39 For the reasons stated, we affirm the dismissal of defendant's postconviction petition.



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¶ 40 Affirmed.