2017 IL App (2d) 150413-U
No. 2-15-0413
Order filed February 27, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-1159
RAYMOND M. KASPER,	)	Honorable Gordon E. Graham and Sharon L. Prather,
Defendant-Appellant.	)	Judges, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in summarily denying defendant's postconviction petition. Therefore, we affirmed.

¶ 2 Following a jury trial, defendant, Raymond Kasper, was convicted of three counts of predatory criminal sexual assault (720 ILCS 5/11-1.40(a)(1) (West 2010)) and three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1) (West 2010)). He was sentenced to 24 years' imprisonment. Defendant now appeals from the trial court's summary dismissal of his *pro se* petition under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1

et seq. (West 2014)). On appeal, he argues that he alleged a gist of a constitutional claim that his trial counsel was ineffective for failing to properly investigate and call witnesses who would have supported his defense that the complainant manufactured her claims about the sexual assaults. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was initially charged by complaint in November 2011. An amended indictment against him dated April 18, 2012, contained seven counts. Count I alleged that between June 1, 2011, and June 30, 2011, defendant committed aggravated criminal sexual abuse against H.H., who was under 13 years of age, by rubbing her breasts. Count II alleged that defendant committed predatory criminal sexual assault between September 1, 2011, and September 11, 2011, by rubbing H.H.'s vagina. Count III alleged that defendant committed criminal sexual abuse during the same time frame by touching H.H.'s vagina. Counts IV, V, and VI alleged that defendant committed predatory criminal sexual assault between October 1, 2011, and October 27, 2011, by placing his finger in H.H.'s vagina. Count VII alleged that defendant committed criminal sexual abuse during the same time frame by touching H.H.'s vagina. The jury found defendant guilty of six of the seven counts; it found defendant not guilty of count II.

¶ 5 In defendant's direct appeal, we set forth a detailed recitation of the evidence adduced at trial, and we do not restate the facts here. See *People v. Kasper*, 2014 IL App (2d) 121322-U, ¶¶ 6-90. Instead, we quote our summary of the evidence, and we discuss other facts as necessary in our analysis.

¶ 6 "We begin with a summary of events and the theories advanced during opening arguments. H.H., born on May 5, 1999, lived with her mother, Laura Taets, and her brother, Bradley, born May 9, 1998. Defendant was Taets's boyfriend and lived with

them from 2003 until 2011. H.H. alleged that all of the incidents of sexual conduct committed by defendant occurred when she was 12 years old. H.H. came forward with the allegations in October 2011, the same month as the last alleged incident.

H.H.'s initial allegations against defendant occurred on October 26, 2011, when she spoke to Janet Morales Ory, a social worker at H.H.'s middle school. The next day, October 27, 2011, Officer Amy Bucci interviewed H.H. at the Child Advocacy Center ***, and the interview was videotaped ***. Several months later, on May 20, 2012, H.H. and other family members, including Taets, Bradley, and defendant's sister, Kim Kasper (Aunt Kim), met at defense counsel's office, and H.H. recanted her allegations. H.H. then wrote a letter of recantation on May 22, 2012. The next day, on May 23, 2012, Officer Bucci and an investigator with the Department of Children and Family Services (DCFS), Janet Lennemann, met with H.H. at school. H.H. testified that during this interview, she relayed that she "believed" in her recantation letter, whereas DCFS investigator Lennmann testified that H.H. claimed that one of the incidents was real and the other two incidents were 70% real.

The State's theory during opening statement was that defendant groomed H.H. and was obsessed with her menstrual cycle. The State argued that the jury would hear evidence that after H.H. got some mosquito bites in June or July 2011, defendant drew a bath for her and washed her body and chest. He then applied lotion to her body and chest ***. On another occasion in September 2011, when H.H. had her period, defendant had H.H. get in the shower so that he could penetrate the outer folds of her vagina and rub between her legs (first shower incident). On yet another occasion in October 2011, when H.H. had her period, defendant had H.H. get in the shower again, and he inserted his

fingers in her vagina three times and rubbed her vagina (second shower incident). The State went on to say that after H.H. came forward and defendant was arrested, she was subject to 'months and months of endless tampering' by Taets and Aunt Kim until she broke down and wrote a letter saying it was 'all a dream.' The State argued that H.H. changed her story because she was not supported and because Taets was still in love with defendant.

Defense counsel presented a different theory in his opening statement. Defense counsel argued that defendant was in a long-term relationship with Taets during which he helped raise and support her two children. However, in February 2011, defendant had an affair that devastated the family, and he moved out. The affair made Taets very angry, and there were a lot of arguments. H.H. was angry that defendant hurt Taets, and she felt betrayed as well. When defendant moved out, H.H. had free reign, but when he moved back in, the "disciplinarian [was] back with his rules." After defendant grounded H.H. and took away her Nintendo DS game and cell phone, H.H. made allegations that he molested her. However, H.H.'s allegations were inconsistent, and her story changed each time she told it. With Taets and Aunt Kim beside her, H.H. came into defense counsel's office and recanted much of her story. Defense counsel concluded that the State's case was full of reasonable doubt and that the jury would see the truth." *Kasper*, 2014 IL App (2d) 121322-U, ¶¶ 6-9.

¶ 7 C. Direct Appeal

¶ 8 In his direct appeal, defendant argued that his trial counsel was ineffective for: opening the door to the admission of two orders of protection that were highly prejudicial; failing to challenge the reliability of statements at the section 115-10 hearing (725 ILCS 5/115-10(a) (West

2010)); failing to object to hearsay testimony, improper closing argument, and irrelevant and prejudicial testimony; violating the advocate-witness rule; various comments he made during closing argument; and seeking to elicit character evidence at trial. Defendant further argued that the trial court abused its discretion in barring evidence of prior sexual allegations by H.H., and that the evidence was insufficient to find him guilty beyond a reasonable doubt. *Kasper*, 2014 IL App (2d) 121322-U. We found defendant's arguments without merit and affirmed his convictions. *Id.*

¶ 9 D. Postconviction Petition

¶ 10 On February 17, 2015, defendant mailed a *pro se* petition for postconviction relief, raising 17 contentions of error. Defendant argued, among other things, that his trial counsel was ineffective for failing to contact Kenneth Taets (Kenneth), H.H.'s maternal grandfather, who was present in the home at the time of the alleged second shower incident. Defendant attached a notarized letter from Kenneth in which he stated that he was visiting the home from about October 8 to 16, 2011, and that he did not witness nor was he made aware of any inappropriate behavior during that time. Kenneth stated that he was only aware of H.H. being resistant to doing some homework, which seemed like typical teenage behavior. Defendant alleged that counsel never obtained an affidavit from Kenneth and failed to obtain Laura Taets's work records, which would have shown that she took time off from her job and was home when her father was visiting. Defendant attached Laura's work records and personal calendar, which supported that Kenneth arrived on October 9 and left on October 16, and that Laura took some days off during that time. Defendant additionally alleged that counsel should have called clinical psychologist Larry Gelman as a witness. Gelman had reviewed the videotaped police interview of H.H. and had written a report criticizing it as suggestive.

¶ 11 On April 1, 2015, the trial court summarily dismissed defendant's petition. It stated that *res judicata* applied to most of the issues and that the forfeiture doctrine applied to the remaining issues. Defendant timely appealed.

¶ 12 II. ANALYSIS

¶ 13 Defendant appeals from the first-stage dismissal of his postconviction petition. The Postconviction Act provides a means for people serving criminal sentences to assert that their convictions resulted from substantial denials of their constitutional rights. *People v. Cotto*, 2016 IL 119006, ¶ 26. It creates a three-stage process for adjudicating postconviction petitions. *Id.* At the first stage, the trial court independently determines, without input from the State, whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1 (West 2014). If the trial court answers this question in the affirmative, it must dismiss the petition. *Id.* If the trial court answers this question in the negative, it is to docket the petition for second-stage proceedings. *Id.* A petition is frivolous or patently without merit only if it has no arguable basis in law or fact, meaning that it relies on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Allen*, 2015 IL 113135, ¶ 25. We review *de novo* the first-stage dismissal of a postconviction petition. *People v. Smith*, 2015 IL 116572, ¶ 9.

¶ 14 On appeal, defendant challenges only the dismissal of his claims of ineffective assistance of trial counsel. For a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). As to trial counsel, the defendant must first establish that, despite the strong presumption that counsel acted competently and that the challenged action was the product of sound trial strategy, counsel's representation fell below an objective standard of reasonableness under prevailing professional norms such that he or she was not functioning as

the counsel guaranteed by the sixth amendment. *People v. Manning*, 227 Ill. 2d 403, 416 (2008). Second, the defendant must establish prejudice by showing a reasonable probability that the proceeding would have resulted differently absent counsel's errors. *People v. Valdez*, 2016 IL 119860, ¶ 14. A failure to establish either prong of the *Strickland* test precludes a finding of ineffectiveness. *People v. Cherry*, 2016 IL 118728, ¶ 24. The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *People v. Enis*, 194 Ill. 2d 361, 377 (2000). Thus, the defendant must show both that appellate counsel's performance was deficient and that the error was prejudicial. *People v. Robinson*, 217 Ill. 2d 43, 61 (2005). Unless an underlying issue has merit, there can be no prejudice from appellate counsel's failure to raise it on appeal. *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 109. At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and it is arguable that the defendant was prejudiced. *People v. Cathey*, 2012 IL 11746, ¶ 23.

¶ 15 The decision of which witnesses to call at trial is a matter of trial strategy within trial counsel's discretion. *Enis*, 194 Ill. 2d at 378. Such a decision comes with the strong presumption that it is a product of sound trial strategy, and it is generally immune from claims of ineffective assistance of counsel. *Id.* Even if defense counsel makes a mistake in trial strategy or tactics or an error in judgment, ineffective assistance of counsel will be found only if the trial strategy was so unsound that counsel entirely failed to conduct meaningful adversarial testing of the State's case. *People v. Perry*, 224 Ill. 2d 312, 355 (2007).

¶ 16 On appeal, defendant focuses on the three counts of predatory criminal sexual assault, which were alleged to have occurred on between October 1 and 27, 2011. According to the

evidence presented by the State, the crimes alleged in counts IV, V, and VI all took place on one day when H.H. was showering during her period in October 2011.

¶ 17 Defendant notes that, in general, the State is not required to prove that an allegation of predatory criminal sexual assault was committed on a particular date, as it is not an essential element of the offense when the statute of limitations is not questioned. See *People v. Letcher*, 386 Ill. App. 3d 327, 331 (2008). However, he argues that the date could be relevant in calling the complainant's basic credibility into doubt. See *People v. Martin*, 115 Ill. App. 3d 103 (1983) (witness's testimony about the date of the crime raised an issue as to his credibility, which the jury could properly consider).

¶ 18 Defendant argues that H.H. was fairly certain in her initial complaints at school and to investigating authorities about when the acts forming the basis of the predatory criminal sexual assault charges occurred. Specifically, on October 26, 2011, she told her middle school social worker that one or two weeks before, defendant had put his fingers in her and moved them around while she was in the shower. On October 27, 2011, H.H. told a police officer that it had occurred on a Tuesday or Friday evening at the beginning of October. On November 3, 2011, H.H. told a pediatric nurse that it took place the week of October 3, 2011.

¶ 19 Defendant maintains that to refute the charges, he needed to show that H.H.'s claims of something happening in early or mid-October were inherently unbelievable. Defendant contends that such a showing was never made to the jury because his trial attorney failed to conduct a meaningful investigation and presentation of a defense. Defendant points out that when counsel was questioning Bradley, he asked when Bradley last saw his maternal grandfather. The State objected on relevance grounds, and the trial court sustained the objection. Counsel made an offer of proof that Kenneth was visiting when H.H. alleged that the October shower incident

occurred. Counsel argued that he wanted to show that not only did H.H. not mention Kenneth's presence, but the incident allegedly happened while he was in the home. The trial court continued to sustain the objection. Defendant argues that counsel failed to include in his offer of proof the dates that Kenneth was present, and his name did not appear on any of the witness lists.

¶ 20 Defendant asserts that according to H.H.'s testimony, the second shower incident occurred as early as October 4 or 7, and as late as October 12 through 19, 2011. Defendant argues that although Kenneth's stay at the house between October 8 and 16, 2011, might not have covered the entire timeline of possibility, it encompassed a significant amount of that time. Defendant argues that Laura's work records show that she reported sick on Tuesday, October 4, 2011; did not work on Friday, October 7, 2011; and never worked past 4:08 p.m. on any day that month. Defendant maintains that this evidence supports the conclusion that H.H. was not home alone with him and Bradley on the evening that she told the officer that the incident occurred.

¶ 21 Defendant further argues that Laura's work records support her trial testimony that she took off work October 7 or 8, 2011, to go on a camping and horseback riding trip with H.H. and another friend. The next day, Kenneth came into town, and that day H.H. also started her period. Defendant argues that if H.H.'s period began on October 7 or 8, and the second bathroom incident allegedly occurred during her period, the incident could not have occurred the week of October 3, but rather the week of October 10, when Kenneth was in the house. Defendant argues that since defense counsel did not call Kenneth as a witness or present Laura's work records or calendar, the jury was never given a significant basis on which to doubt H.H.'s video-recorded statements. Defendant maintains that trial counsel's failure to call Kenneth as a witness, or "more effectively urge" the trial court to allow his line of questioning with Bradley, failed to meet the standard of reasonable competence. Defendant argues that Kenneth would have no

reason to be biased in his favor and would have been able to offer testimony refuting the account of his granddaughter, which would have had a powerful tendency to make her account more unworthy of belief.

¶ 22 The State initially argues that defendant forfeited these claims by failing to raise them in his direct appeal and by failing to assert that his appellate attorney was ineffective for raising them. The State cites *People v. Youngblood*, 389 Ill. App. 3d 209, 214 (2009), where the court stated that because postconviction proceedings involve a review of only matters that were not, nor could have been, previously adjudicated, issues that could have been raised on direct appeal, but were not, are forfeited. The court further stated that forfeiture will not apply if it stems from the alleged incompetence of appellate counsel. *Id.* at 214-15.

¶ 23 Defendant responds that his postconviction petition does in fact allege that appellate counsel was ineffective with respect to trial counsel's failure to contact Kenneth and present his testimony. We agree with defendant that he therefore did not forfeit his argument regarding Kenneth. Still, regardless of forfeiture, we conclude that defendant has failed to show that trial counsel's performance was arguably deficient or that he was arguably prejudiced by counsel's failure to call Kenneth as a witness and present Laura's work records and personal calendar.

¶ 24 Trial counsel is not ineffective for failing to call or investigate a witness whose testimony is cumulative. *Harmon*, 2013 IL App (2d) 120439, ¶ 33. That is the situation here, as Laura testified that Kenneth was in town visiting them around October 8, or 9, 2011, beginning the day H.H. started her period that month. Laura further testified that Kenneth stayed in town for a week. As Kenneth's testimony regarding his visit would have been the same, counsel could not have arguably have been deficient in failing to call him as a witness.

¶ 25 Moreover, defendant could not arguably have been prejudiced by counsel's decision not to call Kenneth as a witness. The dates of Kenneth's visit only cover a portion of the time period alleged in the indictment, and, as stated, the State was not required to prove that the predatory criminal sexual assault was committed on a particular date. *Letcher*, 386 Ill. App. 3d at 331. More importantly, as the State points out, Kenneth's presence in the home does not present an alibi for defendant, who was also in the home during that period of time. Kenneth's presence also does not demonstrate that defendant was never alone with H.H. or undermine the evidence of the second shower incident, particularly since H.H. never claimed that no one else was home or that she shouted or made loud noises during that time. Such testimony would also not contradict the medical evidence offered at trial; the pediatric nurse testified that H.H. had an injury consistent with the insertion of an object or sexual abuse. Finally, the jury was already presented with evidence regarding the various October dates that H.H. claimed the second shower incident occurred, as well as Laura's testimony that H.H.'s period began the day Kenneth arrived.

¶ 26 Similarly, Laura's work records and personal calendar, even if admissible at trial,[1] are cumulative as to her testimony regarding the dates of Kenneth's visits and her testimony that she took some time off of work during his visit. "[C]ounsel cannot be deemed ineffective for failing to present cumulative evidence." *People v. Klein*, 2015 IL App (3d) 130052, ¶ 72. Additionally, they could have, at most, bolstered evidence regarding the dates of Kenneth's visits, but we have already determined that Kenneth's presence in the house did not meaningfully impact the State's case against defendant.

[1] The State argues that they represent inadmissible hearsay.

¶ 27 Last, though defendant argues that trial counsel should have "more effectively urge[d]" the trial court to allow him to question Bradley as to Kenneth's visit, defendant cites no caselaw in support of the curious proposition that counsel must vigorously argue with the trial court after it has made an evidentiary ruling. Here trial counsel provided an offer of proof in response to the trial court sustaining the State's objection to his line of questioning, thereby fulfilling his duties.

¶ 28 Defendant additionally argues that trial counsel was ineffective for not calling Gelman as a witness. Defendant notes that in his report, Gelman stated that he spent more than 10 hours transcribing and reviewing the police interview of H.H. Gelman stated that one treatise stated that children's reports may be false due to persistent and suggestive questioning. Citing various questions from the interview, he opined that "issues of influence, suggestibility and interviewer bias appear to be implicated in the remarks by the police officer interviewer." (Emphasis omitted.) Defendant argues that given that the video interview amounted to significant evidence against him, it would have been equally significant to present the trier of fact with a *bona fide* basis on which to question the believability of the interview.

¶ 29 The State argues that defendant has forfeited this issue by failing to raise it in his direct appeal and by failing to assert that his appellate attorney was ineffective for failing to raise it. We agree. *Youngblood*, 389 Ill. App. 3d at 214.

¶ 30 Even otherwise, defense counsel was not arguably deficient in failing to call Gelman as a witness. He was clearly aware of the report, as it was addressed to him and was dated months prior to the trial. As the State points out, there was information in the report that could have harmed defendant at trial. Gelman stated that it was reported that about 1 in every 200 children were sexually abused in the United States per year; that most victims were female; and that most offenders were known to the children. Gelman stated that there was "nothing of a particularly

compelling nature that [he] could observe in [H.H.'s] general comportment throughout the interview process which would otherwise suggest that she was deliberately fabricating, or not fabricating any of her responses to the interrogatories of police officer interviewer." (Emphasis omitted.) Gelman stated that it appeared that Laura was out of the home much of the time and had given defendant the role of H.H.'s caretaker. Gelman specially questioned, "Where is the mother?" These statements favor the State's theory that Laura was an absent, distant mother who did not take H.H.'s claims seriously. Gelman also questioned whether there were physical, emotional, and/or social reports documenting H.H.'s claims. Given that there were, Gelman could have been cross-examined regarding the reports, which implicated defendant. Finally, Gelman stated that "something seems awry" in the family, of which defendant was a member. Because the report contains information that could have harmed defendant at trial, counsel cannot be said to have been arguably ineffective for failing to call Gelman as a witness at trial.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the judgment of the McHenry County circuit court.

¶ 33 Affirmed.