2017 IL App (2d) 160459-U
No. 2-16-0459
Order filed October 3, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

IN RE COMMITMENT OF JACKIE HUGHES,	)	Appeal from the Circuit Court of Lake County.
	)	No. 06-MR-1326
(The People of the State of Illinois, Petitioner-Appellee, v. Jackie Hughes, Respondent-Appellant).	)	Honorable Christopher Stride, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Respondent failed to establish that he received ineffective assistance of counsel where the complained-of alleged omissions were primarily matters of trial strategy or otherwise did not prejudice respondent.

¶ 2 Respondent, Jackie Hughes, appeals an order of the circuit court of Lake County committing him as a sexually violent person "to the custody of the Department of Human Services for control, care, and treatment in a secure setting until further Order of the Court." The trial court also subsequently denied respondent's motion for a new trial. Respondent contends that he received ineffective assistance from the attorney that represented him in the proceedings below. For the reasons that follow, we disagree and affirm.

¶ 3 The sole issue presented in this appeal concerns trial counsel's effectiveness in representing respondent. The familiar regimen set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), applies when a respondent in a civil commitment proceeding alleges that he or she received deficient legal representation. *In re Kevin S.*, 381 Ill. App. 3d 260, 267 (2008); see also *In re Matter of Carmody*, 274 Ill. App. 3d 46, 54-55 (1995). Thus, to succeed on an ineffectiveness claim, a respondent must establish two prongs: that counsel's performance fell below an objective level of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *People v. Enis*, 194 Ill. 2d 361, 376 (2000). A "reasonable probability" is one sufficient to undermine confidence in the outcome of the proceeding. *Id*. Counsel's performance is strongly presumed to fall within the wide range of reasonable, professional representation. *Id.* at 377. An attorney's trial strategy generally may not form the basis of an ineffectiveness claim. *People v. Manning*, 241 Ill. 2d 319, 327 (2011). Respondent must satisfy both prongs of the test, and where a claim can be resolved on the failure to satisfy one of them, we need not address the other. See *People v. Evans*, 186 Ill. 2d 83, 94 (1999). While we review findings of historical fact using the manifest-weight standard, the ultimate issue of whether counsel's representation was ineffective is reviewed *de novo*. *People v. Nowicki*, 386 Ill. App. 3d 53, 81 (2008).

¶ 4 Respondent first claims that his attorney was ineffective in how he cross-examined an expert witness. Respondent complains that his trial attorney failed to object during the State's examination of Dr. Arroyo when Arroyo referred to certain children as victims despite the fact that respondent had not been convicted of assaulting them. In 1999, respondent was arrested. Initially, respondent states, "there were apparently 6 girls who where the subjects of various counts in that case." However, respondent pleaded guilty to one count and the remaining counts

were dismissed. Respondent now complains that the girls in the dismissed counts were referred to as victims in the instant proceedings. Determining whether to interpose an objection is a matter of trial strategy. *People v. Johnson*, 331 Ill. App. 3d 239, 248 (2002). Here, counsel could have concluded that he did not wish to accentuate the characterization of these individuals as victims, particularly as it was arguably factually accurate, by interposing an objection that may have been overruled. See *People v. Wright*, 2013 IL App (1st) 103232, ¶ 76 ("Defense counsel may not have wanted to call attention to the testimony about the prior shooting when none of the State witnesses had placed [the] defendant at the location at the time."). Moreover, respondent virtually concedes he cannot establish prejudice here, stating, "With no objection we are left wondering what weight, if any, the Court gave that testimony and characterization." The burden is on respondent to demonstrate prejudice. *Enis*, 194 Ill. 2d at 376. If we cannot tell if any weight was attributed to Arroyo's use of the term "victim," that burden is dispositive.

¶ 5 Respondent further complains that his trial attorney failed to address certain comments respondent made to police officers investigating the 1999 case, which Arroyo related to the court. Respondent told the officers that he had trouble achieving an erection after he underwent a surgery related to a urinary tract infection. Respondent states, "This condition appears to be a medical condition that could impact [his] ability to offend sexually in the future." He asserts this should have weighed in his favor and his trial attorney "failed to elicit testimony on cross [examination] to refute State's witnesses' assertions that [he] didn't have a medical condition that could limit his ability to offend." In context, respondent's report of this condition does not support respondent's position, In fact, Arroyo testified as follows:

> "[Respondent] indicated that prior to the offenses, he had a urinary tract problem that required surgery. And because of that surgery, that made his impotence worse. He

> stated that since then, he's used the incidents with the children as a focal point when he is trying to perform with his girlfriend so that he can perform sexually with her. He indicated that he's been able to achieve almost a full erection when he's with the children."

First, we note that the alleged problem occurred before respondent's 1999 offenses, so it did not prevent him from offending then. Second, respondent states that his problem occurs primarily with an adult female and that he is able to get an almost full erection with children. If anything, this suggests respondent is more likely to offend again, as he has an easier time achieving an erection with children. In short, we cannot see how failing to explore this area further prejudiced respondent.

¶ 6 Respondent next complains that trial counsel failed to make a foundational objection to the following testimony from Arroyo:

> "I looked at sexual behavior such as [respondent] inserting Q-Tips into the vagina of two girls between the ages of four and eight, inserting [a] Q-tip into the rectum of the younger child. That it had been reported that [respondent] provided alcohol to some of his victims. That [respondent] had engaged in sexual activity with a 15-year old girl over a period of years resulting in the birth of a child. And that he had been – it had been alleged that he had molested two other girls between the ages of six and nine while he was babysitting them."

Arroyo stated 1982 or 1983 when asked when the babysitting incidents occurred. Respondent now argues, "Without determining when these incidents occurred and the conduct of how the information came out, and who was present, we just don't have enough information." Defendant here highlights the problem with his argument. He states, "These behaviors *could have*

happened when [he] was young, which could result in a favorable a more favorable [*sic*] score on the risk analysis instruments Dr. Arroyo used." (Emphasis added.) Again, it is for respondent to establish prejudice here. *Enis*, 194 Ill. 2d at 376. Respondent cannot fulfill that burden by engaging in such speculation. In *People v. Olinger*, 176 Ill. 2d 326, 363 (1997), where the defendant argued trial counsel was ineffective for failing to explore the scope of law enforcement's investigation of fingerprints found at the crime scene, our supreme court held:

> "Defendant has failed to meet the prejudice prong of the *Strickland* test. He merely posits that some of the unidentified fingerprints '*could have belonged* to a person * * * responsible for the murder.' This pure speculation falls far short of the demonstration of actual prejudice required by *Strickland*." (Emphasis added.)

Respondent's assertion that the offenses "could have happened when [he] was young" is the same sort of speculation. As such, this argument fails on the prejudice prong as well.

¶ 7 Next, respondent asserts that trial counsel should have emphasized the fact that Arroyo stated that he had not had any behavior or disciplinary issues while he was housed in a secure environment. Respondent suggests that this is evidence favorable to him, though Arroyo felt it showed a secure placement was appropriate. However, as the State pointed out in closing argument, respondent did not have access to children during this period, which undercuts the value of this evidence to a degree. We fail to see how this issue is so compelling and probative that counsel's failure to explore it further undermines confidence in the outcome of the proceeding.

¶ 8 Further—pertaining to Arroyo—respondent charges that counsel was ineffective for failing to cross-examine Arroyo regarding a disorderly conduct offense that involved an act of voyeurism when respondent was 17 years old. Arroyo had testified to the "late onset" of

respondent's "trajectory of offending." Traditionally, Arroyo explained, offenders start offending in their teens and peak around the age of 28 to 32, after which they tend to drop off. A late-onset offender starts around the age of 28 (respondent was 29, excluding the act of voyeurism) and then offends roughly once per year (respondent committed 18 offenses in 14 years). According to Arroyo, respondent, who was 58 at the time of trial, would still be in the "peak window of offending." Respondent contends that if the act of voyeurism is regarded as his first offense, he would fit into the traditional group rather than the late-onset group and presumably be past his "peak window of offending."

¶ 9 Respondent ignores the fact that following the age of 29, which Arroyo regarded as the time respondent committed his first offense, respondent committed 18 offenses in 14 years. Arroyo testified that offenders in the typical group peak around the age of 28 to 32, after which they tend to drop off. Respondent's 18 offenses in 14 years clearly do not fit this pattern and is consistent with Arroyo's description of a late-onset offender. We fail to see how trial counsel could have credibly advanced the theory respondent is advocating here. As such, respondent was not prejudiced by counsel's failure to pursue it (respondent's bare contention that if counsel did not "get anywhere" with Arroyo on this point, counsel should have "cleared [it] up" with Dr. Rosell (respondent's expert) is mere speculation).

¶ 10 Respondent next complains of trial counsel's examination of Dr. Rosell. Rosell was the only witness presented by respondent at trial. This argument is highly speculative. Respondent posits questions that trial counsel could have asked Rosell. For example, respondent suggests that counsel should have asked Rosell about the effect impotence has on offenders or whether the age of first sexual activity—whether deviant or not—has an impact on behavior in later years.

We do not know the answer to these questions; those answers could easily have been adverse to respondent as well. Hence, no showing of prejudice has been made here.

¶ 11 Respondent also asserts that trial counsel "should have asked questions of Dr. Rosell that would show the Court why Respondent is no longer a threat." Respondent suggests that counsel could have asked what was different at the time of the trial as compared to respondent's past and that he could have emphasized respondent's compliant conduct in a secure setting. Moreover, respondent professed to have no desire to offend again. However, respondent concedes that "good testimony was elicited from" Rosell. Nevertheless, he charges that "trial counsel simply failed to hammer home why this Respondent is in a vastly different situation and frame of mind that he was when he was arrested for the 1999 case." Trial strategy encompasses "the costs and benefits of calling particular witnesses and pursuing particular questions." *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 85. Here, trial counsel's decisions to pursue certain lines of questioning is quintessential trial strategy. It therefore cannot form the basis of an ineffectiveness claim. *Manning*, 241 Ill. 2d at 327. This is particularly true where, as respondent concedes, trial counsel's handling of the questioning of Rosell elicited "good testimony." Moreover, as we do not know the answers to such questions, prejudice has not been shown.

¶ 12 In light of the foregoing, the judgment of the circuit court of Lake County is affirmed. Respondent's claims of ineffectiveness fail in that they either concern matters of trial strategy or were not shown to be prejudicial to respondent.

¶ 13 Affirmed.