2019 IL App (1st) 162055-U

No. 1-16-2055

September 25, 2019

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 14993
	)	
MATTEL MCCURRY,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The dismissal of defendant's postconviction petition at the second stage is affirmed over his contentions that he made a substantial showing of his trial counsel's ineffectiveness for failing to present certain witnesses or present evidence to support a theory of self-defense. Defendant also has failed to rebut the presumption that his postconviction counsel provided reasonable assistance.

¶ 2 Defendant Mattel McCurry appeals from the circuit court's dismissal of his amended postconviction petition at the second stage of proceedings under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). On appeal, defendant contends his case

should be remanded for an evidentiary hearing under the Act because he made a substantial showing that his trial counsel provided ineffective assistance for failing to investigate and present as part of his case: (1) the accounts of two known witnesses who would have countered the claim of the victim, S.T., that defendant sexually assaulted her; and (2) evidence of a 2004 domestic battery charge against S.T. to support a potential self-defense claim by showing S.T. was the initial aggressor. Alternatively, defendant contends he is entitled to new second-stage proceedings because postconviction counsel amended his petition to include an actual innocence claim based on the same facts as the contentions of trial counsel's ineffectiveness and, thus, counsel did not provide the reasonable assistance required by the Act. We affirm.

¶ 3 Defendant was charged with aggravated criminal sexual assault, aggravated domestic battery and other offenses in connection with a May 10, 2007, incident involving S.T., the mother of his child. Following a bench trial in 2009, defendant was convicted of four counts of aggravated criminal sexual assault and two counts of aggravated domestic battery. He was sentenced to 27 years in prison. On direct appeal, this court affirmed his convictions on two counts of aggravated criminal sexual assault and one count of aggravated domestic battery after finding the other counts merged pursuant to the one-act, one-crime doctrine. *People v. McCurry*, 2011 IL App (1st) 093411, ¶ 9. This court also amended defendant's mittimus to reflect a mandatory supervised release term of three years to natural life. *Id.* ¶ 27.

¶ 4 Although the facts were set out in defendant's direct appeal, it is necessary to largely recount them here to resolve the issues raised. Before trial, the court granted the defense's motion *in limine* to bar the State from presenting testimony regarding the 2007 incident from defendant's and S.T.'s son, who was five years old when he witnessed the incident.

¶ 5 Also prior to trial, the State moved to admit proof of defendant's other crimes. The motion alleged that in 2004, defendant pled guilty to aggravated assault following an incident in Kansas where he lived with S.T. and their son. The motion stated that defendant waved a knife in front of S.T.'s face and threatened to kill her and, the following morning, he prevented S.T. from leaving for work and cut up her clothing. Defendant cut two phone cords with a knife in succession when S.T. tried calling for help. Defendant put the knife to her throat and then used it to cut off her hair.

¶ 6 The State's motion asserted the 2004 conviction was relevant to defendant's statement of mind, motive and intent and to establish defendant's "hostility and animosity" toward S.T. and his "lack of hesitation to physically abuse" her.

¶ 7 Defense counsel argued that defendant's 2004 conviction was too remote to be relevant to his state of mind or motive in the instant offense. The trial court found the 2004 conviction was "relevant to this current charge, especially to establish defendant's "continued hostility and animosity toward the victim and a lack of hesitation to physically abuse and harm the victim in the case[.]" However, the court found the passage of three years between the incidents made the 2004 conviction "somewhat remote."

¶ 8 The court continued:

> "Secondly, I don't know if the other incident would truly establish the defendant's motive in this case and the charges are not exactly the same between the two cases.
>
> So for those reasons the State's motion to introduce evidence of other crimes is denied as to their case in chief; however, should a line of cross-examination of the victim be utilized trying to show that this was a one-time deal, this was an accident, things of

> that nature, then the State would be able to probe this prior event on redirect examination. If [] that doesn't happen but the defendant elects to testify and alleges that this is a one-time deal, this was an accident, this was a consent, then the State could recall the victim to introduce evidence of the other crime in that type of scenario."

¶ 9 At trial, S.T. testified she had known defendant since she was 15 years old and defendnat was 14. S.T., defendant and their son moved to Chicago from Kansas in 2005. At about 7:30 a.m. on May 10, 2007, S.T. was at her apartment with their son. Defendant was present because he had spent the previous night there. S.T. was wearing a T-shirt and jeans. Defendant confronted S.T. in a bedroom, asking her about phone numbers in an address book he found. After defendant called a phone number from that book, he punched S.T. in the face several times with a closed fist and placed her in a headlock. Defendant bit S.T. on the right arm.

¶ 10 S.T. ran into the living room, and defendant followed her. She testified defendant was "mad, very angry" because the person he called was a man she used to date. Defendant set up an ironing board and plugged in a clothes iron. Defendant poured hot water from the iron onto S.T.'s head. He burned her arm with the iron "about three" times, plugged the iron back into the outlet and burned her arm with it again.

¶ 11 S.T. ran to the kitchen to get ice for her burns. Defendant followed her and told her to go to the bedroom. Defendant removed his pants and told S.T., "You know what I want." S.T. initially refused but performed oral sex because she was afraid and "tired of fighting." Defendant told S.T. to lie face down on the bed, which she did, and they had intercourse. S.T. was crying. She complied with defendant's demand that she drive him to his grandmother's house.

¶ 12 After driving defendant to his grandmother's house, S.T. drove to a nearby police station at Wentworth and told a female officer at the front desk that she wanted to file a police report. S.T. showed the officer her burned arm. S.T. testified the officer told her she would have to "go downtown and file" because it was a "domestic case." S.T. did not say anything to the officer about the sexual assault because she "didn't feel comfortable in there" and thought the officer was "just blowing [her] off." S.T. drove her son to school and went to work, where she spoke with family members.

¶ 13 Later that day, S.T. went to Loretto Hospital where her injuries were photographed and she was given antibiotics and burn cream. S.T. told a nurse she had been sexually assaulted but told the nurse that information just before she was discharged because she was scared and nervous. Photographs of the burns and bite mark on S.T.'s body were admitted into evidence.

¶ 14 Over a defense objection, the trial court allowed into evidence three letters written by defendant to S.T. in September and November 2008 and February 2009 while defendant was in jail. In those letters, defendant admitted he had "f----ed up" and apologized for the pain he had caused her.

¶ 15 On cross-examination, defense counsel impeached S.T. with her testimony at a preliminary hearing in July 2007 that was inconsistent with her trial testimony as to the clothing she wore and her position when she and defendant had intercourse. S.T. acknowledged she did not tell a doctor she was sexually assaulted and did not fully describe the incident to an Officer Perry who interviewed her a few days later.

¶ 16 Chicago police officer Cynthia Green testified she met with S.T. at the Wentworth police station on the morning of May 10, 2007. Green made a report of S.T.'s account and her injuries,

advised S.T. to obtain an order of protection and gave her information about the domestic violence court. S.T. did not tell Green she had been sexually assaulted.

¶ 17 Crystal Carey testified she was the nurse who treated S.T. at Loretto. S.T.'s initial complaint was an alleged battery and she had burns on her left arm and right forearm. S.T. also had marks from a "human bite" on her right upper arm. Carey identified those injuries in photographs entered into evidence. The burn on S.T.'s left arm was in the shape of an iron. Carey testified that the burns looked "fresh, no more than a couple hours old." About one hour later, after being seen by Dr. Gulam Siddiqui, S.T. told Carey she was sexually assaulted by the person who caused her injuries.

¶ 18 Dr. Siddiqui performed a pelvic exam of S.T. and found her condition consistent with recent intercourse, noting in S.T.'s records that it was a "probable sexual assault." On cross-examination, the doctor stated he found no signs of tearing or bleeding and said her condition was not different from consensual intercourse of the type described by S.T.

¶ 19 Defendant was arrested on May 27, 2007, on a warrant for domestic battery. Swabs taken during S.T.'s pelvic exam tested positive for the presence of semen that matched defendant's DNA profile.

¶ 20 The defense called Chicago police detective Theresa Tolbert, who was assigned to S.T.'s case and contacted her following the incident. S.T. told Tolbert she had obtained a warrant in domestic violence court and told Tolbert that on May 10, 2007, defendant punched her 10 times in the face with his fist, bit her on the right arm and forced her to have sex. S.T. said defendant went into the bathroom and she helped her son prepare for school. Defendant plugged in an iron

and burned her arm with hot water from the iron. Tolbert prepared a supplemental arrest report that summarized S.T.'s statements.

¶ 21 The parties stipulated that, if called, Officer Perry would testify he was assigned to S.T.'s case on May 10, 2007, and interviewed S.T. at Loretto. The officer's report indicated S.T. had forgotten to state earlier that she had been sexually assaulted. It was also stipulated that in contrast to S.T.'s trial testimony, she testified at the preliminary hearing that she wore jeans and a bra when she was assaulted and after she and defendant began having intercourse, he told her to get on top of him.

¶ 22 At the close of evidence, the trial court found S.T. "highly credible" and stated that "nothing in her testimony indicated any kind of deviousness or a calculating agenda to somehow get even with [defendant]." The court found the physical evidence of S.T.'s burns corroborated her testimony and stated it was illogical that defendant would have inflicted those burns if they had consensual intercourse. The court also noted S.T. reported the incident within a few hours of its occurrence.

¶ 23 The court convicted defendant of four counts of aggravated criminal sexual assault and two counts of aggravated domestic battery. Defendant was sentenced to 27 years in prison.

¶ 24 On direct appeal, defendant argued a portion of his sentencing order was void because the trial court did not state a specific period of mandatory supervised release. He also argued his convictions on two sexual assault counts should be vacated because only two acts of penetration were proven and, moreover, his conviction on one count of domestic battery should be vacated because both domestic battery counts were based on S.T. being burned with an iron. *McCurry*, 2011 IL App (1st) 093411, ¶ 9. This court agreed with defendant's latter arguments and vacated

his convictions on two aggravated criminal sexual assault counts and one aggravated domestic battery count. *McCurry*, 2011 IL App (1st) 093411, ¶ 9.

¶ 25 On August 21, 2012, defendant filed *pro se* a combined postconviction petition and petition for relief from judgment pursuant to section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2010)). In that filing, he raised several claims of the ineffectiveness of his trial counsel, including the failure to present evidence regarding S.T.'s criminal background. He also asserted his counsel prevented him from testifying at trial.

¶ 26 Postconviction counsel was appointed for defendant, and in March 2015, counsel filed the amended petition that is the subject of this appeal. Counsel also filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). The Rule 651(c) certificate indicated that counsel: met with defendant in person and spoke to him by telephone several times; contacted witnesses specified by defendant and obtained affidavits from those witnesses; spoke to defendant's sister, Cherish McCurry,[1] multiple times; reviewed the records of defendant's trial and direct appeal; and spoke with officials in Kansas and obtained records from that state regarding S.T.'s domestic battery charge.

¶ 27 The amended petition raised several claims of trial counsel's ineffectiveness. Relevant to this appeal, defendant asserted his trial counsel was deficient for failing to investigate and present testimony from Valerie Stevens and Adonis Saddler, who were known to counsel and would have testified S.T. told them some of her statements to police about the 2007 incident were false.

[1] Because defendant and his sister have the same last name, we refer to her as Cherish.

¶ 28 Second, defendant claimed his counsel failed to present and "develop an available defense of self-defense" and should have argued that he acted in self-defense after S.T. stabbed him in the shoulder. Defendant asserted his counsel was aware S.T. was arrested for domestic battery in 2004 and should have presented that evidence of S.T.'s violent or aggressive character pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984). Instead, defendant asserted, his counsel only called Detective Tolbert as a witness and otherwise proceeded by way of stipulation. He argued counsel would not discuss with him his right to testify. He alleged that had he testified, he could have presented "his version of events as set out in his affidavit" to rebut S.T.'s account. In sum, defendant argued his counsel did not subject the State's case to meaningful adversarial testing.

¶ 29 Attached to the petition was a Kansas police report detailing S.T.'s arrest for domestic battery on January 9, 2004. According to the report, defendant told police he and S.T. were arguing and she cut his arm with a pocket knife. A supplemental report attached to the petition states S.T. told police defendant choked her but that defendant and Cherish denied that version of events. The report states that S.T. bore "no visible signs" of a choking. Defendant refused medical treatment and neither defendant nor Cherish gave a statement to police.

¶ 30 Also attached to the amended petition were affidavits of defendant, Cherish, Stevens and Saddler. In defendant's affidavit, he denied sexually assaulting S.T. and averred the burn on her arm occurred when he acted in self-defense.

¶ 31 Defendant attested he slept at S.T.'s apartment on the night of May 9-10, 2007, and they had consensual sex. On the morning of May 10, S.T. repeatedly asked him, "Who's Jill?" and stabbed him in the left upper shoulder blade. As he attempted to move away from her, S.T. lunged towards his groin with the knife and cut his leg. Defendant "grabbed the first thing I

could grab which happened to be the iron that was already plugged in" and touched S.T.'s left arm with the iron to stop her from lunging at him. The iron left a mark on S.T.'s arm. Defendant went into the bathroom to clean the stab wounds and when he came out, S.T. placed him in a chokehold. Defendant bit her so she would let go of him. They argued and both left with their son to drop him off at school. S.T. drove defendant to his grandmother's house and kissed him goodbye.

¶ 32 Defendant told counsel that version of events and that photographs of the stab wound on his left shoulder were taken "by the lockup keeper on May 27, 2007, and again by Detective Tolbert on June 28, 2007" but counsel did not request the photos. Defendant also told counsel about S.T.'s arrest in Kansas and that Cherish witnessed the 2004 incident. However, Cherish was not interviewed by counsel and counsel did not investigate the incident or ask S.T. about it at trial in support of a self-defense claim.

¶ 33 Defendant averred he told his counsel Stevens and Saddler could testify that S.T. lied about the incident. He also told counsel he wanted to testify at trial but counsel responded "in essence but not verbatim" that he should "shut up" and he could talk when he went to school and got a degree. Defendant attested: "Subsequently, I agreed not to testify, although I believe I was coerced by my trial counsel to do so."

¶ 34 In Cherish's affidavit, she stated she lived with defendant and S.T. in Kansas and was present on January 9, 2004, when S.T. started an argument with defendant and stabbed him in the arm with a pocket knife. Cherish moved to Chicago because she no longer wanted to live with them. Defendant and S.T. moved to Chicago in 2005 and lived with her, their grandmother and other family members on South May before moving to an apartment with their child.

¶ 35 On May 10, 2007, Cherish saw S.T. drop defendant off at South May. S.T. kissed defendant before driving away. That night, defendant showed her what appeared to be a puncture or stab wound near his left upper shoulder blade and said S.T. stabbed him that morning. Defendant told her S.T. stabbed him while he was in the shower after she looked at his phone and saw he talked to another woman. Defendant told Cherish he acted in self-defense. Cherish attested no public defender or investigator interviewed her regarding either incident.

¶ 36 In the affidavits of Stevens and Saddler, both attested they were friends of defendant and former friends of S.T. and spent a lot of time with the couple. Both averred that, after defendant's arrest, S.T. told them that not everything she had reported to the police was true and her attorney had advised her she would be prosecuted if she changed her story. S.T said she wanted to drop the charges against defendant but did not want to be charged with lying to police.

¶ 37 Stevens attested she last spoke to S.T. before defendant's trial, when S.T. again said she lied to police but would not tell prosecutors the truth. According to Stevens' affidavit, S.T. told her to stop asking about the case or "she would have me locked up."

¶ 38 Saddler attested that on the morning of May 10, 2007, he arrived at defendant and S.T.'s apartment to pick up defendant. Saddler called S.T., who told him she had already dropped defendant off at his grandmother's house. S.T. did not sound upset or angry. In later conversations, S.T. told Saddler she and defendant had consensual sex on May 10, 2007, and he did not sexually assault her; rather, S.T. said she had a new boyfriend and wanted defendant out of the apartment. S.T. told Saddler she wanted to tell the truth at defendant's trial but was warned by her attorney she could be prosecuted for lying if she changed her story. Saddler last spoke to S.T. before trial when S.T. again admitted to lying about defendant's actions and told Saddler to

stop asking her about the case. Both Stevens and Saddler attested no attorney or investigator interviewed them prior to postconviction counsel and they did not report their conversations to the State because they had a child and were afraid of being arrested for speaking to S.T.

¶ 39 The second claim in the amended petition, titled "ACTUAL INNOCENCE" and citing related case law, referred to "the arguments made earlier in this brief." Specifically, the claim referred to, *inter alia*, defendant's contention that he acted in self-defense, S.T.'s admissions to Stevens and Saddler that she was not assaulted, S.T.'s failure to immediately report an assault, and Dr. Siddiqui's conclusion that S.T.'s condition was consistent with consensual intercourse. That claim asserted defendant's convictions should be overturned based on the "new information provided with this petition in combination with facts already heard by" the trial court.

¶ 40 On July 1, 2015, the State moved to dismiss defendant's amended postconviction petition, asserting his claims of trial counsel's ineffectiveness could have been raised on direct appeal and were waived. The State argued even if the claims were not waived, defendant could not establish ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), because the choice of what witnesses to present is a matter of trial strategy. In addition, the State asserted defendant could not show he was prejudiced by counsel's decision not to call those witnesses because the outcome of his trial would not have been different had they testified or had a self-defense theory been raised. The State noted defendant was admonished regarding his right to testify. Lastly, the State contended defendant did not meet the requirements for a freestanding actual innocence claim because he could not rely on the same facts for that claim that were used to support his assertions of ineffective counsel.

¶ 41 In a written response to the motion to dismiss, postconviction counsel argued defendant's claims of counsel's ineffectiveness should not be considered waived and that an evidentiary hearing should be held on those claims. The response did not refer to the second claim in the amended petition.

¶ 42 After hearing arguments, the circuit court granted the State's motion to dismiss defendant's amended petition. Defendant now appeals that ruling.

¶ 43 The Act provides a criminal defendant with the means to redress a substantial violation of his constitutional rights in his original trial or sentencing, and the Act sets out a three-stage process to obtain postconviction relief. *People v. Allen*, 2015 IL 113135, ¶¶ 20-21. Where, as here, a petition is not dismissed within 90 days of its filing, the petition moves to the second stage, where counsel is appointed to represent the defendant, and the State must move to dismiss the petition or file an answer to the petition. 725 ILCS 5/122-5 (West 2012).

¶ 44 At this second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *Allen*, 2015 IL 113135, ¶ 21. This has been described as a "measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation," which if proven at an evidentiary hearing would entitle the defendant to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. The circuit court must therefore determine if the petition and any accompanying documentation meets that standard. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). If the defendant has met that burden, the circuit court advances the petition to the third stage and conducts an evidentiary hearing on the defendant's claims. 725 ILCS 5/122-6 (West 2012). The circuit court's dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Cotto*, 2016 IL 119006, ¶ 24.

¶ 45 On appeal, defendant first contends he has made a substantial showing of the ineffectiveness of his trial counsel. He asserts counsel was ineffective for: (1) failing to investigate Stevens and Saddler, who both averred that S.T. told them she lied to police about the 2007 sexual assault; and (2) failing to present evidence of S.T.'s 2004 arrest for domestic battery in Kansas.

¶ 46 First, as to Stevens and Saddler, defendant contends counsel was ineffective for failing to investigate these witnesses. We initially note, as pointed out by the State, that although defendant frames this issues as counsel's ineffectiveness for failing to investigate these witnesses, a review of defendant's argument shows that he is actually arguing counsel was ineffective for failing to present testimony from Stevens and Saddler. This is especially so where, as here, counsel was aware that Stevens and Saddler were not present for the assault and defendant averred in support of the amended petition that counsel was aware Stevens and Saddler could testify S.T. told them some of her statements to police were false. Thus, according to defendant's averment, trial counsel was aware of the general nature of the potential testimony of those two witnesses. See *People v. Marshall*, 375 Ill. App. 3d 670, 676-77 (2007) (counsel acts reasonably in not interviewing a potential witness if counsel is aware of the substance of the testimony that would be offered and concludes the account would not further the defendant's case). Moreover, defendant argues, essentially, that he was prejudiced by counsel's failure to present Stevens and Saddler because their affidavits: cast considerable doubt on S.T.'s trial testimony; place in question the truthfulness of her allegations with respect to the sexual assault; and impugn her overall credibility as a witness.

¶ 47 Every defendant has a constitutional right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, ' 8; *Domagala*, 2013 IL 113688, ¶ 36. A defendant who alleges counsel's ineffectiveness first 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, the 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. *Id*. Because a defendant must satisfy both prongs of the *Strickland* test, the failure to establish either is fatal to the claim. *Id.* at 687.

¶ 48 Decisions regarding which evidence to present and which witnesses to call to testify are matters of trial strategy that are given a strong presumption of reasonable professional assistance and will not ordinarily support an ineffectiveness claim. *People v. Williams*, 2017 IL App (1st) 152021, ¶ 38. The defendant has the burden of overcoming the presumption that a decision not to call a witness is within the purview of counsel's chosen trial strategy. *People v. Harris*, 389 Ill. App. 3d 107, 133 (2009).

¶ 49 As a threshold matter, we reject the State's contention that because Stevens and Saddler were not with defendant and S.T. on May 10, 2007, their accounts of what S.T. later told them outside of court, *i.e.*, that she lied to the police about defendant assaulting her, would constitute inadmissible hearsay. As defendant notes, the rules of evidence do not apply to postconviction proceedings. See Ill. R. Evid. 1101(b)(3) (eff. Apr. 8, 2013); *People v. Shaw*, 2018 IL App (1st) 152994, ¶ 63. Thus, affidavits involving hearsay statements can be offered in support of a

postconviction petition. *People v. Velasco*, 2018 IL App (1st) 161683, ¶ 117. At this second stage of postconviction proceedings, all well-pleaded facts in the petition, including hearsay affidavits, that do not conflict with the record are taken as true when determining whether the defendant has made a sufficient showing of ineffective assistance of counsel so as to warrant third-stage review. *Id*. (noting that no credibility determinations are made at the second stage).

¶ 50 That said, we conclude that counsel's decision to forego presenting testimony from Stevens and Saddler did not prejudice defendant such that there is reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. As mentioned, neither Stevens nor Saddler were present for the assault and therefore did not witness it. Rather, they would testify that S.T. told them that not everything she said to police was true. Saddler averred that S.T. told him that she and defendant had consensual sex on the date in question and that she had a new boyfriend and wanted defendant out of the apartment. However, both Steven and Saddler also averred that they were friends of defendant and former friends of S.T. As such, they both had an obvious bias towards the defense which the trier of fact would be free to consider in deciding their credibility and resolving conflicts in the evidence. *People v. Gray*, 2017 IL 120958, ¶ 35 (trier of fact decides witness credibility and resolves conflicts in the evidence). However, their testimony would not undermine the physical evidence of S.T.'s burns which corroborated her testimony and the court found the burns to be illogical with the theory that the couple had engaged in consensual intercourse. Moreover, the proposed testimony of Stevens and Saddler would also not explain why S.T. reported the incident within a few hours of its occurrence. Given this record, defendant was not prejudiced by counsel's decision not to call Stevens and Saddler as witnesses.

¶ 51 In reaching this conclusion, we are not persuaded by defendant's reliance on *People v. Upshaw*, 2017 IL App (1st) 151405, ¶¶ 40-46. Here, unlike in *Upshaw*, Stevens and Saddler were not alibi witnesses nor was defendant connected to the crime based solely on his inculpatory statement made after a lengthy period in police custody, *i.e.*, there was a reasonable probability that the alibi witness would have affected the outcome of the defendant's trial such that counsel was ineffective for failing to investigate the witness. *Id.* ¶¶ 42, 47.

¶ 52 Next, defendant contends his trial counsel was ineffective for failing to investigate and present evidence of S.T.'s 2004 arrest to support a theory that he acted in self-defense in the 2007 incident. He argues counsel should have investigated that incident and presented evidence to show S.T. previously committed domestic battery against him. He contends that would have supported a theory that S.T. "actually began the [instant] physical confrontation with lethal force, necessitating force" from him in response.

¶ 53 He argues that evidence would have supported a theory of self-defense by demonstrating S.T. had a violent character and was the initial aggressor in the 2007 incident. He also points to Cherish's affidavit stating that she witnessed the 2004 incident preceding S.T.'s arrest and that she saw his wound following the 2007 incident. He maintains his trial counsel was deficient for not asserting self-defense or any other affirmative defense.

¶ 54 Defendant was convicted of aggravated criminal sexual assault and aggravated domestic battery. S.T. testified that after they argued and he burned her arm several times with the iron, defendant forced her to have intercourse. In support of this petition, defendant averred that he told counsel that he burned S.T. with the iron only after she initiated a confrontation and stabbed him with a knife and that S.T. had been arrested for domestic battery in Kansas in January 2004.

Therefore, as with the potential accounts of Stevens and Saddler, defendant claims counsel was aware of this potential evidence. Cherish attested that defendant told her after the 2007 incident that he acted in self-defense.

¶ 55 The State responds that defense counsel made a strategic decision not to investigate and present evidence of S.T.'s prior arrest to support a claim that defendant acted in self-defense. The State notes that before trial, counsel successfully precluded the State from admitting evidence of defendant's own prior conviction for aggravated assault stemming from an April 2004 incident in Kansas involving S.T. In doing so, counsel argued the April 2004 incident was too remote and not relevant to defendant's state of mind in the 2007 incident. The State further argues that evidence of S.T.'s arrest for domestic battery would not have supported a claim that defendant acted in self-defense in the 2007 incident and counsel's decision not to present a self-defense theory was reasonable in light of several letters that defendant wrote to S.T. in 2008 and 2009 which were admitted at trial and in which he expressed remorse for his actions.

¶ 56 Our consideration of this issue again begins with the strong presumption, which defendant must overcome, that his counsel's challenged action or inaction was the product of sound trial strategy. See *Smith*, 195 Ill. 2d at 188; *People v. Rodriguez*, 2018 IL App (1st) 160030, ¶ 54 (any lack of investigation is judged against a standard of reasonableness and with "a heavy measure of deference to counsel's judgments"). "Whether the failure to investigate constitutes ineffective assistance of counsel is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial." *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26.

¶ 57 Defendant argues his counsel should have investigated and presented evidence of S.T.'s arrest to support a theory that she attacked him and he acted in self-defense. Counsel's decision to rely on one theory of defense to the exclusion of others is a matter of trial strategy that generally will not support a claim of ineffectiveness of counsel. *People v. Labosette*, 236 Ill. App. 3d 846, 856 (1992). That includes whether to argue that the defendant acted in self-defense. *People v. Edmondson*, 2018 IL App (1st) 151381, ¶ 40. The decision of counsel to pursue a particular strategy will not be deemed incompetent merely because it was not successful. *People v. Palmer*, 162 Ill. 2d 465, 479 (1994).

¶ 58 Here, we find that trial counsel's decision not to present evidence of S.T.'s 2004 arrest was reasonable and a matter of sound trial strategy. The record shows that prior to trial, counsel successfully precluded the State from admitting evidence of defendant's own prior conviction for aggravated assault stemming from an April 2004 incident in Kansas. In doing so, counsel argued in part that the 2004 conviction was too remote and the court agreed. Given this, in order to move to admit S.T.'s 2004 arrest for domestic battery counsel would essentially have to raise the counter-argument, *i.e.*, that S.T.'s 2004 arrest was not too remote. Under these circumstances, counsel's strategy to instead focus on the weaknesses in the State's case and demonstrate the State's inability to satisfy its burden of proof was not so unsound that he entirely failed to conduct meaningful adversarial testing of the State's case.

¶ 59 At trial, counsel chose to challenge S.T.'s claims of abuse and assault by questioning her directly about those events. Counsel cross-examined S.T. at trial about the incidents and impeached her trial testimony with her account given at a preliminary hearing in 2007. Counsel brought out on cross-examination that S.T. did not tell the doctor who examined her after the

incident that she had been assaulted or report her assault to police in the following days. In light of this record, we cannot say that counsel's choice was so irrational and unreasonable that no reasonably effective defense attorney would pursue that strategy when facing similar circumstances. See *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 85 (citing *People v. Bryant*, 391 Ill. App. 3d 228, 238 (2009)) (a defendant may overcome the strong presumption that defense counsel's choice of strategy was sound if counsel's decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy).

¶ 60 Defendant's remaining contention on appeal is that postconviction counsel did not provide reasonable assistance by amending his petition to add a claim of actual innocence. Defendant asserts that by adding that claim and referring to the same facts used to support his contentions of trial counsel's ineffectiveness, postconviction counsel failed to shape his petition into appropriate legal form and maintains this case should be remanded for new second-stage proceedings.

¶ 61 In defendant's *pro se* filing, he raised several claims of ineffective assistance of trial counsel, including the failure to present evidence regarding S.T.'s criminal background, and that counsel prevented him from testifying at trial. Postconviction counsel amended the petition to include a second contention, titled "ACTUAL INNOCENCE." That claim asserted defendant's conviction should be overturned as "supported by the arguments" made earlier in the petition. The claim referred to S.T.'s admissions that she was not assaulted, defendant's claim that he acted in self-defense, S.T.'s failure to complain of an assault immediately upon arriving at Loretto, and the doctor's testimony that S.T.'s condition was consistent with consensual

intercourse, along with other evidence. The claim concluded defendant should be granted relief based on the "new information provided with this petition in combination with facts already heard by the court at trial." Defendant now asserts that claim should not have been raised together with his assertion of trial counsel's ineffectiveness because the ineffectiveness claim relied on evidence that counsel knew or could have discovered earlier, while a claim of actual innocence must rest on newly discovered evidence.

¶ 62 In contrast to the constitutional guarantee of effective trial and appellate counsel, the right to counsel in a postconviction proceeding is wholly a creation of statute, and the Act only requires postconviction counsel to provide "a reasonable level of assistance." *People v. Lander*, 215 Ill. 2d 577, 583 (2005); *People v. Patterson*, 2012 IL App (4th) 090656, ¶ 23. The obligations of postconviction counsel are set out in Rule 651(c), which requires counsel to: (1) consult with the defendant to ascertain his contentions of the deprivation of his constitutional rights; (2) examine the record of the relevant proceedings; and (3) amend the petition if necessary to ensure that the defendant's contentions are adequately presented. Ill. S. Ct. R. 651(c); *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). Rule 651(c) is intended to "ensure that postconviction counsel shapes the defendant's claims into a proper legal form and presents them to the court." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18 (holding that substantial compliance with the rule is sufficient).

¶ 63 Where, as here, postconviction counsel has filed a Rule 651(c) certificate, a rebuttable presumption is created that counsel provided reasonable assistance. See *id*. ¶ 19. The defendant then has the burden of rebutting the presumption of reasonable assistance by demonstrating that

postconviction counsel failed to substantially comply with the duties mandated by Rule 651(c). *Id*.

¶ 64 Defendant contends that the inclusion of both an ineffective assistance claim and an actual innocence claim in his petition requires this court to remand regardless of the underlying merit of either claim. In support of this argument, defendant cites *People v. Suarez*, 224 Ill. 2d 37 (2007). In *Suarez*, however, postconviction counsel did not file a Rule 651(c) certificate, and the record did not show counsel had consulted with the defendant. *Id*. at 40, 44. The supreme court held that due to the noncompliance with Rule 651(c), remand was required without a consideration of whether the claims in the petition had merit. *Id*. at 47, 52. Here, in contrast, postconviction counsel filed a Rule 651(c) certificate, creating a presumption of reasonable assistance that now must be rebutted by defendant. See *Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 65 The level of assistance that a postconviction petitioner receives is less than that constitutionally guaranteed to a defendant at trial or on appeal. *Lander*, 215 Ill. 2d at 583; *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 50. Therefore, if postconviction counsel's performance did not result in prejudice and thus cannot be deemed deficient under *Strickland*, counsel cannot be found to have failed to provide the reasonable level of assistance required under the Act. *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 37. Put another way, "it should be even more difficult for a defendant to prove that he or she received unreasonable assistance than to prove that he or she received ineffective assistance under *Strickland*." *Zareski*, 2017 IL App (1st) 150835, ¶ 50.

¶ 66 To make a substantial showing of actual innocence, defendant must present evidence that is newly discovered, material, noncumulative and "so conclusive that it would probably change

the result on retrial." *People v. Coleman*, 2013 IL 113307, ¶ 96. Evidence is newly discovered if it was discovered after the defendant's trial and could not have been discovered earlier through the exercise of due diligence. *Id*. Here, the evidence described in the "actual innocence" claim in the amended petition was either presented at defendant's trial or was available to trial counsel and could have been presented at trial. Thus, it could not be considered newly discovered.

¶ 67 Defendant argues that postconviction counsel should have either omitted that claim from the amended petition or presented the claim "in such a way that it was freestanding and not in conflict with the rest of the petition." In defendant's first scenario, the petition would have included only the claim of trial counsel's ineffectiveness, which has been rejected on its merits.

¶ 68 Moreover, defendant offers no basis for a freestanding actual innocence claim. The "actual innocence" claim in defendant's amended petition more closely resembles a contention that the evidence presented at trial was insufficient to prove his guilt beyond a reasonable doubt. Perhaps recognizing that distinction, postconviction counsel did not refer to the claim in the written response to the State's motion to dismiss and did not explain or argue its merits at the hearing on the State's motion. Defendant has failed to rebut the presumption that postconviction counsel satisfied the standard of reasonable assistance.

¶ 69 Accordingly, the judgment of the circuit court granting the State's motion to dismiss defendant's amended petition is affirmed.

¶ 70 Affirmed.