2019 IL App (4th) 170061-U

NO. 4-17-0061

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 8, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ROBERT T. JONES,	)	No. 09CF1621
Defendant-Appellant.	)	
	)	Honorable
	)	John R. Kennedy,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in denying defendant's postconviction petition and did not apply the incorrect standard for ineffective assistance of counsel.

¶ 2 Defendant, Robert T. Jones, was found guilty of four counts of predatory criminal sexual assault of a child and sentenced to 15-year prison terms for each, with the first two counts running consecutively and counts III and IV running concurrently with counts I and II. This court affirmed on direct appeal. *People v. Jones*, 2013 IL App (4th) 120105-U. In October 2014, defendant filed a postconviction petition, and the trial court appointed counsel. In October 2016, after a third-stage evidentiary hearing, the court denied defendant's ineffective assistance of counsel claim, but it amended the mittimus to reflect the appropriate sentence credit.

¶ 3 On appeal, defendant argues the trial court erred in (1) finding trial counsel was not ineffective for failing to (a) call witnesses, (b) call an expert witness on false memories, (c)

submit a report from Dr. Judith Becker at sentencing; and (2) applying the wrong standard for ineffective assistance of counsel claims in ruling on the postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 This matter comes before this court on appeal of a postconviction petition filed as a result of defendant's conviction for four counts of predatory criminal sexual assault of the child of his then-girlfriend from the time the child was 4 years old until she was past her 11th birthday.

¶ 6 In October 2014, defendant filed a *pro se* postconviction petition alleging various forms of ineffective assistance of counsel. The trial court appointed the Champaign County public defender's office as postconviction counsel. Defense counsel filed an amended petition, alleging trial counsel was ineffective for failing to (1) investigate claims of the victim's history of false accusations, (2) call experts to establish the victim was relaying false memories, (3) cross-examine the victim sufficiently, (4) impeach investigators who misrepresented facts, (5) object to the State vouching for the victim's credibility, (6) object to the victim's statements admitted through other witnesses, (7) file a motion *in limine* regarding the victim cutting herself, and (8) object to evidence of defendant rubbing the victim's neck. Appointed counsel also raised allegations of ineffective assistance of counsel against a different counsel at sentencing, alleging he failed to present Dr. Becker's report as evidence in mitigation, did not object to the State's remark stating defendant was a mandated reporter as a registered nurse, and failed to request the appropriate amount of sentencing credit. The final allegation was against the Office of the State Appellate Defender for not raising these issues on direct appeal. The State filed a motion to dismiss. The court held a hearing on the motion, determined the allegations were sufficient to proceed to a third-stage evidentiary hearing, and denied the State's motion to dismiss. In August

2016, the trial court conducted an evidentiary hearing. Defendant testified on his own behalf, and Daniel Jackson and James Kuehl testified for the State.

¶ 7 A. Defendant

¶ 8 Defendant testified about his romantic relationship with the victim's mother. He testified they resided together in Arizona for a year in 1998 without the victim, because the victim was staying with her biological father, and again after defendant graduated nursing school in May 2005. While in Arizona the second time, the victim, H.T., accused defendant of molesting her, and as a result, the victim and her mother moved to Florida. In 2009, defendant was arrested in Arizona on an arrest warrant in this Champaign County case, and he signed the extradition waiver. Defendant hired a law firm to represent him in the case and spoke with representatives of the firm approximately four or five times in jail. Although he initially retained Thomas Bruno, a member of Bruno's firm, James Kuehl, became his primary attorney for the case, and defendant communicated with Kuehl by e-mail, mail, and phone after defendant bonded out of jail in December 2009. According to defendant, he told his attorney that H.T. had previously made a false claim of molestation saying she had been molested by or, in her words, "made love" to someone at a day care located in a private home. Defendant said although H.T.'s mother believed the account was "fabricated," she still moved H.T. to a different day care. Defendant said his attorney did not conduct any follow-up on that information.

¶ 9 Defendant also testified about seeking the assistance of several experts. He specifically wanted to consider using an expert in false childhood memories, which led him to Dean Tong, "an expert in suggestibility and false memories and interrogation techniques." He also met with Dr. Becker, a psychologist with a specialty in "psycho-sexual evaluations and testing." Defendant stated both experts believed there were issues with how the interviews of the

victim were conducted and other parts of the discovery. Defendant said after he expressed to Kuehl his interest in the use of experts to evaluate the interviews conducted with H.T., Kuehl became "uncommunicative" and did not return defendant's phone calls. At trial, the victim testified about the pattern of sexual abuse to which she was exposed by defendant. Defendant had previously told his attorney he was not living in the home at the time the victim said some of these incidents of molestation occurred, which could be confirmed by other witnesses. He was disturbed that Kuehl did not cross-examine the victim on that issue. During cross-examination, Kuehl did not ask the victim about prior inconsistent statements from her diary, a copy of which defendant said he provided to his attorney. Defendant testified his attorney failed to call any witnesses to verify the victim was unhappy about the move to Arizona and did not investigate the molestation accounts of the victim's close friend and friend's mother to see if there were similarities between the victim's account and theirs. He also told Kuehl prior to trial about the victim cutting herself and defendant did not think that should be presented at trial; however, it was. Defendant also testified to rubbing the victim's neck and giving her a massage, which the victim called "sexual abuse" while in Arizona and was testified about at trial.

¶ 10 The focus of the testimony at the postconviction hearing then shifted to his sentencing attorney, Daniel "Dan" Jackson. At the sentencing hearing, Jackson did not present character letters on defendant's behalf or evidence that defendant paid for the victim's mental-health treatment. Defendant also was asked questions about the sentencing credit that he was entitled to receive.

¶ 11 On cross-examination, the State brought up another expert named Dr. Edward Connor, from Kentucky, who had evaluated defendant. Dr. Tong also told Kuehl to speak with Dr. Kamala London, an expert in the area of false abuse memories. However, she specialized

with very young children and by that time the victim was 17 years old. Defendant also mentioned he learned of the second false allegation of molestation in discovery because the victim accused him of molesting his adult daughter, who defendant claims never met the victim. Defendant testified he obtained the victim's diary because he packed the victim's and her mother's belongings after they moved to Florida. On redirect-examination, defendant stated he paid Dr. Tong to be a trial consultant and never intended to call him as a witness. Dr. Becker also was asked to review the victim's interview for suggestiveness and issues with the testimony. However, she only prepared a report about the issue of recidivism, pursuant to Kuehl's instruction.

¶ 12 B. James Kuehl

¶ 13 James Kuehl is a retired criminal defense attorney. He stated he represented thousands of defendants during his years in practice and took about 125 cases to trial. He stated he represented defendant and met with him about 10 times prior to trial. Kuehl said defendant wanted him to speak with Dean Tong, who Kuehl contacted and described as "a self-educated psychologist." Tong put him in touch with Dr. Connor who evaluated defendant, but was told by Tong not to generate a report. Kuehl's understanding of the purpose of the evaluation was to determine if defendant was capable of committing this type of crime, according to a system Dr. Connor had developed. Defendant failed the test. In a letter to Kuehl, Tong stated defendant was only the third client in the past 12 years who failed the psychosexual testing. Tong said the test was not favorable to defendant and the trial would likely turn into a "he-said/she said" trial and feared defendant would lose. Kuehl believed if Dr. Connor had generated a report, they would have to give it to the State as part of discovery but since no report was made there was no obligation to do so. Tong also referred him to Dr. London. Kuehl believed Dr. London's field of

expertise to be in the area of false memories of abuse, and he sent a letter asking her to consider testifying for defendant. After tendering some evidence to her, her opinion was "she did not see any false accusations. She did not see any manufactured memories." Kuehl went so far as to request a fee schedule from her but never received one. He also spoke with Dr. Becker, who conducted evaluations to determine the possibility of recidivism in child sex offenders. He did not believe she was qualified to testify about "whether a child would accurately recall an incident of abuse."

¶ 14 In regard to the other-crimes evidence, specifically the massaging incident, Kuehl contested the State's pretrial motion to admit the evidence. He could not remember whether defendant told him about the prior false allegations of molestation by the victim but believed he did; however, he had concerns about the source of the information. He was not sure about that particular piece of evidence but he knew that apparently defendant and his wife, from whom he was separated at the time, were still on the same e-mail. He testified he thought some of the allegations "alleging false statements came in that way." In his opinion, the evidence was "illegally obtained." He also did not recall receiving a diary from defendant. If the victim's mother did not believe the victim's testimony was credible, he might have called her, but he stated, "[T]here's a lot of caveats on that." Kuehl was not sure her move was to protect defendant from the allegations, as he had said, but thought she moved H.T. and herself to Florida to get away from defendant. In his mind, she would have had to have fairly overwhelming and useful evidence, "not something that was for example, subject to the Rape Shield Act." He said instances of the victim previously having sex and the sexual abuse at the day care would have been inadmissible under the Rape Shield Act. He testified he did not recall receiving any

information prior to trial that H.T.'s mother found her incredible. Instead, he recalled H.T.'s mother saying something to the effect that she did not *want* to believe her.

¶ 15 At trial, Kuehl addressed the inconsistencies of the victim's interviews with the police and the Illinois Department of Children and Family Services (DCFS) concerning the abuse. In one interview, she said she had oral sex, but in another she said she did not and according to the officer's report, she told her mother defendant did not touch her. The victim admitted she told a made-up statement to her mother. Kuehl's primary goal in cross-examining the victim was to support and complete defendant's timeline of dates and places where he lived and show for the most part they did not live in the same place at the same time. He believed he was effective in getting the victim and her mother to confirm some of that testimony. His other goal was to present the inconsistencies in her testimony without coming right out and calling her a liar because "the jury' [*sic*] sympathies are not going to be with us, they're going to be with her. And despite whatever inconsistencies there might have been, the jury's [*sic*] sometimes tend to overlook that. So [he] wanted her in the—as [he] said, in the courtroom for as little time as possible." He also cross-examined her about the physical layout of the home, the proximity to the bathroom, the number of people residing in the home, and the fact that she shared a bunk bed with two other girls around the same age because he "thought a reasonable jury might consider [the victim's account] to be unreliable testimony."

¶ 16 Kuehl's goal on cross-examination of the victim was to present at most two points because by the third point "you start to lose the jury. So it really depends on how good your first two points are." He also indicated that with a young witness for whom a jury would be sympathetic, he was more concerned with getting her off the stand. Although he did not think it was a particularly strong point, Kuehl attempted to provide the jury with a motivation for H.T. to

lie by cross-examining her on the fact she was upset about the move to Arizona just weeks before her graduation. This resulted in her missing the graduation ceremony as well as the graduation parties. He also asked H.T. about sexual abuse that happened to her friend and she stated she did not know her friend was a victim until after H.T. reported her own allegations against defendant.

¶ 17 The reference to H.T's self-cutting behavior was mentioned by the State during their opening statement and was promptly objected to by Kuehl. Although the trial court allowed it to be admitted, not as evidence of any psychological condition but merely that it happened, the court placed a number of limitations on its use. Kuehl believed the court ruled correctly and "didn't want to make a big deal out of [the cutting]" because, based on his experience with cases of this nature, he knew more about its relationship to sexual victimization than the jury did and did not want it emphasized. He also did not have a problem with the State commenting on H.T's credibility because it was argument and he basically did the same thing by arguing the opposite.

¶ 18 On cross-examination, Kuehl stated he had represented parents and children in child abuse cases for about 30 years and taken about 10 to 15 predatory sex cases to trial. He reviewed the discovery and went over it with defendant. Defendant provided him with a great deal of information about what defendant believed to be potential defenses and gave Kuehl names of possible experts. He also stated he did not contact any of the various renters who lived at the home with defendant, the victim, and her mother.

¶ 19 On redirect, Kuehl was asked about not contacting the renters and said he "made some efforts to find them and came up with nothing." The individuals were more or less homeless. When asked on redirect if their testimony could have cutoff any window for possible abuse, he said the "time line [*sic*] didn't concern those people. It concerned the alleged victim

and the Defendant." Regarding the decision not to call Dr. London, he said he feared they would have to disclose to the State the information provided to her, which was all negative for defendant. He was asked to confirm that Dr. Becker's report said the allegations of sexual abuse occurred when H.T. was between ages 4 through 13. He also confirmed, based on her evaluation of defendant, Dr. Becker's report revealed defendant has "shown an interest in females age six to thirteen." Kuehl said there were significant risks in presenting that report as mitigation at sentencing given some of the information contained therein. He said, "As mitigation, I probably wouldn't. But it would be the kind of thing you'd look for. But, you know, you never want to give a Judge more reason to pack on years in a Class-X felony."

¶ 20 Kuehl acknowledged on recross-examination he did not ask defendant if he wanted to pay for a private investigator to find the former renters but remembered defendant was having financial problems at the time. According to Kuehl, there had been discussions about money needed for trial preparation and it was his understanding defendant's family indicated they were not willing to contribute any more financially. He also did not see significant benefit to defendant by trying to locate people whose testimony would essentially be " 'we didn't see anything.' "

¶ 21 C. Daniel Jackson

¶ 22 Daniel Jackson has been an attorney in criminal law for 16 years and represented defendant at sentencing. He stated he could not recall receiving any character reference letters from trial counsel and he normally presents that kind of evidence at sentencing barring any issues of concern brought up in the letters. When asked about Dr. Becker's report, he said he could not recall ever seeing that report, though defendant had spoken about it. According to Jackson's recollection, he was not sure he received that information in the documents transferred

by Kuehl. He asked Kuehl about it, but Kuehl did not have any recollection of the document either. In Jackson's opinion, if he had seen the document, he thought the trial court would believe the report had little value because it was done prior to trial and was based only on an examination of statements and allegations from defendant. He also believed the report contained conclusions that would have had a more negative impact on the court than positive. He considered the possible mitigating evidence of defendant paying medical bills of H.T. a "mixed blessing." Although it might serve to evince compassion on his part, it also could be considered as evidence of some sort of admission of responsibility. However, Jackson did not specifically recall having that information, though defendant may have disclosed it, because they talked about many issues and the sentencing hearing was a while ago. Even though defendant wanted to introduce H.T.'s counseling records to show he paid them, Jackson said the medical bills and counseling records might provide documentation of the trauma the victim suffered but it might have also been a positive thing for defendant. He was unsure how the court would weigh the information and thought it was best not to risk it. The mention of defendant being a mandated reporter because he was a registered nurse, when in fact he was a nursing student, did not really matter to Jackson because he did not consider it a major part of the State's argument and believed it would have been "within the purview of his duties and training to make that sort of report [regarding sexual abuse] anyway."As a result, he saw no reason to argue the point.

¶ 23 On cross-examination, Jackson could not recall everything he received from Kuehl, but he did not receive Dr. Becker's report, although he remembered defendant talking about it. He discussed character references with defendant but did not recall receiving any names or contact numbers. Jackson testified he addressed defendant's lack of criminal history, his education, his medical training, and other positive attributes in the presentence report. He was

also asked about sentencing credit defendant was owed for time spent in custody before being brought back to Illinois.

¶ 24 D. Trial Court's Ruling

¶ 25 After the State rested, the parties presented oral arguments after the trial court indicated it would be providing a ruling at a later date. One week later, the court issued its oral ruling, denying defendant's postconviction petition in large part but granting it on the issue of sentence credit. The court first set out the standard for consideration of a third-stage claim of ineffective assistance of counsel in a postconviction petition. The court noted that defendant was required to show how "counsel's representation fell below an objective standard of reasonableness and that but for the deficiency there's a reasonable probability that counsel's performance was prejudicial to the defense," *i.e.*, there was a reasonable probability the results would have been different absent the deficient performance.

¶ 26 Addressing first the pretrial issues, the trial court found Kuehl's objection to the evidence of the victim cutting herself was appropriately made and, even though a pretrial motion and/or motion *in limine* may have prevented the reference during opening statements, the relief, to which the court believed defendant was entitled, occurred. The result was the same as if a pretrial motion had been made. With regard to the propensity evidence first raised by the State in a pretrial motion, defendant's counsel properly objected, and it was addressed by the court, so again, defendant received the relief to which the court believed he was entitled. The court stated defense counsel at trial presented "a coherent and reasonable trial strategy" seeking to show through both direct- and cross-examination how unlikely it was for the acts of sexual abuse to have occurred in the manner and to the extent H.T. described. The court noted Kuehl's strategy was intended to cast doubt on the victim's testimony by showing how much access others had to

the areas in which she said the incidents occurred, as well as evidence casting doubt on her testimony regarding when defendant might have had the opportunity to commit the acts alleged. The court found counsel's strategy to be both reasonable and understandable in light of the State's evidence and concluded it "was not below an objective standard of reasonableness."

¶ 27 The trial court then considered the ineffectiveness claim as it related to counsel's alleged failure to present expert witnesses, finding the testimony clearly showed Kuehl followed up on the suggestions from defendant in exploring expert defenses. Finding Mr. Tong's expertise was dubious after contacting him as defendant requested, counsel then contacted other persons suggested as having expertise in the area of child sexual assault. Dr. Connor conducted some sort of testing of defendant and, as a result, discovered defendant "failed the test." Dr. Connor did not appear to be able to assist in achieving a different result. Dr. London also did not appear to be "in a position where she could provide helpful testimony." The court found, after considering all the evidence, she would not produce "any type of defense that's reasonably probable to change the outcome." Dr. Becker's opinions also did not appear particularly helpful to defendant from the standpoint of providing expert testimony sufficient to mount a reasonably successful defense, although it may have had some value in mitigation. The court concluded the proposed experts would not have been helpful in presenting a defense and there was no evidence they would have provided information at trial that would have affected the outcome. The court found Kuehl to be "well within the standard of reasonable diligence" in pursuing expert opinions to no avail.

¶ 28 With regard to defendant's ineffective assistance of counsel claim based on the failure to contact other witnesses, the trial court found the record revealed they were persons who were not "readily amenable to being located" but more importantly, there was no evidence in the record indicating what value, if any, they would have had even if found. The evidence indicated

they were people who, for the most part, were "acquaintances, renters, [or] transients" for whom there was no present location information. Further, defendant had made no effort to explain what their testimony might be, even if found, and explain its significance in the context of a defense. The court found defendant "ha[d] failed to demonstrate that these persons, even if they had been located, would have provided testimony that would create a reasonable probability for a different outcome."

¶ 29 Defendant also contended his trial attorney provided ineffective assistance in that Kuehl did not effectively cross-examine the victim. Noting that normally trial counsel's decisions regarding the nature of cross-examination are matters of trial strategy, the court determined "Mr. Kuehl effectively cross examined the alleged victim." The trial court said the strategy was "very understandable." Counsel recognized the importance of avoiding confrontation with a young victim of sexual abuse in a manner that might arouse jury sympathy. Describing it as "a delicate art that I think anyone who has been in that situation understands," the court recognized how trial counsel wanted to make his points and get her off the stand because "the longer she's there, the longer the jury has a chance to sympathize with her." The court noted trial counsel established the inconsistencies of the victim's statements to investigators with the police and DCFS and, through cross-examination, created the suggestion of possible fabrication through her association with a friend, who had also claimed to be a victim of sexual abuse. The court found this was something experienced counsel would do. The court further noted counsel's cross-examination to show the victim's dissatisfaction with the move to Arizona and the suggestion she blamed defendant for interrupting her schooling during a time that was important to her as a possible motive to fabricate her complaints. In the court's words, defense counsel's actions "were certainly not objectively unreasonable." "Taking all of the

alleged errors at trial, counsel's—trial counsel's performance did not fall below an objective standard of reasonableness." More importantly, the court found no evidence that counsel's performance, even if different, would have created a reasonable probability of a different outcome.

¶ 30 Focusing on the ineffective assistance of counsel claim at sentencing, the trial court found it was objectively unreasonable for the failure of Dr. Becker's report and the character letters to be transferred to attorney Jackson from Kuehl. The court noted the real question was whether the failure to present such information at sentencing would have created a reasonable probability of a different sentence. Considering defendant's convictions required a sentence to the penitentiary, the court was left to determine whether some character reference letters of unknown content and a report, which had both good and bad information in it, would have resulted in a different sentence if presented before the sentencing judge.

¶ 31 The trial court conducted an in-depth analysis of the rationale given by the sentencing judge for the sentences imposed and concluded the missing information would not have affected the outcome for several reasons. After considering the nature of the sentencing court's analysis as expressed at the sentencing hearing, the court concluded the character reference letters would have had, under the circumstances of this case, "negligible, if any value at all."

¶ 32 The trial court considered the report a "double-edged sword." On one hand, the report said he was a low risk to reoffend, but on the other, it said he still has an interest in girls the same age as the victim at the time of these offenses, which "would have the possibility of being very damaging." There were four counts of predatory sexual assault, which required consecutive sentencing and therefore had "a sentencing range of incarceration of six to thirty

years, twice." The sentencing court imposed a sentence of 15 years on counts I and II to run consecutively with each other and 15 years on counts III and IV to run concurrently with counts I and II. This was described by the sentencing court as a "middle range" sentence. The court said the sentencing court placed "significant weight, according to the record, on the nature and circumstances of the offense." The court continued saying, "It's clear that Judge Clem did place significant weight on that. He in his analysis said that there was a victim that was seriously harmed. He said that she was abused over an extended period of time. He said she will carry the burden of these assaults for life." Based on the testimony, the sentencing court said there was evidence of sexual grooming and that a sentence was necessary to deter others. The sentencing court also mentioned various factors in mitigation, including lack of or negligible prior criminal history, the defendant's honorable discharge from the military, his professional education as a nurse, and his rehabilitative potential. The sentencing court was found to have taken all these matters into consideration and fashioned what it considered to be a midrange sentence placing emphasis on the nature and circumstances of the offenses and the fact they were repeated and extended over a period of time. Against this backdrop, the postconviction court concluded the missing information would not have affected the sentencing court's decision and defendant had failed to sustain his burden to show a reasonable probability of a different outcome. Having concluded there was no ineffective assistance of trial counsel, the court also found no ineffective assistance of appellate counsel for failing to raise these issues, as alleged by defendant.

¶ 33 This appeal followed.

¶ 34 II. ANALYSIS

¶ 35 A. Ineffective Assistance of Counsel

¶ 36 Defendant argues his postconviction petition on the grounds of ineffective assistance of counsel should have been granted.

¶ 37 "Where a trial court's decision to deny a postconviction petition after a third-stage evidentiary hearing is based on disputed issues of fact that requires credibility determinations, we will reverse that decision only if it is manifestly erroneous." *People v. Phillips*, 2017 IL App (4th) 160557, ¶ 55, 92 N.E.3d 544. "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *People v. Deleon*, 227 Ill. 2d 322, 332, 882 N.E.2d 999, 1005 (2008). Under this standard, "we give deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and witnesses." *Deleon*, 227 Ill. 2d at 332. "However, where a trial court's decision to deny a postconviction petition after a third-stage evidentiary hearing is based on undisputed facts, we will generally review that decision *de novo*." *Phillips*, 2017 IL App (4th) 160557, ¶ 55.

¶ 38 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687). " 'Effective assistance of counsel refers to competent, not perfect representation.' " *Evans*, 209 Ill. 2d at 220 (quoting *People v. Stewart*, 104 Ill. 2d 463, 491-92, 473 N.E.2d 1227, 1240 (1984)). Mistakes in trial strategy or

tactics do not necessarily render counsel's representation defective. See *People v. Hanson*, 238 Ill. 2d 74, 107, 939 N.E.2d 238, 258 (2010) (finding defense counsel's decision not to file a motion *in limine* instead of objecting at trial was not objectively unreasonable).

¶ 39 To establish the second prong of *Strickland*, "[a] defendant establishes prejudice by showing that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 229 Ill. 2d 1, 4, 890 N.E.2d 424, 426 (2008). A "reasonable probability" has been defined as a probability which would be sufficient to undermine confidence in the outcome of the trial. *Houston*, 229 Ill. 2d at 4. "A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness." *People v. Simpson*, 2015 IL 116512, ¶ 35, 25 N.E.3d 601.

¶ 40 1. *Trial Counsel*

¶ 41 Defendant argues his counsel at trial did not provide effective assistance. We disagree.

¶ 42 We find no error based on trial counsel's failure to call witnesses who may have been in the same residence with defendant and the victim at certain unspecified times. Defendant was not able to pinpoint specifically when various friends, renters, or transients were in the home but asked trial counsel to contact them. Trial counsel made reasonable attempts to get in touch with them but was unsuccessful because they were transient in nature. While he could have hired an investigator to *attempt* to find the residents in question, defendant was having financial troubles and his family had already indicated they were not willing to provide additional funds. More importantly, counsel recognized the minimal value, if any, in calling people to testify they did not see anything. Additionally, defense counsel felt the timeline was not as important for the

witnesses as it was for the defendant and H.T. Reference to the timeline through other witnesses created the possibility of confusing the jury, detracted from defendant's claimed timeline in relation to the allegations, and hindered defendant's argument. Clearly, the decision whether to call these witnesses or not, assuming they were found, was a matter of trial strategy. Regardless, there is no evidence in this record that would lead the court to reasonably conclude the production of such witnesses created a "reasonable probability" of a different outcome. As Kuehl aptly noted, he did not see much evidentiary value to producing witnesses to testify they did not see anything with no clear way to establish when their presence or absence would have coincided with incidents of sexual abuse.

¶ 43 Trial counsel cross-examined the victim and her mother about the timeline of events, and they confirmed some of defendant's own accounts. Defendant argues it would have been better to have the witnesses testify on his behalf to confirm the details of his account. However, there was no proffer of what the witnesses would have been in a position to testify about. They could have only contributed two things. The first is to say they did not witness anything; the second is that he was not residing in the home on certain dates. Neither is of value. Just because some of the witnesses did not see the events in question did not mean they did not occur. Any reasonable prosecutor would point out to jurors what their own common sense would tell them—someone involved in sexually molesting a child is not likely to do it when witnesses were present. The victim's mother was unaware of the molestations, and she lived in the home. It is not uncommon for the residents of the home to be oblivious to the molester's actions, which is why a molester is able to continue his conduct for so many years in some cases. As to the matter of when defendant resided in the home, testimony about the times he did not was irrelevant. It was clear defendant at certain times did reside with the victim. In this case, the State submitted

Illinois Pattern Jury Instructions, Criminal, No. 3.01 (4th ed. 2000), which states "[i]f you find the offense charged was committed, the State is not required to prove that it was committed on the particular date charged." Therefore, these witnesses would have done nothing to assist in his defense even if they could testify he was in a different state for two years out of the nine-year window of the alleged abuse. Again, any reasonably competent prosecutor would have argued to the jury the common-sense observation that defendant was not asserting an alibi as to any specific allegation of abuse but merely making a blanket denial. Obviously, H.T. was not talking about dates when he was not there, and they, as jurors, did not have to find the offenses occurred on specific dates.

¶ 44 Defendant also argues his trial counsel was ineffective because he did not call an expert on false memory testimony. We disagree.

¶ 45 Kuehl testified he submitted discovery to Dr. London, an expert in false memory testimony. In her expert opinion, the victim's memories were not fabricated, implying she believed they were real. Dr. London believed she could not give any testimony in the case that would be useful. Additionally, Kuehl feared if she was called as a witness, she could be asked about the information defense counsel tendered to her, which would be detrimental to defendant's case. If trial counsel did consult his Ouija board to come to this conclusion, as appellant suggested in his brief, perhaps he should do so more often. We cannot say the decision to avoid damaging his client's case was objectively unreasonable because we assume that is what defendant paid him to avoid. The evidence at defendant's third-stage hearing revealed substantial flaws with each of the proposed "expert witnesses." As it turned out, Tong was not intended as an expert witness for trial at all; he was a "trial consultant" and was merely a "self-taught psychologist," whatever that means. Tong then referred counsel to Dr. Connor, who trial counsel

sent defendant to for "psychosexual" testing. He failed the test, achieving the notable status of only being Tong's third client in his 12 years of consultant work who did so. Needless to say, Tong and Kuehl did not want a report generated for fear they might have to disclose it to the State. One can reasonably assume from that fact alone, coupled with the fact that Dr. Connor's name was not even mentioned until defendant was cross-examined by the State, he was not what defendant was looking for in the way of an expert witness. However, counsel had dutifully contacted him and had his client tested as directed. Defendant was also sent to be evaluated by Dr. Becker, a psychologist specializing in "psycho-sexual evaluations and testing" who, it turns out, prepared a report indicating that although defendant tested as someone with a low level of risk for recidivism, he also exhibited an abnormal sexual attraction to female children between the ages of 6 and 13 and male children under the age of 5—probably not the sort of information a reasonably competent defense attorney would choose to present for a defendant charged with predatory criminal sexual assault of a child between the ages of 4 and 11. Even if only for the purposes of sentencing, it would not be unreasonable for trial counsel to be concerned that the sentencing judge may have his or her attention drawn to that fact by the State in spite of the "low risk" score he obtained for recidivism. It must be remembered this is the report that defendant complains was missing from the mitigation evidence available to sentencing counsel. One would not be particularly surprised if counsel was more relieved than grieved at having missed out on the opportunity to provide the court with defendant's analytically tested sexual proclivities. Tong was equally helpful in recommending Dr. London, an expert in the field of false abuse memories. Again, trial counsel dutifully contacted Dr. London, sending her a letter along with relevant portions of discovery material. He eventually spoke with her directly, and her opinion was she saw no false accusations and did not see any manufactured memories in the reports of the victim.

It is not necessary to point out why reasonably competent trial counsel would not have wanted to provide the State with the opportunity to argue to the jury that if defendant's expert found no false or manufactured memories, that must mean they were true.

¶ 46 According to the evidence presented at the hearing on postconviction relief, these are the witnesses trial counsel pursued at defendant's request and is now accused of providing ineffective assistance for failing to call. Based on this record, it is more reasonable to argue it would have been ineffective assistance to rely on any of them as part of a defense strategy. The failure to call any of the various experts suggested by defendant does not meet the standard of ineffective assistance.

¶ 47 2. *Sentencing Counsel*

¶ 48 Defendant argues his counsel at sentencing did not provide effective assistance. We disagree.

¶ 49 Counsel at sentencing did not present as evidence in mitigation character letters and a report from Dr. Becker, in part, because he did not have them. We find the failure to adequately account for the absence of the letters and report is objectively unreasonable. From this record, there is no clear way to determine whether the documents were ever tendered or, if tendered, were ever discovered in the large volume of discovery material described by sentencing counsel. Regardless, it does not change the outcome. We have no information about what the character reference letters contained, but we ponder why defendant would not have known their content. According to the evidence, defendant provided names and contact information for character witnesses but did not include any evidence, by way of affidavit or otherwise, to indicate what they would have said.

¶ 50 As the judge at the postconviction proceedings stated, the character reference letters would have had a negligible impact given the serious and ongoing nature of the incidents of sexual abuse, along with the evidence of grooming behavior by defendant toward the victim. Moreover, the court at sentencing took into consideration all relevant mitigating evidence presented, including his honorable discharge from the military, his lack of criminal history, and his profession as a nurse, as well as his rehabilitative potential.

¶ 51 In regard to Dr. Becker's report, the potential damage to be caused by disclosing defendant's sexual attraction for female children in the victim's age range at the time of these offenses would far outweigh the "low risk" recidivism score when one considers the sentencing judge's concern for the nature and circumstances as well as the seriousness of the offenses and need to deter others. We do not believe that would have changed the outcome at all. Although the recidivism score may have perhaps given some weight to defendant's rehabilitative potential, that was already considered by the court. Moreover, defendant received what the court described as a middle-range sentence, so the factors in mitigation were considered. There is insufficient evidence in this record to find a reasonable probability of a different outcome, and thus, we find counsel was not ineffective.

¶ 52 B. Trial Court Standard

¶ 53 Defendant argues the trial court applied the wrong standard for ineffective assistance of counsel at the postconviction evidentiary hearing. We disagree.

¶ 54 "[T]he trial court is presumed to know the law and apply it properly. However, when the record contains strong affirmative evidence to the contrary, that presumption is rebutted." *People v. Howery*, 178 Ill. 2d 1, 32, 687 N.E.2d 836, 851 (1997).

¶ 55 Here, defense counsel argues the trial court applied the wrong standard for ineffective assistance of counsel when the court stated, "Moreover, there is no showing in evidence that trial counsel's performance, if different, would have created a *substantial* probability of a different outcome." (Emphasis added.) Initially, the court stated the standard was defendant "must show that counsel's representation fell below an objective standard of reasonableness, and that but for the deficiency there's a reasonable probability that counsel's performance was prejudicial to the defense." The court went on to state, "[P]rejudice exists where there is a reasonable probability that the result of the proceeding would have been different." That was the correct standard to apply. See *Petrenko*, 237 Ill. 2d at 496 ("[A] defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant."). Throughout the court's ruling, it stated why defendant's claims of ineffective assistance of counsel were not objectively unreasonable and were "coherent strategy." Moreover, the portion of the transcript referred to by counsel is taken out of context. The court said, "Taking all of the errors at trial, counsel's—trial counsel's performance did not fall below an objective standard of reasonableness." That is the end of the analysis because if defendant does not satisfy one prong of the test, his claim fails. The court went on to say, "Moreover, there is no showing in evidence that trial counsel's performance, if different would have created a substantial probability of a different outcome." The court in that moment was merely stating, even if it did find counsel's performance was unreasonable, defendant's outcome would not have changed. Thus, the claim would still fail. As that analysis was unnecessary, it clearly cannot form the basis of an error. Therefore, we find the trial court did not err.

¶ 56 We commend the postconviction court for its thoughtful and detailed analysis of the postconviction petition. Such analyses are of substantial assistance to courts of review.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 59 Affirmed.