2015 IL App (4th) 130846-U

NO. 4-13-0846

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 15, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
SYLVESTER HENDERSON,	)	No. 07CF1225
Defendant-Appellant.	)	
	)	Honorable
	)	Leo J. Zappa,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Pope and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding defendant failed to make a substantial showing of ineffective assistance of counsel at the second stage of postconviction proceedings.

¶ 2 Defendant, Sylvester Henderson, appeals the second-stage dismissal of his petition for postconviction relief. Following a July 2008 jury trial, defendant was found guilty of one count of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2006)) and sentenced to 15 years' imprisonment. Defendant filed a direct appeal, and we affirmed (*People v. Henderson*, No. 4-08-0774 (unpublished order under Supreme Court Rule 23)).

¶ 3 Defendant thereafter filed a *pro se* petition for postconviction relief and later, with the assistance of counsel, an amended petition for postconviction relief. Defendant's petition alleged ineffective assistance of both trial and appellate counsel. The trial court dismissed defendant's petition at the second stage of postconviction proceedings. Defendant

appeals, arguing he made a substantial showing of ineffective assistance of counsel because his trial counsel (1) elicited and argued damaging and irrelevant evidence, (2) embarrassed him in front of the jury, and (3) failed to adequately prepare him to testify on his own behalf. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In October 2007, the State charged defendant by information with two counts of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2006)) arising out of a September 27, 2007, incident whereby his 22-month-old daughter, J.O., suffered second- and third-degree burns over approximately 8% of her total body surface. The State dropped one of the counts, and defendant's case proceeded to jury trial.

¶ 6 A. Defendant's Trial

¶ 7 Defendant was interviewed by Detective Scott Kincaid. The State introduced a video and transcript of the interview into evidence at defendant's jury trial. In the interview, defendant told Detective Kincaid, when he woke on the morning of September 27, 2007, J.O. was in bed with him, watching television. Once he got out of bed, defendant decided to cook a meal and bathe J.O. In the bathroom, he turned on the spigot in the bathtub and placed J.O. inside without first testing the water temperature. Defendant left J.O. alone in the bathtub for approximately two to three minutes. When he returned to the bathroom, J.O. was whimpering but did not scream, cry, or otherwise indicate she was in pain. After J.O.'s bath, both she and defendant laid down and fell asleep. When defendant awoke approximately two to three hours later, he noticed "bubbles" on J.O.'s legs.

¶ 8 At trial, Jessica Overall, J.O.'s mother and defendant's live-in girlfriend, testified prior to the incident at issue, J.O. had tried to stand in the bathtub by pushing herself up with her

hands or using her hands and knees to rise to a standing position. Overall also noted (1) the bathtub is located approximately four feet away from the stove and (2) she kept her bleach and laundry detergent on the laundry room floor. According to Overall, J.O. often played throughout the house and was capable of moving from room to room on her own. J.O. also opened cabinets but Overall testified J.O. only played in an empty cabinet, not those containing cleaning supplies.

¶ 9 Overall further testified when she arrived home from work on September 27, 2007, defendant informed her J.O. was injured after he bathed J.O. in hot water. After examining J.O., Overall spotted blisters on the top of J.O.'s right foot and on the back of the heel on her left foot. Overall rubbed Neosporin cream on the blisters and wrapped them with gauze. The next day, Overall spoke to a pharmacist who informed her, if the blisters burst or turned yellow, they were likely infected and she should take J.O. to the hospital. At that point, Overall, who had a certified nurse's assistant certificate, did not take J.O. to the hospital because the blisters had not progressed to a bursting or yellowing stage; therefore, Overall thought she could treat J.O.'s injuries herself.

¶ 10 Verlean Henderson, defendant's mother, testified she spoke with defendant by phone on September 27, 2007. During their conversation, defendant asked Verlean why J.O. was whimpering in the bathtub. Verlean responded the bath water was likely too hot. Defendant later told Verlean blisters developed on J.O.'s leg. Verlean visited defendant and J.O. that afternoon and thought the blisters were not "that bad, but if it got worse that [Overall] should take [J.O.] to the hospital."

¶ 11 On October 2, 2007, five days after J.O. began blistering, Overall and Verlean took J.O. to the Memorial Medical Center emergency room after the blisters worsened and J.O. refused to walk on one of her legs. Emergency-room physician Dr. David Griffen treated J.O.

At trial, Dr. Griffen testified he had 20 years' experience working in emergency rooms. Upon examining J.O., Dr. Griffen noticed she ran a fever and had burns in the perineal (genital) and buttocks areas as well as on her lower extremities. Dr. Griffen classified J.O.'s burns as "at least second degree." Dr. Griffen further noted J.O.'s burns did not resemble typical burns from hot water in a bathtub. Specifically, Dr. Griffen stated burns from immersion, such as sitting in hot water in a bathtub, are "circumferential, *** so that all the surface of the extremity that's immersed in hot water shows evidence of burns." He defined "circumferential" as "[a]ll the way around the involved extremities, so on the lower extremities, [burns would exist on] all surface of the area that's immersed, *** usually the feet and lower legs are in the water so you have burns all the way around." Because J.O.'s burns were "more patchy in appearance" and not circumferential, Dr. Griffen stated "they [were] not consistent with other immersion burns [he had] seen."

¶ 12 After Dr. Griffen examined J.O.'s burns, he transferred her to the burn unit. There, physician's assistant Alyssa Moore examined J.O. At trial, Moore testified J.O. arrived in the burn unit on October 2, 2007, with loose skin on her legs and second- and third-degree burns producing substantial drainage and emanating a foul odor. Moore stated she frequently saw bathtub burns and identified victims of such burns as having "burns on their buttocks or legs, pretty uniform burn[s]. If there wasn't any water in the tub, and [the victim] turned the water on themselves, it could appear more like a splash burn." Moore noted J.O.'s burns were not consistent with those acquired while sitting in a bathtub because J.O. "appeared to just have little small areas on her buttocks that were burned. The burns weren't uniform. The *** bottoms of her feet and toes weren't burned. You would expect to see more circumferential burns, around her legs and more burns on her buttocks, if she was sitting in the tub."

¶ 13 Dr. Michael Neumeister also examined J.O. in the burn unit on October 2 or 3, 2007. Dr. Neumeister testified second-degree burns covered 8% of J.O.'s total body surface, consisting of some burns on her left side, scattered burns on her perineum, and burns on the lower extremity of her right side. One small area on J.O.'s right leg contained a third-degree burn. Regarding the timing of the burns, Dr. Neumeister opined at the time he examined J.O., the blisters were a few days old, but blistering likely appeared within three to six hours after the incident giving rise to them. Dr. Neumeister agreed with Dr. Griffen and physician's assistant Moore, stating the pattern of the burns indicated a poured or splashed substance caused them. Dr. Neumeister speculated the offending substance could have been chemical.

¶ 14 The severity of J.O.'s burns caused her to be hospitalized for one week. Upon her admission into the hospital, hospital staff alerted the Department of Child and Family Services (DCFS) to possible abuse of J.O. DCFS assigned investigator Debora Kemp to J.O.'s case.

¶ 15 Kemp testified she had 13 years' experience as a DCFS investigator, underwent special training regarding burns to children, and previously investigated approximately 100 cases involving burned children. On October 3, 2007, Kemp visited defendant at his home, the site where J.O. incurred her burns. There, Kemp toured the house, where she observed the stove was close to the bathroom, and questioned defendant, who told her the burns appeared after he bathed J.O. Defendant informed Kemp J.O. initially "just sat there" in the bathtub but eventually started "sniffering." At first, defendant thought something was wrong with J.O. but then "thought maybe she was just being spoiled." Defendant told Kemp he removed J.O. from the bathtub and then took a nap with her in his and Overall's bed. After the nap, defendant noticed "little bubbles" on J.O.'s leg or foot. After studying photographs of J.O.'s injury and interviewing

defendant, Kemp determined J.O. had incurred abuse. DCFS took J.O. into protective custody and later placed her in foster care.

¶ 16 Detective Kincaid and housing inspector Matt Morrell accompanied investigator Kemp to defendant's home on October 3, 2007. At trial, Morrell testified he was a senior housing inspector assigned to the task of measuring the temperature of the water coming from the bathtub spigot. Morrell let the spigot run until six inches of water filled the tub. At that point, the water running from the spigot had a temperature of 127 degrees and the water sitting in the bathtub was 125 degrees. He also testified he held his hand under the running water from the spigot for five seconds but then had to pull away because his hand became red and uncomfortable due to the water temperature. Morrell did not investigate anything in the home aside from the water in the bathtub.

¶ 17 At trial, defendant testified on his own behalf. Trial counsel asked defendant what he was doing the night before the incident, to which defendant responded he had been drinking Hennessey and Budweiser. He explained, when he woke the next morning around 11 a.m., J.O. was in bed with him, watching television. Once defendant got out of bed, he decided to cook steak and bathe J.O. Trial counsel inquired whether J.O. was old enough to eat steak, to which defendant responded she was.

¶ 18 Defendant then explained he had turned the spigot on to bathe J.O. but had not tested the water temperature before placing J.O. in the bathtub. Defendant left J.O. alone in the tub for approximately two to three minutes while he checked on his steak. When he returned, J.O. was whimpering but not screaming. Without taking J.O. out of the tub, defendant called his mother, Verlean Henderson, to ask her what she thought was wrong with J.O. Verlean told defendant the water might be too hot, so defendant placed his hand in the water to test its

temperature. Defendant testified the water did not feel too hot but he nonetheless removed J.O. from the bathtub, dried her off, fed her, and laid her down on the bed, where both he and J.O. took a nap. When defendant awoke three hours later, he noticed blisters on J.O.'s legs. Defendant testified he did not take J.O. to the hospital the next day because "it didn't look that bad." Trial counsel asked whether he had taken her the day after that, to which defendant responded, "No." Counsel stated, "In fact, [J.O.] didn't go to the hospital until the 2nd of October, right?" Defendant responded, "Yeah, if I recall. I was in—I was in jail for driving at the time." Defendant maintained throughout trial he would never knowingly hurt a child and never poured or spilled anything on J.O.

¶ 19 Following presentation of the evidence, the jury found defendant guilty. In August 2008, defendant filed a motion for a new trial, which the trial court denied. The court then sentenced defendant to 15 years' imprisonment. Defendant appealed, arguing the trial court erred in denying his motion for a new trial, and we affirmed. *Henderson*, No. 4-08-0774.

¶ 20 B. Postconviction Proceedings

¶ 21 In July 2010, defendant filed a *pro se* petition for postconviction relief, alleging multiple claims of trial counsel's ineffective assistance for his failure to object to irrelevant and prejudicial evidence. In addition, defendant alleged trial counsel was ineffective for failing to adequately prepare him to testify. Defendant attached an affidavit to his *pro se* petition, wherein he stated: "[P]rior to testifying, the only time my [a]ttorney inquired to me on the issue of testifying was during a side-bar after the [p]rosecution rested its case and even then the only thing he asked me was 'do you want to testify[?'] And, after I said I did[,] trial counsel said he thought it would be a good idea as well."

¶ 22 In August 2010, the trial court appointed postconviction counsel and gave the State 28 days to file a responsive pleading. Later that month, the State filed a motion to dismiss defendant's postconviction petition.

¶ 23 In September 2012, defendant's appointed counsel filed an amended petition for postconviction relief. Defendant's amended postconviction petition alleged trial counsel's performance was deficient because he failed to (1) object to certain evidence and testimony presented at trial, (2) challenge jury members who had obvious relationships with police officers and witnesses, and (3) prepare defendant to testify at trial. Defendant's amended petition also alleged his appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel on direct appeal.

¶ 24 In June 2013, the State filed a memorandum in support of its motion to dismiss defendant's petition, and in August 2013, the trial court granted the State's motion, finding defendant had failed to satisfy both prongs of the *Strickland* test (*Strickland v. Washington*, 466 U.S. 668 (1984)).

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, defendant argues the trial court erred in dismissing his postconviction petition at the second stage of the proceedings, where he made a substantial showing both his trial and appellate counsel rendered ineffective assistance of counsel. He specifically argues he made a substantial showing of ineffective assistance of counsel at the second stage of postconviction proceedings because trial counsel (1) elicited and argued damaging and irrelevant evidence, (2) embarrassed him in front of the jury, and (3) failed to adequately prepare him to testify on his own behalf. Although a portion of defendant's argument could have been raised on

direct appeal, because his petition alleged ineffective assistance of appellate counsel for failing to raise trial counsel's alleged errors, we will address the merits of defendant's claims. See *People v. Blair*, 215 Ill. 2d 427, 450-51, 831 N.E.2d 604, 619 (2005) (where a defendant is claiming his appellate counsel was ineffective for failing to raise trial counsel's failures on direct appeal, forfeiture does not apply).

¶ 28 A. The Post-Conviction Hearing Act

¶ 29 "The second stage of postconviction review tests the legal sufficiency of the petition. Unless the petitioner's allegations are affirmatively refuted by the record, they are taken as true, and the question is whether those allegations establish or 'show' a constitutional violation. In other words, the 'substantial showing' of a constitutional violation that must be made at the second stage [Citation] is 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 petitioner to relief." (Emphasis in original.) *People v. Domagala*, 2013 IL 113688, ¶ 35, 987 N.E.2d 767.

¶ 30 Ineffective-assistance-of-counsel claims are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Reversal under *Strickland* requires defendant to prove (1) the conduct of trial counsel fell below an objective standard of reasonableness (*Strickland*, 466 U.S. at 687-88) and (2) the deficient performance prejudiced defendant such that a "reasonable probability" exists the result would have been different but for the deficient performance (*Strickland*, 466 U.S. at 694). If it is easier to dispose of a claim for lack of sufficient prejudice accruing to defendant, this should be done. *Id.* at 697; *People v. Coleman*, 183 Ill. 2d 366, 397-98, 701 N.E.2d 1063, 1079 (1998).

¶ 31 Claims of ineffective assistance of appellate counsel are judged under the same standards. See *People v. Salazar*, 162 Ill. 2d 513, 521, 643 N.E.2d 698, 702-03 (1994). To establish ineffective assistance of appellate counsel, defendant must demonstrate (1) the failure to raise an issue was objectively unreasonable; and (2) but for the failure to raise the issue, the trial court's ruling would have been reversed. *People v. Flores*, 153 Ill. 2d 264, 283, 606 N.E.2d 1078, 1087 (1992).

¶ 32 B. Trial Counsel's Elicitation of Irrelevant and Prejudicial Information

¶ 33 Defendant first argues trial counsel was ineffective because he presented damaging facts and embarrassed him in front of the jury. Specifically, he takes issue with counsel informing the jury during his opening argument J.O. was removed from the home and placed into foster care. Defendant also takes issue with counsel asking "several questions" about his alcohol consumption on the night before the incident. He maintains his drunkenness had no relevance to his theory J.O. accidentally burned herself while he was sleeping. We conclude we need not address either of these issues because neither were raised below. See 725 ILCS 5/122-3 (West 2008) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.").

¶ 34 With regard to J.O. being placed in foster care, defendant's amended petition claimed only that trial counsel was ineffective for failing to object when the State introduced testimony regarding J.O. being placed in foster care. Nowhere did defendant claim trial counsel was ineffective for "purposeful[ly] elicit[ing]" such evidence. Further, defendant claims this evidence was irrelevant and prejudicial without elaborating or providing any support for his contention. We refuse to develop defendant's legal argument for him. See *Sakellariadis v.*

Campbell, 391 Ill. App. 3d 795, 804, 909 N.E.2d 353, 362 (2009) (the failure to assert a well-reasoned argument supported by legal authority results in forfeiture).

¶ 35 Similarly, nowhere did defendant's amended petition state trial counsel was ineffective for purposefully eliciting testimony concerning his alcohol consumption. Rather, the only issue defendant had with regard to the mentioning of his alcohol consumption was in relation to trial counsel's failure to adequately prepare him to testify.

¶ 36 Nevertheless, even if we were to consider defendant's "elicitation-of-prejudicial-facts" argument on the merits, when considering the first *Strickland* factor, a court begins with the strong presumption counsel's conduct is objectively reasonable. *People v. Manning*, 241 Ill. 314, 334, 948 N.E.2d 542, 551 (2011). Thus, to prove defense counsel's conduct did not fall within the range of reasonable professional assistance, defendant must overcome the presumption counsel's conduct may be sound trial strategy. *Id.*

¶ 37 We conclude defendant has not overcome the presumption trial counsel's comments regarding foster care were a matter of sound trial strategy. In closing arguments, counsel emphasized J.O. being placed in foster care by noting the family was separated and J.O. had been taken from her parents wrongfully in an attempt to garner support from the jury. Defendant posits this strategy was flawed because it "presupposed" his innocence. However, because one of the most fundamental precepts underlying our criminal justice system is that a defendant is presumed innocent until proven guilty, we disagree. *Kaley v. United States*, 134 S. Ct. 1090, 1114 (2014). With regard to defendant's intoxication, counsel explicitly noted, on the record, his purpose in eliciting information regarding defendant's alcohol consumption was to show "he was hungover, and while he [was] sleeping, the child [was] freely moving about the house."

¶ 38 Although trial counsel's strategies eventually proved unsuccessful, our supreme court has explained, "Counsel's strategic choices are virtually unchallengeable. Thus, the fact that another attorney might have pursued a different strategy, or that the strategy chosen by counsel has ultimately proved unsuccessful, does not establish a denial of the [effective] assistance of counsel." *People v. Fuller*, 205 Ill. 2d 308, 331, 793 N.E.2d 526, 542 (2002). "A defendant is entitled to reasonable, not perfect, representation, and mistakes in strategy or in judgment do not, of themselves, render the representation incompetent." *Id.* Accordingly, we find no error in the trial court's dismissal of these arguments at the second stage of postconviction proceedings.

¶ 39 C. Trial Counsel's Failure To Prepare Defendant To Testify

¶ 40 Defendant next argues trial counsel was ineffective for failing to adequately prepare him to testify on his own behalf. He claims this lack of preparation "caused counsel to react awkwardly" to his testimony, thereby denigrating him in front of the jury. He further claims, had he been adequately prepared, he would have known to limit his responses to the questions posed and would not have volunteered the fact he was in jail for a driving offense on the day J.O. was taken to the hospital.

¶ 41 Initially, we note, even with extensive preparation, trial counsel cannot predict what a defendant is or is not going to say when he takes the stand. This is one of the dangers inherent in a defendant's election to testify on his own behalf. Nevertheless, as mentioned earlier, where an ineffectiveness-of-counsel claim can be disposed of on the ground the defendant did not suffer sufficient prejudice, we need not determine whether counsel's performance constituted less than reasonably effective assistance. *Flores*, 153 Ill. 2d at 283-84, 606 N.E.2d at 1087.

¶ 42 The second prong of *Strickland* requires there to be a "reasonable probability" the result would have been different but for trial counsel's deficient performance. A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Here, even assuming trial counsel failed to adequately prepare defendant to testify, we fail to see how defendant mentioning being in jail for a driving offense or discussing J.O.'s eating habits undermines confidence in the jury's outcome.

¶ 43 Defendant's testimony aside, the State presented extensive evidence showing defendant believed J.O.'s injuries resulted from placing her in hot bath water coming up to her waist. Defendant claims the State's only "damning" evidence is the fact three medical professionals "had no idea what caused the burns," but this was not the evidence presented at trial, nor was it argued by the State on appeal. Rather, as the State correctly noted in its brief, the three medical professionals testified J.O.'s burns were not the sort caused by bathtub immersion, which was defendant's only defense to the charge against him. Indeed, on direct appeal, defendant admitted the State had presented overwhelming evidence J.O. was not burned in the bathtub due to the noncircumferential nature of her burns.

¶ 44 Analyzing the evidence presented at trial in relation to the alleged errors resulting from counsel's failure to adequately prepare defendant to testify, we conclude defendant failed to demonstrate a reasonable probability the result of his trial would have been different but for the alleged deficient performance. Accordingly, we hold defendant failed to make a substantial showing of a constitutional violation at the second stage of postconviction proceedings, and the trial court's dismissal of his postconviction petition was warranted.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 47 Affirmed.