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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 01—CF—304
)	
CHARLES C. BLAIR,)	Honorable
)	James K. Booras,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

Held: The trial court did not err in granting the State's motion to dismiss defendant's postconviction petition because defendant failed to make a substantial showing that his trial counsel rendered ineffective assistance.

Following a jury trial, defendant, Charles C. Blair, was convicted of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2000)) for the death of his wife, Teresa Blair. He was sentenced to 38 years' imprisonment. Defendant subsequently filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2008)) alleging that his trial counsel provided ineffective assistance because he failed to call several witnesses and failed to adequately cross examine the State's expert.

The trial court granted the State's motion to dismiss the petition, and defendant contests this ruling on appeal. We affirm.

I. BACKGROUND

A. Trial

We begin by setting forth the evidence presented at trial. Kevin Wodrich, a firefighter and paramedic with the Countryside Fire Protection District, testified as follows. On January 24, 2001, at about 10:00 a.m., the District received a 911 call about an emergency at the Amerisuites Hotel in Vernon Hills. When Wodrich and other emergency personnel arrived at the reported hotel room, defendant answered the door. Teresa was lying on the floor of the room, face-up. Defendant told Wodrich that Teresa had not been feeling well the previous night, perhaps due to working out on the treadmill. That morning, when he was leaving for a meeting, Teresa said that she was going to take a bath. When defendant returned, he found her just as she was.

Teresa had a pillow underneath her head, and a blanket covered her up to her shoulders. There was a small towel nearby, and it looked like she might have vomited. Teresa was wearing a pair of underwear, positioned at her knees. She had bruises on various parts of her body. The blanket, carpet, pillow, and underwear were dry. Teresa was cool and moist, but she did not appear to have been in the shower. She was also pale and had some "snoring respirations." Teresa was unconscious and did not respond to verbal stimuli or a sternum rub. One pupil was dilated and the other was constricted, which is usually caused by head trauma or narcotics. However, a test indicated that Teresa did not have any narcotics in her system.

Wodrich did not notice any blood on Teresa's head, and based on his limited observations, the hotel room did not show any signs of a struggle. After Wodrich and the other paramedics arrived

at the hospital, a physician mentioned that Teresa's tooth was loose. Wodrich told the doctor that they did not do anything that would have caused a loose tooth. Wodrich thought that defendant was “shaken up” because at the hospital, defendant paced outside and smoked.

Diane O’Gorman, a registered nurse at Condell Hospital, testified that she was working in the emergency room on January 24, 2001. She began caring for Teresa at 3 p.m. O’Gorman noticed that Teresa had bruises on her right eye, right arm, and jaw. She also had bruising on her chest and underneath her arms. Defendant was sitting in Teresa's hospital room. He told O’Gorman that he heard a “thump” while Teresa was showering. He went into the bathroom and saw that she was having difficulty breathing, so he called 911. Defendant later told O’Gorman that Teresa had so many bruises because she drank and did drugs, which caused her to stumble and fall often. Defendant seemed very calm and collected. He did have "some wetness in his lower eyes" that O’Gorman may have described to the police as tears.

Dr. Satnam Singh was accepted by the trial court as an expert in the field of general medicine. She testified that on January 24, 2001, she was called to the emergency room to examine Teresa, who was in a coma. Dr. Singh saw that Teresa had bruises on many parts of her body, including the upper and lower parts of her right eye, both sides of her chest, her left breast, both of her arms, and her right leg. The bruises were different colors, indicating that some were recent and others were older. Dr. Singh thought the bruises may not have resulted from a fall because when a person falls, the injuries are usually localized on the side of the body sustaining the fall. Based on these circumstances, and the fact that Teresa had some bleeding in the brain, Dr. Singh requested that photographs be taken. It was not standard procedure for such pictures to be taken, but the doctors suspected that Teresa did not just fall.

Dr. Singh asked defendant how Teresa was injured. Defendant told Dr. Singh that Teresa had been drinking more than usual the previous night. She was staggering and fell in the bathroom. He picked her up and put her in the bed, and they went to sleep. In the morning, she did not wake up, so defendant called 911 and brought her to the hospital. He initially told Dr. Singh that Teresa had fallen once but later said that she had fallen twice. According to Dr. Singh, defendant was concerned, moaned, and seemed upset. Defendant was “trying to cry,” but Dr. Singh did not see any tears.

On cross-examination, Dr. Singh testified that Teresa was bleeding from the nose and around her lips. However, Dr. Singh did not indicate such bleeding in her two-page hospital report. Defendant told Dr. Singh that Teresa was taking several medications, including Valium, and that she had been unsteady for a few days. Dr. Singh further testified that a subdural hematoma occurs when blood vessels in the brain break, and it is typically caused by a fall or trauma from the outside. The brain reacts to such trauma by swelling. A CAT scan indicated that Teresa’s brain was bleeding, but there were no means to determine when the bleeding began. Dr. Singh agreed that certain factors can affect the rate of bleeding in the brain, such as medications and alcohol. She did not recall any specific external injuries on Teresa’s head.

Officer Andrew Jones of the Vernon Hills police department testified that he went to Condell Hospital to investigate a call about Teresa’s suspicious injuries. Officer Jones noticed that Teresa was bruised on her arms, armpits, legs, hips, back, and knees. He examined Teresa’s head but did not feel any external injuries. Officer Jones spoke to defendant, who said that he worked in Missouri for the Federal Aviation Administration and was in Illinois for a training seminar. Defendant said that he returned to the hotel room on January 23, 2001, at about 4 p.m. Teresa was disoriented and

stumbling around the room. They had been planning to wake up at 3 a.m. the following day to catch their return flight, so they went to bed early. Defendant thought that he heard his wife stumble around and fall to the floor three or four times during the night. He woke up at 3 a.m. when the alarm went off. He woke Teresa up, but she said that she could not get out of bed because she had overworked herself on the treadmill the previous day.

Defendant instructed Teresa to hold on to the edge of the bed and try to stand up. Teresa attempted to do so but fell to the floor. He assisted her back to the bed and asked if she would be ready to go on time. Teresa replied in the affirmative and said that she just needed to take a shower. She was able to get up and walk to the shower. Defendant determined that they were not going to be ready on time, so he called the airline and cancelled their flight. He also called the front desk and asked to keep the room an extra night.

A short time later, defendant thought he heard Teresa fall. He went to the shower and found her in the tub area. He put his hands underneath her armpits and dragged her back into the bedroom. He placed her on the floor, put a pillow underneath her head, and covered her with a sheet. Teresa remained on the floor, and defendant took their remaining luggage out to the car. Defendant returned to the room and called his boss. He then noticed that either blood or bile was coming from Teresa's mouth. He called Teresa's father, a pharmacist. Her father told him to call an ambulance, and defendant then called the front desk to request an ambulance. Defendant said that he had left his wife on the floor for 15 minutes.

Defendant told Officer Jones that Teresa began showering at 6 a.m. Officer Jones pointed out that defendant did not call an ambulance until 9:56 a.m. Defendant then sat back in his chair, crossed his arms, and said that he thought Teresa actually began showering at 7 a.m. Officer Jones

said that, according to defendant's time frame, it still meant that Teresa was showering for over two hours. Defendant looked at the floor and did not respond. Defendant agreed to go to the Vernon Hills police station.

Michael Newby testified that he rented a room at Amerisuites for two weeks and had occupied the room next door to where defendant and Teresa were staying. On January 23, 2001, at around 10:30 or 11 p.m., Newby heard yelling, which he thought was coming from the hallway. Newby also heard thumping, which sounded like something was being slammed against the wall. He opened his door and realized that the noise was coming from the room next door. Newby heard a man say in a loud, deep voice, "You are not smoking in this f***ing room." A woman replied, "Please, just leave me alone." The man again stated, "You are not smoking in this f***ing room." Newby then heard someone being hit; he heard fists hitting skin. The noises continued for the entire five minutes that Newby remained in the hall.

Newby returned to his room, smoked a cigarette, and decided to call the police. He then noticed a placard telling patrons to report disturbances to the front desk. Newby went downstairs and told the front desk clerk to call the police because a woman was being beaten. Newby went across the street to buy cigarettes, and he returned after 15 minutes. The clerk told Newby that he did not call the police because he went upstairs but did not hear anything. Newby returned to his room and watched television for one and a half hours. He did not hear anything unusual during this time.

At around 1 am, Newby heard more screaming. He heard a man speaking in a loud voice, and there was banging that lasted about 15 minutes. It sounded like a large object was being pushed against the wall. Then, everything became quiet until 3 a.m., when Newby was awoken by loud

banging and a picture vibrating on the wall. The noises went on for 15 to 20 minutes. Newby went back to sleep, and he was again awoken at around 8:30 a.m. by shower noises from the adjoining room.

On cross-examination, Newby testified that his statement to the police did not indicate that he heard skin hitting skin. He also did not specify that he heard noises at 1 and 3 am.

Officer Thomas Reed, the chief evidence technician of the Lake County Major Crime Task Force, testified that he arrived at the Amerisuites hotel at 11:18 p.m. on January 24, 2001. Housekeeping had cleaned defendant's room, and there was no evidence of any alcoholic drinks. Reed took photographs and video of the room. There were three brown stains on the carpet between the bedroom and the bathroom. The lampshades on the nightstands were both tilted, and one shade had a crease or a dent in it. Reed searched defendant's car and found a pair of corduroy slippers in a suitcase.

Sergeant Richard Chiarello, another member of the Lake County Major Crime Task Force, testified that he and Officer Todd Williams were assigned to interview defendant. They began talking to defendant at about 10:15 p.m, and throughout the interview process, they never raised their voices or threatened him. Defendant was read his *Miranda* rights and agreed to sign a waiver. Defendant explained that he was in town for a conference from January 16 to January 23. On January 23, he received a certificate for completing the course. Defendant knocked on the hotel room door, and Teresa eventually answered it. He was proud of the certificate and showed it to her, but she did not acknowledge it.

Defendant then told Teresa that they had to prepare for their early flight the next morning. They packed their suitcases and began loading the rental car. Teresa was having difficulty and was

stumbling. She attributed her behavior to being fatigued from a workout on the treadmill earlier that day. Defendant told her to go back to the room. Sergeant Chiarello told defendant that there might be a video camera in the hotel's fitness room confirming whether or not Teresa had used the treadmill. Defendant said that he would not be surprised if Teresa had not actually used the treadmill.

Defendant further explained that Teresa went to sleep at 8:30 p.m. that night, and he went to bed one half hour later. Defendant set the alarm for 3 a.m., in anticipation of their 9 a.m. flight. Around midnight, defendant was awakened because Teresa fell out of bed. He assisted her back into bed and replaced a lamp that had fallen from the nightstand. Defendant woke up again at 3 a.m., when the alarm went off. Teresa was not getting up, and sometime before 8 a.m., he assisted her to the bathroom so that she could shower. Defendant noticed that her face was puffy and swollen.

Defendant heard Teresa fall in the bathroom. She was unresponsive and had bile or blood coming from her mouth. Defendant dragged Teresa out of the bathtub and into the living area. He cleaned her off, cleared her air passage, and put a pillow under her head. At this point, defendant thought that they would not arrive at the airport on time. Defendant rescheduled their plane tickets, reserved the room for another night, told their dog's boarder that their trip was delayed, and reserved the rental car for another day. Defendant then called Teresa's father and said that she was not doing too well. Teresa's father advised him to call the paramedics, which he did.

Defendant's interview concluded at about 10:45 p.m. The officers asked defendant to complete a written statement, and defendant finished this task at about 11:45 p.m. The statement corresponded to what defendant had told the police verbally. Defendant was then brought outside for a break.

At about 12:15 p.m., defendant was brought back to the interview room, and Officers Chiarello and Williams were briefed by other members of the task force. At about 1:30 a.m., they told defendant that there were inconsistencies in his story and asked defendant if he and Teresa had been arguing. Defendant initially denied arguing but later admitted that they had quarreled about Teresa not acknowledging his certificate. Teresa kept getting up at night, and he thought she was taking more pills or drinking again. Around midnight, he got up and started to empty a beer in the sink. The argument started at that time.

Defendant said that their fight became physical, and at one point, Teresa fell on her side of the bed. When asked if he had pushed Teresa, defendant replied that he was not sure. He admitted that she did not attack him. The officers asked for more details, but defendant paused and did not answer. He then said that they did not understand what he had been through for the previous five or six years with his wife. Defendant related that he did a lot of things for Teresa, but she did not even recognize the certificate that he was proud of. Teresa had embarrassed defendant in front of his family and friends.

According to Officer Chiarello, defendant became upset. Defendant said that “this was her fault.” He elaborated that “this” had been piling up for years, and that an “explosion of emotions” and a “fit of rage” caused the argument. When asked how many times he had hit Teresa, defendant replied that he had beat her around 50 times in the past. The officers then clarified that they meant only the recent altercation. Defendant said that he struck Teresa between ten and twenty times, and that he kicked her two or three times. The fight caused the lamp to fall on her side of the bed.

Defendant was advised that an organization was requesting his permission to have Teresa’s organs donated. Officer Chiarello was not sure if Teresa had already passed away when this request

was made, or if she died shortly afterwards. At this point in the interview, it was around 2:30 a.m. The officers pointed out that defendant's current explanation was substantially different from his first one, and they asked him if he would like to revise his written statement. Defendant agreed and wrote another statement. At one point, he showed the officers the statement and asked if it was what they were looking for. Defendant completed the statement at about 4 a.m.

After defendant took another break, the officers presented him with a typed summary. They explained that it intentionally contained errors to ensure that defendant understood what he was reading. Defendant read the statement out loud and corrected all of the errors. The final version stated, in relevant part, as follows:

“My wife, Teresa[,] and myself flew out to Illinois so I could attend a training seminar. *** I completed training on Tuesday (January 23rd). When I returned to the hotel[,] my wife opened the door[,] and I immediately believed she had been drinking or taking too much of her medication. I attempted to tell her about my accomplishment and show her the document that I had been awarded for the conference. However[,] she did not appear to appreciate it because of what I believed to be her drug induced state. I was not happy about her being intoxicated and asked her why she did this today. I began to prepare our luggage due to the early flight we had tickets for. At approximately 10 o'clock[,] we began to argue after I had some beer. We argued about her continuing to embarrass me. I tried to go to sleep[,] but she continued to bother me.

I began to think about the years of trouble that she has made for me to include [*sic*]; being an alcoholic, embarrassing me in front of family and friends, and not helping or appreciating the things that I do for her. After she continued to wake me up, I thought she was

sneaking more alcohol and/or beer. I got up and an argument began. I am not sure if it was the beer I had, the medication I am on, or just something wrong with me, but I just snapped in a fit of rage.

I am not sure exactly how many times I struck her, but I know that I punched her more than 10 times and less than 20. I kicked her with my right foot 5 times, and during this I pushed her[,] and she hit her head on the table with the lamp. Some of the visible bruising on Teresa is a result of past physical altercations between her and I. Teresa never regained consciousness after I did this[,] and when I realized what I had done[,] I was not sure what to do. I put her in the bed and thought it would be ok in the morning. I could have put her in the garbage and no one would have known, but I thought she deserved better[,] so I dragged her to the bathroom where I cleaned her up. After she did not come to, I dragged her out of the bathroom and felt bad for what I did. I covered her and put a pillow under her head. I wiped her mouth [, and] left her on the floor[,] hoping she would come to. After she did not come to[,] I called her father and asked him what I should do. *** I did call an ambulance as her father told me to. We have been in over 50 physical altercations and [I] believe she was as much to blame for what happen [sic] because she provoked me.”

Defendant declined to do a videotaped interview. He signed a statement indicating that the officers had treated him appropriately.

Defendant agreed to return to the hotel, and he demonstrated where particular elements of the fight had taken place. Later, he signed a form stating that he was not under the influence of drugs or alcohol during the fight.

On cross-examination, Chiarello agreed that defendant had been awake 25 hours when he completed the statement. Chiarello was not aware of whether defendant had taken a nap or rested during that time. He agreed that defendant told him that he had tried to call Teresa's father at 7 in the morning, but there was no answer. After he made other calls, he again tried her father and got through.

The trial court accepted Dr. Nancy Jones as an expert witness in forensic pathology. Dr. Jones testified that she performed Teresa's autopsy. Teresa had 46 blunt trauma injuries of varying age. She had bruises on her chest, arms, buttocks, hips, back, legs, and face. An internal examination showed that Teresa had cirrhosis of the liver, which can be caused by alcoholism or infection, and Hepatitis C, which is caused by blood transfusions or exposure to body fluids. Teresa's brain was swollen and she had a subdural hematoma, which is a blood clot on the outer surface of her brain, as well as multiple brain hemorrhages. She also had an old subdural hematoma that had completely healed itself. Dr. Jones identified and discussed in detail numerous photographs showing Teresa's bruises. She noted that a bruise on Teresa's arm had a pattern that was consistent with the material on defendant's corduroy slippers.

Dr. Jones testified that she had conducted about 8,000 autopsies, including examinations of around 100 individuals who died by falling. People who had fallen usually had subdural hematomas with "gliding contusions" and bruising on the under surface of the scalp. Such contusions occurred because the "force of the head striking" would cause the brain to jostle, and as it did, it would scrape back and forth over the bony prominences at the base of the skull, creating the contusions. Teresa did not have such gliding contusions on any part of her brain. Further, normally if a person falls there would be a subgaleal hemorrhage, meaning bruising on the under surface of the scalp, where the

person hit his or her head. Teresa had an older subgaleal hemorrhage but not a newer one. Additionally, many of the injuries that Teresa did have were not consistent with a fall. Dr. Jones opined that, to a reasonable degree of scientific certainty, Teresa did not die from a fall, but rather from a subdural hematoma caused by blunt head trauma. Blunt trauma meant that the head impacted with something or something impacted with the head. Such head trauma could be caused without directly hitting the head, such as a violent movement forwards or backwards or a violent shaking, which could tear blood vessels on the surface of the brain. A person could have such a hematoma from being thrown to the ground even if the person did not hit his or her head on anything. To a reasonable degree of scientific certainty, Teresa's injuries were consistent with having been struck with hands and feet.

On cross-examination, defense counsel elicited testimony from Dr. Jones about certain discolorations on Teresa's body that Jones testified were not the result of injury. Jones further testified that Teresa's liver should have been about 1,500 grams but was 2,119. The enlarged liver indicated alcoholism. Dr. Jones reiterated that the blunt trauma did not mean that Teresa's head necessarily struck anything, but that it could have been a quick movement forwards and backwards, up and down, or side to side that would have moved the brain within the skull and caused the trauma resulting in Teresa's death.

The parties stipulated that if called to testify, Javier Herrera, the hotel's building superintendent and custodian, would testify that he installed new non-slip flooring in the hotel rooms' shower stalls in November 2000.

The defense called John Rorabeck, a deputy coroner. He testified that he received a blood sample taken from Teresa at 1:40 p.m. on January 24. He sent it for testing, and the results indicated

a blood alcohol level of .041 percent. Teresa's urine had an alcohol level of .119 percent, and it also tested positive for Valium.

On cross-examination, Rorabeck agreed that Teresa's blood alcohol level was less than half of the legal limit for a person to drive a car. The alcohol level in urine typically would be higher than in blood. The amount of Valium indicated that it was "simply for therapeutic value" and "would be at best a mild tranquilizer." The low levels of drugs and alcohol in Teresa's system made it unlikely that she would have experienced drowsiness and muscle weakness associated with over-medication, and they would not have debilitated her to the point of appearing intoxicated. Upon further examination, Rorabeck agreed that if a person had taken Valium and regurgitated it, it would not show up in the results, but that would require throwing up immediately after taking the pill. He also agreed that the normal metabolization rate for alcohol was .015 per hour, though Teresa was in a coma with almost non-existent bodily functions.

The jury found defendant guilty of first-degree murder.

B. Posttrial

Defendant filed a *pro se* posttrial motion alleging ineffective assistance of counsel. He alleged, among other things, that counsel should have filed a motion to suppress his statements and should have called certain witnesses at trial. The court held a hearing in which it inquired into the factual basis of the claims. See *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003) (if a defendant files a *pro se* motion alleging ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim; it may deny the motion if the claim is meritless or relates only to matters of trial strategy, or appoint new counsel if the allegations show possible neglect of the case). At that hearing, defendant's attorney Thomas Briscoe stated as follows in relevant part. Prior to trial,

he could see that one of the key issues in the case was going to be Dr. Jones's testimony. He engaged "one of the leading forensic pathologists," Dr. Werner Spitz, as an expert. Dr. Spitz had testified in hundreds of cases for both the State and for the defense. Attorney Briscoe entered into evidence Spitz's CV and list of trial and deposition testimony. Attorney Briscoe sent Dr. Spitz the "discovery," all of defendant's statements, the hospital report, the statements from hospital personnel, Dr. Jones's pathology report, and autopsy photos. Dr. Spitz sent back a letter in which he agreed with Dr. Jones as to the cause of death. The letter, entered into evidence, states: "The injuries on Mrs. Blair are not from falls. The injuries are the result of a violent altercation with grabbing and attempted restraint including grabbing and manipulation of the neck." The letter further states, among other things, that Teresa had a large bruise on the top of her head which could not have resulted from an innocent fall. Attorney Briscoe stated that he discussed with Dr. Spitz the testimony of doctors and test results. He did not call any other medical witnesses from the hospital because he believed that they would have sided with Dr. Jones because she had a better opportunity to examine the injuries as opposed to just using diagnostic tests.

Attorney Briscoe further stated that during his cross-examination of Dr. Jones, he was able to elicit that Teresa's brain injury was consistent with whiplash that could have occurred as he discussed in closing argument—Teresa falling during the middle of the night and striking the end table abruptly. That scenario would have been consistent with a thump on the wall but inconsistent with the testimony of someone being thrown against the wall, because there was no other external manifestation of the injury on the scalp. Attorney Briscoe said that the scenario was consistent with the defense theory that Teresa fell and received a whiplash and shaking of the brain, which caused the brain to swell and caused compression, and ultimately led to her death.

Attorney Briscoe also said that he did not call Gary Bratton, who would have testified that he had seen some of the bruises on Teresa's legs some time before, because it would have opened the door for the State to bring out or emphasize the repeated beatings in the past. Attorney Briscoe stated that in not calling certain witnesses, such as the maid or hotel manager, the defense could emphasize in argument that it was the State's burden to prove its case.

The trial court found that the record contained "abundant *** proof that Mr. Briscoe was extremely effective" and that defendant's claims pertained to matter of trial strategy. Accordingly, it denied defendant's motion.

In his direct appeal, defendant argued that his attorney was ineffective because he failed to request a jury instruction addressing how the jury should consider evidence of other crimes. This court did not determine whether the decision to not request the instruction was reasonable because we concluded that, regardless, there was overwhelming evidence, both direct and circumstantial, of defendant's guilt. We stated:

"Defendant gave conflicting stories about Teresa's injuries to various medical personnel and the police, insisting in several accounts that Teresa had fallen from fatigue, intoxication, and medications. However, Dr. Jones testified that Teresa died from a blunt head trauma that was not consistent with an injury from a fall. Furthermore, Newby testified that he heard fighting in defendant's room, including yelling, screaming, sounds of physical contact, and sounds of something being slammed against the wall. Most significantly, defendant admitted his guilt to the police in both oral and written statements. He described a physical altercation in which he punched Teresa between 10 and 20 times and kicked her 5 times. Defendant further stated that he pushed Teresa, causing her head to hit the nightstand. After Teresa lost consciousness,

he put her back in bed and did not call an ambulance until the next day.” *People v. Blair*, No. 2–03–0101, slip order at 13-14 (Ill. App. 2004).

C. Postconviction Petition

Defendant filed a *pro se* postconviction petition on April 15, 2005. He alleged, among other things, that attorney Briscoe was ineffective for failing to call certain witnesses, and he attached affidavits or copies of police reports to support his allegations. The witnesses included (1) Javier Herrera, who told the police that he helped Teresa operate the hotel’s treadmill on January 23, 2001, at about 12:30 p.m. She appeared very disoriented, intoxicated on alcohol or drugs, and had difficulty staying on the treadmill even at the lowest speed. (2) Manuela Ramirez told the police that she cleaned room 623 (where the Blairs were staying) at about 3:30 p.m. on January 24. There were sheets and towels in front of the bed. The towels were damp and had a yellowish substance on them, and the carpet below also had some of this substance. She saw about five different types of pills in the bathroom. She did not remember seeing any damage to the room or anything completely out of place. (3) Dr. James Orlando, Teresa’s psychiatrist, told the police that defendant called him at about 1:30 p.m. on January 24. Defendant was crying and seemed distraught over his wife’s condition. Dr. Orlando had been treating Teresa for over two years for depression and had prescribed her Celexa and Diazepam. He did not know of any domestic trouble with the couple. (4) Gray and Peggy Bratton were friends and former neighbors of the Blairs. They stated in affidavits that Teresa had an alcohol and substance abuse problem that caused her to fall at times, resulting in bruises. Her medical conditions also caused her to bruise easily. According to the Brattons, defendant was not violent toward Teresa, and they had a tape from their answering machine in which defendant called them from the hospital to tell them about Teresa’s condition.

Defendant also alleged that attorney Briscoe did not effectively cross-examine Dr. Jones and should have called an expert to refute her conclusions.

On June 3, 2005, the trial court ruled that defendant's postconviction petition was not frivolous or patently without merit, and it appointed counsel to assist defendant for second-stage postconviction proceedings.

On December 21, 2007, defendant filed a supplement to his original petition for the purpose of including the affidavit of Dr. Harry Bonnell. The affidavit stated that Dr. Bonnell had performed over 7,000 autopsies and had testified as an expert witness in forensic pathology over 470 times. He reviewed Teresa's medical records from January 24, autopsy and toxicology reports, police investigative reports, and the trial transcript of Dr. Jones's testimony. He opined that, to a reasonable degree of medical certainty, Jones's testimony was inaccurate, incomplete, and inadequately questioned by defense counsel. Dr. Bonnell believed that the pattern of impact on one side of the head with a subdural hematoma on the opposite side of the head was a classic sign of a fall. According to Dr. Bonnell, Dr. Jones's failure to look at samples of the bruised tissue and hematoma under the microscope to establish the age of the injuries was contrary to standard practice. Dr. Bonnell disagreed with Jones's opinion that Teresa could not have fallen because she did not have gliding contusions. He also disagreed that it could have been a no-impact subdural hematoma, because the only reported case of a subdural hematoma occurring by shaking an adult occurred on someone with an abnormally developed skull.

Dr. Bonnell further stated that defense counsel failed to elicit testimony that 38 of the 46 areas of bruising on Teresa were several days old and unrelated to her death, and that five of the fresh injuries on her face were consistent with recently falling and striking her face. The patterned injury

on her arm matched the appearance of a grab mark, corresponding to investigative information that she had been grabbed by the arms to move her. Most of her older bruises were those typically seen in a “ ‘stumbling drunk,’ ” and many fresh bruises were on sites where medical personnel to “ ‘pinch testing’ ” to check response to pain. Dr. Jones’s explanation of the bruising patterns expected by a fall were for someone who was sober and responsive.

After numerous continuances, appointed counsel filed a supplemental petition on October 24, 2008. She added allegations that counsel should have called, among other witnesses, Jeffrey Hardy, the hotel’s front desk clerk, who told police that he received Newby’s complaint about noises coming from the Blairs’ room but did not hear anything when he stood outside of their door. He also told the police that no other guests reported disturbances from that room. The supplemental petition alleged that counsel should also have called nurse Michelle Mitchell from a Missouri hospital, who told police that she received a call from a man, later verified by police as defendant, on January 24 between 9 and 10 a.m. (phone records indicate it was 9:36 a.m.). He said that he thought his wife had taken too much of her medications. He said that he could not get her to wake up, and she had vomited a green bile-like substance. Mitchell advised him to call an ambulance.

On June 5, 2009, the trial court granted the State’s motion to dismiss defendant’s postconviction petition. The court stated that it had considered the entire petition, including amendments and supplements. The court found that many of the issues defendant raised were waived or barred by *res judicata*. It stated that claims of ineffective assistance of counsel pertained to matters of trial strategy, and that defendant had also failed to demonstrate the alleged errors resulted in prejudice. Defendant timely appealed.

II. ANALYSIS

On appeal, defendant challenges the trial court's grant of the State's motion to dismiss his postconviction petition. The Act creates a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Harris*, 224 Ill. 2d 115, 125 (2007). During the second stage, the court may appoint counsel to represent the defendant, and counsel may amend the petition. *People v. Boclair*, 202 Ill. 2d 89, 100 (2002). The State, in turn, may file a motion to dismiss the petition. 725 ILCS 5/122--5 (West 2008). To survive the motion to dismiss, the allegations set forth in the petition, as supported by accompanying affidavits and the trial record, must make a substantial showing of a constitutional violation. *People v. Johnson*, 205 Ill. 2d 381, 389 (2002). At this stage, all well-pleaded facts in the petition and affidavits are taken as true. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). We review *de novo* a trial court's dismissal of a postconviction petition without an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

For a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). The defendant must first establish that, despite the strong presumption that counsel acted competently and that the challenged action was the product of sound trial strategy, counsel's representation fell below an objective standard of competence under prevailing professional norms, to the extent that he or she was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 227 Ill. 2d 403, 416 (2008). Second, the defendant must establish prejudice by showing a reasonable probability that the proceeding would have resulted differently had counsel's representation not been deficient. *People v. Houston*, 229 Ill. 2d 1, 11 (2008). The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *People v. Enis*, 194 Ill. 2d 361, 377 (2000). Thus, the petitioner must show both that appellate counsel's performance was deficient, and

that the error was prejudicial. *People v. Robinson*, 217 Ill. 2d 43, 61 (2005). For the second stage of postconviction proceedings, defendant was required to make a substantial showing that he could meet the *Strickland* test. *Cf. Hodges*, 234 Ill. 2d at 16-17 (in the first stage of postconviction proceedings, a petition may be summarily dismissed only if it has no arguable basis in either law or fact, so a petition alleging ineffective assistance of counsel may not be dismissed at the first stage if it arguably satisfies the *Strickland* test).

The decision of which witnesses to call at trial is a matter of trial strategy within trial counsel's discretion. *Enis*, 194 Ill. 2d at 378. Such decisions come with the strong presumption that they are a product of sound trial strategy and are generally immune from claims of ineffective assistance of counsel. *Id.* at 378. Still, an attorney may be deemed ineffective for failing to present exculpatory evidence, such as failing to call witnesses to support an otherwise uncorroborated defense theory. *People v. Redmond*, 341 Ill. App. 3d 498, 516 (2003). Further, counsel has a duty to conduct both factual and legal investigations in the case. *People v. Montgomery*, 327 Ill. App. 3d 180, 185 (2001). 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. *Id.* at 185.

The State initially argues that defendant forfeited his claims of ineffective assistance of counsel by failing to raise the issues on direct appeal. However, a postconviction claim will not be forfeited where the defendant alleges that the forfeiture resulted from the incompetence of appellate counsel. *People v. Moore*, 402 Ill. App. 3d 143, 146 (2010). Here, defendant alleged in his *pro se* postconviction petition that appellate counsel was ineffective for failing to raise the claims contained in the petition. Although the trial court later appointed postconviction counsel for defendant, counsel

filed a supplement to defendant's petition, rather than an amended petition, and the trial court considered all of the filings as a whole when issuing its ruling. Accordingly, defendant's claim of appellate counsel's ineffectiveness was preserved and renders the State's argument of forfeiture without merit.

Turning to the substance of the appeal, defendant argues that attorney Briscoe was ineffective for failing to call the numerous "exculpatory" witnesses outlined earlier. He maintains that each of the witnesses would have substantially strengthened his defense, which was that Teresa was intoxicated, had fallen, and subsequently died from the injuries that she received from the fall.

The first witness defendant argues his counsel should have called was a medical expert to rebut Dr. Jones's testimony that Teresa's injuries were inconsistent with a fall but rather resulted from blunt trauma such as being struck by hands, fists, and feet. Defendant contends that the medical evidence was of utmost importance in this case.

Defendant's argument is not persuasive. We initially note that the failure to call an expert witness is not *per se* ineffective assistance of counsel, even if the expert testimony could make the defendant's case stronger, because the State could call its own witness to offer contrary opinion. *People v. Hamilton*, 361 Ill. App. 3d 836, 847 (2005). More importantly, the record shows that attorney Briscoe did consult Dr. Spitz, a well-published expert in forensic pathology who had testified in hundreds of cases. Briscoe's attempt to obtain an expert to contradict the State's medical expert readily distinguishes this case from *Montgomery*, 327 Ill. App. 3d at 185, cited by defendant, because there the attorney did no investigation into evidence that the victim may have died from a seizure rather than by strangulation. During the hearing on defendant's original motion alleging ineffective assistance, Briscoe stated that he sent Dr. Spitz various discovery documents, including defendant's

statements, the hospital report, the statements from hospital personnel, Dr. Jones's pathology report, and autopsy photos. Briscoe discussed with Dr. Spitz test results and the doctors' statements. However, Dr. Spitz agreed with Dr. Jones as to the cause of death. He wrote to Briscoe that the "injuries on Mrs. Blair are not from falls. The injuries are the result of a violent altercation with grabbing and attempted restraint including grabbing and manipulation of the neck." Dr. Spitz also stated that Teresa had a large bruise on the top of her head which could not have resulted from an innocent fall. "Where the circumstances known to counsel at the time of his investigation do not reveal a sound basis for further inquiry into a particular area, it is not ineffective for the attorney to forgo additional investigation." *People v. Orange*, 168 Ill. 2d 138, 150 (1995). Given that attorney Briscoe sought out a well-established, independent expert in forensic pathology, and that the expert agreed with Dr. Jones's conclusion that Teresa's injuries were not the result of a fall, Briscoe's decision to not pursue additional experts was reasonable.

Defendant relatedly argues that because attorney Briscoe did not present a medical expert to challenge Dr. Jones, it was critical that he effectively cross-examine her, which he failed to do. Defendant maintains that the most damaging aspect of her testimony was her opinion that Teresa did not die from a fall, as defendant alleged. Dr. Jones opined that Teresa died from a subdural hematoma that was caused by some form of blunt trauma, but it was not necessary for her to have hit her head on something to have suffered that injury, and it could have been caused by being struck with hands and feet. Therefore, defendant reasons, to effectively defend him, attorney Briscoe had to challenge Dr. Jones's conclusion that Teresa could have suffered the hematoma without hitting her head on something, and her conclusion that Teresa's injuries were not consistent with falling. Furthermore, according to defendant, Dr. Jones's testimony that Teresa had 46 areas of bruising on

her body, all of which were consistent with being struck with hands and feet, left the jury with the impression that he had a pattern of abusing Teresa, so counsel should have posed questions to link Teresa's enlarged liver or cirrhosis to her bruises. Defendant argues that Dr. Bonnell's affidavit clearly shows that defense counsel's questioning of Dr. Jones was inadequate, and the "fact that Dr. Bonnell could readily identify all of these problems with Dr. Jones's testimony clearly suggests that it would not have taken defense counsel an unreasonable amount of preparation to be able to draw out these same flaws in front of a jury."

The cross-examination of witnesses is generally a matter of trial strategy, and ineffective assistance will be found only where defense counsel's approach is objectively unreasonable. *People v. Strickland*, 399 Ill. App. 3d 590, 605 (2010). Although defendant attempts to argue that counsel could have found the alleged defects in Dr. Jones's testimony that Dr. Bonnell pointed out, clearly Dr. Bonnell's opinions were based on his status as an expert in forensic pathology, and counsel could not be expected to challenge Dr. Jones's medical testimony in the same manner. Moreover, as discussed, attorney Briscoe did attempt to engage a medical expert for the defense, and that expert agreed with Dr. Jones's conclusion that Teresa's injuries could not be the result of falling. Therefore, it was reasonable for Briscoe to not directly challenge Dr. Jones's opinion as to the cause of Teresa's death. Rather, on cross-examination Briscoe emphasized Dr. Jones's testimony that the blunt trauma to Teresa's head did not necessarily mean that she struck anything, but rather a quick movement could have caused the brain to move within the skull. He also brought out testimony that people bruise differently; that bruising can be affected by medications; and many discolorations on Teresa's body were not the result of injury. In closing argument, counsel argued that Teresa could have fallen without hitting her head, such as if she hit her chest on the nightstand, causing her head to shake as

described by Dr. Jones and resulting in the hematoma. In that manner, he was able to incorporate Dr. Jones's testimony rather than requiring the jury to disagree with it in order to accept the defense's theory of the case. Counsel further emphasized in closing argument that Teresa's death was caused by a subdural hematoma and had nothing to do with her injuries below the neck. Accordingly, we cannot say that attorney Briscoe's approach in cross-examining Dr. Jones was objectively unreasonable.

Defendant argues that aside from medical evidence, the three hotel witnesses he identified "would have provided evidence that [Teresa] was intoxicated before she died and that there were no signs that [defendant] and his wife had fought prior to his death." Defendant maintains that these witnesses would have corroborated his "initial statements to the paramedics, the medical personnel, and the police that [Teresa] had injured herself from a combination of intoxication and falling."

Defendant argues that Javier Herrera saw how intoxicated Teresa was on the afternoon before her death. Defendant argues that Herrera also would have corroborated his initial statements that Teresa told him that she had been on the treadmill that afternoon. We conclude that attorney Briscoe's decision not to call Herrera as a witness was reasonable. Whether Teresa actually used the treadmill was not a key issue in the case. Also, whether Teresa was visibly drunk at 12:30 p.m. would not have been direct evidence of her being drunk many hours later that night or the next morning. In contrast, attorney Briscoe elicited testimony at trial of Teresa's actual blood alcohol level, as well as evidence of alcohol's metabolization rate. From this evidence, the jury could have reasonably inferred that Teresa was under the influence of alcohol immediately prior to her death, especially in light of other testimony elicited by attorney Briscoe (namely regarding Teresa's enlarged liver) indicating that Teresa was an alcoholic. Further, as the State points out, if called as a witness, Herrera

could have provided damaging testimony that sometime earlier he had seen Teresa pacing outside of her room while smoking a cigarette. The fact that Teresa was a smoker and smoking in the hallway rather than the room could have bolstered Newby's account that on the night in question, he heard a man repeatedly yelling "You are not smoking in this f***ing room" at the same time he heard noises that sounded like a physical fight.

Defendant argues that another hotel witness, the maid Manuela Ramirez, would have provided additional evidence of intoxication because she saw five different types of pills in the bathroom. According to defendant, Ramirez would have also corroborated his claim that Teresa had bile coming from her mouth, as Ramirez found yellowish stains on towels and the carpeting. Defendant maintains that Ramirez's testimony would have further shown that the room did not have signs of a struggle. Defendant's argument is without merit. The fact that Ramirez saw pills in the room would not establish that Teresa ingested them was intoxicated from taking them, whereas attorney Briscoe had the deputy corner testify about the presence of Valium in Teresa's blood. Furthermore, the presence of vomit on the towels and the lack of signs of struggle in the hotel room were brought out on Briscoe's cross-examination of the paramedic who initially treated Teresa, so additional testimony on this issue would have been cumulative.

The last hotel witness defendant argues that his attorney should have called is the front desk clerk, Jeffrey Hardy. Defendant argues that Hardy's testimony that he did not hear anything while standing in front of the Blairs' room or receive any other complaints about it could have rebutted Newby's testimony that the Blairs were fighting. However, it was reasonable for attorney Briscoe to not call Hardy, as his testimony that he did not hear anything was already brought out by Newby; Newby testified that Hardy told him that he did not call the police because he went upstairs and did

not hear anything. In fact, Hardy's account corroborated Newby's testimony that he himself did not hear anything for another hour and a half when he returned upstairs. The fact that no other patrons complained would also not have undermined Newby's testimony, as he was in the room right next door, was still awake during the initial fight at 10:30 or 11 p.m., testified that he was a light sleeper, and heard banging on the wall shared by the two rooms.

In addition to the medical and hotel witnesses, defendant argues that attorney Briscoe should have called three witnesses whom defendant phoned while Teresa was in the hospital. Defendant maintains that the calls were not only consistent with his initial statements about Teresa but also would have rebutted the State's argument that he did not seem upset over Teresa's condition. First, defendant argues that Attorney Briscoe should have called Dr. Orlando, Teresa's psychologist, who could have testified that he prescribed Celexa and Diazepam to Teresa, thereby verifying that she had prescription medicine, and who could have testified that defendant was crying and distraught when he called. Defendant argues that Dr. Orlando could have also testified that he was not aware of any domestic problems between the Blairs. However, counsel's decision to not call Dr. Orlando was reasonable, as Deputy Coroner Rorabeck provided testimony regarding the drugs in Teresa's system. Further, counsel was able to elicit testimony about defendant's emotional state on cross-examination of various witnesses, who testified that defendant appeared "shaken up," had tears in his eyes, and appeared concerned and upset. As far as the domestic violence issue, the testimony may have been hearsay and inadmissible. More importantly, eliciting such testimony from Dr. Orlando would have opened the door for the State to reemphasize the medical evidence and admission of defendant that he had a history of abusing Teresa. It may have also opened the door for the State to introduce evidence of past abuse that attorney Briscoe had successfully kept out: Teresa had sent her parents

an envelope with a note saying not to open it unless she told them to or something happened to her, and inside were photographs showing her with a black eye.

Defendant argues that nurse Michelle Mitchell could have testified that he called at 9:36 a.m. and reported that his wife had taken too much of her medication, had vomited a green bile-like substance, and was unresponsive. However, it was reasonable for attorney Briscoe to not call Mitchell, as she also reported that defendant said that he could not get his wife to wake up. This statement is inconsistent with defendant's assertion that she fell in the bathtub and consistent with defendant's ultimate confession that Teresa never regained consciousness after he hit, kicked, and pushed her, causing her to hit her head on the nightstand.

Last, defendant argues that Peggy and Gray Bratton could have testified that he called them from the hospital to inform them of Teresa's condition. Further, they attested that Teresa had a substance abuse problem and a tendency to fall when intoxicated, and that defendant was not violent towards his wife. However, as discussed, attorney Briscoe was able to elicit testimony about defendant's emotional state during cross-examination of other witnesses, so it was reasonable not to call additional witnesses on the subject. He also elicited medical testimony about Teresa's alcohol abuse. It was a very reasonable decision for counsel to not have the Brattons testify that Teresa had a tendency to fall when intoxicated and that defendant was not violent towards her because, as with Dr. Orlando, bringing out an alleged lack of prior abuse would have allowed the State to reemphasize on cross-examination the medical evidence and defendant's admission of past abuse.

In addition to finding that defendant has failed to make a substantial showing that attorney's Briscoe's cross-examination of Dr. Jones or decision to not call certain witnesses was objectively unreasonable, we also conclude that defendant has failed to make a substantial showing that any of

the alleged defects resulted in prejudice, the second prong of the *Strickland* test. As stated, to satisfy this prong, a defendant must show that there is a reasonable probability that the proceeding would have resulted differently absent counsel's deficient representation. *Houston*, 229 Ill. 2d at 11. Even if counsel had presented the evidence cited by defendant that Teresa's death resulted from a fall, there is not a reasonable probability that the jury would have concluded that the fall was accidental rather than as the result of a fight. Although defendant attempts to rely on his "initial statements" to the paramedics, medical personnel, and police that Teresa was injured from a combination of intoxication and falling, these statements are hardly exculpatory due to the conflicting versions of events defendant recited. Defendant removed himself from the scene in the scenario he described to paramedic Wodrich, stating that he left for a meeting; Teresa said that she was going to take a bath; and when he returned, he found her just as she was, which was lying down on the floor of the room with a pillow under her head and a blanket covering her. Defendant was back at the scene in the explanation he gave hospital nurse O'Gorman, which was that he heard a "thump" when Teresa was showering and called 911 when he saw that she had difficulty breathing. The fall in the shower that morning did not occur in the scenario defendant related to the doctor, which was that Teresa had been excessively drinking the night before and fell in the bathroom, after which he put her in bed and they went to sleep. He said that she did not wake up in the morning, so he called 911. The fall in the shower returned in the explanation defendant initially gave the police. He said that Teresa began showering at 6 a.m., but when confronted with the fact that he called the ambulance at 9:56 a.m., he said that he must have begun showing at 7 a.m. When the officer pointed out that would still mean that Teresa was showering for over two hours, defendant did not respond. In defendant's first written statement to police, he added that she fell out of bed around midnight and said that she began showering

sometime before 8 a.m., after which she fell. Even under this statement, defendant waited almost two hours before calling an ambulance.

In contrast to the constantly-shifting versions of events initially described by defendant, Newby, a complete stranger to the Blairs who was staying in the room next door only by chance, provided detailed testimony about the arguing and fighting he heard around 10:30 or 11 p.m., 1 a.m., and 3 a.m. Correspondingly, defendant's ultimate confession described getting in a fight around 10 p.m. and in the middle of the night. Defendant admitted kicking Teresa five times, punching her between 10 and 20 times, and pushing her, with the push resulting in Teresa hitting her head on the nightstand. Defendant even returned to the hotel room with the police to point out where parts of the fight took place. Teresa's body also bore evidence of the fight, as Dr. Jones testified that her injuries were consistent with having been struck with hands and feet. Thus, there is not a reasonable probability that the jury would have credited defendant's argument that his evidence showed that there "were no signs that [defendant] and his wife had fought prior to his death," or that a fall resulting in her death was caused accidentally rather than as a result of defendant's actions.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Lake County circuit court.

Affirmed.