

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

No. 3–09–0967

Order filed March 23, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	for the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois
)	
v.)	No. 05–CF–2288
)	
DYMARION PORTER,)	Honorable
)	Richard C. Schoenstedt,
Defendant-Appellant.)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Carter dissented.
Justice McDade concurred in the judgment.

ORDER

Held: The trial court erred in denying defendant Dymarion Porter's motion for a new trial based on his claim of ineffective assistance of counsel for failure to investigate potential witnesses. The witnesses attested in affidavits filed with Porter's posttrial motion that they had witnessed Jordan's mother abuse him and seen various injuries on his body for which she refused to seek medical attention. The record demonstrates that had trial counsel investigated and presented the testimony of the potential witnesses, reasonable doubts would have been raised regarding Porter's guilt.

Defendant Dymarion Porter was found guilty following a bench trial of two counts of first degree murder in the death of 18-month-old Jordan Gentry. Porter appeals his convictions. We reverse and remand, finding that Porter was denied effective assistance of trial counsel.

FACTS

In November 2005, defendant Dymarion Porter was charged by indictment with two counts of first degree murder for the death of 18-month-old Jordan Gentry, the child of Porter's girlfriend, Quying "Jamie" Jackson. The first count of the indictment alleged that Porter, without lawful justification and with the intent to do great bodily harm to Jordan, choked and struck Jordan about the body, causing his death. 720 ILCS 5/9-1(a)(1) (West 2004). The second count of the indictment alleged that Porter, without lawful justification, choked and struck Jordan about the body, knowing such act created a strong probability of great bodily harm to Jordan, thereby causing his death. 720 ILCS 5/9-1(a)(2) (West 2004). Prior to trial, the State subpoenaed records from the Department of Children and Family Services (DCFS) concerning Jordan. The records were reviewed in camera by the trial court and subject to a stipulated protective order. A bench trial ensued at which the following evidence was presented.

On October 31, 2005, Porter lived with his mother, his sister, Jamie, and Jordan. Around 11:37 a.m., Porter was in the shower when Jamie asked him to wash Jordan while she was busy with her daughter. Porter and Jordan were in the shower together between four and five minutes. After they finished in the shower, Porter wrapped Jordan in a towel and took him to the bedroom, put a diaper on him, and laid him on the bed to sleep. Porter returned to the bedroom after running errands and found Jordan unresponsive. Jordan was pronounced dead at the emergency room at 1:15 p.m.

Jamie Jackson testified as the State's first witness to the following. On the morning of October 31, she left Jordan, who was asleep, with Porter when she took her daughter to the health department around 8 a.m. Her daughter, who was five years old, lived with her father and had lived with him since she was three years old. Jamie was told at the health department to return at 12:30

p.m. She and her daughter arrived at the Porter house around 11:30 a.m. when Jordan was waking up. She changed his diaper and because he had been “real wet,” she asked Porter, who was in the shower, to wash Jordan. Jordan was fine when she handed him to Porter although he was crying, had a prior injury to his eye, and had “these little splotches” on his face. Jamie assumed the splotches resulted from Jordan drinking orange juice which caused him rashes. He was breathing fine. Jordan did not have any bruising on his chin, neck or ears. She did not notice any injuries on his stomach or back when she handed Jordan to Porter. At one point Jamie heard “gurgling” noises from the shower but Porter explained that Jordan had swallowed some water. She did not hear Porter or Jordan screaming or yelling, or any loud thuds or banging.

She estimated Jordan and Porter were in the shower for 10 minutes. After they finished in the shower, she brought Porter a towel. Jordan was awake and she did not see any bruises on his face or head. After Porter took Jordan into the bedroom, she heard a little cry. Porter said that Jordan was “cranky.” A couple of minutes later, Porter told her he had put Jordan to sleep. It was unusual for Jordan to nap at noon. She entered the bedroom and saw Jordan was asleep and asked Porter to put a shirt on him. Porter told her Jordan was fine with a cover on him. She did not check on Jordan because Porter did and “at one point he was rubbing his head so I didn’t need to check on him.” Around noon, Porter asked her to take him on an errand down the street and asked his mother to watch Jordan. Jamie, her daughter, and Porter left and returned about 25 minutes later. Because Jamie had to return to the health department, Porter told her he would watch Jordan since he was still sleeping. Porter had a quick errand but said his mother would watch Jordan while he was out. Jamie then left again, taking her daughter to the health department. She returned to the house after receiving a call from a sheriff’s deputy about Jordan.

Brian Lewis, a Joliet detective, testified for the State. He responded to the Porter home at 1 p.m. on October 31. He spoke to Porter at the house after Jordan was taken to the hospital and twice at the police station, once on October 31 and once on November 1. When they spoke at Porter's home, Porter was not sure what had happened to Jordan but said that he may have choked on some shampoo in the shower. Lewis asked Porter to come to the station for further questioning. The October 31, interview lasted from 2 to 8 pm. Two other detectives assisted him with the interview. Porter gave a variety of explanations regarding Jordan's injuries, including that Jordan slipped in the shower and Porter caught him under the arm and neck area. Porter called Lewis on November 1 and said he wanted to talk more. He was distraught and crying on the phone but when Porter came to the station, he was very cooperative.

During the interview, which lasted four hours, beginning around 6:30 p.m., Porter stated generally that he felt responsible for Jordan's death, that "if anything did happen to him and that anything that happened to him was unintentional." According to Lewis, Porter "use[d] words like, 'I'm guilty, I'm responsible.'" Porter said that he could have done something more to save Jordan. Porter denied choking or striking Jordan but said that he had struck the child in the stomach trying to help Jordan when he was choking. He also said that he accidentally stepped on Jordan's stomach when Jordan slipped and was on the floor of the bathtub. Porter stated that " 'I killed him. I killed him. I'm guilty, I'm responsible.'" He admitted that Porter said he would take responsibility for Jordan's injuries although he could not explain how they happened. On cross-examination, Lewis admitted that he repeatedly presented various scenarios to Porter and asked whether it was possible that the conduct took place. Porter was confused about what had happened and was upset during the interview, at times crying with his head on the table.

Terrence Foster, a Joliet firefighter-paramedic who responded to Porter's house, testified that he arrived there between 12:30 and 12:45 p.m. Porter handed Jordan to him and said that Jordan had "taken on too much water" and was not breathing. He gave Jordan two rescue breaths but there was no water in his lungs. They immediately transported Jordan. Jordan had pale skin with a cool skin temperature and was bluing around the ears and fingertip beds which was indicative that he was not breathing. Jordan's pupils were fixed and dilated, indicating that he had not been breathing for more than a couple of minutes.

Miroslav Skalski, a pediatrician and neonatologist at Silver Cross Hospital who treated Jordan at the emergency room, testified that Jordan arrived at the hospital with no signs of life and was pronounced dead at 1:15 p.m. He estimated the time of Jordan's death to be noon, plus or minus 30 minutes. He based his opinion on the following facts. Rigor mortis, which usually appears two hours after death, had not set in. Livor mortis, which appears about 45 to 60 minutes after death, had not set in. Jordan's body temperature was 95.5 degrees, three degrees less than the usual body temperature of 98.5 degrees, which indicated death had occurred 45 to 60 minutes earlier. Skalski observed bruises and hemorrhages on Jordan's upper body. He identified the bruises on Jordan's neck as consistent with two fingers. Based on their color, he estimated the neck bruises to have occurred within 24 hours. The bruises on his chin and ear were similarly colored. Jordan had six bruises on the front of his abdomen and around the umbilicus. Jordan also had a bruise on his lower left eyelid and a subconjunctival hemorrhage in his left eye. There were petechiae on his face and left shoulder which result from pressure in the venous or circulatory system. The petechiae were red, indicating that they were recent, within 24 hours.

Bryan Mitchell, a Will County coroner's physician, testified that he performed the autopsy on Jordan on November 1, 2005, and determined the cause of death to be blunt force trauma to the abdomen. The petechiae on Jordan's cheeks, eyelids and inside the larynx, along with bruises on his neck and chin, were consistent with strangulation. Petechiae are superficial skin hemorrhages on the skin's surface which appear as a rash caused by increased pressure in the venous system. There were numerous bruises and injuries on Jordan's body including one on the front of his scalp near the hairline, another under his left eye, three on his jaw line, two on the right of the jaw line, one on the right side of his neck, two on his right shoulder, and one on the back of the left ear. The bruises on his jaw were consistent with fingers or knuckles. The bruises also included one that was circular-shaped, an inch in diameter in the center of Jordan's abdomen, and six circular-shaped bruises on the upper abdomen. The six bruises were consistent with knuckles. There were abrasions on the inside of Jordan's right knee, above his left ear, and three on the left side of his face which were consistent with fingernail marks. He estimated all the injuries had occurred within 24 hours of Jordan's death.

An internal examination revealed healing rib fractures that were six to 12 weeks old. Mitchell observed bruises inside Jordan's scalp and in the middle of the neck which were consistent with blunt trauma to the neck, excessive bleeding into the abdominal cavity, and a large clot on Jordan's spinal column that was associated with trauma to either the front or back of Jordan's body. There were multiple lacerations in the abdominal area that had occurred shortly before Jordan's death. The outside of the bowel wall was bruised and there was hemorrhaging of the pancreas. The damage was due to blunt force trauma and the location of the bruises on Jordan's abdomen suggested more than one blow. In Mitchell's opinion, there were at least two blows which caused the hemorrhaging into

Jordan's abdomen. Mitchell estimated the hemorrhaging occurred within an hour to several hours before Jordan's death. The blow to the abdomen would have knocked the wind out of Jordan and he would not have cried or made any sounds. Lack of oxygen to Jordan's brain because of the abdominal bleeding and neck trauma would result in Jordan becoming sleepy, lethargic and eventually nonresponsive. The injuries could have been inflicted within a minute's time and were not accidental.

The State also introduced into evidence without objection the DVD recordings of Porter's police interviews on October 31 and November 1. At the close of the State's evidence, Porter moved for a directed verdict. He argued, in part, that there was no direct evidence of who caused Jordan's injuries and that others had access to Jordan besides him and that they could have injured Jordan. He further argued that the petechiae and eye injury were present when Jamie handed Jordan to him in the shower, suggesting that Jordan had already sustained the fatal blows by that time. Porter's motion was denied, and the following witnesses testified in his defense.

Geraldine Porter, Porter's mother, testified that Jordan was screaming and crying prior to joining Porter in the shower. Jordan stopped crying when Jamie gave him to Porter in the shower. She never checked on Jordan when Porter and Jamie were gone. After Porter returned about a half-hour later, he said something was wrong with Jordan and they attempted cardiopulmonary resuscitation (CPR). She is a registered nurse and certified in CPR. Porter did not know the proper way to perform it. He was breathing too hard and was not gentle with the chest compressions as is necessary. Jordan coughed up some liquids when she and Porter started CPR. It was "water, a little sudsy, but just a little water." There was no indication it was shampoo. Porter told her that Jordan grabbed the shampoo bottle in the shower. She had heard something like a shampoo bottle drop.

In the month or so that Jamie had lived at her house, she had seen Jamie inappropriately hit her daughter. On one instance, when Jordan returned from the sitter, he had a black eye and a broken blood vessel in his eye. Jordan would have nose bleeds and she noticed bruising on his head and foot and a rash on his face and body.

Porter testified that before Jamie handed Jordan to him in the shower, he heard Jordan screaming and crying. He noticed Jordan's red eye, the bruise under it, and little bruises on his forehead. While in the shower, he lost control of Jordan a "little bit" but caught him under Jordan's arm. Jordan did not fall. He did not grab Jordan by the neck. He never hit, punched, squeezed, kicked or stomped on Jordan in the shower. At one point, Jordan grabbed the shampoo bottle but then dropped it when Porter said, "hey." Jordan had the bottle up to his mouth. When Jordan gurgled, Jamie was in the bathroom and saw him put Jordan's mouth under the water and pat him on the stomach. He and Jordan were in the shower together for four or five minutes. Jamie brought a towel, and because Jordan did not want to go with her, Porter kept him. They went into Porter's bedroom where Porter put a diaper on him. Jordan did not want to be touched around the stomach area. Porter left Jordan under the covers in the middle of the bed. He, Jamie and her daughter left to run some errands but Jamie had to run back inside to get the keys. He eventually went inside to see what Jamie was doing. He looked in on Jordan and because Jordan's hair was wet, Porter ran his fingers through it. Jordan looked up in response.

When he and Jamie returned to the house around 12:30, he stayed in the car with Jamie's daughter while Jamie ran inside to get keys for the other vehicle. When Jamie left for the health department with her daughter around 12:30 p.m., Porter went to see his children at their mother's house, returning a short time later. He returned home, went back to his bedroom to get a hat,

noticed a small oval-shaped amount of liquid on Jordan's pillow and called his name several times. When Jordan did not respond, Porter picked him up and discovered he was limp. Porter called for his mother, Geraldine, who told Porter to call 911. Porter tried to help his mother perform CPR but did not administer it correctly. They first placed Jordan on the couch and attempted CPR but because it was too soft a surface, they moved Jordan to the kitchen table and resumed CPR. The paramedics arrived between 12:30 and 12:45 p.m., and immediately took Jordan. Porter stated that he never intended to harm Jordan, and never struck or choked him. He told the police that he felt responsible for Jordan's death because at the time he talked to the police, he did not know how Jordan died. Once he learned how Jordan died, he denied causing his injuries. He had seen bruises and injuries on Jordan during the time he was dating Jamie.

Following the close of evidence, the trial court found Porter guilty on both counts. The trial court found that when Jordan went into the shower, he was "a normal 17 or 18-month old child" and when he got out of the shower, he was no longer "a normal acting young child." The trial court concluded that Jordan's death was not an accident. The trial court found that "beyond a reasonable doubt the time that he hurt his child he knew it and he intended to do it."

Porter retained new counsel and moved for a judgment notwithstanding the verdict or for a new trial. His motion was denied. In denying Porter's motion, the trial court reiterated that the evidence established that Porter had acted intentionally and knowingly, that Jordan had no problems before he entered the shower and that Porter was not credible in denying his involvement in Jordan's death. A sentencing hearing ensued at which posttrial counsel for Porter attempted to present the testimony of Lisa Abernathy, a Will County bailiff, regarding statements that Jamie made to her after the guilty verdict including that Porter was innocent, Jordan's death was her fault and the fault of

Jordan's father, and that she could not say anything because it would cause trouble. The trial court sustained the State's objection to Abernathy's testimony. It sentenced Porter to a term of imprisonment of 34 years.

Porter filed motions to reconsider his conviction and his sentence. A hearing was held on his motions at which Abernathy testified to her conversation with Jamie. Posttrial counsel argued that Abernathy's testimony constituted new evidence that, in combination with the medical evidence, would have created reasonable doubt of Porter's guilt. Porter also argued that his trial counsel was ineffective for failing to offer the report from DCFS indicating Jamie previously had been found unfit as a parent and for failing to investigate witnesses who offered affidavits attesting that they had seen Jamie abuse Jordan. The affidavits presented the following.

Porter attested in his affidavit that he told his counsel that there were witnesses who would testify to Jamie's abuse of Jordan and that his trial counsel did not attempt to interview the witnesses or procure them for trial.

Kyra White attested that she had four children. She had known Jamie since 2005 and had seen her interact with Jordan. She saw Jamie physically grab Jordan in a manner that caused him pain, throw him on the couch in an inappropriate manner, spank Jordan aggressively and harder than appropriate for a child of his age and weight, and strike Jordan multiple times and more than necessary to discipline him. On one occasion in the fall of 2005 when she babysat Jordan, she observed him acting in an unusual manner such that she believed he was in pain. White told Jamie she would no longer care for Jordan unless Jamie took him to the doctor. Jamie refused to seek medical care for Jordan. A few weeks later, she had the opportunity to observe that Jordan would cry excessively when Jamie tried to pick him up and that Jordan ran to Porter when he arrived.

Porter picked Jordan up and calmed him down. She further attested that she observed a conversation between Jamie and Porter after Jordan's death where Jamie told Porter, " 'I know it is not your fault and that you did not do anything wrong.' "

Stephanie Banks attested that she had known Jamie since 2005 and observed her with Jordan. On one instance in September 2005, she saw Jordan acting in an abnormal way, throwing up and not eating. He had purple marks consistent with bruising on his tongue, feet and fingers. Jordan was limping and lethargic which was not consistent with his normal appearance. Banks further attested that Jamie thought Jordan had electrocuted himself because he was not eating but that she would not take him to a doctor or hospital as she feared she would "get in trouble." In July or August 2005, Banks saw Jordan with bruising on his eye and was told by Jamie that he hit his eye on the bathtub.

Germaine Porter averred that in August 2006, he saw Jordan with bruising to his eye which was discolored and looked to be from a blow to the eye. In addition, there were numerous scratches to Jordan's face. On another later instance he saw what appeared to be multiple bruising up and down Jordan's arm. On several occasions, he observed that Jamie did not want to be around Jordan and she attempted to leave him with others. It was his understanding that Jordan's father was abusive and physically intimidating and Jamie would use Jordan as a shield so that his father would not hit her.

The trial court denied Porter's motions, finding that the Abernathy evidence did not constitute newly discovered evidence warranting a new trial and that Porter had not met the standard to establish ineffective assistance of counsel. Porter appealed.

ANALYSIS

Porter raises three issues on appeal: whether he was proven guilty beyond a reasonable doubt, whether the trial court erred in denying his motion for a new trial, and whether he received ineffective assistance of counsel.

Because we find that Porter received ineffective assistance of counsel, we begin with that issue. Porter argues that his trial counsel provided him ineffective assistance by failing to interview witnesses whose testimony would have exonerated him. In support of his posttrial motion, he offered affidavits of three witnesses that were known to defense counsel who would have testified they observed prior incidents of abuse of Jordan by Jamie and saw injuries on Jordan over a period of time prior to his death.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness; and (2) as a result of counsel's deficient performance, defendant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To satisfy the prejudice prong, a defendant must demonstrate there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *People v. Moore*, 356 Ill. App. 3d 117, 121 (2005). A failure to interview witnesses may amount to incompetent representation, particularly where counsel is aware of the witnesses and their testimony may be exonerating. *People v. Steidl*, 177 Ill. 2d 239, 256 (1997). Whether counsel's failure to investigate and present evidence is incompetence depends on the value of the evidence. *People v. Rush*, 294 Ill. App. 3d 334, 342 (1998). An attorney's failure to present evidence that is irrelevant is not incompetence. *Rush*, 294 Ill. App. 3d at 342. A reviewing court should not disturb a conviction on the basis of ineffective assistance of counsel unless the totality

of counsel's performance indicates actual incompetence. *Moore*, 356 Ill. App. 3d at 122 (citing *People v. Bell*, 152 Ill. App. 3d 1007, 1011 (1987)).

Porter offered an affidavit which stated that he told his trial counsel that there were witnesses who would testify about Jamie's abuse of Jordan. His posttrial motion was also supported by affidavits of several potential witnesses whose testimony regarding prior abuse of Jordan he claims show a pattern of abuse by Jamie or another individual and serve to exonerate him. The State asserts that because Porter does not include in his affidavit the names of the witnesses, his trial counsel could not have known their identities and cannot be ineffective for failing to investigate them. Porter attested that he notified trial counsel of the witnesses, and it is reasonable to assume that he included their names in so notifying counsel. To notify counsel of potential witnesses without identifying them would be pointless. We do not find Porter's affidavit insufficient to support his ineffective assistance claim.

The State further argues that Porter failed to demonstrate that the witnesses' testimony would be admissible. Without interviewing the witnesses, trial counsel would have had no basis to determine whether they offered testimony which would be admitted. Moreover, had trial counsel interviewed the witnesses, he may have discovered additional evidence that would have aided Porter at trial. We do not consider that the statements in the affidavits would be inadmissible in whole. *People v. Saraceno*, 341 Ill. App. 3d 108, 116 (2003) (defendant has the right to show that someone else committed the crime). Based on the information provided in the affidavits, we consider the witnesses' statements as potentially exculpatory evidence. When determining the admissibility of other crimes evidence concerning a witness rather than a defendant, the standard is whether the evidence offers significant probative value to the defense. *People v. Cruz*, 162 Ill. 2d 314, 353

(1994). In addition, the *Cruz* court did not preclude the possibility that exculpatory other crimes evidence relating to a witness may be admitted where its only purpose is to show a potential suspect's propensity. *People v. Turner*, 373 Ill. App. 3d 121, 130 (2007). The determination of whether exculpatory other crimes evidence is admissible also differs from a court's regular admissibility analysis in that the prejudice component is not at issue when the defendant, not the State, offers the evidence. *Cruz*, 162 Ill. 2d at 350 (quoting *People v. Tate*, 87 Ill. 2d 134, 143 (1981) (exculpatory other crimes evidence admissible where "the evidence contains 'significant probative value' to the defense without any reference to the element of prejudice").

We are equally unpersuaded by the State's argument that evidence of Jamie's prior abuse of Jordan would not be relevant because the witnesses did not see Jamie inflict the injuries that resulted in Jordan's death. We consider that the information that the witnesses would have provided regarding Jamie's alleged abuse of Jordan would be relevant to the determination of who caused Jordan's death. Evidence is relevant if it has "any tendency to make the existence of any fact in consequence to the determination of the action more or less probable than it would be without the evidence." *People v. Munoz*, 398 Ill. App. 3d 455, 481 (2010) (citing *People v. Coleman*, 347 Ill. App. 3d 266, 270 (2004)). When considering the admissibility of exculpatory other crimes evidence, we look at whether it is significantly probative to the defense. *Turner*, 373 Ill. App. 3d at 132. "Evidence is probative when to the normal mind it tends to prove or disprove a matter at issue." *Turner*, 373 Ill. App. 3d at 132 (quoting *People v. Drescher*, 364 Ill. App. 3d 847, 861 (2006)). Based on our review of the record, we conclude that evidence of Jamie's treatment of Jordan is significantly probative to Porter's defense. Porter consistently denied that he injured Jordan. His denials make

evidence suggesting another person caused the injuries resulting in Jordan's death relevant and necessary for the presentation of an effective defense.

If trial counsel had interviewed White, Banks or Germaine, he would have uncovered information that cast doubt on Porter's alleged conduct and strongly pointed to Jamie as the source of Jordan's injuries. At the very least, the information would have prompted further investigation. There is evidence in the record that trial counsel attempted to question Jamie about an unfitness finding against her by DCFS that resulted in the removal of a child or children from her care. The State's objection to the attempted questioning by defense counsel was sustained on the basis of relevance. Had trial counsel interviewed the witnesses offered by Porter and investigated their claims, the DCFS findings may have been ruled relevant and admissible. Admission of the DCFS report would have contributed additional evidence raising concerns about Jamie's role in Jordan's death and casting doubt on Porter's alleged guilt. Admission of the DCFS records would also have significant probative value to Porter's defense.

In addition, testimony regarding Jamie's alleged abuse of Jordan or her other children would have strengthened the argument that Jordan's injuries were inflicted prior to when she handed him to Porter in the shower as corroborated by the medical evidence. Testimony and estimations regarding time of death and when the injuries were inflicted strongly suggest Jordan was injured before Jamie handed him to Porter just after 11:30 a.m. Terrence Foster, the firefighter-paramedic, responded to the Porter residence between 12:30 and 12:45 p.m.. Jordan's skin was pale and cool, and "bluing" around the ears and fingertip beds, indicating Jordan was not breathing. His pupils were fixed and dilated, suggesting that Jordan had not been breathing for more than a couple of minutes. Miroslav Skalski, the emergency doctor who treated Jordan on his arrival at the hospital,

estimated Jordan's time of death at noon, plus or minus one-half hour. He based his estimation on the fact that neither rigor mortis, which sets in approximately two hours after death, nor livor mortis, which appears 45 minutes to one hour after death, had not yet occurred. Jordan's body temperature also indicated death had occurred 45 to 60 minutes earlier. Jordan was pronounced dead at 1:15 p.m., although he was without signs of life on arrival at the emergency room.

Skalski's examination of Jordan revealed petechiae and multiple bruises that had occurred within 24 hours of Jordan's death. Mitchell, the coroner, testified that his examination revealed multiple injuries to Jordan, all inflicted within 24 hours of his death. In his medical opinion, the injuries could have been inflicted several to seven hours before Jordan's death. Although Mitchell surmised that it was possible but not likely that Jordan would have appeared normal after the beating, he stated that Jordan could have been handed to Porter without indication of his injuries with lethargy setting in afterwards. Mitchell also discovered evidence of prior injuries, including broken ribs that were in the process of healing, as well as scars on Jordan's abdomen and shin.

Trial counsel's failure to interview the potential witnesses and offer their testimony as evidence that Jamie could have been responsible for Jordan's death cannot be excused as trial strategy. The potential testimony of the affiants, combined with the medical testimony, raise reasonable inferences that Jordan was injured sometime in the hours before he showered with Porter and that Jamie inflicted the injuries. We conclude that Porter has established that trial counsel's performance fell below an objective standard of reasonableness, and that as a result of trial counsel's deficient performance, he was deprived of a fair trial. Because we find that trial counsel's assistance was ineffective, we conclude that the trial court erred in denying Porter's motion for a new trial.

Based on our disposition of the ineffective assistance claim, we need only consider Porter's claim of insufficient evidence in summary. We are troubled by the conviction in this case. However, this court reviews a challenge to the sufficiency of the evidence by determining whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Under that high standard, we cannot find that the evidence was insufficient to find Porter guilty beyond a reasonable doubt. *People v. Daniels*, 187 Ill. 2d 301, 310 (1999) (double jeopardy is not violated if defendant successfully appeals a conviction which is reversed on grounds other than sufficiency of the evidence). We need not consider Porter's claim of new evidence. He may have the opportunity to present the evidence at his new trial.

We reverse the judgment of the trial court and remand for a new trial.

For the foregoing reasons, the judgment of the circuit court of Will County is reversed and the cause remanded.

Reversed and remanded.

PRESIDING JUSTICE CARTER, dissenting:

I respectfully dissent from the majority's order in the present case. In my opinion, defendant's claim of ineffective assistance of counsel, as raised in the motion for new trial, should be rejected for three reasons. First, there is insufficient information in this record for this court to conclude whether defense counsel's performance was deficient or whether any alleged deficiency prejudiced defendant. Defendant's affidavit, which was attached to the motion for new trial, did not state that he specifically identified the witnesses in question by name to his attorney, and contrary

to the majority's position, we cannot presume that such was the case. Nor can we speculate as to the specifics of the witnesses' testimonies and whether those testimonies would have been helpful to defendant, even assuming that the testimonies would have been admissible. Furthermore, we do not know when the information was communicated to defense counsel or what, if any, action defense counsel took on the matter.

Rather than acknowledge that the factual information is insufficient at this time to review defendant's claim of ineffective assistance, the majority makes a series of assumptions to get around the lack of information. For example, the majority assumes that: (1) defendant specifically identified the names of the witnesses to defense counsel; (2) the testimonies of those witnesses would have been helpful to defendant and admissible; (3) investigation by defense counsel may have led to the discovery of additional evidence that would have been helpful to defendant; (4) White, Banks, and Germaine were the witnesses defendant had identified to defense counsel; (5) the information provided by White, Banks, and Germaine would have strongly pointed to Jamie as the source of Jordan's injuries or would have prompted further investigation; (6) if defense counsel had pursued this matter further, the DCFS findings relative to Jamie might have been ruled relevant and admissible; and (7) the alleged deficient performance of defense counsel deprived defendant of a fair trial. Those assumptions, however, are speculative and are not based upon evidence currently contained in the record. That is not to say, however, that defendant is left without any recourse on this issue. Defendant can still raise the issue in a postconviction petition and attempt to present a sufficient factual record for the matter to be considered.

Second, even for the witnesses whose affidavits were attached to the motion for new trial, there is no indication that their testimonies would have been admissible. In general, specific

instances of prior bad acts of a witness may not be inquired into on cross-examination of the witness to impeach the witness with a showing of bad character. Ill. R. Evid. 608; *People v. Santos*, 211 Ill. 2d 395, 404 (2004); *People v. Norwood*, 54 Ill. 2d 253, 256-57 (1973); *People v. Kirwan*, 96 Ill. App. 3d 121, 126-27 (1981). In addition, extrinsic evidence of such a nature may also not be presented. *Dimick v. Downs*, 82 Ill. 570 (1876); *Hoge v. People*, 117 Ill. 35, 48-49 (1886); see Michael H. Graham, *Graham's Handbook of Illinois Evidence* §608.5 (10th ed. 2010).

Third, although the defendant has a right to show that someone else committed the offense at issue (see *People v. Saraceno*, 341 Ill. App. 3d 108, 116 (2003)), the evidence still must be relevant and admissible and have a legitimate tendency to establish reasonable doubt as to the defendant's guilt. See *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006); Ill. R. Evid. 404. In that regard, courts have allowed evidence that another person has committed a crime of a similar nature, if there is a strong and persuasive showing of the similarity between that evidence and the offense charged. See *People v. Cruz*, 162 Ill. 2d 314, 350-54 (1994). Courts have also allowed evidence that directly connects a third person to the crime charged. See *People v. Turner*, 373 Ill. App. 3d 121, 131-34 (2007). However, there must be a close connection between the third person and the commission of the offense, and if the evidence has little probative value because it is remote, uncertain, or speculative, the evidence may be rejected. See *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007). Again, the majority's utilization of a series of speculative assumptions cannot serve as a foundation for the admissibility of the suggested evidence in this record. See *People v. Ward*, 101 Ill. 2d 443, 455-457 (1984). Based on the above three reasons, I would reject defendant's claim of ineffective assistance of counsel at this time and affirm the trial court's denial of defendant's posttrial motion.

Finally, I would affirm the trial court's rejection of defendant's claim of newly discovered evidence based upon Jamie's statement to a bailiff. The statement lacked specific factual details regarding the crime and Jamie did not testify at the motion for a new trial. Thus, the alleged newly discovered evidence was not sufficient to warrant a new trial. See *People v. Smith*, 177 Ill. 2d 53, 82-86 (1997).

For the reasons stated, I respectfully dissent from the majority's order in the present case.