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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 Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 04-CF-1219
)	
BRUCE KREBS,)	Honorable
)	Kathryn E. Creswell,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

Held: The trial court properly summarily dismissed defendant's postconviction petition, which alleged various instances of ineffective assistance of trial and appellate counsel, as each of defendant's claims lacked merit.

¶ 1 Following a jury trial in the circuit court of Du Page County, defendant, Bruce Krebs, was found guilty of five counts of criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2000) and one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2000). The trial court imposed consecutive sentences of four years' imprisonment for the counts of criminal sexual assault and three years' imprisonment for aggravated criminal sexual abuse. On direct appeal, we affirmed

defendant's convictions and sentences. *People v. Krebs*, No. 2-08-0556 (2010) (unpublished order under Supreme Court Rule 23) (*Krebs I*). Thereafter defendant filed a petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/ 122-1 *et seq.* (West 2010)). The trial court summarily dismissed the petition (see 725 ILCS 5/122-2.1(a)(2) (West 2010)) and this appeal followed. We affirm.

¶ 2 The evidence presented at trial is recounted in detail in *Krebs I*. Only those facts germane to the issues raised in the appeal now before us will be discussed here. Defendant's convictions were based on evidence that, between 2000 and 2003, he performed various sex acts on M.H., who was born on August 14, 1986. M.H. revealed the abuse to her mother and a friend in October 2003. Defendant is M.H.'s great uncle by marriage; M.H.'s maternal grandmother is defendant's wife's sister. M.H. testified about four incidents, which gave rise to the charges against defendant. During the period that the incidents took place, M.H. resided with her brother and her mother in Downers Grove—first at a house on Gierz Street, and later at a house on Grand Avenue. The prosecution referred to the incidents as the “biting incident,” the “Texas trip incident,” the “green foldout chair incident,” and the “Grand Avenue incident.”

¶ 3 The “biting incident” took place in the spring or early summer of 2000, in M.H.'s bedroom at the Gierz Street house. M.H. testified that defendant kissed her mouth and breasts, licked her vagina, and bit her clitoris.

¶ 4 The “Texas trip” incident occurred in July 2000, the evening before M.H. and her brother traveled to Texas to visit their mother's sister, Cathy Hodge. M.H. testified that defendant visited her in her bedroom and placed his penis in her mouth. Asked whether defendant's penis was erect,

M.H. testified as follows, “It wasn’t fully erect. It was hard. It wasn’t—it wasn’t like still—still kind of soft, not fully hard.”

¶ 5 The “green foldout chair incident” took place in the bedroom of the Gierz Street house sometime between September and December of 2000. M.H.’s bedroom furniture included a green couch or chair that folded out into a bed that her friends could use when they spent the night at her house. After he folded out the bed, defendant kissed M.H. and disrobed her. Then he placed her on the bed and held his penis—which was not erect—against the outside of her vagina. He also placed his fingers in her vagina.

¶ 6 During the summer of 2003, M.H. and her family moved to the Grand Avenue house. The “Grand Avenue incident” occurred near the beginning of the school year. M.H. testified that defendant came into her bedroom and placed a silver egg-shaped vibrator against her clitoris. He also licked her vagina.

¶ 7 According to M.H.’s testimony, these four incidents were part of a larger pattern of sexual conduct. M.H. described the pattern in general terms and also described a number of specific incidents that were not the basis of criminal charges. The sexual conduct included kissing M.H.’s mouth, neck, and breasts, licking her vagina, placing his fingers in her vagina, and having her hold his penis or place it in her mouth. She described instances during which defendant’s penis got “harder.” She testified, however, that she did not recall defendant ever achieving a full erection. M.H. acknowledged that in 2003 she told investigators that she had seen defendant pull some skin over the tip of his penis and push it out with his muscles. Although M.H. had told investigators that defendant’s penis was erect at the time, at trial she explained that she did not know what a fully erect penis was when she spoke with investigators. By the time of trial she did know. It was stipulated,

however, that, prior to her discussions with investigators, M.H.'s computer contained at least one image of an erect penis. M.H. testified that she could recall only two occasions on which defendant ejaculated. However, she acknowledged telling investigators that defendant "would often pull away from her before he ejaculated and he would masterbate [*sic*] until he ejaculated into his hand."

¶ 8 Witnesses for the defense included Christine Saindon, a licensed clinical social worker who counseled M.H. to help her cope with the abuse that she had reported. M.H.'s treatment involved hypnosis. Saindon testified that M.H. participated in two hypnotherapy sessions in April 2004 and one in July 2004. During the sessions, Saindon read a script to M.H. in order to induce a hypnotic state, offer therapeutic suggestions, and bring M.H. out of the hypnotic state. The purpose of the hypnosis was to alleviate the distress M.H. was experiencing as a result of the abuse she suffered. The method of hypnosis Saindon practiced was "content free"—it did not involve a discussion of the specific details of the abuse. Saindon stressed that the scripts read to M.H. were not designed to enhance her memory. Roger Hatcher testified as an expert in the field of clinical psychology. He indicated that there was a substantial body of research that hypnosis can distort memories and validate the subject's belief in false memories. Hatcher believed that metaphors in the scripts Saindon used with M.H. would suggest to M.H. that the process would enable her to recover hidden memories.

¶ 9 Defendant's wife, Sherry Fickenscher, testified that she married defendant in 1981. However, defendant had suffered from erectile dysfunction since about 1997, and they didn't have a "full" sexual relationship. Since 1997, defendant was unable to achieve either a full or a partial erection. Fickenscher testified that defendant suffered from diabetes and that he took insulin.

¶ 10 Defendant testified that he suffered from adult-onset type I diabetes and that he had been taking insulin by injection for about six years. He took two different types of insulin four to five times a day. Before taking insulin, he took oral medications to treat his diabetes. Defendant began to experience erectile dysfunction in 1996 and visited a urologist in 1997. He acknowledged telling the urologist that he had “a three-year history of partial erections, penetration of poor quality, although successful 75 percent of the time.” By 1997, however, he could not obtain even a partial erection and he had no success treating the condition with medication.

¶ 11 Paul Larson, a professor of psychology, was called by the State as a rebuttal witness. He testified as an expert in the practice of hypnosis and its use with individuals suffering from stress-related disorders. Based on a review of the scripts used in connection with M.H.’s hypnosis sessions and summaries of interviews with M.H. both before and after those sessions, Larson formed the opinion that there was little probability that hypnosis had any effect on M.H.’s memory of events.

¶ 12 When a defendant who has been sentenced to imprisonment files a petition under the Act, the trial court must examine the petition; if the trial court finds that the petition is “frivolous or is patently without merit” it will be summarily dismissed. 725 ILCS 5/122-2.1(a)(2) (West 2010). Summary dismissal is proper if the petition “is based on an indisputably meritless legal theory or a fanciful factual allegation.” *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Summary dismissal is reviewed *de novo*. *Id.* at 9.

¶ 13 Defendant argues on appeal that his petition stated meritorious claims that he was deprived of the effective assistance of counsel at trial and on direct appeal. We first consider defendant’s claim that trial counsel was ineffective because “he failed to present evidence of [defendant’s] medical condition—his serious disease of diabetes—to corroborate his and his wife’s testimony that

he could not achieve an erection.” Defendant argues that “due to the neuropathy and vascular destruction that accompanies diabetes, [defendant] indeed would have had difficulty ever attaining let alone maintaining, an erection.” In his reply brief, defendant insists that this case is “[not] about a man who had periodic difficulty experiencing or maintaining an erection,” but rather is about “a man, who, because of nerve damage caused by a chronic, but ultimately fatal disease, could not possibly have done the acts alleged.”

¶ 14 Under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant claiming a deprivation of the right to the effective assistance of counsel must establish that counsel’s performance “fell below an objective standard of reasonableness” and that the deficient performance was prejudicial in that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 688, 694. Defendant’s claim depends on the existence of medical evidence that would have cast doubt on M.H.’s account, such that there is a reasonable probability that, had the jury heard the evidence, it would have acquitted defendant. To avoid summary dismissal, a postconviction petition must do more than merely *allege* that such evidence could have been presented at trial; the defendant must provide evidentiary support for the facts set forth in the petition. See *Hodges*, 234 Ill. 2d at 10. Section 122-2 of the Act provides that “[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.” 725 ILCS 5/122-2 (West 2010). This requirement is designed to establish that the facts underlying a postconviction claim “are capable of objective or independent corroboration.” *Hodges*, 234 Ill. 2d at 10. The evidence submitted in support of defendant’s petition does not meet this standard.

¶ 15 Defendant's postconviction petition is accompanied by portions of medical records maintained by defendant's urologist pertaining to examinations in September 1997 and September 2004. The records for 1997 state that defendant is a "47-year-old male who presents with a three year history of partial erections, progressive. *** Associated with in tact [*sic*] ejaculation, absent morning erections, penetration of a poor quality although successful 75% of the time." The 1997 medical records also state that defendant has been diabetic since 1979. The 2004 records state that "[p]atient is a 54 y/o male with a 10 year (s) history of partial erections, inability to achieve erection and inability to sustain erections," that defendant reported "altered ejaculation," and that defendant's medical history included "DIABETES ADULT-TYPE II UNCOMPL." This evidence does not cast doubt on M.H.'s testimony. Her testimony indicates that defendant achieved only partial erections in her presence. Although in a pretrial statement M.H. related seeing defendant's penis erect, at trial she explained that she did not know what a fully erect penis was when she made that statement. In any event, defendant has submitted no medical evidence that, between 2000 and 2003, he was completely incapable of achieving an erection at any time.

¶ 16 Defendant next argues that he did not receive the effective assistance of counsel on direct appeal, because appellate counsel did not challenge the State's use of "hypnotically enhanced testimony" at trial. "A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced defendant." *People v. Scott*, 2011 IL App (1st) 100122, ¶ 28. If an issue is meritless, counsel's failure to raise it results in no prejudice. *Id.* Our supreme court has held that "hypnotically enhanced" testimony is inadmissible. *People v. Zayas*, 131 Ill. 2d 284, 296-97 (1989) (trial court erred in permitting a detective to testify to a license plate number that he

recalled under hypnosis). Defendant cites no authority, however, that the testimony of a witness who is hypnotized for other purposes, such as therapy, is necessarily tainted. Defendant argues that “[r]ecords admitted at trial make it clear that M.H. came up with critical details about the alleged abuse after the hypnosis.” Defendant maintains that “[w]hether the hypnosis was used to enhance memory or not, the record is clear that it did—in fact—alter M.H.’s memory.” The argument illustrates the logical fallacy of *post hoc ergo propter hoc*. The sequence of events does not prove a causal relationship.

¶ 17 We note that defendant moved *in limine* for a ruling on the admissibility of M.H.’s “testimony relating to her posthypnotic recall.” Defendant sought to bar M.H.’s “hypnosis affected testimony.” The trial court denied the motion. Generally speaking, “a trial court’s ruling on a motion *in limine* regarding the introduction or exclusion of evidence is reviewed under an abuse of discretion standard.” *People v. Starks*, 2012 IL App (2d) 110273, ¶ 20. At the hearing on the motion, the trial court heard testimony from the same mental health professionals who testified at trial. As was the case at trial, they offered conflicting opinions as to whether M.H.’s hypnosis sessions could have affected her memory of the relevant events. Both Saindon and Larson testified to the effect that, because M.H. was placed in a hypnotic state for the purpose of alleviating mental or emotional distress, and because the hypnotic suggestions were content-neutral, her memory would not have been affected. In contrast, Hatcher expressed the opinion that M.H. was susceptible to the suggestion of false memories, even though she was hypnotized for therapeutic purposes and the hypnotic suggestions did not relate specifically to the allegations of abuse. In Hatcher’s view, because M.H. was aware that the therapy related to abuse, she might have formed false memories. It is the responsibility of the trial court to resolve conflicts in the evidence. *People v. Primbas*, 404

Ill. App. 3d 297, 302 (2010). The trial court determined that M.H.'s testimony was not subject to categorical exclusion under the *Zayas* rule, but permitted the parties to present expert testimony concerning the effect, if any, that the therapeutic hypnosis sessions might have had on M.H.'s testimony. Given the conflicting testimony at the hearing on the motion *in limine*, this ruling was not an abuse of discretion. Consequently, any challenge on direct appeal to the trial court's ruling would have failed. Defendant therefore cannot establish prejudice within the meaning of *Strickland*.

¶ 18 Defendant also argues that appellate counsel should have sought reversal on the basis that defendant received ineffective assistance at trial, inasmuch as trial counsel failed to request instructions concerning how the jury should consider evidence of sexual acts that were not the subject of criminal charges. We disagree.

¶ 19 The jury instructions specifically advised the jurors that the charges against defendant related to the four incidents referred to as the "biting incident," the "Texas Trip incident," the "green foldout chair incident," and the "Grand Avenue incident." The jury was also instructed as follows:

"Evidence has been received that the defendant has been involved in conduct other than that charged in the indictment.

This evidence has been received on the issues of the defendant's intent, motive, the familiar relationship between the defendant and M.H., the course of conduct between the defendant and M.H., and to corroborate the testimony of M.H.

It is for you to determine whether the defendant was involved in that conduct and, if so, what weight should be given to this evidence on the issues of the defendant's intent, motive, the familiar relationship between the defendant and M.H., the course of conduct between the defendant and M.H., and to corroborate the testimony of M.H."

Defendant contends that trial counsel should have requested that limiting instructions concerning the possible relevance of evidence of uncharged conduct be given to the jury contemporaneously with the presentation of that evidence. Defendant argues that, without “proper” instructions, the jurors would “logically consider [the evidence of uncharged conduct] as added evidence that [defendant] committed the [charged] abuse.” Indeed, the evidence of uncharged conduct *was* evidence that defendant committed the charged offenses. In prosecutions for criminal sexual assault, aggravated criminal sexual abuse, and certain other sex offenses, evidence of certain prior offenses may be admitted to prove the defendant’s propensity to commit the charged offense. 725 ILCS 5/115-7.3 (West 2000); *People v. Childress*, 338 Ill. App. 3d 540, 549 (2003). It is difficult to envision how instructing the jury more frequently about the purpose for admitting evidence of defendant’s pattern of sexual abuse would have altered the verdict. Defendant suffered no prejudice as a result of trial counsel’s failure to request contemporaneous limiting instructions or as a result of appellate counsel’s failure to craft an ineffective-assistance claim based on the manner in which the jury was instructed.

¶ 20 Defendant also argues that trial counsel was ineffective because he failed to challenge the incorporation of shorthand descriptions of the specific incidents of charged abuse—*i.e.* the “biting incident,” the “Texas trip incident,” the “green foldout chair incident,” and the “Grand Avenue incident”—into the jury instructions. According to defendant, appellate counsel provided ineffective assistance by failing to argue on appeal that trial counsel was ineffective. We disagree because we find nothing objectionable about the instructions at issue. Although defendant argues that the jurors “were given a virtual road map directing them to convict,” the shorthand descriptions merely clarified the basis of the charges against defendant without implying in any way that defendant was

guilty of those charges. In addition, the shorthand descriptions insured that the jurors considered only the “charged” conduct and not the “uncharged” conduct.

¶ 21 Defendant next argues that appellate counsel provided ineffective assistance by failing to argue on appeal that the trial court erred in barring the defense from presenting evidence that, in July 2000, while flying to Texas to visit her aunt, “M.H. may have falsely accused a flight attendant of sexual misconduct.” The evidence in question was that a flight attendant made a ring from a “twizzler” and told M.H. he would ask her to marry him if she were older. M.H. may have told her mother that the flight attendant kissed her hand and touched her knee. The trial court did not err in barring this evidence. Although evidence of prior false accusations of sexual assault may be admitted to show a witness’s interest, bias, or motive to lie (*People v. Cookson*, 215 Ill. 2d 194, 214 (2005)), such evidence is not admissible merely to show a witness’s proclivity for making false accusations. Here, the accusation against the flight attendant, whether true or not, has no bearing on whether M.H. held any bias against defendant or had anything to gain from a false accusation against defendant. Because a challenge to the trial court’s ruling would have failed on appeal, appellate counsel’s failure to raise such a challenge did not deprive defendant of his right to the effective assistance of counsel.

¶ 22 Finally, defendant argues that appellate counsel failed to properly preserve constitutional claims for review in a federal *habeas corpus* action. “Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court.” *United States ex rel. Anderson v. Hardy*, 779 F. Supp. 2d 816, 827 (N.D. Ill. 2011). Defendant argues that, because appellate counsel failed to frame certain issues in constitutional terms and failed to seek leave to appeal to the Illinois Supreme Court, a federal court would conclude that defendant had not

exhausted his state remedies. The claim fails because, even assuming, *arguendo*, that prejudice under *Strickland* can be based on the presumed outcome of a legal proceeding that has yet to take place, defendant has not shown that he has any substantively meritorious basis for *habeas* relief that he would be able to raise if appellate counsel had exhausted state remedies. Thus defendant has not established prejudice under *Strickland*.

¶ 23 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 24 Affirmed.