

No. 1-11-0949

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(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	08 CR 3069
)	
QUINTON FISHER,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Sterba and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* When the record on appeal does not show whether police recorded all interrogations of the defendant in a murder case, the defendant has not proved that his counsel provided ineffective assistance when counsel did not move to suppress some video recorded interviews with the defendant. The defendant also has not proved that counsel should have moved to suppress statements for violation of *Miranda*, where the record does not show the exact warnings police gave for interrogations preceding the video recorded interview presented at trial.

¶ 2 Following a bench trial, the trial court found the defendant, Quinton Fisher, guilty of

murdering Lydia Houston. On appeal, Fisher argues that he received ineffective assistance of counsel because his attorney did not move to suppress statements Fisher made to police. We find that Fisher has not presented a sufficient record to show that the trial court should have suppressed the statements if Fisher's counsel had moved to suppress. Fisher also has not overcome the presumption that counsel had a sound strategic reason for deciding not to move to suppress the statements. Accordingly, we affirm the trial court's judgment, and direct the trial court to correct the mittimus to reflect the correct credit for presentencing custody and to show the entry of judgment on the count on which the court found Fisher guilty.

¶ 3

BACKGROUND

¶ 4 On December 30, 2007, Lanysha Houston dropped off her month-old daughter, Lydia, at the home of Lydia's father, Fisher. Fisher had some guests over that evening, and the guests played with Lydia for a while. Not long after the guests left, Lydia stopped breathing. Fisher spoke on the phone with Lanysha and with one of the friends who had visited that evening. Fisher took Lydia to the nearest hospital. A doctor at the hospital found that Lydia had suffered a skull fracture that went completely across her head. Lydia also suffered a subgaleal hemorrhage and a subarachnoid hemorrhage. Her brain swelled up to such an extent that oxygen could not get into her brain. The hospital placed Lydia on life support that kept her breathing and her heart beating.

¶ 5 Police interviewed Fisher at the hospital on December 31, 2007. Lydia died on December 31, 2007. Police conducted further interviews with Fisher over the following days. They recorded some of the interviews. On February 6, 2008, a grand jury indicted Fisher on two counts of murder: one for intentionally killing Lydia, and a second for killing her, knowing that his acts created a strong

1-11-0949

probability of death or great bodily harm.

¶ 6 The parties engaged in extensive discovery. The prosecution disclosed its intention to use video recordings of interviews held on January 7 and 8, 2008. Defense counsel did not move to suppress the video recordings.

¶ 7 At trial, the medical examiner detailed the extensive injuries and testified that blunt force trauma to Lydia's head caused her death. The extensive injuries resulted from a "tremendous amount of force." Lydia had not merely suffered a shaking, a fall, or a throw onto a hard bed. In the medical examiner's opinion, throwing Lydia hard against a wall, head first, could have caused the trauma she suffered.

¶ 8 The officer who interviewed Fisher at the hospital testified that Fisher said he found Lydia unresponsive on the bed, and he decided to take her to the hospital.

¶ 9 The prosecutor then showed the two promised videos. At the start of the first video, the officer alluded to a prior interview, then reminded Fisher of his rights. Fisher answered that he knew he had a right to remain silent, and that the State could use against him anything he said; he knew he had the right to an attorney, and that the court would appoint one for him if he could not afford one. The same officer repeated the same admonishments at the start of the second interview played in court. The tape showed that Fisher cried a great deal during the two interviews and expressed deep remorse. In the course of the two interviews, Fisher said that on December 30, 2007, Lydia cried after the guests left, and he once raised her over his head and slammed her onto the bed. She bounced against the wall and curled up. He grabbed Lydia's leg, shook her, and said, "don't die."

¶ 10 Defense counsel argued that Fisher acted recklessly, not intentionally. Fisher's attorney relied

partly on the statements Fisher made and the remorse Fisher showed in the recorded interview.

¶ 11 The court found Fisher guilty of murdering Lydia by inflicting blunt force trauma, knowing that his acts created a strong probability of death or great bodily harm. The court denied Fisher's posttrial motion and sentenced him to 22 years in prison. Fisher now appeals.

¶ 12 ANALYSIS

¶ 13 Appendix to the State's Brief

¶ 14 The State has appended to its brief many pages of materials never presented to the trial court. These "matters not properly in the record will not be considered on review." *Jenkins v. Wu*, 102 Ill. 2d 468, 483 (1984).

¶ 15 Ineffective Assistance of Counsel

¶ 16 Fisher argues that his counsel provided ineffective assistance when he failed to move to suppress Fisher's statements. In particular, Fisher argues that counsel should have moved to suppress (1) the statement Fisher made at the hospital on December 31, 2007, because police did not make a video recording of the questioning; (2) the video recorded statements Fisher made after making statements that police failed to video record; and (3) the video recorded statements that include inadequate *Miranda* admonishments.

¶ 17 We use familiar standards to review claims of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, "[a] defendant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, and (2) [h]e was prejudiced by the deficient performance." *People v. Haynes*, 408 Ill. App. 3d 684, 689 (2011). This court presumes that counsel provided reasonable professional assistance, and the defendant must overcome the

presumption that counsel had sound strategic reasons for adopting his course of action. *People v. Albanese*, 104 Ill. 2d 504, 526 (1984).

¶ 18 Under Section 103-2.1 of the Code of Criminal Procedure (Code) (725 ILCS 5/103-2.1 (West 2008)), police must make an accurate electronic recording of any interrogation that occurs as part of a murder investigation, and if the State subjects a murder defendant to an unrecorded custodial interrogation, "then any statements made by the defendant during or following that non-recorded custodial interrogation, even if otherwise in compliance with this Section, are presumed inadmissible." (Emphasis added.) 725 ILCS 5/103-2.1(d) (West 2008). However, the statute does not preclude the use of an unrecorded statement "given at a time when the interrogators are unaware that a death has in fact occurred." 725 ILCS 5/103-2.1(e)(viii) (West 2008).

¶ 19 The police officer who interviewed Fisher in the hospital on December 31, 2007, the day Lydia died, testified that after he spoke to Fisher, he learned that the hospital had decided to transfer Lydia to another hospital for further treatment. Fisher presented no evidence to contradict the inference that the interrogator did not know Lydia had died, even if she had actually died before the interrogation. Thus, Section 103-2.1 of the Code does not mandate suppression of the statements Fisher made to police in the hospital on December 31, 2007. Counsel's decision not to file a futile motion to suppress those statements does not show ineffective assistance. See *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 20 Next, Fisher contends that his attorney should have moved to suppress the video recording of the January 7 and 8 interviews. At the start of the January 7 interview, the interrogator referred to an interview that took place on January 6. No evidence in the record shows whether police

recorded the January 6 interview, which took place a week after Lydia died. If police did not record the prior interviews, section 103-2.1(d) of the Code would provide grounds for suppression of the statements introduced at trial. 725 ILCS 5/103-2.1(d) (West 2008). Although the record on appeal does not show that police recorded the prior interviews, it also does not show that police failed to record the prior interviews. Thus, Fisher's ineffective assistance claim requires resolution of an issue of fact that the record on appeal leaves unresolved. "Where the disposition of a defendant's ineffective assistance of counsel claim requires consideration of matters beyond the record on direct appeal, it is more appropriate that the defendant's contentions be addressed in a proceeding for postconviction relief." *People v. Burns*, 304 Ill. App. 3d 1, 11 (1999). On the record before this court, Fisher has not shown that his counsel provided ineffective assistance when counsel chose not to move to suppress the video recorded statements on grounds of the failure to record prior statements.

¶ 21 As a third ground for finding ineffective assistance of counsel, Fisher argues that his counsel should have moved to suppress the video recorded statements because the police did not adequately inform him of his *Miranda* rights. Although police reminded him that he had a right to an attorney, nothing in the video recorded admonishments informed Fisher that he had a right to bring in an attorney, "not only at the outset of interrogation, but at all times." *Florida v. Powell*, 559 U.S. ___, 130 S. Ct. 1195, 1205, 175 L. Ed. 2d 1009 (2010).

¶ 22 Once again, we find that the incompleteness of the record determines the result here. The interrogating officer, at the start of the record, alludes to a prior interview that may have taken place within a few hours of the interview shown in court. We do not have a complete account of the

admonishments given in the prior interview. Our supreme court has recognized that "fresh *Miranda* warnings are not required after the passage of several hours." *People v. Garcia*, 165 Ill. 2d 409, 425 (1995). Without evidence in the record establishing when the prior interviews occurred, and exactly what warnings police gave before those interviews, we cannot say that trial counsel provided ineffective assistance when he chose not to move to suppress the statements on grounds of inadequate *Miranda* warnings.

¶ 23 Moreover, we agree with the State that counsel could have had a strategic purpose for not moving to suppress the video recorded interviews. In those interviews, which the State could not cross-examine, Fisher said that he did not intend to hurt Lydia, and he slammed her down only once, to stop her crying. If Fisher testified, the State could use his criminal record for impeachment. Fisher argues on appeal that if the court had suppressed Fisher's statements, the court "would have instead been tasked with evaluating [the medical examiner's] testimony on its own merits, hopefully with the addition of a viable theory argued by defense counsel." That is, even now defendant and his current counsel cannot suggest a viable defense other than recklessness. Trial counsel apparently chose to use the interviews as evidence to support the theory that Fisher acted recklessly, when he could get the evidence before the court without subjecting Fisher to cross-examination and the use of his prior convictions for impeachment. Without the video recordings, the defense had virtually no evidence to support an argument that Fisher acted recklessly when he killed Lydia. We also note that Fisher has not overcome the presumption that his counsel had valid strategic reasons for proceeding as he did. Accordingly, we affirm the conviction of Fisher for murder. Because Fisher does not challenge his sentence, we affirm the judgment.

¶ 24

Mittimus

¶ 25 Fisher asks us to order the trial court to correct the mittimus in two ways. The State agrees with both corrections. Accordingly, we order the trial court to correct the mittimus to indicate that the court found Fisher guilty on count II of the indictment, for killing Lydia, while knowing that his acts created a strong probability of death or great bodily harm, in violation of section 9-1(a)(2) of the Criminal Code. 720 ILCS 5/9-1(a)(2) (West 2006). We also direct the trial court to give Fisher credit for 1152 days spent in custody prior to sentencing.

¶ 26

CONCLUSION

¶ 27 Fisher has not presented a sufficient record to show that he received ineffective assistance of counsel, because he has not shown that he did not receive complete, correct *Miranda* warnings before the interviews presented at trial; he has not shown that police failed to record prior interviews begun after Lydia died; and he has not shown that the law mandated recording of the interview in the hospital on December 31, 2007. Therefore, we affirm the trial court's judgment. We direct the trial court to correct the mittimus to show credit for 1152 days in custody, and a conviction on count II of the indictment, for killing Lydia by acts that Fisher knew created a strong probability of great bodily harm.

¶ 28 Affirmed with directions.