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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Kendall County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 06-CF-0146
	)	
MARCIAL GUERRERO,	)	Honorable
	)	John A. Barsanti,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HUTCHINSON delivered the judgment of the court.  
Justices Jorgensen and Spence concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defendant presented the gist of a constitutional claim that the State failed to prove defendant guilty of predatory criminal sexual assault of a child based on defendant intruding his finger into the victim's vagina. Thus, defendant sufficiently alleged that he was denied the effective assistance of appellate counsel, and the trial court erred in summarily dismissing defendant's postconviction petition. Accordingly, we reversed the trial court's summary dismissal and remanded for further proceedings.
- ¶ 2 Following a trial, a jury found defendant, Marcial Guerrero, guilty of three counts of predatory criminal sexual assault of a child pursuant to section 12-14.1(a) of the Criminal Code of 1961 (the Criminal Code) (720 ILCS 5/12-14.1(a) (West 2010)). The trial court sentenced defendant

to three consecutive terms of 25 years' imprisonment, and we affirmed defendant's conviction and sentence on direct appeal. See *People v. Guerrero*, 2-07-1183 (Jan. 26, 2010). Thereafter, defendant filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* West 2010)), alleging that he was denied the effective assistance of appellate counsel because his attorney on direct appeal failed to argue that the State did not prove him guilty beyond a reasonable doubt, among other allegations. Defendant now appeals the trial court's summary dismissal of his petition. While defendant does not challenge in this appeal his convictions for counts 1 and 3 of the indictment, he argues that his conviction for count 2—committing predatory criminal sexual assault of a minor based on him penetrating the victim's vagina with his finger—should be reversed because “no evidence at trial indicated any such intrusion.” For the reasons below, we reverse and remand for further proceedings.

¶ 3

#### I. Background

¶ 4 The facts underlying defendant's conviction were set forth in detail in our prior order. The record reflects that, in May 2006, the State charged defendant by indictment with three counts of criminal sexual assault of a child. Count 1 alleged that defendant sexually penetrated the victim, P.G., based on contact between his penis and the victim's mouth. Count 2 alleged that defendant sexually penetrated the victim by intruding his finger into the victim's vagina. Count 3 alleged that defendant sexually penetrated the victim based on contact between his penis and the victim's anus.

¶ 5 A jury trial commenced on July 16, 2007. The victim testified via closed-circuit television. The victim testified that she turned 11 years of age in February 2003, and that in January 2003, the victim's mother began dating defendant. Defendant moved into an apartment shared by the victim, the victim's mother, the victim's younger sister, and the victim's infant brother. The victim testified that defendant committed sexual acts against her between December 2003 and January 2004.

¶ 6 The victim testified that, at various times, defendant rubbed his penis on or near her “butt hole,” touched her “boobs” and vagina, and placed his penis inside her mouth. The victim testified that defendant’s hand touched her vagina approximately 10 times; he put his penis in her mouth approximately 5 times; and he put his penis in contact with her anus “more than 3” times. Regarding the sexual encounters, the victim testified as follows:

“Q. MR. REIDY [Assistant State’s Attorney]: The first time your clothes were off, what, if anything, did [defendant] do to you to start off with? You said you were touched where?

A. My boobs. He started going down to the vagina.

Q. Where on your vagina did he touch you?

A. Like by the crack.”

The victim accompanied this testimony with a gesture, which the assistant State’s Attorney explained, “she’s indicated in between her fingers, it would be I guess where the crevice or the crack of the fingers.”

¶ 7 During cross-examination, the victim acknowledged that she did not tell investigators that defendant put his finger in her vagina during their first sexual encounter. Regarding that encounter, the victim testified as follows:

“Q. MS. CHUFO [Defense Counsel]: Besides him touching your boobs and your vagina on that first night, what else did he do on that first night?

A. I think that’s it. I don’t remember.

Q. That was it? When you were interviewed by those two men that came to your apartment, isn’t it true that you told them that he also put his fingers in your vagina that first night?

A. They were closed, yeah. Yeah.

Q. When you say they were closed—

A. Like this, like by the crack.

Q. Isn't it true that you said that his fingers went in a little bit?

A. No. That was like another night, he put his [penis] almost in my vagina—or he tried to, but I screamed.”

¶ 8 The State presented other witnesses, including the victim's mother, sister, an investigator with the Kane County Advocacy Center, and the victim's former neighbor. The victim's former neighbor testified that, when she was 16 years old, she and defendant had sexual intercourse while she was babysitting defendant's brother's children. The State tendered a certified copy of defendant's conviction for criminal sexual assault, which the trial court admitted into evidence.

¶ 9 Defendant called Hollida Wakefield, an expert witness in field psychology whose work focused on interviewing children regarding sexual abuse claims, evaluating sexual predators referred for civil commitment, and reviewing cases involving coerced confessions. Wakefield opined on the victim's first interview with investigators not being videotaped, and testified that it was impossible to ascertain whether the interview was suggestive. Defendant testified on his own behalf and denied the indictment's allegations.

¶ 10 Following closing arguments, the jury returned a guilty verdict with respect to each count. Thereafter, the trial court sentenced defendant to three terms of 25 years' imprisonment, to be served consecutively. We affirmed defendant's conviction and sentence on direct appeal.

¶ 11 On June 27, 2011, defendant filed a postconviction petition pursuant to the Act. Defendant's petition alleged that his trial counsel was ineffective for failing to obtain jail records showing how often the victim visited him in jail, which would have impeached trial testimony from the victim's

mother; the charges were brought after the statute of limitations had expired; appellate counsel failed to challenge the State's evidence against him on direct appeal; and the State improperly obtained his indictment by using intentionally misleading testimony.

¶ 12 On July 29, 2011, the trial court dismissed defendant's petition at the first stage of the proceedings. The trial court held that defendant had forfeited the arguments raised in his petition because "[n]one of the arguments raised by [defendant] were unknown, incapable or impossible to argue [by defendant] in all previous litigation or review of the conviction. None of the arguments raised by [defendant] in the [petition] were argued, alleged, or referred to by [defendant] in any of his appeals." After the trial court denied his motion to reconsider, defendant timely appealed.

¶ 13 II. Discussion

¶ 14 The only issue in this appeal is whether the trial court erred in summarily dismissing defendant's postconviction petition. Defendant contends that the trial court improperly dismissed his petition because his appellate counsel was ineffective for failing to argue that "there was no evidence of a digital intrusion" to support a conviction for count 2 of the indictment. In support of this contention, defendant argues that no testimony or other evidence established that defendant's finger intruded the victim's vagina, but instead, the victim testified that defendant only touched her vagina "by the crack." In response, the State argues that the trial court properly dismissed defendant's postconviction petition because defendant failed to notarize the affidavit that accompanied his petition. The State further argues that "the evidence adduced at trial was sufficient to sustain defendant's conviction" on count 2 of the indictment.

¶ 15 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). At the first stage, the petition's allegations, liberally construed and taken as true, need to present only "the gist of a constitutional

claim.” *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). With regard to this requirement, a defendant at the first stage need only present a limited amount of detail (*People v. Ligon*, 239 Ill. 2d 94, 104 (2010) (citing *People v. Hodges*, 234 Ill. 2d 1, 9 (2009))), and the defendant need not make legal arguments or cite to legal authority (*Ligon*, 239 Ill. 2d at 104 (citing *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996))). At the second stage, an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *Gaultney*, 174 Ill. 2d at 418. At the third stage, the trial court conducts an evidentiary hearing on the petition. *Id.* A defendant is not entitled to an evidentiary hearing on her or his petition as a matter of right. *People v. Lucas*, 203 Ill. 2d 410, 418 (2002). “Rather, a defendant is only entitled to an evidentiary hearing where the allegations contained in the petition, supported by the trial record and any accompanying affidavits, make a substantial showing of a constitutional violation.” *Id.* We review *de novo* the dismissal of a postconviction petition at the first stage. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 16 Guided by the above principles, we will address each argument in turn.

¶ 17 A. Unnotarized Verification

¶ 18 Citing *People v. Carr*, 407 Ill. App. 3d 513 (2011), the State first argues that the trial court properly dismissed defendant’s postconviction petition at the first stage because defendant failed to notarize the affidavit accompanying his petition. The State acknowledges our decision in *People v. Turner*, 2012 IL App (2d) 100819, where we determined that the State procedurally defaulted on the issue of an unnotarized affidavit by failing to raise that issue in its motion to dismiss at the second stage of the proceedings. *Id.* ¶ 42. The State argues that this court’s departure from *Carr* was improper and maintains that “the failure to notarize a petition is not a procedural matter that should be precluded from first-stage dismissal.”

¶ 19 We reject the State’s argument. Section 122-1(b) of the Act provides that “the proceeding shall be commenced by filing with the clerk of the court \*\*\* a petition \*\*\* verified by affidavit.” 725 ILCS 5/122-1(b) (West 2010). While we are cognizant that, as the State correctly notes, this court is split on the issue of whether failure to attach a verified affidavit to the postconviction petition provides a basis for dismissing the petition at the first stage, we need not resolve that conflict here. The record reflects that, although defendant’s verification was unnotarized, defendant attached a notarized affidavit attesting under oath that he told his appellate counsel to challenge the sufficiency of the evidence on direct appeal. Thus, unlike postconviction cases where the defendants failed to attach affidavits or attached only unsworn affidavits, defendant notarized an affidavit averring under oath the alleged constitutional violation at issue in this appeal. As a result, we conclude that the petition sufficiently verifies the allegation by the provisions in the Act.

¶ 20 B. Ineffective Assistance of Appellate Counsel

¶ 21 Defendant contends that he was denied the effective assistance of appellate counsel because his attorney on direct appeal failed to challenge the sufficiency of the evidence as to count 2 of the indictment. In support of this contention, defendant argues that no testimony or other evidence established that his finger intruded the victim’s vagina, but instead, the victim testified only that defendant touched her vagina “by the crack.” In response, the State argues that defendant forfeited this issue because, although this appeal bears a relationship to the overarching claim of ineffective assistance of counsel, “this specific allegation was not before the postconviction judge.” The State further asserts that the victim’s hand gesture that accompanied her testimony, which reflected that defendant touched the victim on the “crevice” or the “crack,” resolved any ambiguity in the victim’s testimony and “established an act of digital penetration.”

¶ 22 Initially, we reject the State’s argument that defendant has forfeited this issue. A *pro se* petition is not required to allege facts supporting all elements of a constitutional claim. *People v. Mars*, 2012 IL App (2d) 110695, ¶ 32. “Because a *pro se* defendant will likely be unaware of the precise legal basis for his claim, the threshold for survival is low, and a *pro se* defendant need allege only enough facts to make out a claim that is arguably constitutional for the purposes of invoking the Act.” *Id.* Thus, when a defendant acts *pro se*, courts should review the petition with a lenient eye, and borderline cases should be allowed to proceed. *People v. Hodges*, 234 Ill. 2d 1, 8 (2009). Here, while defendant’s petition did not specifically challenge his conviction on the statutory definition of “penetration,” his petition did allege that his “appellate” counsel was ineffective for failing to challenge the sufficiency of the evidence. At a minimum, defendant’s ineffective-assistance-of-appellate-counsel’s allegation represents a “borderline” question which, under a liberal construction, should be resolved in defendant’s favor. See *id.*

¶ 23 Turning to the merits, a defendant has a constitutional right to the effective assistance of counsel during the defendant’s appeal as of right. *People v. Robinson*, 217 Ill. 2d 43, 47 (2005) (citing *People v. Flores*, 153 Ill. 2d 264, 277 (1992)). However, appellate counsel is not required to argue every conceivable issue on direct appeal. *People v. Williams*, 209 Ill. 2d 227, 243 (2004). Rather, counsel must exercise professional judgment to select from the many potential claims of error that might be asserted on appeal. *Williams*, 209 Ill. 2d at 243 (citing *People v. Tenner*, 175 Ill. 2d 372, 387-88 (1997)). Therefore, we judge a claim that appellate counsel was ineffective for failing to argue a particular issue, not on the basis of what the defendant might have preferred, but under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Williams*, 209 Ill. 2d at 243. To succeed on this claim, defendant here must show both that appellate counsel’s failure to challenge the sufficiency of the State’s evidence as to count 2 of the indictment was objectively

unreasonable and that, absent this failure, his conviction or sentence would have been reversed on direct appeal. See *Williams*, 209 Ill. 2d at 243 (citing *People v. Richardson*, 189 Ill. 2d 401, 412 (2000)).

¶ 24 Section 12-14.1(a) of the Criminal Code provides that a person commits the offense of predatory criminal sexual assault of a child if he or she is over 17 years of age and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed. 720 ILCS 5/12-14.1 (West 2010). Section 12-12(f) of the Criminal Code defines “penetration” as “any intrusion, however slight, of any part of the body of one person \*\*\* into the sex organ of another person.” 720 ILCS 5/12-12(f) (West 2010)); *People v. Lara*, 2012 IL 112370, ¶ 54. This definition “reflects a broad concept of ‘sexual penetration’ ” and “defines two broad categories of conduct.” *People v. Maggette*, 195 Ill. 2d 336, 346-47 (2001). The first category, referred to as the contact clause, includes any *contact* between the sex organ or anus of one person by an object, the sex organ, mouth, or anus of another person. (Emphasis in original.) *Id.* at 347. The second category, known as the intrusion clause, includes any *intrusion* of any part of the body of one person or animal or object into the sex organ or anus of another person. (Emphasis in original.) *Id.* Our supreme court has determined that the word “object” in the contact clause does not include parts of the body, and therefore, with respect to count 2, defendant’s finger cannot constitute an “object” that came into contact with the victim’s vagina. See *id.* at 350.

¶ 25 The State refers us to *People v. Bell*, 234 Ill. App. 3d 631 (1992), for the proposition that an act of penetration may be inferred based on testimony that the defendant “rubbed,” “felt,” or “handled” the victim’s vagina. In *Bell*, the State charged the defendant with committing two counts of aggravated criminal sexual assault and two counts of aggravated criminal sexual abuse against his nieces, aged 9 and 12, at the time of the offenses. *Id.* at 632. During trial, one niece, D.W., testified

that, at the defendant's request, she pulled her pants down and bent over. *Id.* at 632. The defendant touched the victim's vagina with his finger. *Id.* at 633. On cross-examination, D.W. testified that the defendant "handled" her vagina and that the defendant "put his finger—he was rubbing my vagina." *Id.* The other niece, E.W., testified that the defendant "rubbed" her vagina with his finger. *Id.* The assistant State's Attorney further questioned E.W., asking "did he rub you or put his finger in you? What exactly did he do?" E.W. responded, "[r]ubbed it." *Id.* On cross-examination, defense counsel asked E.W. if the defendant put his hands on her private parts, and E.W. answered, "Yeah, he rubbed it." *Id.* at 634. The jury convicted the defendant of two counts of aggravated criminal sexual assault. *Id.* at 632.

¶26 On appeal, the defendant challenged the sufficiency of the State's evidence, arguing that there was insufficient evidence of penetration of either D.W. or E.W. *Id.* at 635. The reviewing court concluded that there was "ample" evidence to establish that the defendant sexually penetrated D.W. *Id.* at 636. The reviewing court noted D.W.'s testimony that the defendant "handled" and "rubbed" her vagina, along with statements that D.W. made to a police officer and DCFS investigator that the defendant "pulled her privates apart" and that defendant "pulled her privates apart and ran his finger up inside her privates." *Id.*

¶27 With respect to E.W., however, the reviewing court concluded that there was "substantially less" evidence of penetration. *Id.* The reviewing court noted that E.W. testified that the defendant rubbed her privates with his finger and that a police officer testified that E.W. told him that the defendant "felt her privates." *Id.* at 636. The reviewing court opined, "If these statements were the only evidence in the record concerning penetration, we would deem them sufficient to affirm the defendant's conviction \*\*\* ." *Id.* The reviewing court emphasized that the assistant State's Attorney asked E.W. whether the defendant rub her or put his finger in her, and E.W. responded

“[r]ubbed it.” *Id.* at 636-37. Thus, the reviewing court concluded that, while the jury was entitled to draw inferences, those inferences must be reasonable. *Id.* at 637. The reviewing court further concluded:

“Although under other circumstances a jury might reasonably infer that an act of penetration occurred based on the testimony that defendant rubbed and felt E.W.’s privates, such an inference is not reasonable where E.W.’s answer to the specific question of whether any penetration took place was implicitly negative. We hold, therefore, that there was insufficient evidence of penetration of E.W. and [the] defendant was not proved guilty beyond a reasonable doubt of aggravated criminal sexual assault upon E.W.” *Id.*

¶ 28 We find *Bell* instructive and, in this case, conclude that defendant’s allegation presents the “gist of a constitutional claim” in that the State failed to prove that defendant committed an act of sexual penetration against the victim by placing his finger into her vagina. The victim testified on direct examination that defendant touched her vagina “by the crack.” She accompanied this testimony with a hand gesture indicating that defendant touched her where the “crevice” or the “crack” would be. However, during cross-examination, defense counsel asked the victim “[i]sn’t it true that you said that [the defendant’s] finger went in a little bit?” The victim responded “No. That was like another night, he put his [penis] almost in my vagina—or he tried to, but I screamed.” Like *Bell*, while we recognize that a jury may reasonably infer penetration, such an inference is not reasonable when the victim’s answer to a specific question regarding penetration was implicitly negative. *See id.* at 637. Here, the victim’s answer to defense counsel’s question was implicitly negative in that, although defendant touched her “by the crack” of her vagina, the victim testified that defendant did not penetrate her vagina with his finger.

¶ 29 We find further support for our determination that defendant has sufficiently alleged the gist of a constitutional claim in *Maggette*, *People v. Garrett*, 281 Ill. App. 3d 535 (1996), and *People v. Lofton*, 303 Ill. App. 3d 501 (1999). In *Maggette*, the victim testified that the defendant “got underneath my panties—and I felt underneath my panties and *in my vagina area* \*\*\*.” (Emphasis in original.) *Maggette*, 195 Ill. 2d at 352. Our supreme court concluded that the victim’s “brief and vague reference to her vaginal area” was not sufficient to prove an “intrusion.” *Id.* In *Garrett*, the reviewing court reversed a criminal sexual assault conviction of penetrating an anus where the only evidence the State presented was that the defendant placed his finger *on* the victim’s anus. (Emphasis added.) *Garrett*, 281 Ill. App. 3d at 545. Likewise, in *Lofton*, the reviewing court held that the State failed to allege facts sufficient for a predatory-criminal-sexual-assault-of-a-child charge because the charging instrument only alleged that the defendant placed his finger “on the vagina [of the victim].” *Lofton*, 303 Ill. App. 3d at 507.

¶ 30 In light of the foregoing, we conclude that defendant has presented the gist of a constitutional claim that he was denied the effective assistance of appellate counsel. Accordingly, while we express no opinion as to whether defendant’s ineffective-assistance-of-counsel claim will ultimately prevail, we reverse the trial court’s summary dismissal of defendant’s petition. Therefore, the cause is remanded and the matter is advanced to the second stage. See *Hodges*, 234 Ill. 2d at 22-23.

¶ 31 III. Conclusion

¶ 32 For the reasons set forth above, we reverse the trial court’s summary dismissal of defendant’s postconviction petition and remand for further proceedings consistent with this order.

¶ 33 Reversed and remanded.