NOTICE
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2013 IL App (4th) 120237-U

NO. 4-12-0237

FILED
July 30, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
MAURICE D. JAKE,	)	No. 09CF356
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in summarily dismissing defendant's *pro se* postconviction petition.

¶ 2 On February 13, 2012, defendant, Maurice D. Jake, filed a *pro se* postconviction petition, alleging, in part, his trial counsel and appellate counsel provided him ineffective assistance. On February 24, 2012, the trial court summarily dismissed defendant's petition. Defendant appeals, arguing his postconviction petition should not have been summarily dismissed because it presented an arguable claim his trial counsel provided him ineffective assistance by allowing the jury to see photographic evidence which should have been excluded pursuant to the trial court's ruling on defendant's motion *in limine*. In addition, defendant argues his appellate counsel was ineffective for failing to raise this issue in his direct appeal. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Because defendant's appeal focuses on only a portion of his postconviction petition, we need only address the facts pertinent thereto. In February 2009, the State charged defendant by information with aggravated domestic battery (720 ILCS 5/12–3.3(a) (West 2008)) and aggravated battery (720 ILCS 5/12–4 (b)(8) (West 2008)). According to the charges, defendant punched Chasity Barefield on or about February 23, 2009.

¶ 5 On July 1, 2009, defendant filed a motion *in limine* to exclude evidence of defendant's prior bad acts. The motion specified the following:

> "2. The discovery tendered in the case and the Order of Protection file indicates that Ms. Chasity Barefield alleges that [defendant] was abusive to her since September or October of 2008. She details different incidents and allegations that are not charged in this case, that if presented to the Jury would be extremely prejudicial."

Before defendant's trial, the trial court heard arguments on this motion.

¶ 6 The State argued the nature of the relationship between defendant and Barefield was relevant and probative for the jury to hear. The State noted defendant provided the police with contradictory stories regarding Barefield's injuries after his arrest. Defendant first told the police he did not know how she sustained her numerous injuries. He later told the police she fell down some stairs a week earlier. According to the State's argument, "the nature of the relationship between [defendant and Barefield] goes to motive, it goes to intent, it goes to—it certainly goes to discredit his suggestion that he doesn't know what happened to her or this

suggestion that she fell down the stairs."

¶ 7 Defense counsel argued the order of protection file showed Barefield indicated her relationship with defendant had been abusive since September or perhaps October 2008. Barefield had also detailed incidents allegedly occurring in December 2008 and January 2009. According to defense counsel, Barefield could testify to the general nature of the relationship but the State should not be allowed to introduce evidence regarding Barefield's prior allegations of abuse for which the State did not charge him. Defense counsel argued she did not intend to open the door for the State with regard to these prior allegations and wanted the jury to focus on the events alleged to have occurred on February 23, 2009.

¶ 8 After the trial court noted section 115-7.4 of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/115-7.4 (West 2008)) controls the admissibility of evidence of a defendant's commission of prior domestic violence offenses in a trial for an alleged domestic violence offense, defense counsel argued:

> "Your Honor, the allegations from February 23 are very specific as to her being in the car and him being next to her and—and hurting her while she was driving. There's no allegation that I've read from anything she's written or that the police reports have said that that same thing had happened in some other car at some other time or on some other date so factually her other allegations are dissimilar."

The court ruled as follows:

> "[TRIAL COURT]: Mr. Harris, I'm going to allow you to

> explore with the victim the nature of the relationship, but I'm going to sustain Ms. Monroe's objection as to any particular incidents of violence. She can say it has been a violent relationship. We've had—you know, however she wants to describe it; but I'm going to grant her motion as to specific prior bad acts, incidents of violence involving this defendant and that victim.
>
> [THE STATE]: Judge, just so I'm clear as to how I admonish her before I bring her in here my intention would be to ask her about the general nature, has he been physically abusive towards you in the past, has he struck you in the past.
>
> [TRIAL COURT]: Yes. That's—that's fine, but I'm not going—you're not going to get any more particular than that."

During defendant's trial, the State introduced seven photographs of Barefield taken at the hospital on February 26, 2009. The photographs showed injuries to plaintiff's right eye, right arm, legs, chest, and right hand.

¶ 9 Barefield testified defendant struck her on occasion during their relationship. On February 23, 2009, she left Wal-Mart after her shift ended and got into a vehicle with defendant. Defendant accused her of lying to him and being unfaithful. Defendant then hit her in the arm before they left the Wal-Mart parking lot and continued to hit her while she drove from Champaign to Paris, Illinois.

¶ 10 Barefield did not specify defendant only hit her on the arm. She testified he punched her arm, her hands, her legs, and her body. With regard to the injuries shown in the

seven photographs, Barefield testified defendant caused those injuries. She specifically testified the injuries to her arm and hand shown in People's exhibit Nos. 3 and 7 were inflicted by defendant on the drive from Champaign to Paris. On cross-examination, Barefield testified defendant did not give her the black eye on February 23.

¶ 11 Officer Jim Bednarz of the Champaign police department testified he took the photographs of Barefield at the hospital on February 26, 2009. Barefield told him her injuries were inflicted by defendant after she left work and was driving back to Paris from Champaign on February 23, 2009. Barefield showed him text messages she received from defendant on February 23, 2009, which stated defendant was going to beat her every 10 minutes. The photographs of Barefield and two text messages on her cell phone were admitted into evidence without objection by defense counsel.

¶ 12 Defendant chose not to testify in his own defense.

¶ 13 The jury found defendant guilty of both aggravated domestic battery and aggravated battery. In August 2009, the trial court sentenced defendant as a Class X offender pursuant to section 5–5–3(c) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5–5–3(c) (West 2008)) to 25 years' imprisonment for aggravated domestic battery with 168 days' sentence credit.

¶ 14 Defendant filed a direct appeal but did not raise this issue nor did he challenge his conviction, but only raised issues regarding his sentence. This court dismissed the appeal in part, affirmed in part as modified, and remanded the case with directions. *People v. Jake*, 2011 IL App (4th) 090779, ¶¶ 1-2, 960 N.E.2d 45.

¶ 15 On February 13, 2012, defendant filed a *pro se* postconviction petition, which

included claims his trial and appellate counsel were ineffective for failing to object to the introduction of evidence of other crimes. On February 24, 2012, the trial court summarily dismissed defendant's petition, finding the petition frivolous and patently without merit. With regard to the issues in this appeal, the court stated:

> "The Defendant claims that proof of other crimes was presented to the jury. It is assumed that he means other instances of violence perpetrated by the Defendant against this victim. 725 ILCS 5/115-7.4 [(West 2008)] allows evidence of the [defendant's] commission of other offenses of domestic violence.
>
> Finally, the Defendant claims ineffective assistance of counsel. First and foremost, Defendant's trial counsel vigorously and appropriately defended his case. Secondly, even if counsel's performance was deficient, there is no prejudice based on the overwhelming evidence of defendant's guilt."

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Defendant argues the trial court erred in summarily dismissing his postconviction petition at the first stage of postconviction proceedings. He contends his petition presented an arguable claim of ineffective assistance because defense counsel allowed the jury to see photographs of Barefield's injuries which were not connected with the charges. According to defendant, these photographs of prior injuries violated the court's ruling on defendant's motion *in limine*. We review the first stage dismissal of a postconviction petition *de novo*. *People v.*

Hodges, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009).

¶ 19 For counsel's performance to be constitutionally ineffective it must be both objectively unreasonable and so prejudicial a reasonable probability exists the result of the proceeding would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The same test applies to both trial and appellate lawyers. *People v. Johnson*, 183 Ill. 2d 176, 187, 700 N.E.2d 996, 1002 (1998). A strong presumption exists an attorney's performance fell within the wide range of reasonable professional assistance. *Johnson*, 183 Ill. 2d at 188, 700 N.E.2d at 1002.

¶ 20 At the first stage of postconviction proceedings, a *pro se* defendant must only allege enough facts to make out a claim that is arguably constitutional for purposes of the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 7 (West 2010)). *Hodges*, 234 Ill. 2d at 9, 912 N.E.2d at 1208. A *pro se* postconviction petition "may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12, 912 N.E.2d at 1209.

> "A petition which lacks an arguable basis either in law or fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. [Citation.] Fanciful factual allegations include those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

As a result, to affirm the trial court's summary dismissal, we must determine it is not arguable (1)

trial and appellate counsel's performance fell below an objective standard of reasonableness or (2) that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212. In his initial brief to this court, defendant argues his *pro se* postconviction petition presented an arguable claim of ineffective assistance of trial counsel because counsel did not object to the introduction of evidence of specific acts of prior abuse by defendant on Barefield and ineffective assistance of appellate counsel because the issue was not raised on direct appeal.

¶ 21 According to defendant, Barefield's injuries to parts of her body other than her arm had nothing to do with the charged offense, and trial counsel should have objected to evidence of those injuries. Defendant points to the fact Barefield testified she was struck on the arm by defendant as she drove home from Wal-Mart. Further, defendant argues the bruises on Barefield's arm looked more recent than the other injuries. As a result, according to defendant, because the non-arm injuries did not occur on February 23, 2009, evidence of the older injuries was excluded pursuant to the trial court's ruling on defendant's motion *in limine*.

¶ 22 Defendant argues he was prejudiced by his trial counsel's failure to object to the introduction of the photographs showing these other injuries because the jury was more likely to find "great bodily harm" after seeing those other injuries. In his brief, defendant states:

> "While Barefield's arm sustained bruising, as is well known, some people bruise rather easily and though bruises are unsightly, they disappear within a short time. Although Barefield did testify about numbness, the record does not show that she was prescribed medication or that her mobility was impaired by the injuries to her arm. Whether a fact finder will consider mere

> bruising to be great bodily harm is an open question and depends on the magnitude of the bruising. Under those circumstances, it behooved trial counsel to narrow the focus of the jury as much as possible so that the jury did not aggregate uncharged conduct with charged conduct to make out great bodily harm, or to prevent the jury from considering that the petitioner was guilty of more serious conduct merely because they thought that the defendant deserved punishment."

According to defendant, whether Barefield's injuries constituted great bodily harm or simple bodily harm was significant because without the finding of great bodily harm defendant could not have been convicted of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2008)) and sentenced as a Class X offender (720 ILCS 5/12-3.3(b) (West 2008)). According to defendant, "Without a finding of great bodily harm, the court would have been confined to sentencing the petitioner only on the verdict for aggravated battery [(citation)], a Class 3 felony offense," which carries a maximum term of 5 years imprisonment or 10 years if an extended term was imposed. See 720 ILCS 5/12-4(b)(8), (e)(1) (West 2008); 730 ILCS 5/5-8-1(a)(6), 5-8-2(a)(5) (West 2008).

¶ 23 We note the charges in this case did not specify defendant struck Barefield in the arm. Instead, the charges only stated defendant punched Barefield. In addition, all of the photographs admitted into evidence were taken on February 26, 2009, three days after the charged offense. The State was not attempting to introduce photographs of Barefield taken prior to February 23, 2009.

¶ 24 The trial court did not err in summarily dismissing defendant's *pro se*

postconviction petition because it is not arguable he was prejudiced by his trial counsel's failure to object to the introduction of photographs of Barefield's non-arm injuries. First, from the record before this court, it does not appear the State violated the trial court's order barring certain evidence. The State did not get into specifics as to the injuries to defendant's legs, face, and chest other than asking if defendant caused the injuries. The trial court ruled the State could question Barefield about the history of violence in her relationship with defendant. The trial court's order simply barred the State from introducing evidence "as to specific prior bad acts, incidents of violence involving this defendant and that victim." From the record, it appears the focus of defendant's motion *in limine* was not evidence of the injuries visible on defendant in the photographs taken on February 26, 2009, but the alleged abuse Barefield said occurred between September 2008 and January 2009 as noted in the order of protection file. Second, the photographs were admissible pursuant to section 115-7.4 of the Criminal Procedure Code (725 ILCS 5/115-7.4 (West 2008)). As a result, it appears defense counsel, who filed the motion *in limine*, did not object because the State's questions did not call for information which she believed would violate the court's order.

¶ 25 Finally, even assuming, *arguendo*, his counsel's performance was unreasonable, an argument cannot be made the unreasonable performance prejudiced defendant. Barefield's testimony defendant repeatedly punched her very hard in the arm on the drive from Champaign to Paris, the pictures of the numerous dark bruises covering nearly half of Barefield's right arm, and the photographs of the text messages from defendant to Barefield on February 23, 2009, which read he was going to beat Barefield "Every fuckin 10 minutges [*sic*] like i told u" overwhelmingly established defendant caused Barefield great bodily harm. Further, Barefield's

other injuries seen in the photographs were insignificant compared to the injuries to her arm and hand.

¶ 26 In his reply brief, defendant argues his trial counsel was also ineffective for failing to object to the photographs being sent to the jury room. He also contends the trial court's summary of the claims defendant raised in his *pro se* postconviction petition do not accurately reflect the extent of defendant's contentions of error. However, defendant forfeited these arguments by not including them in his initial brief to this court in this appeal. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). However, regardless of forfeiture, these claims fail for the same reasons given above.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the trial court's summary dismissal of defendant's *pro se* postconviction petition. We grant the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 29 Affirmed.