

No. 1-12-0797

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).

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.)	No. 99 CR 19293
)	
MELVIN SIMS,)	Honorable
)	Maura Slattery Boyle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 **Held:** Where counsel provided defendant effective assistance at trial and on appeal, we affirm the circuit court’s dismissal of his post-conviction petition without an evidentiary hearing.

¶ 2 Defendant Melvin Sims appeals from the circuit court order granting the State's motion to dismiss his petition filed under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). On appeal, defendant contends that his petition substantially showed that he was denied effective assistance of trial and appellate counsel where his counsel failed to object to the admission of a photograph taken of him smiling following a statement he made to police. We

affirm.

¶ 3 Following a 2002 jury trial, defendant was convicted of the heinous battery of his girlfriend's two-year-old daughter, J.C, as well as aggravated battery of a child, which merged into the heinous battery conviction. The convictions arose from an incident on August 8, 1999, where defendant burned J.C.'s hands with hot water, causing her bodily harm that resulted in permanent disfigurement. He was sentenced to 27 years' imprisonment. This court discussed the evidence presented at trial at length in an order on defendant's direct appeal (*People v. Sims*, No. 1-02-1522 (2003) (unpublished order under Supreme Court Rule 23)), and we will only discuss the facts necessary for the disposition of defendant's current post-conviction petition.

¶ 4 J.C. arrived at the emergency room on August 8, 1999, with third-degree burns to her entire left hand, and a mixture of second and third-degree burns to her right hand. These burns resulted from the immersion of her hands into scalding hot water. While treating J.C. for her burns, doctors found evidence of trauma to her anus and vagina.

¶ 5 The question at defendant's trial was whether J.C.'s injuries resulted by accident, or through the knowing conduct of defendant. The State presented the testimony of Chicago police youth investigators Terrazas and Roman; Assistant State's Attorney (ASA) Thomas Key; K.C., J.C.'s mother; Jy.C., J.C.'s brother; one of J.C.'s neighbors; and a pediatrician/child abuse specialist. The State's witnesses' testimony supported the evidence that defendant beat J.C. to punish her for urinating on herself, and forced her hands under hot water to punish her for defecating on herself.

¶ 6 In particular, ASA Key wrote a summary of the statement defendant gave him and Investigator Terrazas after being given *Miranda* warnings, which was introduced into evidence and published to the jury at defendant's trial. In the summary, defendant stated that he spanked and beat J.C. as hard as he could. While punching her vaginal area, he explained that his finger

would sometimes slip insider her vagina. He stopped hitting her when he noticed blood coming from her anus. Defendant also noticed blood flowing from her vagina. Regarding the scalding of J.C.'s hands, the summary indicated that defendant allowed the water to run 10 to 15 seconds to get hot before putting her hands into it, and that the water was so hot that he could not bear contact with it for more than a second. After defendant allowed J.C. to remove her hands from the water, the flesh from the back of her hands fell off "like wax off a lit candle." Key noted that defendant was allowed to make corrections to the statement as necessary, with Key, Terrazas, and defendant initialing the changes. Additionally, all three men signed each page of the summary. Key then took a photo of defendant, in which he displayed a grin. The photo was entered into evidence.

¶ 7 Defendant testified at trial, claiming that ASA Key fabricated the incriminating information in the statement summary, and insisting that the anal and vaginal injuries resulted from J.C.'s falling from her bunk bed. He also testified that her hand injuries were unforeseen because his hands were in the same water and it did not feel especially hot to him.

¶ 8 Following closing arguments, the jury found defendant guilty of heinous battery and aggravated battery of a child, which merged into the heinous battery conviction. We affirmed that judgment on appeal over defendant's contentions that his constitutional rights were violated when the trial court refused to instruct the jury on the legal definition of "knowledge," and that his sentence was excessive. *Sims*, No. 1-02-1522, order at 16-17, 21. We specifically found that defendant's testimony was "shifting, contradictory, and implausible," and that the "evidence at trial was not close." *Id.* at 14.

¶ 9 On September 23, 2010, defendant filed a *pro se* post-conviction petition. The circuit court appointed defendant counsel who filed a supplemental petition on defendant's behalf on March 16, 2011. The supplemental petition alleged, in pertinent part, that defendant's trial

counsel was ineffective for failing to object to the admission of a photo depicting him smiling after making a statement to police, and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on that basis. In support of his supplemental petition, defendant attached an affidavit in which he attested that ASA Key told him to stand up and smile for the camera, and that his counsel never discussed the admission of the photo with him. The State notes that it presented the photograph to demonstrate that, contrary to defendant's contentions, that his contemporaneous confession was reliable and trustworthy.

¶ 10 The State filed a motion to dismiss defendant's petition, and defendant, through his attorney, filed a response. The circuit court granted the State's motion to dismiss, finding that trial counsel was not ineffective for not objecting to the admission of the photo. The court further held that defendant failed to show that, even if counsel had objected to the admission of the photo and it had been excluded, that he would have prevailed at trial. In addition, the court noted that the evidence against defendant was overwhelming.

¶ 11 On appeal, defendant asserts that trial counsel was ineffective because he failed to object to the admission of the photograph taken of him after giving a statement to police and ASA Key. He specifically maintains that, in light of the horrific nature of the charges, the photo, which depicted him smiling, prejudiced him where it made him appear immoral to the jury, and where there was no relevant purpose for its admission into evidence. He also contends that his appellate counsel was ineffective for failing to raise this claim on direct appeal.

¶ 12 The dismissal of a post-conviction petition is warranted at the second stage of proceedings only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). We review the court's dismissal of a post-conviction petition without an evidentiary hearing *de novo*. *Id.* at 389.

¶ 13 In order to establish ineffective assistance of counsel, defendant must allege facts which demonstrate that counsel's representation fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *People v. Enis*, 194 Ill. 2d 361, 376 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Enis*, 194 Ill. 2d at 377, citing *Strickland*, 466 U.S. at 697. "If it is easier, a court may proceed directly to the second prong of *Strickland* and dismiss an ineffective assistance claim on the ground that it lacks sufficient prejudice, without first determining whether counsel's performance was deficient." *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 70. Prejudice is demonstrated where the defendant shows a reasonable probability that, absent counsel's alleged error, the trial's outcome would have been different. *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 14 Here, defendant cannot establish that there is a reasonable probability that the outcome of his trial would have been different if the photo of him smiling had never been admitted into evidence. As this court found on appeal, "[t]he evidence at trial was not close" where "defendant's shifting, contradictory, and implausible testimony could not reasonably lessen the effect of the State's evidence." *Sims*, No. 1-02-1522, order at 14. In particular, the State's evidence revealed that defendant confessed to beating J.C. and using scalding hot water to burn her hands. Defendant's confession was corroborated by the testimony of Investigators Terrazas and Roman, who stated that defendant told them he submerged J.C.'s hands in hot water to punish her for defecating on herself, as well as ASA Key, who wrote the summary of defendant's statement. In addition, J.C.'s seven-year-old brother, Jy.C., told the jury he watched defendant beat his sister, and heard running water and screaming. Furthermore, Dr. Glick explained that in her professional opinion J.C.'s wounds were inflicted and not accidental, and discounted the idea of J.C.'s vaginal and anal injuries resulting from a straddle fall on a bedpost, as opposed to a

single point of impact.

¶ 15 Despite this evidence, defendant maintains that he was prejudiced by the admission of the smiling photo because the dispute at trial involved his mental state at the time J.C. was injured, and the photo, taken after he made his statement to police, depicted him as “uncaring, heartless, and in all probability sadistic.” In so arguing, defendant relies on *People v. Kannapes*, 208 Ill. App. 3d 400 (1990), where the trial court admitted, over defense counsel’s objection, a photo depicting the defendant wearing a t-shirt that read “Enjoy Cocaine,” which was seized from the defendant’s automobile following his arrest. After the State in its closing argument explicitly advised the jury that the words “Enjoy Cocaine” on the defendant’s shirt were circumstantial evidence that the defendant was a cocaine dealer, he was convicted of delivery of a controlled substance (cocaine). In reversing his conviction, this court held that the prejudicial effect of the photo far outweighed whatever probative value it may have had on the question of the defendant’s moral character, particularly where the State highlighted the significance of the shirt during closing arguments. *Id.* at 406-07. In addition, the court emphasized that the evidence against the defendant was not overwhelming, but in “sharp conflict.” *Id.* at 406. Here, however, defendant’s photo was taken immediately after he made incriminating statements to police and ASA Key, and thus corroborated Key’s identification of him. See *People v. Loferski*, 235 Ill. App. 3d 675, 684-85 (1992) (distinguishing *Kannapes* and finding a photo taken of the defendant on the night of his arrest relevant to show his identity and corroborate an agent’s identification of him). Furthermore, unlike in *Kannapes*, the evidence against defendant in this case was not closely balanced, but overwhelming.

¶ 16 We note that defendant improperly cites to the unpublished decision in *People v. Strawbridge*, 2012 IL App (2d) 110597-U (held that the admission of the contested photo made no difference given the volume of evidence against defendant). Defendant acknowledges that it

has no precedential value but characterizes it as an “informative ruling.” See Ill. S. Ct. R. 23(e) (eff. July 1, 2011) (an unpublished order of the court “is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case”). We will not consider the *Strawbridge* order and the portion of defendant’s brief addressing it is hereby stricken.

¶ 17 Defendant finally alleges that appellate counsel was ineffective on direct appeal. Because we have determined that defendant’s underlying claim is without merit, appellate counsel cannot be found to be ineffective for failing to raise a nonmeritorious issue. *People v. Johnson*, 183 Ill. 2d 176, 187 (1998).

¶ 18 For these reasons, we affirm the judgment of the circuit court.

¶ 19 Affirmed.