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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. 10-DV-1201
)	
MICHAEL MOLINA,)	Honorable
)	Elizabeth W. Sexton,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The trial court's ruling, that defendant failed to make a substantial showing of ineffective assistance of counsel, was not manifestly erroneous. Therefore, we affirmed its denial of defendant's postconviction petition.

¶ 2 Following a bench trial, defendant, Michael Molina, was convicted of battery (720 ILCS 5/12-3 (West 2010)) and domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010)) and sentenced on the latter conviction to 12 months' conditional discharge. Defendant filed a posttrial motion that was subsequently treated similar to a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Defendant argued, among other things, that his trial

counsel was ineffective. The trial court denied the petition after an evidentiary hearing. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Defendant was initially charged by complaint with misdemeanor domestic battery on July 28, 2010. The complaint alleged that on June 10, 2010, he knowingly made physical contact of an insulting nature with minor N.M., a household member, in that he slapped her about the body. On March 16, 2011, defendant was charged by information with battery for the same incident. The information alleged that he made physical contact of an insulting or provoking nature with N.M. in that he slapped her on the buttocks with his hand. Also on March 16, 2011, defendant waived his right to a jury trial, and a bench trial commenced.

¶ 5 The assistant state's attorney began by stating that N.M., the complaining witness, was 16, and he requested that the courtroom be closed. The trial court stated that it was "not a problem," and defense counsel stated that he had no objection and that was "fine."

¶ 6 N.M. testified as follows. She was 16 years old and currently living with her father. Her parents were separated and in the process of getting a divorce. In June 2010, N.M. was living with her mother, Gaby,¹ in the house of N.M.'s Aunt Carmen,² who was Gaby's sister. Carmen's husband, defendant, also lived there, as did their three children, Barbara (age 20), Daniella (age 8), and Jessica (age 6). N.M.'s sister, Gabriela, who was 21, was living with her boyfriend, and N.M.'s brother, Jose, was living with their father. N.M. and Gaby had previously been living in a townhouse, but N.M. and Gaby moved into defendant's house for financial

¹ The name is also spelled "Gabby" in parts of the record.

² Carmen Molina is also referred to as Claudia Molina in the record.

reasons and so that Gaby would “feel more comfortable.” They shared a room in the basement of defendant’s house.

¶ 7 On Thursday, June 10, 2010, N.M. was 15 years old and had been living at the house for a couple of weeks. She returned from volleyball practice and went to the second floor of the house, where the bathroom was located, to take a shower, at about 8:30 p.m. Everyone was home at the time except for Gaby. N.M. was wearing Spandex and a t-shirt and holding a towel, extra clothes, and shower supplies. Barbara was in the shower, so N.M. waited in Barbara’s room for her to come out. Defendant and Carmen were in the master bedroom. When Barbara exited the bathroom, N.M. started walking towards the bathroom. On her way there, defendant came out of the master bedroom and “smacked” the right side of N.M.’s butt relatively hard with an open hand. He looked at her, smiled, and said, “that’s your welcome to the family.” N.M. said, “[O]w, that hurt.” N.M. felt confused “and kind of really, really uncomfortable.” N.M. went into the bathroom and noticed a red mark when she took her clothes off. She took a shower and tried to forget what had happened. Afterwards, she went downstairs and laid down on her bed. N.M. felt confused, uncomfortable, and scared. N.M. did not tell Gaby what happened when Gaby came home later that night because N.M. did not feel comfortable talking to her; defendant had taken Gaby in when she was at her “weakest point,” so N.M. thought she should not say anything.

¶ 8 Over the next few days, N.M. begged Gaby to leave the house because N.M. was not comfortable anymore. However, she did not tell her why she wanted to leave. On Sunday, June 13, 2010, N.M. went with defendant and his family and some neighbors to a drive-in theater; Gaby did not come. “Everybody” went to the bathroom, and N.M. and defendant stayed in the back of the truck. N.M. was laying on her stomach, looking at her phone. Defendant sat next to

her and put her arm over her, leaning in closer and closer to see what was on the phone. This made N.M. very uncomfortable, and she sat up. People started coming back, and they continued to watch the movie.

¶ 9 The next day, on June 14, 2010, N.M. went to volleyball practice. Afterwards, she had a conversation with Gaby, Gabriela, and Jose. Gaby made a comment that N.M. would not be safe if she lived with her dad, so N.M. said that it was not really safe where she was currently living, and she told them about the slap. Gaby did not believe N.M. and went to call Carmen. N.M. drove around with her siblings and eventually went to the police station. She gave a written statement, and the next day she returned to give a recorded statement.

¶ 10 On cross-examination, N.M. agreed that Carmen witnessed the slap. N.M. agreed that she could have talked to Gaby or contacted her father, siblings, or the police about the slap right away but did not. She agreed that on Saturday, June 12, there was a family barbecue at the house with 15 to 20 people, but she did not tell anyone, nor did she tell anyone at the drive-in the next day.

¶ 11 When N.M. discussed the incident with Gaby and her siblings, N.M. had first brought up moving out of the house and in with her dad. Her siblings also confronted Gaby about the fact that Gaby had been on a date the prior night. N.M. was present when Jose called Carmen that day. N.M. did not remember Jose threatening Carmen about the incident because N.M. was crying in the back seat. N.M. also did not remember if Jose described the incident to Carmen.

¶ 12 On re-direct examination, N.M. testified that she did not shower for three days after the incident because she was scared to go upstairs. Before the incident, N.M. was not really close to either her mother or her father. She had wanted to live with Gaby, but just not at defendant's house. She had "just never really felt comfortable there"; she had always felt "weird" there.

After the incident, N.M. wanted to live with her father because Gaby did not believe her and because Gaby was still staying in defendant's house. N.M. was not close to her cousins or anyone she went to the drive-in with. N.M. had a lot of conversations with Gaby about whether or not N.M. should testify in the case, with the most recent conversation taking place 10 minutes before trial.

¶ 13 On re-cross examination, N.M. agreed that Gaby was not currently living in defendant's house.

¶ 14 The State played portions of a videotape of defendant's statements at the police station, after which it rested. The defense moved for a directed finding, which the trial court denied. Carmen Molina, defendant's wife, then provided the following testimony. When N.M. came upstairs to take a shower on the day in question, Carmen was upstairs straightening out Barbara's room and the hallway. N.M. waited for Barbara to finish in the bathroom. When Barbara was coming out of the bathroom, defendant was coming out of the master bedroom. As he walked by N.M., he "tapped" N.M. and kept walking. Carmen did not think that this action was unusual. N.M. said something like "ay" and, "[W]hat was that for[?]" Defendant kept walking and replied something like, "[W]elcome to the family."

¶ 15 Carmen continued to interact with N.M. that day and for the next few days, and N.M.'s demeanor did not change. On Saturday, June 12, 2010, they had about 30 people over for Daniella's birthday. N.M. came home after volleyball practice, showered, and came outside where everyone was sitting. The next day, N.M. and the family went with others to the drive-in; there were about 13 people total. Carmen did not go to the bathroom the entire time she was at the drive-in. There was never a moment when N.M. was alone with defendant at the drive-in, and there was never a time when defendant got in the truck bed.

¶ 16 On June 14, 2010, Jose called Carmen, and they talked for a few minutes about the incident. The way Jose described the incident was different from what Carmen had witnessed. Carmen felt terrified after the call because Jose had threatened her. N.M. moved out of the house that day.

¶ 17 Barbara San-Roman, defendant's stepdaughter, testified as follows. When she came out of the bathroom, N.M. was waiting to go in. Defendant "tapped" N.M. and continued on. Barbara did not think that the action was unusual. She did not hear either of them say anything. Barbara interacted with N.M. both before and after the incident, and N.M.'s demeanor did not change. Barbara was at the drive-in with everyone else, and N.M. and defendant were never alone in the car.

¶ 18 In rebuttal, the State offered a stipulation that Carmen told Sergeant Trujillo that she heard defendant say welcome to the family, and that N.M. did not respond in words.

¶ 19 The trial court found defendant guilty of both counts, stating as follows:

"There is no doubt that *** defendant tapped or slapped or touched [N.M.] on her rear end, and while this family might find this joking or acceptable behavior, when I heard it, it was an OMG moment.

This is a 15-year[-]old girl. This isn't a sophisticated woman, who can come back to somebody who's doing this to her.

[N.M.] testified incredibly credible [*sic*]. If her reason for telling this story that she was insulted or provoked four days later [*sic*], so that she could go live with her father, that motive to fabricate or lie has been removed. She's been living with her father ever since, and she has testified here today against her mother's wishes.

I believe her version of the story. I believe she was confused and uncomfortable, and think back to when we were 15. Is this something you would even feel comfortable talking to a parent about, if you were close to a parent?

This is pretty mortifying, and I got that mortification from [N.M.], through her testimony, and based on that because she was living at the home and because *** defendant is a family member, an uncle, I will make a finding of guilty as to both Counts I and II.”

¶ 20 Defendant’s sentencing hearing took place on April 13, 2011. The trial court found that the battery conviction merged into the domestic violence conviction, and it sentenced defendant to 12 months’ conditional discharge.

¶ 21 On May 13, 2011, defendant filed a motion to vacate the judgment. He argued that: there was insufficient evidence to prove him guilty beyond a reasonable doubt; he was denied his right to due process and a fair trial when the State introduced evidence of other crimes, wrongs, or acts, specifically his conduct at the drive-in theater; and his constitutional rights were violated when the trial court closed the courtroom during N.M.’s testimony without first making necessary findings. Defendant further argued that his trial counsel was ineffective for: (1) failing to object to evidence regarding defendant’s alleged conduct at the drive-in theater; (2) advising defendant to waive his right to a jury trial; (3) failing to investigate the allegations related to defendant’s conduct at the theater and not interviewing people who were present there, including Paul Burns, Kim Burns, Cassie Burns, Caitlin Dittmer, “and her brother”; (4) failing to cross-examine N.M. about her lying to her brother about defendant’s conduct; (5) failing to subpoena witnesses from the drive-in theater to testify at the trial; (6) failing to impeach N.M.’s testimony about the drive-in by calling Burns as a witness; and (7) failing to introduce favorable

evidence, such as (a) the testimony of child protective investigator Tony Powell, who found N.M.'s complaint to be “ ‘unfounded,’ ” (b) evidence that N.M. lied to her brother about the incident, (c) the testimony of N.M.'s mother regarding N.M.'s character for lying, falsehoods, and dishonesty, and (d) the testimony of the witnesses present at the drive-in theater who would testify that defendant was never alone with N.M.

¶ 22 The State moved to strike defendant's motion as untimely because it was filed more than 30 days after he was found guilty. Defendant responded that the motion was substantively a postconviction petition, or, alternatively, a petition under 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). On February 15, 2012, defendant filed an amended petition which added a reference to *People v. Warr*, 54 Ill. 2d 487, 493 (1973), where our supreme court held that a defendant convicted of a misdemeanor who asserts a substantial denial of constitution rights can institute a proceeding “in the nature of a proceeding under the” Act.

¶ 23 The State moved to dismiss the amended petition on the basis that defendant was not entitled to relief under the Act, and, alternatively, because he failed to attach any documents to support his claims. Defendant subsequently filed a trial transcript, his own affidavit, and the affidavit of two attorneys opining that trial counsel was ineffective. The trial court denied the State's motion to dismiss on August 16, 2012. The State then filed an answer to defendant's amended pleading.

¶ 24 An evidentiary hearing took place on December 3 and 4, 2012, and February 25, 2013. Initially, the State moved to bar the testimony of defendant's expert witnesses. The trial court directed the State to file a written motion, which it later did.³ The defense indicated that it was moving forward with only the ineffective assistance of counsel claims.

³ The trial court granted the motion on February 25, 2013.

¶ 25 Cassandra Burns testified that she was 20 years old and was defendant's neighbor. She was present at the drive-in theater outing. During the course of the evening, defendant was never alone with N.M. Between movies, Cassandra left the vehicles to go to the concession stand and the bathroom. She was gone for five minutes at most. During that time, Cassandra's dad was sitting next to defendant in a chair by the car. No one tried to contact her regarding what occurred that day until current counsel called.

¶ 26 Kimberly Burns, Cassandra's mother, testified that she was also at the drive-in theater. There were 14 people total in the group and three vehicles. Kimberly went to the bathroom twice while she was there, once before the first movie and once before the second movie. She was gone for two to three minutes, and defendant was with Kimberly's husband and sons during those times. Therefore, there was never a time that defendant would have been alone with N.M. that evening. Kimberly attended defendant's trial, but no one had previously contacted her about testifying at the trial.

¶ 27 Jeffrey MacKay, defendant's trial counsel, testified as follows. He had been an assistant state's attorney for about eight years before he went into private practice. MacKay's initial meeting with defendant lasted about an hour. Defendant said that N.M. had lied to her brother and said that defendant had touched her on the bottom when she was wearing only a towel. He said that Jose then called Carmen and threatened her. Defendant also said during the initial meeting that N.M.'s parents were in the middle of a bitter divorce and that N.M. had filed charges against defendant because she wanted to move in with her father. He said that there had been a Department of Children and Family Services (DCFS) investigation which came back unfounded for sexual abuse. Defendant mentioned the names of Tony Powell, Jose, Gabriela, Gaby, and Carmen. MacKay never interviewed Powell, Jose, or Gabriela because he did not see

the need to. He might have interviewed Gaby once before trial, and he interviewed her once on the day of trial for 5 to 10 minutes. MacKay had read statements from these individuals in police and/or DCFS reports. Powell concluded that the allegations were unfounded, but Powell was investigating the occurrence of a possible sexual abuse case.

¶ 28 MacKay would have learned from reviewing N.M.'s videotaped interview that she wanted to move out of defendant's house within three days of moving in. He agreed that the DCFS report included the statement that N.M. said that "this is all happening because the mother is treating her natural father unfairly."

¶ 29 The only people MacKay interviewed before trial were defendant, Carmen, and Barbara. He also spoke to Gaby the day of the trial. MacKay did not recall defendant telling him that Gaby would testify that N.M. was lying about being uncomfortable. He also did not recall defendant saying that N.M. had been lying to her father about Gaby drinking. At some point defendant told MacKay that the reason N.M. was pursuing the charges was because her father had been ordered to pay child support just prior to her coming forward.

¶ 30 When asked to describe his theory of the case, MacKay said that there was no way to get around that the event actually took place because N.M. made consistent statements about it, there were two witnesses, and defendant admitted to the police in the reports and on videotape that he did it. MacKay's theory was that the act was not provoking or insulting to N.M. because she waited about four days to report it.

¶ 31 Prior to trial, MacKay had a meeting with defendant, Carmen, and Barbara. Carmen said that Jose had accused defendant of touching N.M. when she was wearing just a towel. MacKay did not recall being told that Jose said that he could ruin their lives. MacKay was told that there were six to eight other people at the drive-in. MacKay thought that testimony from such

witnesses would be cumulative because Carmen and Barbara testified that N.M. was never alone with defendant at the drive-in. MacKay did not think that the occurrence at the drive-in constituted other crimes evidence. He did not object to the evidence because he thought that it fit into his theory of the case, in that N.M. claimed that defendant's behavior there made her uncomfortable, yet she did not change her demeanor or behavior in response to that or the prior slap.

¶ 32 MacKay did not make any efforts to subpoena N.M.'s text messages. When asked if he could have cross-examined N.M. on whether she lied to Jose about how she was clothed during the incident, MacKay responded that he did ask her about Jose speaking to Carmen, but N.M. did not remember what Jose said. When asked why he did not impeach N.M.'s statement at trial that the slap left a red mark on her as inconsistent with her prior statement to police that the slap left no marks, MacKay said that the charge was for an insulting and provoking act, rather than one involving harm, so there was no need to do so. MacKay also did not cross-examine N.M. with Gaby's statement to police that N.M. said that defendant never touched her inappropriately.

¶ 33 On cross-examination, MacKay said that he did not object to closing the courtroom because of N.M.'s age and the emotionally-charged nature of the testimony. Further, the courtroom was closed for just N.M.'s testimony. He did not interview additional witnesses from the drive-in because Barbara and Carmen were already testifying that defendant was not alone with N.M. there. Additional witnesses would have been cumulative and could have potentially contradicted them or each other. MacKay cross-examined N.M. about lying to Jose, and the same information was elicited on his direct examination of Carmen. MacKay did not call Powell because Powell was investigating the case for a sexual abuse, not a battery, and there were several statements in the report where N.M. said that the incident made her uncomfortable,

which was at issue at trial in whether the conduct was insulting or provoking. He did not call N.M.'s brother and sister at trial because they were not going to be favorable. He did not call Gaby as a witness because even if she testified that N.M. had a fight with her about N.M.'s father, Gaby made a statement to police that she believed everything N.M. told her. Also, while Gaby's opinion was that the incident did not amount to something bad, she was not a witness and her opinion did not count.

¶ 34 Defendant testified as follows. He told MacKay that N.M.'s parents were separated and that N.M. and her siblings were upset that Gaby was dating another man. Defendant gave MacKay a copy of the temporary restraining order and a two-year order of protection against N.M.'s father, which also included a mandatory child support provision. The child support provision became known to Jose on the day that N.M. filed charges. Jose thought that their dad should not have to pay child support because Gaby and N.M. were living in defendant's house for free. The siblings wanted Gaby to sign N.M.'s custody over to their father.

¶ 35 Defendant also told MacKay that Jose had called Carmen and said that defendant had hit N.M. on the butt when she was wearing only a towel. Jose said that he could ruin their lives with the information. Defendant further told MacKay that when Powell came to interview N.M., N.M. and her sister began to yell and scream at their mother and use profanities. Defendant told MacKay of another incident, prior to June 10, 2010, when N.M. texted her brother and/or sister that Gaby and Carmen had drunk half a gallon of rum. Jose texted Gaby and accused her of having N.M. in a home with alcohol abuse. Gaby and Carmen then confronted N.M. N.M. first denied making the alcohol allegation and then broke down crying, saying that she did not mean it that way. Defendant told MacKay that according to Gaby, N.M. made the accusation to get back at Gaby for her conduct toward N.M.'s father.

¶ 36 Defendant and MacKay had discussed subpoenaing Powell, and MacKay said that getting DCFS employees to appear in court was challenging, and he also did not think it was necessary. During trial, defendant asked when MacKay was going to bring up the DCFS report, and MacKay said that the judge already had it. Defendant took that to mean that it was already introduced into evidence.

¶ 37 Defendant had the funds to hire an investigator if he had been asked. He further told MacKay that within two weeks of leaving the residence, N.M.'s father paid \$6,000 for her to have cosmetic surgery. She had begun living with her father eight or nine months before trial.

¶ 38 The parties agreed that defendant could submit affidavits of two additional witnesses, Kaitlyn Dittmer and Paul Burns, who stated that defendant was never alone with N.M. at the drive-in. Dittmer also stated that she and Cassandra left the drive-in part-way into the second movie, when defendant, N.M., and others remained.

¶ 39 The trial court denied defendant's amended postconviction petition on July 15, 2013. It stated that on the issue of jury waiver, defendant was questioned extensively in the trial court. The trial court stated that Powell's testimony and report would not have come in because DCFS was investigating sexual abuse, whereas the complaint here alleged insulting or provoking contact. Finally, the trial court stated that with respect to witnesses who would have testified that N.M. was not truthful, it would not have made any difference because other people witnessed the incident underlying the charges, and N.M. testified as to what effect the event had on her.

¶ 40 Defendant timely appealed.

¶ 41 **II. ANALYSIS**

¶ 42 On appeal, defendant challenges the trial court's denial of his posttrial motion, which was treated similar to a petition under the Act. The Act provides a statutory remedy to criminal

defendants who claim that their constitutional rights were substantially violated during trial. *People v. Edwards*, 2012 IL 111711, ¶ 21. A proceeding under the Act is a collateral attack on a conviction and sentence allowing inquiry into constitutional issues that were not, and could not have been, adjudicated on direct appeal. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010).

¶ 43 The Act creates a three-stage process for the adjudication of postconviction petitions. *People v. Hommerson*, 2014 IL 115638, ¶ 7. In the first stage, the circuit court independently determines, without input from the State, whether the petition is “frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). If the petition does not meet this threshold, the trial court must dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2010). Otherwise, the proceedings move on to the second stage, during which the court may appoint counsel to represent an indigent defendant, and counsel may amend the petition. *Hommerson*, 2014 IL 115638, ¶ 8. The State, in turn, may file a motion to dismiss the petition. 725 ILCS 5/122-5 (West 2010). If the trial court does not dismiss the petition, it will conduct an evidentiary hearing on the merits of the petition during the third stage. 725 ILCS 5/122-6 (West 2010). In both the second and third stages of the proceedings, the defendant has the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 44 In *Warr*, our supreme court stated that the Act, by its terms, applies only to people imprisoned in the penitentiary. *Warr*, 54 Ill. 2d at 491. However, it determined that individuals with misdemeanors should still have a means of asserting that their constitutional rights were violated in the proceeding that resulted in their conviction. *Id.* at 492. Therefore, the supreme court directed, in the exercise of its supervisory powers, that these individuals may institute a proceeding “in the nature of a proceeding under the” Act. *Id.* at 493. Such a proceeding is to be

governed by the Act except that the defendant need not be imprisoned; the proceeding must be commenced within six months of the final judgment after a trial; and counsel need not be appointed to represent an indigent defendant if the trial court enters an order finding that, based on the pleadings and the record, the defendant is entitled to no relief. *Id.* at 493.

¶ 45 Here, defendant's petition proceeded to the third stage of proceedings under the Act, and he received an evidentiary hearing. We will not disturb a trial court's decision after an evidentiary hearing involving fact-finding and credibility determinations unless the decision is manifestly erroneous. *People v. English*, 2013 IL 112890, ¶ 23. On the other hand, if the issue is a pure question of law and the trial judge does not have a special familiarity with the underlying case that affects the disposition of the petition, we will review the trial court's decision *de novo*. *Id.* In this case, the trial judge adjudicating defendant's petition was the same judge who presided over the bench trial, and she heard witness testimony relating to defendant's claims. Therefore, we apply the manifestly erroneous standard.

¶ 46 For claims of ineffective assistance of counsel, which are at issue here, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). As to trial counsel, the defendant must first establish that, despite the strong presumption that counsel acted competently and that the challenged action was the product of sound trial strategy, counsel's representation fell below an objective standard of reasonableness under prevailing professional norms such that he or she was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 227 Ill. 2d 403, 416 (2008). Second, the defendant must establish prejudice by showing a reasonable probability that the proceeding would have resulted differently had it not been for counsel's unprofessional errors.

People v. Henderson, 2013 IL 114040, ¶ 11. A failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Id.*

¶ 47 A. Tony Powell

¶ 48 Defendant first argues that MacKay was ineffective for not investigating Powell as a potential defense witness. Defendant argues that Powell could have testified that N.M. told him that her motivation for making these exact claims was to get back at her mother, which would have impeached N.M.'s trial testimony and shown that N.M. just wanted to make her mother pay for slights that she perceived that her father endured. Defendant argues that this evidence was paramount because N.M.'s credibility was at the heart of the case. Defendant maintains that MacKay could not have exercised a strategic decision not to subpoena or call Powell without first investigating him.

¶ 49 The State maintains that defendant forfeited the argument that trial counsel was ineffective for failing to investigate or interview Powell, because defendant's petition alleged that counsel was ineffective only for failing to introduce Powell's testimony. See 725 ILCS 5/122-3 (West 2012) (any claims of violations of constitutional rights not raised in the original or amended postconviction petition is forfeited); *People v. Jones*, 211 Ill. 2d 140, 148 (2004) (a defendant may not raise an issue for the first time on appeal from the disposition of a postconviction petition). However, we agree with defendant that the State's distinction is largely a question of semantics, and we decline to find the issue forfeited.

¶ 50 The decision of which witnesses to call at trial is a matter of trial strategy within trial counsel's discretion. *People v. Enis*, 194 Ill. 2d 361, 378 (2000). Such a decision comes with the strong presumption that it is a product of sound trial strategy, and it is generally immune from claims of ineffective assistance of counsel. *Id.* Still, an attorney may be deemed

ineffective for failing to present exculpatory evidence, such as failing to call witnesses to support an otherwise uncorroborated defense theory. *People v. Redmond*, 341 Ill. App. 3d 498, 516 (2003). Counsel also has a duty to conduct both factual and legal investigations in the case. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26. Whether counsel's failure to investigate constitutes ineffective assistance of counsel is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial. *Id.*

¶ 51 Generally, a defendant who claims that trial counsel was ineffective for failing to investigate and call a witness must obtain an affidavit from that witness so that the reviewing court can determine whether the witness could have provided testimony or information favorable to the defendant. *Id.* ¶ 30. However, a postconviction petition can survive without an affidavit if the defendant's allegation is uncontradicted and supported by the record. *Id.*

¶ 52 In this case, defendant did not obtain an affidavit from Powell or call him as a witness at the evidentiary hearing. However, defendant introduced Powell's report into evidence, so we rely on the report to determine his potential testimony. Defendant cites a portion of the report from June 23, 2010, in which Powell wrote:

“CPI did speak with [N.M.] as he [*sic*] was brought over to the address by her adult sister, Gabriela. The child was seated in her sister's back seat as she got out and spoke with this investigator asking that the aunt and uncle go back into their own home. Above child states that she was at the home with the aunt and uncle when the uncle smacked her on the butt in the hallway [as] she passed by him and said, ‘welcome to the family[.]’ *Child states that this did make her uncomfortable and this is why she refuses to go back inside ever.* Above child states that she was living at the home with the mother for a short period, but that now, she will just stay at her sister's until the father

can get custody of her. *Above child states that this is all happening because the mother is treating her natural father unfairly.* As CPI explained that the custody issue between her father and the mother was not a concern right now, the child acknowledged that she was aware of this, but that she was fine. Child states that the mother is aware of where she is with her sister and okay with it.” (Emphases added.)

¶ 53 We agree with the State that, in context, Powell’s written statement that N.M. said that this was “all happening because the mother is treating her natural father unfairly” refers to N.M.’s living and custody situation rather than N.M.’s motivation to report defendant’s slap. Indeed, the very same paragraph states that N.M. reported that the slap made her uncomfortable to the extent that she refused to reenter defendant’s house for the interview. Powell’s report contains numerous other references to N.M. reporting that the slap made her uncomfortable. Moreover, the report clearly concludes that N.M.’s allegations were unfounded as to sexual abuse, not to the slap itself, with the occurrence of the slap being corroborated by defendant, Carmen, and Barbara. Thus, MacKay’s decision to not investigate and/or call Powell as a witness cannot be labeled objectively unreasonable based on what is contained in the report, so the trial court’s ruling on this issue was not manifestly erroneous.

¶ 54 B. Testimony Regarding Drive-in

¶ 55 Defendant next argues that he made a substantial showing that MacKay was ineffective for not objecting to testimony about the drive-in. Defendant maintains that such “bad acts” evidence was not relevant to whether N.M. felt insulted or provoked at the time she was hit on the rear end.

¶ 56 Defendant argues that not only did MacKay allow the improper and prejudicial testimony to be entered without objection, but he did not even attempt to rebut the evidence by calling Cassandra, Kimberly, Paul, or Dittmer to testify that the “ ‘bad acts’ never in fact happened.”

¶ 57 Under Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011), “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided by [certain statutes]. Such evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

¶ 58 The State argues, and we agree, that evidence about the drive-in did not constitute evidence of “bad acts,” as defendant’s act of leaning over N.M. and looking at her phone did not constitute a crime or wrongful act.

¶ 59 In his amended petition, defendant also cited Illinois Rule of Evidence 403 (eff. Jan. 1, 2011), which states that relevant evidence may be excluded if its probative value is substantially outweighed by, among other things, the danger of unfair prejudice or confusion of the issues. MacKay testified at trial that he did not object to evidence of what occurred at the drive-in because it fit into his theory of the case, in that N.M. claimed that defendant’s behavior at the drive-in made her uncomfortable yet did not change her own behavior or demeanor in response to that or to the prior slap.

¶ 60 We conclude that the trial court’s denial of defendant’s petition on the issue of objecting to the drive-in evidence was not in error. MacKay’s cross-examination of N.M. and his questioning of Carmen elicited that N.M. chose to attend a family barbeque on Saturday, June 12, and the drive-in outing on Sunday, June 13, and that her demeanor did not seem to have changed, which could undermine her claim that she felt uncomfortable around defendant and

about the slap. Furthermore, counsel elicited testimony that many other people were present at the events, but N.M. did not mention anything about the slap to them, which could also undermine her claim about her level of discomfort. Therefore, it was not manifestly erroneously to conclude that defendant failed to show that MacKay's decision not to object was objectively unreasonable to the extent that he was not acting as counsel under the sixth amendment. See *Manning*, 227 Ill. 2d at 416.

¶ 61 We reach the same conclusion regarding MacKay's decision not to investigate or call additional witnesses who were present at the drive-in. Dittmer stated that she and Cassandra left part-way through the second movie, when defendant, N.M., and others were still present, so their testimony would have been of little value. Kimberly and Paul could have testified that they never saw defendant and N.M. alone together, and that when Kimberly went to the bathroom Paul was still present, and vice-versa. However, this would have been cumulative of Carmen's testimony that she never went to the bathroom and that defendant and N.M. were never alone, and Barbara's testimony that she never saw defendant and N.M. alone. "Failure to call or investigate a witness whose testimony is cumulative does not demonstrate ineffective assistance of counsel." *People v. Jarnagan*, 154 Ill. App. 3d 187, 194 (1987).

¶ 62 Further, while defendant argues that the testimony was important to show that the "bad acts" never in fact happened," a police report shows that defendant stated during an interview that N.M. was laying on her stomach, texting, and he was sitting on the vehicle's tailgate, near her head. N.M. told him "not to try and creep in on her text messages" because she was tired of people trying to read her messages. Defendant denied trying to read the messages but admitted to "playfully lean[ing] over [N.M.] and act[ing] like he was interested." Thus, even if additional witnesses testified that defendant and N.M. were never alone together, the State could have

introduced evidence that defendant admitted the substance of what occurred at the drive-in, *i.e.*, leaning over N.M. and looking at her phone.

¶ 63 Moreover, in making its oral findings resulting in the convictions, the trial court did not mention the incident at the drive-in. In ruling on defendant's petition after the evidentiary hearing, the trial court stated that having such witnesses would not have made a difference because they did not see the incident underlying the charges, whereas the witness who actually testified at trial did. Therefore, it was not manifestly erroneous to conclude that defendant failed to show a reasonable probability that the trial would have resulted differently if not for the alleged errors, as necessary to sustain a claim of ineffective assistance.

¶ 64 C. Public Trial

¶ 65 Last, defendant argues that MacKay's failure to object to the closing of the courtroom during N.M.'s testimony denied him his right to a public trial. Defendant maintains that MacKay's lack of objection resulted in the State not even having to justify the courtroom closure to determine if it was proper pursuant to caselaw.

¶ 66 The State argues that defendant abandoned this claim at the evidentiary hearing. However, the record reflects that the defense stated that it was proceeding with only the ineffective assistance claims, which included the claim that MacKay was ineffective for not objecting to the courtroom closure. MacKay was also questioned about this issue at the hearing. He testified that he did not object because of N.M.'s age and the emotionally-charged nature of her testimony, and because the closure was limited to just her testimony. Accordingly, defendant did not affirmatively waive this argument in the trial court.

¶ 67 A defendant is entitled to a public trial under the sixth amendment of the United States Constitution. U.S. const., amend. VI. The purpose of the guarantee is to benefit the accused and

provide a safeguard against any attempt to use the courts as instruments of persecution. *People v. Burman*, 2013 IL App (2d) 110807, ¶ 50. Trials are presumed to be open, but the right can be trumped by an overriding interest that is specifically articulated. *Id.* ¶ 51. The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; the closure must be only as broad as necessary to protect the interest; the trial court must consider reasonable alternatives; and the trial court must make adequate findings to support the closure. *Id.*

¶ 68 Although defendant raises this issue in the context of a claim of ineffective assistance of counsel, he does not frame his argument under the *Strickland* test. Defendant does cite *People v. Taylor*, 244 Ill. App. 3d 460, 468 (1993), for the proposition that a defendant need not prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee. *Taylor* in turn cites *Waller v. Georgia*, 467 U.S. 39, 49 (1984), for this point. It is clear from reading *Waller* that the court meant that a defendant does not need to show how he or she was specifically injured by being denied the right to a public trial, because to demonstrate prejudice would be practically impossible. *Id.* at 49 n.9. Neither *Taylor* nor *Waller* looked at the question of open trials in the context of a claim of ineffective assistance of counsel. Therefore, these cases do not support the position that defendant does not have to show prejudice from MacKay's failure to object; *i.e.*, that had MacKay objected, there is a reasonable probability that the proceeding would have resulted differently, in that the trial court would have sustained the objection and kept the courtroom open during N.M.'s testimony. To the contrary, if an objection would have been properly overruled, trial counsel cannot be deemed ineffective for failing to object. *People v. Glisson*, 359 Ill. App. 3d 962, 973 (2005).

¶ 69 “[I]t is not the job of this court to bear defendant’s burden of argument.” *People v. Snow*, 2012 IL App (4th) 110415, ¶ 32. Given that N.M. was 16 at the trial of trial, age 15 at the time

of the incident, the incident involved a slap on her butt by a family member, and the trial court limited the closure to just N.M.'s testimony, we cannot say that defendant met his burden of showing prejudice under the *Strickland* test, meaning that he failed to show a reasonable probability that the trial court would have sustained counsel's objection had he made one. See also *Burman*, 2013 IL App (2d) 110807, ¶ 59 (quoting *U.S. v. Osborne*, 68 F.3d 94, 99 (5th Cir. 1995)) (“ [t]he protection of a minor from emotional harm is a substantial enough reason to defend a limited closing of the proceedings.’ ”). As the failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance (*Henderson*, 2013 IL 114040, ¶ 11), it was not manifestly erroneous for the trial court to deny defendant's petition on this issue.

¶ 70

III. CONCLUSION

¶ 71 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

¶ 72 Affirmed.