

SIXTH DIVISION
March 13, 2015

No. 1-11-3487

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

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellant,)	Cook County.
)	
v.)	03 CR 1866
)	
EDWARD BUCKNER,)	Honorable
)	Joseph M. Claps,
Petitioner-Appellee.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justice Lampkin and Justice Rochford concurred in the judgment.

ORDER

Held: Postconviction court's order, following a third-stage evidentiary hearing, granting the petitioner's request for a new trial based upon its finding that trial counsel was ineffective for failing to make a pretrial challenge to the victim's competency to testify, was not manifestly erroneous.

¶ 1 The State appeals from an order of the postconviction court granting petitioner Edward Buckner's petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Following a third-stage evidentiary hearing under the Act, the postconviction court granted the petitioner's request for a new trial on the ground that his trial counsel was ineffective for failing to make a pretrial challenge to the victim's competency to testify where the victim was barely three years old at the time of the offenses and seven years old at the time of trial. The primary issue in this postconviction appeal is whether the court erred in this regard. The State raises a number of arguments as to why it believes the court erred in granting the postconviction relief. For the reasons that follow, we affirm.

¶ 2 In January 2003, petitioner was charged with three counts of predatory criminal sexual assault and two counts of aggravated criminal sexual abuse of his female cousin C.M. It was alleged that the petitioner committed various acts of sexual penetration upon C.M., a person under the age of thirteen. At the time of the alleged incidents, petitioner was 18 years old, and the victim was barely 3 years old.

¶ 3 Following a bench trial, petitioner was found guilty of one count of predatory criminal sexual assault and sentenced to 10 years' imprisonment. On direct appeal, we affirmed petitioner's conviction and sentence and corrected the mittimus to reflect presentence custody credit. *People v. Buckner*, No. 1-06-2804 (2008) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied his petition for leave to appeal. *People v. Buckner*, 231 Ill. 2d 672 (2009).

¶ 4 On December 22, 2009, the petitioner, who was represented by counsel, filed a postconviction petition raising several allegations of ineffective assistance of trial counsel and due process of law. On March 17, 2010, the petitioner amended his postconviction petition to

include claims of ineffective assistance of trial, as well as appellate counsel, for failing to challenge the competency of the victim.

¶ 5 The State moved to dismiss the amended postconviction petition. After hearing arguments from the parties, the postconviction court denied the State's motion to dismiss and scheduled an evidentiary hearing. Following the evidentiary hearing, where various witnesses for both sides testified, the court entered an order on October 12, 2011, granting the petitioner's request for a new trial based upon its finding that trial counsel was ineffective for failing to make a pretrial challenge to the victim's competency to testify. The court ordered defendant, who had by that time served over half of his ten year sentence, released on bond pending appeal.

¶ 6 This appeal followed. The parties are familiar with the underlying facts of the case. Moreover, the facts are set out at length in our decision on direct appeal and therefore we repeat only those facts relevant to the disposition of the issues raised in this postconviction appeal.

¶ 7 ANALYSIS

¶ 8 In a noncapital case such as this, the Act provides a three-stage process by which criminal defendants may assert that their convictions or sentences were the result of a substantial denial of their constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). "Throughout the second and third stages of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 9 In the instant case, petitioner's petition advanced to a third-stage evidentiary hearing. At this stage of the postconviction proceedings, the court acts as fact finder, determining witness credibility and the weight to be given particular testimony and evidence, and resolving any conflicts in the evidence. *People v. Domagala*, 2013 IL 113688, ¶ 34. If a petition advances to a

third-stage evidentiary hearing at which fact-finding and credibility determinations were made, it is reviewed for manifest error. *Pendleton*, 223 Ill. 2d at 473. "Manifest error is that which is 'clearly evident, plain, and indisputable.' " *People v. Johnson*, 206 Ill. 2d 348, 360 (2002) (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)).

¶ 10 As mentioned, this appeal concerns the postconviction court's finding that trial counsel rendered ineffective assistance of counsel. Both the United States and Illinois Constitutions guarantee a criminal defendant the assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. This requires not only that a person accused of a crime have the assistance of counsel for his or her defense, but also that such assistance be "effective." *United States v. Cronin*, 466 U.S. 648, 655-56 (1984).

¶ 11 The test for determining an ineffective assistance of counsel claim was established in *Strickland v. Washington*, 466 U.S. 668, 691-98 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The test is comprised of two prongs: deficiency and prejudice.

¶ 12 In order for a defendant to obtain reversal of a conviction based on an ineffective assistance of counsel claim, he or she must show that: (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced defendant that there is a reasonable probability that, absent the errors, the outcome of the trial would have been different. *People v. White*, 322 Ill. App. 3d 982, 985 (2001). "The fundamental concern underlying this test is 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *People v. Powell*, 355 Ill. App. 3d 124, 14 (2004) (quoting *Strickland*, 466 U.S. at 686). A defendant must satisfy both prongs of the *Strickland*

test and a failure to satisfy either of the prongs precludes a finding of ineffectiveness. *People v. Patterson*, 192 Ill. 2d 93, 107 (2015).

¶ 13 The State argues that the postconviction court erred in granting the postconviction relief because the court determined that trial counsel was ineffective without making a ruling on the deficiency prong of *Strickland*. In support of this argument the State relies upon the following italicized language in the court's order of October 12, 2011, where the court granted the petitioner's request for a new trial based upon its finding that trial counsel was ineffective for failing to challenge the competency of the victim to testify:

"At the evidentiary hearing, Dr. Galatzer-Levy testified regarding how counsel could have attacked the victim's competency. *Although counsel's decision not to do so may have been trial strategy, Petitioner suffered prejudice from counsel's failure to pursue this argument.* There was no physical evidence in this case; as a result, credibility of the victim and her mother were key to the State's case. Counsel did not subject the victim to any meaningful adversarial testing. In addition to presenting an expert, counsel could have called Charlotta Taylor Carter to testify regarding the victim's behavior after the incident allegedly occurred. The addition of this information would have bolstered Petitioner's case and may have altered the outcome at trial. Therefore, Petitioner has made a substantial showing that counsel was ineffective and is entitled to a new trial."
(Emphasis added.)

¶ 14 The State contends that the above italicized language shows the postconviction court found that the petitioner had satisfied only the prejudice prong of *Strickland*. We must disagree.

¶ 15 The State's contention that the postconviction court's reference to "trial strategy" amounted to a "finding" of no deficiency under *Strickland* is not supported by the record. What

the record actually shows is the court determined that in light of the fact there was no physical evidence and that the State's case heavily rested upon the credibility of the victim and her hearsay statements to her mother, trial counsel's alleged strategy in deciding not to challenge the competency of the young victim was so unsound that no meaningful adversarial testing was conducted. A trial counsel's strategy is presumed reasonable unless "counsel's strategy was so unsound that no meaningful adversarial testing was conducted." *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 72 (citing *People v. Enis*, 194 Ill. 2d 361, 378 (2000)). Here, the court determined that under the circumstances in this case, trial counsel's alleged strategy in deciding not to challenge the competency of the victim constituted an unsound strategy amounting to deficient performance.

¶ 16 We do not believe the postconviction court's decision was against the manifest weight of the evidence. The issue here is not whether the victim was competent to testify. The issue is whether trial counsel's failure to investigate and challenge the victim's competency to testify amounted to ineffective assistance of counsel under the circumstances in this case. Failure to conduct an investigation and develop a defense can amount to ineffective assistance. *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005).

¶ 17 Our courts have determined that under section 115-14 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-14 (West 2008)), every person, irrespective of age, is presumed competent to testify and the objecting party carries the burden of proving otherwise. *People v. Harris*, 389 Ill. App. 3d 107, 125 (2009); *People v. Velasco*, 216 Ill. App. 3d 578, 586 (1991). Nonetheless, our courts have also acknowledged that when a child under the age of fourteen is called to testify, especially in a criminal trial, the competency of the child is generally independently established. See, e.g., *People v. Goble*, 41 Ill. App. 3d 491, 497 (1976); *People v.*

Longstreet, 23 Ill. App. 3d 874, 883 (1974). In this case, the competency of the young victim to testify was never clearly or independently established.

¶ 18 At the evidentiary hearing, trial counsel testified that he did not contemplate making a pretrial challenge to the victim's competency to testify. Counsel maintained that if he later determined the need to challenge the competency of the victim, his strategy was to do so through cross-examination at trial rather than through a separate pretrial competency hearing.

¶ 19 We find that trial counsel's decision to attempt to discredit the victim's testimony through cross-examination at trial rather than attempting to disqualify her testimony altogether through a pretrial competency challenge was not a reasonable trial strategy under the circumstances in this case. See, e.g., *Medina v. Diguglielmo*, 373 F. Supp. 2d 526, 548-49 (E. D. Pa. 2005), *rev'd on other grounds*, 461 F. 3d 417 (3rd Cir. 2006). A review of the record shows there were several "red flags" in this case which would have caused a reasonably competent attorney to make a pretrial challenge to the victim's competency to testify: the victim was barely three years old at the time of the alleged offenses; there was a seven or eight month lapse in time between the alleged offenses and the victim's first pretrial interview; the victim underwent at least five separate pretrial interviews regarding the alleged sexual abuse where the interviews were conducted without the procedural safeguards recommended for interviews of child-abuse complainants; there was a four-year lapse in time between the alleged offenses and the commencement of the trial; and there was evidence suggesting the victim was unable to accurately perceive and or relate details such as the day of the week and time of day.

¶ 20 Under these circumstances a pretrial challenge to the victim's competency to testify would have had arguable merit. Trial counsel could have first attempted to eliminate the victim's testimony altogether by objecting to her competency to testify. If successful, there would have

been no need to pursue the less certain method of attempting to discredit the victim's testimony on cross-examination. "In considering testimony produced at trial, it must be recalled that 'the points to be covered in a competency hearing are rarely discernible through testimony on trial issues,' *** and that mere inconsistencies in testimony relate only to the credibility and not the competency of the witness." *People v. Seel*, 68 Ill. App. 3d 996, 1005 (1979) (quoting *People v. Sims*, 113 Ill. App. 2d 58, 62 (1969)). If the competency challenge was unsuccessful, trial counsel could have attempted to discredit the victim's testimony through cross-examination.

¶ 21 Given the facts of this case, we believe a reasonable attorney would not have merely relied on cross-examining a key child-witness when the attorney could have made an arguably meritorious competency challenge and eliminated the witness's testimony outright. As a result, we find that trial counsel's failure to make a pretrial challenge to the victim's competency to testify fell below an objective standard of reasonableness. See *People v. Gunartt*, 218 Ill. App. 3d 752, 762-63 (1991).

¶ 22 We next consider whether defendant satisfied the prejudice prong of the *Strickland* test, *i.e.*, whether he has shown there is a reasonable probability that, but for trial counsel's error in failing to challenge the victim's competency to testify, the result of the proceeding would have been different. In regard to our prejudice analysis, we note the postconviction judge is the same judge who presided over defendant's bench trial. Consequently, the judge was in a unique position to assess the possibility of prejudice under the particular circumstances of this case. See *Hinesley v. State*, 999 N.E.2d 975, 982 (Ind. Ct. App. 2013). We find there is a reasonable probability that a pretrial challenge to the victim's competency to testify would have been successful and that without her testimony as the sole eyewitness-victim, the outcome of the trial would have been different.

¶ 23 "The competency of a minor witness is determined not by her chronological age but by the degree of intelligence of the child." *People v. Diaz*, 201 Ill. App. 3d 830, 835 (1990). "In determining the competency of a witness to testify, the trial court considers four criteria: (1) the ability of the witness to receive correct impressions from her senses; (2) the ability to recollect these impressions; (3) the ability to understand questions and express answers; and (4) the ability to appreciate the moral duty to tell the truth." *People v. DeWeese*, 298 Ill. App. 3d 4, 12 (1998). Here, the record contains adequate evidence to permit a finding that there is a reasonable probability the victim would have been found incompetent to testify if trial counsel had requested a pretrial competency hearing.

¶ 24 At the evidentiary hearing, defendant introduced substantial evidence regarding what a competency challenge would have likely yielded in this case. The evidence was presented through the testimony of Dr. Robert Galatzer-Levy, who was qualified as an expert in the field of child psychiatry. The doctor's testimony was offered to assist the postconviction court in determining whether trial counsel possessed sufficient information to put him on notice that he had grounds to make an arguably meritorious pretrial challenge to the victim's competency to testify.

¶ 25 As part of his evaluation, Dr. Galatzer-Levy reviewed the victim's trial testimony, her medical records, police reports containing hearsay statements the victim made during her various interviews, as well as widely available child developmental literature. The postconviction court heard the doctor's testimony concerning the potential problems involved in interviewing child witnesses, the uncertain reliability of their disclosures when they are interviewed improperly, and importantly the doctor's opinion that in this particular case trial counsel should have requested a pretrial competency hearing.

¶ 26 Dr. Galatzer-Levy observed that at the time of the offenses, the victim was barely 3 years old. The doctor explained that children that young have a limited capacity to give accurate information regarding their experiences because they frequently cannot distinguish between reality and fantasy, their capacity to remember events is limited, they are particularly suggestible, and they may not comprehend certain actions. After noting that the victim was seven years old at the time of trial, Dr. Galatzer-Levy testified it was "exceedingly unlikely" for the victim to have "a memory based on recollection of events of something that occurred when she was three years old. She remains vulnerable to suggestibility, that is to giving information based on what she has been previously told or been asked about to a very significant extent." The doctor observed there were not only some inconsistencies in the victim's description of abuse and the time frame in which the abuse took place, but there were some descriptions of virtually physically impossible events, namely defendant inserting his finger into the victim's anus while her pants were still on.

¶ 27 Dr. Galatzer-Levy was asked by the court to define the term "infantile amnesia." He explained that the term "refers to the almost universal experience that people do not have a continuous memory of events prior to approximately age five." In this regard, the doctor noted there was a six to eight month lapse in time between the alleged incidents and the child's first pretrial interview and a four-year lapse in time between the alleged incidents and the trial.

¶ 28 With regard to the prejudice prong under *Strickland*, we find that in light of Dr. Galatzer-Levy's testimony, there is a reasonable probability that a challenge to the victim's competency to testify would have been successful. We also believe there is a reasonable probability the outcome of the trial would have been different if the victim had been declared unavailable as a witness.

¶ 29 There was no physical evidence in this case. Without the testimony of the victim, the State's case rested almost exclusively on defendant's confession and the victim's out-of-court statements to others. If the victim was declared unavailable in the evidentiary sense, then the hearsay witnesses would not have been permitted to testify concerning the out-of-court statements made to them by the victim unless the court determined that the victim's hearsay statements were sufficiently reliable to be admitted under section 115-10 of the Code,¹ leaving defendant's confession as the sole piece of remaining evidence.

¶ 30 However, an accused may not be convicted of a crime based solely on his own uncorroborated confession without some independent proof that a crime has been committed, that is, without proof of the *corpus delicti*. *People v. Sargent*, 239 Ill. 2d 166, 183 (2010). In this regard, the issue would be whether there is any evidence, independent of the confession, which establishes the fact that a crime was committed, not whether there is sufficient evidence to convict the defendant. *People v. Marcotte*, 337 Ill. App. 3d 798, 803 (2003). The primary purpose behind the *corpus delicti* rule is to test the reliability of a defendant's confession. *Sargent*, 239 Ill. 2d at 183. A confession is not conclusive evidence of guilt. See *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) ("Confessions, even those that have been found to be voluntary, are not conclusive of guilt.")

¹ Section 115-10 of the Code allows for a child victim's hearsay statement to be admitted if either the trial court deems the statement reliable and the child testifies at trial (subsections (b)(1) and (b)(2)(A)); or the child is unavailable as a witness, the statement is deemed reliable, and the allegations of sexual abuse are independently corroborated (subsections (b)(1) and (b)(2)(B)). 725 ILCS 5/115-10(b)(1), (b)(2)(A), (b)(2)(B) (West 2008).

¶ 31 We believe that absent the victim's testimony, there is a reasonable probability the results of the trial would have been different. Therefore, defendant has satisfied the prejudice prong of *Strickland*.

¶ 32 Accordingly, for the reasons set forth above, we affirm the judgment of the postconviction court.

¶ 33 Affirmed.