

NOTICE

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2015 IL App (4th) 130412-U

NO. 4-13-0412

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

May 15, 2015

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
CHARMELL D. BROWN,)	No. 08CF32
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Pope and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err by summarily dismissing defendant's *pro se* postconviction petition at the first stage because the allegations stated within were frivolous and patently without merit when the allegations of ineffective assistance involved matters of strategy or were not supported by the record and defendant could not demonstrate prejudice.

¶ 2 In March 2013, defendant, Charmell D. Brown, *pro se* filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2012)), asserting he was denied his right to a fair trial when the prosecutor cried and repeatedly mentioned the victim's four children during her closing argument. He further claimed both trial counsel and appellate counsel violated his right to the effective assistance of counsel relating to the prosecutor's conduct. That is, defendant claimed trial counsel was ineffective for not objecting to the prosecutor's closing argument, and appellate counsel was ineffective for failing to raise the issue

of trial counsel's incompetence on direct appeal. Because we find defendant's allegations were frivolous and patently without merit, we affirm the court's summary dismissal.

¶ 3

I. BACKGROUND

¶ 4

After a December 2009 jury trial, defendant was convicted of one count of first degree murder and one count of aggravated battery with a firearm. The trial court sentenced defendant to a 60-year term in prison for murder and a consecutive 30-year term for aggravated battery. Defendant appealed, claiming he was entitled to a new trial due to (1) prosecutorial misconduct (not related to the prosecutor allegedly crying), (2) errors committed during jury selection, (3) the ineffective assistance of trial counsel, and (4) the improper introduction of other-crimes evidence. This court affirmed defendant's conviction. See *People v. Brown*, No. 4-10-0409 (June 10, 2011) (unpublished order filed under Supreme Court Rule 23).

¶ 5

On March 15, 2013, defendant filed a *pro se* postconviction petition, alleging (1) prosecutorial misconduct when, *inter alia*, the prosecutor "appeared to cry during her closing argument" and repeatedly referenced the victim's four children, (2) ineffective assistance of trial counsel for not objecting to the misconduct, and (3) ineffective assistance of appellate counsel for failing to raise trial counsel's incompetence on direct appeal. The circuit court summarily dismissed defendant's petition, finding it frivolous and patently without merit. The court relied on this court's statement from defendant's direct appeal, wherein we opined defendant had failed to demonstrate application of the plain-error doctrine. We stated: "Based solely on these witnesses, we conclude that the evidence presented at defendant's trial overwhelmingly implicated him and established his guilt." See *Brown*, No. 4-10-0409 at 24. The court also denied defendant's motion to reconsider.

¶ 6

This appeal followed.

¶ 7

II. ANALYSIS

¶ 8

Defendant claims his petition stated the gist of a constitutional claim sufficient to survive first-stage dismissal. In particular, defendant insists the prosecutor's closing argument, including repeated references to the victim's children, was designed to inflame the emotions of the jury and was "highly improper." He insists this error, combined with trial counsel's failure to object, and appellate counsel's failure to raise it on direct appeal, was sufficient to overcome defendant's burden at the first stage of the postconviction proceedings. We disagree.

¶ 9

A defendant may proceed under the Act by asserting that in the proceedings which resulted in his conviction, a "substantial denial" of his constitutional rights occurred. 725 ILCS 5/122-1(a)(1) (West 2012). The Act establishes a three-stage process for adjudicating a postconviction petition. *People v. Andrews*, 403 Ill. App. 3d 654, 658 (2010). At the first stage, the trial court examines the postconviction petition only to determine whether the petition alleges a constitutional deprivation that is un rebutted by the record, rendering the petition neither frivolous nor patently without merit. *Andrews*, 403 Ill. App. 3d at 658. Section 122-2.1 of the Act directs if the trial court determines the petition is frivolous or patently without merit, it shall be dismissed in a written order. *Andrews*, 403 Ill. App. 3d at 658.

¶ 10

If a petition is not dismissed at stage one, it proceeds to stage two, where section 122-4 of the Act provides for the appointment of counsel for an indigent defendant who wishes counsel to be appointed. 725 ILCS 5/122-4 (West 2012). At the second stage, the State has the opportunity to answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2012). If the trial court does not grant the State's motion to dismiss or if the State has filed an answer, the petition proceeds to the third stage, where the defendant may present evidence in support of his petition. 725 ILCS 5/122-5, 122-6 (West 2012).

¶ 11 When, as here, the trial court dismisses a defendant's postconviction petition at the first stage, our review is *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 12 A. Prosecutorial Misconduct During Closing Argument

¶ 13 Defendant's first claim relates to the prosecutor's conduct and comments during closing argument. Defendant insists the prosecutor cried during her closing argument, attempting to "inflame the passion[] of the jury." Indeed, it is improper for the prosecutor to cry during closing arguments. See *People v. Dukes*, 12 Ill. 2d 334, 341 (1957). However, this conduct is neither rebutted by nor indicated in the record. The prosecutor has not admitted to crying and the trial court stated it never happened. In a March 2010 posttrial hearing, addressing defendant's issue of the prosecutor's misconduct during her closing argument, the trial court stated:

"I'm sure at some points —and I do recall her voice modulating, but that had nothing to do with any, as the motion says, redness of complexion, watery eyes, and simultaneous changes in vocal inflections. They appeared when [the prosecutor] was engaged in stridently delivering an argument. She, involuntarily exhibiting deep profound sadness to the point of tears, or at tears, or extremely accurate affections of the same. Didn't see it, don't think it happened, and therefore it's not going to be allowed."

¶ 14 Given these comments by the trial court on the record, and without support by any other means such as an affidavit or sworn statement, defendant's allegations cannot survive first-stage dismissal. Further, any comments about the victim's children during closing arguments would not have had any effect on the outcome of the trial in light of the evidence as a whole presented at trial. This court has previously and specifically noted the overwhelming evidence of defendant's guilt (*Brown*, No. 4-10-0409 at 24) presented at trial. The overwhelming evidence of guilt effectively defeats any claim of prejudice that could justify a new trial based on the prosecutor's mention of the victim's children three times during her closing argument. See *People v. Johnson*, 208 Ill. 2d 53, 115 (2003) (a prosecutor's improper comment will not result in the jury's verdict being disturbed on appeal "unless the remark caused substantial prejudice to the defendant, taking into account the content and context of the comment, its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial"). Accordingly, we find defendant's claim of a constitutional violation based on prosecutorial misconduct is without merit.

¶ 15 B. Ineffective Assistance of Trial Counsel

¶ 16 To establish a claim of ineffective assistance of counsel, a defendant must satisfy the familiar *Strickland* test. See *Strickland v. Washington*, 466 U.S. 668 (1984). The test is composed of two prongs: deficiency and prejudice. *Strickland*, 466 U.S. at 687. That is, the defendant must first prove that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the sixth amendment. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Counsel's conduct is measured under an objective standard. *Evans*, 186 Ill. 2d at 93. To establish defective performance, the defendant must overcome the strong presumption that

counsel's challenged action or inaction may have been the result of sound trial strategy. *Evans*, 186 Ill. 2d at 93.

¶ 17 Next, to establish prejudice, the defendant must prove there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 186 Ill. 2d at 93. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. The prejudice prong of *Strickland* entails more than an 'outcome-determinative' test. The defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *Evans*, 186 Ill. 2d at 93.

¶ 18 Defendant's allegations do not meet either prong of the *Strickland* test. Although the record neither supports nor rebuts defendant's claim that the prosecutor cried during her closing argument, the record does, in fact, rebut defendant's claim that trial counsel did not raise the issue in the trial court. Defendant's trial counsel had alleged in his posttrial motion that the prosecutor cried or "appeared to cry," which is why the trial court responded as quoted above. Defendant's contention that counsel failed to address this issue is without merit.

¶ 19 Although it is true trial counsel did not make a spontaneous objection during closing, failing to object under these circumstances can reasonably be deemed a matter of strategy, since counsel may have decided not to draw further attention to the prosecutor or her conduct. See *People v. Leger*, 149 Ill. 2d 355, 396-97 (1992). We conclude, based on the record before us, counsel *did* in fact raise the issue in the trial court proceedings. We therefore find the circuit court correctly determined defendant's claim of trial counsel's ineffectiveness was clearly rebutted by the record, was frivolous, and patently without merit.

¶ 20

C. Ineffective Assistance of Appellate Counsel

¶ 21

The *Strickland* analysis also applies to appellate counsel's conduct. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). Defendant claims appellate counsel was ineffective for failing to raise trial counsel's incompetence on direct appeal. However, appellate counsel cannot be deemed ineffective for not raising an issue clearly rebutted by the record. Under such circumstances, defendant cannot demonstrate either defective performance or prejudice.

" 'A defendant who contends that appellate counsel rendered ineffective assistance, *e.g.*, by failing to argue an issue, must show that the failure to raise that issue was objectively unreasonable and that the decision prejudiced the defendant. Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. Accordingly, unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal. [Citations.]' " *People v. Haynes*, 192 Ill. 2d 437, 476 (2000) (quoting *People v. Easley*, 192 Ill. 2d 307, 328-29 (2000)).

In this case, appellate counsel cannot be deemed ineffective for not raising trial counsel's incompetence on direct appeal. As we discussed above, trial counsel's failure to object during closing arguments could reasonably have been a strategic decision. However, counsel *did* include the issue in his posttrial motion. Because the underlying issue of trial counsel's

incompetence has no merit as we discussed above, the issue of appellate counsel's incompetence is likewise without merit.

¶ 22 Further, because the trial court had expressly found there had been no such conduct by the prosecutor during her closing argument, and because the record would not support defendant's contention that the prosecutor cried, nor contradict the court's finding that she did not cry, appellate counsel was not ineffective for failing to raise this issue on appeal. See *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 67 (the defendant was not prejudiced when the record failed to demonstrate the prosecutor was in fact crying). The prosecutor never admitted she was crying nor does defendant suggest he can prove such. In fact, the record rebuts defendant's allegation by the trial court's comments at the posttrial motion hearing. Thus, to overcome defendant's burden of establishing a violation of his right to a fair trial, defendant would need to allege the trial court was incorrect in its assessment of the prosecutor's emotional state during her closing argument. Without alleging the existence of supporting evidence of the trial court's misconception, defendant's claim does not state the gist of a constitutional violation.

¶ 23 Further, on direct appeal, we concluded, after our careful review of the entire record, the evidence was not closely balanced and "clearly established defendant's guilt." *Brown*, No. 4-10-0409 at 23. Given defendant's allegations in his postconviction petition, in light of the strength of the evidence presented at trial, he is unable to establish any prejudice from the errors alleged. We conclude the trial court's assessment of defendant's petition at the first stage of the postconviction proceedings was accurate—defendant's claims were frivolous and patently without merit and summary dismissal was proper.

¶ 24

III. CONCLUSION

¶ 25 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 26 Affirmed.