

NOTICE

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2015 IL App (4th) 140162-U

NO. 4-14-0162

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 8, 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
GREGORY G. HAYES,)	No. 13CF567
Defendant-Appellant.)	
)	Honorable
)	Richard P. Klaus,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.

Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed defendant's conviction on the offense of aggravated criminal sexual assault, finding his ineffective-assistance-of-counsel claim should be addressed in a postconviction petition.

¶ 2 In October 2013, a jury found defendant, Gregory G. Hayes, guilty of aggravated criminal sexual assault. In December 2013, the trial court sentenced defendant to 60 years in prison.

¶ 3 On appeal, defendant argues his conviction should be reversed and the cause remanded for a new trial because defense counsel was ineffective. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In April 2013, the State charged defendant by information with two counts of attempt (aggravated criminal sexual assault) (counts I and III) (720 ILCS 5/8-4, 11-1.30(a)(4) (West 2012)) and two counts of aggravated criminal sexual abuse (counts II and IV) (720 ILCS

5/11-1.60(a)(2), (a)(6) (West 2012)). In May 2013, the State charged defendant with two counts of aggravated criminal sexual assault (counts V and VI) (720 ILCS 5/11-1.30(a)(2), (a)(4) (West 2012)). Count VI alleged defendant committed a criminal sexual assault against G.C., in that by the use of force he pulled her to the ground, held her down and placed his finger in her vagina and, in doing so, caused her bodily harm. 720 ILCS 5/11-1.30(a)(2) (West 2012). Defendant pleaded not guilty.

¶ 6 In October 2013, defense counsel filed several motions *in limine*. The first motion sought to bar the State from eliciting testimony concerning defendant's prior convictions, including a conviction for aggravated criminal sexual assault. The State agreed it would not seek to impeach defendant's credibility with his prior convictions, and the trial court granted the motion.

¶ 7 At defendant's jury trial, the State moved to dismiss counts I, II, III, IV, and V and indicated it would proceed only on count VI. G.C. testified she was 19 years old and a student at the University of Illinois. On the night of April 6, 2013, she attended a birthday party at an apartment that was located about a mile from her dormitory. Late in the evening, G.C.'s friends wanted to go to the bars but, because she was underage, G.C. stayed at the apartment. During the early morning hours of April 7, 2013, G.C. was still at the apartment and hoping to get a ride to her dorm.

¶ 8 Upon the return of G.C.'s friends, who had too much to drink, she decided to walk to her dorm. G.C. stated she was dressed in a skirt and a jean jacket. While walking to her dorm, G.C. noticed someone following her on the same side of the street. G.C. described the man as wearing a "gray sweat suit." Upon approaching the door to her dorm, G.C. opened her purse and "fiddled around trying to find" her key card. She was able to get in the door and, once

inside, the man who had been following her grabbed her and forced her out the door. G.C. started screaming and struggling with the man. G.C. attempted to hang onto the door but the man forced her outside. Once out in the courtyard, the man "sort of fell on top" of her. The man then put one hand over her mouth and one hand up her skirt. The man "pushed [her] underwear aside and put [his fingers] into [her] vagina." G.C. continued with "muffled screaming" until the man put both hands around her neck. G.C. stated a dorm resident came out, and defendant ran away. G.C. testified to her injuries that occurred. The police arrived, and G.C. identified a man in custody as her attacker. At trial, G.C. identified that man as defendant.

¶ 9 Craig Cochrane testified he lived in the same dorm as G.C. on April 7, 2013. At approximately 3 a.m., he was on his computer when he heard screams outside. Cochrane looked out the window and saw "a man on top of a girl." He heard the woman saying, " 'no, please, stop, stop, please help me.' " Thereafter, he ran downstairs and found the man and woman "laying on the ground." When Cochrane asked if everything was okay, the man got up, started to walk away, and then ran. Cochrane identified the man as defendant. Cochrane stated he noticed G.C. had "cuts all on her leg." He described her as being "in shock." Cochrane and another student brought G.C. back into the dorm and he called the police.

¶ 10 Ryan Mok testified he was walking to his dorm at approximately 3 a.m. on April 7, 2013, when he stopped to talk to a friend who had been returning from campus. Mok saw a girl walking toward the dorm. She looked over her shoulder "a couple of times" and "seemed very nervous." Mok also saw a man wearing gray sweatpants and a sweatshirt following the female. A short time later, Mok "heard a scream." He ran across the street and "saw someone walking away from [him] very like urgently." Mok then saw a female and another man standing near the entrance to the dorm.

¶ 11 University of Illinois police officer Eric Helms testified he arrived at the dorm and found a "distraught" female who was "visibly upset." After speaking with G.C., Cochrane, and Mok, Helms returned to the station to review security camera footage.

¶ 12 University of Illinois police officer John Wright testified he viewed the video surveillance footage from the area where the attack happened. Another officer recognized the man as defendant and provided his name. Police officers then went to defendant's residence. While not present initially, defendant returned after his wife called him. Wright stated defendant wore red shorts and a gray Eastern Illinois University T-shirt. Wright handcuffed defendant and took him back to the dorm to see if G.C. could identify him.

¶ 13 During the ride to the dorm, Wright advised defendant of his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)). Defendant stated he had spent the day at his in-laws' house and then went to sleep at his home. He got up at 2:30 a.m. to pick up newspapers to fold for later delivery. He returned home at 3:15 a.m. and left before returning after receiving the call from his wife. Wright told defendant about the video footage and noted defendant's timeline conflicted. When Wright mentioned defendant was wearing the same Eastern Illinois University T-shirt, defendant held his head in his hands and looked down.

¶ 14 University of Illinois police detective Laura Tison testified she obtained a search warrant for defendant's residence and car. Tison collected evidence, including a gray sweatshirt, gray sweatpants, and a pair of boots. Tison also collected buccal swabs from defendant and G.C.

¶ 15 Jennifer Acosta-Talbot, a forensic scientist with the Illinois State Police, testified she found bloodstains on the pair of sweatpants and preserved a sample. Amanda Humke, a forensic scientist with the Illinois State Police, testified she generated profiles of deoxyribonucleic acid (DNA) from the samples and the known standards from G.C. and

defendant. On the bloodstain from the sweatpants, Humke found two profiles—one that matched G.C., while defendant could not be excluded from the other. A swab taken from the waistband revealed a profile matching defendant and two minor profiles too small for comparison.

¶ 16 Defendant testified he was in the process of delivering newspapers in the early morning hours of April 7, 2013, when he saw G.C. walking alone down the street. Defendant had the feeling that "something's probably wrong" and he thought he would "try to help her." Defendant parked his car and "began to pretty much shadow or follow her." He stated he was wearing a gray hooded sweatshirt, a gray Eastern Illinois University T-shirt, jogging pants, and boots. Upon getting closer to G.C., he said something to her about the weather and suggested she should call somebody. Defendant stated G.C. did appear to use her phone to call someone.

¶ 17 Defendant testified he followed G.C. to the dorm. Once G.C. was able to open the outer door to the dorm, defendant told her to "have a good night." Defendant stated G.C. responded by saying she "didn't need any beefy nigger following [her] home." Defendant stated he turned around and approached to ask her what she said. He stated G.C. said she was sorry but defendant wanted to go outside and talk about it because he was "upset" at the slur. Defendant stated a "struggle ensued" and he could tell she did not want to go out with him. Once outside, G.C. tripped over a stone, and defendant, trying to catch her, fell on top of her. G.C. screamed, and defendant told her to calm down. Defendant stated he never put his hand near G.C.'s vaginal area. Defendant saw Cochrane arrive and, "trusting that he's going to do right by her," he decided to "leave [G.C.] there with him." At the end of defendant's direct testimony, defense counsel asked him, "you do have a prior felony conviction; is that right?" Defendant stated, "[t]hat's correct."

¶ 18 On cross-examination, defendant admitted he was "definitely bigger" than the "petite" G.C. He decided to follow her because he assumed "something wasn't right." He followed her for "quite awhile" until she entered the dorm. After telling her "good night," defendant testified G.C. responded with the racial slur. Upon questioning from the prosecutor, defendant admitted pulling G.C. by the arm, putting both his arms around her neck, and pushing her out the door. When questioned about the statements to the police regarding his whereabouts, defendant stated he thought Officer Wright was asking about his normal routine, not his movements that particular morning.

¶ 19 Following closing arguments, the jury found defendant guilty. In November 2013, defense counsel filed a posttrial motion. In December 2013, the trial court denied the motion. Thereafter, the court sentenced defendant to 60 years in prison. Defense counsel filed a motion to reconsider the sentence, which the court denied. This court granted defendant's motion for leave to file a late notice of appeal.

¶ 20 II. ANALYSIS

¶ 21 Defendant argues his trial counsel was ineffective when she elicited, during his testimony, that he had previously been convicted of a felony, even though the State agreed prior to trial not to seek to introduce his prior convictions for impeachment purposes. We decline to address defendant's claim on direct appeal.

¶ 22 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Cathey*, 2012 IL 111746, ¶ 23, 965 N.E.2d 1109. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To

establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687-88). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 23 In the case *sub judice*, defendant argues counsel's question about his prior felony constituted ineffective assistance of counsel because the State agreed not to attempt to impeach him with his prior convictions. Defendant argues there was no reason for counsel to inject the issue into the trial and amounted to impeaching her own client's credibility. Defendant contends counsel's error prejudiced him because the issue of whether the offense of aggravated criminal sexual assault occurred rested on a credibility contest between him and G.C.

¶ 24 In its brief, the State points out defendant's trial counsel filed a motion *in limine* to bar the State from eliciting testimony concerning his prior convictions, and the State agreed it would not seek to impeach defendant's credibility on those convictions. Although defense counsel did indeed elicit the testimony that defendant had a prior felony, the record does not contain an explanation from defense counsel as to why she elicited the testimony.

¶ 25 In *People v. Kunze*, 193 Ill. App. 3d 708, 726, 550 N.E.2d 284, 296 (1990), this court held the adjudication of an ineffective-assistance-of-counsel claim is often better made in postconviction proceedings, where a complete record can be made. For example, we have found that, without an explanation from trial counsel, this court could not properly determine whether

the trial counsel's actions involved the exercise of judgment, discretion, or trial tactics, which are not reviewable matters; and thus, we recommended a postconviction petition was a better forum for adjudication of the ineffective-assistance claim. *People v. Flores*, 231 Ill. App. 3d 813, 827-28, 596 N.E.2d 1204, 1213-14 (1992). Additionally, we have explained the resolution of a criminal defendant's ineffective-assistance claim is usually more appropriate for postconviction proceedings because the record on direct appeal in a criminal case rarely contains anything explaining the trial counsel's tactics. *In re Carmody*, 274 Ill. App. 3d 46, 56, 653 N.E.2d 977, 984 (1995); see also *People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 127, 29 N.E.3d 481 (stating "[a] collateral proceeding is generally a better forum for adjudication of ineffective assistance claims"). "Thus, if 'those trial tactics are to be the subject of scrutiny, then a record should be developed in which they can be scrutinized.' " *Carmody*, 274 Ill. App. 3d at 56, 653 N.E.2d at 984 (quoting *People v. Fields*, 202 Ill. App. 3d 910, 917, 560 N.E.2d 1220, 1224 (1990) (Steigmann, J., specially concurring)). Accordingly, we decline to address defendant's ineffective-assistance-of-counsel claim at this juncture. Rather, defendant may pursue the claim under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2014)).

¶ 26

III. CONCLUSION

¶ 27

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.

¶ 28

Affirmed.