2018 IL App (2d) 160974-U
No. 2-16-0974
Order filed April 30, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT LUCHT, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 09-CF-285 Honorable Joseph P. Condon, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's post-conviction petition at the second stage; defendant's claims of ineffective assistance of counsel were either forfeited, failed to show deficiency in performance where evidence was not admissible, or failed to show prejudice.

¶ 2 Defendant, Robert Lucht, appeals from the trial court's second-stage dismissal of his petition for post-conviction relief. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)) and one count of aggravated

criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)) and sentenced to 25 years in the Department of Corrections. This court affirmed defendant's convictions on direct appeal in *People v. Lucht*, 2014 IL App (2d) 121361-U. Defendant then filed a petition for post-conviction relief under the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1 et seq. (West 2014)), raising multiple allegations of ineffective assistance of trial counsel. The trial court advanced the petition to the second stage and subsequently granted the State's motion to dismiss the petition. This appeal followed.

¶ 5 II. ANALYSIS

¶ 6 Defendant now contends that the trial court erred in dismissing his petition at the second stage and declining to advance the petition for a full evidentiary hearing. A post-conviction petition is initially examined by the trial court, without input from the State, to determine if it alleges a constitutional deprivation that is unrebutted by the record such that the petition is neither frivolous nor patently without merit. *People v. Turner*, 2012 IL App (2d) 100819, ¶ 18. If the petition is not dismissed at the first stage, it proceeds to the second stage, where the State has the option of either answering or moving to dismiss the petition. *Id* at ¶ 19. Throughout the second stage (and third stage) of a post-conviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true. *Id*. If the circuit court dismisses the petition at the second stage, we generally review the circuit court's decision using a *de novo* standard. *Id*. Only if the allegations in the petition, supported by the record and accompanying affidavits, if any, demonstrate a substantial violation of a constitutional right, does the petition proceed to the

third stage, at which point the court conducts an evidentiary hearing. *Turner*, 2012 IL App (2d) 100819, ¶ 20.

¶ 7 Defendant here raises multiple allegations of ineffective assistance of trial counsel, all related to counsel's failure to present evidence that the victim in this case, his step-daughter J.B., falsely accused other men of sexually violating both her and other women, thereby missing the opportunity to diminish J.B.'s credibility. None of these issues were raised in defendant's direct appeal. In general, claims that could have been addressed on direct appeal, but were not, are forfeited for post-conviction purposes. See *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005). Such forfeiture may be relaxed, *inter alia*, where the facts relating to the claim do not appear on the face of the original appellate record. *Id* at 450-51. As defense counsel's alleged failures do not appear in the original appellate record, we will review them here.

¶ 8 Claims of ineffective assistance of counsel are resolved by application of the *Strickland* standard. See *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must demonstrate both a deficiency in counsel's performance and prejudice resulting from the deficiency. *People v. Edwards*, 195 Ill. 2d 142, 162 (2001). To show a performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *Id* at 163. Prejudice is demonstrated if there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome, namely, that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Enis*, 194 Ill. 2d 361, 376–77 (2000). There is a "strong presumption" that counsel's performance falls within the wide range of reasonable professional assistance and that the challenged conduct constitutes sound trial strategy.

Strickland, 466 U.S. at 689; *Enis*, 194 Ill. 2d at 377. Failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Id.*

¶ 9 Defendant first argues that trial counsel should have tried to admit evidence that J.B. lied about being attacked by a resident of the Child Serve group home in Naperville, where she had resided for one week in 2009. J.B. left the home without permission and was later found with another girl from the home; it was at this time that she told police that a resident of the home attacked her, pressing a flat iron against her throat. The Department of Children and Family Services (DCFS) investigated the allegation and determined that it was untrue. Prior to trial, the State moved *in limine* to prohibit use of this incident at trial. While defense counsel argued against the motion, the trial court granted it.

¶ 10 First we note that, contrary to defendant's claim, trial counsel *did* attempt to have J.B.'s statement regarding the alleged group home attack admitted into evidence. While counsel was unsuccessful in arguing against the motion *in limine*, the effort was made. Thus, defendant's post-trial claim on this issue is not supported by the record, and defendant could not be prejudiced by a failure that did not occur. Defendant also argues that trial counsel "did not set forth the appropriate basis for admission of the evidence" in arguing against the motion *in limine* such that counsel was ineffective. However, defendant did not raise this argument in his post-conviction petition. In general, arguments not raised in a post-conviction petition cannot be raised for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 504 (2004). While courts have acknowledged various reasons to relax this rule (see *id* at 504-08), we find no reason for relaxation of the rule here, as the issue was not supported by the record, and defendant was not prejudiced.

¶ 11 Defendant next argues that trial counsel should have presented evidence that defendant's neighbor, Susan Collins, believed that, if J.B. moved in with her family, J.B. would accuse Collins' husband "of something." According to defendant, it "can be inferred that the basis of Ms. Collins's [*sic*] concerns about false accusations against her husband stemmed from her knowledge of the nature of the allegations against" defendant. Thus, according to defendant, it can be inferred that "the basis of Ms. Collins's concerns about false accusations against her husband stemmed from her knowledge of the nature of the allegations against Petitioner." Collins' statement is nothing more than mere speculation on her part, and the claim that Collins possessed some special knowledge regarding the charges in this case is mere speculation on defendant's part. This evidence was inadmissible, and counsel was not ineffective for failing to present that evidence.

¶ 12 The remainder of defendant's contentions share a common argument: evidence of J.B.'s allegedly false accusations against others was admissible because it demonstrated J.B.'s bias, interest, or motive to testify falsely. At the time of defendant's 2012 trial, caselaw clearly established that, in general, the proper procedure for impeaching a witness' reputation for truthfulness was to present evidence of the witness' reputation, not opinion evidence or evidence of specific past instances of untruthfulness. See *People v. Cookson*, 215 Ill. 2d 194, 213 (2005).[1] Defendant does not present these contentions as impeaching J.B.'s reputation for truthfulness; instead, he presents them as a series of specific collateral instances of alleged untruthfulness. As such, they are generally not admissible. Defendant has instead taken an alternative route that is

[1] Illinois Rule of Evidence 608 (eff. Jan. 6, 2015), which now provides that the credibility of a witness may be attacked by evidence in the form of opinion or reputation, was not effective in 2012.

allowable in limited circumstances. Our supreme court has recognized that evidence that is not generally admissible to impeach a witness' credibility "may nonetheless be admitted to show the witness' interest, bias, or motive to lie." *Id* at 214. Such evidence " 'must give rise to the inference that the witness has something to gain or lose by his or her testimony' " and " 'must not be remote or uncertain.' " *Id* at 214-15, quoting *People v. Bull*, 185 Ill. 2d 179, 206 (1998). We shall review these contentions to determine if they were in any way admissible.

¶ 13 Defendant raises potential testimony of Seretha Eiland, an employee at Alexian Brothers hospital, where J.B. had been admitted in February 2009 for depression and suicidal thoughts. According to the petition, J.B. told Eiland that defendant had improperly touched her but that she did not want trouble for defendant and did not want the police involved. Eiland told investigators "that she questioned whether J.B. was telling the truth." In general, it is improper to have a witness comment directly on the credibility of another witness. *People v. Becker*, 239 Ill. 2d 215, 236 (2010). This applies to attacking the credibility of an out-of-court statement. See *id*. Further, J.B.'s accusations against defendant are not proven false just because another person finds them questionable. As we have said, the proper procedure for impeaching a witness' reputation for truthfulness was to present evidence of the witness' reputation, not opinion. *Cookson*, 215 Ill. 2d at 213. Defendant argues that Eiland's testimony need not have been presented in the form of an opinion; her testimony could have been admitted "to show the details and circumstances of the accusation" such that "the jury could have drawn its own conclusions as to the veracity of J.B.'s statement to Eiland." However, nowhere does defendant even allege that J.B. told Eiland details of the accusation beyond that defendant touched her inappropriately. For several reasons, Eiland's testimony was inadmissable, and counsel was not ineffective for failing to try to admit it.

¶ 14 Defendant next contends that counsel should have offered the testimony of J.B.'s friend, J.A. Defendant argues that police reports disclosed that J.B. told police that she had told J.A. about defendant's sexual abuse. When questioned, J.A. stated that J.B. told her about sexual activity between defendant and J.B.'s mother but did not tell her that defendant had abused J.B. According to defendant, the "clear inference" that defense counsel could have drawn from the testimony was that, had J.B. actually been abused by defendant, she would have told that to J.A. during a conversation involving defendant and sexual activity. We first note that the police report actually relates that J.A. "doesn't recall" J.B. saying that she had been abused, not that J.B. did not tell J.A. about the abuse. Defendant argues that J.A. "would have recalled such an accusation" and that "the only reasonable inference is that[,] at that time, J.B. did not tell J.A. [that] Petitioner had abused her, because he had not done so." Not only is this, at best, speculation, we also point out that this conversation occurred when the friends were in second grade; at the time of trial, J.B. was in tenth grade. As there was no prior inconsistent statement, this in no way showed an interest, bias, or motive to lie. Thus, counsel was not ineffective for failing to offer it into evidence.

¶ 15 We next address defendant's claims of defense counsel's ineffectiveness for failing to present evidence that: (1) J.B. falsely accused defendant's adult son, Danny Lucht, of sexually abusing his girlfriend; and (2) J.B. falsely accused defendant's other adult son, Brian Lucht, of sexually abusing J.B. Defendant argues that the allegations against the sons were "strongly related" to defendant and the allegations against him. He also contends that J.B. falsely accused Danny "as part of her vendetta against" defendant and in the belief that the allegations "bolstered the veracity of her accusations" against defendant. Again, evidence of specific past instances of untruthfulness is not the proper procedure for impeaching a witness' reputation for truthfulness.

Cookson, 215 Ill. 2d at 213. Further, these alleged false allegations do not involve defendant and do not show J.B.'s interest, bias, or motive to lie against him. See *id* at 214. They are clearly collateral issues—not relevant to a material issue of the case. See *People v. Santos*, 211 Ill. 2d 395, 405 (2004). Thus, as evidence regarding these accusations would not have been properly admitted, there is no ineffective assistance here.

¶ 16 Defendant's final allegation involves the failure to present evidence of J.B.'s accusation that, in 2009, defendant touched the area around the vagina of her friend, D.R. While this allegation clearly is collateral, as it involves a different victim, it could be used to show J.B.'s interest, bias, or motive to lie about defendant, as this could be seen as an attempt to pile on additional allegations to bolster her testimony about the abuse at issue here.

¶ 17 However, even if we were to find trial counsel deficient in failing to attempt to present this evidence, defendant must also prove that the deficient performance prejudiced him. *Edwards*, 195 Ill. 2d at 162. The failure to show substantial prejudice disposes of an ineffective assistance claim. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984). As we concluded in defendant's direct appeal, the evidence at trial was "overwhelmingly in favor of a finding of guilt beyond a reasonable doubt" such that the outcome of the trial would not have changed even had defendant's statements to police been suppressed; J.B.'s statements to police and to others were consistent with her trial testimony, and physical evidence found at defendant's home corroborated J.B.'s testimony. *Lucht*, 2014 IL App (2d) 121361-U, ¶ 36. Here, we cannot conclude that the failure to attempt to diminish J.B.'s credibility with evidence of a collateral allegation about defendant would have a reasonable probability of resulting in a different outcome at trial. See *Strickland*, 466 U.S. at 694. Thus, defendant has failed to show prejudice, and his claim of ineffective assistance fails.

¶ 18 III. CONCLUSION

¶ 19 For these reasons, the judgment of the circuit court of Mc Henry County is affirmed.

¶ 20 Affirmed.