

NOTICE
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2014 IL App (5th) 120530-U

NO. 5-12-0530

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Saline County.
)	
v.)	No. 99-CF-110
)	
BRYAN M. TAYLOR,)	Honorable
)	Walden E. Morris,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Cates and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant failed to make a substantial showing of a constitutional violation, the second-stage dismissal of his amended petition for postconviction relief must be affirmed.

¶ 2 Defendant, Bryan M. Taylor, a prisoner in the Illinois Department of Corrections, appeals from an order of the circuit court dismissing his amended petition for postconviction relief. Defendant's appointed attorney for this appeal, the Office of the State Appellate Defender (OSAD), has filed a motion to withdraw as counsel on the ground that this appeal lacks merit. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). This court has considered OSAD's

motion, defendant's written response thereto, and the entire record on appeal. For the reasons that follow, this court grants OSAD's motion to withdraw and affirms the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 In 1999, a jury found defendant guilty of 15 felony counts, *viz.*: five counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(10) (West 1998)), three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(a)(1) (West 1998)), two counts of aggravated unlawful restraint (720 ILCS 5/10-3.1 (West 1998)), and five counts of aggravated battery (720 ILCS 5/12-4(b)(2) (West 1998)). In 2000, the circuit court imposed prison sentences for all of these offenses, with several of the sentences to be served consecutively, for an aggregate sentence of 51 years.

¶ 5 In an appeal from the judgment of conviction, defendant argued that (1) he was deprived of a fair trial due to the trial judge's alleged prejudice against him, (2) the results of the State's DNA testing were unreliable and did not support a guilty verdict, and (3) his consecutive sentences were unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Wholly disagreeing with defendant, this court affirmed the convictions and sentences. *People v. Taylor*, No. 5-00-0119 (May 28, 2002) (unpublished order pursuant to Supreme Court Rule 23).

¶ 6 On January 30, 2003, defendant filed *pro se* a petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2002)). The *pro se* petition presented numerous claims of constitutionally ineffective assistance by trial counsel and by direct-appeal counsel. On October 17, 2011, defendant filed by appointed

postconviction counsel an amended petition for postconviction relief. The amended petition incorporated all of the claims of the *pro se* petition and added a few more claims of ineffective assistance, plus two claims of error by the trial court. The State filed a motion to dismiss the amended postconviction petition. The court held a hearing on the State's motion to dismiss, heard arguments from both sides, and took the matter under advisement. On November 7, 2012, the court granted the State's motion and dismissed defendant's amended petition. Defendant timely appealed. The circuit court appointed OSAD to represent defendant in this appeal. As previously noted, OSAD has filed a *Finley* motion to withdraw as counsel, and defendant has filed a response thereto.

¶ 7 This decision does not include a thorough summary of the evidence adduced at defendant's trial. Such a summary was included in this court's decision in the direct appeal, and need not be repeated here. In this decision, trial evidence will be described in the analysis section, and only as necessary for an adequate discussion of defendant's postconviction claims.

¶ 8 ANALYSIS

¶ 9 The Post-Conviction Hearing Act provides a method by which a person under criminal sentence may assert that his conviction resulted from a substantial denial of his rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1(a)(1) (West 2012); *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction action is a collateral attack on a judgment of conviction; it is not an appeal. *Id.* Any issue raised and decided on direct appeal is barred by *res judicata*, and any issue that could have been raised on direct appeal, but was not raised, is forfeited. *Id.* If an issue could

have been raised on direct appeal, but the forfeiture stems from the constitutionally ineffective assistance of direct-appeal counsel, the forfeiture rule will be relaxed. *People v. Williams*, 209 Ill. 2d 227, 233 (2004).

¶ 10 A postconviction proceeding is commenced through the filing of a petition. 725 ILCS 5/122-1(b) (West 2012). Each proceeding has three distinct stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, the circuit court independently reviews the petition, without input from the State, to determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). This threshold is a low one, and requires the postconviction petitioner to present only a limited amount of factual detail. *Hodges*, 234 Ill. 2d at 9. If the court finds that the petition is frivolous or patently without merit, it must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012). If the court does not dismiss the petition as frivolous and patently without merit, the petition advances to the second stage of postconviction proceedings. *Tate*, 2012 IL 112214, ¶ 10. At the second stage, the State may file a motion to dismiss the petition. 725 ILCS 5/122-5 (West 2012). The circuit court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation. *Edwards*, 197 Ill. 2d at 246. The court takes as true "all well-pleaded facts that are not positively rebutted by the trial record." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If the petition fails to make a substantial showing of a constitutional violation, it is dismissed. If such a showing is made, the petition advances to the third stage, where the court conducts an evidentiary hearing (725 ILCS 5/122-6 (West 2010)). *Edwards*, 197 Ill. 2d at 246.

¶ 11 The instant appeal is from the second-stage dismissal of defendant's amended petition for postconviction relief. The dismissal of a postconviction petition, whether at the first or second stage, is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 12 Of defendant's numerous postconviction claims, all but two allege a deprivation of the constitutional right to the effective assistance of trial counsel or direct-appeal counsel. (The other two claims allege errors by the trial court.) A claim of ineffective assistance of counsel is evaluated according to the familiar two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting the *Strickland* standard). In order to obtain relief under *Strickland*, a petitioner must show both that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694. The *Strickland* standard applies whether the claim concerns trial counsel or direct-appeal counsel. *People v. Easley*, 192 Ill. 2d 307, 328 (2000).

¶ 13 In regard to trial counsel, there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and that the challenged action or inaction was the product of sound trial strategy. *Strickland*, 466 U.S. at 694; *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Matters of trial strategy are generally immune from claims of ineffective assistance of counsel (*People v. West*, 187 Ill. 2d 418, 432 (1999)) and will not support a claim of ineffective assistance of counsel unless counsel's strategy was so unsound that counsel entirely failed to conduct any meaningful

adversarial testing of the State's case (*People v. Patterson*, 217 Ill. 2d 407, 441 (2005)). As for direct-appeal counsel, she is not obligated to brief every conceivable issue on appeal, and she certainly is not incompetent for choosing not to raise meritless issues. *Easley*, 192 Ill. 2d at 329. A defendant who argues that appellate counsel was ineffective for failing to argue an issue must show that the failure was objectively unreasonable, and that the defendant was prejudiced by the decision. *Id.* at 328-29.

¶ 14 This order includes discussion of all of defendant's postconviction claims. They have been regrouped and rearranged so as to lend some sense of order or coherence.

¶ 15 I. Claims of Ineffective Assistance of Trial Counsel

¶ 16 Defendant claimed that trial counsel provided constitutionally ineffective assistance in various ways before, during, and after trial. All of the issues raised by these claims are based on facts appearing in the original trial record, and therefore the issues could have been raised in the direct appeal and now would be deemed forfeited. However, defendant claimed that direct-appeal counsel was constitutionally ineffective for failing to raise those issues, a situation that would relax the forfeiture rule. For this reason, the claims of ineffective assistance of trial counsel must be individually examined in order to determine whether they had merit.

¶ 17 A. Failure to Interview State's Witnesses Prior to Trial

¶ 18 Defendant claimed that trial counsel "failed to interview and investigate State witnesses before trial." In support of this claim, defendant noted that counsel began his cross-examinations of State's witnesses Donna Rees and Jamie Harman by asking each to confirm that she and counsel had not previously met.

¶ 19 Rees was a forensic scientist in the Illinois State Police's Metro-East Forensic Science Laboratory in Fairview Heights. Harman was the scientific director of Genetic Technologies, Inc. Each of these State's witnesses had performed DNA analyses on evidence in this case. With each of these two witnesses, trial counsel began his cross-examination by asking her to confirm that she and counsel had not previously met; each witness so confirmed. With each witness, counsel then proceeded to conduct a thorough cross-examination. No professional norm obligates a criminal defense attorney to interview every State's witness prior to trial. Defendant did not offer any explanation as to how counsel was deficient for not interviewing Rees or Harman prior to trial. Furthermore, defendant did not even attempt to explain how he was prejudiced by counsel's alleged deficiency, and no potential prejudice is apparent from the record. This claim had no merit.

¶ 20 B. Delivering a Weak Opening Statement

¶ 21 Defendant claimed that trial counsel "gave a weak/damaging opening statement." He was particularly scornful of a few specific portions of counsel's statement.

¶ 22 The content of an opening statement surely is one of those areas left to the judgment and discretion of counsel. Even the decision to make or waive an opening statement is a matter of trial strategy and does not *per se* reflect incompetency of counsel. *People v. Georgev*, 38 Ill. 2d 165, 169 (1967). *People v. Jennings*, 142 Ill. App. 3d 1014, 1028 (1986). Therefore, this claim had no merit.

¶ 23 Furthermore, a review of counsel's opening statement reveals that the statement was not particularly weak, and certainly did not damage defendant's case. In his

statement, counsel highlighted two key features of the case, from the defense perspective, namely: the inability of the two victims to identify defendant as their attacker, and the alleged unreliability of the State's DNA evidence. Counsel also indicated to the jury that the State's other evidence was neither cut-and-dried nor determinative, and he urged the jury to keep an open mind until both sides had been heard. The opening statement certainly did not fall below an objective standard of reasonableness.

¶ 24 In his postconviction petition, defendant specifically faulted counsel for "destroy[ing] the credibility" of alibi witness Steve Evans by stating that Evans had "mental problems." Considered in context, counsel's remarks could not have harmed defendant's case. Counsel told the jury that Evans, although "a likeable sort," was "what we all politely call a little slow. He is not completely—he is not completely right. He has some mental problems." Apparently, Evans did indeed have a cognitive impairment. At trial, Evans himself testified that he was "mentally retarded" and received social security benefits. Illinois State Police master sergeant Kenneth H. Clore testified at trial that he spoke with Evans in connection with this case and, after only a very brief time, formed the impression that Evans suffered from some type of mental "deficiency." Presumably, trial counsel in his opening statement was merely alerting the jury to an idiosyncrasy in Evans, so that the jury would not be unduly distracted by it, but rather would focus on the content of Evans's testimony. Evans, who was defendant's uncle, was one of defendant's alibi witnesses. Along with Don Kimbro, who was defendant's former father-in-law, Evans testified in a manner that corroborated defendant's testimony that he was at home at the time the instant offenses were being committed in a nearby national forest.

Counsel did not cast aspersions on Evans's credibility. The opening remarks on Evans were perfectly reasonable, and counsel cannot be faulted for making them.

¶ 25 Defendant also faulted counsel for these opening remarks to the jury: "There is not going to be any evidence that [the victims, M.D. and D.S.] were not assaulted. They were. I mean, I will save you the time right now. The evidence is going to be that they were assaulted, and it can only be considered in a heinous and cowardly manner so take it to heart." In his petition, defendant did not specify what he found objectionable about these opening remarks. These remarks were perfectly consonant with the defense theory of the case, which was that M.D. and D.S. were indeed sexually assaulted by a masked and armed man, but this man was not defendant.

¶ 26 C. Failure to Object to State's Witnesses' Testimonies

¶ 27 Describing Prior Statements Made by Defendant

¶ 28 Defendant faulted trial counsel for a "failure to raise timely objections to the hearsay testimony" provided by State's witnesses Susan Atkinson, Brennan Palmer, Kenneth Johnson, and Rita Culkin. All four of those witnesses testified about prior conversations in which defendant expressed a desire to engage in certain sexual or sensual activities. All of the activities described by those four witnesses were activities included in the sexual assaults perpetrated upon the two victims in this case, M.D. and D.S., and in this way those witnesses helped to connect defendant to the assaults. Such testimony did not run afoul of the hearsay rule, for it concerned admissions made by defendant himself. See, e.g., *People v. Aguilar*, 265 Ill. App. 3d 105, 110 (1994) (a statement is not hearsay if it is a party's own statement offered against that party).

Therefore, any objection to the testimony on hearsay grounds would have been unavailing.

¶ 29 Defendant also claimed that the testimonies of Atkinson, Palmer, Johnson, and Culkin "[went] against the Modus-operandi hearing." Here, defendant must have been referring to the trial court's *limine* order prohibiting the State from presenting at defendant's trial any evidence of other crimes with which defendant had been charged or that he was alleged to have committed. The testimonies of Atkinson, Palmer, Johnson, and Culkin did not violate this *limine* order in the slightest. None of those four witnesses discussed other crimes; they merely described prior out-of-court statements by defendant wherein he expressed a desire to engage in certain activities.

¶ 30 Where no hearsay or other problem existed, trial counsel was not obligated to object to these four witnesses' testimonies. Counsel never is required to make losing objections in order to provide effective legal assistance. *People v. Lewis*, 88 Ill. 2d 129 (1981).

¶ 31 D. Failure to Properly Cross-Examine or Impeach State's Witnesses

¶ 32 Defendant claimed that trial counsel was constitutionally ineffective in his cross-examinations or impeachments of seven witnesses for the State, *viz.*: Gary Schiff, Suzanne Kidd, Donald Krohn, Donna Rees, Stacie Speith, Jamie Harman, and Steve Evans. There is no merit to this claim *vis-a-vis* any of these witnesses.

¶ 33 1. Gary Schiff

¶ 34 In regard to Schiff, defendant stated in the amended postconviction petition that trial counsel "failed to impeach the testimony of witness Gary Schiff to show that his

statement to the 9[-]1[-]1 operator was contrary to his testimony in court regarding the Defendant's vehicle being seen on the day the crime occurred." In the *pro se* petition, defendant stated that counsel should have impeached Schiff with a written report describing Schiff's telephone call to the police. Defendant did not attach to his *pro se* petition a copy of this report, and the report does not seem to be a part of the record. Regardless, the trial transcript clearly establishes that trial counsel did in fact impeach Schiff's testimony concerning the whereabouts of a 1980s Oldsmobile (similar to the one defendant drove) on the day the instant crimes were committed, as well as testimony concerning the identity of the Oldsmobile's driver. Counsel perfected the impeachment of Schiff through the trial testimony of Illinois State Police (ISP) telecommunicator Mark Wells, who had handled Schiff's telephone call to the ISP and who recalled the (allegedly inconsistent) statements Schiff made to him during that call. Counsel's impeachment of Schiff appears to have been thorough. Defendant certainly has not suggested any particular additional questions that trial counsel should have posed to Schiff or to Wells. Counsel's cross-examination of Schiff was not constitutionally ineffective.

¶ 35

2. Suzanne Kidd

¶ 36 In regard to Kidd, defendant stated in his *pro se* postconviction petition that trial counsel "failed to ask any questions dealing with Ms. Kidd's statements as to something missing, and failed to inquire as to State's exhibits not bearing her markings." In the amended petition, defendant faulted trial counsel for "fail[ing] to develop the testimony of Suzanne Kidd on cross-examination regarding her statement that the rape kit was

missing and that she had examined all evidence but later said she did not recognize some evidence."

¶ 37 Kidd was a forensic microscopist at the ISP's Southern Illinois Forensic Science Center in Carbondale. Her duties included receiving evidence and returning it to police agencies. During her direct examination by the State, Kidd provided chain-of-custody evidence concerning garments collected from the two victims in this case, plastic ties that police investigators had seized, and a sexual assault evidence collection kit for one of the two victims, D.S. The evidence collection kit for D.S. was People's exhibit 28, which had been laboratory exhibit number 5. Near the end of her direct testimony, Kidd testified that laboratory exhibit number 4, which she described as "a sexual assault kit," was not among the various exhibits she was shown at trial. Kidd also testified that she did not recognize People's exhibits 28C, 28D, 28E, and 28G (all of which were DNA evidence, of one sort or another, collected from D.S.) because they did not bear her markings.

¶ 38 In his petition, defendant did not suggest any particular line of questioning that trial counsel should have pursued, but failed to pursue, when cross-examining Kidd about these portions of her testimony. A review of Kidd's testimony does not reveal any particular point that counsel should have explored more thoroughly. The fact that laboratory exhibit number 4 was not among the several exhibits shown to Kidd at trial is of no apparent consequence. The record does not give any indication that laboratory exhibit 4 ever became a trial exhibit. Based upon Kidd's testimony that laboratory exhibit 4 was "a sexual assault kit," it can be presumed that laboratory exhibit 4 was the evidence

collection kit for M.D., the other victim in this case. After all, there were only two victims in this case—M.D. and D.S.—and the evidence collection kit for victim D.S. was laboratory exhibit 5, which became People's exhibit 28 at trial. The crucial DNA evidence in this case was developed from swabs taken from D.S.'s body and placed in the evidence collection kit for D.S. The swabs taken from M.D.'s body did not produce any trial evidence. Laboratory exhibit 4 played no part at defendant's trial. Defendant did not even attempt to explain how the item may have been important in his case. As for People's exhibits 28C, 28D, 28E, and 28G, it is of no consequence that Kidd did not recognize them. The State properly laid a foundation for those four exhibits through the testimonies of witnesses other than Kidd, and those four exhibits were properly admitted into evidence. Kidd apparently was not a part of the chain of custody for any of those four exhibits. Trial counsel was not ineffective in his cross-examination of Kidd, and defendant's claim to the contrary had no substance.

¶ 39

3. Donald Krohn

¶ 40 In regard to Krohn, defendant stated that "trial counsel asked no questions of Mr. Krohn's missing initials on the packaging in which the State offered to him to identify, in which he 'ought' to have inquired, which would then have broken the claim [*sic*] of custody." Donald Krohn was an evidence technician with the ISP's Metro-East Forensic Science Laboratory in Fairview Heights. At defendant's trial, the State called him to provide chain-of-custody testimony regarding various items of DNA-related evidence. During direct examination by the State, Krohn testified that the envelopes marked People's exhibits 28C, 28E, and 28G did not bear his initials and were "not [his] package"

or "not [his] envelope." These bits of testimony appear to be the basis for defendant's postconviction claim that trial counsel ineffectively cross-examined Krohn and thus failed to destroy the State's chain of custody. However, nothing in Krohn's testimony suggested a weak or broken chain of custody. With each of the three aforementioned exhibits, Krohn opened the exhibit envelope and positively identified the items contained therein, thus providing the requisite chain-of-custody evidence. It was the items contained in the envelopes, not the envelopes themselves, that were important to the State's case against defendant. The fact that Krohn had not previously used or seen the particular envelopes that held the exhibits was of no consequence. Defendant in his postconviction petition did not offer any suggestion as to how trial counsel should have cross-examined Krohn. An examination of the transcript of Krohn's testimony does not reveal any fertile area of cross-examination that counsel overlooked.

¶ 41

4. Donna Rees

¶ 42 Defendant claimed that trial counsel was constitutionally ineffective in cross-examining State's witness Donna Rees, who was a forensic scientist in the Metro-East Forensic Science Laboratory in Fairview Heights. At trial, Rees testified in abundant detail about DNA analyses she had performed in this case and how those analyses led her to conclude that defendant was the likely source of the sperm found on victim D.S.'s body. In his postconviction petition, defendant accused trial counsel of cross-examining Rees in a way that "did nothing to aid [the defendant]." Defendant did not suggest any line of questioning that counsel should have pursued with Rees; he did not mention any portion of Rees's testimony that he considered particularly vulnerable to attack. Defense

counsel's cross-examination of Rees is spread across 64 pages of the report of proceedings. Counsel obviously was familiar with DNA and with the techniques of DNA analysis. Apparently, the principal goals of the cross-examination were (1) to make clear that DNA analysis cannot establish with certainty that a particular person was in fact the source of a particular unknown DNA sample, and (2) to lay the groundwork for the defense theory that another ISP forensic scientist, Stacie Speith, mishandled the DNA evidence, and thus rendered the DNA evidence generally unreliable. (The alleged unreliability of the DNA evidence was an issue that defendant pursued all the way through his direct appeal.) Counsel's cross-examination of Rees was far from constitutionally ineffective. It may have done little or nothing to detract from Rees's testimony in the eyes of the jury, but an attorney cannot be considered constitutionally ineffective merely for failing to detract from the testimony of a very strong witness, such as Rees in this case.

¶ 43

5. Stacie Speith

¶ 44 Defendant claimed that trial counsel provided ineffective assistance where he "failed to fully develop/impeach and explore the testimony of the State's witness, Stacy [*sic*] Speith, regarding the unreliable D.N.A. testing she had conducted in the past." Stacie Speith was a forensic biologist at the ISP's Southern Illinois Forensic Science Center in Carbondale. She performed some of the DNA analyses in this case, and she testified for the State, via video deposition, at the defendant's trial. During cross-examination by defense counsel, Speith acknowledged that in two prior criminal cases, neither of which was at all related to the instant case, she had made mistakes. In one of

those prior cases, she "designated an envelope with an incorrect exhibit number and caught the problem and made the correction before any error occurred," she explained. In the other prior case, she made a mistake that some other person caught. The exact nature of this second mistake is not entirely clear from Speith's testimony, but it appears to have been a problem with labeling or paperwork. There was no indication that Speith, in those prior cases, made mistakes in the actual testing of DNA material or in the analysis of results. Apparently, trial counsel questioned Speith about these mistakes in prior cases in order to create the impression that Speith was prone to, or at least capable of, making mistakes in her work and therefore may have made a mistake in the defendant's case. In his postconviction claim, defendant seemed to be referring to this portion of Speith's testimony. However, defendant did not suggest what counsel should have done differently, or what information a different approach may have yielded, or how the trial's result might possibly have been altered. Trial counsel was not ineffective in cross-examining Speith about her mistakes in prior cases. Counsel made his point that Speith was not immune from making mistakes. The jury was free to consider Speith's past mistakes when evaluating Speith's testimony and the other evidence at trial.

¶ 45

6. Jamie Harman

¶ 46 Defendant claimed that trial counsel was ineffective in his cross-examination of State's witness Jamie Harman "regarding the chain of custody and how the Defendant's DNA came to be on a rectal swab." Harman was an employee of Genetic Technologies, Inc., and she performed some of the DNA testing and analysis in this case. At trial, she opined that defendant's known genetic profile was "indistinguishable" from the genetic

profile of the semen found on a rectal swab taken from victim D.S. During the course of her direct examination by the State, Harman was shown six exhibits. Three of the exhibits were DNA-containing materials; the chains of custody for these three exhibits were established through the testimonies of Harman and other witnesses. The three other exhibits shown to Harman were data displays that Harman generated during her testing and analysis of the DNA-containing materials. No chain-of-custody problem is apparent in Harman's testimony. In his petition, defendant did not describe any particular problem with any particular exhibit's chain of custody. On cross-examination by defense counsel, Harman confirmed that although she found defendant's DNA material on D.S.'s rectal swab, she did not know how it got there. This statement seems obviously true. After all, a DNA analyst can only determine whether DNA with a specific profile is present; the analyst has no way of knowing the circumstances under which the DNA material was deposited in the place where it was found. This court cannot imagine what else trial counsel could have done with this portion of Harman's testimony. The defendant certainly did not offer any suggestions.

¶ 47

7. Steve Evans

¶ 48 Defendant claimed that trial counsel provided ineffective assistance when, during his cross-examination of State's witness Steve Evans, he failed to ask any questions relating to defendant's alibi. Evans, who was defendant's uncle, testified for the State concerning his own height, weight, and eyesight, and about the vehicles that were at defendant's residence on the date the sexual assaults were committed. Questions about defendant's whereabouts would have been beyond the scope of the direct examination,

and therefore counsel could not have posed them. See, *e.g.*, *People v. DuLong*, 33 Ill. 2d 140, 144 (1965) (cross-examination is ordinarily limited to matters brought out on direct examination). Furthermore, counsel called Evans to testify during defendant's case in chief, and at that time he asked Evans questions relating to defendant's alibi, and Evans answered those questions in a manner supporting the alibi defense.

¶ 49 E. Assisting State in Establishing Chain of Custody

¶ 50 Defendant claimed that trial counsel "assist[ed] the State" by filling a gap in a "chain of custody." In support of this claim, defendant quoted from a passage of trial transcript wherein trial counsel informed the trial judge that the State wanted to "present a witness for chain of custody" prior to publishing to the jury a videotape of forensic scientist Stacie Speith's evidence deposition. Counsel further informed the judge that defendant did not have any objection to the State's calling a witness prior to publication of the videotape. The State then called a witness who testified that on the previous day (*i.e.*, the day that Speith's evidence deposition was taken), he delivered to Speith a particular exhibit. After this witness's extremely brief testimony, Speith's evidence deposition was published to the jury.

¶ 51 This particular claim may be the weakest of all the claims presented by defendant, although the competition for that distinction is fierce. The trial transcript makes clear that trial counsel was merely informing the judge of how the State intended to proceed with its witnesses and expressing the defendant's lack of an objection thereto. Counsel did not help the State to meet its burden of establishing a chain of custody for any piece of evidence.

¶ 52

F. Mishandling the Alibi Defense

¶ 53 Defendant claimed that he was deprived of the effective assistance of trial counsel where counsel "agreed with [the lead prosecutor] that [defendant's] alibi defense [did] not raise [*sic*] to the normal level of an alibi defense." Defendant also claimed that counsel "failed to fully develop" the testimony of alibi witness Steve Evans and otherwise "failed to properly assert [defendant's] alibi defense."

¶ 54 Shortly after the 12 regular jurors were selected, sworn, and excused for the day, the trial judge and the attorneys for both sides discussed pending motions, one of which was the State's "motion to strike defendant's disclosure of alibi defense." In the course of argument, the lead prosecutor stated that defendant's written disclosure lacked "specific information as to specific times," and therefore did not "qualif[y]" as a proper disclosure. To this statement, defense counsel replied as follows: "I agree with [the lead prosecutor]. I don't think it rises to the normal level of alibi defense; but when doing our response to discovery, we wanted to cover every base so the possibility if that does rise to alibi is not refused [*sic*]." Ultimately, the court denied the State's motion to strike the defendant's disclosure, and the alibi defense was utilized at trial. In context, it is far from clear that trial counsel was conceding a weakness in the alibi defense. It appears that counsel was admitting a possible weakness in his written disclosure of the alibi. Even if trial counsel was suggesting that the alibi defense itself was weak or somehow deficient, this (very brief) comment would not have prejudiced defendant, for counsel made the comment outside the presence of the jury.

¶ 55 Defendant claimed that counsel "failed to fully develop" Steve Evans's testimony in support of the alibi. The record contradicts this claim. Counsel presented the alibi defense through the testimonies of (1) Don Kimbro, who was defendant's former father-in-law, (2) defendant himself, and (3) Evans, who was defendant's uncle. These three witnesses testified in that order. Evans corroborated the more-detailed testimonies of Kimbro and defendant. Taken together, the testimonies of these three placed defendant at his residence before, during, and after the time period during which the instant crimes were committed in a nearby national forest. Trial counsel asked Evans appropriate questions to elicit the exculpatory testimony. In his petition, defendant did not specify what additional questions counsel should have asked, or what counsel should have done to "develop" Evans's testimony more "fully," and an examination of the record does not suggest anything along those lines.

¶ 56 Counsel competently presented defendant's alibi defense. Defendant has not specified any piece of evidence that counsel should have presented but failed to present. The claims relating to counsel's handling of the alibi defense had no merit.

¶ 57 G. Failure to Argue Competently in Favor of Directed Verdict

¶ 58 Defendant claimed that trial counsel provided constitutionally ineffective assistance when he made an oral motion for a directed verdict without mentioning various "relevant facts" such as defendant's "sound alibi witnesses." At the close of the State's evidence, trial counsel orally moved for a directed verdict of not guilty. On that occasion, counsel pointed out that the victims did not identify defendant as their attacker, and he argued that the State's DNA evidence had been "shown to be flawed in nature,"

resulting in a "purely circumstantial" case against defendant. The court denied the motion for a directed verdict. At the close of all the evidence, counsel again moved, without success, for a directed verdict. Counsel's argument was basically the same as before; he did not discuss the evidence adduced during defendant's case in chief. Counsel's exclusive focus on the State's evidence should not be surprising. After all, a motion for a directed verdict of not guilty asks whether the *State's* evidence could support a verdict of guilty beyond a reasonable doubt. See, e.g., *People v. Connolly*, 322 Ill. App. 3d 905, 915 (2001). Regardless of what evidence or what witnesses counsel may have discussed when arguing in favor of his motion for a directed verdict, and regardless of how sterling an argument counsel may have presented, counsel would not have prevailed on the motion. The trial court could have granted the motion only if the evidence was insufficient to support a verdict of guilty. 725 ILCS 5/115-4(k) (West 1996). Here, the evidence certainly was sufficient to support verdicts of guilty. In the order affirming the judgment of conviction in this case, this court wrote that "we cannot say that the State failed to prove the defendant's guilt beyond a reasonable doubt." *People v. Taylor*, No. 5-00-0119, order at 8 (May 28, 2002) (unpublished order pursuant to Supreme Court Rule 23). Twelve years on, the evidence of defendant's guilt does not appear any less strong. Under the law, the trial court had no real choice but to deny defendant's motion for a directed verdict, regardless of the content of trial counsel's argument in favor of the motion.

¶ 60 Defendant claimed that trial counsel provided ineffective assistance during his closing argument to the jury, by failing to mention various points of testimony by various witnesses. According to defendant, counsel should have mentioned "the mistakes made by State's DNA experts of the past," "[defendant's] phone calls to his wife, seeking a ride back to work," and other points. The reference to mistakes made by the State's DNA experts was likely a reference to the testimony of ISP forensic scientist Stacie Speith. As described *supra*, Speith acknowledged during her cross-examination by defense counsel that in two prior criminal cases, neither of which was at all related to the instant case, she mislabeled an exhibit envelope and made some other mistake, the nature of which was not entirely clear from Speith's testimony, but which did not appear to involve the actual testing of DNA or the analysis of data. Defense counsel elicited this testimony in an apparent attempt to portray Speith as someone who was prone to making mistakes. This testimony was not very compelling. Furthermore, this testimony was minor compared to the testimony that in the instant case, 36 microliters of an extraction of the defendant's DNA were unaccounted for. The "missing" 36 microliters were the focus of trial counsel's cross-examination of Speith, and understandably so. Indeed, the "missing" 36 microliters were the basis for defendant's attack on the State's DNA evidence, and on the State's entire case in chief, and they were the basis for the defendant's (unsuccessful) direct-appeal argument that the State's DNA evidence was so unreliable that it could not possibly support defendant's convictions. In his closing argument, counsel

understandably focused on the "missing" 36 microliters, and did not mention the mistakes that Speith had made in previous, unrelated cases.

¶ 61 As for the reference to "[defendant's] phone calls to his wife, seeking a ride back to work," defendant must be referring to the telephone call that, according to Shawnee Telephone Company records, was placed from defendant's residence on the date of the instant crimes, March 2, 1999, at 1:23 p.m. Evidence of this telephone call was part of defendant's alibi defense. The idea behind this evidence was that defendant could not possibly have perpetrated the sexual assaults at a national forest and also have been at his residence to make that telephone call at 1:23 p.m. This idea has at least one weakness. Contrary to the defense theory, it certainly may have been possible for defendant to perpetrate the assaults and to be back home by 1:23 p.m., and then to make a telephone call in order to help manufacture an alibi. The scene of the crimes was less than four miles from the defendant's residence, and multiple witnesses testified that in the early afternoon of March 2, 1999, they saw a car very similar to the Oldsmobile defendant was driving that day, and that the car was moving at an unusually high rate of speed on the blacktop and gravel roads that connect the crime scene to defendant's residence. The evidence of the 1:23 p.m. telephone call was not nearly as persuasive as defendant imagines. Trial counsel cannot be severely faulted for not mentioning the telephone call during closing argument. Counsel rightly focused on DNA, for the outcome of this case turned on DNA evidence, given that no eyewitness identified defendant as the perpetrator.

¶ 62 Counsel argued to the jury that police investigators rashly settled on defendant as the perpetrator, and thereafter focused on building a case against him, without considering other possibilities. Counsel argued that the testimonies of alibi witnesses Evans and Kimbro, in and of themselves, were enough to raise a reasonable doubt as to defendant's guilt. Counsel reviewed the testimony of the defense's DNA expert, assistant professor of zoology Dr. Thomas P. Breen, who had testified that the State's handling of the DNA material was horribly sloppy and rendered the results of the State's DNA analysis wholly unreliable. The argument was strategically sound, and certainly not objectively unreasonable under prevailing professional norms.

¶ 63 I. Not Seeking to Have an Exhibit Sent to Jury Room

¶ 64 Defendant claimed that trial counsel was ineffective for not asking the judge to send back to the jury room, during deliberations, defendant's exhibit 5, which defendant in his petition described as "Dr. Tom Breen's written outline as to errors made by State's experts." Defendant's exhibit 5 is not part of the record on appeal, and defendant did not attach a copy of it to his postconviction petition. Toward the end of the defendant's trial, as the judge and the parties were reviewing exhibits, the judge asked trial counsel whether he was offering defendant's exhibit 5, which the judge described as "the lab report," and counsel answered in the negative. During counsel's cross-examination of forensic scientist Stacie Speith, counsel showed Speith "what's previously been identified as Defendant's 5" and he described the exhibit as "a memo of March 24th, 1999, to Belinda McConnell from Diane Coronado." (McConnell and Coronado were ISP officers who testified at defendant's trial.) The record does not contain any indication that

defendant's exhibit 5 was any sort of "written outline" prepared or used by defense DNA expert Breen.

¶ 65 During Breen's testimony, neither party showed Breen any exhibit, and Breen did not identify any exhibit. Breen never mentioned any sort of written outline. Breen simply testified that he had reviewed documents relating to the State's handling and analysis of DNA evidence in defendant's case, and he then proceeded to state his opinions about the handling of the evidence. It seems that defendant, in his postconviction petition, was in error regarding the nature of defendant's exhibit 5. Even if defendant's description of defendant's exhibit 5 were accurate, no significant harm would have resulted from not submitting it to the jury during deliberations. Breen was a thorough and articulate expert witness who cogently criticized the handling of the DNA evidence by State employees. The jury heard his testimony and was free to evaluate it along with all the other evidence adduced.

¶ 66 J. Failure to Preserve Trial Errors

¶ 67 Defendant claimed that trial counsel "failed to preserve errors *** in his weak motion for a new trial." Defendant faulted counsel for not including the following claims in that motion: (1) the testimonies of "four State witnesses" concerning their conversations with defendant violated the general prohibition on hearsay testimony and the trial court's *limine* order, and (2) the credibility of State's witness Gary Schiff was impaired by evidence of Schiff's prior inconsistent statements. The "four State witnesses" to whom defendant referred must be Atkinson, Palmer, Johnson, and Culkin. As explained *supra*, these four witnesses' testimonies violated neither the hearsay rule nor

the *limine* order. Therefore, their testimonies did not provide grounds for a new trial, and trial counsel cannot be faulted for not mentioning them in the motion for a new trial. As for the credibility of Gary Schiff, whether (or to what extent) it was impaired by evidence of Schiff's prior statements was for the jury to determine. Counsel's inclusion of this claim in the motion for a new trial would not have altered the outcome of the proceedings.

¶ 68 Defendant presented many claims of ineffective assistance of trial counsel. None of them had merit. Defendant certainly did not make a substantial showing of a violation of his right to the effective assistance of trial counsel.

¶ 69 II. Claims of Errors by the Trial Court

¶ 70 In addition to the numerous claims of ineffective assistance of trial counsel, defendant claimed that the trial court (1) "erred in allowing hearsay evidence regarding prior bad acts, which the Court had previously ruled inadmissible," and (2) "erred in [defendant's] sentencing when it sentenced him to 15 counts with 8 of those counts to run consecutive." These two claims, like the claims of ineffective assistance of trial counsel, concern issues that could have been raised on direct appeal, since they are based on facts appearing in the original trial record, and would now be deemed forfeited. Because defendant claimed that direct-appeal counsel was constitutionally ineffective for not presenting these issues, the claims must be considered on the merits.

¶ 71 The first of these claims apparently relates to the testimonies of State's witnesses Susan Atkinson, Brennan Palmer, Kenneth Johnson, and Rita Culkin. As explained *supra*, the testimonies of these four witnesses violated neither the hearsay rule nor the

trial court's *limine* order. Even if this claim implicated a constitutional right and was properly raised in the postconviction proceeding, there was no substantial showing of a constitutional violation. The four witnesses' testimonies were properly allowed.

¶ 72 As for the second of these claims, defendant failed to specify the nature of the alleged error in his sentences. In the direct appeal, defendant argued that his consecutive sentences were unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000); this court rejected that argument and affirmed the judgment of conviction. *People v. Taylor*, No. 5-00-0119 (May 28, 2002) (unpublished order pursuant to Supreme Court Rule 23). Twelve years on, this court finds nothing wrong with the sentences. The claims regarding defendant's sentences had no merit.

¶ 73 III. Cumulative Effect of All Errors at Trial

¶ 74 Defendant claimed that the cumulative effect of all the errors allegedly committed by trial counsel or the trial court, discussed *supra*, deprived him of his right to a fair trial and necessitated postconviction relief. However, none of the alleged errors was truly an error. Thus, there cannot be a cumulative effect. See, *e.g.*, *People v. Evans*, 186 Ill. 2d 83, 103 (1999). Whether defendant's claims are examined individually or all together, they amount to nothing.

¶ 75 IV. Claims of Ineffective Assistance of Direct-Appeal Counsel

¶ 76 Defendant claimed that the attorney who handled his direct appeal provided constitutionally ineffective assistance by (1) failing to present the issues raised in the various postconviction claims regarding trial counsel and the trial court, and (2) failing to

develop information relating to the background of State's witness Gary Schiff and failing to present this court with an argument concerning that information.

¶ 77 Direct-appeal counsel certainly was not ineffective for not presenting the issues raised in the various postconviction claims regarding trial counsel and the trial court. As discussed *supra*, none of those claims had any merit. In turn, direct-appeal counsel was not obligated to raise any of those issues. Because direct-appeal counsel was not ineffective, all of the postconviction claims alleging errors by trial counsel or by the trial court have been procedurally defaulted.

¶ 78 The second part of this ineffective-assistance-of-direct-appeal-counsel claim requires some explanation. In his postconviction petition, defendant alleged that "[s]hortly after appellate counsel was appointed" for the direct appeal, defendant's "family and friends" searched "the Internet" and found that witness Schiff " 'was not' an ordained minister" and that his name did not appear among the "listed employees past and present working for Illinois Department of Corrections." At defendant's trial, Schiff had testified that he was a pastor at Bethany General Baptist Church and that he had twice worked as a State of Illinois correctional officer prior to becoming a pastor. In the postconviction petition, defendant did not specify any web sites that were visited; he did not explain how any web site might establish that some particular person was not a pastor or had never worked as a correctional officer. Even if defendant's "friends and family" did uncover some information that, if developed, conceivably could be helpful to the defendant, direct-appeal counsel was in no position to exploit it. After all, a direct appeal is generally confined to the contents in the trial record. See, *e.g.*, *People v. Newbolds*,

364 Ill. App. 3d 672 (2006) (noting that if supporting facts are not part of trial record, they may not be considered by the reviewing court on direct appeal).

¶ 79

CONCLUSION

¶ 80 As the above discussion suggests, defendant's numerous postconviction claims were exceedingly weak. The defendant certainly did not make a substantial showing of any constitutional violation. Therefore, the circuit court was correct in dismissing defendant's petition, and OSAD was correct in concluding that this appeal lacks merit. Accordingly, OSAD's *Finley* motion to withdraw as counsel is hereby granted, and the judgment of the circuit court is hereby affirmed.

¶ 81 Motion granted; judgment affirmed.