2012 IL App (1st) 053374-U

FOURTH DIVISION
Rule 23 Order filed December 21, 2012
Modified upon denial of rehearing December 19, 2013

No. 1-05-3374

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re DENZEL W., a Minor,	)	Appeal from the
	)	Circuit Court of
(THE PEOPLE OF THE STATE OF ILLINOIS,	)	Cook County.
	)	
Plaintiff-Appellee,	)	No. 05 JD 40030
	)	
v.	)	
	)	Honorable
DENZEL W.,	)	Richard F. Walsh,
	)	Judge Presiding.
Respondent-Appellant).	)	

PRESIDING JUSTICE HOWSE delivered the judgment of the court. Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 *HELD*: The trial court is affirmed. The record does not support the minor's claim that he was prejudiced by counsel's performance and, even accepting all of the minor's claims, the allegations of counsel's deficient performance are not sufficient to demonstrate prejudice.

¶ 2 A petition for adjudication of wardship was filed in

the circuit court of Cook County which alleged Denzel W., a minor, committed the offense of aggravated battery by committing a battery at a public place of amusement, the Ridgeland Commons Community Park, in Oak Park, Illinois, on January 9, 2005. At trial, a law student assisted defense counsel pursuant to Illinois Supreme Court Rule 711. Respondent was adjudicated delinquent following a bench trial in the circuit court of Cook County. Denzel was sentenced to one year probation, ordered to perform 20 hours of community service, ordered to participate in a victim impact panel and violence prevention program, and ordered to submit to a buccal swab for the State's DNA database.

¶ 3 On appeal, we reversed Denzel's adjudication and remanded the case for a new trial, finding counsel's failure to file Denzel's written consent to the representation by the 711 law student was a violation of Supreme Court Rule 711 and, therefore, a violation of respondent's right to counsel. *In re Denzel W.*, No. 1-05-3374 (2008)(unpublished order under Supreme Court Rule 23). The Illinois Supreme Court reversed our decision, holding that a failure to file an accused's written consent to 711 representation does not result in a *per se* denial of counsel when a fully licensed attorney is present and supervising the representation. *In re Denzel*, 237 Ill. 2d 285, 297-98 (2010). The supreme court remanded the case to the

appellate court for "a determination of whether the trial court's actions, along with respondent's other claimed errors, resulted in respondent receiving ineffective assistance of counsel" under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 300. For the following reasons, we affirm the circuit court.

¶ 4 BACKGROUND

¶ 5 After a bench trial on April 7, 2005, the minor was adjudicated delinquent. Denzel was represented by an assistant public defender, who stated to the trial court before trial: "I'll be assisted by our 711 law clerk ***, on behalf of [Denzel]."

¶ 6 State's witness Bobbi F., age 14 at the time of trial, testified that around 5 p.m. on January 9, 2005, she walked to the park with three friends to go sledding. Bobbi testified that she had been sledding for about an hour when she observed four boys, including Denzel, walking toward the sledding area.

¶ 7 She testified that Denzel walked toward her and made a lewd comment. She did not say anything but ran away into a park building. Denzel followed her inside the building where Denzel dragged her out by her ponytail, tripped her and banged her head on a pile of ice about 10 to 15 times. Bobbi testified that she

pleaded with Denzel to stop but he would not. The beating stopped when Denzel picked her up and threw her into a garbage can. Travis was one of the individuals present during the beating.

¶ 8 On direct examination Bobbi testified she got out of the garbage can while other people in the area were laughing. Bobbi testified she walked over towards her friends and told them what happened. Bobbi testified her friends saw the events and came to the scene after everything had happened and asked if she was okay. Bobbi and her friends began to walk home. One of her friends flagged down a police officer. An ambulance arrived at the scene and Bobbi was treated for her injuries. Bobbi testified that her lip was bleeding and she had a gash on her forehead that was bleeding and swelling.

¶ 9 Bobbi testified that she told police about the incident. She was treated for her injuries in the ambulance but did not go to the hospital. Bobbi testified that she had known Denzel for about a year and met him at school. On cross-examination, Bobbi testified that she and Denzel had issues in the past. Defense counsel asked Bobbi whether she and Denzel had a relationship. Bobbi stated they went to school together but they never hung out. Words had been passed between them but there was nothing physical until the date of the incident.

¶ 10 State's witness Grant M., age 13 at the time of the trial, testified that he was with Bobbi at the sledding area on the day of the incident. Grant testified that he knew Denzel from school and that Bobbi went over to the park building to meet Denzel. He did not see anything unusual occur between Denzel and Bobbi. Grant testified that Bobbi just turned around and started running. He testified that "[i]t looked like she had a smirk on her face." Grant observed Denzel chasing after Bobbi. Grant testified that he turned his attention elsewhere because he thought Bobbi was having fun.

¶ 11 Grant testified that approximately 15 to 30 minutes later he observed that Bobbi had blood on her face, right above her mouth and below her nostrils. Grant testified that he did not observe anyone strike Bobbi.

¶ 12 On cross-examination, Grant testified that he did not observe an injury to Bobbi's forehead or observe Denzel grab Bobbi's ponytail. He was not paying attention to Denzel and Bobbi and did not hear her ask for help or tell Denzel to stop pushing her face to the ground. Grant testified that he did not have a clear view of the front of the park building and that he was focused on sledding. Bobbi did not tell him about the incident with Denzel.

¶ 13 State's witness Tracy S., Bobbi's mother, testified

that she went to the park on the day of the incident after receiving a telephone call from the Oak Park police. At the park she observed Bobbi in an ambulance with a "goose egg" on her head and her lip was split open and bleeding up through the nose. Tracy testified that the paramedics treated Bobbi and did not offer to take her to a hospital. The State rested its case.

¶ 14 The first witness to testify for the respondent was Tequila. The direct examination was conducted by the 711 law student. Tequila testified that she was at the park sledding with Bobbi, Grant and other friends Nakita and Mark. Tequila testified that she was away from Bobbi for approximately five or 10 minutes and that she did not observe or hear anything out of the ordinary.

¶ 15 She observed Denzel at the park that day but did not observe Bobbi with Denzel together. She testified that her friends told Bobbi not to go down the hill because a group of boys had congregated in the area. Tequila testified that Bobbi did not explain what happened after she was injured and she did not observe any injuries on Bobbi's forehead. Tequila observed Bobbi with a little bloody nose.

¶ 16 During the direct examination of Tequila, the 711 student tried to elicit testimony about a possible relationship between Bobbi and Denzel.

¶ 17 The following exchange ensued:

"Q. 711 LAW STUDENT: To your knowledge, did [Bobbi] have a prior relationship with Denzel?

ASSISTANT STATE'S ATTORNEY: Objection.

THE COURT: Sustained.

DEFENSE ATTORNEY: I believe this goes to motive –

THE COURT: Sustained. Let's go.

Q. Can you tell us anything – How long have you known [Bobbi]?

A. Well, about a year. But I have heard about her from my brother since she was in 6th grade.

Q. Did you go to school with [Bobbi]?

A. Yes.

Q. What type of reputation did Bobbi have at school?

ASSISTANT STATE'S ATTORNEY: Objection.

THE COURT: Her reputation – sustained.

DEFENSE ATTORNEY: Judge.

THE COURT: If it goes to peacefulness, that's fine. If it goes to anything else, no. It has nothing to do with this case. You have to lay a proper foundation for reputation. If you're going to go to peacefulness.

Q. Nothing further with this witness, your honor."

¶ 18 After the State cross examined Tequila, the defense

counsel attempted to begin the redirect examination of Tequila, but was prevented from doing so in the following exchange:

"DEFENSE ATTORNEY: Couple questions.

THE COURT: You didn't start this examination. You don't get a right to finish it. Your co-counsel did the examination. You know that's - we don't play tag team here.

DEFENSE ATTORNEY: That's fine.

THE COURT: If she has other questions to ask on redirect, fine."

¶ 19 The 711 student completed the redirect examination of Tequila then conducted the direct examination of defense witness Travis P. Travis testified that he went to the park with Denzel and two other friends to go sledding. Travis testified that he was only away from Denzel for approximately two minutes. He did not observe Denzel interact with Bobbi in any way and did not observe that Bobbi had suffered any injuries. Travis testified that he did not observe Denzel chase Bobbi and he was not with Denzel by the park building. Travis testified that he was present when the ambulance arrived and the police questioned him.

¶ 20 Defense counsel then called Bobbi, the complainant, as a defense witness. Defense counsel asked Bobbi whether she told police that her friends and Denzel's friends had tried to pull

Denzel off of her. Bobbi did not testify in her prior testimony that anyone had tried to pull respondent off of her. The following exchange occurred:

"Q. Did you tell the police that your friends and Denzel's friends were trying to take Denzel from –

ASSISTANT STATE'S ATTORNEY: Objection.

Q. Trying to pull him off of you?

ASSISTANT STATE'S ATTORNEY: Objection.

THE COURT: Basis?

ASSISTANT STATE'S ATTORNEY: Number one, your Honor, it's hearsay. The witness is here. She's subject to cross-examination about the actual incident. Also, I don't know if counsel is prepared to proffer this up. Officer Smith is not here.

THE COURT: Well, you got a third reason. What are they recalling her for?

DEFENSE ATTORNEY: Judge.

THE COURT: You had a right to cross-examine her on direct. Now, you're stuck with her as your witness. The appropriate question should be is what you told the police. You don't get to call a witness just to cross-examine them. You should have done it after your direct examination.

If you didn't bring it out, you're out of luck. That's the objection to take. If you call her, you call her as your witness, and you call her for some reason other than what happened, that you should [have] gone into on cross-examination. You don't get to cure it by putting them back on the stand. If you didn't do a proper cross-examination, you're out of luck.

DEFENSE ATTORNEY: Let me withdraw that question regarding what she told the police."

¶ 21 Denzel, age 14 at the time of trial, testified on his own behalf. He was at the park with his friends sledding and having a snowball fight. Denzel testified that one of his friends hit Bobbi with a snowball and she accused him and an argument ensued. Denzel testified: "Then she just walked off. Her friend just told me to be cool about it."

¶ 22 Denzel testified that he and his friends chased Bobbi and her friends with snowballs. Denzel testified that the girls did not run to the park building, instead they ran out of the gate. Denzel testified that he does not know if Bobbi went into the park building and he did not ever physically lay his hands on her.

¶ 23 On cross-examination, Denzel testified that he was never alone with Bobbi. He testified that he was away from

Travis when he and his friend, JJ, slid down the hill. Denzel testified that Bobbi's friends Jenee and Nakita threw snowballs at him and his friends. Denzel testified, "We weren't intentionally throwing them at Bobbi, but Bobbi was with Jenee and Nakita." Denzel testified he did not observe blood on Bobbi's face.

¶ 24 In closing argument, defense counsel stated Bobbi did not like Denzel and that they had problems in the past. He argued Bobbi exaggerated and got caught in an exaggeration. He stated Bobbi made up the story about Denzel slamming her head into the ground, pulling her ponytail and placing her in the garbage can. Defense counsel stated it was troubling that one of Bobbi's friends and not Bobbi flagged down the police. He argued that the other witnesses contradict Bobbi's testimony.

¶ 25 The trial court adjudicated Denzel delinquent for aggravated battery. This appeal followed.

¶ 26 ANALYSIS

¶ 27 On appeal, Denzel claims he was denied effective assistance of counsel because: (1) trial counsel failed to impeach Bobbi with a prior inconsistent statement and the trial court erred when it refused to allow trial counsel to impeach Bobbi when she was called as a witness during respondent's case; (2) the trial court interfered with the 711 law student's attempt

to present evidence of Bobbi's reputation for truthfulness; (3) the trial court improperly prevented the 711 student from introducing evidence of motive; and (4) the supervision of the 711 student was so inadequate it was tantamount to no supervision at all. We will consider whether representation by the 711 law student, defense counsel, along the actions of the trial court, amounted to ineffective assistance of counsel under the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), as instructed by our supreme court.

¶ 28 Under *Strickland,* a defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance prejudiced the defendant by creating a reasonable probability that, but for counsel's errors, the trial result would have been different. *People v. Alvine,* 173 Ill. 2d 273, 293 (1996) (citing *Strickland,* 466 U.S. at 687). A reasonable probability is a probability sufficient to undermine confidence in the result of the trial -- that is, to indicate that defense counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Enis,* 194 Ill. 2d 361, 376 (2000).

¶ 29 It is the defendant’s burden to affirmatively prove prejudice. *Strickland*, 466 U.S. at 693-94.

¶ 30 Because a defendant's failure to satisfy either prong of the *Strickland* test will defeat an ineffective assistance of counsel claim, we are not required to "address both components of the inquiry if defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

¶ 31 In assessing an ineffective counsel claim, the court must give deference to counsel's conduct within the context of trial and without the benefit of hindsight. *People v. King*, 316 Ill. App. 3d 901, 913 (2000). Therefore, "a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of *sound* trial strategy and not incompetence." *Id.* (Emphasis added). The defendant can overcome the strong presumption of a sound strategy if counsel's decision appears so irrational and unreasonable that no reasonably effective defense attorney facing similar circumstances would pursue the same strategy. *Id.* at 916.

¶ 32 In determining whether a defendant has been denied a right to the effective assistance of counsel, the court uses a "fact sensitive analysis," which seeks to measure "the quality and impact of counsel's representation under circumstances of the individual case." *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002). A reviewing court must consider the totality of the evidence before the fact finder in determining whether a

defendant has established his attorney's unreasonable errors and the reasonable probability of a different result. *Strickland*, 466 U.S. at 695.

¶ 33 Respondent presents his claims of ineffective assistance of counsel in his direct appeal. In *Massero v. United States*, 538 U.S. 500 (2003), the United States Supreme Court has recognized that ineffective assistance of counsel claims are preferably brought on collateral review rather on direct appeal because frequently the record on direct review is insufficient to support a claim of ineffective assistance of counsel. "When an ineffective assistance of counsel claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Massaro*, 538 U.S. at 506. "Claims of ineffective assistance of counsel are usually reserved for postconviction proceedings where a trial court can conduct an evidentiary hearing, hear defense counsel's reasons for any allegations of inadequate representation, and develop a complete record regarding the claim and where attorney-client privilege no longer applies." *People v. Weeks*, 393 Ill. App. 3d 1004, 1012 (2009), see *People v. Kunze*, 193 Ill. App. 3d 708, 725-26 (1990). In his appellate brief, Denzel acknowledges that our supreme court has

determined that postconviction petitions are not available to contest juvenile adjudications. *In re William M.*, 206 Ill. 2d 595, 604-05 (2003); *In re Timothy P.*, 388 Ill. App. 3d 98, 102 (2009). We will consider Denzel's claims of ineffective counsel and determine whether the record supports his claims under the *Strickland* standard.

¶ 34 Counsel's Failure to Impeach Complaining Witness

¶ 35 We first consider Denzel's claims that he was denied effective assistance of counsel because defense counsel failed to impeach the complaining witness with an alleged prior inconsistent statement she made to a police officer. Denzel argues Bobbi made a statement to a police officer on the scene that Bobbi's friends and Denzel's friends tried to pull Denzel off of her, an account that was different from her trial testimony.

¶ 36 Bobbi's testimony concerning who was present when the beating stopped changed during her testimony. On cross-examination, Bobbi testified her friends saw the events when they came to the scene after everything had happened. Subsequently, in further cross-examination, Bobbi testified she walked toward her friends after everything was over, and that Jenee and Nakita had seen what happened. However, Bobbi never testified that anyone tried to pull Denzel off of her.

¶ 37 Denzel argues that defense counsel was ineffective for failure to impeach Bobbi with the statement she allegedly made to a police officer that Denzel's friends and her friends tried to pull Denzel off her.

¶ 38 The State argues that there is nothing in the record to indicate Bobbi made such a statement to the officer. We have examined the record and conclude, with the exception of defense counsel's questions during the examination of Bobbi and his suggestions during arguments, there is no evidence in the record that Bobbi made the statement that either her friends or Denzel's friends tried to pull Denzel off of her.

¶ 39 Denzel argues that the State only objected to the questions about the alleged inconsistent statement on hearsay grounds and that defense counsel could not prove-up the prior inconsistent statement. Denzel argues the State did not assert during trial that Bobbi did not make an inconsistent statement. Denzel argues that the failure of the State to deny at trial that Bobbi gave an inconsistent account of what happened is evidence Bobbi made an inconsistent statement.

¶ 40 We decline respondent's invitation to speculate that Bobbi made an inconsistent statement based upon the lack of denial by the State at trial that an inconsistent statement was made. A claim of ineffective assistance cannot be based upon

speculation and conjecture. *People v. Bew*, 228 Ill. 2d 122, 134-35 (2008). Here the record does not support the allegation that Bobbi made an inconsistent statement which trial counsel could have used in respondent's defense. Therefore, the record does not support respondent's claims.

¶ 41 Denzel argues that although the alleged inconsistent statement is not preserved in the record, we may nonetheless find counsel ineffective because he failed to make an offer of proof and failed to ask for a continuance for the police officer's testimony. In support of his argument, respondent cites *People v. Lemcke*, 80 Ill. App. 3d 298 (1980).

¶ 42 In *Lemcke*, defendant was convicted of the offense of indecent liberties with a child for fondling the victim with the "intent to arouse or satisfy the sexual desires of himself." During trial, Lemcke testified in his own defense. *Lemcke*, 80 Ill. App. 3d at 298. Lemcke's attorney asked him during the examination of defendant whether he had any sexual desires to have contact with the victim. *Id.* at 300. An objection was sustained. Lemcke was also asked when he had last been sexually aroused. An objection to this question was also sustained. On appeal defendant raised two issues: (1) whether the trial court erred by excluding the testimony as to defendant's alleged lack of intent and; (2) whether Lemcke was deprived of the effective

assistance of counsel for failure to make an offer of proof after objections to the questions concerning intent were sustained. *Id.*

¶ 43 The appellate court stated that the questions counsel asked concerning defendant's sexual desires were relevant because defendant's intent was an element of the offense. *Id.* However, the State argued that Lemcke did not make an offer of proof and waived any error. The appellate court agreed that the questions at issue are not the type that clearly indicated to the court their purpose and admissibility and, thus, an offer of proof was a prerequisite to assign error. *Id.* at 301.

¶ 44 The appellate court then raised an issue not argued by either party. The court noted defense counsel tendered an erroneous instruction. The charging instrument alleged defendant committed the acts upon the victim with the "intention of arousing himself." *Id.* The instruction given by the defendant's counsel allowed the jury to find defendant guilty based on the alternative mental state: "Defendant committed the acts with the intent to arouse or satisfy the sexual desires of the defendant *or* the victim." *Id.* (Emphasis added). The court cited several decisions which held that tendering an improper instruction was evidence of incompetency of counsel. *Id.* at 302. The appellate court held that the tendering of the improper instruction

combined with the lack of an offer of proof were acts of "incompetency" resulting in substantial prejudice. *Id.*

¶ 45 The *Lemcke* decision is not controlling here. First of all, the primary reason for the *Lemcke* court's decision was the fact defense counsel tendered an improper instruction. The court cited several cases to support its conclusion that counsel's tendering improper jury instructions is evidence of incompetency of counsel. Significantly, the court cited no authority for the proposition that failure to make an offer of proof when evidence is excluded, without more, is ineffective assistance. Secondly, the *Lemcke* case was decided four years before *Strickland*, where the United States Supreme Court promulgated the standards to evaluate claims of ineffective assistance of counsel. In *Strickland* the Supreme Court placed the burden on defendants claiming ineffective assistance of counsel not only to demonstrate deficient performance but also to affirmatively prove prejudice. *Strickland*, 466 U.S. at 693-94. *Lemcke* does not support Denzel's argument that the failure of counsel to make an offer of proof when the court excludes evidence without affirmative proof of prejudice, constitutes ineffective assistance under the *Strickland* standard.

¶ 46 Denzel also cites *People v. Ortiz,* 224 Ill. App. 3d 1065 (1992), to support his argument that counsel's failure to

know the rules of evidence and failure make an offer of proof when evidence is excluded satisfies both the deficient performance and prejudice prongs of *Strickland*. In *Ortiz*, the defendant was convicted of the aggravated battery of the legally blind woman with whom he shared an apartment. *Ortiz*, 224 Ill. App. 3d at 1066-67. The victim testified she was alone in the apartment when she heard someone enter and she was beaten and cut on the face with a box cutter. *Id.* at 1067.

¶ 47 During opening statements, defense counsel stated he would present evidence that the victim had another boyfriend, Joe Robbins, in addition to the defendant. He also stated the evidence would show that when police stopped Robbins to question him concerning the incident, he was armed with two knives. *Id.* at 1066.

¶ 48 When defense counsel attempted to ask the victim about Joe Robbins on cross-examination, the State objected on the basis of relevancy and because the questions were beyond the scope of the direct examination. The objection was sustained, but it was unclear on what basis. Counsel did not call the victim during the defense case. *Id.* at 1067.

¶ 49 The defendant testified on his own behalf. Counsel did not ask the defendant about Robbins until the redirect examination. The State objected because the questions about

Robbins on the basis they were beyond the scope of the cross-examination. The objection was sustained. *Id.* at 1068.

¶ 50 During closing arguments, the State pointed out that the defendant failed to produce the promised evidence of another suspect, Joe Robbins. Defendant was convicted. On appeal defendant argued he should get a new trial on the basis of counsel's demonstrated lack of knowledge of evidence rules. *Id.* at 1070. The appellate court found that counsel was unable to get the testimony about Joe Robbins in evidence and deficient performance was established. *Id.* at 1072. However, the court acknowledged that it could not determine whether the deficient performance prejudiced the defendant because counsel did not make an offer of proof. *Id.* at 1071. However, the court found prejudice under the *Strickland* standard on another basis -- counsel failed to produce the evidence about Joe Robbins that he promised the jury in his opening statement. *Id.* at 1072.

¶ 51 Although Ortiz argued his counsel was ineffective for failing to make an offer of proof and for counsel's lack of knowledge of evidence rules, the court recognized the record did not show prejudice on that basis. *Id.* at 1071. The court found counsel ineffective because he failed to keep the promise he made in opening statement, a claim which was supported by the record. *Id.* at 1072. Therefore, *Ortiz* is not persuasive here.

¶ 52 Respondent also claims *People v. Vera,* 277 Ill. App. 3d 130, supports his claims of ineffective assistance. In *Vera*, the defendant was convicted of aggravated battery with a firearm and sentenced to 17 years. *Vera*, 277 Ill. App. 3d at 131. At trial, the issue was whether Vera was the shooter or whether Humberto Beltran was the shooter. *Id.*

¶ 53 In his direct appeal, Vera alleged the trial court was unable to consider crucial evidence that could have changed the outcome of the trial. Reyna Lopez testified she was a passenger in Beltran's van. *Id.* at 134. At trial, Lopez denied that Beltran had a gun or that Beltran fired the shots. But during a taped conversation with the defendant, recorded by defense counsel in the Spanish language, Lopez purportedly said it was Beltran who had the gun and it was Beltran who fired the gun. *Id.* at 138. Defense counsel attempted to offer into evidence an English translation of the conversation. He made no effort to authenticate the transcript. *Id.* at 138-39. The trial judge rejected the transcript because it lacked foundation and defense counsel did nothing more to attempt to prove the accuracy of the transcript.

¶ 54 Robert Otero also testified at trial that he saw Vera aim and shoot the gun. *Id.* at 139. Prior to trial, Otero told a defense investigator, John Rea, that he could not identify which

of the two individuals in a photo (Vera and Beltran) was the shooter. *Id.* Although Rea testified at trial, counsel did not attempt to impeach Otero's testimony.

¶ 55 With regard to Lopez's testimony, the *Vera* Court found that counsel was ineffective for not establishing a foundation for the English translation. *Id.* The record is silent as to whether a post trial affidavit was filed addressing the translation of Lopez's statement or how much of Lopez's statement was in the record. Although the court found defendant was prejudiced by counsel's deficient performance (*Id.* at 141), nothing in *Vera* authorized courts to speculate about the nature of omitted evidence based solely upon counsel's representation on appeal. To the extent that it does, we disagree.

¶ 56 In regard to the claims related to Otero, the court noted that Vera filed a post-trial motion which contained an affidavit from Rea, the investigator who interviewed Otero. *Id.* The appellate court acknowledged it was authorized to consider Rea's post-trial affidavit to evaluate the incompetency claim, citing *People v. House*, 141 Ill. 2d 323, 388-89 (1990). *Id.* at 140. The court found defendant was prejudiced by counsel's performance based on the content of the post-trial affidavit. *Id.* at 141. The *Vera* court found the prejudice prong of the ineffective assistance claim was proven by matters in the record

before it (Rea's affidavit) with regard to Otero's statement. *Id.*

¶ 57 Bobbi's alleged inconsistent statement is not contained in a post-trial affidavit or found anywhere in the record. It is arguable that the failure of counsel to make an offer of proof for evidence that is excluded by court is deficient performance. However, the record does not support Denzel's claims that he was prejudiced by the alleged deficient performance of his attorney because the alleged statement is not preserved in the record. Therefore, his ineffective assistance claim based on the failure to impeach Bobbi with a prior inconsistent statement fails.

¶ 58 Denzel argues that the error in counsel's failure to use the alleged prior inconsistent statement was compounded when the trial court did not allow defense counsel to impeach Bobbi when she was recalled in the defense case.

¶ 59 When Bobbi was called as a defense witness, counsel tried to inquire about the statement to police. The State objected. The trial court sustained the objection and also stated that impeachment of a defense witness was improper. Defense counsel withdrew the question.

¶ 60 Initially we note that Supreme Court Rule 238 as amended, provides that "[t]he credibility of a witness may be

attacked by any party, including the party calling him." (134 Ill. 2d R. 238(a)). Under this rule, a party may call a witness solely for the purpose of impeachment (see *People v. Morgan*, 142 Ill. 2d 410, 457 (1991)) and, therefore, does not vouch for the credibility of the witness. Defense counsel should have been allowed to pursue impeachment of Bobbi. However, the alleged statement is not preserved in the record to prove Bobbi made a prior inconsistent statement, therefore, Denzel cannot prove prejudice.

¶ 61 Inadequate Supervision of the 711 Student

¶ 62 We next consider Denzel's claims he was denied effective assistance of counsel and a fair trial when the 711 law student unsuccessfully attempted to elicit testimony from Tequila about Bobbi's relationship with Denzel and about Bobbi's reputation for truthfulness.

¶ 63 In the State's case, Bobbi testified that she and Denzel did not get along and that they had exchanged words in the past. During her direct examination of Tequila, the 711 student inquired whether Bobbi and Denzel had a relationship. The State objected and the trial court sustained the objection. On appeal, Denzel argues that the 711 student was attempting to get testimony from Tequila that would have been helpful to Denzel. Yet, there was no offer of proof at trial or post-trial affidavit

filed to suggest what this helpful answer from Tequila would have been.

¶ 64 We note Bobbi had already testified at trial that she had no relationship with Denzel and they did not get along. When Denzel testified at trial, he did not state he had a romantic or any other relationship with Bobbi. On appeal, Denzel argues the 711 student was trying to get helpful testimony from Tequila about a relationship between Bobbi and Denzel and without demonstrating what Tequila's testimony would be. Again, we decline Denzel's invitation to speculate about Tequila's testimony to find prejudice. *People v. Bew*, 228 Ill. 2d 122, 134-35 (2008).

¶ 65 In regard to Bobbi's reputation for truthfulness, the record does not contain any evidence Tequila knew Bobbi's reputation for truthfulness and the reputation was bad or that Tequila's answer to the inquiry about Bobbi's reputation would have been helpful to Denzel.

¶ 66 In the absence of an offer of proof or post-trial affidavit from Tequila that she would have testified that Bobbi had a poor reputation for truthfulness, we cannot say Denzel has made an affirmative showing of prejudice.

¶ 67 In sum, based on the record before us, defendant has failed to meet his burden under *Strickland* by affirmatively

showing he was prejudiced by the conduct at trial by his counsel or the 711 law student. Denzel is required to make an affirmative showing of prejudice. *Strickland*, 466 U.S. at 693. We will not reverse the finding of the trial court based on speculation.

¶ 68 Denzel also claims he is entitled to a new trial because the trial court forced defense counsel into a position of mere presence by not allowing counsel to conduct the redirect examination of Tequila. Denzel argues that the trial court improperly interfered with trial counsel's responsibility to supervise the 711 student.

¶ 69 In his first appeal, we agreed with Denzel that the trial court's action in this regard was inappropriate and our supreme court found the trial court's action troubling. On remand, we were charged to determine whether Denzel was deprived of effective assistance of counsel under the *Strickland* standard.

¶ 70 Under Rule 711, students may represent parties charged with a felony only under the supervision of a licensed attorney. We believe one purpose of the presence of the supervising attorney is to step in and conduct representation of a client when, in the opinion of the attorney, the 711 student is not effectively representing the client. In this case, the supervising attorney attempted to take over the examination of

Tequila to elicit testimony regarding Bobbi's reputation for truthfulness but was prevented from doing so by the trial court for reasons based on its courtroom protocol. We believe the trial court improperly prevented defense counsel from taking over the examination of Tequila.

¶ 71 However, to sustain a claim of ineffective assistance of counsel, Denzel must not only show deficient performance of counsel, he is also required to make an affirmative showing of prejudice. *Strickland*, 466 U.S. at 693. *Strickland* requires actual prejudice be shown not mere speculation as to prejudice. *Bew*, 228 Ill. 2d at 135, citing *People v. Olinger*, 176 Ill. 2d 326, 363 (1997)("pure speculation falls far short of the demonstration of actual prejudice required by *Strickland*"). Here, the record in this direct appeal does not show Denzel was prejudiced by counsel's performance.

¶ 72 Petition for Rehearing

¶ 73 In a petition for rehearing, respondent asked this court to retain jurisdiction over the appeal and remand to the trial court for the limited purpose of developing a "sufficient record" for us to resolve this claim, in a procedure similar to that followed by our supreme court in *People v. Houston*, 226 Ill. 2d 135 (2007). The defendant in *Houston* argued on appeal that his trial counsel was ineffective for waiving the presence of a

court reporter during *voir dire*. *Houston*, 226 Ill. 2d at 140-41. Our supreme court found that trial counsel's waiver of a court reporter for *voir dire* contravened Illinois Supreme Court Rule 608(a)(9). *Houston*, 226 Ill. 2d at 147 (citing 210 Ill. 2d R. 608(a)(9)). The court found that without a record of the *voir dire* proceedings, a defendant faces serious obstacles in establishing a *prima facie* case of discrimination in jury selection at the posttrial stage or on appeal. *Houston*, 226 Ill. 2d at 148. The court held that "[f]or these reasons, counsel's waiver of the court reporter in the case at bar falls below an objective standard of reasonableness." *Houston*, 226 Ill. 2d at 148.

¶ 74 Having concluded that trial counsel's performance was professionally deficient, our supreme court turned to the prejudice prong of the *Strickland* test. The court found that it could not determine whether the defendant had been prejudiced by trial counsel's deficient performance because "without a *voir dire* record--the absence of which is directly attributable to counsel's deficient performance--we have no way of determining the extent to which defendant was prejudiced." *Houston*, 226 Ill. 2d at 149. The *Houston* court retained jurisdiction of the appeal and remanded the cause to the circuit court for the limited purpose of conducting a hearing to reconstruct the *voir dire*

record. *Houston*, 226 Ill. 2d at 154. The court chose remand, "rather than simply denying defendant relief, out of concern for the seriousness of [the] defendant's race-discrimination claim." *Houston*, 226 Ill. 2d at 151. Our supreme court was reluctant to simply deny the defendant all relief based solely on the court's "inability, because of the lack of a *voir dire* record, to determine the extent of the prejudice suffered by [the] defendant." *Houston*, 226 Ill. 2d at 149.

¶ 75 Respondent asserts that we are similarly unable, because of the lack of an offer of proof, to determine the extent of the prejudice he suffered from trial counsel's arguably deficient performance in failing to impeach Bobbi with her alleged prior inconsistent statement, or from his attorney's inability to obtain testimony from Tequila about Bobbi's prior relationship with respondent as well as Bobbi's reputation for truthfulness. Respondent asks this court to remand for the development of a record on those issues because, unlike in an adult prosecution, respondent is unable to pursue collateral remedies for the alleged deprivations of his constitutional rights. See *People v. Neylon*, 327 Ill. App. 3d 300, 311 (2002) (involving claim of ineffective assistance of counsel for failure to make an offer of proof regarding refusal to admit confession by another party). In *Neylon*, the defense attorney informed the

trial court he had a confession he wanted to use. *Id.* at 311. The court inquired whether the confession was hearsay and the defense attorney responded that it was. *Id.* The court stated that was the end of the matter and that trial would proceed. *Id.* The defendant's attorney did not make an offer of proof as to the contents of the confession. *Id.* at 311-12.

¶ 76 At the hearing on the defendant's posttrial motion, the defendant's attorney argued he had evidence to support a finding of reliability as to the purported confession. *Neylon*, 327 Ill. App. 3d at 312. On appeal, the *Neylon* court held that without an offer of proof, it could not determine whether the defendant would have been permitted to admit the evidence. *Id.* The court held that in this situation, "this court has consistently found a defendant's claims of ineffective assistance are better served in the context of a postconviction petition where a complete record can be made." *Neylon*, 327 Ill. App. 3d at 312. In this case, respondent asks for remand for the making of a complete record since he cannot file a postconviction petition. See *In re William M.*, 206 Ill. 2d 595, 604-05 (2003) (refusing to dismiss juvenile's appeal for failure to comply with Illinois Supreme Court Rule 604(d) due to counsel's deficient performance in failing to file the motion because the Post-Conviction Hearing Act does not apply in juvenile proceedings, potentially leaving

juveniles without a remedy for their claims, including those claims alleging constitutional violations).

¶ 77 We agree with respondent that, in an appropriate case involving an adjudication of delinquency, which does not provide the protections of the Post-Conviction Hearing Act, remand for development of a sufficient record to resolve a claim of a deprivation of constitutional rights may be appropriate when the inadequacy of the record is itself the result of a constitutional deprivation. However, we find this is not such a case.

¶ 78 The determination of whether respondent received ineffective assistance of counsel based on the failure to impeach Bobbi requires us to resolve whether Bobbi made an inconsistent statement at trial, which defense counsel failed to impeach, *and* whether, but for such failure, there is a reasonable probability that the result of the trial would have been different. *Alvine*, 173 Ill. 2d at 293 (citing *Strickland*, 466 U.S. at 687). We previously found that the record does not support respondent's claim that he was prejudiced by the arguably deficient performance of his trial counsel in failing to impeach Bobbi and, since it is respondent's burden to affirmatively prove prejudice, we rejected his claim. We now hold that, even accepting respondent's allegations regarding Bobbi's prior inconsistent statement as true, there is no reasonable probability that the

outcome of respondent's trial would have been different had respondent's trial counsel impeached Bobbi with a prior inconsistent statement to police that her friends and respondent's friends tried to pull respondent off of her. Accordingly, respondent's claim of ineffective assistance of counsel must fail: respondent did not suffer constitutional prejudice as a result of counsel's performance. *Strickland*, 466 U.S. at 697 ("there is no reason for a court deciding an ineffective assistance claim to *** address both components of the inquiry if the defendant makes an insufficient showing on one.").

¶ 79 "The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose." *U.S. v. Cronic*, 466 U.S. 648, 655 (1984). "[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." *Herring v. New York*, 422 U.S. 853, 857 (1975). "The Sixth Amendment guarantees to the accused in all criminal prosecutions the right[] *** to be 'confronted' with opposing witnesses." *Id.*, at 856-57. "The confrontation clause of the sixth amendment

of the United States Constitution (U.S. Const., amend. VI) guarantees a defendant the right to cross-examine a witness against him for the purpose of showing the witness' bias, interest or motive to testify falsely." *People v. Harris*, 123 Ill. 2d 113, 144 (1988). The prior inconsistent statements of a testifying witness may be admitted to impeach the witness's credibility. *People v. Wilson*, 2012 IL App (1st) 101038 ¶ 38.

¶ 80 To determine if the Sixth Amendment right to confront witnesses has been violated due to counsel's deficient performance, "the question [is] whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness's direct testimony. [Citations.] We look to the record in its entirety and the alternative means open to the defendant to impeach the witness. [Citations.] Thus, if a review of the entire record reveals that the fact-finder has been made aware of adequate factors concerning relevant areas of impeachment of a witness, no constitutional question arises merely because the defendant has been prohibited on cross-examination from pursuing other areas of inquiry." (Internal quotation marks omitted.) *People v. Klepper*, 234 Ill. 2d 337, 355-56 (2009) (involving claim trial court improperly limited cross-examination and trial counsel was ineffective for failing to provide an offer of proof

regarding anticipated testimony about bias). Further, the determination of whether a reasonable probability exists that, absent the error, the factfinder would have had a reasonable doubt respecting guilt must be made on the basis of the entire record, not isolated instances. *People v. Kluppelberg*, 257 Ill. App. 3d 516, 526 (1993).

¶ 81 In this case, the factfinder was aware of adequate factors concerning Bobbi's credibility to sufficiently test the truth of her direct testimony. Respondent argued in the first appeal that the "defense presented witnesses whose testimony contradicted Bobbi's account of the events, and also pointed out discrepancies amongst the testimony of the State's witnesses." Respondent continued to admit that the witnesses "significantly undermined Bobbi's version of events." Bobbi's testimony concerning who was present when the beating stopped changed during her testimony and other witnesses contradicted her testimony. The factfinder observed Bobbi's testimony. This court has found that "[c]redibility is evaluated primarily based on the witness's physical reaction to the questions, such as demeanor and tone of voice." *People v. Melchor*, 376 Ill. App. 3d 444, 453-54 (2007).

¶ 82 We reiterate that a reasonable probability that the result of the trial would have been different is a probability

sufficient to undermine confidence in the result of the trial--that is, to indicate that defense counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Enis*, 194 Ill. 2d at 376. The factfinder had before it evidence of Bobbi's injuries (although the evidence contradicted as to the extent of those injuries), inconsistencies in Bobbi's testimony, the witnesses's contradiction of her testimony, and the opportunity to observe Bobbi's testimony as well as that of all the witnesses. In light of the foregoing, we hold that the absence of evidence that when "given a chance to tell her story to police officers, she told it in a different way," where the statement regards not the *fact* of the attack but what may have occurred *during* the attack, is not sufficient to render the verdict unreliable or the proceeding fundamentally unfair.

¶ 83 Similarly, we hold that there is no reasonable probability the result of the trial would have been different had the trial court allowed respondent's attorney to question Tequila about Bobbi's "relationship" with respondent or Bobbi's reputation for truthfulness. As we noted, Bobbi testified she did not have a relationship with respondent, and when respondent testified he did not testify that he and Bobbi did have a romantic or any other relationship. Bobbi did admit that she and

respondent had issues in the past and that words had been passed between them but it had not become physical. The factfinder had enough information about respondent's relationship with Bobbi to weigh that relationship, to the extent any such relationship had any relevance to the issue in this case, in making its determinations of fact. Respondent argued that Bobbi and respondent's relationship gave Bobbi a motive to testify falsely. The factfinder could gauge any animus or motive to testify falsely from the testimony of the principals involved in the relationship. We cannot say that Tequila's testimony about their "relationship," in light of their own testimony or lack thereof as to that relationship, would have had such an impact as to affect the outcome of the trial.

¶ 84 Finally, "[a] witness may be impeached by testimony showing generally a poor reputation for truth and veracity." *People v. Makiel*, 358 Ill. App. 3d 102, 118 (2005). Respondent did not suffer unfair prejudice from counsel's failure to solicit Tequila's testimony as to Bobbi's reputation for truthfulness, assuming a proper foundation for such testimony could be made and that she would have testified to a poor reputation for truthfulness. The prejudice test may be satisfied if respondent can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair.

People v. Manning, 241 Ill. 2d 319, 327 (2011). "[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." (Internal quotation marks omitted.) *Manning*, 241 Ill. 2d at 330. Even assuming, *arguendo*, Tequila would have testified that Bobbi had a reputation for untruthfulness, we cannot say that but for counsel's failure to solicit that testimony the outcome of the trial would have been different. We have already noted Bobbi's inconsistent testimony, the factfinder's opportunity to observe her testimony and to assess her credibility (*Melchor*, 376 Ill. App. 3d at 453-54), and the fact that the evidence contradicted portions of Bobbi's testimony. The trial court adjudicated respondent delinquent after a trial in which Bobbi's recitation of events and her credibility underwent adversarial testing before an impartial factfinder. The court's determinations are not rendered unreliable because the defense did not make one additional attack on Bobbi's credibility, where the court had the opportunity to observe her demeanor on the stand and had the benefit of multiple witnesses who testified at respondent's trial. Under the circumstances we cannot say that respondent did not receive a fair trial. Compare *People v. Naylor*, 229 Ill. 2d 584, 607-09 (2008) (finding improperly admitted evidence "may have played an

unacceptable part in the trial court's decision" where police and defendant testified to opposing versions of events and "no extrinsic evidence was presented to corroborate or contradict either version").

¶ 85 CONCLUSION

¶ 86 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 87 Affirmed.