THIRD DIVISION
February 9, 2011

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).

No. 1-09-1321

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	of Cook County.
	)	
v.	)	No. 95 CR 6687
	)	
ABEL COLIN,	)	Honorable
	)	John J. Fleming,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justice Murphy and Justice Steele concurred in the judgment.

O R D E R

Held: Where defendant has not shown a substantial showing of a constitutional violation based on his claim of ineffective assistance of appellate counsel, the second-stage dismissal of defendant's post-conviction petition is affirmed.

Following a jury trial, defendant was found guilty of two counts of aggravated criminal

sexual assault and sentenced to two consecutive 60-year terms of imprisonment. This court affirmed the judgment on direct appeal. People v. Colin, 344 Ill. App. 3d 119 (2003), *appeal denied* 207 Ill. 2d 609 (2004). During the pendency of his direct appeal, defendant filed a *pro se* post-conviction petition pursuant to the Illinois Postconviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)), alleging, *inter alia*, that the circuit court allowed improper statements by the prosecutor during closing and rebuttal arguments, and that trial and appellate counsel were both ineffective. On November 26, 2003, the circuit court summarily dismissed defendant's *pro se* post-conviction petition as frivolous and patently without merit. On appeal, this court reversed the summary dismissal of defendant's *pro se* post-conviction petition and remanded for the appointment of counsel and second-stage proceedings under the Act. People v. Colin, No. 1-04-0718 (November 3, 2006) (unpublished order pursuant to Supreme Court Rule 23). On remand, appointed counsel filed a supplemental post-conviction petition and, following a hearing, the circuit court granted the State's motion to dismiss the supplemental petition.

On appeal, defendant contends that the circuit court erred in granting the State's motion to dismiss where defendant made a substantial showing that he was denied the effective assistance of counsel on direct appeal. Defendant asserted that appellate counsel failed to argue that trial counsel was ineffective for failing to object to numerous improper comments made by the prosecutor during closing and rebuttal arguments. For the following reasons, we affirm.

I.. BACKGROUND

Defendant's conviction stems from his involvement in the aggravated criminal sexual assault of a minor female, S.F., from 1993 to 1995. During this time frame, S.F. was six to eight

years old and a neighbor of defendant. Defendant and his wife, Stephanie, babysat for S.F. before and after S.F. went to school. Defendant orally assaulted and vaginally raped, sodomized and tortured S.F. on a daily basis with the aid and abatement of Stephanie. Defendant also procured from S.F. a videotape in which defendant told S.F. to state that she went out late at night to see "gangbangers," who had sex with her.

S.F. testified that prior to the sexual assaults, Stephanie would wash S.F.'s vagina then bring S.F. naked to defendant. S.F. testified that during the sexual assaults, Stephanie would watch or hold S.F.'s legs open. S..F. also testified that, occasionally, defendant would bring her into the bedroom of his teenage son, who would also sexually assault her.

Defendant sexually assaulted S.F. for the last time on February 6, 1995. Two days later, S.F. went to the hospital accompanied by her mother and Stephanie, with defendant driving them. Stephanie brought a pair of S.F.'s underwear in a bag and gave them to a nurse. Stephanie told the nurse that a "gangbanger" had sexually assaulted S.F. and cut her vagina with a knife. S.F. was examined by a physician, to whom Stephanie also told the fabricated story. S.F's underwear were subsequently inventoried by the Chicago Police Department Crime Laboratory.

When S.F. and her mother were subsequently in the privacy of their own home, S.F. told her mother that it was defendant who had sexually assaulted her. Defendant and Stephanie were charged with multiple counts of aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, kidnaping and unlawful restraint. Stephanie provided a written statement to an Assistant State's Attorney (ASA) detailing her involvement in the sexual assault of S.F. over the two-year period. Stephanie subsequently pled

guilty to aggravated criminal sexual assault for her participation in the assaults of S.F. and was sentenced to 23 years in prison.

At defendant's trial, Stephanie denied ever seeing defendant sexually assault S.F., and the State introduced Stephanie's written statement. A further discussion of the facts relating to defendant's conviction is located in his direct appeal. Colin, 344 Ill. App. 3d at 122-26.

On direct appeal, defendant's appellate counsel argued that the circuit court erred in admitting evidence that Colin had committed prior sexual assaults on another minor, H.R., and that defendant's extended-term sentence was unconstitutional under Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348. This court held that the evidence of defendant's prior sexual assaults on H.R. was admissible to establish defendant's *modus operandi.* Colin, 344 Ill. App. 3d at 129. This court explained the similarities between both cases where defendant selected both victims, H.R. and S.F., using virtually identical criteria including the victims' vulnerability and their families' friendship with defendant and his wife. In both cases, defendant acted in concert with his wife to procure the victims and assaulted the victims with his wife's participation that included "preparing" the victims and physically aiding defendant by holding the victims down or spreading their legs open during the sexual assaults. Colin, 344 Ill. App. 3d at 129. This court also held that defendant waived his Apprendi claim and that the plain-error doctrine did not apply where defendant's extended-term sentences were based on the circuit court's finding as to the exceptionally brutal or heinous nature of defendant's behavior and there was no doubt that the jury would have made the same finding. Colin, 344 Ill. App. 3d at 133-34. This court explained, "[N]o doubt the jury would have found that defendant's

ongoing two-year sexual ravaging of an infant such as S.F. was brutal and heinous." Colin, 344 Ill. App. 3d at 134.

During the pendency of defendant's direct appeal, defendant filed a *pro se* post-conviction petition alleging, *inter alia*, that appellate counsel was ineffective for failing to raise meritorious issues before the appellate court. Specifically, defendant argued that the prosecutor's closing arguments were improper where the prosecutor attacked witnesses, made disparaging remarks about defense counsel and a defense expert, and the prosecutor made an inaccurate summary of the DNA evidence presented at trial. On November 26, 2003, the circuit court summarily dismissed defendant's *pro se* post-conviction petition on the ground that his claims either could have been raised on direct appeal and were, therefore, forfeited or that they otherwise lacked merit.

On appeal, the Sixth Division of this court, in an order authored by Justice O'Malley, reversed the summary dismissal and remanded for additional post-conviction petition proceedings. People v. Colin, No. 1-04-0178 (June 23, 2006) (unpublished order pursuant to Supreme Court Rule 23, subsequently withdrawn). Pursuant to the State's timely-filed petition for rehearing, the court withdrew its previous order and granted the State's motion for rehearing. The court permitted additional briefing by the State and the Appellate Defender. After further consideration, including considering additional briefs filed by the parties, the court reversed the summary dismissal of plaintiff's *pro se* post-conviction petition and remanded for the appointment of counsel and second-stage proceedings under the Act. People v. Colin, No. 1-04-0718 (November 3, 2006) (unpublished order pursuant to Supreme Court Rule 23). In that order,

the Sixth Division of this court found that defendant stated "the gist of a meritorious claim" that appellate counsel's failure to raise arguments about the alleged impropriety of the prosecutor's closing arguments with respect to the DNA evidence presented at trial was objectively unreasonable. The court noted that "[b]ecause the amount of genetic material recovered [from a pair of the victim's underwear] was so small, the DNA evidence against defendant was quite weak." The court explained that the only testimony concerning the DNA evidence was from the defense expert that the genetic material recovered by the police failed to match the defendant. The court explained that "it may have been puffery for the defense to suggest that the DNA evidence completely excluded defendant" and that "it would have been more accurate to say that it failed to prove defendant was the offender." However, the court concluded that the prosecutor misstated the evidence presented at trial where the prosecutor argued that the DNA evidence "overwhelmingly buried" defendant and "absolutely corroborates" that defendant, and his son, assaulted the victim. The court found that there was "at least a hypothetical possibility" that the prosecutor's arguments may have improperly affected the outcome of the case where the case involved a sympathetic victim and the evidence against defendant was not overwhelming. The court cautioned that it was not analyzing whether the prosecutor actually engaged in misconduct sufficient to require a new trial, but, rather, merely whether the petition stated the "gist" of a constitutional claim.

On remand, appointed counsel filed a supplemental post-conviction petition alleging that numerous arguments made by the prosecutor during closing and rebuttal arguments were improper. The circuit court granted the State's motion to dismiss defendant's post-conviction

petition where defendant failed to show a substantial violation of his constitutional rights with respect to his representation by trial and appellate counsel, and defendant was unable to show he was prejudiced where the evidence against him was substantial.

On appeal, defendant contends that the circuit court erred in granting the State's motion to dismiss his post-conviction petition where he presented sufficient facts to establish that he was denied the effective assistance of appellate counsel. Defendant asks that this court grant him a new trial or, alternatively, remand for an evidentiary hearing under the Act.

II. ANALYSIS

A. Proceedings under the Act

A post-conviction proceeding not involving the death penalty contains three distinct stages. People v. Hodges, 234 Ill. 2d 1, 10 (2009). At the first stage, the circuit court must, within 90 days of the petition's filing, independently review the petition, taking the allegations as true, and determine whether "the petition is frivolous or is patently without merit." Hodges, 234 Ill. 2d at 10; 725 ILCS 5/122-2.1(a)(2) (West 2004). If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2004). If the petition is not dismissed, then the petition advances to the second stage, where counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2004)) and where the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2004)).

At the second stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. People v.

Edwards, 197 Ill. 2d 239, 246 (2001). If no such showing is made, the petition is dismissed. However, if a substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. Edwards, 197 Ill. 2d at 246.

Here, the circuit court granted the State's motion to dismiss defendant's post-conviction petition at the second stage, which we review *de novo*. People v. Alberts, 383 Ill. App. 3d 374, 376 (2008). Defendant claims that the circuit court erred in dismissing his petition where appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor made improper remarks throughout closing and rebuttal arguments.

Claims of ineffective assistance of appellate counsel are evaluated under the familiar two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by our supreme court in People v. Albanese, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that 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 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. The failure to satisfy either prong of the Strickland test precludes a finding of ineffective assistance of counsel. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

" 'A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating that such failure was objectively unreasonable and counsel's decision prejudiced [him]. If the underlying issue is not meritorious, then defendant has suffered no prejudice.' " Alberts, 383 Ill. App. 3d at 379, quoting People v. Enis, 194 Ill. 2d 361, 377 (2000). "[I]t is not incompetence of counsel to refrain from raising issues that in his judgment are without merit." People v. Mitchell, 189 Ill. 2d 312, 332 (2000).

Here, defendant cites several remarks made by the prosecutor during closing and rebuttal arguments that he contends deprived him of a fair trial. Therefore, defendant maintains that appellate counsel was ineffective for failing to raise this issue on direct appeal. Prosecutors are afforded wide latitude in closing argument. People v. Wheeler, 226 Ill. 2d 92, 123 (2007). Prosecution comments in opening statement or closing argument do not require reversal if they do not result in "substantial" prejudice. People v. Moore, 397 Ill. App. 3d 555, 562 (2009). Substantial prejudice occurs "if the improper remarks constituted a material factor in a defendant's conviction." Wheeler, 226 Ill. 2d at 123. When reviewing claims of prosecutorial misconduct in closing argument, a reviewing court will consider the entire closing arguments of both the prosecutor and the defense attorney, in order to place the remarks in context. Wheeler, 226 Ill. 2d at 122. "In closing, the prosecutor may comment on the evidence and any fair, reasonable inferences it yields." People v. Nicholas, 218 Ill. 2d 104, 121 (2005). The prosecution may also respond to comments made by defense counsel. People v. Tijerina, 381 Ill. App. 3d 1024, 1032 (2008).

B. Comments about the DNA Evidence

Defendant first contends that he made a substantial showing that his constitutional rights were violated where appellate counsel failed to argue on direct appeal that the prosecutor misstated the DNA evidence presented at trial. Specifically, defendant objects to the prosecutor's statements during closing arguments that "[t]he DNA expert overwhelmingly buried [defendant]" and that the DNA testimony "absolutely corroborated" the fact that the victim had been "shared between father and son" and that defendant and his son "both ejaculated."

In reviewing the circuit court's summary dismissal of defendant's post-conviction petition, the Sixth Division of this court found that defendant stated the "gist of a meritorious claim" that appellate counsel's failure to raise this issue on direct appeal was objectively unreasonable. The court indicated that "there was at least a hypothetical possibility" that the prosecutor's arguments involving a mischaracterization of the evidence at trial may have prejudiced defendant where the victim in this case was sympathetic, the allegations of abuse were disturbing, and the evidence against defendant was "not overwhelming."

However, we now review defendant's claim under the higher "substantial showing" standard applicable to the second stage of post-conviction proceedings. The record shows that in granting the State's motion to dismiss defendant's petition, the circuit court concluded that defendant did not establish that he was substantially prejudiced by trial or appellate counsel's performance where the evidence against defendant was substantial. We agree.

The record shows that during trial, the parties stipulated that Joanna Doute, employed by the forensic biology unit of the Chicago Police Department Crime Laboratory division, would testify that the laboratory received two vaginal swabs, one vaginal smear, two rectal swabs, one

rectal smear, and one pair of the victim's underwear that was brought to the hospital by co-defendant Stephanie, defendant's wife. Chemical testing and microscopic examination of the vaginal and rectal swabs and smears yielded negative results for the presence of semen. Chemical testing for the presence of semen on the pair of underwear yielded negative results. A microscopic exam of the underwear revealed the presence of sperm fragments, and chemical and erological tests revealed the presence of human blood. Further testing was precluded due to an insufficient amount of sample. The parties stipulated that swatches of underwear fabric as well as reference samples from defendant and the victim were sent to Dr. Alan Leo Friedman, owner of Helix Biotech laboratory.

Dr. Friedman testified as defendant's expert in the field of DNA analysis, and the State did not object to his being tendered as an expert. Dr. Friedman testified that he evaluated DNA profiles of the genetic material recovered from the underwear of the victim, that the genetic material contained DNA profiles of "three or more" individuals, and that none of the profiles were "consistent with the DNA profile for [defendant]." Dr. Friedman testified that the quantity of the genetic material recovered from the victim's underwear was limited and while "there was human DNA present" there was "very little of it," "the concentration was very, very low," and "both the concentration and the absolute quantity was very, very small."

During cross-examination by the State, Dr. Friedman acknowledged that the limited amount of genetic material could have affected the results of the testing. When the prosecutor asked whether defendant's DNA could have been present but not have been seen, Dr. Friedman admitted, "[t]hat's true." Dr. Friedman testified that the sample from the underwear matched

defendant's DNA in 10 out of 11 alleles that were tested, with two alleles being off because defendant "varied at two genetic systems." Dr. Friedman acknowledged that the very little amount of DNA and the low concentration could have affected the intensity of the alleles in the amplification process. Dr. Friedman also acknowledged that given that the intensity of the amplification of the alleles could have been affected by the concentration and weakness of the DNA, "it is possible" that the two alleles failed to show in this case. When questioned whether he was incorrect when he excluded defendant as a contributor, Dr. Friedman maintained, "Not necessarily. No, when I excluded him it was not incorrect." Dr. Friedman explained that since "there were two alleles, DNA types, that were missing from the evidence," he "could not conclude that [defendant] was a contributor." Dr. Freidman admitted that the DNA could have been there and not seen, but he stood by his conclusion.

Also during cross-examination, Dr. Friedman testified that his client, defendant, did not inform him that there was an allegation that defendant's son had raped the same victim. Dr. Friedman testified that he relied on his clients to "inform him as to the relevance of those situations." Dr. Friedman admitted that it would have been important to obtain a DNA sample from defendant's son to see if he was the third contributor, particularly where 10 out of 11 alleles had matched defendant. Dr. Friedman agreed that it was "a plausible explanation" that it was far more likely that the missing contributor of the alleles was a family relative of defendant. Dr. Friedman agreed that a "father and son would have a DNA profile which was more similar than a random individual." Dr. Friedman explained that a father and son were 25 percent more likely to have similar DNA. Dr. Friedman concluded, "I have no inference whatsoever and will not

speculate as to whether the third contributor is or is not a family member [of defendant.] There's no genetic evidence to support that it was a family member that is the third contributor, assuming that [defendant] is even a contributor at all." Dr. Friedman agreed that S.F., defendant, and a family member of defendant could all have been one of the three profiles of genetic material recovered from the victim's underwear.

During rebuttal argument, the prosecutor argued in relevant part:

> "But [Dr. Friedman] had to admit that nine alleles matched this guy to a tee. And that because the DNA was so diluted and so weak that the two alleles that are missing may have been an allele dropout. And the, yes, folks, he had to admit that the defendant could have been the source of the DNA. That's unbelievable. That's astounding.
>
> He excludes him in a report and changes his opinion on the stand and then he has to admit that, not only could the defendant be the source of the DNA, but the defendant's son is 24 percent more likely to be the third, unidentified profile.
>
> * * *
>
> You know how else he included [defendant]? Because he said there were three profiles. And when I asked him to count well, who the three profiles were? One was S.F. One was [defendant]. And one was the [defendant's son].
>
> [Defense counsel]: Objection, judge.
>
> I'm sorry. One was possibly [defendant's son].
>
> So, how could [defendant] be excluded in his mind if he's counting him as

one of the profiles that he found in this evidence?

[Defense counsel]: Objection.

The Court: The jury heard the evidence.

The DNA expert overwhelmingly buried this man. What any [sic] doubt was left in your minds should have been laid to rest.

* * *

How can an eight-year-old child cope with being shared between father and son? And that is absolutely corroborated by the DNA testimony, that she was shared by father and son.

[Defense counsel]: Objection.

The Court: The jury heard the evidence.

[The prosecutor continued]: The DNA evidence corroborates that, [defendant] and [defendant's son] both ejaculated.

[Defense counsel]: Objection."

Defendant contends that appellate counsel was ineffective for failing to raise trial counsel's failure to object to the above argument, which defendant argues was a mischaracterization of the DNA evidence presented at trial. However, we note that the record shows that trial counsel did in fact object to the prosecutor's argument. Defendant, nonetheless, argues that he was prejudiced by appellate counsel's failure to raise this issue on direct appeal. Defendant argues while the prosecutor asserted that the DNA evidence "buried" defendant and corroborated the allegation that defendant and defendant's son both ejaculated, "the only DNA evidence presented

at trial was that [defendant] was excluded as a source for the DNA found in the victim's underwear."

The record shows that while Dr. Friedman's conclusion was that he excluded defendant as a contributor of DNA on the victim's underwear, he also agreed that it was possible that both defendant and a family member of defendant had contributed DNA. Dr. Friedman testified that the sample from the underwear matched defendant's DNA in 10 out of 11 alleles that were tested, with two alleles being off because defendant "varied at two genetic systems." Dr. Friedman acknowledged given that the intensity of the amplification of the alleles could have been affected by the concentration and weakness of the DNA, "it is possible" that the two alleles failed to show in this case. Dr. Friedman also agreed that it was "a plausible explanation" that it was far more likely that the missing contributor of the alleles was a family relative of defendant. Dr. Friedman explained that a father and son were 25 percent more likely to have similar DNA. Therefore, there was a basis in the record to support the prosecutor's argument that the DNA evidence supported the State's case against defendant.

While the prosecutor suggested that "the DNA expert [Dr. Friedman] overwhelmingly buried [defendant]" and that the DNA evidence "absolutely corroborated" the allegation that the victim was shared by defendant and defendant's son, it would have been more accurate to say that Dr. Friedman failed to exculpate defendant or defendant's son with the DNA evidence and that Dr. Friedman admitted that it was possible that defendant and defendant's son contributed DNA.. Defendant relies on People v. Linscott in support of his argument that the prosecutor's inaccurate comments require reversal of his conviction or remand for an evidentiary hearing

under the Act.

In Linscott, the State relied on three pieces of evidence to convict the defendant of the victim's murder: a dream defendant recounted to the police which paralleled the crime; head and pubic hairs found in the victim's apartment and on her body which were consistent with defendant's head and pubic hair; and the results of blood-typing tests which showed that the seminal material taken from the victim could have come from defendant. Linscott, 142 Ill. 2d at 27. In that case, the prosecutor "made up" blood-analysis evidence that a vaginal swab indicated the victim could only have been raped by a nonsecretor, a person whose blood type cannot be detected in his body fluids, and that the defendant was a nonsecretor. Linscott, 142 Ill. 2d at 37. The prosecutor also "repeatedly" argued that hairs found near and on the victim's body were conclusively from the defendant, despite expert witness testimony that "you cannot say that this hair came from this individual, only *** that it's consistent." Linscott, 142 Ill. 2d at 30. The prosecutor made a mathematical prediction about the probability that any other man left the hairs, which our supreme court found was not from the expert witness' testimony and was "without foundation and *** patently inapplicable" to the case. Further, the prosecutor stated several times that the hair found at the scene "matched" the defendant's hair. Linscott, 142 Ill. 2d at 34. Our supreme court reversed the defendant's conviction based on the misstatement of the blood-analysis evidence and the repeated misstatements indicating the hairs found conclusively were from the defendant, and where the repeated misstatements were compounded by the erroneous mathematical prediction. Linscott, 142 Ill. 2d at 38-39.

Unlike Linscott, we do not believe that the prosecutor's comments regarding the DNA

evidence in this case were sufficient to require reversal of defendant's conviction. Unlike Linscott, where the State relied primarily on hair analysis and blood-typing tests, there was evidence other than the DNA material recovered from a pair of S.F.'s underwear linking defendant to the repeated sexual assault of S.F. over the course of a two-year period.

The evidence presented against defendant included testimony from S.F. and H.R. Both of these witnesses testified to being sexually assaulted by defendant and there were striking similarities between the attacks on S.F. and H.R. In addition, Stephanie, defendant's wife and co-defendant, testified for the State. Stephanie admitted that she plead guilty to aggravated criminal sexual assault for her participation in the assaults of S.F. At trial, Stephanie denied ever witnessing defendant assault S.F. However, on February 10, 1995, Stephanie provided a statement to ASA Laura Forrester that detailed her participation and observation of defendant's repeated sexual assaults of S.F.

Defendant's 11-year old daughter, Sandy, testified that she saw defendant take S.F. down to the basement on numerous occasions. Sandy testified that she was not allowed to go into the basement when defendant and S.F. were down there. Sandy testified that on one occasion, she heard S.F. tell defendant, "Get off me." and defendant reply, "No." Sandy testified that on another occasion, she went to the basement and saw defendant and S.F. on a bed. Defendant was "trying to get [S.F.'s] clothes off" and trying to take his own clothing off.

The State presented testimony from a licensed clinical social worker, who conducted a Victim Sensitive Interview (VSI). The social worker testified regarding S.F.'s description of being sexually assaulted by defendant with the assistance of his wife, Stephanie. Also, the State

presented testimony from Dr. Emily Flaherty, an expert in the area of child sexual abuse, who examined S.F. on February 14, 1995. Dr. Flaherty testified that S.F.'s injuries indicated that she had suffered repeated sexual trauma. Dr. Flaherty testified that S.F. did not have any recent cuts or bleeding and that her trauma was unlikely to have been caused by a knife. In her medical opinion, S.F. had been sexually abused and her injuries were consistent with long-term repeated penetration by an adult penis.

Considering all of the evidence presented against defendant at trial, we do not believe that the DNA evidence and the prosecutor's closing argument regarding the DNA evidence was a material factor in his conviction. The lack of DNA evidence on one pair of the victim's underwear, where defendant was charged with multiple counts of aggravated sexual assault of S.F. over a two-year period, does not exculpate defendant. This is especially true where it was defendant's wife and co-defendant, Stephanie, who brought the pair of underwear to the hospital to turn over to authorities.

While the Sixth Division of this court found that the evidence was not "overwhelming," we disagree. The evidence at trial, as noted above, showed that during a two-year period, S.F., who was six to eight years old at the time, was orally assaulted, vaginally raped, sodomized and tortured on a daily basis by defendant with the aid and abatement of his wife, Stephanie. As this court noted on direct appeal, in declining to find plain error in defendant's case, there is "[n]o doubt the jury would have found that defendant's ongoing two-year ravaging of an infant such as S.F. was brutal and heinous." Colin, 344 Ill. App. 3d at 134. As a result, defendant has not shown a substantial violation of his constitutional rights as required for an evidentiary hearing

under the Act.

C. Comments about the DNA Expert Witness

Defendant next contends that the prosecutor engaged in a series of improper attacks on the DNA witness, Dr. Friedman, that were not supported by the record. Defendant complains of the following remarks by the prosecutor during closing arguments:

> "And the evidence is overwhelming that the defendant committed an aggravated criminal sexual assault on this child. Otherwise, the only alternative for you to believe is that she was out engaging in promiscuous activity because she wanted it basically with everybody who lived on the block.
>
> You also have to believe that *** the defendant would have you believe that [H.R.] and [S.F.] wanted and engaged in sexual activity. *** [S.F.] wanted everybody else, this promiscuous seven-year old girl out having sex with everybody in sight.
>
> However, I think it's pretty clear the only evidence you heard in this case of anybody being a whore came from the [defendant's] own expert, Dr. Friedman. And although it was entertaining at points, high comedy, watching [the other prosecutor] cross-examine him, this is about as serious as it gets, folks.
>
> He's the expert who comes in here who's supposed to give you the key to say there is reason *** [y]ou shouldn't think it's [defendant] and he got up on that witness stand and told you he was wrong. He excluded him. Nine out of ten

> alleles and [defendant] is excluded, not even considering that they were different, just a dropout. They didn't show up.
>
> So, it could be his DNA fragments and it certainly could be [defendant's son's] fragments, but he decided to tell you it wasn't [defendant] instead of giving the appropriate answer that any professional person would do and say, you know what? I just don't know, inconclusive. ***."

The record shows that defendant's theory was that S.F. had suffered her sexual trauma and injuries during consensual sexual encounters with "gangbangers" in the neighborhood. Therefore, the prosecutor's comments responded to defendant's trial strategy. Tijerina, 381 Ill. App. 3d at 132. In addition, as previously discussed, defendant's expert, Dr. Friedman maintained that defendant was excluded as a contributor of DNA on the victim's underwear. However, Dr. Friedman also admitted that it was possible that defendant was a contributor of one of the three DNA profiles found on the victim's underwear that had been turned in by defendant's wife and co-defendant, Stephanie. The prosecutor was entitled to question the credibility of defendant's witness and challenge his theory of defense in closing argument where there was evidence to support such a challenge. People v. Kirchner, 194 Ill. 2d 502, 549 (2000). The complained of arguments were properly based on the evidence at trial and were not error. Nicholas, 218 Ill. 2d at 121; People v. Tolliver, 347 Ill. App. 3d 203 (2004).

Defendant also points to several comments made by the prosecutor during rebuttal argument that he contends served no purpose other than to "degrade and humiliate the defense witness in front of the jury." The record shows that during rebuttal argument, the prosecutor

continued to challenge Dr. Friedman's conclusion that defendant was excluded as a contributor of DNA on the victim's underwear. The prosecutor noted that the parties stipulated that the state crime laboratory found the sample on the victim's underwear insufficient to submit for further testing. The prosecutor argued that Dr. Friedman should have reached the same conclusion and found the DNA "inconclusive," but because he was a "defense expert," he "conveniently chang[ed] what should be an inconclusive to an exclusion." Defendant argues that during her argument, the prosecutor improperly referred to Dr. Friedman as "the ace in the hole," a "windbag" who was "defense oriented," and referred to his exclusion of defendant as "poppycock."

However, the prosecutor was entitled to comment on the credibility of defendant's expert and the prosecutor's remarks were based on the evidence presented by defendant and Dr. Friedman. The prosecutor commented on Dr. Friedman's exclusion of defendant while he agreed that it was possible that defendant could have been a contributor of DNA. The record also shows that Dr. Friedman testified that he had never testified for the State and that 40 to 50 percent of his caseload came from the Public Defender's Office. Accordingly, we cannot find that the prosecutor's comments exceeded the bounds of proper debate.

D. Comments about Defense Counsel

Defendant next contends that the prosecutor's comments disparaged defense counsel and the defense theory. Defendant complains about the following comments made by the prosecutor

during closing arguments:

> "Let's talk about their so-called defense. *** [T]here was not one shred of evidence of any of the defenses they told you that they would show you in opening statement.
>
> ***. They told you that the evidence would show *** [S.F.'s] father is an abusive alcoholic. Where's the evidence of that, folks? What was the purpose of that, folks? You know what the purpose of that was? Defense number one, dirty up the victim or her family, all right? Blame the victim. Throw a bunch of stuff at you and hope that something sticks, that you get distracted from the real overwhelming evidence.
>
> * * *
>
> And finally their last defense, the gangbanger defense, is such an insult to your intelligence and the sheer impossibility of it is so overwhelming that to ask you to believe it is appalling. ***.
>
> How could you have for a month period of time, from September to October, knives shoved up a vagina of a seven-year old girl and then *** have it happen on the night before you go to the hospital in February of 95 and not have one cut, one laceration, or any evidence of fresh bleeding?
>
> * * *
>
> I don't know what planet they were on when Dr. Flaherty testified, but in

> no way, shape or form did she say that what she saw was evidence of a laceration or cut to [S.F.'s] vaginal area.
>
> What she found was striking findings, long-term abuse consistent with an adult penis. They just want to twist the words and make them fit into what they want to distract you with. This is not a normal eight-year old vagina, pure and simple.
>
> * * *
>
> But the bottom line, folks, is that the details kept changing. I don't know what fantasy planet these people over there are on.
>
> [Defense counsel]: Objection.
>
> [Prosecutor]: But to go and arrest four gangbangers -
>
> [The Court]: Overruled.
>
> [Prosecutor]: - based on first names is absurd.
>
> You and I know why nobody made any investigation into these gangbangers, because it is so blatantly unbelievable ***."

We find the case at bar distinguishable from People v. Emerson, 97 Ill. 2d 487, 497 (1983), upon which defendant relies. In Emerson, our supreme court concluded that a prosecutor's comments required reversal where, among other things, the prosecutor suggested that defense counsel laid down a smokescreen " 'composed of lies and misrepresentations and

innuendoes' " and that counsel, like all defense attorneys, tried to " 'dirty up the victim.' " Emerson, 97 Ill. 2d at 496-98. Our supreme court held that "[u]nless based on some evidence, statements made in closing arguments by the prosecution which suggest that defense counsel fabricated a defense theory, attempted to free his client through trickery or deception, or suborned perjury are improper." Emerson, 97 Ill. 2d at 497.

Here, unlike in Emerson, the prosecutor did not allege that defense counsel had deliberately lied to the jury or had fabricated a defense. Instead, we find that the objected-to comments were proper comments "on the credibility of the defendant and his theory of defense rather than an impermissible attack on defense counsel." Kirchner, 194 Ill. 2d at 549.

Defendant also complains that the following comments by the prosecutor implied that the DNA expert fabricated evidence at the behest of defense counsel:

> "So, look at all of those problems with those underwear and the DNA, and the bottom line is it still could be [defendant]. [Dr. Friedman] should have been a State witness. But you know what? He wouldn't have gotten that four thousand dollars.
>
> * * *
>
> So, the bottom line is because he's a defense expert, quote/unquote, he's willing to do whatever it takes and conveniently forget and conveniently change what should be an inconclusive to an exclusion."

We find that nothing in these comments suggested that defense counsel did anything improper.

Rather, the complained-of comments related to the credibility of defendant's witness and defense theory, and did not exceed the bounds of proper argument. Kirchner, 194 Ill. 2d at 549.

E. Comments about Defendant and Defendant's Wife

Defendant next argues that the prosecutor improperly referred to defendant as a monster, rapist, manipulator, pedophile, predator and the architect or author of a nightmare; and his wife, Stephanie, as a despicable creature, evil disgusting pig, and part of a "husband/wife rape team." Defendant contends that these words served only to inflame the jurors and direct their attention away from the evidence presented at trial.

A prosecutor's characterization of a defendant as a "monster" or an "animal" has been upheld on review where the evidence justified the comment. People v. Burton, 338 Ill. App. 3d 406, 419-20 (2003). In Burton, this court found that the prosecutors comments, including referring to one codefendant as a "monster" and the other as a " creature," did not result in substantial prejudice to the defendants, such that absent those remarks the verdict would have been different. Burton, 338 Ill. App. 3d at 419-20. This court found that the prosecutor's references were supported by the evidence that codefendant's three-year-old daughter suffered bruises, burns and abrasions repeatedly for several months before the child's death and the codefendant did not prevent the other codefendant from drowning the child in the bathtub. Burton, 338 Ill. App. 3d at 419-20. This court noted, " '[I]t is entirely proper for a prosecutor to denounce a defendant's wickedness, engage in some degree of invective, and draw inferences unfavorable to the defendant if such inferences are based upon the evidence.' " Burton, 338 Ill.

App. 3d at 418, quoting People v. Gutierrez, 205 Ill. App. 3d 231, 261 (1990). Similarly, in light of the evidence at trial showing that during a two-year period, S.F., who was six to eight years old at the time, was orally assaulted, vaginally raped, sodomized and tortured on a daily basis by defendant with the aid and abatement of his wife, Stephanie, we do not believe a reasonable jury would have acquitted defendant but for the remarks of the prosecutor.

F. Comments to the Jurors

Defendant next argues that the prosecutor improperly urged the jurors to use their verdict to vindicate the victim and assuage the suffering of her family. Defendant complains of the following comments by the prosecutor during rebuttal argument:

> "It's appalling the trail of victims that he has left behind with the trail of tears that no doubt each of them cry before they go to sleep at night, and it's time, ladies and gentlemen, to stop it.
>
> Every single witness who came into this courtroom and went up to that stand and took their right hand and raised it and took the oath in the State's case and most of the ones in the defense case buried this man in guilt so overwhelming, there is not a single doubt left as to who committed this crime.
>
> * * *
>
> And no matter what they will do with their lives, when they took the stand, [defendant's daughter], [S.F.], and [H.R.], and they raised their right hand and they faced that man, they faced down the monster in their lives, and that, ladies and gentlemen, was their finest hour. It was a brave and heroic thing for those

> little girls to do. You can't let those brave, heroic acts go to waste.
>
> * * *
>
> And no matter what you do today, folks, there's a very special place in heaven for little girls, and all of the little girls in this case will go there. And, likewise, there's a very special place in hell for child molesters, and no matter what you do, folks, there is no doubt that [defendant] will go there. But we ask you today, that you recognize him while he still has time on earth and recognize him for what he is and what he did, the architect and the author of the nightmare endured by that little girl, [S.F.]. Thank you."

Defendant relies on People v. Blue, 189 Ill. 2d 99 (2000), in support of his argument that the above comments improperly implored the jurors to use their verdict to vindicate the victim in this case. In Blue, the State argued that the victim's parents " 'need to hear from you that even though they suffered the worst nightmare a parent could suffer, that they had to bury their child, they need to hear from you that they will get justice.' " Blue, 189 Ill. 2d at 128. The State also argued that the victim's daughter " 'needs to hear *** that daddy didn't die in vain.' " Blue, 189 Ill. 2d at 128. Unlike Blue, we find that the comments made by the prosecutor were not improper. While the prosecutor commented on the evil nature of the crime involved, the prosecutor asked the jurors to "recognize [defendant] for what he is and what he did" and, therefore, convict him based on the evidence presented against defendant. See People v. Gutierrez, 402 Ill. App. 2d 866, 898 (2010) (a prosecutor may comment unfavorably on the evil effects of the crime and urge the jury to administer the law without fear, when such argument is

based on competent and pertinent evidence).

G. Comments Invoking Religious Images

Defendant lastly argues that the prosecutor improperly invoked religious images to inflame the jury by comparing the victim to a "sacrificial-lamb-to-slaughter." The prosecutor made the following comments during rebuttal argument:

> "They want you to believe that Stephanie Colin was coerced into making a statement by [ASA] Laura Forester in 1995 and equally coerced, I guess into making a statement in 1997 ***. And that somehow *** the big bad State's Attorneys, that we *** somehow coerced her into telling you *** a statement in court.
>
> Make no mistake about it, folks. She's not our witness. She is an evil, despicable creature, and I use the word creature instead of human being.
>
> And make no mistake about it. He chose her as a witness. He chose her as a fellow rapist, and she willingly accepted the role of bringing the sacrificial lambs to the altar of her husband so he could ritually slaughter them with his penis, and that's why she's a witness. We don't vouch for her character. She's a disgusting pig, and that's putting it mildly."

Defendant also complains that the prosecutor improperly used religious imagery by stating that "there's a special place in heaven" for the girls in this case and "a special place in hell for child molesters" where defendant will go. Defendant relies on People v. Quirozi, 257 Ill. App. 3d 576 (1993) and People v. Cruz, 248 Ill. App. 3d 473 (1993), in support of his argument that the prosecutor's use of religious imagery served only to inflame the passions of the jury and denied

defendant his right to a fair trial.

In Quirozi, this court found that the prosecutor's reference during closing arguments to the defendant, who was a member of the Satan Disciples street gang, as a "Disciple of Satan" and statement that "passion" comes from the suffering of Christ between the Last Supper and the following day were improper where they bore no relevance to the facts of the case. Quirozi, 257 Ill. App. 3d at 584-85. However, this court concluded that the prosecutor's remarks amounted to harmless error where the jury was instructed that closing arguments are not evidence and that statements made during arguments not based upon the evidence should be disregarded, and the prosecutor's remarks did not unfairly influence the outcome of the defendant's case. Quirozi, 257 Ill. App. 3d at 585. In Cruz, this court found that the prosecutor's statement during closing argument, sarcastically suggesting that there would have been no room for drugs in defendant's pockets "with the Bible and the crucifix stuck in there," was improper where it was not relevant to the defendant's guilt or innocence and could only have been offered to inflame the jury. Cruz, 248 Ill. App. 3d at 479. This court concluded that where the jury was instructed that closing arguments are not evidence and that statements made during arguments not based upon the evidence should be disregarded, and where the prosecution did not dwell upon the improper statement, the defendant's right to a fair trial was not affected. Cruz, 248 Ill. App. 3d at 479.

Here, unlike Quirozi and Cruz, the prosecutor's reference to Stephanie leading "the sacrificial lamb to the alter" was based on evidence presented at trial. The evidence showed that Stephanie and defendant engaged in the systematic sexual abuse of S.F. over a two-year period. Stephanie acted in concert with defendant, included by washing S.F. prior to bringing S.F. to

defendant to be sexually assaulted and physically aiding defendant by holding the victim's legs down while she was sexually assaulted.

In addition, as previously discussed, the prosecutor's comments regarding heaven and hell were a reference to the evil of the crime involved. Moreover, even if we were to find that the prosecutor's comments exceeded the bounds of proper argument, defendant's right to a fair trial was not affected. The record shows that the jury was specifically instructed that closing arguments are not evidence and that statements made during arguments not based upon the evidence should be disregarded. Such instructions are deemed to protect defendant against most prejudices caused by a prosecution's improper comments. Quirozi, 257 Ill. App. 3d at 585. Also, the prosecutor did not dwell on these comments in this case. Therefore, we find that the quoted remarks did not unfairly influence the outcome of defendant's case.

For the above reasons, we find that defendant has failed to make a substantial showing that his constitutional rights were violated. Accordingly, we affirm the judgment of the circuit court dismissing defendant's supplemental post-conviction petition during the second-stage of proceedings under the Act.

Affirmed.