2019 IL App (1st) 170108-U

No. 1-17-0108

Order filed December 10, 2019.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 1514
	)	
MELVIN RIGGS,	)	The Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Second-stage dismissal of defendant's postconviction petition was proper where defendant failed to make a substantial showing that he received ineffective assistance of trial counsel.

¶ 2 Defendant Melvin Riggs appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2016). In the petition, defendant, who stands convicted of two counts of aggravated criminal sexual assault,

claimed that his trial counsel was ineffective for failing to investigate and impeach the State's other-crimes witness with prior statements that were inconsistent with her trial testimony. On appeal, defendant contends that his petition should have advanced to an evidentiary hearing because it made a substantial showing of ineffective assistance of trial counsel.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the 2005 assault of J.J. in Chicago. Following his arrest, defendant was charged by indictment with four counts of aggravated criminal sexual assault and three counts of aggravated kidnapping. Prior to trial, the State nol-prossed the counts of aggravated kidnapping. The State also filed a motion to allow other-crimes evidence, specifically, evidence that defendant had sexually assaulted M.T. in 2001, to show defendant's propensity to commit sex crimes, to rebut a potential consent defense, and to show intent and motive. Following a hearing, the trial court granted the State's motion.

¶ 5 At defendant's 2008 jury trial, J.J. testified that she met defendant in church in 2004. At first, their relationship was platonic. But that October, J.J. and her brother, for whom she was a caregiver, started renting a room at defendant's apartment. Defendant began to pursue J.J. aggressively, and their relationship became sexual. In April 2005, the relationship ended and J.J. and her brother moved out.

¶ 6 On August 7, 2005, J.J. called defendant to arrange to retrieve some of the belongings she had left behind at his apartment. Defendant called her back while she was at work on August 8, 2005, asking her to have dinner with him. J.J. agreed, but later that day, called him back. She told defendant she was sick, but as a compromise, asked him to pick her up after she got off work at 8:30 p.m. and drive her to the Howard El station.

¶ 7 Defendant picked J.J. up from her job on Michigan Avenue and drove to a restaurant. He went inside to buy carryout food and then drove to Lincoln Park, where he and J.J. ate on a bench near the bike path. While they were eating, defendant asked J.J. twice if she wanted to have sex with him. She said no both times. Defendant then asked for a kiss, and J.J. complied "because [she] thought that that would be a way to pacify him." However, when defendant placed his hand on her breast, J.J. pushed his hand away, told him she was not interested, and asked if they could please leave the park.

¶ 8 Defendant and J.J. returned to defendant's car and drove to a gas station, where defendant bought gas. As they were preparing to pull out of the parking lot, J.J. noticed that defendant's turn signal indicated he was going to turn south, rather than north toward the Howard El station. When J.J. asked him about the direction of his turn signal, defendant hesitated, casually said, "Oh," and "you're right," and then turned north. As they drove north, defendant asked if they could park and have a conversation. J.J. said no, explaining that she did not have time. At a red light, defendant put his car in reverse and backed into a vacant parking lot that was surrounded by bushes. J.J. asked defendant what he was doing, but he did not respond.

¶ 9 Defendant turned off the engine and grabbed J.J.'s hands and wrists. J.J. attempted to pull away and told defendant she could not spend a lot of time with him that evening. When she saw a person walking a dog on the other side of the street, she shouted, "Help, call the police," but the person did not respond and kept walking. J.J. threw her purse out the open passenger-side window and, because that door was not functional, put her legs out the window and tried to get her body out of the car. Defendant held J.J.'s arms, pulled her back into the car, and raised the car's windows. J.J. continued to shout for help and kicked the passenger-side window in an unsuccessful

attempt to break it. Defendant pressed one of his arms against J.J.'s forehead, pushing her head back, and put the other arm around her neck.

¶ 10 J.J. testified that she decided she was not going to be able to escape, so she asked defendant what he wanted. He pulled her skirt up and her pantyhose and underwear down. J.J.'s clothes started to rip, so she told defendant she would pull them down herself, which she did. Defendant unfastened his pants, climbed on top of J.J., and put his mouth on her vagina. She cooperated because she felt she did not have a choice. When defendant was done, she attempted to bite his cheek. In response, defendant bit her chin. He then put his penis into her vagina.

¶ 11 J.J. noticed that one of the back-seat windows was slightly open, so she began screaming for help again. A police car pulled into the parking lot and several officers approached on foot, asking if everything was all right. J.J. called to the officers, who opened the driver's door. Defendant told the officers, "Oh, man, we're just having sex." The officers removed defendant from the car. J.J. adjusted her clothes, got out of the car, and retrieved her purse. J.J. told a female detective what had happened and then went to the hospital. There, J.J. was examined and questioned by another detective. Her injuries included an open bite wound on her chin, scratches on her hands, and bruising on her ankles, arms, and chest.

¶ 12 Around 7 a.m., J.J. left the hospital and was escorted to the police station by a detective. She remained there until about 3 p.m. She did not sign a complaint against defendant that day. J.J. explained that she did not do so "[b]ecause I couldn't understand the extremity of the defendant's behavior from what I had previously known about the defendant, and so I was very confused at the time about the behavior." J.J. agreed that she "eventually" signed a complaint.

¶ 13 In court, J.J. identified photographs depicting bruising on her right arm and "red scars" on her right breast and shoulder. J.J. stated that marks she identified were a result of the incident with defendant.

¶ 14 On cross-examination, J.J. clarified that she had known defendant through her church for approximately 15 years before moving in with him. She stated that when she was at the police station, she was allowed to make phone calls. J.J. explained that she did not sign a complaint that day because she felt what defendant did "was out of character," and that she told the detective she needed "more information" and needed to talk to a particular person from her church in order to feel comfortable making that decision. However, the detective did not allow her to finish her conversation with that person and ordered her to leave the police station. According to J.J., she returned to the police station later on August 9, 2005, and again several times after that date to sign a complaint, but one was never presented to her. She did not recall the names of the people she talked to at the station during those visits. J.J. signed a complaint on November 22, 2005. On re-direct, J.J. explained that it was after she contacted the state's attorney's office that she was able to sign a complaint.

¶ 15 Chicago police officer Jesse Farmer testified that around 11:40 p.m. on August 8, 2005, he and his two partners responded to a call of a person calling for help. Within two minutes of the call, they arrived at the given location, a school. The officers drove by, turned around, and on their second pass, Farmer heard someone in a parked car in the school's parking lot screaming for help. He looked in the front passenger side of the car and saw a man on top of a woman. The woman was flailing her arms wildly and screaming, "Someone please help me." Farmer approached the driver's side on foot, knocked on the window, and tried to open the door, but found it locked. The

man, identified in court as defendant, looked at Farmer, who announced his office and directed him to open the door. Defendant unlocked or opened the door, at which time Farmer grabbed his arm and pulled him out of the car. Defendant's pants were around his ankles and his penis was exposed. Farmer and one of his partners pulled defendant's pants up and handcuffed him. As Farmer's other partner helped the woman, later identified as J.J., out of the car, Farmer noticed she was disheveled and crying, and that her pantyhose were down around her ankles. Defendant was placed in custody and J.J. was taken to the hospital.

¶ 16 Chicago police officer Ken Krupa testified, consistent with Officer Farmer, that he and his partners responded to a report of a person calling for help. When they heard the screams of someone calling for help, they pulled into a parking lot and observed a parked car. Krupa added that the school's parking lot was "not too visible from the street," as there were bushes around it. Krupa also added that when he approached the car's passenger side and saw defendant on top of J.J., she was waving her arms and legs in a wild manner and screaming for help. Krupa tried to get the door open, but was unable to do so. After he went around to the driver's door to assist Farmer, he noticed J.J. was distraught, distressed, crying, screaming, and visibly shaking.

¶ 17 Before the State called M.T. to the stand, the trial court instructed the jury that the State was about to offer evidence that defendant had been involved in an offense other than the one for which he was standing trial. The court indicated that M.T.'s testimony was being offered by the State "on the issue or issues of the defendant's intent and propensity to commit sex crimes and may be considered by you only for that limited purpose." The trial court admonished the jurors that it was for them to determine whether defendant was involved in the offense involving M.T., and if so, what weight should be given to this evidence.

¶ 18 M.T. testified that she met defendant in 1999, when he was doing construction work for her mother. They became friends, and after about nine months, they briefly became sexually intimate. M.T. stated that they decided to stop engaging in sexual activities because they were going to wait until they got married. Then, M.T. ended the relationship after a few months. She stated that they remained friends, but she tried to avoid him.

¶ 19 On the morning of March 10, 2001, M.T. was installing ceiling tiles in her house when defendant showed up at her door. He told M.T. that he had heard her godmother passed away and that his mother had just passed away, so M.T. let him in. After they talked about their respective losses, defendant offered to help install the ceiling tiles and M.T. accepted. When they finished the project, defendant was dirty and dusty. He asked to take a shower. M.T. said sure, and while he did so, she went in the kitchen to fix some food.

¶ 20 When defendant came out of the bathroom and into the kitchen, he was wearing only a towel. He "wanted to put [M.T.] on his lap," but she said no. They started to fight as M.T. tried to get off defendant's lap. M.T. scratched, bit, and hit defendant, but he laughed. Defendant pinned M.T. to the floor on her stomach, pulled her pants down, and put his penis in her vagina. The phone rang. Defendant allowed M.T. to answer the call, which was from her neighbor. M.T. asked her neighbor to call the police. After she got off the phone, she tried to stall defendant so he would still be at her house when the police arrived. However, he wanted "to continue," so she told him the police were on the way. Defendant put his clothes on and left.

¶ 21 On cross-examination, counsel asked M.T. about the nature of her relationship with defendant. She agreed their relationship had been "romantic," said they would go out to eat after church, and agreed they bought each other gifts. However, M.T. said she did not "remember ever

dating, going out too much." M.T. related that in the months between their breakup and the assault, defendant lived nearby, so they would see each other in the neighborhood and talk every now and then. She changed her phone number because she did not want defendant to have it. With regard to the day of the assault, M.T. stated that she "kind of" remembered defendant asking if he could take a shower.

¶ 22 Defendant made a motion for a directed verdict, which the trial court denied.

¶ 23 Chicago police detective Edward Herdt testified for defendant that in the early morning hours of August 9, 2005, he interviewed J.J. in the emergency room. When J.J. was released from the hospital around 7 a.m., she and Herdt relocated to a police station. At that time, J.J. was committed to prosecuting and was cooperating with the case. As such, Herdt contacted the state's attorney's office, and an assistant state's attorney came to the station around 8 or 9 a.m. At approximately 12:30 p.m., the assistant state's attorney approved felony charges. Herdt then typed up a criminal complaint and presented it to J.J. to sign.

¶ 24 J.J. asked if she could use the phone to call some people before she signed the complaint. Herdt agreed and arranged for J.J. to look up phone numbers on a computer, use the phone in the conference room for local calls, and use the phone in the watch commander's office for long-distance calls. In all, Herdt estimated that J.J. was allowed almost two hours to make phone calls. During this time, he "poked [his] head in there" several times to spur J.J. on. Eventually, Herdt, accompanied by the assistant state's attorney, went into the room where J.J. was using the phone, interrupted her, and said she really needed to sign the complaint so they could continue processing defendant. J.J. told Herdt to leave the room, that she would sign the complaint when she was ready, and that "if she didn't talk she was going to walk." Herdt disconnected J.J.'s call and told her she

could either sign the complaint or leave the station. J.J. walked out. To Herdt's recollection, J.J. did not return to the station later that day. He said that after J.J. left, his immediate responsibility was to see to defendant's release, which took only a few minutes, and that after that was accomplished, Herdt left the station.

¶ 25 On cross-examination, Herdt testified that J.J. did not have a chance to sleep either at the hospital or at the police station. He believed she was given something to eat early on at the hospital, but did not recall whether she ate anything else later in the day. Herdt acknowledged that he left the station about 15 minutes after J.J. did, and agreed that he did not know what happened at the station after that time.

¶ 26 Following closing arguments, the jury found defendant guilty of two counts of aggravated criminal sexual assault. The jury found defendant not guilty of the two counts of aggravated criminal sexual assault premised on kidnapping.

¶ 27 Defendant's trial counsel filed a motion for a new trial. In court, trial counsel asked for a date to argue the motion, and defendant interjected with an allegation that trial counsel was ineffective. The trial court agreed to appoint "a lawyer from one of the bar associations" and continued the case.

¶ 28 Appointed counsel thereafter filed an amended motion for a new trial, arguing, as relevant here, that trial counsel was ineffective for failing to "investigate the case" and "contact witnesses." At the hearing on the motion, appointed counsel specified that M.T. was one of the witnesses trial counsel should have contacted.

¶ 29 The State called trial counsel, Vincent Akers, to testify. On the topic of his investigation of M.T., Akers testified on cross-examination that he did not make any attempts to contact or

interview M.T. Akers explained that he and defendant talked about his relationship with M.T., as well as M.T.'s potential testimony and how it would impact his case. Akers stated that defendant did not make a specific request that he interview M.T. On redirect examination, Akers testified regarding M.T. as follows:

"Q. Additionally, you also, as a part of discovery, received reports as to [M.T.'s] case?

A. I did.

Q. The incident between [M.T.] and the defendant?

A. Yes.

Q. And I believe there were police reports containing her statements in that case?

A. Yes.

Q. And you had prior -- prior to trial you had a very good idea of what [M.T.] was going to testify to based on the information that you received on paper?

A. Yes."

¶ 30 The trial court denied defendant's motion for a new trial, finding, *inter alia*, that defendant had not established Akers was ineffective in his representation. The trial court's only finding specific to M.T. was that "[t]he defense cross-examination of the victims in the case, two victims, was effective for a couple of reasons." Those reasons were that (1) "the defense cross-examination [of J.J.] enabled the defense to establish that there was some evidence of consent, and therefore, they got the consent jury instruction to the jury and were able to argue that theory without the defendant testifying," and (2) the jury found defendant not guilty of the two counts premised on

kidnapping, which indicated to the trial court "that the defense was, a, effective and, b, the jury thought through the evidence in this case and gave [defendant] a totally fair trial."

¶ 31 Following a sentencing hearing, the trial court imposed consecutive 10-year and 8-year terms of imprisonment.

¶ 32 On direct appeal, defendant contended that the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during jury selection, and that the trial court improperly assessed various fines and fees against him. We affirmed, but modified the fines and fees order. *People v. Riggs*, No. 1-09-1726 (2011) (unpublished order under Supreme Court Rule 23).

¶ 33 On September 20, 2012, defendant mailed a *pro se* postconviction petition to the circuit court. Among the arguments defendant made in his petition was that trial counsel was ineffective for failing to investigate M.T., thus leaving counsel unprepared to show that there were inconsistencies between her trial testimony and statements she made at the time of defendant's arrest. Defendant asserted that investigation into M.T.'s statements would have shown she was an unreliable witness.

¶ 34 On December 10, 2015, appointed postconviction counsel filed a supplemental postconviction petition, expounding on defendant's claim of ineffectiveness. Referencing two police reports, postconviction counsel argued that trial counsel, Akers, should have challenged M.T.'s trial testimony with her initial statements to the police, which he maintained "conflicted with [her] testimony at trial." Postconviction counsel stated that the police reports were available to Akers, as "Post Conviction counsel found the reports in Public Defender Trial counsel's trial file." Postconviction counsel asserted that Akers "could / should have introduced testimony by Chicago police officers who wrote the reports." According to postconviction counsel, because the

evidence at trial was closely balanced, it was likely that M.T.'s unchallenged account of defendant's prior acts contributed substantially to the verdict. Therefore, had counsel undermined M.T.'s credibility, it was probable that the outcome of trial would have been different.

¶ 35 Postconviction counsel argued in the supplemental petition that M.T.'s initial statements to the police conflicted with her trial testimony in six ways. First, she told the police her relationship with defendant was based on friendship and that she broke it off when he wanted to take it to a more intimate level, but testified at trial that her relationship with defendant was romantic and sexual. Second, she told the police that defendant took a bath after installing the ceiling tiles, but at trial, testified that he took a shower. Third, she testified at trial that defendant came out of the bathroom wearing only a towel, but this detail was not included in the police reports. Fourth, she testified at trial that she started fighting defendant when she was sitting on his lap in the kitchen, but told the police the incident began when she and defendant were in the dining room and he asked for a hug, or in the kitchen when defendant asked for a hug and a kiss. Fifth, M.T. told the police that defendant choked her, but she did not mention any choking at trial. Finally, M.T. testified at trial that she asked her neighbor to call the police, but she told the police she herself had called, or warned defendant she was going to call the police.

¶ 36 Two documents were attached to the supplemental petition. The first, a Chicago police "General Offense Case Report" written by Officer V. Barber on the date of the incident, March 10, 2001, included the following narrative:

> "In summary: victim related to R/O that the offender came over to give his condolences. The offender then observed that the victim was putting up ceiling tiles and offered his assistance. The victim stated when the tiles ran out the offender requested a

hug. The victim refused. The offender then picked up the victim and carried her into the bedroom. The victim told the offender to stop, she was not playing. The offender began choking the victim. The victim then stated she would submit to the offender. The offender pulled down the victim's pants and penetrated the victim vaginally several times. The victim called the police while the offender was there. When the offender realized that the victim was serious he fled the scene."

¶ 37 The second document, a "Case Supplementary Report" prepared on April 5, 2001, by Officer Dolores Myles, included the following paragraphs:

"[M.T.] related the following in summary, not verbatim: [M.T.] had known the offender for 3 years. She initially met him through her mother after the offender did some home improvement and repair work around the victim's mother's residence. She stated their relationship was based on friendship on her part but the offender wanted to take the friendship to a more intimate level. It was because of this obsession, the victim broke off contact with the offender. [M.T.] had not seen the offender for a while. Recently, [M.T.] had a death in her family member [*sic*]. The offender came over to [M.T.'s] home on 10 March 2001 to express his condolence.

While the offender was in her home, he helped the victim put up ceiling tiles. The offender told her he did not have heat or water at his mother's home, and could he use her bathroom to take a bath. The victim could see the offender appeared to have not bathed in several days. [M.T.] allowed him to use the bathroom. After the bath, [M.T.] and the offender were sitting in the kitchen when the offender made a sexual overture to [M.T.]. He asked for a hug and a kiss. When she refused, the offender forcibly carried her into a

bedroom where he choked and sexually assaulted her by placing his penis into her vagina. After the attack, the victim told the offender she was going to call the police. The offender then fled the scene before the arrival of the police."

¶ 38 The State filed a motion to dismiss, and postconviction counsel filed a response. Following a hearing, the trial court granted the State's motion.

¶ 39 On appeal, defendant contends that his petition made a substantial showing of ineffective assistance of trial counsel where counsel failed to investigate and impeach M.T. with readily available prior statements that were inconsistent with her trial testimony. Specifically, the points on which defendant asserts trial counsel should have impeached M.T. with her prior inconsistent statements are: whether her relationship with defendant was platonic, or, instead, romantic and sexual; whether defendant took a shower or a bath at her house; whether defendant came out of the bathroom wearing only a towel; whether M.T. began fighting defendant while sitting on his lap in the kitchen, or whether defendant carried her into a bedroom after she refused to hug him; and whether defendant choked her. Defendant asserts that by not impeaching M.T., trial counsel allowed her "extremely damaging" testimony to go unchallenged. He argues that trial counsel's failure was prejudicial because the evidence against him was not overwhelming, as he did not confess and J.J.'s actions at the police station called her credibility into question. Defendant concludes that there was a reasonable probability M.T.'s testimony "tipped the scales" against him, and that the jury might have reached a different verdict had M.T. been impeached.

¶ 40 As an initial matter, we address the State's assertions that defendant's claim of ineffectiveness is barred by the doctrine of *res judicata* because the trial court already adjudicated

it at the hearing on the posttrial motion, and by forfeiture because defendant could have raised it on direct appeal.

¶ 41 The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original trial that have not been, and could not have been, previously adjudicated. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010). Issues that were raised and decided in prior proceedings are barred by the doctrine of *res judicata*, and issues that could have been presented on direct review, but were not, are procedurally forfeited. *Id.*

¶ 42 We disagree with the State's argument regarding *res judicata*. At the hearing on the amended posttrial motion, appointed counsel asserted that trial counsel, Akers, was ineffective for failing to "investigate" and "contact" M.T., and elicited testimony from Akers that he did not make any attempts to contact or interview her. In response to questioning from the State, Akers agreed that during the course of discovery, he received "police reports containing her statements," and that prior to trial, he "had a very good idea of what [M.T.] was going to testify to based on the information that [he] received on paper." When the trial court announced its decision denying defendant's motion, it stated that Akers' cross-examination of the "two victims" was "effective for a couple of reasons," but the reasons it gave related only to J.J., and not to M.T.

¶ 43 Here, defendant is arguing that Akers was ineffective for failing to impeach M.T. with prior inconsistent statements that were contained in two police reports. This claim was not decided at the hearing on the posttrial motion. While Akers indicated at the hearing that he had reviewed police reports, that fact does not speak to whether he was ineffective for failing to call the police officers who authored those reports to impeach M.T.'s trial testimony. Additionally, although the trial court stated a general finding that Akers' cross-examination of M.T. was effective, it had not

been presented with an argument that Akers should have impeached M.T. with her prior statements. Defendant's claim of ineffectiveness was not raised or decided in an earlier proceeding. Accordingly, it is not barred by *res judicata*. *People v. Ross*, 2015 IL App (1st) 120089, ¶ 28.

¶ 44 We also disagree with the State's position that the claim is forfeited. The forfeiture rule applies in postconviction cases only where it was possible to raise an issue on direct appeal. *People v. Moore*, 402 Ill. App. 3d 143, 146 (2010). Defendant's claim that Akers failed to impeach M.T. with her prior inconsistent statements depends on matters outside the trial record, *i.e.*, police reports that were not admitted at trial. Therefore, the claim could not have been raised on direct appeal. As such, it is not barred by forfeiture. *Id.*

¶ 45 In cases not involving the death penalty, the Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9-10 (2009). The instant case involves the second stage, where counsel is appointed to indigent defendants and the State is allowed to move to dismiss. *Hodges*, 234 Ill. 2d at 10-11. At this stage, all factual allegations that are not positively rebutted by the record are accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). The granting of the State's motion to dismiss is warranted if the petition's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). In other words, a defendant is entitled to proceed to a third-stage evidentiary hearing on his petition only if the allegations in the petition, supported by the trial record and affidavits or exhibits, make a substantial showing of a violation of constitutional rights. *Id.* at 381. Our review at the second stage is *de novo*. *Id.* at 388, 389.

¶ 46 The standard for determining whether a defendant was denied the effective assistance of counsel is the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *Hall*, 217 Ill. 2d at 334-35. To establish ineffective assistance of counsel under *Strickland*, a defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland*, 466 U.S. at 687.

¶ 47 In the instant case, we need not determine whether counsel's performance fell below an objective standard of reasonableness. This is because defendant has not made a substantial showing of prejudice. See *People v. Salas*, 2011 IL App (1st) 091880, ¶ 91 (if a claim of ineffectiveness may be disposed of due to lack of prejudice, this court is not required to address whether counsel's performance was objectively reasonable).

¶ 48 On appeal, defendant argues he was prejudiced because there is a reasonable probability M.T.'s testimony tipped the scales against him, since he did not confess and J.J. was so reluctant to sign a complaint that he was initially released from custody. As such, defendant asserts there is a reasonable probability that had Akers impeached M.T.'s credibility with prior inconsistent statements, the jury's verdict would have been different.

¶ 49 We disagree. First, the points on which defendant maintains M.T. should have been impeached were, for the most part, peripheral. The material value of M.T.'s testimony was that defendant had sexually assaulted her, thus showing that he had a propensity to commit sex crimes. M.T.'s testimony regarding that assault would not have been materially discredited with statements, made seven years earlier, that her relationship with defendant had been platonic rather than romantic, that defendant took a bath at her house rather than a shower, or that defendant

initiated the attack by carrying her into a bedroom after she refused to hug him, rather than by putting her on his lap in the kitchen. A point that M.T. testified to at trial but apparently did not mention in her prior statements – that defendant was wearing only a towel when he came out of the bathroom – is similarly immaterial. The final "inconsistency" identified by defendant is that M.T. told the police defendant choked her, but did not mention any choking when she testified. While this detail would have been relevant, we fail to see how it could have been to defendant's benefit for Akers to have introduced an allegation of choking at trial.

¶ 50 Second, even if Akers had impeached M.T. with her prior statements, we cannot find that there is a reasonable probability defendant would have been acquitted. This is because even without the other-crimes testimony, the evidence showing defendant sexually assaulted J.J. was overwhelming. J.J. testified at trial that defendant physically restrained her, tried ripping off her clothes, and used force to put his mouth on and penis in her vagina. Her testimony was corroborated by two police officers who were responding to a report of a person calling for help. The officers testified that as they passed the lot where defendant had parked, they heard a person screaming for help. When they approached the car on foot, they saw defendant on top of J.J. One of the officers stated that J.J. was flailing her arms wildly and screaming, "Someone please help me." The other officer testified that J.J. was waving her arms and legs in a wild manner and screaming for help. The first officer described J.J. as disheveled and crying, and the other described her as distraught, distressed, crying, screaming, and visibly shaking. Finally, photographs were admitted at trial depicting bruising on J.J.'s right arm and "red scars" on her right breast and shoulder. Having carefully reviewed all the evidence presented at trial, we find that the evidence of defendant's guilt – even without M.T.'s testimony – was overwhelming. See *People v. Weston*,

2011 IL App (1st) 092432, ¶¶ 38, 42 (evidence may be deemed overwhelming even in the absence of physical evidence or a confession).

¶ 51 In light of the nature of the proposed impeachment and the overwhelming evidence of defendant's guilt, we cannot conclude that there was a reasonable probability that, but for defense counsel's failure to impeach M.T. with prior inconsistent statements, defendant would have been found not guilty. *Strickland*, 466 U.S. at 694. Defendant has failed to make a substantial showing of ineffective assistance of counsel. See *Coleman*, 183 Ill. 2d at 381-82. Accordingly, the trial court did not err in granting the State's motion to dismiss defendant's postconviction petition.

¶ 52 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 53 Affirmed.