2012 IL App (3d) 110552-U

Order filed December 10, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal No. 3-11-0552
	)	Circuit No. 10-CF-94
JOSHUA L. STORM,	)	
	)	Honorable Kathy Elliott,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Trial counsel did not render constitutionally ineffective assistance by failing to object to psychiatrists' testimony, failing to offer an instruction limiting the jury's consideration of the psychiatrists' testimony, or questioning defendant regarding prior incidents during his direct testimony.

¶ 2 A jury found defendant, Joshua Storm, to be a sexually dangerous person. The circuit

court of Kankakee County committed him indefinitely to the Illinois Department of Corrections. This is his direct appeal in which he claims he was denied effective assistance of counsel.

¶ 3 BACKGROUND

¶ 4 Om March 19, 2010, the State indicted defendant for predatory criminal sexual assault of a child. 720 ILCS 5/12-14.1(a)(1) (West 2010). The indictment alleged that the defendant committed the act of sexual penetration by placing an object in the anus of E.A., who was under the age of 13 at the time of the act. Six days later, on March 25, 2010, the State filed a petition to declare defendant a sexually dangerous person under the Sexually Dangerous Persons Act (the Act) (725 ILCS 205/1.01 (West 2010). The petition alleged that defendant suffered a mental disorder and that defendant had criminal propensities toward acts of sexual molestation of children.

¶ 5 The trial court appointed Dr. Terry Killian and Dr. Lawrence Jeckel as qualified psychiatrists to examine the defendant. Each was directed to file a report with an opinion as to whether or not the defendant is sexually dangerous within the meaning of the Act.

¶ 6 Prior to trial, the State filed a motion pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2010)) seeking to have statements made by the victim to others admitted into evidence. The trial court granted the motion finding sufficient safeguards of reliability as to the spontaneous statements E.A. made to Wendy Hood, Angela Allison and Kristen Jackson.

¶ 7 At trial, Dr. Jeckel testified that he interviewed the defendant. He also reviewed police

reports, the petition to declare defendant a sexually dangerous person, a previous evaluation of fitness and DVDs before arriving at his opinions.

¶ 8 Reports reviewed by Jeckel to arrive at his opinions included out-of-court statements involving: a 2005 accusation that defendant touched a young girl's genital area; a report of a father who claimed defendant touched his child; and a report of two girls who accused the defendant of asking them to meet with him. Defendant's trial counsel did not object to any of Dr. Jeckel's testimony, nor did he request an instruction limiting the jury's consideration of the substance of the reports.

¶ 9 Dr. Jeckel noted that during his interview of defendant, defendant was alert when answering questions and understood the questions. Jeckel found that defendant appeared tense and runny or teary-eyed. Defendant was not being "smoothly evasive" when answering questions. It appeared that defendant was struggling with his conscience and having trouble fabricating when denying the allegations of sexual conduct with children. Dr. Jeckel diagnosed defendant with pedophilia finding him sexually attracted to nonconsenting males and females and nonexclusive type.

¶ 10 A second psychiatrist, Dr. Killian, also testified. Dr. Killian testified that he interviewed defendant on May 15, 2010. Killian relied on written and recorded materials in forming his opinion. He disclosed the substance of these materials upon which he relied, which included out-of-court statements contained in reports of an accusation against the defendant in 2005 by two girls on a school bus that defendant asked them to go someplace with him where there were

no adults. Killian also reviewed a 2005 criminal sexual abuse or assault case involving a five-year-old girl who claimed defendant touched her vaginal area, an accusation by a three-year-old made in March of 2006 that defendant had touched the child "down there," and a report of a father of a three-year-old boy.

¶ 11 Dr. Killian gave the defendant three psychological tests to determine the risk to commit a sex offense in the future. Defendant scored low risk to offend on the Minnesota Sex Offender Screening Tool. Killian explained that the Minnesota score was low as it counted only convictions as an indicator of risk to reoffend. Killian also gave defendant the Rapid Risk Assessment for Sex Offender Recidivism (RRASOR) and the Static-99 psychological tests. The RRASOR indicated that defendant had a 70% risk to be arrested again within 10 years. The Static-99 test placed the defendant in the high risk category to commit a sex offense in the future. Dr. Killian diagnosed defendant with pedophilia and social anxiety disorder. He opined that defendant was at a high risk of reoffending and that defendant is a sexually dangerous person.

¶ 12 Killian believed that defendant understood the questions and defendant's answers corresponded to the questions. Defendant denied the sexual allegations made by E.A. He admitted to lying to Dr. Killian about not spending much time around children when confronted with a previous statement. Trial counsel did not object to any of Dr. Killian's testimony.

¶ 13 Both Jeckel and Killian opined that defendant suffered from a mental disorder of pedophilia, which has existed for not less than one year at the time the petition was filed. The psychiatrists stated: that this disorder affects his emotional and volitional capacity; that this

disorder results in his inability to control sexual impulses; that defendant has criminal propensities which cause him to commit sex offenses; and, that defendant would engage in sexually dangerous behavior with children in the future if he was not confined to a secured setting for treatment.

¶ 14 The victim, four-year-old E.A., testified that he was going to attend preschool. He demonstrated that he knew the difference between the truth and a lie and promised to tell the truth. He stated that "Josh" hurt him and that Josh was not his uncle anymore because Josh "stuck a real screwdriver in my butt." He further testified that it hurt when Josh did this.

¶ 15 Betty A. testified that she was E.A.'s grandmother and that E.A. referred to defendant as "uncle Josh." Betty noted that defendant babysat E.A. several times, had taken E.A. places such as McDonald's and Wal-Mart and that E.A. stayed overnight at defendant's parent's trailer three times.

¶ 16 While Betty was changing E.A.'s diaper on January 28, 2010, E.A. put a toy screwdriver near his anus. She took the screwdriver away from E.A. and told him not to do that again. She noticed blood on the baby wipe when she wiped near E.A.'s anus.

¶ 17 Betty noted that defendant always had a car seat in his car, which she found unusual. Defendant also always had candy on his person. E.A. would ask for candy and defendant would routinely give it to him.

¶ 18 Angela A. testified that she is E.A.'s mother. She described E.A.'s unusual behavior after he had stayed overnight at the defendant's parent's home. In January 2010, E.A. would put his

finger near his anus when she changed his diaper. Angela stated that E.A. would "hump a door frame" and position himself facing a door frame, then move his body in and out against the frame. She noted a horrible rash around E.A.'s anus. Angela noted that E.A. told her that it was the defendant "who taught him how to put a screwdriver near his butt."

¶ 19 Wendy Hood testified that she babysat E.A. in January 2010 while Angela A. was on a trip to Chicago. Hood noticed E.A. pulling on his diaper and asked him what was wrong. He told her that uncle Josh had hurt him and had put a screwdriver in his butt. Hood also testified that she observed E.A. "hump" the dog and a wall and found this to be unusual behavior.

¶ 20 The defendant testified on his own behalf. Defendant's counsel questioned him regarding: Kankakee County police case No. 2005-8268 that alleged on October 25, 2005, defendant solicited two young girls; the disposition of a case involving five-year-old A.W.; and the accusation that he was driving through the trailer park where an alleged victim lived. Defendant denied all accusations made against him.

¶ 21 The defendant admitted he kept a car seat in his vehicle despite the fact that he had no children. He stated that a friend of his was moving who "had this car seat and it was still in good shape, so she's like it needs to be cleaned up, so you can have it to give to somebody. Defendant further acknowledged that he "frequently" had candy on his person stating, "I bought it for me basically when I'm on my route because I would get dry throat." The State then cross-examined defendant regarding the aforementioned incidents.

¶ 22 The State called Detective Marlene Rittmanic to testify as a rebuttal witness. Portions of

a videotaped interview Rittmanic conducted with defendant were then admitted into evidence.

¶ 23 Ultimately, the jury returned a finding that defendant is a sexually dangerous person. The trial court committed him to the Illinois Department of Corrections. No posttrial motions were filed. This appeal followed.

¶ 24 ANALYSIS

¶ 25 Defendant's singular claim on appeal is that his trial counsel rendered constitutionally ineffective assistance. Defendant asks that we reverse the verdict of the jury, which found him to be sexually dangerous, and remand the matter to the trial court for a new hearing.

¶ 26 Persons made defendants under the Act are entitled to effective assistance of counsel "judged according to the same standards used in criminal cases." *People v. Lawton*, 212 Ill. 2d 285, 295 (2004). The standard of review for an ineffective assistance of counsel claim is enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). Under the *Strickland* standard, a party claiming ineffective assistance of counsel must demonstrate that counsel's performance fell below an objective standard of reasonableness and the performance prejudiced the defense of the case. *Strickland*, 466 U.S. at 687. Further, a defendant must overcome the presumption that counsel's challenged action was trial strategy. *Strickland*, 466 U.S. at 689.

¶ 27 Defendant argues his counsel was ineffective for: (1) failing to object to testimony offered by Dr. Jeckell and Dr. Killian regarding out-of-court statements made by others; (2) failing to request a limiting instruction regarding the psychiatrists' disclosures of out-of-court

statements made by others; and (3) opening the door to otherwise inadmissible prior conduct or prior arrest evidence.

¶ 28 A. Dr. Jeckell and Dr. Killian Testimony

¶ 29 Without specifying the exact statements made, defendant notes that both psychiatrists "testified as to statements made by other children and persons regarding alleged molestation of children. These statements were contained in written or recorded materials that the psychiatrists relied upon in forming their opinion." Defendant argues trial counsel was constitutionally ineffective for failing to object to such statements, claiming the "record is devoid of any evidence that experts in the field of psychiatry rely on such materials in forming their opinions." Defendant concludes that had defense counsel objected to the doctors' testimony, "the jury would not have been given the opportunity to hear and to use as substantive evidence the impermissible hearsay testimony of additional alleged victims ***."

¶ 30 As noted above, while defendant cites to four pages in the record on appeal, which seemingly contain the offending statements, he does not identify the specific statements to which he claims his counsel should have objected. The first page of the four, from Dr. Jeckell's testimony, states:

> "Q. In the case of Josh Storm, what made you believe that he was – – or what did you base your decision that he was a pedophile?
>
> A. Well, he – – he did admit to police on one occasion – – I think in the 2005 case that he got sexually excited touching a girl's

> genital area. So he has said – – he did say that he did but the pattern is such that we have these repeated accusations that children have been clearly assaulted, penetrated, overstimulated, which require someone to do something to them. And there are many of these accusations. There's a pattern here. And the pattern – – given my training, and skills, and experience, I believe the pattern indicates that he's – – he's a pedophile."

¶ 31 Other pages cited to by defendant indicate that when asked what "cases" he reviewed that were part of "past accusations" made against defendant, Dr. Killian detailed two different 2005 cases. One involved two young girls on a school bus, who claimed defendant touched one of them on the arm then "asked both of them if they wanted to go someplace with him where there wouldn't be any adults." The second 2005 cases involved a "five-year-old girl who said that he had touched her vaginal area and had laid on top of her in a sexual fashion humping her."

¶ 32 Dr. Killian further detailed a March of 2006 case in which defendant "was accused of touching *** a 3-year-old girl *** down there." Dr. Killian noted defendant was 20 years old at the time of the March of 2006 accusation. Defendant babysat "at only $50 a week" for the three-year-old and her seven-year-old brother in March of 2006.

¶ 33 The State initially responds to defendant's claim of ineffectiveness by citing to *People v. Pecoraro*, 144 Ill. 2d 1, 13 (1991), which holds that "trial strategy encompasses decisions such as what matters to object to and when to object." *Id.* at 13. The State further notes that our

supreme court stated in *People v. Palmer,* 162 Ill. 2d 465 (1994), that mistakes in trial strategy or tactics do not render representation incompetent and "counsel's strategic choices are virtually unchallengeable." *Id*. at 476. The State posits that counsel's failure to object to the physicians' testimony was nothing more than a strategic decision and, as such, cannot form the basis of a colorable ineffective assistance of counsel claim. Finally, the State claims, in the alternative, that should we find counsel deficient for failing to object to the psychiatrists' testimony, defendant has not shown prejudice by such conduct and, as such, we should affirm the trial court's judgment.

¶ 34 As the State indicates, our supreme court "has noted on several occasions that decisions regarding 'what matters to object to and when to object' are matters of trial strategy." *People v. Perry*, 224 Ill. 2d 312, 344 (2007) (citing *People v. Pecoraro*, 175 Ill. 2d 294, 327 (1997)). The *Perry* court recited instances where it found defense counsel provided adequate representation even though counsel failed to object to arguably inadmissible other crimes evidence if "it was 'highly possible that defense counsel allowed the statement to pass without objecting to diffuse its importance, rather than object and draw further attention to the statement.' " *Perry*, 224 Ill. 2d 345 (citing *People v. Evans*, 209 Ill. 2d 194, 221 (2004)). " 'A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness.' " *People v. Manning*, 241 Ill. 2d 319, 343 (2011) (quoting *Hughes v. United States*, 258 F. 3d 453, 457 (6th Cir. 2001)).

¶ 35 We find defense counsel's decision not to object to the doctors' testimony strategic. The

decision was not so ill-chosen that it permeated the entire trial with obvious unfairness. As such, we hold the decision not to object to the psychiatrists' testimony concerning the basis of their opinions " 'cannot be the basis for a claim of ineffective assistance.' " *Manning*, 241 Ill. 2d at 343.

¶ 36 A review of the record indicates that counsel decided to attack the State's case by emphasizing defendant had been acquitted of the only charge ever brought against him. Counsel's cross-examination of both Killian and Jeckell focused on the fact that defendant had only been arrested for one of the prior incidents. Counsel's cross-examination of Killian highlighted Killian's testimony regarding the "score of zero" and finding that he was at "low risk" to commit a future sex crime pursuant to the Minnesota Sex Offender Screening Tool. Counsel's cross-examination further highlighted the fact that of the prior allegations which helped form the basis for Killian's opinion, one was not an alleged sex crime at all but, instead, an allegation of disorderly conduct.

¶ 37 Defense counsel obtained testimony from Dr. Killian on cross-examination indicating the psychiatrist did not read any of the 750 pages of source material provided to him. Instead, he relied on a summary of the material from an assistant. Counsel pointed out that Killian did this despite knowing that the assistant was unable to open and view one of the DVDs containing a video interview of the defendant. Counsel stressed during cross-examination and closing that Killian made no attempt whatsoever to verify the accuracy of his assistant's summary and his office made no attempt to obtain a working copy of a videotaped interview defendant gave

regarding these allegations.

¶ 38 When cross-examining Dr. Jeckel, defense counsel began by referencing the "police reports" and "source material" which helped form the basis of Jeckel's opinion. Defense counsel also questioned Jeckel concerning "all the incidents" which he reviewed when coming to his conclusions and asked how many "resulted in charges being filed against the defendant?" Jeckel answered one prior to the current case. Counsel followed up asking if there were any "findings of guilty" associated with the prior incidents considered by Jeckel. Jeckel acknowledged there were none. Jeckel also acknowledged that his opinions are based on the assumption that the source materials contain accurate information and noted that he would "have to revise my opinions" if the information in the source materials was inaccurate. Jeckel testified that he operated under the impression that a victim did not or could not testify in a 2005 case against defendant. Defense counsel then asked, "Would it surprise you that the victim, in fact, did testify in that case?" Jeckel responded, "Well, then I'm mistaken." Defense counsel then obtained another acknowledgment from Jeckel that the 2005 case "still involved an acquittal."

¶ 39 Defense counsel opened his closing argument to the jury by emphasizing that defendant has "been acquitted of" the only case charged by the State despite the psychiatrists' discussion of prior incidents. Counsel argued that the acquittal "should carry a good deal of weight in your deliberations." Counsel then discussed the incidents not charged, noting there was "no attempt made to bring those to court" by the State. He argued the State was "out to get" his client following the acquittal of the only case brought to court prior to the instant matter. Defense

counsel then turned his attention to the psychiatrists, noting that all they did was review police reports and made no effort to "validate their source materials and question either the children or their parents."

¶ 40 It is clear that counsel made a strategic choice to attack the information upon which the psychiatrists based their opinions. Counsel used these attacks to emphasize that defendant had only been charged with one of the alleged incidents and those charges resulted in an acquittal. Counsel further attacked the veracity of the source information, noting that Killian only reviewed a short synopsis of more than 750 pages of information and failed to attempt to verify the accuracy of any of the source material. Counsel continued attacking the credibility of the source material by noting that both psychiatrists testified their opinions were based on the assumption that the source material was correct, yet, at least one psychiatrist incorrectly assumed an alleged victim failed to testify in the only incident for which defendant was charged prior to this case.

¶ 41 Defendant correctly notes that to lay a proper foundation for expert testimony of this nature, an expert should testify that not only he relied on such material as part of the basis for his opinions, but also that the materials are of a type reasonably relied upon by experts in the particular field. *People v. Nieves*, 193 Ill. 2d 513, 527-28 (2000); *Wilson v. Clark*, 84 Ill. 2d 186, 193 (1981). However, courts have long refused to find counsel acted ineffectively when failing to object to testimony, or take other actions such as moving for a mistrial, when doing so might "highlight or strengthen the expert's testimony before the jury" (*People v. Smith*, 2012 IL App (1st) 102354, ¶ 72) or "would have further highlighted the event" which is adverse to the

defendant. *People v. Cordevant*, 297 Ill. App. 3d 193, 200 (1998).

¶ 42 While not specifically stating that others in the field also rely on similar source materials to form their opinions, Killian stated that the actuarial instruments he used "are widely used in the field of sex offender evaluations" noting that "they've been studied repeatedly." Killian detailed what information, such as the facts surrounding the prior incidents, he entered into the actuarial instruments without actually using the magic words that other experts rely on and consider similar instances of alleged inappropriate conduct when evaluating these types of cases. Certainly, objecting to the psychiatrists' testimony to elicit the simple response that the materials upon which these doctors relied are of the type reasonably relied upon by other experts in the field would have only served to highlight or bring added credibility to the source materials. The strategic decision not to object and add that credibility to the source materials does not equate to ineffective assistance of counsel.

¶ 43 Moreover, while not addressed by either party, we feel compelled to discuss the skepticism with which courts of review have analyzed untimely claims that the State failed to lay a proper foundation before eliciting testimony or proffering evidence. It is axiomatic to note that "a defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review." *People v. Woods*, 214 Ill. 2d 455, 470 (2005). Our supreme court is clear in its pronouncement that this "rule is particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant's lack of a timely and specific objection deprives the State of the

opportunity to correct any deficiency in the foundational proof at the trial level." *Id.*

¶ 44 Defendant acknowledges "that an expert may give his opinion based upon facts that are not in evidence if those facts are of a type reasonably relied upon by experts in the particular field." *People v. Nieves*, 193 Ill. 2d 513, 527-28 (2000); see also *People v. Anderson*, 113 Ill. 2d 1 (1986) (Although reports made by others are not substantively admissible, an expert witness is nonetheless allowed to reveal the contents of the materials upon which the expert has reasonably relied to explain the basis of his or her opinion.). Defendant's argument regarding the admissibility of the doctors' testimony does not attack the substance of their testimony. Instead, defendant argues the testimony was allowed in error as the doctors' never specifically stated that the facts are reasonably relied upon by other experts in the field.

¶ 45 Numerous reported opinions have recited similar testimony from experts without finding the testimony lacked a proper foundation (*People v. Masterson*, 207 Ill. 2d 305 (2003); *In re Detention of Isbell*, 333 Ill. App. 3d 906 (2002); *In re Tittlebach*, 324 Ill. App. 3d 6 (2001)) including this court in *People v. Bailey*, 405 Ill. App. 3d 154 (2010). The *Bailey* court, in fact, affirmed a finding that the defendant was sexually dangerous following a trial in which Dr. Jeckel "discussed in great detail defendant's history of inappropriate sexual behavior." *Id.* at 160. Undoubtedly, Dr. Jeckel or Dr. Killian would have likely answered affirmatively if asked if other experts in their field reasonably rely on similar facts to form the basis of their opinions, thereby satisfying the technical foundational requirement. As noted above, forcing them to make such a statement would only serve to add credibility to their testimony. Moreover, "where evidence is

admissible at trial, defense counsel is not required to perform the useless act of objecting to this evidence, and his conduct cannot be faulted for such failure." *People v. Jackson*, 357 Ill. App. 3d 313, 323 (2005). Objecting to the doctors' testimony on the grounds suggested would have undoubtedly been a useless act.

¶ 46 B. Limiting Instruction

¶ 47 Defendant also argues that his trial counsel rendered constitutionally ineffective assistance by failing to ask for an instruction informing the jury that the psychiatrists' discussion of the aforementioned out-of-court statements were limited to the purpose of explaining the basis for their opinions and could not be viewed as substantive proof against defendant. Citing to *People v. Shaw*, 186 Ill. 2d 301 (1998), the State argues any potential error in this matter is harmless as it "did not contribute to the defendant's commitment." Harmless-error analysis, however, is inapplicable in the matter before us. In *People v. Thurow*, 203 Ill. 2d 352 (2003), our supreme court discussed the "important difference" between harmless-error analysis and plain-error analysis. (Internal quotation marks omitted.) *Id.* at 363. Harmless-error analysis applies when "the defendant has made a timely objection" which differs from plain-error analysis which applies "where the defendant has failed to make a timely objection." *Id.*

¶ 48 We are concerned with neither harmless error, as there is no allegation that an inappropriate instruction was given over defendant's objection, nor plain error as defendant has not sought plain-error review. Our task is to determine whether defense counsel was constitutionally ineffective for failing to propose a limiting instruction informing the jury that the

psychiatrists' disclosure of the out-of-court statements were limited to the purpose of explaining the basis for their opinions and could not be viewed as substantive proof against defendant.

¶ 49 As noted above, *Strickland* guides our analysis. In analyzing the two-part test to be employed to determine the effectiveness of counsel's representation, the *Strickland* Court specifically stated that a court need not "determine whether counsel's performance was deficient before examining the prejudice suffered" by defendant, but may dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice before reaching the deficiency analysis. *Strickland*, 466 U.S. at 697. Our supreme court agrees, noting that if "it is easier to dispose of an ineffective assistance claim on the ground that it lacks sufficient prejudice, then a court may proceed directly to the second prong and need not determine whether counsel's performance was deficient." *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 50 We find defendant has failed to establish his counsel's alleged deficient representation prejudiced him and, as such, his ineffective assistance of counsel claim fails. Prejudice exists where there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694.

¶ 51 The deficient performance complained of in this instance is counsel's failure to offer the limiting instruction. We cannot say a reasonable probability exists that the result of the proceeding would had been different had defendant's counsel proposed, and the jury received, the instruction. As such, we hold defendant has failed to state a colorable claim for ineffective assistance of counsel.

¶ 52 The State met its burden of proving beyond a reasonable doubt that defendant was a sexually dangerous person: that is: (1) he suffered from a mental disorder for at least one year prior to filing the petition; (2) he had criminal propensities to commit sex offenses; (3) he demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children; and (4) there existed a substantial probability that he would commit sex offenses in the future if not confined. 725 ILCS 205/1.01 (West 2010); *People v. Masterson*, 207 Ill. 2d 305, 329-30 (2003); *People v. Trainor*, 196 Ill. 2d 318, 335 (2001).

¶ 53 The victim testified that he was four years old and that he was going to attend preschool. He demonstrated that he knew the difference between the truth and a lie and promised to tell the truth. He stated that "Josh" hurt him and that Josh was not his uncle anymore because Josh "stuck a real screwdriver in my butt." E.A. noted that it hurt when Josh did this to him.

¶ 54 Betty A. noted E.A. commonly referred to defendant as "uncle Josh." She recounted times when defendant was alone with E.A. and how she discovered blood near his anus. She further detailed E.A.'s mimicking of what defendant did to E.A. Finally, Betty described defendant's odd behavior of always having candy available and a car seat in his car.

¶ 55 E.A.'s mother described the victim's unusual behavior after having stayed at defendant's house, how E.A. would put his finger near his anus, and the horrible rash around E.A.'s anus. She also testified that E.A. told her it was defendant "who taught him how to put a screwdriver near his butt." Wendy Hood, a babysitter, further corroborated this testimony, noting E.A. also told her that uncle Josh hurt him by putting a screwdriver in his butt.

¶ 56 The defendant claims E.A.'s testimony is not credible as E.A. was unable to identify defendant at trial. However, Betty A. identified defendant at trial and noted that E.A. commonly referred to defendant as "uncle Josh." Betty further stated that to the best of her knowledge, E.A. did not know anyone else "by the name of Josh."

¶ 57 Dr. Jeckel testified that he evaluated defendant in April 2010. Defendant understood the questions posed to him and alertly answered them. Dr. Jeckel noted defendant appeared to be struggling with his conscience and having trouble fabricating when denying the allegations of sexual conduct with children. Dr. Jeckel diagnosed defendant with pedophilia and found defendant to be sexually attracted to nonconsenting males and females. He opined that defendant would engage in sexually dangerous behavior with children in the future if not confined to a secure facility.

¶ 58 Dr. Killian testified that he also interviewed the defendant and believed defendant understood the questions. Defendant denied the allegations made by E.A. While the defendant initially told Dr. Killian that he did not spend much time around children; he later admitted he lied about that fact. Dr. Killian gave the defendant three psychological tests to determine defendant's risk to commit a sex offense in the future. Defendant scored as a low risk to reoffend on the test, which uses convictions as an indication of future activity. The two other tests indicated that defendant had a 70% risk to reoffend and found him in the high-risk category to commit a sex offense in the future.

¶ 59 Dr. Killian diagnosed defendant with pedophilia and social anxiety disorder. He opined

that defendant was at high risk of reoffending and that defendant is a sexually dangerous person. Both psychiatrists opined that defendant suffered from a mental disorder of pedophilia, which has existed for more than one year prior to the filing of the petition in this case, that this mental disorder affected defendant's emotional and volitional capacity, that the disorder results in defendant's inability to control sexual impulses, that defendant has criminal propensities which cause him to commit sex offenses, and that defendant would engage in sexually dangerous behavior with children in the future if he was not confined in a secured setting for treatment.

¶ 60 Again, to show prejudice, defendant must establish that a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Given the overwhelming evidence adduced at trial from the victim, victim's family and psychiatrists, we cannot say that a reasonable probability exists that the outcome of the proceeding would have been different had the jury received a limiting instruction regarding the testimony of the psychiatrists. The psychiatrists still would have been able to testify to the facts which helped form the basis of their opinions. See *People v. Nieves*, 193 Ill. 2d 513, 527-28 (2000); *Wilson v. Clark*, 84 Ill. 2d 186, 193 (1981).

¶ 61 The limiting instruction would not have affected how the jury viewed testimony from the victim's family detailing how this 21-year-old man, with no children of his own, kept a car seat in his car and candy in his pocket at all times. The jury heard the defendant attempt to explain the reason he kept a car seat in his car as well as his explanation that he "frequently" possessed candy for his "dry throat." The instruction would not have rendered the testimony of the family

members recounting the victim's description of being violated with a screwdriver any less consistent or powerful. We further fail to see how the instruction would have affected the credibility and weight given to the psychiatrists' testimony detailing their diagnosis of pedophilia. As such, we hold defendant has not established that counsel's failure to request a limiting instruction prejudiced him and, therefore, he cannot meet his burden under the second prong of the *Strickland* test.

¶ 62 C. Opening the Door to Prior Conduct and Arrest

¶ 63 Defendant's last claim of error is that his counsel rendered constitutionally ineffective assistance by opening "the door for the State to question" him regarding the prior arrests. Noting that he was the only witness called in his defense, defendant avers that the facts surrounding the arrests "would have never come into evidence as substantive proof had trial counsel not elicited the information on direct examination." The State responds by claiming defense counsel's decision to elicit the testimony regarding prior arrests was in response to the psychiatrists testimony in the State's case-in-chief. Therefore, the State suggests it was part of defense counsel's overall strategy and, as such, is beyond the reach of an ineffective assistance of counsel claim. The State further argues that even if trial counsel erred by opening the door to questions concerning defendant's prior conduct, any such "error was harmless beyond a reasonable doubt" as "defendant is unable to show that he was prejudiced by the evidence." Finally, the State maintains that the only authority cited by defendant, *People v. Valentine*, 299 Ill. App. 3d 1 (1998), to support the contention that his counsel was ineffective for opening the door regarding

prior arrests does not mandate a similar finding here.

¶ 64 We note that *Valentine* involved a defendant convicted of aggravated battery and unlawful restraint following what was literally a he said/she said trial. *Id.* at 2. The *Valentine* victim testified that she shot the defendant in the arm after he began "beating her." *Id.* Defendant testified that the victim began shooting at him so "he started beating her to stop her." *Id.* Neither side introduced much corroborating evidence. *Id.* The State secured a ruling allowing it to use defendant's prior retail theft conviction for impeachment purposes should he decide to testify in his own defense. *Id.* Defendant did testify. During direct examination his counsel inquired as to the theft conviction as well as defendant's criminal history, asking if he was ever arrested "for anything involving violence?" *Id.* at 3. The trial court then allowed the State "to correct the portrayal of defendant in a nonviolent light pursuant to the doctrine of completeness" and question defendant about four prior arrests for battery. (Internal quotation marks omitted.) *Id.* at 3.

¶ 65 A split panel from the First District found defense counsel's actions constitutionally deficient; one judge dissented. *Id.* at 5. A linchpin in the *Valentine* decision was the majority's assertion that without the questions posed "on direct examination, the jury never would have learned of defendant's prior arrests for battery during this trial for aggravated battery." *Id.* at 4. The court continued that even "if one assumes that defense counsel's actions were well-intentioned trial tactics, the admission of prior arrests for battery in this trial for aggravated battery would still be unduly prejudicial" and therefore, defendant satisfied the second prong of

the *Strickland* analysis. *Id.* at 5.

¶ 66 In the present case, unlike *Valentine*, the jury was already aware of defendant's past conduct through the testimony of Dr. Killian and Dr. Jeckel when defense counsel inquired into the prior incidents. As noted above, failing to object to the psychiatrists' discussion of the prior incidents without first ensuring testimony was adduced indicating that others in the field routinely rely on such matters did not equate to ineffective assistance of counsel as counsel. The technical foundation requirement would have likely been satisfied had defendant objected and given the State the opportunity to cure any potential error. Therefore, defendant suffered no prejudice by counsel's decision not to object. Defense counsel clearly made a strategic choice to emphasize that none of the incidents resulted in convictions and the only incident charged resulted in an acquittal. Undoubtedly, trial counsel made a tactical decision to attack the source materials relied upon by the psychiatrists in an attempt to discredit their testimony. In doing so, counsel emphasized that despite the State's insistence that defendant routinely targeted young children, the State had only once brought charges which were ultimately found wanting. Our review of the record indicates trial counsel detailed the other incidents, through defendant's testimony, to further develop that trial strategy.

¶ 67 Unlike the jury in *Valentine,* this jury was already well aware of the prior incidents before defendant took the stand. While the *Valentine* court labeled defense counsel's questioning of defendant's criminal history as, at best, a "well-intentioned trial tactic" but found it "unduly prejudicial," we do not similarly find that defense counsel in the case at bar prejudiced his client

by discussing prior incidents of which the jury was already aware. To the contrary, this jury previously heard that Killian based his opinion, in large part, on a summary of 750 pages of documents, which detailed these prior incidents. Killian operated under the assumption that the information in the summary was accurate and noted that if it was not he would have to change his opinion. Eliciting testimony from defendant on direct examination in an attempt to discredit the basis of the psychiatrists' opinions as well as emphasize the acquittal was simply trial strategy. "Matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *People v. Manning*, 241 Ill. 2d 319, 327 (2011). "The only exception to this rule is when counsel's chosen trial strategy is so unsound that 'counsel entirely fails to conduct any meaningful adversarial testing.' " *People v. West*, 187 Ill. 2d 418, 432-33 (1999) (quoting *People v. Guest*, 166 Ill. 2d 381, 394 (1995)).

¶ 68 We find defendant's trial strategy was not so unsound that one could reasonably say that counsel failed to conduct meaningful adversarial testing of the State's case. As such, we hold defendant has not shown he was denied effective assistance of counsel.

¶ 69 CONCLUSION

¶ 70 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 71 Affirmed.