2016 IL App (5th) 130400-U

NO. 5-13-0400

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Massac County.
	)	
v.	)	No. 07-CF-93
	)	
JOSEPH L. DRAFFEN,	)	Honorable
	)	Joseph Jackson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Schwarm and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant failed to show a substantial deprivation of his constitutional rights, the circuit court's denial of his postconviction petition after third-stage evidentiary hearing is affirmed.

¶ 2 The defendant, Joseph L. Draffen, appeals *pro se* the denial of his petition for postconviction relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, he argues that his waiver of postconviction counsel was not knowing and intelligent, that the circuit court erred in making a credibility determination based on an affiant's statement rather than his live testimony,

and that he was denied the effective assistance of trial counsel. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The defendant was charged with residential burglary, home invasion, and aggravated battery for the events which occurred on or about June 27, 2007, at the home of Richard Modglin, an 83-year-old man. At the defendant's jury trial, the State alleged that the defendant and Marlon Greg Peppers, who was tried separately, had committed the crime. The defense's theory was that Cynthia Featherston, not the defendant, was Peppers' accomplice. Detective Scott Deming testified that the defendant had provided a statement wherein he claimed that he told Peppers that he wanted no part of the plan to rob Modglin. Deming also testified that there had been no forced entry into Modglin's home. Modglin testified that he considered Featherston a friend and had given her money. Featherston testified that she was friends with Modglin and knew Peppers, that she had heard the defendant and Peppers discussing robbing Modglin, and that she had shown Peppers where Modglin lived because he had threatened her. She also testified that Modglin had told her that he kept a house key under a mat by the back porch. Richard Ford testified that at the time of the burglary he and the defendant were staying with the defendant's father. The day before the burglary, Peppers, whose voice Ford recognized, called and asked to speak with the defendant. Ford heard the defendant state that Tammy Rogers was going to drive Peppers and the defendant to Metropolis where they were going to rob an old man. Ford further testified that after the defendant got off the phone with Peppers he told Ford about the plan to rob Modglin and asked him to

provide an alibi, but Ford refused. The defendant's estranged wife, Monica, testified that she was on the phone with the defendant for several hours during the night of the burglary and that the defendant was at his father's house the entire time she was talking to him. The jury found the defendant guilty of all charges.

¶ 5 On January 3, 2008, the defendant was sentenced to 16 years of imprisonment for home invasion, but was not sentenced on the residential burglary or the aggravated battery convictions. The defendant appealed, arguing that trial counsel was ineffective for (1) failing to tender the accomplice-witness jury instruction and (2) failing to object to the evidence relating to the defendant's child support delinquencies, his outstanding warrants, and Monica's order of protection against him. This court affirmed. *People v. Draffen*, No. 5-08-0081 (2010) (unpublished order under Supreme Court Rule 23).

¶ 6 On July 6, 2011, the defendant filed his initial petition for postconviction relief. He filed supplemental postconviction petitions on December 6, 2011, and April 27, 2012. On May 15, 2012, a hearing was held where the defendant sought to dismiss appointed postconviction counsel and proceed *pro se*. The court admonished him at length, stating, "I will tell you in the strongest of terms, I think you're *** To have an opportunity to have that wealth of experience sitting at your table giving you advice and pleadings and so forth–I mean, you have the right to represent yourself *** but I'm, in the strongest terms, telling you I think you're making a very ***." At the defendant's insistence, the court then inquired about the defendant's education, and he responded that he had achieved his GED and that he was taking classes at the prison. The defendant continued his argument by stating that he had access to the law library and discussed *res judicata*

with the court. The court continued that just because the defendant *could* represent himself did not mean it was wise. The court advised him several times to reconsider his continuation of *pro se* representation. The defendant insisted and upon the granting of his request stated he was glad that he did not "have an attorney in the way now." On January 7, 2013, the defendant filed his second additional supplemental petition for postconviction relief. At each subsequent hearing, the defendant represented himself. The court inquired numerous times as to the defendant's *pro se* representation and if he had reconsidered, to which the answer was always "no."

¶ 7 In his postconviction petition and the supplements thereto, the defendant argued, *inter alia*, that he was innocent and that he had been denied the effective assistance of counsel. Specifically, he argued that he had advised his trial counsel, McArthur Allen, via a letter that Peppers' accomplice was Tammy Rogers, not Featherston. He also alleged that counsel failed to introduce into evidence a recorded telephone call between Peppers and Featherston in which Peppers indicated that the defendant was innocent, failed to introduce phone records which would have corroborated his claim that he was on the phone with Monica at the time the crime occurred, and failed to impeach Ford with his status as a confidential informant.

¶ 8 An evidentiary hearing was held on April 3, 2013. At the beginning of the hearing, the court stated, "There had been attorneys offered to Mr. Draffen. Mr. Draffen had persisted in his desire to represent himself. There was questioning of Mr. Draffen. He indicated that he had worked–or was working in the law library in the Department of

Corrections; that he felt he had the education, training, and ability to represent himself; and a decision was made that he would be allowed to represent himself in this matter."

¶ 9 The defendant called three witnesses. Mary Linda Barger, the defendant's mother, testified that she had attended Peppers' trial where a recording of a phone call between Peppers and Featherston was played. The defendant asked Barger whether Peppers had said that he was innocent. The State objected and the court sustained the objection, stating that "the tape's of record here *** everybody knows what's on the tape *** [Peppers] says you didn't do it, and he says he didn't do it." Monica testified that she spoke with attorney Allen on the day of the defendant's trial and offered to provide phone records to prove she was on the phone with the defendant when the crime was committed, but that Allen said that he did not need them. The defendant had requested subpoenas for three other witnesses: Featherston; Matthew Snow, a cellmate of Peppers who had completed an affidavit stating that Peppers had told him that the defendant was innocent; and attorney Allen. The court took the subpoena requests for Featherston and Snow under advisement and issued a subpoena for attorney Allen.

¶ 10 At the close of this hearing, the court stated, "And, really, Mr. Draffen, I know that–I will commend you. You obviously have a very good understanding of the criminal rules, the criminal procedures, the cases. You've done a very able job of representing yourself, you know, regarding these various issues. I mean, you really have." Further, the court stated, "But–I will say this. I did commend you on how well prepared you were; what a good job you've done." The case was continued to another date.

¶ 11 On May 13, 2013, the State's motion to continue was heard, as attorney Allen could not appear at this previously scheduled court date. Discussion occurred regarding the issuance of the subpoenas for Snow and Featherston. In declining to issue a subpoena for Snow, the court stated, "I mean, you can make what arguments that you want to make, but that [issuance of a subpoena] would be denied on the other inmate. *** You furnished the affidavit, and I've read it. *** It's under oath. I will accept it as his testimony under oath. *** It hasn't been contradicted by the State. *** There's nothing that cross-examination would add to what you've presented for Mr. Snow." The court granted the request to subpoena Featherston.

¶ 12 The hearing continued on July 18, 2013, and began with the court stating, "Let the record show that [the] Defendant is present. Mr. Draffen has elected to represent himself in this matter. The court has had very thorough discussion with Mr. Draffen, and he has persisted in his position that he does not want to be represented by an attorney and that he want[s] to represent himself. We've had that conversation before, Mr. Draffen. Is that still correct?" To which the defendant responded, "Yes, your Honor."

¶ 13 After the State provided documentation showing that Featherston was under a doctor's care, the court declined the defendant's request for a subpoena. Therefore, the only witness on that date was attorney Allen who testified via video-conference. Attorney Allen testified that he did, indeed, see the letter wherein the defendant stated that Rogers was Peppers' accomplice, but that the defendant subsequently changed his story. Allen testified that he and the defendant had agreed that they should argue that Featherston was the accomplice because there was no forced entry and she knew where

Modglin kept a spare key. With respect to the tape of the conversation between Peppers and Featherston, Allen testified that if the tape were given to him in discovery, he would have reviewed it and since he did not use it, it likely was not able to be used at trial. Allen did not recall speaking with Monica Draffen. When asked why he did not inform the police that Ford had reported the defendant to the police two days before the burglary, Allen responded that Ford had reported him for domestic violence.

¶ 14 At the close of this hearing, the court stated, "I think you've done a very admirable job of presenting your Post-Conviction Petitions and the various other supplemental things that you filed in relation to that."

¶ 15 On August 1, 2013, the circuit court denied the defendant's postconviction petition(s). On August 12, 2013, the defendant filed this timely appeal. The Office of the State Appellate Defender (OSAD) was appointed; however, the defendant filed a motion to proceed *pro se* in this appeal and OSAD filed a motion to withdraw as counsel. This court granted the defendant's motion to proceed *pro se*, as well as OSAD's motion to withdraw.

¶ 16 ANALYSIS

¶ 17 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2012). The Act provides a three-stage process for the adjudication of postconviction petitions. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the circuit court has 90 days to independently assess the

defendant's petition and summarily dismiss it if the court finds it "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If the petition is not dismissed at the first stage or if the circuit court fails to rule on it within 90 days, the petition must be docketed for further consideration. 725 ILCS 5/122-2.1(b) (West 2012).

¶ 18 At the second stage, the circuit court must determine whether the defendant is indigent and, if so, whether he wishes to have counsel appointed to represent him. 725 ILCS 5/122-4 (West 2012). After appointed counsel has made any necessary amendments to the petition, the State may answer or file a motion to dismiss it. 725 ILCS 5/122-5 (West 2012); *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 13. If the State files a motion to dismiss the petition, the circuit court must determine whether the defendant has made a substantial showing of a constitutional violation. If no substantial showing is made, the petition is dismissed. If a substantial showing is made or if no motion to dismiss is filed, the petition proceeds to the third stage for an evidentiary hearing.

¶ 19 At the third stage of a postconviction proceeding, the circuit court must determine whether the defendant has met his burden of showing a substantial deprivation of federal or state constitutional rights. *People v. Lane*, 398 Ill. App. 3d 287, 296 (2010). The circuit court's decision at the third stage will not be reversed unless it was manifestly erroneous. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). A decision is manifestly erroneous only if the error is " 'clearly evident, plain, and indisputable.' " *People v. Frieberg*, 305 Ill. App. 3d 840, 847 (1999) (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)). "The credibility of the testimony in a post[ ]conviction case, as in other cases

tried by the court without a jury, is a matter for the trial judge to determine ***." *People v. Alden*, 15 Ill. 2d 498, 503 (1959). With these standards in mind, we turn to an analysis of the defendant's claims.

¶ 20 The defendant's first argument on appeal is that his waiver of postconviction counsel was not knowing and intelligent because the circuit court failed to inform him that postconviction counsel would read the record, amend his claims, and obtain materials to support those claims. A postconviction petitioner has the right to proceed *pro se* provided that his waiver of his statutory right to counsel is knowing and intelligent. *People v. Heard*, 2014 IL App (4th) 120833, ¶ 10. The determination of whether a waiver of counsel is intelligent "depends upon the particular facts and circumstances of the case." *People v. Gray*, 2013 IL App (1st) 101064, ¶ 23. In this case, when the defendant sought to proceed *pro se*, the court inquired about his abilities, accepted as true his statements that he had a GED, worked in the law library, and had the ability to access the materials he needed, and admonished the defendant multiple times regarding his desire to proceed *pro se*. The defendant cited more than 30-plus cases in his very first petition for postconviction relief. The defendant filed three supplemental postconviction petitions, with numerous affidavits and attachments, and several responses to the State's filings. The record demonstrates that the defendant provided evidence of his ability to represent himself and, after several lengthy admonishments from the court, continued in his desire to proceed *pro se*.

¶ 21 The defendant alleges that he is entitled to a *Faretta*-type inquiry prior to the waiving of counsel. The United States Supreme Court requires that in order to

"competently and intelligently *** choose self-representation, [the defendant] should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). "[T]echnical legal knowledge *** [is] not relevant to an assessment of his knowing exercise of the right to defend himself." *Faretta*, 422 U.S. at 836. In *Faretta*, upon the court's inquiry regarding the defendant's request to represent himself, it was found that the defendant had once represented himself in a criminal prosecution, that he had a high school education, and that he did not want to be represented by the public defender because he felt the office was under a heavy case load. In the case at bar, the defendant had a GED, was taking classes at the prison, worked in the law library, and had access to caselaw, and he did not want to be represented by counsel. Further, he had previously submitted three petitions which contained extensive citations to case law, coherent argument, and appropriate affidavits and evidence. Admonishment need not be a laundry list of each and every task an attorney may do for a defendant, as the defendant here wishes, but only that the court ensures the defendant is aware of the dangers of self-representation. Here, the court admonished the defendant several times and made strong recommendations that he keep his postconviction counsel–as she had many years of experience in criminal law, but the defendant continued his stance–that he had his GED, worked in the law library and had access to what he needed to proceed *pro se*, and was glad he no longer had an attorney "in the way."

¶ 22 Lastly on this issue, the defendant has a constitutional right to proceed *pro se*. In *Faretta*, the United States Supreme Court reversed Faretta's conviction and ordered a new trial because the circuit court forced counsel upon him. "The right to defend is personal. *** It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " *Faretta*, 422 U.S. at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)). A court may not force a *pro se* defendant to be represented by counsel.

¶ 23 Finally, the defendant was commended on his performance at his postconviction hearings at least twice by the court, with statements such as, "I think you've done a very admirable job of presenting your Post-Conviction Petitions and the various other supplemental things that you filed in relation to that," and "I will commend you. You obviously have a very good understanding of the criminal rules, the criminal procedures, the cases. You've done a very able job of representing yourself, you know, regarding these various issues. I mean, you really have." The court also commented on how well-prepared he was and what a good job he had done. Additionally, the defendant alleged in his motion to proceed *pro se* on appeal that he "successively [*sic*] navigated his way all the way through a[n] evidentiary hearing at the circuit level for his post-conviction hearing." Even the defendant felt he did an adequate job and successfully argued his postconviction motions.

¶ 24 Based upon this, we reject the defendant's argument that his waiver of postconviction counsel was not knowing and intelligent.

¶ 25 The defendant next argues that in rejecting his claim of actual innocence, the circuit court implicitly found Matthew Snow to be not credible and that it erred by making this determination based on Snow's affidavit rather than allowing him to testify. The defendant further argues that Snow's affidavit demonstrates that he is innocent.

¶ 26 In his affidavit Snow states that Peppers told him that he had "hit a lick" with a "sketchy chick" because his "rappie" would not go with him. Snow also stated that "Joe" indicated that "Peppers" was his "rappie." The defendant sought a subpoena for Snow for the evidentiary hearing. The court denied the defendant's request, stating that "You furnished the affidavit, and I've read it. *** It's under oath. I will accept it as his testimony under oath. *** It hasn't been contradicted by the State. *** There's nothing that cross-examination would add to what you've presented for Mr. Snow."

¶ 27 The Act gives postconviction judges wide discretion as to the type of evidence received when ruling on the allegations of the postconviction petition. *People v. Humphrey*, 46 Ill. 2d 88, 91 (1970). The circuit court may receive proof by affidavits, depositions, oral testimony, or other evidence. 725 ILCS 5/122-6 (West 2012). Circuit courts are granted wide discretion in deciding upon the issuance of a subpoena. *People v. Jones*, 295 Ill. App. 3d 444, 450 (1998).

¶ 28 Here, the circuit court agreed to accept Snow's affidavit as his testimony under oath. In other words, the court agreed that if called to testify, Snow would say what he said in the affidavit. The court noted that the affidavit had not been contradicted and that

the defendant could make any argument or interpretation he wanted. The defendant does not suggest that there is any testimony he would have elicited from Snow beyond that which was in the affidavit. If anyone was prejudiced, it was the State, which was deprived of the ability to cross-examine Snow. We cannot find that the circuit court abused its discretion in declining the request to subpoena Snow.

¶ 29 The due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004); *People v. Washington*, 171 Ill. 2d 475, 489 (1996). To support an actual innocence claim based upon new evidence, "the evidence (1) must be of such conclusive character that it will probably change the result on retrial; (2) must be material to the issue, not merely cumulative; and (3) must have been discovered since trial and be of such character that the defendant in the exercise of due diligence could not have discovered it earlier." (Internal quotation marks omitted.) *People v. Brown*, 2013 IL App (1st) 091009, ¶ 50. "Generally, evidence is not 'newly discovered' when it presents facts already known to the defendant at or prior to trial, although the source of those facts may have been unknown, unavailable, or uncooperative." *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007) (citing *People v. Moleterno*, 254 Ill. App. 3d 615, 625 (1993)). Moreover, "the hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' " *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008) (citing *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (1999)). Actual innocence claims must be supported " 'with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts,

or critical physical evidence–that was not presented at trial.' " *People v. Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)).

¶ 30 In the present case, Snow's affidavit does not present any facts unknown to the defendant at the time of trial. At trial, the defendant argued that it was Featherston who had committed the burglary with Peppers. Although he claims that Tammy Rogers was actually Peppers' accomplice, the defendant was not unaware of these alleged facts prior to trial. The defendant wrote a letter to attorney Allen in which he claimed Rogers was Peppers' accomplice, although for reasons of trial strategy the defense chose to argue that it was Featherston. Moreover, Snow was not an eyewitness to the crime and his statement was nothing more than rank hearsay.

¶ 31 Hearsay concerns aside, it is unlikely that Snow's testimony would lead to an acquittal. At the defendant's trial, officer Tim Davis, who responded to the burglary call, testified that Modglin reported being attacked by two white males. Featherston testified that she heard the defendant and Peppers discussing "ripping the old man" and that Peppers forced her to show him where Modglin lived. Ford testified that the defendant told him about the plan to rob Modglin and asked him to provide an alibi. In light of this evidence, we cannot say that Snow's testimony would be of such conclusive character that it would probably change the result on retrial. Consequently, we cannot find that the circuit court's rejection of the defendant's actual innocence claim was manifestly erroneous.

¶ 32 The defendant's final argument is that he was denied the effective assistance of counsel where counsel (1) argued that Featherston rather than Rogers was Peppers'

accomplice, (2) failed to introduce the tape of the conversation between Peppers and Featherston, (3) failed to introduce phone records which would have corroborated his claim that he was on the phone with Monica at the time the crime occurred, and (4) failed to impeach Ford with his status as a confidential informant.

¶ 33 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and adopted by the supreme court in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). To prevail under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance so prejudiced the defendant that he was denied a fair trial. *People v. Cordell*, 223 Ill. 2d 380, 385 (2006). More specifically, the defendant must demonstrate (1) that counsel's performance was objectively unreasonable under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Harris*, 225 Ill. 2d 1, 20 (2007). A reasonable probability that the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome of the proceeding. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). Because a defendant's ineffective-assistance-of-counsel claim will fail if either prong of the *Strickland* test is not met, a reviewing court need not determine whether counsel's performance was deficient before determining whether he was prejudiced. *People v. Perry*, 224 Ill. 2d 312, 342 (2007). The reviewing court can address these requirements in either order. *Albanese*, 104 Ill. 2d at 527. There is a strong presumption that counsel's action or inaction was a matter of trial strategy. *People v. Evans*, 186 Ill. 2d 83, 93

(1999). Counsel's strategic choices are virtually unchallengeable (*Harris*, 225 Ill. 2d at 49 (citing *Strickland*, 466 U.S. at 690)) and generally are not subject to scrutiny under *Strickland* (*People v. Metcalfe*, 202 Ill. 2d 544, 562 (2002)). Counsel's strategic decisions will not support a claim of ineffective assistance of counsel unless counsel's strategy is so unsound that he or she entirely fails to conduct any meaningful adversarial testing of the State's case. *People v. Patterson*, 217 Ill. 2d 407, 441 (2005).

¶ 34 The defendant argues that had counsel read his letter counsel would have known that Tammy Rogers, not Featherston, was Peppers' accomplice. At the evidentiary hearing attorney Allen testified that he had read the defendant's letter and was aware that the defendant had claimed that Rogers was Peppers' accomplice. Allen further testified that after discussing the case he and the defendant agreed that it was more advantageous to suggest that Featherston was the accomplice because there was no forced entry and Featherston knew where the spare key was hidden. Arguing that Featherston was the accomplice was a strategic choice by counsel. We cannot conclude that counsel's choice was unsound, and the record does not support a conclusion that counsel entirely failed to conduct any meaningful adversarial testing of the State's case.

¶ 35 The defendant also argues that counsel was ineffective for having failed to introduce a recording of a phone conversation between Featherston and Peppers in which Peppers indicated that the defendant was not involved in the robbery. The recordings had been obtained pursuant to an overhear order and were played at Peppers' trial. Transcripts of those conversations were attached to the defendant's postconviction petition. The gist of the conversations is that Peppers denied having anything to do with

the Modglin robbery and claimed that the defendant would never so something like that. Assuming, *arguendo*, that attorney Allen could have gotten the recordings admitted at the defendant's trial and that his failure to do so was objectively unreasonable, the defendant suffered no prejudice.

¶ 36 At the defendant's trial, detective Scott Deming testified that the defendant had voluntarily given a statement to police in which he claimed that Peppers had asked him several times to help him rob Modglin and he had refused. Peppers then asked him to take Peppers to a bar so he could find someone to help. Featherston testified that Peppers threatened to kill her and her family if she did not tell him where Modglin lived and that she had heard Peppers and the defendant discuss robbing Modglin. Ford testified that Peppers had called and asked to speak to the defendant and that he had overheard the defendant discussing the plan to rob Modglin. In light of this evidence, it is highly improbable that the defendant's jury would have accorded any credibility to Peppers' recorded assertions that neither he nor the defendant were involved in the robbery. Consequently, there is no reasonable likelihood that the outcome of the defendant's trial would have been different had the recordings been admitted into evidence.

¶ 37 The defendant next argues that counsel failed to impeach Ford at trial with Ford's status as a confidential informant. This, too, was a matter of trial strategy. Attorney Allen testified at the evidentiary hearing that he had received a police report that Ford had called police several days before the robbery and reported the defendant for domestic violence and that he did not aggressively cross-examine Ford because of his unwillingness to belabor the previous violent behavior of the defendant against his wife

in front of the jury, given that the defendant was being tried for a crime of violence against a frail, elderly man. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" *Strickland v. Washington*, 466 U.S. 668, 689 (1984). As the defendant's trial was based upon a violent offense to an elderly individual, it is an appropriate consideration for counsel to attempt to limit evidence of the defendant's violent behavior in front of the jury.

¶ 38 Finally, the defendant argues that trial counsel was ineffective for failing to obtain the phone records Monica Draffen offered to provide, evidence he claims would have proven that he was home when the burglary occurred. At the defendant's trial, Monica testified that she was on the phone with the defendant for several hours the night the burglary occurred. This information was already before the jury. Moreover, as we noted in our prior order, Monica testified that she was on the phone with Draffen until 11:30 p.m. or midnight and the burglary occurred sometime between midnight and 12:30 a.m. *Draffen*, No. 5-08-0081, order at 7. We cannot say that there is a reasonable probability that the result of the trial would have been different had the phone records been introduced into evidence.

¶ 39 Based on the foregoing, we find that the defendant's waiver of postconviction counsel was knowing and voluntary, the circuit court's denial the defendant's actual innocence claim was not manifestly erroneous, and the defendant did not receive

ineffective assistance of counsel. Consequently, the circuit court's denial of the defendant's postconviction petitions was not manifestly erroneous.

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, the judgment of the circuit court of Massac County is affirmed.

¶ 42 Affirmed.