2014 IL App (2d) 130313-U
No. 2-13-0313
Order filed December 19, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. HEZEKIAH HAMILTON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 07-CF-3445 Honorable James C. Hallock, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed defendant's postconviction petition, which alleged that counsel was ineffective for eliciting or acquiescing in the admission of other-crimes evidence: because the evidence against defendant was overwhelming, the exclusion of the other-crimes evidence would not have affected the result.

¶ 2 Defendant, Hezekiah Hamilton, appeals from the first-stage dismissal of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). He asserts that he stated the gist of a claim of ineffective assistance of counsel based on counsel's eliciting, or failing to object to, other-crimes evidence. We hold that the evidence of defendant's

guilt was so overwhelming that no prejudice from counsel's allegedly deficient behavior was possible. We therefore affirm the dismissal.

¶ 3 I. BACKGROUND

¶ 4 A grand jury indicted defendant on one count of first-degree murder (knowing performance of acts creating a strong probability of death) (720 ILCS 5/9-1(a)(2) (West 2006)). The charge stemmed from the October 30, 2007, stabbing death of Brenetta Beck.

¶ 5 Defendant moved to suppress his statements to police on the basis that the police had violated his rights to remain silent and to counsel. The court denied the motion. Before trial, defendant raised an objection to counsel's representation of him, but ultimately withdrew it. Defendant moved to exclude evidence of his prior convictions: aggravated vehicular hijacking with a weapon and manufacture and delivery of cannabis. The court ruled that it would allow the cannabis conviction only. Defendant signed a jury waiver.

¶ 6 The evidence tended to show that the offense took place shortly before 6 a.m. on October 30, 2007. The victim died in the bathroom of her second-floor apartment at 1700 Molitor Road in Aurora. The parties introduced the autopsy report and inquest transcript by stipulation. The report showed that the forensic pathologist had found multiple stab wounds to the victim's head, neck, and chest area, most of them to the front of the body. One lacerated the carotid artery, and one penetrated through the rib cage. Two stabs to the left temple area penetrated the skull. By the State's count, the pathologist had noted 54 stab wounds. The report gave the time of death as the time that emergency personnel on the scene had pronounced the victim dead, 6:45 p.m. on October 30, 2007. The inquest transcript contained testimony that the victim was dressed in a nightgown and underwear. This testimony also characterized some of the wounds as defensive.

¶ 7 The State's first witness was Sharon Beck, the victim's aunt. On October 30, 2007, at about 6 a.m., Sharon went to the victim's apartment and started pounding on the door. She heard Tamia, the older of the victim's two children, crying. (Tamia was 14 months old; the younger child was only 10 days old.) While she was there, she heard someone getting in a car and speeding away. She became concerned, went downstairs to a relative's apartment, and called the victim's mother. (The victim's mother, like the victim, was named Brenetta Beck, but was always known as "Brenda." The victim was sometimes known as "Netta.") Brenda said that she was on her way from home to work, but would come over to the apartment immediately.

¶ 8 The State asked Sharon whether she knew defendant. She did; she knew him as the father of the victim's children. Defendant had lived with the victim for "a couple" of years. The only child legally established to be defendant's was Tamia.

¶ 9 Brenda also testified for the State. On October 30, 2007, she received Sharon's call at about 6 a.m., which was just as she arrived at work. Alarmed to hear that the victim was not answering her door, Brenda called 911 and then drove herself to the victim's apartment. As she was at the door, still knocking, firefighters arrived and, hearing the children crying inside, broke the door open. Brenda rushed in; when she got to the bathroom, she saw blood "all over everywhere" and the victim, obviously dead.

¶ 10 Brenda also testified that defendant had lived with the victim until about November 2006. They had shared an apartment on a higher floor of the same building, but, when defendant left, the victim moved to the apartment in which she died. Brenda's understanding was that defendant was the father of both of the victim's children.

¶ 11 The meat of defendant's claim on appeal (that defense counsel was ineffective) arises from counsel's cross-examination of Brenda. Defense counsel asked Brenda whether it was

correct that only Tamia had been legally established as defendant's. Brenda responded, "As far as I know, both of them is his children." Defense counsel asked if that was her belief, and she responded, "I know they are his children." Defense counsel pointed out that the younger was born more than nine months after defendant had moved out, and then he asked, "[H]ow do you know that the second child is Mr. Hamilton's?" Brenda then responded:

> "Because my daughter said it was his child, she didn't have sex with anyone else. And another thing what happened is the reason why she got pregnant, because she said he had come over there and had raped her and that's how she ended up pregnant."

Defense counsel apparently started to make an objection, but then said, "[N]ever mind." Defense counsel followed up by asking, "So there was some sort of a continuing relationship after Mr. Hamilton moved out?" Brenda answered:

> "Well, I don't know if it was a relationship.
>
> He came over and pretended like he wanted to see his daughter, and he took some sex from her. That's what had happened. That's how she ended up pregnant."

¶ 12 Candice Sweat, who had been defendant's fiancée, testified at length. At the relevant time, Sweat lived with defendant in an apartment in Joliet. Sweat knew of the victim as the mother of defendant's daughter Tamia and had met Tamia when defendant had visitation. Sweat also knew that defendant was paying child support to the victim. She had heard that the victim had a newborn child of whom defendant was the father.

¶ 13 On the evening of October 29, 2007, Sweat overheard defendant's side of several phone calls that she understood to be with the victim. During one call, defendant asked for Tamia's social security number so that defendant could add her as a beneficiary to his life insurance policy at work.

¶ 14 Sweat worked as a school-bus driver and, on the morning of October 30, 2007, was supposed to be at work at 6:20 a.m. Defendant was then working at Cyl-Tec in Aurora. They had the alarm set for 4:45 a.m., and both of them got up at about 5 a.m. Defendant left the apartment at about 5:10 a.m., which was the normal time he left to go to work. When he left, he was wearing a black sweatshirt with a hood, a work shirt, work pants, and work boots. The work shirt was short-sleeved and had both defendant's name and his employer's name on it. (As other evidence showed, it was a typical company-issued shirt with a patch with the employer's name on the chest and defendant's first name embroidered on a pocket.) Defendant drove a distinctively painted older Nissan pickup. Defendant had once had a cap for the pickup's bed, but defendant had gotten rid of it a few months before the victim's death.

¶ 15 Sweat left the apartment about 10 minutes after defendant did. Her drive to work took about 35 to 40 minutes. As Sweat was driving, she called defendant on his cell phone and spoke to him about what he wanted for dinner. At about 5:45 a.m., she tried to call him back, but he did not answer. She called him over and over, but, after a while, the calls started to go straight to voicemail.

¶ 16 A few minutes before 6 a.m., defendant called her back. She asked him why he had not been answering; he told her that the pickup had developed problems as he was driving, so that he had needed to pull to the side of the road to fix it. He told her that he had to stop talking because he had reached work and was about to go in.

¶ 17 Sweat, who suspected defendant of being unfaithful, thought that he was lying when he called her, so she called her employer to say that she would not be in and then drove to Cyl-Tec. She arrived at roughly 6:20 a.m., but could not find his truck in the parking lot.

¶ 18 Sometime between 6:20 and 6:30 a.m., Sweat called defendant to ask where he was and why he was not at work. She reached him, and he told her that he was on the way home because he felt unwell. She said that she would go home as well, but at something like 7:15 a.m., when she was about halfway home, he called her again and said that he was on his way back to work. Sweat responded that she would meet him at his work; she turned and drove back to Cyl-Tec.

¶ 19 Sweat arrived ahead of defendant; she saw his pickup pull in at about 8 a.m. When defendant got out of the pickup, she noticed that he was wearing a cream-colored "thermo" shirt instead of the black sweatshirt that he wore every day. Sweat was curious where the sweatshirt was, so, after she had a brief conversation with defendant, she went over to the pickup to see if the sweatshirt was there. She did not see it. She saw defendant walk into the Cyl-Tec building and then drove home.

¶ 20 Sweat believed defendant when he said that he had returned to the apartment. This was because defendant said that he was going to leave a light on to show that he had been there and, when she got back to the apartment herself, a light was indeed on.

¶ 21 The State introduced a DVD of security video from the Cyl-Tec parking lot. Sweat initially misidentified another car as her own, but then identified her car as she arrived at the lot. She identified defendant's pickup as he drove into the lot. Finally, she recognized herself approaching defendant in the lot and going back to look in defendant's pickup.

¶ 22 Officer Angel Nieves of the Aurora police testified about an interview of defendant that he, with Detective Ricardo Galarzo, conducted on October 30, 2007. The court admitted the recording and transcript of the interview.

¶ 23 At the outset, an officer told defendant that he could leave at any time; they gave the *Miranda* warnings nonetheless. The tone of this interview was initially nonconfrontational. One

officer told defendant that the victim was dead. He said that, the night before, he had fallen asleep on the sofa, but had gone to bed in his bedroom at about 9 p.m. He usually got up at 4:40 a.m., but he had overslept because the alarm did not wake him. He woke up at about 7 a.m. and arrived at work at about 8 a.m., two hours late. He said that he had gone to work by way of a route that (as exhibits introduced at other times showed) took him well to the west of the victim's apartment.

¶ 24 An officer, taking a sympathetic tone, asked defendant about his relationship with the victim. Defendant said that the victim was unreasonable about visitation and child-support issues. That officer asked defendant when he last had "messed around with" the victim, to which defendant replied that it was six months ago, when the victim had told him that she was again pregnant. Defendant admitted that, in some of his arguments with the victim, he had "smacked" her.

¶ 25 The parties stipulated to the admission of records for Sweat's and defendant's cell phones; records for defendant's phone identified the towers that handled defendant's calls. Another exhibit showed the times and tower locations of defendant's calls on a standard street map. Further admitted were standard records for Sweat's cell phone. The parties stipulated that a cell phone can connect to a tower as far as five miles away. The distance from defendant's apartment to the victim's was 23.42 miles.

¶ 26 The call records corroborated Sweat's account of multiple calls to defendant's cell phone. Sweat's first call to defendant on the morning of October 30, 2007, started at 5:23 a.m. and lasted two minutes. Multiple minimum-length calls—presumably unanswered—followed. At 5:52 a.m., she made a call to defendant that lasted five minutes. Calls continued until 7:55 a.m., about the time Sweat saw defendant in the Cyl-Tec parking lot.

¶ 27 The location records were inconsistent with defendant's original alibi and broadly consistent with the State's theory of the case. The records put defendant's phone in the northern part of Joliet at 5:35 and 5:54 p.m. on the 29th. On the morning of the 30th, the phone was in Aurora well to the north of Joliet at 5:53 a.m. The records then showed it heading rapidly south. By 6:50 a.m., a northeast trend was clear, and it was in northern Aurora by 7:54 a.m.

¶ 28 Detectives Michael Auld and John Cebulski of the Aurora police questioned defendant after his arrest on October 31, 2007. Defendant again acknowledged understanding his *Miranda* rights. Defendant initially maintained that he had overslept and headed to work late, well after Sweat had left the house. He again described a route to work that took him well to the west of where the victim lived.

¶ 29 After a break, Cebulski told defendant that defendant must have made a mistake. The police had defendant's cell-phone records, which showed that the calls to defendant had started at 5:30 a.m. Defendant denied any contradiction and said that he had answered the calls without "paying attention." At that point, Cebulski told defendant that the police had records of what cell towers had handled the calls to defendant's phone, which placed him near the victim's apartment on Molitor Road. Defendant responded that his memory was unclear. However, he thought that he might have gone to find the cap for his pickup, which he had left near the home of a coworker, Bevan Watt. This was in the same part of Aurora as the victim's apartment. He had searched unsuccessfully for the cap and then decided to go home. He spoke to Sweat while he was at home. Her comments, about needing rent money, angered him, and he headed back toward work. Sweat continued to call, and defendant said that she could meet him at work.

¶ 30 Cebulski pressed defendant further. In response, he volunteered that he had just remembered that he had actually left the house before Sweat, at around 5 a.m.

¶ 31 Auld began to press defendant, highlighting the contradictions in his account, and defendant repeatedly denied knowing what happened to the victim. The interrogation ended with defendant saying, "I need to talk to a lawyer."

¶ 32 During the interview, Cebulski commented to defendant that he had reviewed "domestic reports" relating to defendant and the victim. Cebulski said that these were "nothing big."

¶ 33 On cross-examination, Cebulski agreed that, in interviewing defendant, he had exaggerated the degree to which the cell-phone data pinpointed defendant's location. On redirect, Cebulski used the cell-phone maps to explain defendant's location. At 5:52 a.m., defendant's phone registered at a tower in Aurora three-fourths of a mile west and half a mile south of the victim's apartment.

¶ 34 Watt testified that defendant had indeed removed the cap from his pickup to move some furniture. This occurred in July or August 2007.

¶ 35 Sergeant Tom Hinterlong of the Aurora police testified that, excepting the front door forced open by the firefighter, none of the apartment's doors or windows showed any sign of forced entry. He found that the two patio or balcony doors were locked from the inside.

¶ 36 Officer David Adams of the Aurora police testified that he found a clear shoeprint on the carpet of the victim's apartment; other prints appeared similar but less clear. This pattern appeared to be consistent with defendant's work boots. When Adams examined those boots, he noticed that the soles were "extremely clean." Adams also documented the presence of a social security card—Tamia's—in the bathtub. He further documented the presence of a bluish-colored button, which had been discovered in the hallway as the victim's body was moved. This button was consistent with those on defendant's work shirts, but also with those on police uniform shirts.

¶ 37 Officer Brian McGarr of the Aurora police testified concerning his search of defendant's pickup. He identified likely bloodspots for DNA testing; he also found a box of latex gloves under the seat.

¶ 38 Detective Sally Trujillo of the Aurora police testified that, at her request, Cyl-Tec employees had located nine of defendant's work shirts, each with a Cyl-Tec logo on one pocket and the name "Hezekiah" on the other. Cyl-Tec records showed that one short-sleeved shirt issued to defendant was missing.

¶ 39 David Turngren of the Illinois State Police Crime Laboratory in Joliet performed DNA analysis on the samples from the door area of the pickup and from defendant's clothing. Those from the door area, from the right boot, and from two spots on a sock all came from the victim, to a high degree of certainty. A stain on the left boot came from defendant, to a high degree of certainty, as did a sample taken from behind the bathroom door in defendant's apartment and a CD case in defendant's apartment.

¶ 40 Assistant State's Attorney Marzenia Vandeburgt testified that she had been in the State's Attorney's office's child-support division and had had responsibility for the victim's case. She remembered that case because defendant, on his first appearance, had become very angry in the courtroom and had left before the proceedings had concluded. Specifically, he became agitated as the court went through the information necessary to set temporary support and left before the court issued the order. Defendant was angry and upset at the second hearing and was unwilling to negotiate a settlement of financial issues. He demanded to know who had brought the case. When told that the State had, he took an accusatory tone toward the victim, asking why she was doing "this" to him. Defendant also was combative toward the judge and Vandeburgt.

¶ 41 The court denied defendant's motion for a directed finding. Defendant rested without presenting evidence.

¶ 42 The court, in making its ruling, reviewed the evidence in detail. It found that the State had demonstrated that defendant had a clear motive for the murder, in that he resented the child support for Tamia and was likely facing a support claim for the second child. Further, defendant had displayed a willingness to use physical violence—he "smacked" the victim—and other lack of control, as demonstrated by his behavior in court. The cell-phone evidence showed that defendant was in the general area of the murder at approximately the correct time. The court stated that the case "turn[ed] most definitively on the DNA." It did not make any explicit credibility determinations. It court found defendant guilty.

¶ 43 At sentencing, the State requested that the court impose a 60-year term of imprisonment, the standard-term maximum. The court, in consideration of certain mitigating evidence, imposed a sentence of 55 years' imprisonment rather than 60.

¶ 44 Defendant, after the court denied his motion for reduction of his sentence, appealed, challenging only the length of the sentence. We affirmed. *People v. Hamilton*, 2011 IL App (2d) 100739.

¶ 45 Defendant then filed a postconviction petition that alleged, among other things, that trial counsel was ineffective for failing to seek to exclude evidence of defendant's "smacking" the victim and sexually assaulting her. (Defendant was under the impression that the State had elicited Brenda's rape testimony.) He asserted that counsel should have objected to the State's introduction of the recordings of the interrogations. He asserted that counsel should have objected to the State's eliciting from Cebulski that Cebulski had examined a "domestic report" relating to defendant and the victim. Defendant noted that the court, in announcing its finding of

guilt, specifically stated that it had considered the evidence of defendant's past violence toward the victim.

¶ 46 The court dismissed the petition at the first stage. Defendant timely appealed.

¶ 47 II. ANALYSIS

¶ 48 On appeal, defendant asserts that he stated the gist of a claim that trial and appellate counsel were ineffective. He argues that trial counsel acted unreasonably in eliciting other-crimes evidence and in acquiescing to the State's other-crimes evidence. Specifically, he asserts (1) that counsel should not have elicited Brenda's statement that the victim's second child with defendant was the result of rape, (2) that counsel should have objected to the inclusion of the domestic-violence-related portions of the interview recordings and transcripts, and (3) that counsel should have objected to Cebulski's testimony that he was aware of calls to police about domestic-violence incidents. Defendant further asserts that appellate counsel was ineffective for failing to raise these issues.

¶ 49 We hold that defendant's ineffective-assistance claim is without merit because the evidence against defendant was so powerful as to insure that no prejudice could have resulted from any error of counsel's. The court therefore did not err in dismissing defendant's petition.

¶ 50 "[A] *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be *** dismissed [at the first stage] as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). A *pro se* petition can be sufficient to survive first-stage dismissal "even if the petition lacks formal legal arguments or citations to legal authority." *Hodges*, 234 Ill. 2d at 9. Moreover, the supreme court has "required only that a *pro se* defendant allege enough facts to

make out a claim that is arguably constitutional for purposes of invoking the Act." *Hodges*, 234 Ill. 2d at 9. We review *de novo* a first-stage dismissal. *Hodges*, 234 Ill. 2d at 9.

¶ 51 To state a claim of ineffective assistance of counsel, a defendant must satisfy both prongs of the standard stated in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced him or her in that a reasonable probability exists that, but for counsel's deficient performance, the proceeding would have had a different result. *Strickland*, 466 U.S. at 687, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "In demonstrating, under the first *Strickland* prong, that his counsel's performance was deficient, a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct might be considered sound trial strategy." *People v. Houston*, 226 Ill. 2d 135, 144 (2007). If the reviewing court "concludes that [the] defendant did not suffer prejudice, the court need not decide whether counsel's performance was constitutionally deficient." *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 52 "Other-crimes evidence" is any evidence of misconduct or criminal acts that are distinct from the act for which a defendant is on trial and that occurred at a time other than the time of the conduct for which the defendant is standing trial. *E.g.*, *People v. Young*, 2013 IL App (2d) 120167, ¶ 22. Such evidence is "inadmissible if it is relevant only to demonstrate the defendant's propensity to engage in criminal activity." *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 61. Such evidence is, however, admissible "to show *modus operandi*, intent, motive, identity, or absence of mistake with respect to the crime with which the defendant is charged." *People v. Pikes*, 2013 IL 115171, ¶ 11. The supreme court has held that the "erroneous admission of evidence of other crimes carries a high risk of prejudice" and thus is generally not

harmless error. *People v. Lindgren*, 79 Ill. 2d 129, 140 (1980). Thus, in a jury case, a conviction potentially flawed by the improper admission of other-crimes evidence will be upheld only if "the properly admitted evidence is so overwhelming that no fair-minded jury could have voted for acquittal." *Lindgren*, 79 Ill. 2d at 141. However, the supreme court has noted that, where a case is tried by a court, not a jury, the improper admission of other-crimes evidence is "less likely to have a prejudicial impact." *Lindgren*, 79 Ill. 2d at 140.

¶ 53 Here, the evidence was so overwhelming that, even under the standard that would have applied if the issue had arisen in a jury case, the admission of all the other-crimes evidence at issue here would not have amounted to reversible error. It follows that defendant did not suffer prejudice under the prejudice prong of *Strickland*, either: No reasonable probability existed that the proceeding would have had a different result (*Strickland*, 466 U.S. at 694) had neither party introduced other-crimes evidence. We note that "there is no legal distinction between direct and circumstantial evidence as to the weight and effect thereof." *People v. Case*, 246 Ill. App. 3d 566, 576 (1993).

¶ 54 The nature of the evidence against defendant negated any possibility of prejudice. In particular, the child-support evidence established defendant's motive, the cell-phone evidence, as well as witness testimony, defeated defendant's alibi, and the DNA evidence established his presence at the scene. Consequently, the trial court did not err in dismissing defendant's petition at the first stage.

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, we affirm the dismissal of defendant's postconviction petition.

¶ 57 Affirmed.