

No. 1-08-0428

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23 (3) (1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
)	the Circuit Court
Plaintiff-Appellee,)	of Cook County.
)	
v.)	No. 91 CR 25032
)	
KEVIN BETTS,)	Honorable
)	Luis Alonso-Jorge,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

ORDER

Held: Where defendant did not meet his burden to establish that he was prejudiced by any asserted deficiencies of trial and appellate counsel, the judgment of the circuit court dismissing defendant's postconviction petition was affirmed.

Following a jury trial, defendant Kevin Betts was convicted of first-degree murder and aggravated battery with a firearm. The trial court sentenced defendant to respective prison terms of 65 and 25 years, to be served concurrently. We affirmed his conviction and sentence on direct appeal. *People v. Betts*, No. 1-93-2649 (1996) (unpublished order under Supreme Court Rule 23). Subsequently, defendant filed a petition for relief under the Post-Conviction Hearing Act

1-08-0428

(725 ILCS 5/122-1 *et seq.* (West 1998)), which the circuit court dismissed in part after an evidentiary hearing and in part on the State's motion.

On appeal, defendant raises various contentions, including: (1) that a new trial is warranted because defendant's trial counsel was ineffective for failing to investigate and present certain evidence that could have supported his theory of self-defense; (2) that he has newly discovered evidence of his actual innocence; and (3) his appellate counsel was ineffective for failing to raise meritorious issues on appeal. For the following reasons, we affirm the judgment of the circuit court.

I. BACKGROUND

A. Trial Testimony

Defendant's convictions arose from the fatal shooting of Gabriel Travis and the wounding of Eric Mahone in the living room of an apartment in Chicago on December 23, 1990.

Defendant's theory at trial was self-defense. The court also allowed him to submit a jury instruction on imperfect self-defense.

The facts adduced at trial were recounted fully on direct appeal and are summarized here. On the evening of December 23, 1990, Travis and Mahone bought some alcohol and drove to Travis' girlfriend Tonita Mill's home. Defendant and his cousin Tyler Lewis later entered the home. Mahone did not know either of them.

At some point, defendant, who also went by the name "Fred," and Travis "started having words back and forth." During the conversation, Travis was sitting on the couch and defendant was about ten feet away in the dining room. Defendant repeatedly said, "Gabriel, I told you

1-08-0428

about that!” Travis replied, “Fred, it[']s cool!” Defendant got upset and said, “[f]uck that shit, man,” turned sideways and pulled out a gun from the front of his pants. Mahone then stood up and told defendant, “[i]t is no problem; I’ll leave, I’ll leave, whatever is going on!” Travis was still sitting on the couch and was telling defendant “[i]t ain’t that serious.”

Defendant began shooting. Mahone heard about three shots and saw fire coming from a black 9-millimeter Smith and Wesson, and saw shells “jumping” before he got “stung” in the side. The more shots that defendant fired, the closer he came towards Mahone and Travis. Mahone fell back on top of Travis, who was next to him on the couch. Mahone heard Travis yelling, “Fred, Fred, it ain’t that serious man!” Defendant continued to shoot until he was directly in front of the couch. Defendant pointed the gun directly at Mahone’s head from about two feet away. Mahone was pinned back on the couch with Travis pinned under him. Mahone closed his eyes, assuming he was going to be shot in the head. He heard Travis behind him yelling, “Fred, Fred!” After he heard the gunshot, Mahone did not hear anything else from Travis. Mahone closed his eyes and “played dead” for about five minutes.

Mahone saw defendant leave after grabbing a pouch with a large sum of money coming out of it. Mahone saw “gushes of blood” running from the side of Travis’ head. Mahone laid Travis on the couch, told one of the girls in the house to call the police, grabbed keys off the table, and went to his girlfriend’s cousin’s house and was taken to the hospital.

On cross-examination, Mahone acknowledged that he had been convicted of burglary in 1985 or 1986. He denied that Travis dealt drugs and denied that Travis carried a gun. Mahone also acknowledged that he and Travis had been drinking on the night of the incident. After the

1-08-0428

shooting, he did not call police or wait for them to arrive. He denied that he picked up drugs off the floor and denied picking up a gun off of Travis' body before he left. He acknowledged that in 1988 he had a fight with a man named Mark Gibson on the street and they "got into it." He denied striking first.

The police found Travis in a seated position on the floor leaning against the couch. They observed one .9 millimeter spent shell casing in an ashtray on the table in front of the body, one on the floor near the couch, and one in between the dining room and living room area. Some plastic bags with a white powder or a rock-like substance were recovered from the house. There was a .38 caliber weapon recovered in the upstairs of the house. The police did not know to whom that belonged. They were unable to locate defendant until September 1991. It was stipulated that the medical examiner would testify that Travis died from a gunshot wound to the head.

Defendant's 15-year-old cousin, Christian Mills, testified on defendant's behalf. She lived at 7136 South Seeley with her sister Tonita Mills, Tonita's son, an uncle, her cousin Yolanda Mills, and her mother Betty Mills. Christian testified that Travis had been dating her sister Tonita for about nine to ten months. Travis was at their home everyday and usually carried a gun with him. Christian further testified that Travis was a drug dealer.

On the night of the shooting, Christian was home with her sister, nephew, uncle, cousin, and another girl named Bina. At some point, Travis and Mahone, to whom she was later introduced, entered the home. Travis had some alcohol with him and a gun, which he set down on the table by the couch. A few minutes later, when there was a knock at the door, Travis stood

1-08-0428

up and placed the gun inside his waistband. Defendant and her cousin, Tyler Lewis, entered the home.

While she was in the bathroom, she heard defendant and Travis arguing. She then heard about six shots in rapid succession. Christian then saw Mahone pick something up off the floor, either money or objects in plastic bags, and saw him reach over Travis. She also noticed that Travis' gun was no longer in his waistband.

On cross-examination, Christian acknowledged that she never told the police that she saw Travis with a gun or that she saw him put the gun on the table or in his waistband. She also never told police that she saw Mahone pick up items off the ground or appear to take something from Travis. She further testified on cross-examination that she never saw a gun in Travis' hand.

Defendant's aunt, Betty Mills, testified that at about 5 p.m. on December 23, 1990, she was at her sister's home. She was not present when Travis was shot. She had known Travis as Tonita's boyfriend. Every time Travis came over to her home he carried a gun. She described a confrontation between her brother and Travis on another occasion where she had to intervene. Travis attempted to block her brother from entering the home and Travis lifted his coat to show his gun. On another occasion, Travis got into a fight with her neighbor's nephew. According to Mills, Travis landed the first punch. Mills further testified that Travis sold drugs. She acknowledged on cross-examination that she never told police that Travis brought a gun to her home or that he was a drug dealer.

The jury found defendant guilty of the first degree murder of Travis and the aggravated battery with a firearm of Mahone. He was sentenced to an extended 65 year prison term for first

1-08-0428

degree murder and a concurrent 25 year prison term for aggravated battery. His conviction and sentence were affirmed on direct appeal. *People v. Betts*, No. 1-93-2649 (1996) (unpublished order under Supreme Court Rule 23).

B. Post-Conviction Proceedings

On November 17, 1999, defendant filed a *pro se* document that the circuit court characterized as a post-conviction petition. Defendant raised various contentions, including the following claims: (1) ineffective assistance of privately retained appellate counsel for failing to communicate with defendant, failing to raise trial counsel's competence on appeal, failing to investigate and interview witnesses and call them to testify in order to bring issues of perjury and prosecutorial misconduct to the appellate court's attention, and failing to raise a claim of actual innocence; (2) ineffective assistance of trial counsel for failing to investigate or call Tyler Lewis, Tonita Mills, and Mark Gibson as witnesses, and for failing to obtain a jury instruction on manslaughter or second-degree murder; (3) perjury by Mahone; (4) prosecutorial misconduct for withholding the truthful statements of Tyler Lewis and Tonita Mills, falsifying a statement by Tyler Lewis, knowingly allowing Mahone to give perjured testimony, and making improper remarks in closing argument; and (5) actual innocence based on the affidavits of Tyler Lewis and Tonita Mills.

Defendant attached to the petition several affidavits, including the affidavit of his cousin Tyler Lewis. Therein, Lewis stated that he was present in the home at the time of the incident. At some point, he heard defendant and Travis arguing. He saw Travis reach into his waistband, pull out a gun, and point it in defendant's direction. Lewis became frightened and went to

1-08-0428

another room where he heard gunshots. He saw Mahone leave with a gun, some money, and little packets. Lewis further stated that he told the State's attorney that he never saw defendant with a gun and that he did not see the actual shooting. He was told to sign a paper and was told that he would not have to testify at the trial.

Thereafter, counsel was appointed to represent defendant¹. However, the trial court subsequently granted defendant's request to proceed *pro se* and allowed appointed counsel to withdraw. The State then filed a motion to dismiss the petition. According to the State's motion, defendant sought to amend his *pro se* petition in order to raise the following issues: (1) ineffective assistance of trial counsel for failing to interview Tyler Lewis and Tonita Mills, failing to advise defendant that he could receive an extended-term sentence, failing to present evidence to support his theory of self defense, failing to seek proper jury instructions, and failing to call Mark Gibson to impeach Mahone; (2) ineffective assistance of appellate counsel for failing to raise trial counsel's incompetence on direct appeal and failing to communicate with defendant during the appeal; (3) perjury by Mahone; (4) actual innocence; (5) excessive sentence; and (6) prosecutorial misconduct for improper remarks in closing argument. This motion to amend is not part of the record on appeal. However, the record reveals that the motion was before the circuit court at the hearing on the State's motion to dismiss and was ultimately ruled

¹ The petition was originally summarily dismissed on February 22, 2000. After defendant appealed, the appellate court allowed the State's motion for a summary remand pursuant to *People v. Bocclair*, 202 Ill. 2d 89 (2002). The petition was remanded to the trial court for further proceedings. *People v. Betts*, No. 1-00-1065 (2003).

1-08-0428

upon.

Subsequently, defendant filed another document that the circuit court treated as a supplemental petition. Therein, defendant raised the following issues: (1) ineffective assistance of trial counsel for failing to transport Mark Gibson to trial as a *Lynch* witness; (2) the trial court abused its discretion in sentencing him to an extended-term sentence; (3) actual innocence based upon the affidavit of Tonita Mills; (4) ineffective assistance of appellate counsel for failing to raise numerous issues regarding trial counsel's incompetence, failing to communicate with defendant, failing to file a petition for leave to appeal in the supreme court, and for causing defendant's post-conviction petition to be filed untimely.

After considering the issues raised, the circuit court granted the State's motion to dismiss on all claims except for defendant's claim of ineffective assistance of counsel for failing to interview Tyler Lewis and Tonita Mills. The court granted defendant an evidentiary hearing on that sole issue.

1. Evidentiary Hearing

At the evidentiary hearing, defendant chose to represent himself. Tyler Lewis, defendant's cousin, testified that on the night of the incident, while he was upstairs, he heard Travis and defendant arguing. He went to the kitchen and "heard something about a gun" on the "taller guy," apparently referring to as Mahone. Lewis then stated that he saw Travis pick up the gun and put it in the small of his back. He then left the room and was not in the room when the shooting occurred. He did not see defendant shoot. He heard four shots and when the shooting stopped he ran out the front door. As he was leaving, he saw a gun and drugs on the table. He

1-08-0428

testified that he told police that he saw a gun on Travis.

Lewis acknowledged that he gave a statement to the assistant State's attorney and gave testimony before the grand jury. He denied that the statement and the testimony he gave before the grand jury implicating defendant were true, and testified that he was forced by police to give those statements. He testified that the police threatened to charge him with the murder. He further testified that he was never contacted by any attorneys to give testimony at defendant's trial, that he came forward now because he was tired of being scared and he lives in another state, and that nobody forced him to come to court to testify at the evidentiary hearing.

On cross-examination, Lewis testified that he signed an affidavit in 1999, but did not know who prepared it or what was contained in the affidavit. He could not recall where he was when he signed the affidavit. He signed the statement to help his cousin. In the affidavit, he did not mention that the police forced him to make a false statement. He also acknowledged that he signed the statement that he gave to the ASA, that he had a chance to review it, and that there were corrections indicated with his initials on it. He told the ASA that he had been treated well by the police and that no promises were made to him. Lewis further testified on cross-examination that the first time he saw the gun was when Mahone picked it up off the floor when Lewis was running out the door. He did not know where the gun came from.

Trial counsel, Ann Collins, testified that she was the lead counsel for defendant's trial. This was her first murder trial as lead counsel, but she had been a public defender since 1985. She was aware that defendant told her prior to trial that Travis pulled a gun on him during their argument. The parties stipulated that the police inventory report indicated that there was a .38

1-08-0428

caliber revolver, a grenade, and drugs found at the scene. She was aware of these items and did not recall testing any of those specific items found at the scene or presenting the gun to any witnesses at trial. She did not interview the cousin of Mahoney's girlfriend because she could not identify that person nor did she believe that they would be forthright with her.

She explained that as part of the theory of the case she tried to show that Mahoney left the scene with objects that were no longer there when the police arrived, including the gun that had been present at the scene prior to the shooting. She did not know whether the .38 caliber revolver recovered at the home belonged to Travis.

She recalled that one of the witnesses at the scene was Tyler Lewis and that she could not recall at the hearing why she did not interview him. She attempted to locate him, but did not recall specifically what attempts she made and she did not record that information. She stated that she would have wanted to interview him because frequently witnesses say different things to the lawyer than to the police and grand jury. She was not aware that defendant would be subject to an extended term sentence until sentencing.

On cross-examination, Collins testified that during her representation of defendant she met with him and talked to him about his case. She filed pre-trial motions, she reviewed police reports and was aware of the police interviews with Tyler Lewis and Tonita Mills. She also reviewed the written statement that Lewis gave to the ASA. She was also aware of Lewis' grand jury transcript. Collins interviewed Tonita Mills and decided not to call her as a witness at defendant's trial. Tonita had an outstanding warrant for her arrest at the time. Collins recalled that she reviewed photographs taken at the scene and introduced them at trial, that she cross-

1-08-0428

examined the State's witnesses and called Christian and Betty Mills as witnesses for the defense. She filed a motion for a new trial, and she presented several witnesses in mitigation at sentencing and cross-examined the State's witnesses in aggravation. She could not recall whether she demanded trial, but stated that if she had it would have been to "run the term." She agreed that one possible tactic for demanding trial is in the hope that the State would not be able to produce their witnesses.

Tonita Mills testified that she did not recall the day of the shooting and did not remember signing an affidavit in 1999. The signature on the affidavit did not look like her own. She later testified that she recalled seeing Travis with a gun in his waistband when she let him into the house, but that she was not present when the shooting took place. She had seen Travis sell drugs out of her house, but she never saw Travis pull out a gun on December 23, and she denied that her affidavit was accurate with respect to that fact. She told police that Travis was a drug dealer. She further testified that in 1992, there was a warrant for her arrest for forgery. She later pled guilty and received probation.

Mary Clements, an investigator with the Cook County Public Defender testified that in June 1999, she went to the home of Amy Perry, defendant's aunt, to interview mitigation witnesses for defendant in an unrelated pending murder case. While there, the family told her that Tonita Mills and Tyler Lewis were witnesses to the Travis murder case. Clements interviewed Tonita regarding her recollection of the shooting and Tonita signed an affidavit at that time.

James Tyrell, the ASA assigned to defendant's case, testified that he never made a guilty

1-08-0428

plea offer and Collins never requested one. Instead, Collins demanded trial. He recalled that he had great difficulty in getting witnesses to testify at trial and that Collins almost “ran the term” by continuing to demand trial. When jury selection began, the term was on day 113 out of 120.

Tyrell testified that he could not locate Tyler Lewis, Tonita Mills, or Christian Mills. He wanted Lewis to testify because he had testified before the grand jury and had given a statement to police and a handwritten statement to the ASA, which he believed were all extremely inculpatory toward defendant. He believed that Lewis would have been a stronger witness for the State than Mahone. Tyrell subpoenaed Lewis twice and tried unsuccessfully to reach him by phone. Lewis and Tonita Mills were never successfully served. In March 1993, Tyrell attempted to have police locate Lewis at his last known address, but the police were unable to locate him. Lewis did not respond to a subpoena. Tyrell was forced to proceed to trial without Lewis or Tonita Mills.

Tyrell recalled that during trial Collins made numerous objections, made motions *in limine*, gave an opening statement, cross-examined the State’s witnesses, made a motion for a directed finding, presented several witnesses, presented a self-defense theory, and successfully argued for a second degree murder instruction without defendant testifying. She filed a motion for a new trial asserting 54 points of error.

Timothy Joyce testified that in 1990 he was an assistant State’s attorney in the felony review unit. He was responsible for taking Lewis’ handwritten statement regarding the shooting. Joyce explained the procedures he generally undertook when taking a statement. He indicated that Lewis stated that nobody threatened him. Had Lewis indicated differently, Joyce would have proceeded in a different manner.

1-08-0428

Lewis' statement to the ASA was read into the record at the evidentiary hearing. According to the statement, Lewis was with defendant on the afternoon of December 23, 1990, when they decided to go to 7136 South Seeley to visit Lewis' father and defendant's girlfriend. After they arrived, defendant and Travis began to argue. Defendant was mad because he thought Travis was selling drugs out of defendant's drug dealing location. Lewis knew that defendant was a drug dealer who worked out of the first floor apartment. Lewis went to the kitchen and heard gunshots. He ran into the dining room and saw defendant holding a 9-millimeter pistol and shooting it at Travis and Mahone. Defendant fired six times, then took the clip out, put a second clip in, and fired two or three more shots at Travis and Mahone. Lewis then ran out of the house because he was afraid. Lewis stated that he was treated well by the police and the ASA, and that no threats or promises were made in making his statement. Each page was signed by Lewis, ASA Joyce, and the detective. The statement and Lewis' corresponding grand jury testimony were admitted into evidence at the evidentiary hearing.

The court allowed defendant to introduce additional evidence, including an affidavit from Betty Mills indicating that she told Collins prior to trial that the guns, grenade, and drugs belonged to Travis. The parties stipulated that the toxicology report indicated that there was alcohol in Travis' system at the time of the autopsy. The court denied defendant's request to introduce an affidavit from Collins that was made prior to the hearing.

After allowing extensive closing arguments, the circuit court held that defendant did not satisfy his burden to show that the claims and contentions he raised established a substantial denial of his constitutional rights. Specifically, the court held that defendant failed to satisfy

1-08-0428

either prong of the *Strickland* test with regard to any of his claims. In particular, the court made the following findings:

“The two witnesses that he now says his lawyer was ineffective or incompetent for not finding are in fact witnesses he was running from. These are friends and family who gave statements to the police, to the Grand Jury, signed statements implicating [defendant].

Not only did he not want them at the trial, he demanded trial to try and avoid them coming to court. Had they come to court, they would have testified in a manner consistent with the statements they gave, or at best for him, been impeached by those statements, and those statements could have come in at least as to Mr. Lewis as substantive evidence.

So I think that it is untrue, and baseless at this point, to say that Miss Collins should have chased down those witnesses who did not want to come to court because it was not in her client’s interest to have them. Had she forced those individuals to come to court, that might have been ineffective assistance.”

Accordingly, the circuit court denied defendant’s petition for postconviction relief. Additionally, the court denied defendant’s motion made during closing arguments to amend the pleadings to conform to the proof. Defendant filed a timely notice of appeal. Thereafter, defendant sought to

1-08-0428

proceed *pro se* on appeal. We granted the State Appellate Defender leave to withdraw as counsel and struck counsel's brief. Defendant then filed his *pro se* brief, which we now consider.

II. ANALYSIS

The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 1998)) provides a means by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). To be entitled to postconviction relief, a defendant has the burden to show that he suffered a substantial deprivation of his constitutional rights in the proceedings that produced the conviction or sentence being challenged. 725 ILCS 5-122(a) (West 1998); *Whitfield*, 217 Ill. 2d at 183. Where, as here, the trial court conducted an evidentiary hearing, involving fact-finding and credibility determinations, we will not disturb the decision of the trial court unless it is manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Manifest error is error that is clearly evident, plain, and indisputable. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

Initially, we address defendant's contention that trial counsel was ineffective in failing to interview and present the testimony of Tyler Lewis. Ineffective assistance of counsel claims are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

More specifically, the defendant must demonstrate that counsel's performance was

1-08-0428

objectively unreasonable under prevailing professional norms and that there is a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Because a defendant must satisfy both components of the *Strickland* test, the failure to establish either is fatal to the defendant’s claim. *Strickland*, 466 U.S. at 687.

The failure to interview a known witness can indicate incompetence if the testimony of the witness may exonerate defendant. *People v. Steidl*, 177 Ill. 2d 239, 256 (1997). However, whether a failure to investigate the testimony of a potential witness amounts to incompetence depends on the value of the evidence to the case. *Steidl*, 177 Ill. 2d at 256. Here, the circuit court found after an evidentiary hearing that defendant was not prejudiced by any failure to interview and call Tyler Lewis to testify at trial.

Based upon the evidence presented at the evidentiary hearing, trial counsel was aware that Lewis gave a handwritten statement and testimony before the grand jury implicating defendant in the shooting and characterizing defendant as a drug dealer who was angry with Travis. Nothing in Lewis’ testimony before the grand jury would have supported defendant’s self-defense theory. Had Lewis testified, he would have either testified consistently with his prior testimony before the grand jury and his written statement, or he would have been substantially impeached with his prior statements. His grand jury testimony would have likely been admitted at trial as substantive evidence under section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 1992)), further inculcating defendant. See *People v. Guest*, 166 Ill. 2d 381, 400 (2007) (counsel may decline to call a witness if testimony would be subject to damaging

1-08-0428

impeachment). Indeed, the prosecutor testified at the evidentiary hearing that he sought to have Lewis testify against defendant because of the strength of his inculpatory statements. The circuit court found that it was defense counsel's trial strategy in making a demand for trial that kept Lewis from coming to court on behalf of the State. We find no basis to conclude that the circuit court's finding was manifestly erroneous.

Additionally, had Lewis testified at trial consistently with his testimony given at the evidentiary hearing, it would not have contradicted Mahone's testimony that established defendant as the initial aggressor. In order to prove that he was acting in self defense, defendant was required to establish several elements, including that he was not the aggressor. 720 ILCS 5/7-1 (West 1992); *People v. Morgan*, 187 Ill. 2d 500, 533 (1999). To mitigate the offense of first-degree murder to second-degree murder on the basis of an actual but unreasonable belief that self-defense was required, defendant was required to prove that "[a]t the time of the killing he believe[d] the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of [the] Code, but his belief is unreasonable." 720 ILCS 5/9-2(a)(2) (West 1992).

The evidence presented by Mahone at trial was that defendant and Travis were arguing when defendant suddenly pulled out a gun and began firing. Mahone indicated that he would leave, intending to placate defendant. Travis, while sitting on the couch, also attempted to calm defendant. Despite these statements, defendant began firing and the more shots defendant fired, the closer he came to Mahone and Travis. Defendant continued to shoot several more rounds. Several shell casings were recovered from the 9-millimeter weapon near the body.

1-08-0428

Nothing in Lewis' testimony given at the evidentiary hearing would have contradicted the testimony by Mahone that defendant was the initial aggressor. Despite Lewis' testimony that Travis had a gun in his waist, there was no evidence that Travis or Mahone threatened defendant with a gun or reached for the gun, which could require the use of deadly force. Lewis' testimony at the hearing was also consistent with Christian's testimony at trial, which the jury already heard, that Travis picked up a gun and put it in his waistband. However, Lewis then left the room, did not see the shooting, and thought he heard four gunshots. Lewis also completely contradicted the statements made in his affidavit: he indicated that he did not recall signing it, did not know why he signed it other than to help his cousin, and did not know who wrote it. Accordingly, the trial court's finding was not manifestly erroneous and defendant failed to meet his burden to establish that he was prejudiced by counsel's failure to interview and call Lewis to testify at trial.

Defendant additionally maintains that Lewis' testimony would have established his actual innocence. Courts may consider a claim of actual innocence in a postconviction proceeding if the claim is based upon newly discovered evidence that is material, noncumulative, and of such a conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Newly discovered evidence is evidence that was not available at the defendant's original trial, and it must be evidence that the defendant could not have discovered sooner through diligence. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004).

Here, the evidence presented by Lewis at the evidentiary hearing was not newly discovered because defendant was aware prior to trial that Travis had a gun. *People v. Collier*,

1-08-0428

387 Ill. App. 3d 630, 637 (2008) (evidence is not newly discovered when it presents facts already known to defendant even if the source of those facts is unavailable or uncooperative). Christian and Betty Mills testified at trial that Travis was known to carry a gun and that while in the home prior to the shooting he had a gun in his waistband, and that after Mahone reached over Travis' body, the gun was no longer in Travis' waistband. Nor was Lewis' testimony at the hearing of such a conclusive character that it would probably change the result on retrial. As previously stated, to establish self defense or imperfect self defense, defendant had to show that he was not the initial aggressor. Lewis' testimony does not contradict that fact. Accordingly, defendant cannot establish an actual innocence claim based on his theory of self defense. See, e.g., *People v. Jarrett*, 399 Ill. App. 3d 715 (2010) (where defendant was the initial aggressor, evidence that another individual aimed a gun at him after he began firing was not evidence that would have probably changed the result on retrial).

We next address defendant's contentions that were dismissed on the State's motion at the second stage of the postconviction proceedings. At the second stage, the State is required to either answer or move to dismiss the defendant's petition. 725 ILCS 5/122-5 (West 1998). The defendant is not entitled to an evidentiary hearing unless the allegations set forth in the petition, as supported by the trial record or accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). In reviewing the sufficiency of the petition, all well-pled facts not positively rebutted by the record are taken as true, and the trial court's dismissal is reviewed *de novo*. *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

Defendant contends that trial counsel was ineffective for failing to transport Mark Gibson to testify as a *Lynch* witness in support of his self-defense theory related to the aggravated battery with a firearm charge. Defendant couches his claim as an ineffective assistance of appellate counsel claim on the ground that it should have been raised on direct appeal because the matters were of record. A claim of ineffective assistance of appellate counsel is governed by the same rules that apply to claims of ineffective assistance of trial counsel. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). The defendant must show that appellate counsel's failure to raise a particular issue on direct appeal was objectively unreasonable and that the defendant was prejudiced by that failure. In order to show prejudice, the defendant must show that the underlying issue had merit. *Childress*, 191 Ill. 2d at 175.

The record reveals that at trial, defense counsel attempted to show on cross-examination of Mahone that he had an aggressive nature by introducing testimony that he had a prior altercation with a man named Mark Gibson. Mahone refused to acknowledge that he started the fight, merely stating that they "got into it." Defense counsel attempted to call Gibson to testify about Mahone's violent character pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984). The record further reflects that defense counsel's investigator failed to pick up Gibson and bring him to court. During a recess, counsel requested a continuance to locate the witness and the trial court denied her request. Defense counsel rested without the testimony of Gibson.

In *People v. Lynch*, the court held when self-defense is properly raised, evidence of the victim's aggressive and violent character may be offered for two reasons: (1) to show that the defendant's knowledge of the victim's violent tendencies affected defendant's perceptions of and

1-08-0428

reactions to the victim's behavior; and (2) to support the defendant's version of the facts where there are conflicting accounts of what happened. *Lynch*, 104 Ill. 2d at 199-200.

Under the first approach, the evidence is relevant only if the defendant knew of the victim's violent acts. *Lynch*, 104 Ill. 2d at 200. Given that defendant did not know Mahone, let alone his violent tendencies, the evidence would not have been proper under the first approach. Under the second approach, Gibson's testimony could only be relevant to support the defense theory as to the aggressor during the confrontation where the evidence was conflicting. Here, there was no conflicting testimony presented at trial to support that Mahone was the initial aggressor in the shooting. There was no evidence at trial or alleged in the petition that he threatened defendant in any way. Rather, the uncontradicted evidence with respect to Mahone was that defendant pulled out his gun, and that Mahone attempted to placate him. The theory of self-defense at trial and in defendant's petition for post-conviction relief was that Travis was the initial aggressor. Thus, the confrontation in this case as presented at trial was between defendant and Travis.

Defendant acknowledged this when he asserted at the evidentiary hearing that "this case is about self-defense based on provocation. That provocation being that the decedent pulled a gun on [defendant] first." Therefore, any evidence of prior violent tendencies involving Mahone would have been remote to the question of whether defendant was justifiably defending himself against Travis. See, e.g., *People v. Figueroa*, 381 Ill. App. 3d 828, 848 (2008) (where there was only tenuous evidence at best that a witness was the aggressor, evidence of prior violent acts involving that witness were irrelevant and inadmissible under *Lynch* where the confrontation was

1-08-0428

between the defendant and a third party). Therefore, defendant did not meet his burden to establish that he was prejudiced by any failure of trial counsel to present the testimony of Mark Gibson as a *Lynch* witness. Because the underlying issue lacked merit, defendant did not meet his burden to establish ineffective assistance of appellate counsel on direct appeal. *Childress*, 191 Ill. 2d at 175.

We next address defendant's contention that the prosecutor violated his fifth amendment rights during closing argument. Defendant asserts that appellate counsel was ineffective in failing to raise this particular issue, squandering his right to a discretionary appeal and causing him to file a late postconviction petition. At the outset, we find that defendant cannot establish any prejudice in the filing of a late post-conviction petition where his petition was ultimately not dismissed on the basis of untimeliness. Accordingly, we address his contentions regarding the loss of his right to a discretionary appeal.

On direct appeal, defense counsel raised the issue of prosecutorial misconduct in closing argument. The appellate court found that in one instance the remarks constituted a proper statement of the law and were proper "fodder" for closing argument. *People v. Betts*, No. 1-93-2649 (1996) (unpublished order under Supreme Court Rule 23). Additionally, the court held that with respect to additional remarks made by the State in rebuttal, the issue had been forfeited because defendant failed to object to these remarks, and the comments were not subject to plain error review. *Betts*, No. 1-93-2649 (1996) (unpublished order under Supreme Court Rule 23).

Initially, we reject the State's blanket assertion that the issue raised in defendant's petition was barred by *res judicata* because it was previously raised on direct appeal. Defendant

1-08-0428

argued in his *pro se* petition that the prosecutor's comments constituted plain error because the prosecutor referred to the "uncontradicted" evidence of Mahone and inferred that defendant did not testify, in violation of defendant's fifth amendment rights. There is no indication from the record that this particular fifth amendment issue was ever raised on direct appeal. Thus, we consider the ineffective assistance of appellate counsel claim under the *Strickland* analysis. As stated previously, in order to show prejudice, the defendant must show that the underlying issue had merit. *Childress*, 191 Ill. 2d at 175.

As defendant acknowledges, the record discloses that defendant forfeited this issue on direct appeal for failing to object to these comments. Had appellate counsel raised the issue on appeal, it would have been subject to plain error analysis. The plain-error doctrine creates "a narrow and limited exception to the general rule of forfeiture, whose purpose is to protect the rights of the defendant and the integrity and reputation of the judicial process." *People v. Allen*, 222 Ill. 2d 340, 353 (2006) (citing *People v. Herron*, 215 Ill.2d 167, 177 (2005)). It permits a reviewing court to consider unpreserved error when "(1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In making our determination, we consider the law at the time of defendant's direct appeal. *People v. Harris*, 206 Ill. 2d 1, 59 (2002).

Under the United States Constitution, an accused has a constitutional right not to testify

1-08-0428

as a witness in his own behalf. U.S. Const. Amend. V; *Griffin v. California*, 380 U.S. 609 (1965); *People v. Herrett*, 137 Ill. 2d 195, 210 (1990). Comments by a prosecutor as to a defendant's decision not to testify at trial violate the defendant's right against self-incrimination. See *Griffin* 380 U.S. 609. The State may comment that its case is uncontradicted, even if the defendant is the only one who could have contradicted it, if the comments are not intended to direct the jury's attention to the defendant's failure to testify. *People v. Herrett*, 137 Ill. 2d at 211; *People v. Hopkins*, 52 Ill. 2d 1, 6 (1972). A reviewing court must examine the challenged remarks in the context of the entire proceeding. *Herrett*, 137 Ill. 2d at 211.

Here, even if defendant could establish that the complained of remarks met this test, this error does not constitute plain error. We note that defendant did not articulate an argument as to how he has met either prong of the plain error analysis in his postconviction petition or on appeal. Nevertheless, even assuming his appellate counsel should have raised it, the evidence presented at trial was not closely balanced given the strength of Mahone's testimony, the evidence corroborating it, and defendant's flight. With respect to the second prong, our supreme court held that an improper reference to an accused's failure to testify at trial was "not an error which is so substantial that it deprives the accused of a fair and impartial trial." *People v. Herrett*, 137 Ill. 2d at 216. Accordingly, had counsel raised the issue in his direct appeal, defendant would have been barred by his procedural default from raising the error as grounds for reversal because he could not satisfy his burden under either prong of the plain-error doctrine. Because the underlying issue lacked merit, defendant cannot establish that he was prejudiced by appellate counsel's failure to raise the issue on direct appeal or in a discretionary appeal to the

1-08-0428

supreme court.

To the extent that defendant argues that appellate counsel also squandered his further right to a discretionary appeal to the United States Supreme Court, we construe this to be an argument that he would have been entitled to *habeas corpus* relief from a federal court.

Defendant cites *Freeman v. Lane*, 962 F.2d 1252 (7th Cir. 1992) (granting *habeas* relief and finding ineffective assistance of counsel for failing to raise a fifth amendment claim on direct appeal) in support of his argument.

However, defendant has not established that he would have been able to satisfy the procedural hurdles to allow for *habeas* consideration. Moreover, even if defendant could meet those procedural hurdles, he has not met his burden to establish that his federal claim would have been meritorious. See *Yancy v. Gilmore*, 113 F.3d 104, 106 (1997) (the defendant must establish that state court adjudication resulted in a decision that was contrary to established Federal law, as determined by the United States Supreme Court). In rejecting *habeas* relief, the court in *Yancy*, citing *Freeman*, relied on the United States Supreme Court decision in *Griffin*, finding that the state court adjudication was not contrary to *Griffin* because *Griffin* only involved a direct comment upon the accused's decision not to testify. *Yancy*, 113 F.3d at 106. In this case, defendant has not shown that the prosecutor made a direct comment on his failure to testify, in violation of *Griffin*, nor do we find support for that claim in the record.

Additionally, we note that trial counsel reiterated in closing argument that defendant had no obligation to testify, and the jury was properly instructed that defendant's decision not to testify should not be considered by them in rendering their verdict. See *People v. Kliner*, 185 Ill.

1-08-0428

2d 81, 158 (1998) (where court held even if error occurred, the challenged comments did not deprive defendant of a fair trial where trial judge instructed jury). Accordingly, for all of the foregoing reasons, defendant has not met his burden to establish that he was prejudiced by any failure of appellate counsel to raise this argument.

Next, we consider defendant's contention that trial counsel was ineffective for failing to investigate and present to the jury the .38 caliber revolver found at the scene, claiming that the evidence would have been exculpatory. Trial counsel acknowledged at the evidentiary hearing that she was aware of the gun, but she did not have the gun tested and she did not present the gun to any defense witnesses at trial. Rather, her strategy was to show that Mahone left the house after the shooting and took the gun with him, as defense witness Christian Mills had testified.

There was no evidence presented other than speculation that, had the gun been tested, there would have been any prints of value to make any determination valuable to defendant. Instead, defense counsel's theory was that Mahone took the gun with him when he left in an effort to show that Mahone was trying to hide something. We cannot say that this was an unreasonable defense strategy, given that defense witnesses testified that Mahone appeared to leave with the gun.

Nevertheless, even if defense counsel had tested the gun that was recovered on the second floor of the house, and even if it might have corroborated defendant's theory that the gun belonged to Travis, it would not have appreciably aided in defendant's theory of self-defense, let alone exculpated defendant, as he suggests. As stated previously, the fact that Travis was known to carry a gun and had a gun in his waistband was already presented to the jury. There was no

1-08-0428

evidence at trial that Travis pulled out the gun from his waistband, reached for the gun, or threatened defendant with the gun in any way. Rather, Mahone and Travis attempted to placate defendant after defendant pulled out his gun. Defendant chose not to testify. Accordingly, defendant cannot establish that, but for counsel's failure to test the gun for fingerprints or present the gun to the jury, there is a reasonable probability that the outcome of the trial would have been different.

Defendant next contends that he established 12 other instances of ineffective assistance of trial counsel during the evidentiary hearing and that due to the cumulative effect of these errors he is entitled to a new trial. He further maintains that the circuit court abused its discretion in denying his motion to amend his pleadings to conform to the proof at the hearing pursuant to section 2-616(a) of the Code of Civil Procedure (735 ILCS 5/2-616(a) (West 2008)). He requests that we now consider the cumulative effect of these errors and remand for a new trial.

The issues raised in his brief on appeal are all couched in terms of ineffective assistance of trial counsel claims. Those issues not previously addressed above include: (1) failure to inform him that he was subject to an extended term sentence; (2) failure to investigate drugs found in Travis' pockets to establish that he was selling cocaine; (3) failure to secure a jury instruction on provocation; (4) failure to impeach Mahone about his employment status and the testimony regarding \$250 that he gave to Travis to purchase his car; (5) failure to "investigate" and present the toxicology report to the jury in order to establish that Travis was intoxicated; (6) arguing to the jury that no guns were recovered and that Mahone left with the weapon; (7) failure to investigate the police report as to how many times Mahone was shot, and to impeach Mahone

1-08-0428

where Mahone testified falsely that he had been shot twice instead of once to inflame the passion of the jury; and (8) failure to investigate the cousin of Mahone's girlfriend to ascertain if Mahone had a gun when he arrived at that residence after the shooting.

Initially, we address the circuit court's denial of defendant's motion to amend. The Act provides for a court, in its discretion, to allow amendment of petitions "as shall be appropriate, just and reasonable and as is generally provided in civil cases." 725 ILCS 5/122-5 (West 2008). The Code of Civil Procedure provides for amendments "at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just." 735 ILCS 5/2-616 (West 2008). The decision to permit amendment to the pleadings is within the circuit court's discretion, and will be reversed only for an abuse of that discretion. *People v. Washington*, 256 Ill. App. 3d 445, 449 (1993).

During closing argument at the evidentiary hearing, defendant sought to amend his pleadings to conform to the proof adduced at the hearing and the court denied that request. We note that throughout the postconviction process defendant was given leave to repeatedly amend and supplement his petition and the circuit court granted extensive leeway at every stage, allowing defendant to take advantage of his *pro se* status and allowing rehearing argument on many of his claims.

As stated by the circuit court, the purpose of the evidentiary hearing was to determine whether counsel was ineffective for failing to investigate Tyler Lewis and Tonita Mills. Despite the narrow scope of the evidentiary hearing, the circuit court allowed defendant extensive leeway to show a pattern of conduct and allowed many of the issues and theories now raised to evolve,

1-08-0428

over the State's objection and even after rulings had been made on these issues at the second stage of the proceedings. Defendant was given an opportunity to address all of these issues in opening and closing argument and to present relevant evidence to support these issues.

Accordingly, the record reflects that defendant had ample opportunity to present his claims and to have those claims addressed by the court.

To the extent that he now seeks review of the circuit court's ruling on those claims, we have thoroughly considered these issues under the familiar *Strickland* standard and find that defendant cannot establish that he was prejudiced by any of his asserted deficiencies of trial counsel. Despite defendant's assertion in his pleadings that he would have taken a 32-year plea had counsel advised him of an extended term, the evidence at the evidentiary hearing contradicted that assertion. No plea was ever requested and no plea offer was ever made by the State. With respect to the drugs and the toxicology report, evidence that Travis engaged in selling drugs and that Mahone and Travis were intoxicated was presented to the jury at trial and was argued to the jury in closing argument to support defendant's theory of self defense. With respect to the failure to secure a jury instruction on provocation, the record reveals that defendant secured a second degree murder instruction and an instruction on mitigation. His argument regarding provocation was previously addressed on direct appeal and is therefore barred by *res judicata*. *People v. Sanders*, 238 Ill. 2d 391, 413 (2010).

With respect to the impeachment of Mahone, at trial, defense counsel attempted to impeach him regarding his statement to police that he was unemployed and regarding the \$250 that he gave Travis to buy a car. The State objected and the court sustained the objection, finding

1-08-0428

it collateral. It is well established that where the impeachment was collateral, defendant cannot establish deficient performance by trial counsel. See, e.g., *People v. Harris*, 182 Ill. 2d 114, 138 (1998) (improper to impeach on collateral matters). We further find no deficient performance in failing to investigate Mahone's cousin's girlfriend, who was an unknown witness. At no time in his petition or at the evidentiary hearing was defendant able to identify this witness whom he now claims counsel should have investigated in order to identify what testimony this person would have given at trial. See 725 ILCS 5/122-2 (West 1998). The other claims raised by defendant were either contradicted by the record or are related to trial strategy and did not ultimately prejudice defendant. Accordingly, because there is no individual error we find no basis for cumulative error. *People v. Garmon*, 394 Ill. App. 3d 977, 991 (2009).

III. CONCLUSION

Defendant has not met his burden to establish that he was prejudiced by any asserted deficiencies of trial and appellate counsel. We affirm the dismissal of defendant's postconviction petition.

Affirmed.

1-08-0428