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SIXTH DIVISION
February 10, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	03 CR 12607
)	
FREDERICK HARRIS,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.
)	

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice Cahill concurred in the judgment.

ORDER

HELD: The trial court's second-stage dismissal of defendant's postconviction petition was affirmed where defendant's claims were forfeited because they could have been raised on direct appeal and where appellate counsel was not ineffective for failing to raise the claims on appeal because: (1) defendant was not denied his right to a speedy trial; (2) the trial court considered the credibility of the witnesses at the hearing on defendant's pretrial motions to quash arrest and suppress identification; (3) defendant's constitutional rights were not violated by the presence of security officers in the courtroom during his jury trial; (4) defendant failed to establish that the prosecution knowingly used perjured testimony at trial; (5) the prosecution did not make improper comments during closing arguments; (6) trial counsel did not provide ineffective

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assistance at the pretrial hearing on defendant's motions to quash arrest and suppress identification; (7) the trial court did not engage in fact-finding or make credibility determinations in dismissing defendant's postconviction petition; and (8) defendant knowingly and voluntarily waived his right to counsel prior to trial.

Defendant, Frederick Harris, appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). He seeks reversal of that order and a remand for an evidentiary hearing, contending that he made a substantial showing of violations of his constitutional rights.

The underlying facts of this case are sufficiently set forth in our order from defendant's direct appeal and we will therefore discuss only those facts necessary to resolve the issues defendant raises in this appeal. In brief, the evidence presented at defendant's jury trial established that on May 25, 2003, defendant robbed the victim of her purse while she was pushing her 17-month-old daughter in a stroller. Two eyewitnesses saw defendant fleeing the area immediately after the robbery carrying a purse and wearing an orange t-shirt under a white basketball jersey with the number eight on the back. One of the eyewitnesses chased defendant to a gated stairwell and confined him to that area until police arrived. Defendant resisted the two officers who attempted to arrest him, at one point knocking one of those officers to the ground and punching and kicking him on the side of his head. Inside the stairwell where defendant was found hiding, the police discovered the victim's purse and an orange t-shirt and white basketball jersey with the number eight on the back that matched the description given by eyewitnesses. The jury found defendant guilty of aggravated robbery, aggravated battery on a public way, and

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aggravated battery of a police officer. The trial court sentenced defendant to a total term of 35 years' imprisonment, consisting of 30 years' imprisonment for aggravated robbery, 5 years set to run concurrently for aggravated battery on a public way, and 5 years set to run consecutively for aggravated battery of a police officer.

Defendant filed a direct appeal in which his sole contention was that his sentence was excessive. This court affirmed defendant's conviction and sentence. See *People v. Frederick Harris*, No. 1-05-1072 (unpublished order pursuant to Supreme Court Rule 23).

On June 26, 2007, petitioner filed a postconviction petition arguing that his trial counsel ineffectively argued pretrial motions to quash arrest and suppress identification. Defendant also argued that the trial court erred by not appointing him standby counsel, that his right to a speedy trial was violated, and that he was denied a fair trial by the presence of security officers during his trial. The petition was not ruled on within 90 days and was therefore advanced to second-stage postconviction proceedings. The trial court also appointed the Public Defender's office to represent defendant. On October 15, 2008, defendant indicated that he wished to proceed *pro se* and the trial court granted the public defender's motion to withdraw. The court then admonished defendant about representing himself during postconviction proceedings and granted him leave to file an amended postconviction petition.

In his amended *pro se* petition, in addition to the arguments raised in the original petition, defendant argued that the State knowingly used perjured testimony at trial and improperly commented during closing arguments on defendant's decision to not testify on his own behalf. Defendant further argued that the trial court improperly used his prior felony convictions to

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impeach him. The State filed a motion to dismiss defendant's petition, arguing that his claims were forfeited because they were not raised on direct appeal and that defendant's claims were also without merit.

Following arguments, the trial court granted the State's motion to dismiss. The court found that defendant's claims were forfeited because they were not raised on direct appeal and that defendant's claims lacked merit. This appeal followed.

At the second stage of proceedings under the Act, the circuit court must determine whether the allegations in the petition, supported by the trial record and any accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If no such showing is made, defendant is not entitled to an evidentiary hearing and the petition may be dismissed. *People v. Johnson*, 206 Ill. 2d 348, 357 (2002). Dismissal is also appropriate where the record from the original trial proceedings contradicts the allegations in defendant's petition. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001). Because a proceeding under the Act is a collateral attack on a judgment of conviction, all issues that were decided on direct appeal are res judicata and all issues that could have been raised in the original proceeding are subject to forfeiture. *People v. Mahaffey*, 194 Ill. 2d 154, 170-71 (2000). We review the circuit court's second stage dismissal of defendant's postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 378-79.

Defendant first contends that he was denied his right to a speedy trial. We find that this claim is forfeited because it is based on matters contained in the record and could have been raised on direct appeal. See *Mahaffey*, 194 Ill. 2d at 170-71. Defendant attempts to avoid

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forfeiture by claiming that his appellate counsel was ineffective for failing to raise the issue on appeal. To prevail on such a claim, defendant must show that the failure to raise the issue was objectively unreasonable and that, but for this failure, a reasonable probability exists that his conviction would have been reversed. *Johnson*, 206 Ill. 2d at 362-63. Appellate counsel is not required to brief every conceivable issue, and it is not incompetence for counsel to refrain from raising issues that are without merit. *People v. Edwards*, 195 Ill. 2d 142, 163-64 (2001). Unless the underlying issue is meritorious, defendant sustained no prejudice from counsel's failure to raise that issue on appeal. *People v. Childress*, 191 Ill. 2d 168, 175 (2000).

The speedy trial statute states in relevant part:

“Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant. *** Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record.” 725 ILCS 5/103-5(a) (West 2002).

The decision as to accountability for delay is within the discretion of the trial court and should not be disturbed absent a clear abuse of discretion. *People v. Williams*, 272 Ill. App. 3d 868, 877 (1995). “In reviewing speedy trial claims, this court is duty-bound to examine both the transcript of proceedings and the common-law record so as to do complete justice to both the State and defendant.” *People v. Sojak*, 273 Ill. App. 3d 579, 582-83, (1995).

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In this case, defendant was arrested and taken into custody on May 25, 2003, and was not released on bail. Therefore, his 120-day statutory period began to run on May 25, 2003. See *People v. Mayo*, 198 Ill. 2d 530, 536 (2002) (when a defendant is not released on bail and remains in custody, the 120-day period begins to run on the day the defendant is taken into custody and no formal demand for trial is required). Defendant also filed a written demand for a speedy trial on June 2, 2003. Defendant next appeared in court on July 9, 2003, 46 days after his arrest. Defendant's case was then continued by agreement to August 11, 2003. An agreement to continue the case is an affirmative act of delay attributable to the defendant which tolls the speedy-trial term. *People v. Kliner*, 185 Ill. 2d 81, 115 (1998).

On August 11, 2003, the case was continued by agreement to August 25, 2003. On August 25, defense counsel stated that he needed medical records and asked for a status date. According to the common law record, the case was continued by agreement to September 26, 2003. Additionally, "when a defense attorney requests a continuance on behalf of a defendant, any delay caused by that continuance will be attributed to the defendant." *Mayo*, 198 Ill. 2d at 537. Thus, the speedy trial term did not begin to run again on this date. On September 26, 2003, the case was continued by agreement to October 3, 2003, on which date the case was again continued by agreement to October 10, 2003. On October 10, defense counsel requested a status date and the case was continued by agreement to December 2, 2003. On that date, defense counsel asked for a hearing date on pretrial motions and the case was continued by agreement to January 14, 2004. On January 14, the case was continued by agreement to January 15, 2004. On January 15, the case was continued by agreement to January 21, 2004. On that date, the case was

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again continued by agreement to January 23, 2004.

On January 23, 2004, defense counsel filed an answer on defendant's behalf and asked that the case be set for a jury trial. According to the common law record, the case was continued by agreement. Trial was set for March 15, 2004. On March 15, defendant elected to proceed *pro se*. Defendant then demanded trial and stated he would be ready for trial the following day. The case was continued on State's motion to March 16, 2004. At this point, defendant's speedy trial term began to run again. On March 16, the case was continued on the State's motion to March 17. On that date, the case was continued on the State's motion to April 6, 2004, on which date the case was continued on the State's motion to April 7, 2004. On April 7, the case was continued on the State's motion to April 27, 2004. On April 27, 2004, the case was continued on the State's motion to May 10, 2004.

On May 10, 2004, the case was continued to May 19 on defendant's motion due to a finding of physical incapacity because defendant had chicken pox. Because this delay was occasioned by defendant, his speedy trial term stopped on this date. See *Mayo*, 198 Ill. 2d at 537. Defendant's trial began on May 19, 2004.

The record establishes that 46 days of defendant's term elapsed from May 25, 2003, to July 9, 2003, when the term was tolled. 56 days of defendant's term elapsed from March 16, 2004, to May 10, 2004, when the term was again tolled. Thus, 102 days of defendant's term expired before he was brought to trial and there was no violation of defendant's right to a speedy trial.

Defendant nevertheless argues that his term should have started to run again on January

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23, 2004. However, the common law record states that the continuance on that date was by agreement, and thus is attributable to defendant. See *Kliner*, 185 Ill. 2d at 115; *Sojak*, 273 Ill. App. 3d at 582-83 (finding that a continuance was properly attributed to the defendant where the half-sheet indicated the continuance was by agreement and noting that a reviewing court must consider the transcript of proceedings and the common law record).

Moreover, on January 23, 2004, the trial court stated, “[a]t this time defense files an answer on behalf of Mr. Harris and asks that this matter be set down for a jury trial.” Defense counsel responded, “that’s fine,” and the court said, “all right, March 15 for jury trial.” These circumstances are similar to those in *People v. Andrade*, 279 Ill. App. 3d 292 (1996). In that case, defense counsel stated that “we are ready to have this case set for trial.” The court and defense counsel discussed trial dates, with counsel demanding May 3 and the court setting the trial date for May 16. Defense counsel said “thank you” and the court ordered the case continued on the State’s motion to May 3, but “by agreement any other date.” Defense counsel responded, “sure.” The court then stated “by agreement to May 16 with for trial.” The half sheet also indicated that the continuance was by agreement. *Andrade*, 279 Ill. App. 3d at 296.

On appeal, the defendant argued that this discussion was a mere agreement to a date ordered by the court due to its crowded docket and not an agreement by the defendant to a delay of trial. The appellate court disagreed and found that the trial court properly attributed the delay to defendant:

“In the case before us, there is no evidence that the State or the court was not ready to proceed to trial immediately. Nor is there

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evidence that defense was ready to proceed. As is evidenced by the aforementioned colloquy, defense counsel's position on April 19 was at best ambiguous. His first statement to the court was "we are ready to have this case set for trial." This alone is not determinative, but coupled with the remaining colloquy, it is. Although counsel stated he was continuing in his demand for trial, he did not state he was ready to proceed immediately nor did he demand trial for that day. Rather, he stated that he was ready to have the case set for trial." *Andrade*, 279 Ill. App. 3d at 297-98.

In this case, as in *Andrade*, we find that defendant agreed to the continuance on January 23, 2004. Defense counsel's request was framed as one for setting a trial date and not a demand to immediately proceed to trial. There is also no evidence suggesting that defendant was ready to proceed to trial immediately or that the State or the court were not ready to proceed to trial. In this case, as in *Andrade*, the half sheet also indicates that the continuance was by agreement. For these reasons, we reject defendant's claim that his term should have started to run again on January 23, 2004, and conclude that his right to a speedy trial was not violated. In light of that conclusion, we find that appellate counsel was not ineffective for failing to raise the issue on appeal. See *Childress*, 191 Ill. 2d at 175.

Defendant next contends that the trial judge failed to consider the "matter of credibility" at the pretrial hearing on defendant's motions to quash arrest and suppress identifications. Defendant asserts that the court did not consider the "crux of [his] defense" and that there were

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discrepancies and inconsistencies in the testimony of an officer who appeared as a witness at the hearing on defendant's pretrial motions.

We find that this claim is forfeited because it is based on matters contained in the record and could have been raised on direct appeal. See *Mahaffey*, 194 Ill. 2d at 170-71. Defendant responds that appellate counsel was ineffective for failing to raise the issue on appeal. However, we find that there is no merit to defendant's underlying claim.

At the conclusion of the hearing on defendant's pretrial motions, the trial court stated:

"I've considered the testimony of the witnesses and observed their demeanor. Defendant is impeached by several convictions and I don't find his testimony is reasonable, he's not a credible witness. The officer testified, he was unimpeached, I find his testimony to be credible."

This portion of the record refutes defendant's claim that the trial court did not consider the credibility of the witnesses or the "crux of [his] defense." As to the alleged discrepancies in the officer's testimony, it was the trial court's responsibility to determine what effect, if any, they had on the credibility of the officer and the weight to be given to his testimony. *People v. Bannister*, 236 Ill. 2d 1, 18 (2009). These questions were resolved against defendant and a reviewing court will not substitute its judgment of the finder of fact. *Bannister*, 236 Ill. 2d at 18. For these reasons, we find that defendant's underlying claims are without merit and that appellate counsel was therefore not ineffective for failing them on appeal.

Defendant next contends that he was prejudiced by the presence of SORT officers in the

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courtroom during his jury trial.¹ We again find that defendant's claim is based on matters contained in the record and therefore could have been raised on direct appeal. *Mahaffey*, 194 Ill. 2d at 170. Defendant acknowledges that the record shows that SORT officers were present and near him during trial, but he claims that his petition reveals the proximity and attire of those officers and that his claim therefore could not have been properly raised on direct appeal. See *People v. Peeples*, 205 Ill. 2d 480, 526-27 (2002) (finding that defendant's claim regarding the security measures employed during his trial was not forfeited where, although the record on appeal reflected the presence of security officers near defendant during trial, the nature and extent of those procedures was not in the record but was contained in defendant's postconviction petition). We have reviewed defendant's petition, however, and have found no specific allegations regarding the nature and extent of the security procedures employed. Rather, defendant's allegation is based entirely on matters contained in the record and therefore the claim is forfeited.

Regardless, we find no constitutional violation arising out of the security procedures employed in this case. The record shows that defendant had an altercation with courtroom deputies prior to trial and that the trial court admonished him about the possibility of being placed in the custody of SORT officers if he continued to cause disruptions. Defendant indicated he understood. Approximately one week later, defendant told the court he did not think it was necessary to place him in the custody of SORT. Defendant acknowledged that he had another

¹The parties have not supplied this court with a definition of the acronym "SORT." However, in denying defendant's motion for a new trial, the trial court stated that the only difference between a sheriff's deputy and a SORT officer was the color of his or her shirt.

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incident with the court deputies after the trial court previously admonished him and the court stated that it was going to rely upon the advice of the deputy that defendant needed to be placed in SORT custody. The court also observed that defendant was “a little quick tempered.” The court told defendant that it would take precautions to ensure that his rights were not prejudiced in front of the jury. Defendant also raised this issue in his posttrial motion. The trial court rejected it, noting that the only difference between a deputy and a SORT officer was the color of his or her shirt, that nothing was communicated to the jury that would have suggested anything “extraordinary” about the presence of the SORT officers, and that defendant was in street clothes and was never shown to be in custody.

Defendant claims that he was prejudiced by the presence of the SORT officers, that he did not “do anything” to justify the court considering him a security risk, and that the trial court employed the security procedures for the “sole purpose” of giving “the State an advantage.”

Decisions regarding security and safety in the courtroom are squarely within the discretion of the trial court. *Peeples*, 205 Ill. 2d at 532. Moreover, “once the challenged security measures are found not to be inherently prejudicial, the defendant bears the burden of affirmatively demonstrating actual prejudice as a result of the in-court security.” *Peeples*, 205 Ill. 2d at 532, citing *Holbrook v. Flynn*, 475 U.S. 560, 572, 106 S. Ct. 1340, 1347-48, 89 L. Ed.2d 525, 537.

In *Peeples*, the defendant alleged in a postconviction petition that his right to a fair trial was violated by the presence of two uniformed deputy sheriffs who were seated and sometimes stood within arms reach behind defendant as he sat at the defense table. The defendant also

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alleged that a deputy sheriff escorted him to the witness stand, stood behind him while he testified, and then escorted him back to the defense table. *Peeples*, 205 Ill. 2d at 526. Our supreme court observed that not “every courtroom practice which tends to single out a defendant from everyone else in the courtroom constitutes a violation of a defendant's constitutional rights.” *Peeples*, 205 Ill. 2d at 528, citing *Holbrook*, 475 U.S. at 567, 106 S. Ct. at 1345, 89 L. Ed. 2d at 533. Rather, “‘jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance’ and that ‘every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct’ cannot be eliminated from court proceedings.” *Peeples*, 205 Ill. 2d at 528-29, quoting *Holbrook*, 475 U.S. at 567, 106 S. Ct. at 1345, 89 L. Ed. 2d at 533-34. The court further observed that in *Holbrook*, the Supreme Court rejected a presumption that the presence of identifiable security guards in the courtroom is inherently prejudicial and held that “[i]n view of the variety of ways in which such guards can be deployed, *** a case-by-case approach is more appropriate.” *Peeples*, 205 Ill. 2d at 529, quoting *Holbrook*, 475 U.S. at 569, 106 S. Ct. at 1346, 89 L. Ed. 2d at 535. The court noted that the Supreme Court’s rejection of such a presumption was based upon the recognition that “jurors could reasonably draw a ‘wide [] range of inferences * * * from the officers' presence’ and that such presence ‘need not be interpreted as a sign that [a defendant] is particularly dangerous or culpable.’” *Peeples*, 205 Ill. 2d at 529, quoting *Holbrook*, 475 U.S. at 569, 106 S. Ct. at 1346, 89 L. Ed. 2d at 534.

Reviewing the defendant’s claim in that case, the court initially relied upon *Holbrook* to find that the security procedures employed by the trial court were not inherently prejudicial.

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Peeples, 205 Ill. 2d at 480. The court then rejected the defendant's claim that the only possible inference raised by the security measures was that the defendant was guilty. The court noted that other courts have found no prejudice when an officer was positioned near the defendant during trial, where two uniformed officers were seated behind the defendant during trial, or where a prospective jury panel observed a defendant being escorted into the courtroom by a uniformed sheriff's deputy. *Peeples*, 205 Ill. 2d at 530-31. The court reviewed the record and agreed with the trial court that no extraordinary measures were adopted regarding security and that there was no evidence that the number of guards or their weaponry suggested particular official concern or alarm. *Peeples*, 205 Ill. 2d at 531. Accordingly, the court found that any inferences unfavorable to defendant would be too "highly speculative" and that the evidence presented by the defendant was insufficient to make a substantial showing that his constitutional rights were violated. *Peeples*, 205 Ill. 2d at 531-32.

We reach the same result in this case. Initially, contrary to defendant's claim, the presence of SORT officers during trial was not inherently prejudicial. See *Peeples*, 205 Ill. 2d at 480. Moreover, defendant's claim that he did not "do anything" to warrant the security measures employed and that those measures were used to give an advantage to the State is contradicted by the record. Defendant had an altercation with courtroom deputies prior to trial and he indicated he understood when the trial court admonished him that he would be placed in the custody of SORT officers if he caused another disruption. Approximately one week later, defendant acknowledged to the court that another incident with courtroom deputies had occurred. Thus, defendant himself acknowledged the conduct that the trial court felt justified placing defendant in

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SORT custody. Moreover, we note the trial court's observations that the only difference between a SORT officer and a deputy was the color of his or her shirt, that defendant appeared in street clothing and was not shown in custody throughout trial, and that nothing was communicated to the jury to suggest anything "extraordinary" about the presence of the SORT officers.

Defendant has presented no evidence to contradict the trial court's statements regarding the security measures employed or to make a substantial showing that those measures denied him a fair trial. See, e.g., *People v. Fields*, 322 Ill. App. 3d 1029, 1035 (2001) ("It is a common courtroom practice to have uniformed guards present during court proceedings"); *Holbrook*, 475 U.S. at 569, 106 S. Ct. at 1346, 89 L. Ed. 2d at 534 (the "presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable"). Accordingly, we find that there is no merit to defendant's claim and that counsel was not ineffective for failing to raise it on appeal.

Defendant next contends that the State knowingly used perjured testimony at trial. The record establishes that at the hearing on defendant's motion to suppress, Officer O'Brien testified that defendant was not wearing a shirt when the officer found him hiding in the stairwell. The officer also testified that an orange t-shirt and a basketball jersey with the number eight on the back were found in that stairwell. The officer was shown a "mug shot" of defendant wearing a blue shirt and testified that he did not recall giving defendant a shirt. At trial, Officer O'Brien again testified to the above facts and also testified that he was not present when the photo of defendant wearing a blue shirt was taken and that defendant must have gotten the shirt in the lockup because he was not wearing a shirt when he was arrested.

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Defendant asserts that the mug-shot of him wearing a blue t-shirt is evidence that Officer O'Brien committed perjury. Defendant further claims that the State knowingly used this perjured testimony when it called the officer as a witness at trial and failed to correct the alleged perjured testimony.

We find that defendant's claim is forfeited because it is based on matters contained in the record and therefore could have been raised on appeal. Defendant claims that appellate counsel was ineffective for failing to raise this issue. We disagree. A witness's testimony only constitutes perjury if the witness knowingly makes a false statement. *People v. Pulgar*, 323 Ill. App. 3d 1001, 1008 (2001). In this case, the photograph of defendant wearing a blue shirt does not establish that Officer O'Brien committed perjury or that the State knowingly used perjured testimony. Defendant's theory appears to be that the photograph establishes that he was wearing a blue t-shirt when he was arrested and that he was not wearing the jersey and orange t-shirt described by the witnesses. However, the officer's testimony at the pretrial hearing was consistent with his trial testimony that defendant was not wearing a shirt when he was arrested. Moreover, the victim and two other witnesses who were brought to the area where defendant was arrested for a show-up also testified that defendant was not wearing a shirt at the time. Additionally, defendant attempted to use the photograph when cross-examining Officer O'Brien in order to establish that the officer's testimony that defendant was not wearing a t-shirt at the time of his arrest was inconsistent with the photograph showing defendant in a blue t-shirt. However, the officer testified that he was not present when the photograph of defendant wearing a blue t-shirt was taken. Further, even if defendant had established such an inconsistency during

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the officer's cross-examination, this does not establish that the officer committed perjury. See *People v. Laboy*, 227 Ill. App. 3d 654, 6621 ("perjury does not deal with inconsistency, it deals with falsity").

Similarly, although defendant claims that inconsistencies in all of the witnesses' testimony indicate that "someone was not being truthful," inconsistencies in testimony do not establish perjury. *People v. Amos*, 204 Ill. App. 3d 78, 85 (1990); see also *People v. Berland*, 74 Ill. 2d 286, 316-17 (1979) (discrepancies in the description of the defendant and variations in what different witnesses reported they saw do not indicate perjury). Moreover, for false testimony to constitute perjury, that testimony must have been material to defendant's guilt or innocence. *Laboy*, 227 Ill. App. 3d at 663. The testimony that defendant was not wearing a shirt at the time of his arrest was not material to his conviction. All of the witnesses described the offender as wearing an orange t-shirt and white basketball jersey with the number eight on the back. Defendant was found hiding in a stairwell and in that stairwell police also found an orange t-shirt and white jersey matching the witnesses' description. The victim's purse was also discovered by police in the same area defendant was found hiding. Thus, whether or not defendant was wearing a blue t-shirt at the time of his arrest was not material to his guilt. Accordingly, we find that defendant has not made a substantial showing that any witnesses committed perjury. Given this finding, we likewise conclude that defendant has not made a substantial showing that the State knowingly used perjured testimony. We thus find that appellate counsel was not ineffective for failing to raise this issue on appeal.

Defendant next contends that the prosecution made improper comments during closing

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arguments. This claim is forfeited because it is based on matters contained in the record and therefore could have been raised on direct appeal. See *Mahaffey*, 194 Ill. 2d at 170. Defendant responds that appellate counsel was ineffective for failing to raise the issue on appeal. We disagree.

The prosecution is afforded wide latitude in making closing arguments so long as the comments made are based on the evidence or reasonable inferences drawn therefrom. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). When reviewing a challenge to remarks made by the prosecution during closing arguments, the comments must be considered in context of the entire closing arguments made by both parties. *People v. Wiley*, 165 Ill. 2d 259, 295 (1995). A reviewing court will not reverse a jury's verdict based upon improper remarks made during closing arguments unless the comments were of such magnitude that they resulted in substantial prejudice to defendant and constituted a material factor in his conviction. *People v. Griffin*, 368 Ill. App. 3d 369, 376 (2006).

First, defendant claims that the prosecution made improper comments during rebuttal argument. The record shows that in opening statements, defendant argued that he was beaten by the police when he was arrested and that as a result he suffered a laceration that left blood "gushing" from his head. Defendant also made the following statements during closing arguments, which focused on whether he was wearing a blue t-shirt at the time he was arrested:

"Ladies and gentlemen, I asked Mary Breiteneker was it true that the only reason she identified me as the person that did this is because the police held that shirt up to my chest when they

arrested me. She said no.

I'm not sure if I asked the other two witnesses the same question, but they tried to make it clear that the shirt, the jersey with the number 8 on it, had absolutely nothing to do with the reason I was identified, yet they all testified that the person that committed the crime was wearing that shirt.

Now, consider this fact. According to the evidence, the only physical tangible evidence the State has admitted to try me for the crime is that jersey. In fact, from day one, the date of May 25, 2003, the shirt was a very big part of their case. That's the reason why the police inventoried it under inventory number 10144062 as evidence.

Now, everybody testified when the police arrested me when they supposedly brought me out to the stairwell, I wasn't wearing any shirt. And not only did I prove that they were lying, because the mug shot picture that was taken of me the day I was arrested clearly shows me wearing a blue tee shirt.

But think about this. If it's true that I didn't have on a shirt when the police arrested me and if it's true that that shirt had nothing to do with the identification of me, then why did the police give me a shirt back to put on if it was mine? Because they're

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lying.

I did have on a shirt, and the shirt they found, it wasn't mine. That shirt was the reason I was identified, and the fact that I'm black. Plain and simple."

In rebuttal arguments, the prosecutor made the following complained-of remarks:

"Do you remember when Mr. Harris was talking in his opening statement about how he was being unbelievably beaten and gushing blood? Tell me something, where is the blood on the tee shirt he claims he was wearing during this entire time he was beaten? Where is the tee shirt he claims he was wearing the entire time of this beating? Where is one drop of the blood that he claims is gushing out of his head? You know why there is no blood on this shirt? Because he got the shirt well after the fact. He got it from either an inmate or a lockup keeper who was being kind to him. Where is the blood? It's not on there."

Defendant claims that these comments were improper because they were made in rebuttal and denied him the opportunity to respond and because they were designed to impeach his credibility. However, when read in context, it is evident that the prosecutor's comments were made in response to defendant's closing argument and were a comment on the persuasiveness of the defendant's theory of the case. Counsel may comment upon the credibility of the defense theory of the case and may respond in rebuttal to statements made by the defense that clearly

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invite a response. *People v. Evans*, 209 Ill. 2d 194, 225 (2004); *People v. Love*, 377 Ill. App. 3d 306, 314 (2007). Here, defendant told the jury that he was bleeding from the head and then argued in closing that the witnesses who said he was not wearing a shirt when he was arrested were lying and that he was wearing the same blue t-shirt when he was arrested that he was wearing in the mug-shot photograph. In response to this argument, the prosecutor made the complained-of remarks in order to point out to the jury that there would have been blood on the t-shirt had defendant been wearing it at the time of his arrest. The prosecutor's argument that defendant was not wearing a blue t-shirt when he was arrested is supported by the record. Although defendant claimed he was wearing a blue t-shirt at the time of his arrest, no such t-shirt was found by the police when defendant was arrested and witnesses testified that defendant was not wearing a shirt at the time of his arrest in the stairwell. Officer O'Brien was shown the mug-shot photograph depicting defendant in a blue t-shirt and testified that defendant was not wearing that shirt when the officer found defendant hiding in the stairwell. Moreover, witnesses identified defendant as the offender and stated that he was wearing an orange t-shirt under a white jersey with the number eight on the back at the time he committed the robbery. A white jersey with the number eight on the back and an orange t-shirt were discovered by police in the stairwell where defendant was found hiding.

When viewed in context, the prosecutor's remarks were made in response to defendant's closing argument. The remarks were also supported by the evidence and were a proper comment on the lack of evidence to support defendant's theory of the case. We therefore find no error in the prosecutor's remarks.

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Defendant next claims that the prosecutor improperly commented on defendant's decision not to testify or present any evidence on his own behalf.

In closing, defendant argued that the witnesses against him were "liars" and then stated, "I can't talk about the details of my arrest because I chose not to testify, because I can't question myself, so all I can say - -." At this point, the prosecutor objected and stated that defendant had a right to testify. The court sustained the objection and instructed the jury to disregard defendant's comment. Defendant proceeded to argue that he did not fall in the stairwell and cause the gash to his head.² In rebuttal, the prosecutor reminded the jury that defendant repeatedly stated in opening and closing arguments that he was innocent and that he did not commit the robbery. The prosecutor argued that opening and closing statements were not evidence that could be considered by the jury. The prosecutor then made the following remarks:

"If he wanted evidence, he had every right to take the stand. That is a constitutional right, a constitutional right that he can do that. Now, I'm not saying you can't consider that that [sic] he didn't do it, but you can't take and convert his statements, his opening statement and self-serving denial, opening statement and closing argument, into some kind of ideal, he said he didn't do that."

Defendant claims that these remarks improperly shifted the burden of proof to him. We disagree. The prosecutor's remarks were made in response to defendant's statement in closing

²At trial, Officer O'Brien testified that defendant fell and hit his head in the stairwell during his struggle with the police.

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that he did not testify because he could not question himself and therefore was unable to tell the jury the details of his arrest. The implication of defendant's statements was that he was beaten by the police when he was arrested but that he could not testify to this beating because he chose not to take the stand and testify on his own behalf. Defendant then explained that he chose not to testify because he was unable to question himself. Therefore, when viewed in context, the prosecutor's remarks were not an attempt to shift the burden of proof but instead were invited by defendant and were made in order to rebut defendant's statement that he could not testify on his own behalf. As noted, a prosecutor may respond to comments made by defense counsel which clearly invite a response. *Evans*, 209 Ill. 2d at 225; *People v. Starnes*, 374 Ill App. 3d 132, 135-36. The prosecutor was also properly arguing that opening and closing statements were not evidence and that defendant's claim that he did not commit the crime, made in his opening and closing statements, could not be considered as evidence by the jury. We find no error in the prosecutor's remarks.

Moreover, even if the prosecutor's comment was improper, defendant suffered no prejudice. The prosecutor told the jury that although defendant had a constitutional right to testify, his decision not to testify could not be considered by the jury. Additionally, the evidence of defendant's guilt in this case was overwhelming. Multiple witnesses testified that the offender was wearing a white sports jersey with the number eight on the back over an orange t-shirt. The victim testified that she identified defendant at the scene as the person who stole her purse and that she was looking at defendant's face while he attempted to take her purse. Another witness testified that he was at home on the date of the robbery and that he looked out his window when

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he heard screaming and saw the victim pointing at a man who she claimed had just stolen her purse. This witness identified defendant as this man. A third witness, the victim's neighbor, ran outside when he heard screaming and was told what had happened by the victim. After searching the area, this witness saw defendant running away while carrying a purse. Defendant was found by the police hiding in a stairwell, where officers discovered the victim's purse and an orange t-shirt and white sports jersey with the number eight the back. Finally, Officer O'Brien testified that defendant hit him and another officer as they attempted to place defendant under arrest. This evidence overwhelmingly proved defendant's guilt. See, e.g., *People v. Cloutier*, 156 Ill.2d 483, 509 (1993) (finding that, in light of the overwhelming evidence of defendant's guilt, "none of the[] alleged prejudicial comments were of a magnitude sufficient to have altered the trier of fact's determination of defendant's guilt").

Finally, the trial court instructed the jury that closing arguments were not evidence and that the jury should disregard any statement made during closing that was not based on the evidence. The court also gave the jury these instructions in writing. The trial court's admonitions ameliorated any possible prejudice resulting from the prosecutor's allegedly improper remarks. As this court has observed:

“Regulation of remarks by counsel is best left to the trial court's discretion, which may cure such errors by giving proper jury instructions on the law, informing the jury that counsel's arguments are not evidence and to be disregarded if not supported by the evidence at trial, or by granting an objection and admonishing the

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jury to disregard comments.”” *People v. Gonzalez*, 388 Ill. App. 3d 566, 598 (2008), quoting *People v. Tijerina*, 381 Ill. App. 3d 1024, 1032-33 (2008).

See also *People v. Griffin*, 368 Ill. App. 3d 369, 377 (2006) (finding any error in improper prosecutorial comments during closing arguments harmless where the court instructed the jury that closing arguments were not evidence and should be confined to the evidence and reasonable inferences drawn therefrom, and noting that “[i]nstructions of this sort decrease the likelihood that improper remarks in the prosecutor's closing argument rose to the level of plain error”).

Accordingly, we find that not only was there no error in the prosecution's closing arguments, either individually or cumulatively, but also that any possible error was not sufficiently prejudicial and did not constitute a material factor in defendant's conviction. Moreover, because there is no merit to defendant's claim that the prosecutor made improper comments in closing arguments, we find that defendant failed to make a substantial showing that his appellate counsel was ineffective for failing to raise the issue on appeal. See *Childress*, 194 Ill. 2d at 175.

Defendant next contends that his trial counsel was ineffective at the hearing on defendant's pretrial motions to quash arrest and suppress identification. Defendant claims that his counsel failed to utilize police reports, photographs, and other physical evidence; failed to object to or exploit the flaws in the State's case; and failed to present a vigorous argument on his behalf.

We find that this claim is forfeited because it could have been raised on direct appeal. In

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response, defendant asserts that appellate counsel was ineffective for failing to raise the issue on appeal. We disagree.

Claims of ineffective assistance of counsel are reviewed under the two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984). *People v. Evans*, 186 Ill. 2d 83, 93 (1999). To prevail on a claim of ineffective assistance of counsel, defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and that (2) counsel's deficient performance so prejudiced defendant as to deny him a fair trial. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 674, 104 S. Ct. at 2064. The failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994).

With regard to the first prong, defendant must overcome the strong presumption that, under the circumstances, the challenged action or inaction of counsel was sound trial strategy. *People v. Jones*, 322 Ill. App. 3d 675, 678-79 (2001). Moreover, because effective assistance of counsel refers to competent, not perfect, representation (*Palmer*, 162 Ill. 2d at 476), matters relating to trial strategy are generally immune from claims of ineffective assistance of counsel (*People v. West*, 187 Ill. 2d 418, 432 (1999)).

To establish prejudice, defendant must show there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Johnson*, 206 Ill. 2d at 362. If we can resolve defendant's claim on the issue of prejudice, we need not consider whether counsel's performance was deficient. *People v. Smith*, 326 Ill. App. 3d 831, 841 (2001).

Defendant initially claims that his counsel failed to attack the credibility of Officer

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O'Brien, failed to impeach the officer with out-of-court statements, and failed to utilize police reports. However, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which generally will not support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). Regardless, the record shows that defense counsel conducted a vigorous cross-examination of Officer O'Brien and specifically attempted to impeach him regarding information the officer testified to at the hearing but did not include in his general offense report. Defendant also claims that counsel failed to make objection during the hearing. The claim is refuted by the record, which shows that counsel made timely objections throughout the hearing. Moreover, a "defense counsel's failure to object to testimony may be a matter of sound trial strategy, and does not necessarily establish deficient performance." *People v. Evans*, 209 Ill. 2d 194, 221 (2007). Ultimately, defendant's claims relate to matters of trial strategy and amount to the assertion that counsel should have handled the pretrial motion differently. However, "[n]either mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent." *People v. Negron*, 297 Ill. App. 3d 519, 538 (1998).

Moreover, we have already found that the evidence of defendant's guilt was overwhelming. In light of that overwhelming evidence, defendant has not shown a reasonable probability that but for counsel's alleged errors, the result of the pretrial hearings would have been different. See, e.g., *People v. Lopez*, 371 Ill. App. 3d 920, 929-931 (2007) (finding that defendant was not prejudiced by alleged errors in counsel's performance where the evidence of his guilt was overwhelming); *People v. Benford*, 295 Ill. App. 3d 695, 699 (1998). We therefore

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find that defendant has failed to make a substantial showing that his right to effective assistance of counsel at the hearing on his pretrial motions was violated. Similarly, because the underlying issue is without merit, we find that defendant has failed to make a substantial showing that he was denied effective assistance of appellate counsel. See *Childress*, 191 Ill. 2d at 175.

Defendant's next contention is that the trial court improperly dismissed his postconviction petition after it engaged in fact-finding and credibility determinations. We find this claim to be without merit. Our review establishes that the trial court found that a majority of defendant's claims could have been raised on direct appeal and were therefore barred by forfeiture. The court found that defendant's claim regarding the Speedy Trial Act was "bald and conclusory" and unsupported by evidence. The court also found that defendant failed to make a substantial showing of prejudice from the presence of SORT officers, that his claim regarding the State's knowing use of perjured testimony was unsupported by caselaw, and that the prosecutor did not make improper comments during closing arguments. Finally, the court reviewed defendant's claims of ineffective assistance of trial and appellate counsel under the *Strickland* test and found them to be without merit. Accordingly, we find that the trial court did not engage in fact-finding or make credibility determinations in dismissing his postconviction petition.

Defendant's final contention is that he did not voluntarily waive his right to counsel. The United States Constitution guarantees criminal defendants the right to assistance of counsel "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *People v. Baker*, 92 Ill. 2d 85, 90 (1982). Complimenting this right, a criminal defendant has the corresponding right to self-representation and may proceed *pro se* provided the

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defendant acts knowingly and intelligently in foregoing counsel and that the waiver of counsel is clear and unequivocal. *Faretta v. California*, 422 U.S. 806, 819, 835, 95 S. Ct. 2525, 2533, 2541, 45 L. Ed.2d 562, 572, 581-82 (1975); *People v. Burton*, 184 Ill. 2d 1, 21 (1998).

In Illinois, the proper procedure for a trial court to follow when defendant seeks to waive counsel is governed by Supreme Court Rule 401(a) (134 Ill.2d R. 401(a)), which provides:

“(a) Waiver of Counsel. Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

- (1) the nature of the charge;
- (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
- (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court.” 134 Ill.2d R. 401(a).

Supreme Court Rule 401(a) helps to ensure that a defendant's waiver is knowing and voluntary, and as a consequence, our supreme court has held that “compliance with Rule 401(a) is required for an effective waiver of counsel.” *People v. Haynes*, 174 Ill.2d 204, 236 (1996). Nevertheless, the trial court need not strictly comply with the provisions of the rule; “substantial compliance

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will be sufficient to effectuate a valid waiver if the record indicates that the waiver was made knowingly and voluntarily, and the admonishment the defendant received did not prejudice his rights.” *Haynes*, 174 Ill.2d at 236. The standard of review when determining whether there has been a knowing and intelligent waiver of counsel is the abuse of discretion standard. *People v. Dixon*, 366 Ill. App. 3d 848, 852 (2006).

The record shows that after the trial court denied defendant’s pretrial motions, the parties appeared in court on March 15, 2004. The following exchange took place:

“MS. YI [PUBLIC DEFENDER]: Judge, this is Mr. Frederick Harris. Mr. Harris wishes to proceed pro se in this matter. I spoke to him briefly in the lockup this morning. Mr. Harris does not wish to proceed further with the Public Defender’s Office.

THE COURT: Is that right, Mr. Harris?

THE DEFENDANT: Yes, Judge.”

Defendant then explained to the judge that he was having difficulty contacting his public defender by phone and that she had refused to reopen and reconsider his motion to quash. Defendant also argued that his counsel had been ineffective in arguing his motion to quash arrest and suppress identification. The court explained to defendant that his pretrial motions had already been heard and denied and that defendant had not presented anything that would cause the court to change it’s ruling on those motions. The exchange continued:

“THE COURT: *** Now, *** what you need to decide is

from this point on is whether or not you want to continue to be represented by an attorney or whether you want to represent yourself. This is the only discussion that you and I will have right now. Now, if you want to be represented by an attorney, you certainly can hire an attorney. If you can't afford to hire an attorney, then the Public Defender will represent you, and I will not allow you to choose your Public Defender. That is up to the Public Defender's Office. You are shaking your head no. If you don't want to be represented by the Public Defender, you can hire a lawyer or represent yourself. You need to decide what you want to do. I have had a –

THE DEFENDANT: I choose to represent myself.

THE COURT: I have had a long discussion about you representing yourself. You know how I feel about it, but that is up to you, and if you are telling me you want to represent yourself, I will go through the admonitions that are required under the Supreme Court Rules, and if you tell me that is what you want to do, I will discharge the Public Defender from representing you, and then you will be on your own, but I want you to understand that I will not treat you any differently than any other lawyer. I will not give you any breaks; I will not relax the rules for you. You are

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going to have to follow the rules, and the chips will fall where they may. I have told you before that it is not a good idea, not a good idea, but it is up to you. You understand?

THE DEFENDANT: Yes, I understand that.”

The trial court then admonished defendant regarding the charges against him, the minimum and maximum sentence for each charge, and the required terms of mandatory supervised release. The court also informed defendant that his background would subject him to Class X sentencing and that he could receive consecutive sentences. Defendant stated that he understood each of these admonishments. Defendant also told the court that he understood he had a right to appointed counsel but that he did not want the particular public defender who had been representing him. Defendant informed the court that he was 30 years old, that he received his GED, and that he went to Chicago State University.

The exchange between the trial court and defendant then continued:

“THE COURT: Mr. Harris, this is the moment right now where we will stop this discussion. I will not try to persuade you one way or another any more. You have made your decision, and it is fine with me. If you want to represent yourself from this point forward, you tell me so.

THE DEFENDANT: I think I need to represent myself, Judge, but I need assistance of counsel.

THE COURT: You don't understand that. You will not

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have assistance of counsel. If you represent yourself, you are on your own.

THE DEFENDANT: Okay. Well, fine.

THE COURT: Is that what you want to do?

THE DEFENDANT: That is what I will do.”

The court then found that defendant had been properly admonished, that he understood his right to appointed counsel, and that he had declined that right. Defendant later told the court that a witness he wished to call had moved. The court told defendant that if he had an attorney, he or she could reach out to that witness but that if defendant was going to represent himself, “you will have to represent yourself.” Defendant stated that, “that is a dead issue as far as I am concerned,” to which the court replied that it would therefore not revisit the issue.

Defendant now claims that he was “clearly not refusing/rejecting any counsel.” Instead, defendant claims that he was rejecting the specific public defender who had been appointed to represent him. Defendant also claims that he “clearly asked for standby counsel to assist him.”

Our review of the record establishes that defendant knowingly and unequivocally waived his right to counsel. The trial court properly admonished defendant of the charges against him and the corresponding sentences that he could receive if he were found guilty. The court also told defendant that he had a right to counsel, that he could hire an attorney, and that if he could not afford an attorney, the court would appoint one to represent him. Defendant indicated that he understood each of these admonishments. When defendant told the court he did not want to be represented by the specific public defender who had been representing him, the court told

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defendant that he could not choose the public defender who represented him because that was up to the Public Defender's office. Defendant stated that he wished to represent himself. This record refutes defendant's claim that he did not knowingly and voluntarily waive his right to counsel.

We also find no abuse of discretion in the trial court's denial of defendant's request for standby counsel. "[T]he right of self-representation does not carry with it a corresponding right to the assistance of a legal adviser; one choosing to represent himself must be prepared to do just that." *People v. Gibson*, 136 Ill. 2d 362, 383 (1990). Nevertheless, a trial court may appoint standby counsel to assist a defendant who elects to proceed *pro se*. *People v. Smith*, 377 Ill. App. 3d 458, 461 (2007). When a trial court considers whether to appoint standby counsel to assist a *pro se* defendant, relevant criteria include the nature and gravity of the charge, the expected factual and legal complexity of the proceedings, and the abilities and experience of the defendant. *Gibson*, 136 Ill. 2d at 380. The trial court has broad discretion in deciding whether to appoint standby counsel, and a reviewing court will not reverse the trial court's decision absent an abuse of that discretion. *Smith*, 377 Ill. App. 3d at 461.

In this case, defendant was charged with aggravated battery, aggravated robbery, and resisting or obstructing a peace officer. The case against defendant was factually simple and the issues at trial were not complex. The case rested primarily on eyewitness testimony and no scientific evidence or expert testimony was involved. Defendant was also 30 years old and told the court that he had obtained a GED and attended college. Defendant also had experience with the judicial system based upon an extensive criminal history. Under these circumstances, we

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cannot say that the denial of defendant's request for standby counsel was an abuse of discretion.

See *People v. Phillips*, 392 Ill. App. 3d 243, 265-66 (2009) (finding no abuse of discretion in trial court's denial of defendant's request for standby counsel where the defendant was charged with aggravated battery of a police officer, where neither the law nor the facts were complex and no expert testimony or scientific evidence was required, and where the defendant was a 41 year old adult who had experience with the criminal justice system).

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County dismissing defendant's postconviction petition.

Affirmed.