

No. 1-08-3577

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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.)	No. 98 CR 20292
)	
ROLANDO AGUALLO,)	Honorable
)	Marjorie Laws,
Defendant-Appellant.)	Judge Presiding.
)	

PRESIDING JUSTICE GALLAGHER delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

HELD: The circuit court's finding at the third-stage evidentiary hearing on defendant's postconviction petition that trial counsel's performance was not deficient was not manifestly erroneous where trial counsel presented witnesses to impeach the sole eyewitness and the eyewitness identification was reliable. Moreover, appellate counsel's failure to raise the issue of third-party threat evidence on direct appeal does not constitute ineffective assistance of counsel, where the evidence was relevant to explain the demeanor of the witness, the trial court limited the testimony, and no evidence of the actual threat was presented.

A jury convicted defendant Rolando Aguallo of three counts of aggravated battery with a

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firearm. The circuit court sentenced Aguallo to three consecutive 30-year prison terms. On direct appeal, this court affirmed the convictions but remanded for a determination of whether consecutive sentences were properly imposed. On remand, the circuit court determined that consecutive sentences were proper and this court affirmed. Aguallo then filed a postconviction petition. His petition was denied by the circuit court after an evidentiary hearing. Aguallo raises two issues on appeal: (1) that the evidence presented at the evidentiary hearing showed that the cumulative effect of trial counsel's errors deprived Aguallo of the effective assistance of trial counsel, and (2) that counsel on direct appeal was ineffective for failing to raise the meritorious claim that Aguallo's right to a fair trial was violated when the State's sole eyewitness was allowed to testify that she was threatened in an attempt to unduly influence her testimony where no evidence linked Aguallo to the threats. For the reasons that follow, we affirm the judgment of the circuit court.

BACKGROUND

On July 21, 1998, three people were injured by bullets from a gun that was fired on the 3200 block of South Morgan in Chicago. Following a jury trial, Aguallo was convicted of three counts of aggravated battery with a firearm. Evidence adduced at trial established that Aguallo was taken into custody the night of the shooting after an eyewitness identified him as the shooter. Detective John Murray testified that he interviewed Aguallo and learned that he was 18 years old and a member of the Satan Disciples street gang. Aguallo initially denied any knowledge of the shooting and stated that he was with his girlfriend, but his girlfriend's mother did not corroborate his alibi.

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Aguallo was held in an interview room overnight. He was given a hamburger around 4 p.m. the following day. Around 10 p.m. that day, after Murray informed Aguallo that his alibi had not been corroborated, Aguallo told Murray that he had been standing outside a youth center on 32nd Street just east of Lituanica Avenue on the night of the shooting. A car drove by very slowly and one of the occupants flashed the sign of a rival street gang, the Latin Kings. Aguallo said that he went and retrieved a gun from its hiding place on a low roof on the youth center and ran westbound on 32nd Street after the vehicle. Aguallo said that he had purchased the gun about two months earlier. When he got to 32nd Street and Morgan, he saw the vehicle traveling southbound on Morgan and a group of people he thought were Latin Kings gang members standing in a bank parking lot on Morgan. He began firing at both the car and the people in the bank parking lot and then ran back to Lituanica and threw the gun in a dumpster near the youth center. Police officers searched the area but did not recover the gun.

At trial, Dominga Martinez testified that she was standing outside her residence at 1014 West 32nd Street near Morgan talking to some neighbors on the night of the shooting. She saw two males run from around the corner and stop at the intersection of 32nd and Morgan, near her house and the bank. Martinez said both of the men were shouting gang slogans; one was shouting, "disciple love" and the other was shouting, "king killer." She said that one of the men had a gun and started shooting. There were lights on in the bank parking lot and she was able to see the face of the shooter. She identified him as Aguallo and said that she had known Aguallo for ten years from the youth center because she was a volunteer parent there. Martinez said that after Aguallo fired about 10 shots down Morgan, he turned and went back around the corner in

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the same direction he had come from, toward Lituania. When asked how far she was from Aguallo, Martinez indicated it was approximately the distance between where she was and the courtroom door. The court estimated that distance to be about 80 feet.

In the middle of Martinez's testimony, the court recessed for lunch. During the recess, one of the prosecutors informed the court that Aguallo's brother, Francisco Aguallo, had called Martinez's mother and told her that if anything happened to Aguallo, he was "going to get" Martinez's two sons. When proceedings resumed, the court called Francisco before the court outside the presence of the jury and asked the assistant state's attorney to repeat the allegations. The court ordered the assistant state's attorney to prepare a rule to show cause for contempt proceedings and ordered Francisco to be taken into custody until the rule to show cause was prepared. The court set Francisco's bond at half a million dollars and appointed a public defender to represent him. The court further ordered that phones, pagers, and anything else Francisco had on his person were to be impounded and stated that if it turned out there were phone calls to anybody, a cash bond would be set at one million dollars.

On cross examination, Martinez was asked about the statement she gave to police about four hours after the shooting, in which she said she was walking with her friend Judy toward Morgan and was near the alley between her house and Morgan at the time of the shooting. Martinez explained that she was going to the store earlier with her friends, Judy and Rosella, but that when she saw Aguallo she was on the street right in front of her house. Martinez was then questioned about two of the witnesses defense counsel planned to call. She acknowledged that she lived with a woman named Monica Marshall in 2000 and that she knew a woman named

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Sharon Edwards, but denied telling either of them that she had incorrectly identified Aguallo as the shooter. She stated that both women were affiliated with the Satan Disciples street gang.

On redirect examination, the assistant state's attorney noted for the record that Martinez was crying. The court permitted limited inquiry into the demeanor of the witness, and Martinez said she was crying because her mother had paged her. The court sustained defense counsel's objection. Martinez was then asked if any member of the Satan Disciples street gang tried to get her to change her story that day, and the court allowed her to answer. Martinez answered that someone had, but when she was asked how that person had done so, the court conducted a sidebar conference outside the presence of the jury and sustained defense counsel's objection.

Sharon Edwards testified for the defense. She said that in July of 1999, she and her fiancé, Michael Sparacino, were talking with Martinez and her boyfriend, Chris, at Edwards' home. Edwards said that Chris lived with them at the time. She said that the four of them were talking and the conversation led to Aguallo. Martinez told them that she knew Aguallo was not the shooter but that her children had been outside and could have been killed so she decided that she would just point out anyone the police brought to her. Martinez told them that "Little Richard's cousin" was the shooter. On cross examination, Edwards acknowledged that Sparacino was a former member of the Satan Disciples street gang.

Sparacino also testified. He confirmed that Martinez told them that she knew Aguallo was not the shooter. She said that the shooter was from the nearby housing projects and that if the police brought anyone from the projects, she would say he was the shooter. Martinez said that because her son could have been shot just like the victims, she wanted to teach the young

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men from the projects a lesson. Sparacino said he had confronted Martinez because he knew all along that Aguallo was not the shooter. He stated that everyone in the neighborhood knew.

Monica Marshall testified that she was a friend of Aguallo's and that she, Aguallo, and several other people were at a park in the neighborhood playing basketball the night of the shooting. She said that she heard the gunshots while they were playing basketball and that Aguallo was still at the park at that time. It was established that the park was about six blocks away from the scene of the shooting. Marshall further testified that in July 2000, she was living in the upper peninsula of Michigan with her boyfriend, his family, and Martinez. Martinez told Marshall that Aguallo was not the shooter and that she was just blaming it on him because she did not like any of the young men from the housing projects.

During closing arguments, the assistant state's attorney talked about eyewitness identification and stated that Aguallo ran a full block in front of Martinez, and that she saw him under streetlights, car lights and lights from the bank. She watched him fire the gun for 15 seconds and then saw him run back. He stated that Aguallo was not a stranger, but was someone from the neighborhood and Martinez had known him for years. The jury found Aguallo guilty of three counts of aggravated battery with a firearm.

On direct appeal, this court affirmed Aguallo's convictions but vacated his consecutive sentences and remanded to the trial court for a determination of whether the victims suffered severe bodily injury. *People v. Aguallo*, No. 1-02-2892 (2004) (unpublished order under Supreme Court Rule 23). On remand, the trial court held that all three victims suffered severe bodily injury and ordered that Aguallo's sentences be served consecutively. This court affirmed.

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People v. Aguallo, No. 1-05-2454 (2007) (unpublished order under Supreme Court Rule 23).

Aguallo then filed a postconviction petition alleging, *inter alia*, that trial counsel was ineffective for failing to investigate the scene and interview Martinez, failing to call witnesses to impeach Martinez's testimony, and failing to support the motion to suppress Aguallo's statement with evidence regarding his ability to comprehend and knowingly waive his *Miranda* rights. The petition also alleged that appellate counsel was ineffective for failing to challenge Martinez's third-party threat testimony when no evidence linked Aguallo to the threats. The State filed a motion to dismiss the petition. The circuit court ordered an evidentiary hearing on the issues of whether Aguallo knowingly waived his *Miranda* rights and whether trial counsel was ineffective for failing to call witnesses to impeach the testimony of Martinez, the only eyewitness, and for failing to investigate the scene of the crime. The circuit court further ordered a psychiatric examination to determine whether Aguallo was capable of understanding *Miranda* warnings at the time of his arrest. The resulting report concluded that he could understand the warnings.

At the evidentiary hearing, Judy Zawadzki testified that she lived at 3232 South Morgan at the time of the shooting. She said that Martinez was an acquaintance of hers, but that she was inside her own home at the time of the shooting and was not standing outside in front of Martinez's house or walking to the store with Martinez. She further testified that when she heard the shots, she came outside and ran toward the bank. She saw Martinez and heard her shouting, "Oh, I seen it. I seen it." She also heard Martinez shout that "KK" had done it. Judy testified that "KK" means "king killer." She later saw Martinez talking to police officers at the scene and heard her telling the officers that she knew who did it.

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Rosellen Zawadzki, Judy's daughter, testified that at the time of the shooting, she lived at 933 West 33rd Street. She said that she was inside her home on the night of the shooting, putting her baby to bed, when she saw lights and heard sirens. She went outside to see what was happening and she saw Martinez talking to the police. Rosellen said that she had not been with Martinez at all that day until after Martinez talked to the police, and that she was inside at the time of the shooting and did not even hear the gunshots.

Tanya Zawadzki, who is also Judy's daughter, testified that she was standing on the sidewalk outside her home at 3232 South Morgan when the shooting occurred. She saw a man with a gun across the street from the grocery store that was on the corner of Morgan and 33rd Street. Tanya estimated that the distance between her and the gunman was about as far as the back of the courtroom. There was a stipulation that the distance was approximately 80 feet. Tanya stated that she knew Aguillo at the time, but that it was too dark to identify the shooter. She said that about five shots were fired in her direction. She also said that there was a fence that may have slightly obstructed her view of the shooter. When asked about the location of the bank in relation to the store, Tanya said that the bank was on the corner of 32nd Street and not on the same corner as the store she was referring to.

Robert Swanson testified that he was a private investigator and was hired by postconviction counsel to investigate Aguillo's case. Swanson went to the scene of the shooting and prepared a diagram of the streets in the area of 32nd Street and Morgan. Swanson testified that he stood on the sidewalk outside 1014 West 32nd Street, Martinez's residence at the time of the shooting, and was not able to see 32nd Street east of Morgan, nor could he see Lituanica from

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that location. Swanson further testified that he measured the distance between Martinez's residence to the east sidewalk on Morgan and it was 210 feet. Swanson also took photographs of the area after 8 pm. He testified that one of the photographs was taken from in front of Martinez's residence facing east toward Morgan. The photograph showed an alley between the residence and Morgan. Swanson testified that he measured the distance between the center of the alley and the center of Morgan and it was 183 feet.

James Marcus, Aguallo's defense counsel at trial, also testified. Marcus said that he had obtained Martinez's statement during discovery and it contained the names Judy and Roselle. He stated that there were no last names in the statement and said that he attempted to locate them, but acknowledged that he did not make much of an attempt. When asked why, he explained that he thought the State was looking for the witnesses to corroborate Martinez's account and that if they did provide corroboration, it would have weakened his client's case and strengthened the State's case. Marcus said he also made numerous attempts to locate Martinez but was unsuccessful.

Marcus testified that he had personally gone to the scene of the shooting and had taken some photographs. He did not introduce any of his photographs at trial because he did not think they were particularly helpful to his client. Marcus stated that he filed a motion to quash arrest and suppress evidence, but did not see any reason to file a motion based on Aguallo's ability to understand the *Miranda* warnings. He said that he spent hours going over every word of Aguallo's statement with him, that he communicated with Aguallo in English, and Aguallo had no problem understanding him and was an active participant in his defense.

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On cross examination, Marcus was asked about his file in this case. He testified that the file was destroyed when he changed law firms. Based on his memory of the case, Marcus testified that Aguallo told him that the statement he signed was false and that he only signed it because the police told him they would release him if he signed. Marcus remembered that he filed a motion to suppress the statement but said that he did not call Aguallo as a witness because Aguallo told Marcus he did not want to testify. Marcus also filed a motion for a new trial in which he attacked the testimony and credibility of Martinez and stated that the witnesses called on Aguallo's behalf were more credible than Martinez.

Aguallo testified that he never gave the police an oral statement and that he only signed the written statement because he was cold and hungry and the police promised to let him go home if he signed it. Aguallo said that he told Marcus he wanted to testify at the hearing on the motion to suppress the statement, but that Marcus told him he should not because he had a criminal record and the State could use it against him. He also testified that he was standing outside his girlfriend's house on Lituania with her sisters at the time of the shooting and did not go to the basketball court until later that evening.

Martinez also testified at the evidentiary hearing. She responded to most questions about the night of the shooting with, "I don't recall" or "I don't remember," even after she was shown a transcript of her trial testimony to refresh her recollection. She acknowledged that she met with Swanson at her place of employment in 2008. She said that she understood he was an investigator, but thought he was there about her son. She did not recall telling Swanson that she only saw the shooter's back and could not identify him. She said that Swanson wrote something

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down and asked her to sign it but she did not sign it and did not even read it but just gave it right back to him.

On cross examination, Martinez was asked what she meant when she said she thought Swanson came to see her about her son. She explained that her son had been hit by a car and had sustained brain damage. She said that a criminal case was currently pending in her son's case and she initially thought Swanson wanted to talk to her about the case involving her son.

Swanson was recalled to the stand. He testified that he located Martinez's place of employment and told her that he was an investigator working for Aguallo's attorney. He said that Martinez told him she recalled the shooting incident. He asked her what happened and she said she was standing outside her apartment when she heard shots, "pow, pow, pow, pow." He said he remembered that specifically because he wrote it down and because he never asked her how many shots were fired. Swanson said Martinez then told him that she looked toward Morgan and saw a person in the shooting position and then saw him run away. Swanson asked if she could identify him and Martinez said she could not and that she only saw his back.

Swanson testified that he went to his car, prepared a statement memorializing the conversation and returned to Martinez's place of employment. He gave her the statement and asked her if she would read it and confirm that it contained the information she had given him that morning. Swanson watched Martinez read the statement. He said she then handed it back to him and told him she was not going to sign anything. He asked her if the statement was correct and she confirmed that it correctly stated what she had told him, but said that she did not want to get involved in it.

Swanson was questioned about two separate statements he had prepared for Martinez to sign that were contained in his file on the case. The statements were nearly identical, except that one included the words: "I could not identify him." Swanson testified that after he prepared the statement, he called Aguallo's attorney, David Thomas, and read him the statement. Thomas asked him if Martinez identified the shooter and Swanson told him no. Thomas told him he should indicate that in the statement so he rewrote it and took the edited version to Martinez and asked her to sign it. Swanson had written on both statements that Martinez had refused to sign, but he acknowledged that he only showed her the edited version and that is the only statement that he initialed at the time she refused to sign.

The circuit court issued its ruling on the postconviction petition from the bench. The court noted that the primary evidence at trial consisted of an eyewitness and a confession that was determined to be voluntary. The court further noted that the petition attacked Martinez's credibility and that her credibility had also been attacked during the course of the trial. The court stated that defense counsel at trial had a strategy and he called witnesses who provided an alibi and testimony that Martinez had recanted her identification of the shooter. The court observed that Martinez had identified the shooter immediately after the shooting and expressed concern about the fact that everything was gang related and that Aguallo's family provided the witnesses who said Martinez recanted her testimony. Moreover, at least one of the Zawadzkis testified that one of the defendant's family members took her to the currency exchange to sign the affidavit for the postconviction petition.

The court also expressed concern about the two different affidavits prepared by Swanson,

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and commented on Martinez's demeanor at the evidentiary hearing and the fact that most of her testimony consisted of, "I don't remember." The court noted that during the trial, Martinez received threatening phone calls regarding her two sons and at the evidentiary hearing, the court learned that one of her sons had been run over by a car. While the court stated that it did not know if the incident with the car was an accident or intentional, the court could tell that Martinez was very emotional and distraught about the situation and it was understandable, given the gang involvement, that Martinez would be hesitant to testify at the hearing. The court determined that no weight should be given to the affidavits prepared by Swanson because Martinez did not sign either affidavit and the second affidavit included a sentence that was not added until after Swanson spoke with Thomas on the phone.

Turning to the issue of identification, the court stated that the photographs introduced at trial were not helpful because they did not show the location of Martinez's house. In the court's view, the strongest argument was the 120 foot discrepancy between what the jury heard at trial about how far Martinez was from the shooter and the actual measurement produced at the evidentiary hearing. The court noted, however, that Martinez knew the defendant and immediately identified him to police as the shooter. With that information and the defendant's confession, the 120 foot discrepancy was not sufficient to demonstrate that the outcome of the trial itself would have been different if that evidence had been presented. Finally, the court noted that the defendant provided an alibi at the hearing, but that it was different from the alibi his witness provided at trial. Therefore, the court denied the petition.

This appeal follows.

ANALYSIS

The Post-Conviction Hearing Act (Act) (725 ILCS 5/122–1 *et seq.* (West 2002)) provides a procedural mechanism by which any person imprisoned in the penitentiary may assert that there was a substantial denial of a federal or state constitutional right in the proceeding which resulted in his or her conviction. 725 ILCS 5/122–1(a) (West 2002); *People v. Harris*, 224 Ill. 2d 115, 124 (2007). Proceedings are commenced by the filing of a petition, verified by affidavit, in the circuit court in which the conviction took place. 725 ILCS 5/122–1(b) (West 2002). A postconviction proceeding is limited to constitutional issues that have not been, nor could have been, previously adjudicated. *Harris*, 224 Ill. 2d at 124.

Postconviction proceedings may consist of up to three stages in cases that do not involve the death penalty. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the circuit court reviews the petition to determine whether the petition is frivolous and patently without merit. *Harris*, 224 Ill. 2d at 125-26. A petition must present "the gist of a constitutional claim" to survive beyond the first stage. *Id.* at 126. The circuit court is required to dismiss petitions that are frivolous and patently without merit, and such dismissals are final orders. *Id.* At stage two, the circuit court may appoint counsel for the defendant and the State may move to dismiss the petition. *Id.* At the second stage, the relevant inquiry is whether the petition establishes a substantial showing of a constitutional violation. *Id.*, citing 725 ILCS 5/122-6 (West 2002). A petition that is not dismissed at the second stage proceeds to the third stage where the circuit court conducts an evidentiary hearing. *Id.*

Here, the petition reached the third stage and the circuit court conducted an evidentiary

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hearing. At both the second and third stages of postconviction proceedings, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. When the circuit court conducts an evidentiary hearing that involves fact finding and credibility determinations, a reviewing court will not reverse the circuit court's decision unless it is manifestly erroneous. *Id.* Manifest error is error that is "clearly evident, plain, and indisputable." *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

To support a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and, furthermore, that counsel's actions resulted in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. To fairly evaluate counsel's performance, the reviewing court must make every effort to assess the conduct from counsel's perspective at the time, and the defendant must overcome a strong presumption that counsel's conduct might be considered sound trial strategy under the existing circumstances. *Id.* Moreover, "[i]n any effectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691.

Aguallo initially contends that the circuit court applied the incorrect legal standard for determining whether trial counsel was ineffective, because the court stated that Aguallo was required "to show that the probability of the outcome of the trial itself would have been different in this matter." Relying on our supreme court's decision in *People v. Richardson*, 189 Ill. 2d 401, 411 (2000), Aguallo argues that the correct standard for establishing prejudice is whether

counsel's deficient performance "rendered the result of the trial unreliable or the proceeding fundamentally unfair." The State responds that the court in *Richardson* actually articulated a more arduous standard, namely, that in addition to showing that the result of the proceeding would have been different but for counsel's errors, the defendant must also show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding unfair.

We believe that both arguments misapprehend the standard. The Supreme Court explained that the appropriate standard of prejudice in an ineffective assistance claim is somewhat lower than the high standard for assessing motions for a new trial based on newly discovered evidence. *Strickland*, 466 U.S. at 693-94. In newly discovered evidence claims, a defendant must show by a preponderance of the evidence, *i.e.*, that it is more likely than not, that the outcome would have been different, while in ineffective assistance claims, a defendant need only show a reasonable probability that the outcome would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In *Richardson*, our supreme court stated the reasonable probability standard exactly as it appears in *Strickland*, and further explained that in order to meet this standard, "[t]he defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair," language that also appears in *Strickland*. *Richardson*, 189 Ill. 2d at 411; see also *Strickland*, 466 U.S. at 694.

Here, the circuit court stated that the defendant must show a probability that the outcome would have been different. Although the court omitted the word "reasonable," it did not articulate the higher standard, that the defendant needed to show by a preponderance of the

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evidence that the outcome would have been different. Thus, we conclude that the circuit court applied the correct legal standard.

Aguallo contends that his trial counsel was ineffective because: (1) he failed to support the motion to suppress Aguallo's written confession with testimony from Aguallo, (2) he failed to conduct an investigation of the crime scene, (3) he failed to interview and call the Zawadzki's as witnesses to impeach Martinez's testimony, and (4) he failed to interview Martinez. Aguallo argues that trial counsel should have called him as a witness at the hearing on the motion to suppress to provide supporting evidence for the motion's allegations that his statement was coerced. He further contends that because of defense counsel's lack of basic knowledge about the crime scene, he did not challenge the testimony that the sole eyewitness observed the shooter from a distance of 80 feet. Moreover, he did not challenge Martinez's testimony that she was able to see the shooter run down 32nd Street east of Morgan. Aguallo also argues that had defense counsel interviewed and called the Zawadzki's, the testimony of Martinez would have been undermined because she said she was with them at the time of the shooting and they both testified they were in their respective homes at that time. Finally, Aguallo contends that if defense counsel had interviewed Martinez prior to trial, she would have admitted that she could not identify the shooter.

The circuit court considered the testimony presented at the evidentiary hearing and determined that the evidence was insufficient to overcome the presumption that counsel's performance might be considered sound trial strategy under the existing circumstances. Moreover, the court found that Aguallo had not shown a reasonable probability that the outcome

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would have been different. To prevail on an ineffective assistance of counsel claim, both prongs must be satisfied. *Strickland*, 466 U.S. at 687.

We first consider whether the circuit court's finding that trial counsel's performance was not deficient was manifestly erroneous. Aguallo's first argument is that counsel's performance was deficient because Aguallo was not called as a witness to testify to the coercive conditions surrounding his statement at the hearing on the motion to suppress the statement. However, Aguallo acknowledges that witnesses for the State did in fact testify that he was held in isolation for over 24 hours and fed only twice near the end of that period. Aguallo testified that he told his trial counsel that he wanted to testify at the hearing, but counsel advised him not to because the State would use his criminal record against him. His trial counsel testified that Aguallo told him at the time that he did not want to testify. Aguallo also testified that he only signed the statement because he was cold and hungry and the police told him he could go home if he signed.

Aguallo further contends that he did not speak or read English well at the time he signed the statement. However, his trial counsel testified that he communicated with Aguallo solely in English and Aguallo participated in his defense. We cannot conclude that trial counsel was deficient for failing to have Aguallo testify at the hearing. Other testimony at the hearing established the duration and conditions of Aguallo's detention and questioning by police. It was reasonable trial strategy on the part of trial counsel to advise his client not to testify.

Aguallo's remaining arguments are all related to the impeachment of Martinez, the sole eyewitness to the shooting. His argument that if defense counsel had interviewed Martinez prior to trial she would have recanted her identification is mere speculation. The circuit court did not

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give any weight to the affidavits prepared by Swanson because the key detail that Martinez was not able to identify the shooter was only added to the statement after Swanson spoke with Aguallo's attorney. Moreover, Martinez did not sign either statement. While we agree with the circuit court that these affidavits are problematic, even if we were to accept that Martinez told Swanson years later that she could not identify the shooter, it does not necessarily follow that she would have made a similar statement to Aguallo's defense attorney before trial. In fact, the record supports the opposite conclusion. Trial counsel presented three witnesses who testified that Martinez subsequently recanted her identification and yet Martinez testified at trial that she did not make those statements.

Moreover, trial counsel's testimony that he did not make much of an effort to locate the Zawadzki's before trial does not support a conclusion of deficient performance. Trial counsel pursued an impeachment strategy at trial and presented other witnesses who challenged Martinez's credibility. Generally, the impeachment of a witness is considered to be a matter of trial strategy and cannot support an ineffective assistance of counsel claim. *People v. Smith*, 177 Ill. 2d 53, 92 (1997).

At the evidentiary hearing, Judy and Rosellen both testified that they were inside their respective homes at the time of the shooting and not, as Martinez claimed, outside with Martinez. Even if the Zawadzki's had been called at trial and testified that they had not been outside at the time, the State would have simply argued that they were afraid to get involved because the shooting was gang related. In fact, both witnesses confirmed that when they did come outside, they saw Martinez talking to the police and heard her tell the police at that time that she could

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identify the shooter, testimony that would have refuted the defense witnesses' claims that Martinez told them she was going to identify anyone the police brought from the projects. Trial counsel called certain witnesses to impeach Martinez and it is well settled that an ineffective assistance claim arising from a matter of defense strategy will not support a conclusion of ineffective representation. *Id.* at 93.

We also note that it is not clear to this court why Tanya Zawadzki was called as a witness at the evidentiary hearing. She apparently saw another shooter on 33rd Street shooting northbound on Morgan at the same time someone was shooting southbound on Morgan from 32nd Street. No evidence was presented at trial of a shooter at 33rd and Morgan. Moreover, whether or not it was too dark for Tanya to identify a shooter near the store on the corner of 33rd and Morgan from her residence on Morgan has no relevance to whether Martinez could have identified the shooter who was near the well-lit parking lot of the bank at 32nd and Morgan from where Martinez stood on 32nd Street.

Finally, we address Aguallo's argument that trial counsel was ineffective for his failure to investigate the crime scene. We note that trial counsel testified that he did, in fact, visit and photograph the crime scene. Aguallo's argument is two-fold. First, trial counsel should have challenged Martinez's statements that she saw someone running on 32nd Street east of Morgan and second, the distance between where Martinez said she was standing and where the shooter was standing is more than twice the distance trial counsel stipulated to at trial.

Lituanica and Morgan run parallel to each other, one block apart. Testimony at the evidentiary hearing established that 32nd Street does not intersect Morgan in the typical grid

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pattern. Rather, 32nd Street from the west forms a “T” intersection with Morgan. 32nd Street from the east forms another “T” intersection with Morgan, to the north of the “T” intersection from the west. Swanson testified that a person cannot see 32nd Street east of Morgan from the sidewalk outside Martinez’s residence.

We note that at trial, Martinez had significant trouble with directions and was confused about street names and whether certain streets ran east and west or north and south. Martinez testified that she saw two men “running from around the corner and stood right on the corner by my house.” She explained she meant the corner near the bank at 32nd and Morgan. She was asked how long she had seen Aguallo running before he stopped, and she answered, “He didn’t run that long because it’s right around the corner.” Martinez testified that after the shooting, Aguallo ran “right back down Lituania.” Upon further questioning, she agreed that he ran down 32nd Street. She testified that Aguallo turned back around “and went straight around the corner from where they came from,” back toward Lituania. During closing arguments, the assistant state’s attorney told the jury that Aguallo ran a full block in front of Martinez.

Martinez also gave conflicting testimony about exactly where both she and the gunman were standing at the time of the shooting. Martinez testified that she was “not far at all” from Aguallo when she saw him firing the gun and indicated the distance was probably about the same as the distance between the witness stand and the courtroom door. Trial counsel estimated that distance to be about 36 feet and the court interjected that it was approximately 80 feet. Swanson testified that the distance between the sidewalk in front of Martinez’s house and the east sidewalk of Morgan was 210 feet, and the distance from the alley to the east sidewalk of Morgan

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was 183 feet. However, distance is not the only factor to consider in determining the reliability of eyewitness identification, and we note that the average person is unable to estimate distances accurately.

The circumstances courts consider in evaluating the reliability of an identification include: (1) the opportunity the witness had to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the time of confrontation, and (5) the length of time between the crime and the confrontation. *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989). Courts also consider whether the witness was acquainted with the criminal prior to the crime, and whether there was any pressure on the witness to make a certain identification. *People v. Brooks*, 187 Ill. 2d 91, 130 (1999).

Here, Martinez identified the shooter as someone she had known for ten years. She saw him that night from a distance that was not precisely established at trial, in an area that had a reasonable amount of lighting from both car headlights and lights from the bank parking lot, and she identified him to police immediately after the crime. She stated that she saw him running "from around the corner," and because she knew him and knew where he lived, she would have known the general direction from which he had come.

The Zawadzki's corroborated her account that she identified Aguallo to police before they brought a suspect for her to identify, directly contradicting the testimony from the defense witnesses at trial who said that she told them she was going to identify anyone the police brought from the projects. Because a consideration of all factors supports a determination that the

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identification was reliable, we cannot conclude that trial counsel was ineffective for failing to challenge Martinez's confusing statements about distance and where she saw Aguallo running. Thus, the circuit court's finding that trial counsel's performance was not deficient was not manifestly erroneous.

Defendant's claim of ineffective assistance also fails under the second prong of the *Strickland* test. Even if we were to determine that trial counsel's performance was deficient, defendant has not met his burden of showing there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. That is, defendant must show a probability sufficient to undermine confidence in the outcome.

Here, defendant's confession was determined to be voluntary. Defendant said he ran down 32nd Street after the car, turned on Morgan, and fired his gun southbound on Morgan. Martinez's testimony was that she saw Aguallo, who she has known for 10 years, run from around the corner and fire a gun southbound on Morgan. The only discrepancy is the distance she was from Aguallo at the time of the shooting. This does not meet the standard of showing a probability sufficient to undermine confidence in the outcome of the trial. Thus, the circuit court's finding was not manifestly erroneous.

We now turn to Aguallo's argument that appellate counsel was ineffective for failing to challenge the admission of third-party threat testimony. Aguallo contends that his right to a fair trial was violated when the sole eyewitness testified that unidentified individuals threatened her in an attempt to unduly influence her testimony where no evidence linked Aguallo to the threat.

The *Strickland* analysis also applies to a claim of ineffective assistance of appellate

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counsel. *Richardson*, 189 Ill. 2d at 412. This means that if a defendant argues that appellate counsel was ineffective for failing to raise an issue, the defendant must show that the failure was objectively unreasonable and, but for this failure, defendant's conviction would have been reversed. *Id.* Appellate counsel is not required to raise every conceivable argument and counsel's assessment of what to raise and argue will not be questioned unless it was patently wrong. *Id.*

We must first determine whether appellate counsel's failure to raise the issue of the third-party threat testimony was objectively unreasonable. Evidence of a threat can be relevant to explain courtroom demeanor indicating intimidation. See *U.S. v. Thomas*, 86 F.3d 647, 654 (1996) (and cases cited therein). Relevant evidence is admissible if the probative value of the evidence outweighs its prejudicial impact. *People v. Gonzalez*, 265 Ill. App. 3d 315, 326 (1994). If the evidence does not link the alleged threat to the defendant, that alone does not negate the possibility that the defendant will be prejudiced by introduction of the evidence. *People v. Williams*, 147 Ill. 2d 173, 224 (1991). Rather, prejudice to the defendant must be judged by considering the nature of the evidence itself. *Id.* A trial court's decision to admit such evidence will not be reversed absent a clear abuse of discretion. *Gonzalez*, 265 Ill. App. 3d at 326.

Here, the circuit court permitted only limited inquiry for purposes of explaining the demeanor of the witness, who was described by the court as shaking, sobbing and appearing terrified. No testimony regarding the actual threat was allowed. The jury did not hear that defendant's brother threatened Martinez's children, only that a member of the Satan Disciples tried to get her to change her story. Defense counsel objected to any further inquiry about the

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actual threat and the objection was sustained. Because the testimony was so limited, it was not objectively unreasonable for appellate counsel not to raise this issue on direct appeal. Moreover, even if the issue had been raised, we cannot say that the admission of this evidence was a clear abuse of discretion and thus, it would not have resulted in a reversal of defendant's conviction.

CONCLUSION

Based on the foregoing analysis, we conclude that the circuit court's finding that trial counsel's performance was not deficient was not manifestly erroneous. We further hold that appellate counsel's failure to raise the issue of third-party threat evidence on direct appeal does not constitute ineffective assistance.

Affirmed.