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No. 1-09-0061

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,)	Appeal from the
)	Circuit Court of
v.)	Cook County.
)	
)	01 CR 30788
MICHAEL BARNES,)	
)	
Petitioner-Appellant.)	The Honorable
)	James B. Linn,
)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justice Fitzgerald Smith and Justice Sterba concurred in the judgment.

ORDER

HELD: Petitioner did not waive review of the dismissal of his post-conviction petition where fundamental fairness requires review, some of the facts relating to the defendant's claim allegedly do not appear on the face of the original appellate record, the alleged waiver stems from the incompetence of appellate counsel, and because we recognize that ineffective assistance of counsel claims are often better resolved in post-conviction proceedings than on direct appeal. Affirmed the dismissal of petitioner's post-conviction petition based on ineffective assistance of counsel where: (1) the petitioner did not properly support his petition with an affidavit from a witness regarding his counsel's purported insufficient investigation of the witness, the record showed that his counsel effectively impeached the witness regarding his memory and engaged in a reasonable investigation of the witness, and incompetence is not indicated where a defendant can point to no potentially favorable testimony or testimony as to which the effect would not

have been cumulative; (2) petitioner's counsel did not render ineffective assistance of counsel for failing to object to the trial court's answer to a jury question that it had heard all the evidence where the jury's question concerned an issue of fact; and (3) the petitioner's claim of ineffective assistance based on his counsel's alleged coercion of him to not testify failed because petitioner failed to plead that he suffered prejudice as a result of his not testifying.

¶1 Following a jury trial, petitioner, Michael Barnes, was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2004)). We affirmed his conviction on direct appeal. Barnes thereafter filed a pro se post-conviction petition, which the trial court summarily dismissed. Barnes appeals and argues the trial court erred in dismissing his post-conviction petition because he suffered constitutional violations with an arguable basis in law and fact for ineffective assistance of his counsel based on the following: (1) failing to interview, investigate, and cross-examine the State's identification witness, Damone Stewart, regarding his memory problem; (2) failing to request the trial court to clarify the jury's question concerning the photographic and lineup identification of Shawn Jackson; and failing to object to the trial court's comment that the jury had received all the evidence and should continue to deliberate; and (3) preventing him from testifying at trial. Barnes also argues that he did not waive his claims of ineffective assistance of counsel by failing to present these claims on direct appeal because they were off-the-record contentions and, to the extent some contentions were on the record, the arguments were not waived because he was represented by the same attorney for both the trial and appellate proceedings.

¶2 We determine that: (1) Barnes did not waive review of his post-conviction claims by failing to raise them on direct review where fundamental fairness requires review, some of the facts relating to the defendant's claim allegedly do not appear on the face of the original appellate

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record, the alleged waiver stems from the incompetence of appellate counsel, and because we recognize that ineffective assistance of counsel claims are often better resolved in post-conviction proceedings than on direct appeal; (2) Barnes did not properly support his petition with an affidavit from a witness regarding his counsel's purported insufficient investigation of the witness, the petition has no arguable basis in fact where the record shows that Barnes' counsel effectively impeached the witness regarding his memory and engaged in a reasonable investigation of the witness, and the petition has no arguable basis in law because incompetence is not indicated where a defendant can point to no potentially favorable testimony or testimony as to which the effect would not have been cumulative; (3) the trial court properly refused to answer the jury's question, and Barnes' counsel did not render ineffective assistance of counsel for failing to object, where the jury's question concerned an issue of fact; and (4) Barnes failed to plead that he suffered prejudice as a result of his not testifying, thus rendering his petition without an arguable basis in law or fact. Therefore, we affirm the trial court's dismissal of Barnes' post-conviction petition.

¶3 BACKGROUND

¶4 Petitioner, Michael Barnes, along with co-defendants Derrick Martin and Terrell Barnes, was charged on December 20, 2001, with first degree murder for the shooting death of Tsarina Powell. Following a jury trial, Barnes was found guilty of first degree murder and was sentenced to forty years' imprisonment. Barnes' conviction and sentence were affirmed on direct appeal to this court in an unpublished order on December 23, 2005, pursuant to Illinois Supreme Court Rule 23 (Ill. S. Ct. Rule 23 (eff. July 1, 1994)). See *People v. Barnes*, No. 1-03-2638.

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¶5 The testimony in this case is complicated and involves multiple relationships, meetings, events, altercations and arguments. To summarize: The State's theory of the case was that after police seized drugs belonging to Michael Barnes that had been "stored" at the home of Twanda Lucas, Barnes and his co-defendants went to another residence where Twanda was staying with her children and fired dozens of shots into the residence and through the wall from the outside, killing Tsarina Powell, age 9.

¶6 Barnes' defense was misidentification, claiming it was Aja (Shawn) Jackson, Tsarina's cousin, who fired the fatal shots because he was angry about being kicked out of the residence after refusing to pay rent.

¶7 The testimony against Barnes included testimony by Damone Stewart, who was 10 at the time of the shooting, and said he was in bed and saw someone at his window trying to get in. Stewart identified Shawn Jackson in a photo array and told police the person "looked like" Shawn and also identified Shawn in a lineup, then a month later identified Barnes in a second lineup as the person who tried to open his window. Damone identified Barnes in court as the person at his window. At trial Damone acknowledged a written statement he had given co-defendant Terrell Barnes' attorney and his investigator, Mr. Bunch, saying he was "seventy percent sure" the person at the window was Barnes and not Shawn. Damone's mother was present during the interview and acknowledged that her son has a learning disability related to lead poisoning.

¶8 However, Detective Michael Adams testified that he conducted the lineup viewed by Damone and Damone identified Barnes as the person lifting up the individual who tried to

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open his window, and not the individual who was actually trying to get in. Detective Joseph Struck testified that Damone told him that Shawn was the person trying to open his window and an individual Kenneth Brown as the individual boosting up Shawn Jackson.

¶9 In addition, Laresa Bellamy testified that on June 12, 2000, after an argument over a parking space, Barnes said to her, "Bitch you don't own no parking spot," and hit her with his fists. Barnes then later came into her apartment with a .45 gun and pointed it at her and said if she called the police he would kill her. Laresa called the police and told them there was a gun at Twanda's house and saw them enter Twanda's house and retrieve a gun.

¶10 Twanda testified that on July 4, 2000, Barnes pulled up next to a car she was in with Stephanie and LaRessia Currington and said he wanted the money for his drugs that were allegedly taken from Twanda's house earlier that summer. Twanda, Barnes and LaRessia got into a physical altercation. Twanda had been staying at Stephanie's house but after this altercation with Barnes she returned home. On the night of the shooting, Twanda tried calling Stephanie but was unable to because both of their telephone wires were cut.

¶11 Stephanie Lucas testified that she lived with the victim, Tsarina Powell, and Damone Stewart. Shawn Jackson lived in her home from September 1999 to January 2000, but Stephanie asked Shawn to move out because he did not want to pay rent. However, on cross-examination, Stephanie denied that Shawn ever told her that he would return to her home and shoot the place up after he left. Stephanie also testified she witnessed the altercation on July 4, 2000 with Barnes, Twanda and LaRessia. Stephanie testified that before Barnes left the scene he

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said someone would pay if he did not get his money back.

¶12 Dennis Allen testified that at the request of his daughter, Deidre, and because Twanda was his niece, he called Barnes' mother's house and spoke with Barnes. Barnes told him he wanted his money for the missing drugs, and Barnes said "someone was going to pay for it" and he "didn't care if it was one of the kids paying for it."

¶13 Edward Hughes, a neighbor, testified that from about 7:00 p.m. to 2:00 a.m. the night and early morning of the shooting he was in his garage celebrating with some friends. At about 2:00 a.m. he heard gunshots which, from his military experience, he believed to be from an AK 47 semi-automatic rifle. He saw the person firing from the backyard into the Powell residence. The individual was a black male wearing all black clothing and holding what looked like a rifle with both hands. He heard more gunshots and then saw a car coming down Honore fairly fast. He was about 20-30 feet away. The area was well lit by streetlights, the driver's window was open, and when the driver turned to see if it was clear Hughes saw the driver. The next day Hughes identified Barnes in a photo array as the shooter.

¶14 Derrick Martin, charged as a co-defendant in the case, testified for the State in exchange for an eight-year sentence. Derrick testified that he used to work for Barnes selling cocaine. He lived with Barnes and Deidre Allen. On June 12, 2000, he saw the altercation between Barnes and Laresa Bellamey about the parking spot and followed Barnes inside Laresa's residence and saw Barnes pull a gun on Laresa. After they left Laresa's residence, Derrick put the gun inside the residence he shared with Barnes under the couch because Laresa was going to call the police.

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¶15 On July 9, 2000, Barnes' brother, Terrell Barnes, and someone he knew as "Peanut" picked him up in Terrell's Chevrolet Suburban and drove to meet Barnes and Deidre at 10 p.m. Barnes said Twanda had not paid him his money and he was going to find her and kill her. Deidre, Barnes and Terrell left in the Suburban to find Twanda. Barnes drove and parked the Suburban at the end of the alley. Barnes began firing an AK rifle into the Powell residence from the backyard. Then Derrick went back to the alley and saw Barnes shooting in the opposite end of the alley. After the shooting, the three ran back to the Suburban and Barnes drove away.

¶16 Forensic investigator Tovar testified that he observed approximately a dozen bullet holes at the back end of the Powell residence. He also observed gunshots to the first floor door of the enclosed porch, which was a bedroom, and saw 6-7 bullet holes in the wall and 2 bullet holes near the upper frame of a bunk bed. Tovar recovered a total of 17 large, military-type cartridge cases. Officer Lynne Lopit, a Chicago police forensic investigator, testified that at the back of the Powell residence several telephone wires were cut and an electrical breaker was pulled out. Detective William Svilar testified that he recovered a pair of wire cutters and a pair of pliers from the Suburban.

¶17 In addition to a defense of misidentification, Barnes also presented alibi testimony. Jamie Kincaid testified that on the night of the shooting, Kincaid was at a birthday party at Jackson and California. Kincaid testified he left the party to purchase alcohol at the liquor store at 1:45 a.m. While Kincaid was at the liquor store he saw Barnes exit his car and come into the liquor store.

¶18 During jury deliberations, the jury sent a note asking the trial court the following:

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"One, Identify Aja Jackson's picture;" and "Two, is he in the lineup photo?" The note was signed by the foreperson. The court's analysis was as follows:

"I'm not sure what this juror is asking about. I'm not sure what they're [sic] request is.

But it occurs to me that the proper response would be that you have heard all the evidence, received all the evidence that will be presented at the trial. Rely on your collective memories of the evidence and continue deliberations.

Is that an agreeable response?"

¶19 Barnes' counsel responded, "Yes, Judge, it absolutely is." Then Barnes' counsel noted that Aja (Shawn) Jackson may have been pointed out in the evidence. The court asked whether counsel was suggesting a different response to the jury, but counsel replied he was not. The court then answered the jury as follows:

"You have heard all of the evidence presented at the trial. Rely on your collective memories of the evidence. Please continue your deliberations."

¶20 The jury found Barnes guilty of first degree murder, and returned a special verdict finding that "the fact does not exist during the commission of the offense [that] the defendant personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement or death to Tsarina Powell." The trial court sentenced defendant to 40 years' imprisonment. Through counsel, Barnes appealed his conviction, which we affirmed on December 23, 2005, in an unpublished order pursuant to Supreme Court Rule 23 (Ill. S. Ct. R. 23 (eff. July 1, 1994)).

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¶21 Barnes subsequently filed a pro se post-conviction petition, alleging that his trial counsel was ineffective for: (1) failing to interview, investigate, and cross-examine the State's identification witness, Damone Stewart, regarding his lead-paint poisoning memory problem; (2) failing to request the trial court to clarify the jury's question concerning the photographic and lineup identification of Shawn Jackson and failing to object to the trial court's comment that the jury had received all the evidence and should continue to deliberate; and (3) preventing him from testifying at trial. The trial court dismissed Barnes' post-conviction petition at the first stage and did not hold an evidentiary hearing. Barnes appeals this dismissal.

¶22 ANALYSIS

¶23 *Pro Se* Post-Conviction Standard of Review

¶24 When considering an appeal from the dismissal of a petitioner's post-conviction petition, the we are limited to considering matters that are of a constitutional dimension. *People v. Rossi*, 387 Ill. App. 3d 1054, 1059 (2009). Section 122-2 of the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)) provides:

"(a) Any person imprisoned in the penitentiary may institute a proceeding under this Article if the person asserts that:

(1) in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1 (West 2008).

¶25 Barnes' post-conviction petition is premised on the alleged ineffective assistance of his trial counsel. To establish ineffective assistance of counsel a petitioner must prove both:

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(1) counsel's performance was deficient in falling below an objective standard of reasonableness under prevailing professional norms; and (2) petitioner suffered prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). The standard of quality for an attorney's advocacy is that of reasonably effective assistance pursuant to prevailing professional norms. *Strickland*, 466 U.S. at 687-88.

¶26 Post-conviction proceedings not involving the death penalty are comprised of three distinct stages. *People v. Jones*, 399 Ill. App. 3d 341, 356 (2010). At the first stage, a trial court must independently review the petition within 90 days of its filing and determine whether the petition is frivolous or is patently without merit. *Jones*, 399 Ill. App. 3d at 356 (citing 725 ILCS 5/122-2.1 (2006), *People v. Edwards*, 197 Ill. 2d 239, 244 (2001)). If the court determines that the petition is either frivolous or patently without merit, it shall dismiss the petition by written order. *Jones*, 399 Ill. App. 3d at 356 (citing 725 ILCS 5/122-2.1 (2006)). If the petition is not dismissed at stage one, it advances to the second stage, where counsel may be appointed for an indigent defendant if requested. *Jones*, 399 Ill. App. 3d at 356 (citing 725 ILCS 5/122-4 (2006)). Barnes' petition was dismissed at the first stage.

¶27 In reviewing the sufficiency of the petition, the court is to examine the court file of the proceeding in which the petitioner was convicted, any transcripts of such proceeding, and any action taken by an appellate court on direct appeal. 725 ILCS 5/122-2.1(c) (West 2008). The Act requires that the petition "clearly set forth the respects in which petitioner's constitutional rights were violated," and requires the attachment of "affidavits, records or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS

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5/122-2 (West 2008).

"The question raised in an appeal from an order dismissing a post[conviction] petition is whether the allegations in the petition, liberally construed and taken as true, are sufficient to invoke relief under the Act." *People v. Stewart*, 381 Ill. App. 3d 200, 203 (2008) (quoting *People v. Coleman*, 183 Ill. 2d 366, 388 (1998)).

¶28 A *pro se* petitioner is required only to allege "enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009) (citing *People v. Porter*, 122 Ill. 2d 64, 74 (1988) (stating that only a "gist" of a constitutional claim is needed at this stage). The pleading requirements can be met by a *pro se* petitioner "even if the petition lacks formal legal arguments or citation to legal authority." *Id.* at 10. Our supreme court has clarified that when it has spoken of a "gist" of a claim, it "meant only that the section 122-2 pleading requirements are met, even if the petition lacks formal legal arguments or citations to legal authority." *Hodges*, 234 Ill. 2d at 9.

¶29 However, this liberal reading of petition does not relieve a defendant of pleading specific facts supporting her or his claim. *People v. Hill*, 308 Ill. App. 3d 691, 699 (1999). To determine whether a meritorious claim has been presented, the court must inquire into the relevance and merit of the defendant's supporting documents. *Jones*, 399 Ill. App. 3d at (citing *People v. Deloney*, 341 Ill. App. 3d 621, 627 (2003)). "[W]hile a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008). "As a result, the failure to either

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attach the necessary "affidavits, records, or other evidence" or explain their absence is "fatal" to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal." *Delton*, 227 Ill. 2d at 255 (citing *People v. Collins*, 202 Ill. 2d 59, 66 (2002), citing *People v. Coleman*, 183 Ill. 2d 366, 380 (1998), quoting *People v. Jennings*, 411 Ill. 21, 26 (1952)).

¶30 Section 122-2.1(c) of the Act provides that in considering the petition at the first stage, the court may examine (1) the court file of the proceedings in which the petitioner was convicted; (2) any action taken by an appellate court in such proceeding; and (3) any transcripts of such proceeding. *Jones*, 399 Ill. App. 3d at 356 (citing 725 ILCS 5/122-2.1(c) (West 2006)). The court should examine those records to determine whether the allegations in the petition are positively rebutted by the record. *Jones*, 399 Ill. App. 3d at 356-57 (citing *People v. Shaw*, 386 Ill. App. 3d 704, 708 (2008); *Coleman*, 183 Ill. 2d at 382).

¶31 The relevant threshold question, on appeal from summary dismissal of petition for post-conviction relief, is whether the petition is frivolous or patently without merit. *People v. Smith*, 326 Ill. App. 3d 831, 840 (2001). The standard as explained recently by our supreme court is that "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as 'frivolous or *** patently without merit' pursuant to section 122-2.1(a)(2) only if the petition has no arguable basis either in law or in fact." *Id.* at 16. The court explained what constitutes a lack of an arguable basis in law or fact:

"A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record.

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* * * Fanciful factual allegations include those which are fantastic or delusional." *Id.* at 16-17.

A claim is "indisputably meritless" if it is "completely contradicted by the record" or includes facts "which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 16-17.

¶32 Our review of a circuit court's dismissal of a defendant's post-conviction petition is *de novo*. *Hodges*, 234 Ill. 2d at 9 (citing *Edwards*, 197 Ill. 2d at 247; *Coleman*, 183 Ill. 2d at 388-89; *People v. Torres*, 228 Ill. 2d 382, 394 (2008)); *People v. Johnson*, 206 Ill. 2d 348, 357 (2002). On *de novo* review this court accepts as true all facts alleged in the petition unless the record of the trial contradicts those allegations. *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003) (citing *Coleman*, 183 Ill. 2d at 381-82). We will uphold the summary dismissal of a post-conviction petition when the record from the original trial proceedings contradicts the defendant's allegations. *People v. De Avila*, 333 Ill. App. 3d 321, 329 (2002). We may also affirm trial court's dismissal of petition for post-conviction relief on any basis supported by the record. *People v. Little*, 335 Ill. App. 3d 1046, 1051 (2003).

¶33 Barnes alleged that his trial counsel was ineffective for the following reasons: (1) failing to interview, investigate, and cross-examine the State's identification witness, Damone Stewart, regarding his lead-paint poisoning memory problem; (2) failing to request the trial court to clarify the jury's question concerning the photographic and lineup identification of Shawn Jackson and failing to object to the trial court's comment that the jury had received all the evidence and should continue to deliberate; and (3) preventing him from testifying at trial. Barnes also argues that his claims of ineffective assistance of counsel were not waived because

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they raised matters off the record and, to the extent they were on the record, they were not waived because he was represented by the same counsel for both trial and appellate proceedings. We first address the issue of waiver.

¶34 I. Waiver

¶35 Generally, "[b]ecause a proceeding brought under the Act is a collateral attack on a judgment of conviction, all issues actually decided on direct appeal are *res judicata*, and all issues which could have been raised in the original proceeding, but were not, are waived." *People v. Marshall*, 381 Ill. App. 3d 724, 731 (2008) (quoting *People v. Mahaffey*, 194 Ill. 2d 154, 170 (2000)). However, the post-conviction waiver rule is relaxed in three situations: (1) where fundamental fairness requires; (2) where the facts relating to the defendant's claim do not appear on the face of the original appellate record; and (3) where the alleged waiver stems from the incompetence of appellate counsel. *People v. Gale*, 376 Ill. App. 3d 344, 350 (2007). Here, Barnes argued all three grounds in his petition.

¶36 First, although not fully fleshed out by legal argument, Barnes alleged that fundamental fairness requires review of his post-conviction claims.

¶37 Second, Barnes also argues that he did not waive his ineffective assistance of counsel claims by failing to present them on direct appeal where they were based on matters off the record. Barnes alleged that his counsel failed to investigate Damone Stewart. Barnes also alleged that his decision not to testify was based solely on counsel telling him that if he testified he would destroy his case. See *People v. Barkes*, 399 Ill. App. 3d 980, 986 (2010) (holding that

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the defendant could not have raised his allegations of ineffective assistance of counsel on direct appeal because they were based on information outside the record, specifically things his counsel told him or failed to tell him); *People v. Piper*, 272 Ill. App. 3d 843, 846 (1995) (holding that the allegations contained in petitioner's petition required an inquiry into certain matters outside the record and, accordingly, the issue of whether petitioner's trial counsel deprived him of his constitutional right to testify in his own behalf was not barred by waiver or res judicata).

¶38 Third, Barnes also argued ineffective assistance of appellate counsel in his post-conviction petition. While the doctrine of waiver does not bar consideration of an issue where the waiver stems from the incompetency of counsel on appeal, a claim of ineffective assistance of appellate counsel must appear in the post-conviction petition. *People v. Lacy*, 407 Ill. App. 3d 442, 461 (2011) (citing *People v. Jones*, 213 Ill. 2d 498, 505–06 (2004)). Here, Barnes argued in his petition that his trial counsel was ineffective, and that his appellate counsel was the same counsel. Barnes also specifically alleged that he was denied effective assistance of appellate counsel where appellate counsel failed to raise the issue on his direct appeal of his own failure to object to the court's ruling on the jury's question. See *People v. Moore*, 402 Ill. App. 3d 143, 146 (2010) (holding the defendant's post-conviction ineffective assistance of trial counsel claim was not forfeited due to defendant's failure to raise the claim on direct appeal where the defendant's post-conviction petition raised a claim of ineffective assistance of appellate counsel).

¶39 We note Barnes did not argue ineffective assistance of his appellate counsel for the remaining issues raised in his post-conviction petition. However, because the State does not

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raise the failure of Barnes to argue an ineffective assistance of appellate counsel claim as a basis for waiver, we may consider the merits of Barnes' claims. See *Lacy*, 407 Ill. App. 3d at 461 (2011) (citing *People v. De La Paz*, 204 Ill.2d 426, 433 (2003) (“It is well established that the State may waive waiver.”)). Thus, Barnes has argued all three grounds for relaxing the waiver rule.

¶40 We further note the recognition by our courts that ineffective assistance of counsel claims are often better resolved in post-conviction proceedings than on direct appeal. “Claims of ineffective assistance of counsel are usually reserved for post[-]conviction proceedings where a trial court can conduct an evidentiary hearing, hear defense counsel's reasons for any allegations of inadequate representation, and develop a complete record regarding the claim and where attorney-client privilege no longer applies.” *People v. Weeks*, 393 Ill. App. 3d 1004, 1011 (2009). See *People v. Young*, 250 Ill. App. 3d 55, 63 (1993) (holding that if the defendant's failure to file a motion to withdraw his guilty plea stemmed from ineffective assistance of his trial counsel, a proceeding under the Post-Conviction Hearing Act, rather than direct appeal, would be the appropriate forum for defendant to develop the record in support of his claim that trial counsel was ineffective for failing to investigate defendant's mental records and consider whether defendant was fit to enter guilty plea); *People v. Burns*, 304 Ill. App. 3d 1, 11 (1999) (holding that where the disposition of defendant's ineffective assistance of counsel claim requires consideration of matters beyond record on direct appeal, it is more appropriate that the defendant's contentions be addressed in a proceeding for post-conviction relief, and the appellate court may properly decline to adjudicate the defendant's ineffective assistance of counsel claim in his direct appeal).

Therefore, we hold that Barnes has not waived his post-conviction claims of ineffective assistance of counsel by failing to raise these arguments on direct appeal.

¶41 II. Failure to Investigate, Interview, and Cross-Examine Damone

¶42 We now turn to address the first of Barnes' contentions – that his trial counsel was ineffective for failing to investigate and fully cross-examine Damone Stewart concerning his lead paint poisoning. Barnes argues that at the first stage of post-conviction proceedings, he was not required to establish that his trial counsel was ineffective or that the outcome of his trial would have been different but, rather, was merely required to allege facts which, taken as true and liberally construed, arguably supported a claim of ineffective assistance of counsel. *Hodges*, 234 Ill. 2d at 10, 17, 21. The State argues that the record reveals that Barnes' counsel was aware of Damone's memory problems and that his decision not to cross-examine Damone about the specific reason for his memory problems was trial strategy. We find that Barnes' petition is not properly supported, and that the record in fact contradicts his claim of ineffective assistance of counsel.

¶43 First, Barnes did not properly support his petition. Our supreme court has held that while *pro se* petitioners have a low pleading threshold, they are not excused from complying with section 122-2 of the Act, which provides that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." *Hodges*, 234 Ill. 2d at 10 (quoting 725 ILCS 5/122-2 (West 2006)). "The purpose of the 'affidavits, records, or other evidence' requirement is to establish that a petition's allegations are

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capable of objective or independent corroboration." *Hodges*, 234 Ill. 2d at 10 (quoting *Delton*, 227 Ill. 2d at 254, citing *People v. Hall*, 217 Ill. 2d 324, 333 (2005), citing *People v. Collins*, 202 Ill. 2d 59, 67 (2002). Specifically, "[a] claim that counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness." *People v. Palmer*, 352 Ill. App. 3d 877, 885 (2004) (citing *People v. Enis*, 194 Ill. 2d 361, 380 (2000)).

¶44 To support his allegation that his counsel provided ineffective assistance for failing to investigate and interview Damone Stewart, Barnes relies solely on the trial transcript of his counsel's cross-examination of Damone. Barnes did not attach an affidavit from Damone Stewart supporting his claim that his trial counsel did not interview him, or explaining how his lead paint poisoning affects his memory, nor did Barnes explain the absence of such documentation. Indeed, even Barnes' own affidavit does not aver that his trial counsel failed to investigate Damone. Thus, the petition is not adequately supported. We may reject Barnes' contention for this reason alone. See *Enis*, 194 Ill. 2d at 380 (holding that a copy of unsigned, unsworn, untitled investigation note containing a statement that contact was made with a witness who stated that the murder victim had told him that she had been sexually assaulted by a person wearing a mask and gloves and that she could not identify her attacker, was insufficient to satisfy the requirement that a post-conviction claim that trial counsel was ineffective for failing to investigate and call a witness; rather, the petition must be supported by an affidavit from the proposed witness); *Delton*, 227 Ill. 2d at 255 (holding that the failure to attach the necessary affidavits to a petition is "fatal" to a post-conviction claim); *People v. Diehl*, 335 Ill. App. 3d 693, 707 (2002) (holding that the defendant's post-conviction petition based on an allegation of newly-discovered evidence was

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properly summarily dismissed as frivolous and patently without merit as the petition did not have attached, as was required, the affidavits, records, or other evidence supporting its allegations, did not state why the same were not attached, and defendant's own sworn verification was not a substitute); *People v. Collins*, 202 Ill. 2d 59, 66 (2002) (holding that the circuit court properly dismissed the petition as frivolous and patently without merit because the defendant's *pro se* post-conviction petition was unsupported by affidavits, records, or other evidence and offered no explanation why such evidence was lacking).

¶45 Second, even if Barnes had properly supported his petition with an affidavit of Damone, the record contradicts Barnes' claim. The transcript of Barnes' cross-examination of Damone reveals that his counsel knew of the investigation of Damone which revealed the lead paint poisoning and Damone's memory problem. Counsel specifically questioned Damone regarding his investigation interview with Bunch and Pernick. Although Damone contended he did not identify Shawn Jackson and instead identified Barnes, Barne's counsel elicited an admission from Damone that during the interview with Bunch and Pernick he identified Aja (Shawn) Jackson and said he was "seventy percent sure" he looked like the person he saw at his window. Upon further questioning by Barnes' counsel, Damone also admitted that he wrote on the back of a photograph containing Barnes that "I did not see none of them that night." Also, when questioned by Barnes' counsel concerning whether he made a statement to Detective Gerardi that he recognized the person at his window as Shawn Jackson, Damone repeatedly stated, "I don't remember." In response to questioning if he remembered what the individuals were wearing, Damone stated, "No." Damone denied seeing a second person boosting up the

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individual at his window, but simultaneously maintained that when he looked, the individual at his window "jumped down." In response to questioning regarding whether he gave a description of the person at his window, Damone again stated, "I don't remember."

¶46 Thus, Barnes' counsel effectively impeached Damone regarding his identification of Barnes. While co-defendant's counsel questioned Damone further regarding his lead poisoning specifically as being the reason he had memory problems, we find Barnes' counsel rendered effective assistance of counsel during his cross-examination. Barnes' counsel clearly called Damone's identification of Barnes into question in front of the jury. Damone's testimony was further undermined on cross-examination of Detective Struck, who testified that Damone clearly identified Shawn Jackson as the person at his window and described what he was wearing and stated that Shawn stated he would shoot everyone in the house.

¶47 The record also shows that Barnes' counsel engaged in reasonable investigation and even considered calling the private investigator as a witness. In counsel's amended answer to discover filed on March 31, 2003, on behalf of Barnes, counsel listed investigator Bunch as a witness who may or may not be called due to information discovered, which indicates counsel indeed conducted a reasonable investigation regarding Damone Stewart. Thus, there is no arguable basis in fact for this post-conviction claim.

¶48 There is also no arguable basis in law for Barnes' claim of ineffective assistance because Barnes argues that his counsel failed to adequately investigate Damone based solely on counsel's decision to not cross-examine Damone about his lead paint poisoning specifically. The

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failure of counsel to interview witnesses may indicate actual incompetence, particularly when the witnesses are known to counsel and their testimony may be exonerating. (Citations.) *People v. Williams*, 147 Ill. 2d 173, 245 (1991). However, incompetence is not indicated where a defendant can point to no potentially favorable testimony the witnesses might have offered, or testimony as to which the effect would not have been cumulative. (Citations.) *Williams*, 147 Ill. 2d at 245 (1991). "Generally, cross-examination of witnesses is a matter of trial strategy and defense counsel will not be found to have rendered ineffective assistance unless his approach is objectively unreasonable." *Strickland*, 399 Ill. App. 3d at 605, citing *People v. Pecoraro*, 175 Ill. 2d 294, 326-27 (1997). Trial counsel is only under a duty to make reasonable investigations, or a reasonable decision which makes particular investigations unnecessary, and counsel's judgment on those matters is entitled to a heavy measure of deference. *Pecoraro*, 175 Ill. 2d at 324. An attorney is not ineffective in foregoing additional investigation where the circumstances that were known to him or her did not reveal a sound basis for further inquiry in a particular area. *Pecoraro*, 175 Ill. 2d at 324. See *People v. Goodloe*, 263 Ill. App. 3d 1060, 1073-74 (1994) (holding that trial counsel was not ineffective in failing to interview prospective alibi witnesses because counsel knew what witnesses' potential testimony would be, based on their written statements to police, and determined that alibi defense would not help defendant). Cf *People v. Sparks*, 393 Ill. App. 3d 878, 886-87 (2009) (holding dismissal at the first stage of post-conviction relief was improper because the defendant attached the affidavit of a witness, previously unavailable to defendant, that supported the defendant's trial testimony of self-defense and claim of actual innocence and the witness' testimony was new, material, noncumulative and

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could have changed the result of defendant's trial).

¶49 The allegation in Barnes' petition, even if true, does not establish that trial counsel's approach was objectively unreasonable. Barnes does not argue that some potentially exculpatory evidence would have come to light with more investigation of Damone Stewart. Here, the record shows that his counsel was aware of Damone's lead paint poisoning through the investigation by Bunch and Pernick, and counsel effectively impeached Damone on cross-examination about his inability to remember key details and changed identification testimony. Any further impeachment would have been cumulative.

¶50 Also, the rest of the record supports our determination that Barnes' trial counsel provided effective assistance to Barnes. When assessing the sufficiency of the allegations, the trial court and the court of review are to consider the petition in light of the entire record. *People v. Holliday*, 313 Ill. App. 3d 1046, 1049 (2000) (citing *People v. Vunetich*, 185 Ill. App. 3d 415, 419 (1989)). To determine whether a post-conviction petitioner claiming ineffective assistance of counsel has established a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different, the court must consider the totality of the evidence before the court. *People v. King*, 316 Ill. App. 3d 901, 917 (2000) (citing *Strickland*, 466 U.S. at 695).

¶51 Here, the record not only reveals Barnes' trial counsel aggressively cross-examined and impeached Damone, but also that he otherwise vigorously defended Barnes. The record reflects that Barnes' trial counsel filed motions to bar evidence against Barnes, including the

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evidence of the fights with witnesses before the shooting, evidence of the tool marks on the telephone wires, and evidence of the wire cutter and pliers. Barnes' trial counsel also moved to bar evidence of prior bad acts, which included the testimony of Barnes' altercation with Larissa, and renewed his objections to this evidence during the trial. Trial counsel also moved to bar evidence that Barnes was a possible member of the "Traveling Vice Lords" street gang, and moved to bar evidence that a vehicle owned by Larisa was burned after the date of the shooting.¹ Counsel presented a cogent and well-argued closing argument, undermining the credibility of the state's witnesses, and submitted proper jury instructions. Barnes' trial counsel also filed a motion for new trial alleging that the court erred in not barring the evidence of the fights before the shooting, evidence that Derrick Martin sold drugs for Barnes, evidence of the wire cutter and pliers. Thus, the entirety of Barnes' trial counsel's representation of Barnes throughout the proceedings established that Barnes received effective assistance of counsel.

¶52 In *People v. Taylor*, 94 Ill. App. 3d 230 (1981), this court held that the defendant had been given effective assistance of counsel where his counsel conducted discovery, made appropriate pretrial and posttrial motions, vigorously cross-examined state's witnesses, made timely and appropriate objections to testimony, made a respectable closing argument and submitted proper jury instructions. *Taylor*, 94 Ill. App. 3d at 232-33. See also *Taylor*, 94 Ill. App. 3d at 232 (holding that a review of counsel's competency does not extend to those areas involving the exercise of judgment, discretion, or trial tactics but, rather, the competency of

¹ The court reserved ruling, and Barnes' trial counsel indicated he would object at the appropriate time. However, there was no testimony on these subjects at trial.

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counsel is to be determined from the totality of counsel's conduct at trial). Similarly here, Barnes' counsel conducted discovery, made appropriate pretrial and post-trial motions, vigorously cross-examined the state's witnesses, made timely and appropriate objections to testimony, made a respectable closing argument and submitted proper jury instructions.

¶53 Barnes cites to *People v. Plummer*, 344 Ill. App. 3d 1016, 1022 (2004), for the proposition that a post-conviction claim alleging trial counsel's failure to impeach a witness with evidence that fails to explain the relevancy of evidence presented at trial and prevents impeachment on that witness' credibility may not be dismissed at first stage proceedings. However, *Plummer* is distinguishable because the defense counsel in *Plummer* was prevented by the trial court from cross-examining the witness about mental health issues because counsel failed to introduce the witness' mental health records. Here, Barnes' counsel did cross-examine Damone, and there were no medical records which could have been introduced. The only evidence of Damone's lead poisoning was a statement by his mother to the investigator and co-defendant's counsel.

¶54 Similarly, *People v. Salgado*, 263 Ill. App. 3d 238, 246 (1994), is distinguishable where defense counsel in *Salgado* failed to impeach the sole identification witness with his inconsistent trial testimony. Here, Barnes' counsel repeatedly impeached Damone concerning his inability to remember his earlier inconsistent statements. Although Barnes argues that not cross-examining Damone specifically about his lead poisoning prevented counsel from impeaching Damone's identification of Barnes we find, to the contrary, as noted above, counsel very effectively impeached Damone's inability to remember his earlier statements and key details

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concerning his identification of Barnes.

¶55 Further, as the State suggests, the fact that co-defendant Terrell Barnes was acquitted cannot be solely attributed to Terrell's counsel's further questioning about Damone's lead poisoning. Despite Barnes' counsel's effective impeachment of Damone on cross-examination, Damone steadfastly maintained his identification of Barnes at trial. There was also additional evidence against Michael Barnes that was not present against Terrell Barnes, most notably motive due to anger over stolen drugs, provided in the testimony of Derrick. Derrick's version of events corroborated what was witnessed and heard by Hughes, in that Barnes used a rifle, fired many times, and then fired again in the direction of the other end of the alley. Hughes also identified Barnes as the individual who drove the black sport utility vehicle away from the shooting.

¶56 The identification of Barnes was ultimately a credibility issue for the jury. The fact that the jury chose to believe Damone's trial testimony concerning his identification of Barnes does not mean Barnes' counsel rendered ineffective assistance of counsel. We find that Barnes failed to allege an arguable claim that his counsel's performance fell below an objective standard of reasonableness and failed to establish that it was arguable he was prejudiced. This claim in Barnes' petition has no arguable basis either in law or in fact (*Hodges*, 234 Ill. 2d 1, 16), and thus the trial court properly dismissed it at the first stage of proceedings.

¶57 III. Failure to Request the Trial Court To Answer the Jury's Question Regarding the Identity of Shawn Jackson and Failing to Object to the Court's Reply That the Jury Received All the Evidence

¶58 Barnes argues his counsel was also ineffective for failing to request the trial court to clarify the jury's question concerning the photographic and lineup identification of Shawn Jackson, and for failing to object when the court replied that the jury had received all the evidence and should continue to deliberate. However, the weight of authority establishes that, to the contrary, the trial court correctly refused to answer the jury's question and Barnes' counsel did not render ineffective assistance in not objecting.

"When faced with a jury question during deliberations, 'the general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion.'" *People v. Brown*, 406 Ill. App. 3d 1068, 1078 (2011) (quoting *People v. Childs*, 159 Ill. 2d 217, 228–29 (1994)). "The court may decline to answer a jury question when (1) the instructions are readily understandable and sufficiently explain the relevant law; (2) further instruction would serve no useful purpose or would potentially mislead the jury; (3) the inquiry involves a question of fact; or (4) answering the question would cause the court to express an opinion that could potentially direct the verdict." *Brown*, 406 Ill. App. 3d at 1079 (citing *Childs*, 159 Ill. 2d at 228). Thus, when the jury raises a factual question during deliberations, decision of whether to answer question is within the trial court's discretion (*People v. Brooks*, 187 Ill. 2d 91, 138 (1999)), and the trial court has wide discretion in deciding whether to respond to a jury question. *People v. Almendarez*, 266 Ill. App. 3d 639, 647 (1994) (citing *People v. Flynn*, 172 Ill. App. 3d 318, 323 (1988)).

¶59 A fair trial contemplates that the jury will, alone, fulfill its duty of determining the

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facts, and it is not the province of the court, in a criminal case, to express by word or indicate by conduct, in the jury's hearing, any opinion on the facts. *People v. Rivers*, 294 Ill. App. 3d 601, 604 (1998) (citing *People v. Marino*, 414 Ill. 445, 450 (1953)). The trial court "has a duty to avoid giving jury its opinion on evidence and should not answer a question that requires conclusion on issues at trial." *People v. Almendarez*, 266 Ill. App. 3d 639, 647-48 (1994) (citing *People v. Williams*, 60 Ill. 2d 1, 13 (1975)). See *People v. Fly*, 249 Ill. App. 3d 730, 740 (1993) (holding the trial court did not improperly fail to exercise its discretion by refusing to answer deliberating jury's question in prosecution for unlawful delivery of controlled substance regarding the whereabouts of confidential police informant during the alleged drug transaction; instead, trial court was aware it was within its discretionary powers to answer jury's question but felt that interest of justice was best served by leaving question unanswered). See also *People v. Morris*, 229 Ill. App. 3d 144, 169 (1992) (holding that the trial court appropriately responded to an ambiguous jury inquiry by stating that jury had heard evidence); *People v. Kelly*, 89 Ill. App. 3d 400, 406 (1980) (holding that although in responding to jury question concerning resolution of factual inconsistency it might have been helpful had trial court reiterated prior instructions on the matter, it was not an abuse of discretion to simply refuse to answer such an improper question and direct jury to continue their deliberations).

¶60 Here, the trial court properly refused to answer the jury's question, and Barnes' counsel did not render ineffective assistance of counsel for failing to object, where the jury's question concerned an issue of fact and it would have been inappropriate for the trial court to comment on the evidence. The jury's note stated: "One, Identify Aja Jackson's picture;" and

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"Two, is he in the lineup photo?" There was extensive testimony on the photo array and lineup photo which the jury heard. The identification of Aja (Shawn) Jackson's picture and whether he was in the lineup photo were factual issues for determination by the jury. A statement of the trial judge's view of this evidence would have been improper. Barnes' counsel did not render ineffective assistance in agreeing to the court's response that the jury had heard all the evidence.

¶61 In *People v. Dunigan*, 96 Ill. App. 3d 799 (1981), the jury similarly sent a question to the trial court concerning the evidence, and we held the trial court properly declined to answer and told the jury it had all the evidence. The jury specifically asked, "was there any testimony to indicate that the defendant sought help re: his physical and/or mental state (either before or after December 25, 1970)?" *Dunigan*, 96 Ill. App. 3d at 828. The trial court's response was: "You have all the evidence, continue to deliberate." *Dunigan*, 96 Ill. App. 3d at 828. We held that the court's response was proper. *Dunigan*, 96 Ill. App. 3d at 828. Similarly here, the jury's question concerning clarification of the evidence was properly answered by the trial court's response that it had heard all the evidence.

¶62 Here, any comments by the trial court on the evidence would have invaded the province of the jury in weighing the evidence and resolving factual issues. As the trial court found in dismissing Barnes' post-conviction petition, the identification of Shawn Jackson in the photographic array and lineup "were questions of fact that the jury had to resolve themselves and it would be improper for the Court to do so. I find accordingly his *pro se* petition for post-conviction relief is without merit." For the same reason, we likewise find that this claim of ineffective assistance of counsel has no merit and was properly dismissed.

¶63 IV. Alleged Coercion of Barnes to Not Testify On His Own Behalf

¶64 Barnes also argues that his post-conviction petition should not have been dismissed

where he alleged that his trial counsel prevented him from testifying at trial. Advising a defendant not to testify is a matter of trial strategy and does not constitute ineffective assistance absent evidence suggesting that counsel refused to allow him to testify. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009). Barnes argues that his assertion that he told his trial counsel that he wanted to testify but that his counsel coerced to not testify by threatening to withdraw his representation is neither completely contradicted by the record nor based on factual allegations that are delusional or fanciful. Barnes maintains that his "*pro se* post-conviction petition was pled sufficiently to survive the low threshold applicable to petitions at the first stage."

¶65 However, Barnes failed to plead that he suffered prejudice as a result of his not testifying, thus rendering his petition without an arguable basis in law or fact. A defendant must also still show that he suffered prejudice from being denied his right to testify in order to properly make out a claim of ineffective assistance of counsel. *Youngblood*, 389 Ill. App. 3d at 218, citing *People v. Madej*, 177 Ill. 2d 116, 146-47 (1997). Pleading prejudice is required. *Youngblood*, 389 Ill. App. 3d at 219.

¶66 In his petition, Barnes did not allege that he was prejudiced. Barnes alleged the following:

"I wanted to testify at my trial to prove my innocence, but my attorney told me that if I testified, that I would destroy his case, and counsel said that his reputation was on the line. And

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if I testified, he would stop representing me. Therefore, I was compelled not to testify."

In his petition, Barnes alleged he would have testified to the following:

"A.) I would have testified that I was not the person driving the SUV that state witness Everett Hughes claimed in his testimony.

B.) Also I would of [sic] testified that on June 12, 2000, me and Laresa [sic] Bellamy never got into a dispute about a parking place. Which the states [sic] claimed lead to the murder of Tsarina Powell.

C.) I would of [sic] testified that my co-defendant Derrick Martin lied about me calling him about any drugs, and that I never told Derrick that I was going to kill Twanda Lucas.

D.) I would of [sic] testified that on the day of the crime, that I was at the "Drive In" with my girlfriend Deidre and cousin Peanut at 1:30 a[.]m. And then I went to the liquor store at 2:00 a[.]m[.] and that's when I seen [sic] Jamie and her cousin[.]"

Barnes then merely alleged that this testimony was "relevant to his defense," not that he was prejudiced.

¶67 Regarding the second prong of *Strickland* specifically, Barnes alleged:

"Under the second prong of [the] *Strickland* test, the record does not reflect a reasonable likelihood that the petitioner would not have waived his right to testify, absent of the erroneous legal assistance of trial counsel, and this petitioner is entitled to an evidentiary hearing."

¶68 Again, Barnes did not allege that he was prejudiced. An ineffective assistance of counsel claim may be summarily dismissed if the petitioner fails to make an arguable showing

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that he was prejudiced under *Strickland*. See *Youngblood*, 389 Ill. App. 3d at 218-19 (holding that the failure to allege prejudice rendered the post-conviction petition insufficient to warrant further proceedings). Barnes failed to allege that the outcome of the trial would have arguably been different had he testified. Thus, summary dismissal for failure to make an arguable showing under the second prong of *Strickland* was proper.

¶69 Even had Barnes made the argument that he was prejudiced by his failure to testify,

we find that such contention is wholly without merit, as it is contradicted by the record. Barnes' testimony would not have arguably altered the outcome of the trial, given the eyewitness testimony of Damone, Hughes and Derrick, along with strong evidence of motive testified to by numerous witnesses, which included statements by Barnes that he would shoot up the residence in retribution for the stolen drugs, and the circumstantial evidence corroborating the witnesses' testimony, including the shell casings from an assault rifle on the scene, the recovery of the black Chevrolet Suburban and the wire cutters and pliers. Therefore, as all grounds raised by Barnes for alleged ineffective assistance of counsel are without merit, we affirm the trial court's summary dismissal of Barnes' post-conviction petition.

¶70 Affirmed.